

1 **BEFORE THE BOARD OF COMMISSIONERS**  
2 **FOR LINCOLN COUNTY, OREGON**

3  
4 In the Matter of )  
5 )  
6 *The Ballot Measure 37 Claim of Robert D. Updenkelder,* )  
7 *Sandra LaRoche, and Beverly Updenkelder* )  
8 *Case File No. 8-LURCC-05* )

**ORDER NO.** 6-05-204

9  
10 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37.  
11 The Measure amends ORS Chapter 197 to require, under certain circumstances, actions to address claims  
12 of owners of real property if government land use regulations reduce fair market property value; and  
13

14 WHEREAS Ballot Measure 37 provides that to maintain a claim, an owner of real property must  
15 make a "written claim for compensation" to the government entity enacting, enforcing or applying a land  
16 use regulation that allegedly restricts the use of the owner's property and has the effect of reducing its fair  
17 market value; and  
18

19 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims procedures with  
20 certain limitations; and  
21

22 WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim that  
23 reduces fair market value of real property or, in the alternative and in lieu of payment of just  
24 compensation, allows the County to modify, remove or not apply the land use regulation allegedly  
25 supporting a claim reducing a property's fair market value; and  
26

27 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for compensation  
28 and make decisions on those claims. A determination to modify, remove or not apply a land use regulation  
29 or compensate a property owner must be based on substantial factual information and analysis; and  
30

31 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and ambiguous  
32 provisions and that future litigation or legislative action will be necessary to clarify the measure's terms.  
33 The County, therefore, adopted procedures in Board of Commissioners Orders #12-04-318 and #4-05-120  
34 to assess claims in a timely manner and to require factual and analytical information as part of the claim so  
35 the County will have a rational basis for its decision on each claim; and  
36

37 WHEREAS on January 4, 2005, Robert D. Updenkelder, Sandra LaRoche, and Beverly  
38 Updenkelder filed a Measure 37 claim seeking compensation, or the modification, removal or non-  
39 application of land use regulations that restrict the placement of dwellings in the A-C zone on property 1.2  
40 miles east of Siletz on Logsdan Road, and is further identified as Tax Lot 512, Lincoln County Assessor's  
41 Map #10-10-10-00. County records and the filed claim are found in Lincoln County Planning Department  
42 File No.8-LURCC-05 and by this reference are incorporated into this Order as if fully set forth; and  
43

44 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-120, a  
45 hearing was held on May 12, 2005 on the claim before the Planning Director as Hearings Officer, for the  
46 purpose of receiving facts and evidence related to determining the validity of the claim. The Claimants'  
47 provided testimony in support of the claim. There was no testimony in opposition to the claim.

1  
2 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation  
3 that is attached to this Order as Exhibit "A" and by this reference incorporated herein. That report finds  
4 and concludes that the claim when submitted was valid, and recommends that the Board, lacking funds for  
5 compensation, in the alternative modify, remove or not apply the restrictions (commonly referred to as a  
6 "waiver") by not applying the current A-C zone regulations (LCC 1.1373) at issue in the subject claim that  
7 were enacted by Lincoln County in their present form by Ordinance #347 in 1994. The current A-C zone  
8 standards at issue restrict the placement of dwellings on property classified as "High Value Farmland"  
9 unless provided in conjunction with the farm use and upon demonstration that the tract can produce at least  
10 \$80,000 (1994 values) in gross income from farm sales (LCC1.1373(4)(e)). Alternatively, a non-farm  
11 dwelling would be allowed under LCC 1.1373 only if could be shown that the property is "generally  
12 unsuitable" for farming. This is improbable given the soils capabilities for the subject property.  
13 Applying the "waiver" would allow the Claimants to apply for a dwelling approval under the standards in  
14 effect at the time of the Claimants' acquisition of the subject property in 1986 without the dwelling  
15 restrictions in LCC 1.1373. This would, in accordance with the requirements of Subsection (8) of Ballot  
16 Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition;  
17 and

18  
19 WHEREAS the Board has considered the report and recommendations of the Planning Director  
20 and County Counsel and finds it is in the public interest, due to the lack of resources to pay compensation,  
21 to modify, remove or choose not to apply the challenged land use regulation to the subject property and  
22 issue the "waiver" to Claimants.

23  
24 **NOW, THEREFORE IT IS HEREBY ORDERED THAT:**

25 1. The Measure 37 claim of Robert D. Updenkelder, Sandra LaRoche, and Beverly. Updenkelder,  
26 Lincoln County Case File No. 8-LURCC-05, was a valid claim when filed on January 4, 2005. The  
27 Board of Commissioners declines to pay just compensation for the claim. In lieu of compensation,  
28 Lincoln County Code (LCC) Section 1.1373 is modified, removed or not applied for Robert D.  
29 Updenkelder, Sandra LaRoche, and Beverly. Updenkelder against the subject property to the following  
30 effect:

- 31
- 32 • The non-application of regulations would be limited to the restrictions on dwellings  
33 provided for in LCC 1.1373. All other provisions of the Lincoln County Code would  
34 continue to apply.
  - 35
  - 36 • Establishment of any dwelling on the subject property would be subject to all applicable  
37 public health and safety regulations including, but not limited to: building codes, flood  
38 hazard zone regulations, on-site sewage disposal rules and requirements, and county road  
39 approach permit requirements.
  - 40

41 2. A state of Oregon "waiver" under Measure 37 may be required for the development or use of  
42 the subject property. Lincoln County lacks authority to waive state regulations or laws. This Order does  
43 not affect any land use regulations of the State of Oregon. The Claimants are responsible for seeking  
44 compensation or "waiver" from the state of any applicable state laws. The Planning Director shall send  
45 notice of the Board's decision to the Director of the Department of Land Conservation and Development.  
46

1 3. This "waiver" provision is void if the property owners or property owners' successors are  
2 compensated by another governmental agency, including the state, for a reduction in value resulting from  
3 the same or similar land use regulations on the subject property.

4  
5 4. Excepting new land use regulations imposed after the date of this decision, and subject to  
6 applicable review rights as permitted under Measure 37, this final decision bars a subsequent Measure 37  
7 claim against the County as to the subject property.

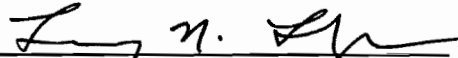
8  
9 5. Transferability of the "waiver" granted by the County under this decision is unknown under the  
10 current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law.  
11 Granting of this "waiver" does not commit the County to issuance of development or building permits, if  
12 those actions are not allowed under law.


13  
14 6. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln County  
15 Clerk without payment of recording fees.


16  
17 7. Copies of this Order be provided to the Planning Director, County Counsel, and Claimants.

18 DATED this 29<sup>th</sup> day of June, 2005.

19 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

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22 TERRY M. THOMPSON, Chair

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25 DON LINDLY, Commissioner

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27   
28 BILL HALL, Commissioner

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30  
31  
32 K:\Measure 37\M-37 Orders\order Updenkelder, LaRoche, Updenkelder #8-LURCC-05.DOC



**DEPARTMENT OF PLANNING AND DEVELOPMENT**

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**LAND USE REGULATION COMPENSATION CLAIM**

**PLANNING DIRECTOR'S STAFF REPORT and  
RECOMMENDATION**

**Revised 6/14/05**

**CASE FILE:** 8-LURCC-05

**DATE FILED:** 01/04/05

**CLAIMANTS:** Robert D. Updenkelder, Sandra LaRoche and Beverly Updenkelder;  
Litchfield & Carstens, Agent.

**REQUEST:** The claimant seeks compensation for, or the modification or removal of,  
land use regulations that prohibit the establishment of a single family dwelling on the  
subject property.

**A. REPORT OF FACTS:**

1. **Lot Size:** 9.2 acres
2. **Property Location:** The property is located 1.2 miles east of Siletz on  
Logsden Road, and is further identified on Lincoln County Assessor's map #10-  
10-10-00 as tax lot 512.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses along Logsden Road are comprised  
primarily of scattered rural residences, with some small scale agricultural

activities.

6. **Topography & Vegetation:** The property consists of an alluvial terrace between Logsdan Road and the Siletz River. It is open pasture.
7. **Existing Structures:** None.
8. **Utilities:** The following utilities are proposed to serve the subject property:
  - a. Sewer: On-site sewage disposal
  - b. Water: On-site well
  - c. Electricity: Central Lincoln P.U.D.
9. **Development Constraints:** A small portion of the property is within the regulated flood hazard area of the Siletz River.

## **B. EVALUATION OF THE CLAIM:**

### **1. Background:**

Litchfield & Carstens, LLP, filed a Land Use Regulation Compensation Claim on behalf of property owner Robert D. Updenkelder on January 4, 2005. This claim was filed with the Department of Planning and Development in accordance with the procedure established for Ballot Measure 37 claims by Lincoln County Board of Commissioners Order # 12-04-318. The Updenkelder property is located on the Siletz River, east of Siletz on Logsdan Road. The current zoning of the property is A-C, Agricultural Conservation. The claimants assert a diminution in the value of their property resulting from the restrictions of the A-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the development of a residence on the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the A-C zone restrictions in a manner that will permit the establishment of one single-family dwelling.

Planning staff has discussed in detail with claimants on several previous occasions the currently applicable restrictions on dwellings in the A-C zone. Based on these discussions, it does not appear that the subject property could be approved for the siting of a dwelling under current zoning. Deed records submitted with the claim document acquisition of the subject property by the claimants' family in 1967. Title was transferred to the claimants in 1986.

On May 12, 2005, a public hearing was held on the subject claim for the purpose of receiving facts and evidence related to determining the validity of the claim. Notice of the hearing was provided in accordance with Board of Commissioners order #4-05-120. The claimants' representative provided testimony in support of the claim.

There was no testimony in opposition to the claim.

2. **Measure 37 Claim Requirements:** Measure 37 provides the following criteria for establishing eligibility for the supplemental right of compensation created by the measure:

- a. **Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” of property, which is defined in Measure 37 as the “present owner of the property, or any interest therein.”**

The claimants, Robert D. Updenkelder, *et al.*, acquired their original interest in the property by warranty deed in 1986 (recorded at Book 171, page 2222, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Robert D. Updenkelder, *et al.*, remain the owners of the subject property.

- b. **A public entity enacts or enforces a land use regulation that restricts the use of private real property:**

The current A-C zone regulations (LCC 1.1373) at issue in the subject claim were enacted by Lincoln County in their present form by ordinance #347 in 1994. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the A-C zone. These regulations restrict the use of this private real property to only those uses expressly authorized in the A-C zone.

- c. **The land use regulation has the effect of reducing the fair market value of the property:**

The currently effective requirements of the A-C zone restrict the placement of dwellings. The subject property is defined as “High Value Farmland” pursuant to LCC 1.1371 (1)(a). On land identified as high value farmland, dwellings customarily provided in conjunction with farm use are permitted only upon demonstration that the tract has produced at least \$80,000, in 1994 dollars, in gross annual income from the sale of farm products [LCC 1.1373 (4)(e)]. The claimants assert that they have never produced gross annual income in this amount from the subject property.

Dwellings not provided in conjunction with farm use require a showing that the

property is “generally unsuitable” for farm use. Given that the subject property is comprised entirely of NRCS capability class II soils, such a showing is highly improbable.

Stating that the currently effective land use regulations applicable to the subject property effectively prohibit the establishment of a dwelling, claimants assert that this restriction reduces fair market value of the property. In support of this claim, claimants have submitted a competitive market analysis and letter of opinion from a local real estate broker. This letter places a market value on the subject property under current regulations (i.e., absent the permissibility of placing a residence) of \$24,000. The letter estimates the current value of the property with the ability to secure approval for a residence to be in excess of \$120,000.

- d. **The land use regulation complained of is not a regulation: (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations; (c) required to comply with federal law; (d) restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.**

The regulations addressed by the subject claim are the restrictions on dwellings imposed by the A-C zone. The A-C zone was enacted to comply with Statewide Planning Goal 3, which mandates the placement of defined agricultural lands into exclusive farm use zones meeting the requirements of ORS Chapter 215. The purpose of the A-C zone is to preserve agricultural lands for agricultural uses. It does not directly address common nuisances, health and safety, adult businesses or activities, nor does it have any federal nexus.

The claimants have provided documentation that the claimants' family's original interest in the property was acquired by warranty deed in 1967 (recorded at Book 113, page 1155, Lincoln County Deed Records). The claimants acquired title to the property on June 12, 1986 (Bargain and Sale deed recorded at Book 171, page 2222). The A-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was enacted after the date of acquisition of a family member of the owner.

- e. **For claims arising from land use regulations enacted prior to December 3, 2004 (the effective date of Ballot Measure 37),**



**written demand for compensation shall be made within two years of the effective date of the act.**

The land use regulations for which compensation is sought, the A-C zone restrictions on dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on January 4, 2005, within two years of the December 3, 2004 effective date of Ballot Measure 37.

**C. Recommended Findings and Conclusions:**

The director recommends for the board's consideration the following findings and conclusions:

**Findings:**

1. Robert D. Updenkelder, Sandra LaRoche and Beverly Updenkelder filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on January 4, 2005.
2. According to records of the Lincoln County Assessor, Robert D. Updenkelder, Sandra LaRoche and Beverly Updenkelder are the current owners of the subject property.
3. The claim is based on an assertion of a reduction in fair market value of real property due to the enforcement of land use regulations by Lincoln County.
4. The subject property is identified as tax lot 512 on Lincoln County Assessor's map 10-10-10-00, which is taxed as real property by Lincoln County.
5. The A-C zone provisions (LCC 1.1373) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
6. The A-C zoning restricts uses; specifically, the A-C zone standards, as applied to the subject property, prohibit the establishment of a single-family dwelling.
7. The claimants have submitted evidence of a diminution in value caused by the A-C zone restrictions in the form of a competitive market analysis prepared by a licensed real estate broker. The resulting letter of opinion states that the land use

regulations that prohibit the establishment of a dwelling on the subject property have the effect of reducing the fair market value of the subject property by at least \$96,000.

8. According to the Lincoln County deed records, a family member of the claimants first acquired an interest in the subject property in 1967. The claimants, Robert D. Updenkelder, *et al.*, acquired their present interest in the subject property on June 12, 1986, and have maintained an ownership interest continuously since that time.
9. The currently effective A-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimants' date of acquisition.
10. The A-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
11. The subject claim was filed on January 4, 2005, which is less than two years from the December 3, 2004 effective date of Ballot Measure 37.

**Conclusions:**

Based on the above findings of fact, the Board reaches the following conclusions:

1. The subject claim for compensation for reduction in value of private real property from the enforcement of land use regulations was timely filed on behalf of the owners, Robert D. Updenkelder, *et al.*, pursuant to Subsection (5) of Ballot Measure 37.
2. The land use regulations which are the subject of the claim, specifically the restrictions on dwellings imposed by LCC 1.1373 (A-C zone), are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37; they restrict the use of the subject private real property; and they have the effect of reducing the fair market value of the property.
3. The owners of the property, Robert D. Updenkelder, *et al.*, are therefore entitled to the payment of just compensation equal to

the reduction in the fair market value of the subject property caused by the enforcement of the A-C zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of the A-C zone restrictions, may modify, remove or not apply these restrictions in order to permit the owner to use the property for a use permitted at the time of his acquisition.

#### **D. Recommended Decision**

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires either the payment of just compensation, or the modification, removal or non-application of the offending land use regulations. The selection of the remedy is at the discretion of the Board. Staff recommends that the Board choose the non-application of the subject land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that the Board direct that the current restrictions on dwellings in the A-C zone not be applied to the subject property. This would allow the claimants to apply for approval of a single family dwelling on the subject property, subject to the Lincoln County Code provisions in effect on June 12, 1986. This would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition. This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the current dwelling restrictions of the A-C zone would permit the claimants-owners apply for approval of one single family dwelling on a parcel of approximately 10 acres, which is generally consistent with the prevailing land use pattern in the area.
3. Not applying the current dwelling restrictions of the A-C zone in order to permit the establishment of one single-family residence is the claimants' desired resolution.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the current restrictions on dwellings provided for in LCC 1.1373. Instead, an application for approval of a dwelling would be subject to the provisions of the A-C zone in effect on

June 12, 1986, the claimants' date of acquisition. All other provisions of the Lincoln County Code would continue to apply.

- Establishment of the permitted single-family dwelling would be subject to all applicable public health and safety regulations, including but not limited to building codes, on-site sewage disposal rules and requirements, flood hazard area regulations, and county road approach permit requirements.

If the Board concurs with the above recommendation, you may direct staff to prepare an order for your adoption implementing this recommendation. This order will incorporate the above-recited findings of fact and conclusions, and the appropriate directives for the application of the A-C zone provisions in effect in 1986, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director