

STATE OF OREGON } ss.
County of Lincoln

11 Pages

I, Dana W. Jenkins, County Clerk, in and for said county, do hereby certify that the within instrument was received for record, and recorded in the Book of Records of said county at Newport, Oregon. WITNESS my hand and seal of said office affixed.


DANA W. JENKINS, Lincoln County Clerk



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

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In the Matter of)
)
The Ballot Measure 37 Claim of Lucille Curtis)
Case File No. 1-LURCC-04)

ORDER NO. 5-05-155

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

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

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

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

WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for compensation and make decisions on those claims. A determination to waive or modify a land use regulation or compensate a property owner must be based on substantial factual information and analysis; and

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

WHEREAS on December 2, 2004 Lucille Curtis (Litchfield and Carstens, Agent) filed a Measure 37 claim seeking compensation, or the modification, removal or non-application of land use regulations that prohibit the establishment of a single family dwelling on property located at 422 Gibson Lane in Logsdon, Oregon and further described as Tax Lot 601, Lincoln County Assessor's Map 9-9-33. County records and the filed claim are found in Lincoln County Planning Department File No. 1-LURCC-04 and by this reference are incorporated into this order as if fully set forth; and

1 claim. Claimant's representative did confirm that claimant had passed away after the claim was filed but
 2 before the County had processed the claim within the 180 days afforded the County to act.

3
 4 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation
 5 which is attached to this order as Exhibit "A and by this reference incorporated herein. That report finds
 6 and concludes that the claim when submitted was valid, and recommends that the Board, lacking funds for
 7 compensation, in the alternative modify, remove or not apply the restrictions (commonly referred to as a
 8 "waiver") on dwellings provided in LCC 1.1373 under certain conditions. However, the report also
 9 recognizes that the intervening death of the claimant may impact the validity of the claim; and

10
 11 WHEREAS County Counsel has opined that with the death of the decedent after the claim was
 12 filed but before it was processed, it is unclear under the provisions of Measure 37 whether the claim
 13 survives. An abundance of caution would dictate that the County process the otherwise valid claim and
 14 issue the waiver directly to Lucille Curtis. The effect of that decision will be that the claimant's heirs
 15 receive whatever the law allows, if anything, as successors in interest to her estate; and

16
 17 WHEREAS the Board has considered the recommendations of the Planning Director and County
 18 Counsel and finds it is in the public interest, due to the lack of resources to pay compensation, to modify,
 19 remove or choose not to apply the challenged land use regulation to the subject property and issue the
 20 "waiver" to claimant.

21
 22 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

23 1. The Measure 37 claim of Lucille Curtis, Lincoln County Case File No. 1-LURCC-04 was a
 24 valid claim when filed on December 2, 2004. Although Lucille Curtis subsequently died before this
 25 claim was acted on by Lincoln County and the legal impact of her death is unknown under the current
 26 status of the law, the Board finds that validating the claim as to Lucille Curtis is a prudent and lawful
 27 action. The Board of Commissioners declines to pay just compensation for the claim. In lieu of
 28 compensation, Lincoln County Code (LCC) Section 1.1373 is modified, removed or not applied for
 29 Lucille Curtis against the subject property to the following effect:

- 30
 31 • The non-application of regulations is limited to the restrictions on dwellings provided for
 32 in LCC 1.1373. All other provisions of the Lincoln County Code continue to apply.
 33
 34 • Establishment of the permitted single-family dwelling would be subject to all applicable
 35 public health and safety regulations including, but not limited to, building codes and on-
 36 site sewage disposal rules and requirements.

37
 38 2. A state of Oregon "waiver" under Measure 37 may be required for the development or use of
 39 the subject property. Lincoln County lacks authority to waive state regulations or laws. This Order does
 40 not affect any land use regulations of the State of Oregon. If the use allowed above remains prohibited by
 41 a State of Oregon land use regulation, the Planning Director shall send notice of the Board's decision to
 42 the Director of the Department of Land Conservation and Development. The notice shall include a
 43 statement that the County will not accept an application for a building permit related to the newly
 44 allowed use on the property until the earlier of the following events: (1) notice by the Department of
 45 Land Conservation and Development that it concurs with the Board's decision and has "waived" the state

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regulation or (2) 180 days have elapsed from issuance of the Board's decision where no response is made to the notice by the Department of Land Conservation and Development.

3. This "waiver" provision is void if the property owner or her successors are compensated by another governmental agency for a reduction in value resulting from the same or similar land use regulations on the subject property.

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

5. Relief granted under this decision is specific to claimant Lucille Curtis. Transferability of the "waiver," and the effects of claimant's death before issuance of this decision are unknown under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law. Granting of this "waiver" does not commit the County to issuance of development or building permits, if those actions are determined not to be allowed under law given the circumstances in this decision.

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

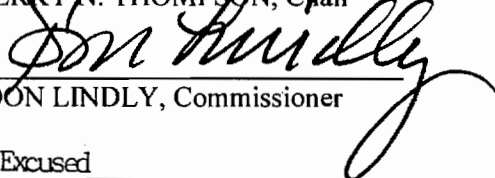
7. Copies of this Order be provided to the Planning Director, County Counsel, and claimant's representatives.

DATED this 25th day of May , 2005.

LINCOLN COUNTY BOARD OF COMMISSIONERS



TERRY N. THOMPSON, Chair



DON LINDLY, Commissioner

Excused

BILL HALL, Commissioner

K:\Measure 37\order Lucille Curtis.DOC



DEPARTMENT OF PLANNING AND DEVELOPMENT

210 S. W. 2nd ST
Newport, OR 97365
(541) 265-4192
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LAND USE REGULATION COMPENSATION CLAIM

PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

CASE FILE: 1-LURCC-04

DATE FILED: 12/02/04

CLAIMANT: Lucille Curtis; 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:** 18.8 acres
2. **Property Location:** The property is located one mile north of Logsdan at 422 Gibson Lane, and is further identified on Lincoln County Assessor's map #9-9-33 as tax lot 601.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses along Gibson Lane and Moonshine Park Road are comprised primarily of scattered rural residences, with some small scale agricultural activities.
6. **Topography & Vegetation:** The property is located on an alluvial terrace

between Moonshine Park Road and the Siletz River. It is open pasture.

7. **Existing Structures:** An agricultural accessory structure is located on the property.
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:** None identified.

B. EVALUATION OF THE CLAIM:

1. Background:

Lucille Curtis filed a Land Use Regulation Compensation Claim on December 2, 2004. 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 Curtis property is located just north of Logsdan on Gibson Lane. 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 the claimant 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 the claimant's acquisition of the subject property in 1978. In 1978 the zoning of the subject property was A-1 (Ordinance #34, enacted in 1974) which permitted one single-family residence as an outright use.

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 claimant's representative provided testimony in support of the claim. There was no testimony in opposition to the claim.

Subsequent to the filing of the subject claim with the department, the claimant, Lucille Curtis, passed away. The subject property is currently a part of Ms. Curtis' estate. The transfer of the property to Ms Curtis' heirs may impact the rights of the successors in title relative to the modification or removal land use restrictions authorized by Measure 37. This matter is currently under review by counsel, and advice on this issue will be provided to the board under separate cover. For purposes of evaluating this claim, the department has proceeded based on the facts as they existed at the time of filing of 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 claimant, Lucille Curtis, acquired her original interest in the property by land sales contract in 1978 (recorded at Book 86, page 1042, Lincoln County Deed Records). Records of the Lincoln County Assessor's office confirm that Lucille Curtis was the owner of the subject property at the time the subject claim was filed.

- 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 only 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 claimant asserts that they have never produced gross annual income in this amount from the subject property.

Dwellings not provided in conjunction 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 current 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 an appraisal prepared by a State Certified General Appraiser. This appraisal places a market value on the subject property under current regulations (i.e. absent the permissibility of placing a residence) of \$53,000. The appraisal states that the current value of the property with the ability to secure approval for a residence to be \$106,000.

- 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 claimant's original interest in the property was acquired by land sales contract in 1978 (recorded at Book 86, page 1042, Lincoln County Deed Records). 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 the present owner.

- e. For claims arising from land use regulations enacted prior to December 2, 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 December 2, 2004, within two years of the December 2, 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. Lucille Curtis filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on December 2, 2004. According to records of the Lincoln County Assessor's office, Lucille Curtis was the owner of the subject property at the time the claim was filed.
2. 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.
3. The subject property is identified as tax lot 601 on Lincoln County Assessor's map 9-9-33, which is taxed as real property by Lincoln County.
4. 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.
5. 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.
6. The claimants have submitted evidence of a diminution in value caused by the A-C zone restrictions in the form of an appraisal prepared by a State Certified General Appraiser. The appraisal 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 \$53,000.
7. According to the Lincoln County deed records, the claimant, Lucille Curtis, first acquired an interest in the subject property in 1978, and maintained an ownership interest continuously

from that time up to the time of filing of the subject claim.

8. The currently effective A-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimant's date of acquisition.
9. 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.
10. The subject claim was filed on December 2, 2004, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.
11. The claimant, Lucille Curtis, died after the subject claim was filed but before it was reviewed and processed by Lincoln County.

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 by the owner, Lucille Curtis, 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 owner of the property, Lucille Curtis, was 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 her acquisition.

4. The claimant, Lucille Curtis, died before the subject claim had been acted upon by Lincoln County.

D. Recommended Decision

Based on the preceding findings and conclusions that the subject claim was valid when filed, 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 the Board direct that restrictions on dwellings in the A-C zone not be applied to the subject property. This would allow the claimant to establish a single family dwelling on the subject property, as the zoning regulations in place at the time of the claimant's acquisition of the subject property in 1978 allowed a single family dwelling as an outright use. Thus, the allowance of a single family dwelling 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.

As previously noted in this report, the claimant, Lucille Curtis, passed away subsequent to her filing of this claim. The status of any modification or non-application of land use regulations granted to Ms. Curtis upon transfer of the property to her heirs is unclear. Counsel is reviewing this matter, and advice on this issue will be provided separately. While this analysis by counsel may bear on the ultimate utility of the relief being proposed, the director recommends that the board proceed with the granting of the relief requested at this time as a means to timely resolve this claim.

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 dwelling restrictions of the A-C zone would permit the claimant owner to establish one single family dwelling on a parcel of approximately 19 acres, which is generally consistent with the prevailing land use pattern in the area.
3. Not applying the dwelling restrictions of the A-C zone in order to permit the establishment of one single-family residence is the claimant's desired resolution.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the restrictions on dwellings provided for in LCC 1.1373. 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 and on-site sewage disposal rules and requirements.
- Establishment of a single-family dwelling would be subject to the granting by the appropriate authority of any required modification, removal or non-application of applicable land use regulations enacted or enforced by the State of Oregon.
- The recommended relief in the form of the non-application of certain land use regulations is transferable from the claimant to subsequent owners of the subject property only to the extent allowed by law.

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 allowance of one single-family residence on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director