

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 Nancypat Dundas* )  
7 *Case File No. 11-LURCC-05* ) **ORDER NO. 11-05-327**  
8

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

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

18 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims procedures with  
19 certain limitations; and  
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21 WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim that  
22 reduces fair market value of real property or, in the alternative and in lieu of payment of just  
23 compensation, allows the County to modify, remove or not apply the land use regulation allegedly  
24 supporting a claim reducing a property’s fair market value; and  
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26 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for compensation  
27 and make decisions on those claims. A determination to modify, remove or not apply a land use regulation  
28 or compensate a property owner must be based on substantial factual information and analysis; and  
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30 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and ambiguous  
31 provisions and that future litigation or legislative action will be necessary to clarify the measure’s terms.  
32 The County, therefore, adopted procedures in Board of Commissioners Orders #12-04-318 and #4-05-120  
33 to assess claims in a timely manner and to require factual and analytical information as part of the claim so  
34 the County will have a rational basis for its decision on each claim; and  
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36 WHEREAS on May 24, 2005, Dawn Pavitt, agent, filed a Measure 37 claim on behalf of Nancypat  
37 Dundas (“claimant”) seeking compensation, or the modification, removal or non-application of land use  
38 regulations that establish 80-acre minimum parcel size for land divisions and restrict the placement of  
39 dwellings in the A-C zone on property located 7.3 miles east of Siletz on Bell Lane off of Logsdan Road,  
40 further identified as Tax Lot 902, Lincoln County Assessor's Map #09-09-33. County records and the filed  
41 claim are found in Lincoln County Planning Department File No.11-LURCC-05 and by this reference are  
42 incorporated into this Order as if fully set forth; and  
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44 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-120, a  
45 hearing was held on August 8, 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 claimant’s

1 representative provided testimony in support of the claim. There was no testimony in opposition to the  
2 claim; and

3  
4 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation  
5 that 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") by not applying the current A-C zone regulations (LCC 1.1373) at issue in the subject claim that  
9 were enacted by Lincoln County in their present form by Ordinance #347 in 1994. The restrictions  
10 preclude division of claimant's land and the development of additional dwellings on the subject property.  
11 Applying the "waiver" would allow the claimant to divide the subject property into twelve additional  
12 parcels, and permit the establishment of single-family dwelling on the resulting parcels under the standards  
13 in effect at the time of the claimant's acquisition of the subject property in 1974. This would, in  
14 accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the  
15 property for a use permitted at the time of the owners' acquisition; and

16  
17 WHEREAS subsequent to the application, hearing and staff report and recommendations Marion  
18 County Circuit Court Judge Mary Mertens James decided in *Macpherson et al. V Department of*  
19 *Administrative Services, et al.* (Marion County Circuit Court Case No. 05C-10444) that Measure 37 is  
20 unconstitutional. A final judgment was entered in that case and no stay was granted by either the circuit  
21 court or the Supreme Court. That decision is expected to be appealed and the results of that appeal are  
22 very speculative. It is not known when a decision on the appeal will be issued. It is legally unclear whether  
23 or not the Marion County Circuit Court's decision applies directly to Lincoln County's actions concerning  
24 Measure 37 claims at this juncture; therefore the impacts on implementation of Measure 37 in Lincoln  
25 County continue to be reviewed. What is known is that the circuit court decision applies to claims against  
26 the State of Oregon and four other Oregon counties (not including Lincoln County). Those jurisdictions  
27 are ordered to stop accepting and ruling on claims immediately; it appears the case also invalidates State  
28 Measure 37 claims already granted; and

29  
30 WHEREAS any claimant now proceeding on a claim does so at the risk of having any County  
31 action on the claim declared null and void, and furthermore proceeds with the knowledge that properties  
32 needing a waiver of State laws to move forward on development of a waiver are invalid and cannot be  
33 honored by the County in any development application requiring such a waiver; and

34  
35 WHEREAS the Board has considered the report and recommendations of the Planning Director  
36 and County Counsel, including the implications known at this time for the circuit court decision holding  
37 Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the Board desires to proceed  
38 cautiously with processing this Measure 37 claim. Therefore the Board will decide this Measure 37 claim  
39 after placing the claimant on notice of the court decision. However, where a State waiver is required to  
40 permit development, no permits will be issued, uses allowed, or decisions taken by the County on  
41 development of the property until the case is finally decided and the State issues, if appropriate, its own  
42 waiver or an existing waiver is reactivated by the appeals court's decision; and

43  
44 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is in the  
45 public interest, due to the lack of resources to pay compensation, to modify, remove or choose not to apply  
46 the challenged land use regulation to the subject property and issue the "waiver" to claimant.

1  
2 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

3 1. Claimant Nancypat Dundas is placed on notice that the Marion County Circuit Court has found  
4 Measure 37 unconstitutional. While appeals of that decision are pending, it applies directly to Measure  
5 37 claims made to the State of Oregon. Claimant proceeds in this matter knowing that any action taken  
6 by the Lincoln County Board of County Commissioners could be null and void if the circuit court  
7 decision is upheld on appeal and that Lincoln County does not waive any rights or remedies under law by  
8 granting a “waiver” under the challenged law.

9  
10 2. If Measure 37 is unconstitutional or other wise void as found by the appeals courts, then this  
11 Order shall be and is automatically rescinded without any further action by the Board of Commissioners.  
12 Claimant has no vested right in this decision should the measure be unconstitutional.

13  
14 3. If Measure 37 is constitutional, then the Measure 37 claim of Nancypat Dundas, Lincoln County  
15 Case File No. 11-LURCC-05, was a valid claim when filed on May 24, 2005. The Board of  
16 Commissioners declines to pay just compensation for the claim. In lieu of compensation, Lincoln County  
17 Code (LCC) Section 1.1373 is modified, removed or not applied for Nancypat Dundas against the subject  
18 property to the following effect:

- 19  
20 • The non-application of regulations would be limited to the restrictions on dwellings  
21 provided for in LCC 1.1373 in order to permit the creation of up to twelve additional land  
22 parcels and the placement of one single-family residence on each resultant parcel. All  
23 other provisions of the Lincoln County Code would continue to apply.
- 24  
25 • Establishment of the additional parcels and dwelling on the subject property would be  
26 subject to all applicable public health and safety regulations including, but not limited to:  
27 land division procedures, building codes, flood hazard zone regulations, on-site sewage  
28 disposal rules and requirements, and county road approach permit requirements.

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30 4. Measure 37 is currently invalid as applied to claims against the State of Oregon. A State of  
31 Oregon “waiver” under Measure 37 may be required for the development or use of the subject property.  
32 Lincoln County lacks authority to waive state regulations or laws. This Order does not affect any land  
33 use regulations of the State of Oregon. The claimant is responsible for seeking compensation or “waiver”  
34 from the state of any applicable state laws. The Planning Director shall send notice of the Board’s  
35 decision to the Director of the Department of Land Conservation and Development. If a State Measure  
36 37 claim is required, no use, development, permits or other development applications will be processed  
37 or approved by Lincoln County until the appeals of the Marion County Circuit Court are decided and the  
38 State has issued, if appropriate, its own “waiver”.

39  
40 5. This “waiver” provision is void if the property owner or property owner’s successors are  
41 compensated by another governmental agency, including the State, for a reduction in value resulting from  
42 the same or similar land use regulations on the subject property.

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

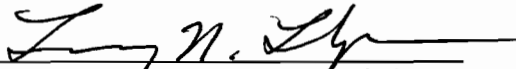
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2 7. Transferability of the "waiver" granted by the County under this decision is unknown under the  
3 current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law.  
4 Granting of this "waiver" does not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

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

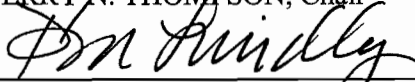
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10 9. Copies of this Order be provided to the Planning Director, County Counsel, claimant, and  
11 claimant's agent.

12 DATED this 2nd day of November, 2005.


13 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

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15 TERRY N. THOMPSON, Chair

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17 DON LINDLY, Commissioner

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19 BILL HALL, Commissioner  
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