



1 additional single family dwellings in the County A-C (Agricultural Conservation) and T-C  
2 (Timber Conservation) zones which apply to the subject property. The subject property is located  
3 near Harlan adjacent to Feagles Creek Road, Grant Creek Road and Harlan Road, and is further  
4 identified on Lincoln County Assessor's Map #12-08-07 as tax lots 600 and 601; Lincoln County  
5 Assessor's Map #12-08 as tax lots 5400 and 5401; and Lincoln County Assessor's Map #12-09, as  
6 tax lot 3300. County records and the filed claim are found in Lincoln County Planning  
7 Department File No. 18-LURCC-05 and by this reference are incorporated into this Order as if  
8 fully set forth; and

9  
10 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-  
11 120, a hearing was held on October 25, 2005 on the claim before the Planning Director as  
12 Hearings Officer, for the purpose of receiving facts and evidence related to determining the  
13 validity of the claim. The claimants' representative provided testimony in support of the claim.  
14 There was no testimony in opposition to the claim.

15  
16 WHEREAS the Planning Director has issued his Department's Staff Report and  
17 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated  
18 herein. That report finds and concludes that the claim when submitted was valid and recommends  
19 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the  
20 restrictions (commonly referred to as a "waiver") from the current restrictions in Lincoln County  
21 Code (LCC) Section 1.1373 (A-C Zone) and 1.1375 (T-C Zone) (adopted in Ordinance #347 in  
22 1994) that in their present form require an 80-acre minimum parcel size for land divisions and  
23 also restrict the establishment of additional single family dwellings on the subject property. This  
24 "waiver" would allow the claimants to use the property for uses permitted at the time of their  
25 acquisition of the subject property in 1975 and 1976 in accordance with the requirements of  
26 Subsection (8) of Ballot Measure 37; and

27  
28 WHEREAS subsequent to the application, hearing and staff report and recommendations,  
29 Marion County Circuit Court Judge Mary Mertens James decided in *Macpherson, et al. v.*  
30 *Department of Administrative Services, et al.* (Marion County Circuit Court Case No. 05C-10444)  
31 that Measure 37 is unconstitutional. A final judgment was entered in that case, and no stay was  
32 granted by either the circuit court or the supreme court. That decision is expected to be appealed  
33 and the results of that appeal are very speculative. It is not known when a decision on the appeal  
34 will be issued. It is legally unclear whether or not the Marion County Circuit Court's decision  
35 applies directly to Lincoln County's actions concerning Measure 37 claims at this juncture;  
36 therefore, the impacts on implementation of Measure 37 in Lincoln County continue to be  
37 reviewed. What is known is that the circuit court decision applies to claims against the State of  
38 Oregon and four other Oregon counties (not including Lincoln County). Those jurisdictions are  
39 ordered to stop accepting and ruling on claims immediately; the State has taken the position that  
40 the decision also invalidates State Measure 37 claims already granted; and

41  
42 WHEREAS any claimant now proceeding on a claim does so at the risk of having any  
43 County action on the claim declared null and void, and furthermore proceeds with the knowledge

1 that properties needing a waiver of State laws to move forward on development of a waiver are  
2 invalid and cannot be honored by the County in any development application requiring such a  
3 waiver; and

4  
5 WHEREAS the Board has considered the report and recommendations of the Planning  
6 Director and County Counsel, including the implications known at this time for the circuit court  
7 decision holding Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the  
8 Board desires to proceed cautiously with processing this Measure 37 claim. Therefore, the Board  
9 will decide this Measure 37 claim after placing the claimants on notice of the court decision.  
10 However, where a State waiver is required to permit development, no permits will be issued, uses  
11 allowed, or decisions taken by the County on development of the property until the case is finally  
12 decided and the State issues, if appropriate, its own waiver or an existing waiver is reactivated by  
13 the appeals court's decision; and

14  
15 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is  
16 in the public interest, due to the lack of resources to pay compensation, to modify, remove or  
17 choose not to apply the challenged land use regulation to the subject property and issue the  
18 "waiver" to claimants.

19  
20 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

21 1. Claimants Sterling Grant and Tim Grant are placed on notice that the Marion County  
22 Circuit Court has found Measure 37 unconstitutional. While appeals of that decision are  
23 pending, it applies directly to Measure 37 claims made to the State of Oregon. Claimants  
24 proceed in this matter knowing that any action taken by the Lincoln County Board of County  
25 Commissioners could be null and void if the circuit court decision is upheld on appeal and that  
26 Lincoln County does not waive any rights or remedies under law by granting a "waiver" under  
27 the challenged law.

28  
29 2. If Measure 37 is unconstitutional or otherwise void as found by the appeals courts, then  
30 this Order shall be and is automatically rescinded without any further action by the Board of  
31 Commissioners. Claimants have no vested right in this decision should the measure be  
32 unconstitutional.

33  
34 3. If Measure 37 is constitutional, the Measure 37 claim of Sterling Grant and Timothy  
35 Grant, Lincoln County Case File No. 18-LURCC-05, was a valid claim when filed on July 13,  
36 2005. The Board of Commissioners declines to pay just compensation for the claim. In lieu of  
37 compensation, Lincoln County Code (LCC) Sections 1.1373 and 1.1375 are modified, removed  
38 or not applied for Sterling Grant and Timothy Grant against the subject property to the following  
39 effect:

- 40  
41 • The non-application of regulations would be limited to the minimum parcel size  
42 requirements and restrictions on dwellings provided for in LCC 1.1373 and 1.1375,

1                   thereby allowing claimants to create additional parcels of not less than five (5) acres  
2                   in size and the placement of one single family dwelling on each resultant parcel. All  
3                   other provisions of the Lincoln County Code would continue to apply.

- 4
- 5                   • Establishment of additional land parcels and dwellings on the subject property is  
6                   subject to all applicable public health and safety regulations, including but not  
7                   limited to land division procedures, building codes, on-site sewage disposal rules  
8                   and requirements, flood hazard regulations, and County road approach permit  
9                   requirements.

10

11                   4. Measure 37 is currently invalid as applied to claims against the State of Oregon. A  
12                   State of Oregon “waiver” under Measure 37 may be required for the development or use of the  
13                   subject property. Lincoln County lacks authority to waive state regulations or laws. This Order  
14                   does not affect any land use regulations of the State of Oregon. The claimants are responsible for  
15                   seeking compensation or “waiver” from the State of any applicable State laws. The Planning  
16                   Director shall send notice of the Board’s decision to the Director of the Department of Land  
17                   Conservation and Development. If a State Measure 37 claim is required, no use, development,  
18                   permits or other development applications will be processed or approved by Lincoln County until  
19                   the appeals of the Marion County Circuit Court are decided and the State has issued, if  
20                   appropriate, its own “waiver.” State waivers granted before the Marion County Circuit Court  
21                   decision are considered invalid by the State.

22

23                   5. This “waiver” provision is void if the property owners or property owners’ successors  
24                   are compensated by another governmental agency, including the State, for a reduction in value  
25                   resulting from the same or similar land use regulations on the subject property.

26

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

30

31                   7. Transferability of the “waiver” granted by the County under this decision is unknown  
32                   under the current status of Measure 37. Transferability of the “waiver” is allowed to the extent  
33                   permitted by law. Granting of this “waiver” does not commit the County to issuance of  
34                   development or building permits, if those actions are not allowed under law.

35

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

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39                   ///

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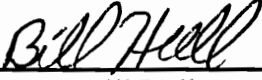
41                   ///

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1 9. Copies of this Order be provided to the Planning Director, County Counsel, and  
2 claimants.

3 DATED this 4<sup>th</sup> day of January, 2006.

4  
5 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

6  
7  
8  Excused   
9 Terry N. Thompson Don Lindly Bill Hall  
10 Chair Commissioner Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

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## LAND USE REGULATION COMPENSATION CLAIM

### PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

**CASE FILE:** 18-LURCC-05

**DATE FILED:** 07/13/05

**CLAIMANT:** Timothy Grant and Sterling Grant; George Heilig, agent

**REQUEST:** The claimants seek compensation for, or the modification or removal of, land use regulations that establish an 80-acre minimum parcel size for land divisions and restrict the establishment of additional single family dwellings on the subject property.

#### **A. REPORT OF FACTS:**

1. **Lot Size:** 436 acres
2. **Property Location:** The property is located near Harlan adjacent to Feagles Creek Road, Grant Creek Road and Harlan Road, and is further identified on Lincoln County Assessor's map #12-8-7, as tax lots 600 and 601; map 12-8, tax lots 5400 and 5401; and map 12-09, tax lot 3300.
3. **Zoning Designation:** A-C (Agricultural Conservation) and T-C (Timber Conservation)
4. **Plan Designation:** Agricultural Land and Forest Land
5. **Surrounding Land Use:** Adjacent uses along Feagles Creek, Grant Creek and Harlan Roads are comprised of large ownership commercial agricultural uses and

public and industrial forest lands, along with scattered rural residences.

6. **Topography & Vegetation:** The property consists of a series of alluvial terraces and adjoining foothills along Grant Creek, Feagles Creek and Big Elk Creek. It is predominantly in pasture, with some forested uplands.
7. **Existing Structures:** Two residences along with a number of outbuildings are located on the subject 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: Consumers Power.
9. **Development Constraints:** Small portions of the property, immediately along the creek banks, are within the regulated flood hazard area of Grant Creek and the Big Elk.

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

### **1. Background:**

George Heilig acting as agent filed a Land Use Regulation Compensation Claim on behalf of property owners Timothy Grant and Sterling Grant on July 13, 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 Grant property is located on Big Elk Creek, Feagles Creek and Grant Creek River at Harlan. The current zoning of the property is A-C, Agricultural Conservation, and T-C, Timber Conservation. The claimants assert a diminution in the value of their property resulting from the restrictions of the A-C and T-C zone applied after their date of acquisition, more specifically, those restrictions that limit the division of additional land parcels and the development of additional residences on the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the A-C and T-C zone restrictions in a manner that will permit the division of five-acre parcels and permit the establishment of one single-family dwelling on each resulting parcel.

Planning staff met with claimants prior to the filing of their claim and discussed in detail the basic elements of the claim. Deed records submitted with the claim document the claimant's acquisition of the subject property in December of 1975 (tax lot 601) and December of 1976 (the balance of the property). The properties were acquired by the claimants from family members, whose ownership history

dates back to the 1800's. The subject properties were zoned A-1 (Lincoln County Ordinance #34) at the time of acquisition by the present owners in 1975 and 1976.

On October 25, 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, Timothy Grant and Sterling Grant, acquired their original interest in tax lot 601 by warranty deed recorded at Book 61, pages 1243-1244, Lincoln County Deed Records on December 30, 1975. The claimants acquired their interest in the remainder of the subject property by warranty deed recorded on December 8, 1976, at Book 70, page 1552. Records of the Lincoln County Assessor's office confirm that Timothy Grant and Sterling Grant 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 and T-C zone regulations (LCC 1.1373 and LCC 1.1375) 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 and T-C zones. These regulations restrict the use of this private real property to only those uses expressly authorized in the A-C and T-C zones. Specifically, in the case of the subject property, these regulations limit the further division and the placement of additional dwellings on the property.

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

As noted, the currently effective requirements of the T-C and A-C zones limit

the division of the subject property to 80- acre minimum parcels; these restrictions also limit the outright placement of additional dwellings on the property to parcels of not less than 160 acres.

Claimants assert that these restrictions reduce fair market value of the property. In support of this claim, claimants have submitted a market evaluation prepared by a real estate broker. The evaluation states the current value of the property, as is with current regulations, at \$1,275,000. The evaluation estimates the sales price of the property with regulations as in effect at the time of acquisition by the current owners to be \$4,100,000. The difference in value attributed to the current land use restrictions is \$2,825,000. Based on this information and evidence provided, the department concludes that there has been diminution in value as a result of the current land use regulations imposed after the date of the current owners' acquisition.

- 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 land divisions and dwellings imposed by the A-C and T-C zones. The A-C and T-C zones were enacted to comply with Statewide Planning Goals 3 and 4, respectively, which mandate the placement of defined agricultural and forest lands into zones intended to limit development to only farm or forest related uses in compliance with the requirements of ORS Chapter 215. The purpose of these zones is to preserve resource lands for agricultural and forest uses. These regulations do not directly address common nuisances, health and safety, adult businesses or activities, nor do they have any federal nexus.

The claimants have provided documentation that the claimants' original interest in the property was acquired in 1975 and 1976. The A-C and T-C zones, in their present form, were enacted in 1994, so the regulations giving rise to the claim were enacted after the date of acquisition of the present owners.

- 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 and T-C zone restrictions on land divisions and dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on July 13, 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. Timothy Grant and Sterling Grant filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on July 13, 2005.
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 lots 600 and 601 on Lincoln County Assessor's map 12-8-7; tax lots 5400 and 5401 on Lincoln County Assessor's map 12-8 and tax lot 3300 on Lincoln County Assessor's map 12-9. These parcels are taxed as real property by Lincoln County.
4. The A-C zone and T-C zone provisions (LCC 1.1373; LCC 1.1375) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The A-C and T-C zoning restrict uses; specifically, the A-C and T-C zone standards limit the division of the subject property and the establishment of additional single-family dwellings.
6. The claimants have submitted evidence of a diminution in value caused by the A-C and T-C zone restrictions in the form of a market evaluation prepared by a licensed real estate broker. The evaluation concludes that the land use regulations that limit the division of and the establishment of additional dwellings on the subject property have the effect of reducing the fair market value of the subject property by \$2,825,000.

7. According to the Lincoln County deed records, the claimants, Timothy Grant and Sterling Grant, first acquired an interest in a portion of the subject property on December 30, 1975, and in the remainder of the property on December 8, 1976, and have maintained an ownership interest continuously since that time.
8. The currently effective A-C and T-C zone regulations governing the division of land and the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimants' date of acquisition.
9. The A-C and T-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 July 13, 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, Timothy Grant and Sterling Grant, pursuant to Subsection (5) of Ballot Measure 37.
2. The land use regulations which are the subject of the claim, specifically the restrictions on land divisions and dwellings imposed by LCC 1.1373 (A-C zone) and LCC 1.1375 (T-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, Timothy Grant and Sterling Grant, 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 and T-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

and T-C zone restrictions, may modify, remove or not apply these restrictions in order to permit the owners to use the property for a use permitted at the time of 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 minimum parcel size requirements and the restrictions on dwellings in the A-C and T-C zones not be applied to the subject property. This would allow the claimants to divide the subject property into parcels of a minimum of five acres as proposed and to establish one single-family dwelling on each of the resultant parcels. Lincoln County zoning regulations applicable at the time of the claimants' acquisition of the subject property in 1975 and 1976 (A-1 zoning, Lincoln Ordinance #34) permitted the creation of five-acre parcels and one dwelling per parcel as an outright use. Therefore, the allowance to partition the subject property into five-acre parcels and establish dwellings on the resultant parcels would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owners to use the property for a use permitted at the time of the owners' 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 land division and dwelling restrictions of the A-C and T-C zone in order to permit the establishment of additional rural home sites 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 minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1373 and LCC 1.1375 in order to permit the creation of additional land parcels of not less than five acres in size and the placement of one single family residence on each resultant parcel. All other provisions of the Lincoln county code would continue to apply.

- Establishment of additional land parcels and dwellings on the subject property would be subject to all applicable public health and safety regulations, including but not limited to land division procedures, 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 to not apply the minimum parcel size requirements and dwelling restrictions of the A-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director