

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* ) **ORDER NO. 4-06-136**  
7 *Jerry and Judith Kinney (husband and wife),* )  
8 *Dennis Bartoldus, Agent* )  
9 *File No. 31-LURCC-05* )

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

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

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

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

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

34  
35 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and  
36 ambiguous provisions and that future litigation or legislative action will be necessary to clarify the  
37 measure's terms. The County, therefore, adopted procedures in Board of Commissioners Orders  
38 12-04-318 and 4-05-120 to assess claims in a timely manner and to require factual and analytical  
39 information as part of the claim so the County will have a rational basis for its decision on each  
40 claim; and

41  
42 WHEREAS on October 14, 2005, Jerry and Judith Kinney (husband and wife), Dennis  
43 Bartoldus, Agent, filed a Measure 37 claim seeking compensation or the modification, removal or

1 non-application of land use regulations (“waiver”) that restrict land divisions and the placement  
2 of dwellings in the A-C (Agricultural Conservation) Zone (LCC 1.1373). A “waiver” would allow  
3 the claimants to divide the subject property into seven 10-acre parcels, and permit the  
4 establishment of one single-family dwelling on each of the resulting parcels. The property is  
5 69.95 acres in size, is located east of the City of Siletz at 847 Hamer Road and is further identified  
6 on Lincoln County Assessor’s Map #10-10-11 as Tax Lots 102, 103, and 702. County records and  
7 the filed claim are found in Lincoln County Planning Department File No. 31-LURCC-05 and by  
8 this reference are incorporated into this Order as if 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 February 15, 2006 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; and  
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 subject land use regulations: staff recommends that the Board direct that the minimum parcel size  
21 requirements and the restrictions on dwellings in the A-C zone not be applied to the subject  
22 property. The claimants have provided documentation that the claimants’ original interest in the  
23 property was acquired August 10, 1981 (Tax Lots 102 and 103) and December 17, 1992 (Tax Lot  
24 702). The A-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the  
25 claim was enacted after date of acquisition of the present owners of all portions of the subject  
26 property. This would allow the claimants to divide the subject property into parcels in from two to  
27 five acres in size as permitted at the time of acquisition of the subject property in 1981 and 1992;  
28 and  
29

30 WHEREAS the Board has considered the report and recommendations of the Planning  
31 Director and County Counsel, including the implications known at this time concerning  
32 ambiguous provisions in Measure 37 which are and will continue to be subject to judicial  
33 clarification for the foreseeable future. Given that status, the Board desires to proceed cautiously  
34 with processing this Measure 37 claim. Therefore, the Board will decide this Measure 37 claim  
35 after placing the claimants on notice of possible future court decisions and interpretations; and  
36

37 WHEREAS based on what is known at this time, the Board finds it is in the public interest,  
38 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the  
39 challenged land use regulation to the subject property and issue the “waiver” to claimants;  
40

41 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- 42 1. Claimants Jerry and Judith Kinney (husband and wife) are placed on notice that  
43 Oregon courts continue to interpret provisions in Measure 37 which may change the way claims

1 are treated. Claimants proceeds in this matter knowing that any action taken by the Lincoln  
2 County Board of County Commissioners could be null and void if a court of competent  
3 jurisdiction interprets Measure 37 in any fashion which alters the Board's approval. Lincoln  
4 County does not waive any rights or remedies under law by granting a "waiver" under the law.

5  
6 2. The Measure 37 claim of Jerry and Judith Kinney (husband and wife), Lincoln County  
7 Case File No. 31-LURCC-05, was a valid claim when filed on October 12, 2005. The Board of  
8 Commissioners declines to pay just compensation for the claim. In lieu of compensation,  
9 Lincoln County Code Section LCC 1.1373 (A-C Agricultural Conservation Zone) is modified,  
10 removed or not applied for Jerry and Judith Kinney (husband and wife) against the subject  
11 property to the following effect:  
12

- 13 • The non-application of regulations would be limited to the minimum parcel size  
14 requirements and restrictions on dwellings provided for in LCC 1.1373. This would allow  
15 the claimants to divide the subject property into 10-acre parcels, and permit the  
16 establishment of one single-family dwelling on each of the resulting parcels. All other  
17 provisions of the Lincoln County Code would continue to apply.
- 18 • Establishment of additional land parcels and dwellings on the subject property would be  
19 subject to all applicable public health and safety regulations, including but not limited to  
20 land division procedures, building codes, on-site sewage disposal rules and requirements,  
21 flood hazard area regulations, and county road approach permit requirements.

22  
23 3. A State of Oregon "waiver" under Measure 37 may be required for the development or  
24 use of the subject property. Lincoln County lacks authority to waive state regulations or laws.  
25 This Order does not affect any land use regulations of the State of Oregon. The claimants are  
26 responsible for seeking compensation or "waiver" from the State of any applicable State laws.  
27 The Planning Director shall send notice of the Board's decision to the Director of the  
28 Department of Land Conservation and Development. If a State Measure 37 claim is required, no  
29 use, development, permits or other development applications will be processed or approved by  
30 Lincoln County unless the State has issued, if appropriate, its own "waiver."  
31

32 4. This "waiver" provision is void if the property owner or property owner's successors  
33 are compensated by another governmental agency, including the State, for a reduction in value  
34 resulting from the same or similar land use regulations on the subject property.  
35

36 5. Excepting new land use regulations imposed after the date of this decision, and subject  
37 to applicable review rights as permitted under Measure 37, this final decision bars a subsequent  
38 Measure 37 claim against the County as to the subject property.  
39

40 6. Transferability of the "waiver" granted by the County under this decision is unknown  
41 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent

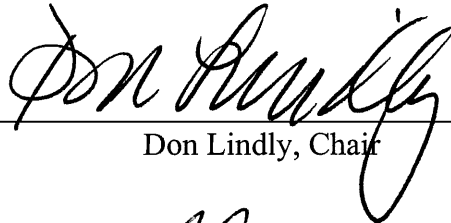
1 permitted by law. Granting of this "waiver" does not commit the County to issuance of  
2 development or building permits, if those actions are not allowed under law.

3  
4 7. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln  
5 County Clerk without payment of recording fees.

6  
7 8. Copies of this Order be provided to the Planning Director, County Counsel, claimants'  
8 representative, and claimants.

DATED this 5<sup>th</sup> day of April, 2006.

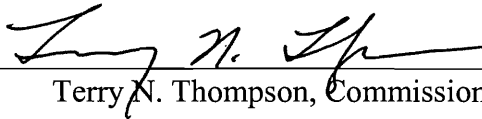
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



Don Lindly, Chair



Bill Hall, Commissioner



Terry N. Thompson, Commissioner

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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:** 31-LURCC-05

**DATE FILED:** 10/14/05

**CLAIMANT:** Jerry and Judith Kinney (husband and wife), Dennis Bartoldus, Agent.

**REQUEST:** The claimants seek compensation for, or the modification or removal of, land use regulations which restrict land divisions and the placement of dwellings in the A-C (Agricultural Conservation) zone.

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

1. **Lot Size:** Approximately 69.95 acres.
2. **Property Location:** The property is located east of the City of Siletz at 847 Hamer Road and is further identified on Lincoln County Assessor's Map #10-10-11 as tax lots 102, 103, and 702.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses along Hamer Road are comprised of scattered rural residences, with some small scale agricultural activities and forest lands.
6. **Topography & Vegetation:** The property consists of moderately sloping to level open land.

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7. **Existing Structures:** Existing structures on the subject property include a residence, constructed in 1981, along with out-buildings.
8. **Utilities:** The following utilities currently serve the subject property:
  - a. Sewer: On-site sewage disposal
  - b. Water: On-site well
  - c. Electricity: Consumers Power.
9. **Development Constraints:** The subject property fronts on the Siletz River. No constraints were identified.

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

### **1. Background:**

Dennis Bartoldus, agent for Jerry and Judith Kinney (husband and wife), filed a Land Use Regulation Compensation Claim on October 14, 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 Kinney property is located east of the City of Siletz at 847 Hamer 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 division of 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 zone restrictions in a manner that will permit the division of the subject property into approximately seven 10-acre parcels and permit the establishment of one single-family dwelling on each of the resulting parcels.

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 claimants' acquisition of the subject property in 1981 (tax lots 102 and 103) and 1992 (tax lot 702, the roadway). At each of these times, acknowledged county code provisions of the A-C zone permitted the creation of 10-acre farm parcels, and permitted one-single family dwelling when used in conjunction with farm use.

On February 15, 2006, 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 provided testimony in support of the claim. There was no testimony in opposition to the claim.

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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, Jerry and Judith Kinney, acquired their original interest in tax lots 102 and 103 of Assessor’s Map #10-10-11 by warranty deed in 1981 (recorded at Book 126 Page 851, Lincoln County Deed Records). The claimants acquired their original interest in the roadway, tax lot 702 on the same Assessor’s Map, in 1992 (recorded at Book 254 Page 2256). Records of the Lincoln County Assessor’s office confirm that Jerry and Judith Kinney 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. Specifically, in the case of the subject property, these regulations prohibit the further division and the placement of any 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 A-C zone prohibit any division of the subject property; these restrictions also prohibit the placement of any additional dwellings on the property.

Claimants assert that these restrictions reduce fair market value of the property. In support of this claim, the claimants’ agent asserts a loss in fair market value of \$1 million to \$1.5 million. Because the claim does not include an analysis of the fair market value of the property subject to current regulations, it is difficult to substantiate the specific diminution in value caused by the A-C zone restrictions. Nonetheless, the information on its face; i.e., the market value difference between one home site versus the potential for 6 or 7 home sites permitted at the time of acquisition, leads the department to conclude that it is

more likely than not that there has been some reduction in fair market value of the subject property as a result of the enactment of the cited land use regulations.

- 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 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' original interest in the property was acquired August 10, 1981 and December 17, 1992. The A-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was enacted after date of acquisition of the present 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 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 October 14, 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:

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Findings:

1. Dennis Bartoldus, agent for Jerry and Judith Kinney, (husband and wife) filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on October 14, 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 102, 103 and 702 on Lincoln County Assessor's map 10-10-11, 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 prohibit 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 zone restrictions in the form of an estimated market value prepared by the claimants' agent of \$1million to \$1.5 million. The analysis indicates that the land use regulations that prohibit 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.
7. According to the Lincoln County deed records, the claimants, Jerry and Judith Kinney, first acquired an interest in the subject property (tax lot 102 and 103) in 1981 and (tax lot 702) in 1992, and have maintained an ownership interest continuously since that time.
8. 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.
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 October 14, 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 Jerry and Judith Kinney, 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), 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, Jerry and Judith Kinney (husband and wife), 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 her acquisition.

**D. Recommended Decision**

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires 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 claimants be allowed to divide the subject property into 10-acre parcels, each with a homesite used in conjunction with farm use, as permitted at the time the claimants acquired an interest in the subject property. This 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 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.

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2. Not applying the dwelling restrictions of the A-C zone would permit the claimant owners to create parcels of 10- acres in size. The creation of these homesites would not be generally inconsistent with the prevailing land use pattern in the area.
3. Not applying the land division and dwelling restrictions of the A-C zone in order to permit the establishment of additional rural home sites is the claimant's desired resolution.

This recommended resolution would be subject to the following limitations:

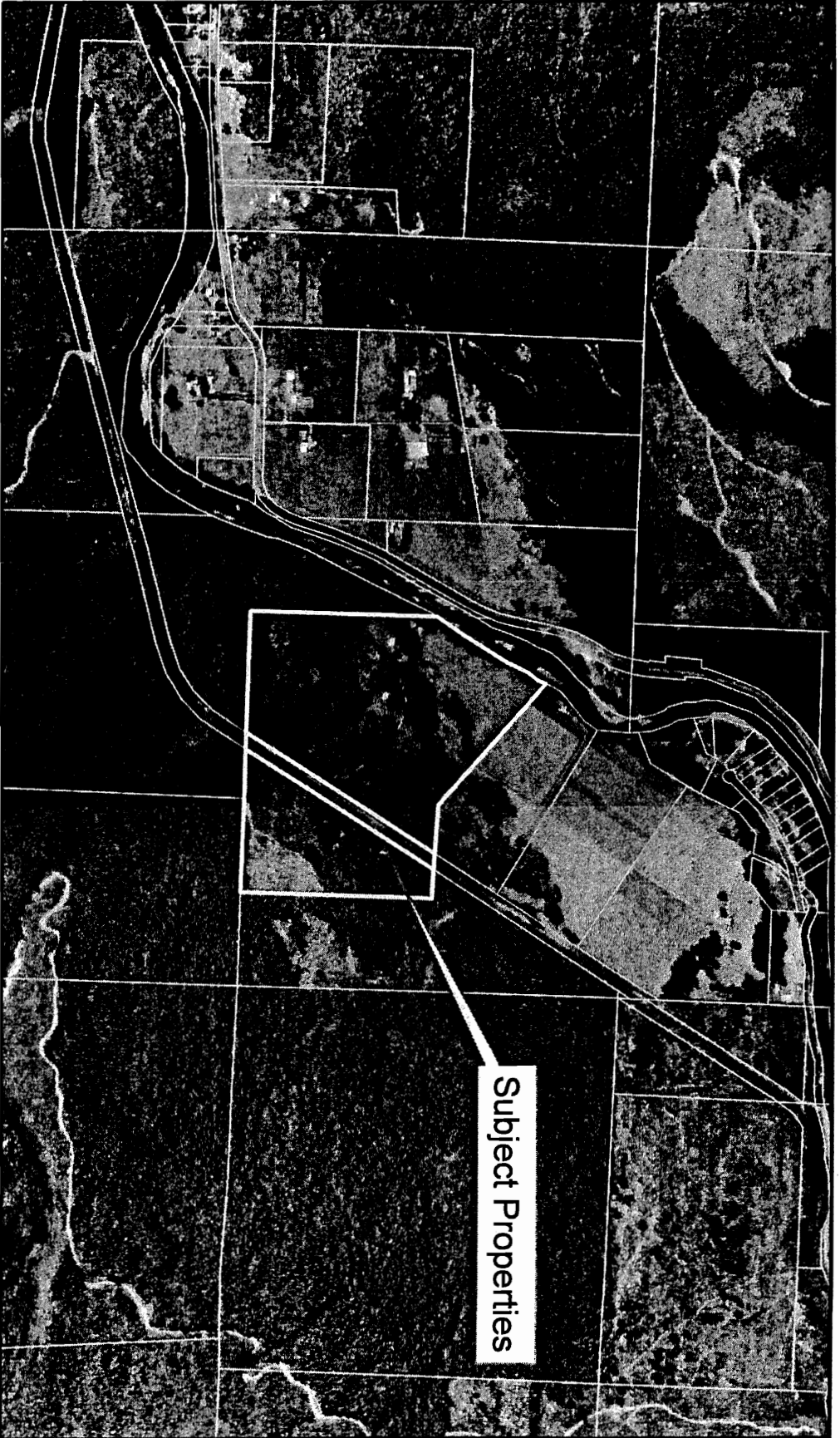
- The non-application of regulations would be limited to the minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1373. All other provisions of the Lincoln county code would continue to apply.
- Establishment of an additional land parcel and dwelling on the subject property 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.

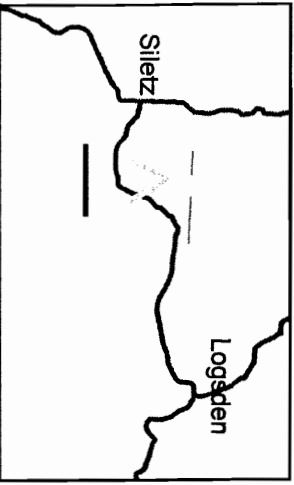
Respectfully submitted

Matt Spangler  
Director

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Subject Properties



Applicant: Jerry and Judith Kinney  
Map and Tax lot: 10-10-11 / 102, 103, 702

