

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.** 1-06-10
7 *Virgil and Doris Myers (husband and wife)*)
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10 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot
11 Measure 37. The Measure amends ORS Chapter 197 to require, under certain circumstances,
12 actions to address claims of owners of real property if government land use regulations reduce fair
13 market property value; and

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

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

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

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

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

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40 WHEREAS on August 12, 2005, Virgil and Doris Myers (husband and wife), filed a
41 Measure 37 claim seeking compensation, or the modification, removal or non-application of land
42 use regulations that restrict land divisions and also the establishment of additional single family

1 dwellings in the T-C (Timber Conservation) zone which applies to the subject property. The
2 subject property is located at 2428 East Eckman Creek Road (County Road # 712) and is further
3 identified on Lincoln County Assessor's Map #14-11-00 as tax lot 600. County records and the
4 filed claim are found in Lincoln County Planning Department File No. 21-LURCC-05 and by this
5 reference are incorporated into this Order as if fully set forth; and
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7 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-
8 120, a hearing was held on October 25, 2005 on the claim before the Planning Director as
9 Hearings Officer, for the purpose of receiving facts and evidence related to determining the
10 validity of the claim. The claimants provided testimony in support of the claim. There was no
11 testimony in opposition to the claim.
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13 WHEREAS the Planning Director has issued his Department's Staff Report and
14 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
15 herein. That report finds and concludes that the claim when submitted was valid and recommends
16 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
17 restrictions (commonly referred to as a "waiver") from the current restrictions in Lincoln County
18 Code (LCC) Section 1.1375 (T-C Zone) (adopted in Ordinance #347 in 1994) that in its present
19 form precludes division of their land and the establishment of additional single family dwelling on
20 the subject property. This "waiver" would allow the claimants to use the property for uses
21 permitted at the time of their acquisition of the subject property in 1971 in accordance with the
22 requirements of Subsection (8) of Ballot Measure 37; and
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24 WHEREAS subsequent to the application, hearing and staff report and recommendations,
25 Marion County Circuit Court Judge Mary Mertens James decided in *Macpherson, et al. v.*
26 *Department of Administrative Services, et al.* (Marion County Circuit Court Case No. 05C-10444)
27 that Measure 37 is unconstitutional. A final judgment was entered in that case, and no stay was
28 granted by either the circuit court or the supreme court. That decision is expected to be appealed
29 and the results of that appeal are very speculative. It is not known when a decision on the appeal
30 will be issued. It is legally unclear whether or not the Marion County Circuit Court's decision
31 applies directly to Lincoln County's actions concerning Measure 37 claims at this juncture;
32 therefore, the impacts on implementation of Measure 37 in Lincoln County continue to be
33 reviewed. What is known is that the circuit court decision applies to claims against the State of
34 Oregon and four other Oregon counties (not including Lincoln County). Those jurisdictions are
35 ordered to stop accepting and ruling on claims immediately; the State has taken the position that
36 the decision also invalidates State Measure 37 claims already granted; and
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38 WHEREAS any claimant now proceeding on a claim does so at the risk of having any
39 County action on the claim declared null and void, and furthermore proceeds with the knowledge
40 that properties needing a waiver of State laws to move forward on development of a waiver are
41 invalid and cannot be honored by the County in any development application requiring such a
42 waiver; and
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1 WHEREAS the Board has considered the report and recommendations of the Planning
2 Director and County Counsel, including the implications known at this time for the circuit court
3 decision holding Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the
4 Board desires to proceed cautiously with processing this Measure 37 claim. Therefore, the Board
5 will decide this Measure 37 claim after placing the claimants on notice of the court decision.
6 However, where a State waiver is required to permit development, no permits will be issued, uses
7 allowed, or decisions taken by the County on development of the property until the case is finally
8 decided and the State issues, if appropriate, its own waiver or an existing waiver is reactivated by
9 the appeals court's decision; and

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

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16 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

17 1. Claimants Virgil and Doris Myers (husband and wife) are placed on notice that the
18 Marion County Circuit Court has found Measure 37 unconstitutional. While appeals of that
19 decision are pending, it applies directly to Measure 37 claims made to the State of Oregon.
20 Claimants proceed in this matter knowing that any action taken by the Lincoln County Board of
21 County Commissioners could be null and void if the circuit court decision is upheld on appeal
22 and that Lincoln County does not waive any rights or remedies under law by granting a "waiver"
23 under the challenged law.

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

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30 3. If Measure 37 is constitutional, the Measure 37 claim of Virgil and Doris Myers
31 (husband and wife), Lincoln County Case File No. 21-LURCC-05, was a valid claim when filed
32 on August 12, 2005. The Board of Commissioners declines to pay just compensation for the
33 claim. In lieu of compensation, Lincoln County Code (LCC) Section 1.1375 is modified,
34 removed or not applied for Virgil and Doris Myers (husband and wife) against the subject
35 property to the following effect:

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- The non-application of regulations would be limited to the minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1375, thereby allowing claimants to create three parcels of land and the placement of one single family dwelling 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 is 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 regulations, and County road approach permit requirements.

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

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

6. 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.

7. Transferability of the “waiver” granted by the County under this decision is 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 not allowed under law.

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

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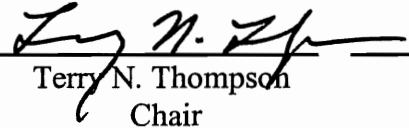
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1 9. Copies of this Order be provided to the Planning Director, County Counsel, and
2 claimants.

3 DATED this 4th day of January, 2006.

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5 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

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


Bill Hall
Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

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LAND USE REGULATION COMPENSATION CLAIM

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

CASE FILE: 21-LURCC-05

DATE FILED: 08/12/05

CLAIMANT: Virgil and Doris Myers (husband and wife).

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 T-C (Timber Conservation) zone.

A. REPORT OF FACTS:

1. **Lot Size:** 73.34 acres.
2. **Property Location:** The subject property is located at 2428 East Eckman Creek Road (County Road #712) and is identified on Lincoln County Assessor's Map #14-11-00 as tax lot 600.
3. **Zoning Designation:** T-C (Timber Conservation).
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Adjacent uses along East Eckman Creek Road are comprised primarily of scattered rural residences, a commercial quarry, and public and industrial forest lands.

6. **Topography & Vegetation:** The property consists of varying topography ranging from fairly level to steeper slopes. East of the County Road flows Eckman Creek where also present is an area of jurisdictional wetlands.
7. **Existing Structures:** Existing structures on the subject property include three manufactured homes, one of which is used as a medical hardship dwelling.
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:** As described above, Eckman Creek flows east of the County Road, where there is also an area of jurisdictional wetlands. No other constraints were identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Virgil and Doris Myers (husband and wife), filed a Land Use Regulation Compensation Claim on August 12, 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 Myers' property is located east/southeast of the City of Waldport off of Highway 34 at 2428 East Eckman Creek Road. The current zoning of the property is T-C, Timber Conservation. The claimants assert a diminution in the value of their property resulting from the restrictions of the T-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the division of their land and permanent placement of an additional dwelling on the property. The claimants state that their desired remedy to the claim is the removal or modification of the T-C zone restrictions in a manner that will permit the division of the subject property into three parcels of land, which will result in each parcel containing one single-family dwelling. The remedy would also permit the manufactured home utilized as a medical hardship dwelling to be permanently located as opposed to its removal upon cessation of the medical hardship.

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 1971. There were no land use regulations in effect at the time the property was

acquired.

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 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, Virgil and Doris Myers acquired their original interest in the property by contract sale in 1971 (recorded at Book 33 Page 1255, Lincoln County Deed Records). Records of the Lincoln County Assessor's office confirm that Virgil and Doris Myers 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 T-C zone regulations (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 T-C zone. These regulations restrict the minimum lot size and use of this private real property to only those sizes and uses expressly authorized in the T-C zone.

- 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 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 by \$1,112,000. 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 T-C zone restrictions. Nonetheless, the information on its face; i.e, the market value difference between maintaining the two existing homesites and

eventual removal of the medical hardship dwelling on one parcel of land versus dividing the property in a manner that will permit the division of the subject property into three parcels of land, each of which contains one single-family dwelling (and allow the medical hardship dwelling to remain), 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 T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forest lands forest zones meeting the requirements of ORS Chapter 215. The purpose of the T-C zone is to preserve forest lands for forest 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 in March of 1971. The T-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 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 August 12, 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. Virgil and Doris Myers (husband and wife) filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on August 12, 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 located at 2428 East Eckman Creek Road and is identified as tax lot 600 on Lincoln County Assessor's map 14-11-00 (index), which is taxed as real property by Lincoln County.
4. The T-C zone provisions (LCC 1.1375) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The T-C zoning restricts uses; specifically, the T-C zone standards prohibit the division of the subject property and the establishment of an additional single-family dwelling.
6. The claimants assert a diminution in value caused by the T-C zone restrictions of \$1,112,000.
7. According to the Lincoln County deed records, the claimants, Virgil and Doris Myers, first acquired an interest in the subject property in 1971, and have maintained an ownership interest continuously since that time.
8. The currently effective T-C zone regulations governing land divisions and the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimant's date of acquisition.
9. The 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 August 12, 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 Virgil and Doris Myers, 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 1.1375 (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, Virgil and Doris Myers (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 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 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 their 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 T-C zone not be applied to the subject property. This would allow the claimants to divide the subject property into three parcels of land, each of which will contain one single-family dwelling. This would also convert the manufactured home currently used as a medical hardship dwelling to be a permanently located homesite, exempt from provisions requiring removal upon

cessation of the medical hardship. 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.
2. Not applying the dwelling restrictions of the T-C zone would permit the claimant owners to create three parcels of land, each of which will contain one single-family dwelling. The creation of three parcels would not be inconsistent with the general pattern of land use in the area.
3. Not applying the land division and dwelling restrictions of the T-C zone in order to permit the creation of additional parcels of land 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 1.1375. 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 T-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director