

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. 4-06-134**
7 *Margarie Patt (Andrew Kauffman, Agent)*)
8 *File No. 29-LURCC-05*)
9

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

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

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

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

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

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

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41 WHEREAS on October 12, 2005, Margarie Patt (Andrew Kauffman, agent), filed a
42 Measure 37 claim seeking compensation or the modification, removal or non-application of land
43 use regulations (“waiver”) that limit land divisions and the placement of dwellings in the T-C

1 (Timber Conservation) zone (LCC 1.1375). The property is 38.73 acres in size, is located at 5213
2 Logsdan Road and is further identified on Lincoln County Assessor's Map #10-09-06 as tax lot
3 201. County records and the filed claim are found in Lincoln County Planning Department File
4 No. 29-LURCC-05 and by this reference are incorporated into this Order as if fully set forth; and
5

6 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-
7 120, a hearing was held on February 15, 2006 on the claim before the Planning Director as
8 Hearings Officer, for the purpose of receiving facts and evidence related to determining the
9 validity of the claim. The claimant provided testimony in support of the claim. There was no
10 testimony in opposition to the claim; and
11

12 WHEREAS the Planning Director has issued his Department's Staff Report and
13 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
14 herein. That report finds and concludes that the claim when submitted was valid and recommends
15 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
16 subject land use regulations: staff recommends that the Board direct that the minimum parcel size
17 requirements and the restrictions on dwellings in the T-C zone enacted under Ordinance #347 in
18 1994 (LCC 1.1375) not be applied to the subject property. This would allow claimant Patt to
19 divide the subject property into a total of 39 parcels, each with one single-family dwelling on the
20 resultant parcels, as permitted at the time of acquisition of the subject property. This would, in
21 accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use
22 the property for a use permitted at the time of the owner's acquisition of the subject property in
23 1971; and
24

25 WHEREAS the Board has considered the report and recommendations of the Planning
26 Director and County Counsel, including the implications known at this time concerning
27 ambiguous provisions in Measure 37 which are and will continue to be subject to judicial
28 clarification for the foreseeable future. Given that status, the Board desires to proceed cautiously
29 with processing this Measure 37 claim. Therefore, the Board will decide this Measure 37 claim
30 after placing the claimant on notice of possible future court decisions and interpretations; and
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32 WHEREAS based on what is known at this time, the Board finds it is in the public interest,
33 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the
34 challenged land use regulation to the subject property and issue the "waiver" to claimant;
35

36 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

37 1. Claimant Margarie Patt is placed on notice that Oregon courts continue to interpret
38 provisions in Measure 37 which may change the way claims are treated. Claimant proceeds in
39 this matter knowing that any action taken by the Lincoln County Board of County
40 Commissioners could be null and void if a court of competent jurisdiction interprets Measure 37
41 in any fashion which alters the Board's approval. Lincoln County does not waive any rights or
42 remedies under law by granting a "waiver" under the law.
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2 2. The Measure 37 claim of Margarie Patt, Lincoln County Case File No. 29-LURCC-05,
3 was a valid claim when filed on October 12, 2005. The Board of Commissioners declines to pay
4 just compensation for the claim. In lieu of compensation, Lincoln County Code Section LCC
5 1.1375 (T-C zone) is modified, removed or not applied for Margarie Patt against the subject
6 property to the following effect:
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- 8 • The non-application of regulations would be limited to the minimum parcel size
9 requirements and restrictions on dwellings provided for in LCC 1.1375 to allow the
10 creation of up to 39 parcels of land and the placement of one single-family dwelling on the
11 resultant parcel. All other provisions of the Lincoln County Code would continue to apply.
- 12 • Establishment of each additional land parcel and dwelling on the subject property would
13 be subject to all applicable public health and safety regulations, including but not limited
14 to land division procedures, building codes, on-site sewage disposal rules and
15 requirements, flood hazard area regulations, and county road approach permit
16 requirements.
17

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

27 4. This “waiver” provision is void if the property owner or property owner’s successors
28 are compensated by another governmental agency, including the State, for a reduction in value
29 resulting from the same or similar land use regulations on the subject property.
30

31 5. Excepting new land use regulations imposed after the date of this decision, and subject
32 to applicable review rights as permitted under Measure 37, this final decision bars a subsequent
33 Measure 37 claim against the County as to the subject property.
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35 6. Transferability of the “waiver” granted by the County under this decision is unknown
36 under the current status of Measure 37. Transferability of the “waiver” is allowed to the extent
37 permitted by law. Granting of this “waiver” does not commit the County to issuance of
38 development or building permits, if those actions are not allowed under law.
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40 7. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln
41 County Clerk without payment of recording fees.
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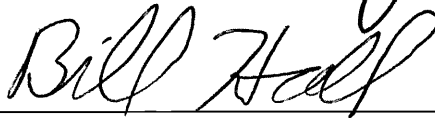
8. Copies of this Order be provided to the Planning Director, County Counsel, claimant and claimant's agent.

DATED this 5th day of April, 2006.

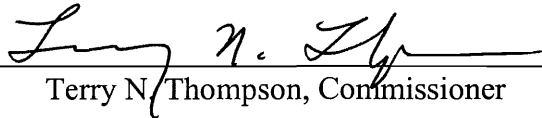
LINCOLN COUNTY BOARD OF COMMISSIONERS



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 DEPARTMENT'S STAFF REPORT and
RECOMMENDATION**

CASE FILE: 29-LURCC-05

DATE FILED: 10/12/05

CLAIMANT: Margarie Patt (Andrew Kauffman, agent)

REQUEST: The claimant seeks compensation for, or the modification or removal of, land use regulations that restrict land divisions and the placement of dwellings on the subject property.

A. REPORT OF FACTS:

1. **Lot Size:** 38.73 total acres
2. **Property Location:** The subject property is located at 5213 Logsdan Road and is identified as tax lot 201 on Lincoln County Assessor's Map 10-9-6.
3. **Zoning Designation:** T-C (Timber Conservation)
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Adjacent uses along Logsdan Road near Twin Bridges are comprised primarily of scattered rural residences and properties used for forest management and farm activities.
6. **Topography & Vegetation:** The property is generally flat with only slight slopes. The property is mostly clear with grasses and is sparsely forested with conifers, alder, and typical under story species.

7. **Existing Structures:** Single-family dwelling and multi-purpose shed
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, Inc.
9. **Development Constraints:** None identified

B. EVALUATION OF THE REQUEST:

1. Background:

Andrew Kauffman, acting as agent, filed a Land Use Regulation Compensation Claim on behalf of property owner Margarie Patt on October 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 Patt property is located on Logsden Road about one half mile above the intersection of Logsden Road and Sams Creek Road at Twin Bridges. The current zoning of the property is T-C, Timber Conservation. The claimant asserts 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 and the development of additional residences on the subject property. The claimant states that her 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 39 parcels and permit the establishment of one single-family dwelling on each resulting parcel.

Planning staff met with the claimant prior to the filing of her 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 June of 1971. There were no land use regulations in effect in this area in 1971.

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 claimant 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 claimant, Margarie Patt, acquired her original interest in the property through a real estate contract entered into on June 21, 1971, and recorded in the Lincoln County Deed Records, Book 26, page 569. The property ownership has been subject to a number of transactions since that time, but the claimant has maintained a continuous ownership since her original acquisition, and her ownership remains effective at present.

- 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 use of this private real property to only those uses expressly authorized in the T-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 T-C zone prohibit any division of the subject property; these restrictions also prohibit the placement of any additional dwellings on the property.

The claimant asserts that these restrictions reduce fair market value of the property. In support of this claim, the claimant has estimated the value of each proposed parcel to be \$20,000 to \$30,000, if buildable. At 39 proposed parcels, the cumulative total estimate would be \$780,000 to \$1,200,000. The current real market value of the property provided by the Lincoln County Assessor – with the current restrictions – is \$168,930, a loss in value of \$611,070 to \$1,030,070. Because the estimated retail value of the proposed parcels does not take into account development and other costs associated with bringing the properties to market, the difference in value of the property as is, versus as subject to regulations at the time of acquisition by the present owner, is likely less than the stated \$611,070 to \$1,030,070. However, based on the information

and evidence provided, the department concludes that there has been at least some diminution in value as a result of the current land use regulations imposed after the current owner's date of 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 T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forest lands into zones which comply with the requirements of OAR 660, Division 6. 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 claimant has provided documentation that the claimant's original interest in the property was acquired on June 21, 1971 (Book 26, Page 569). The T-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was enacted after the date of acquisition of the present owner.

- e. For claims arising from land use regulations enacted prior to December 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 October 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. Margarie Patt filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on October 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 identified as tax lot 201 on Lincoln County Assessor's map 10-9-6, 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 additional single-family dwellings.
6. The claimant has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of an estimate of the retail value of the proposed 39 parcels. The estimate concludes 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 by \$611,070 to \$1,030,070. However, because the estimated retail value of the proposed parcels does not take into account development and other costs associated with bringing the properties to market, the difference in value of the property as is, versus as subject to regulations at the time of acquisition by the present owner, is likely less than the stated \$611,070 to \$1,030,070. However, based on the information and evidence provided, the Board finds that there has been at least some diminution in value as a result of the current land use regulations imposed after the current owner's date of acquisition.
7. According to the Lincoln County deed records, the claimant, Margarie Patt, first acquired an interest in the subject property on June 21, 1971 and has maintained an ownership interest continuously since that time.

8. The currently effective T-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimant's date of acquisition.
9. The 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 October 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 owner, Margarie Patt, 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 owner of the property, Margarie Patt, is 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 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 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 claimant to divide the subject property as proposed and to establish one other single-family dwelling on the each resultant parcel. As no zoning existed on the subject property at the time of the claimant's acquisition of the subject property in 1971, the allowance to divide the subject property and establish a dwelling on each resultant parcel would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition. 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 in the manner requested would permit the claimant owner to create 39 rural home sites on a parcel of 38.73 acres, as desired by the claimant.
3. Not applying the land division and dwelling restrictions of the T-C zone in order to permit the establishment of additional rural home sites is the claimant's desired resolution.

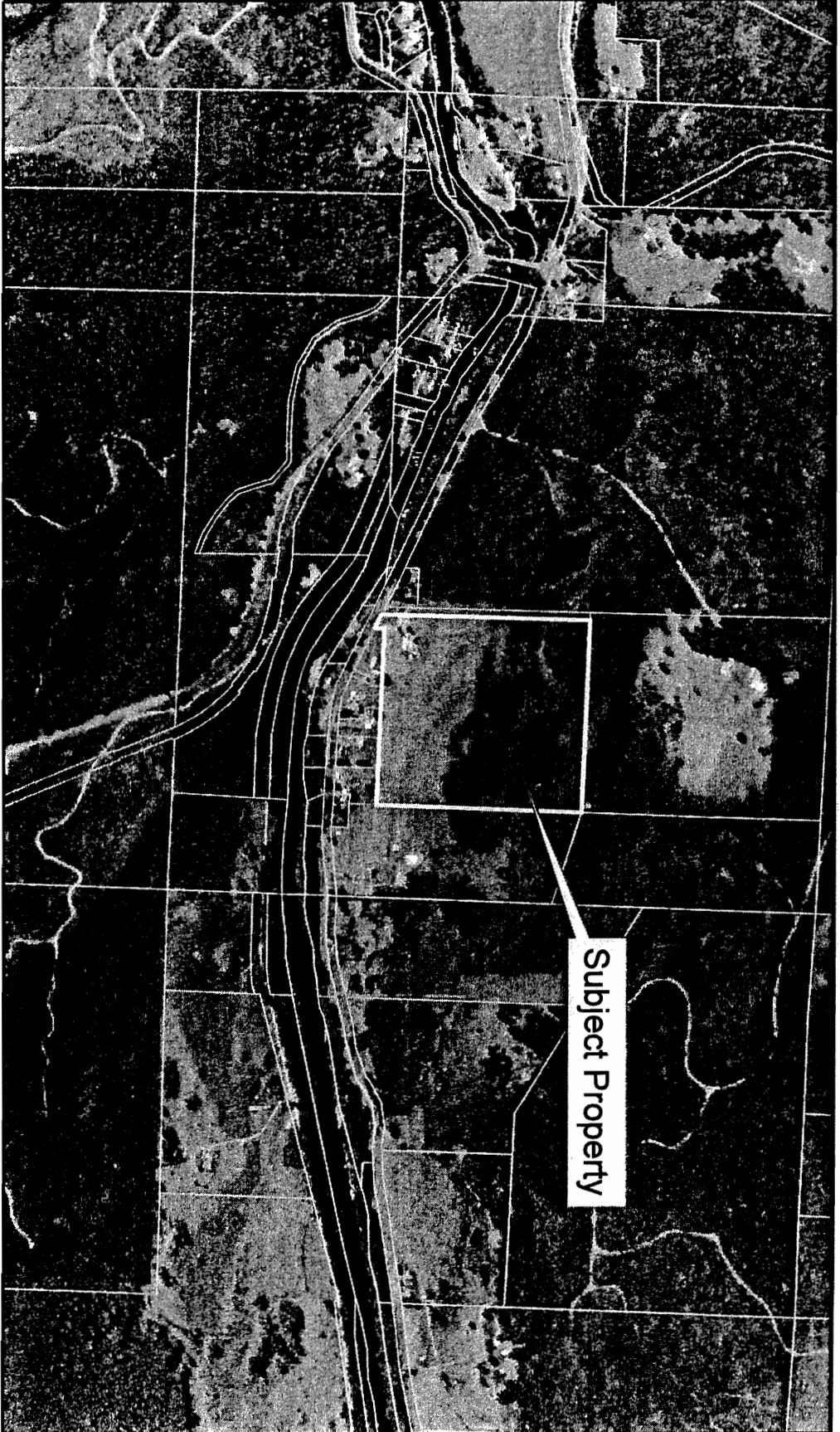
This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1375 in order to permit the creation of up to 39 additional land parcels 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 T-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director



Subject Property

Siletz
Logsden

Applicant: Margarie Patt
(Agent: Andrew Kauffman)

Map and Tax lot: 10-9-6 / 201

