

**BEFORE THE BOARD OF COMMISSIONERS  
FOR LINCOLN COUNTY, OREGON**

In the Matter of )  
 )  
*The Ballot Measure 37 Claim of* ) **ORDER NO. 4-06-137**  
*Raymond and Lorraine Walter* )  
*File No. 32-LURCC-05* )

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

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

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

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

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

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

WHEREAS on December 21, 2005, Raymond and Lorraine Walter, filed a Measure 37 claim seeking compensation or the modification, removal or non-application of land use regulations (“waiver”) that restrict land divisions and uses in the RR-5 zone which apply to the

1 subject property. The subject property is located east of the City of Waldport at 2358 SE Nelson  
2 Wayside Drive. It is 5.23 acres in size. It is identified as Tax Lot 101 on Lincoln County  
3 Assessor's Map 13-11-29-AC. County records and the filed claim are found in Lincoln County  
4 Planning Department File No. 32-LURCC-05 and by this reference are incorporated into this  
5 Order as if fully set forth; and

6  
7 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-  
8 120, a hearing was held on February 15, 2006 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; and

12  
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 subject land use regulations: staff recommends that the Board direct that the minimum parcel size  
18 and use restrictions of the RR-5 zone (LCC 1.1355) not be applied to the subject property. This  
19 allowance would, in accordance with the requirements of Subsection (8) of Ballot Measure 37,  
20 allow the owners to use the property for a use permitted at the time of the owners' acquisition of  
21 the subject property in 1965 (Claimant Raymond Walter) and 1970 (Claimant Lorraine Walter),  
22 respectively; and

23  
24 WHEREAS the Board has considered the report and recommendations of the Planning  
25 Director and County Counsel, including the implications known at this time concerning  
26 ambiguous provisions in Measure 37 which are and will continue to be subject to judicial  
27 clarification for the foreseeable future. Given that status, the Board desires to proceed cautiously  
28 with processing this Measure 37 claim. Therefore, the Board will decide this Measure 37 claim  
29 after placing the claimants on notice of possible future court decisions and interpretations; and

30  
31 WHEREAS based on what is known at this time, the Board finds it is in the public interest,  
32 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the  
33 challenged land use regulation to the subject property and issue the "waiver" to claimants;

34  
35 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- 36  
37 1. Claimants Raymond and Lorraine Walter are placed on notice that Oregon courts  
38 continue to interpret provisions in Measure 37 which may change the way claims are treated.  
39 Claimants proceed in this matter knowing that any action taken by the Lincoln County Board of  
40 County Commissioners could be null and void if a court of competent jurisdiction interprets  
41 Measure 37 in any fashion which alters the Board's approval. Lincoln County does not waive  
42 any rights or remedies under law by granting a "waiver" under the law.  
43

1           2. The Measure 37 claim of Raymond and Lorraine Walter, Lincoln County Case File No.  
2 32-LURCC-05, was a valid claim when filed on December 21, 2005. The Board of  
3 Commissioners declines to pay just compensation for the claim. In lieu of compensation,  
4 Lincoln County Code 1.1355 (RR-5 Zone) is modified, removed or not applied for Raymond and  
5 Lorraine Walter against the subject property to the following effect:  
6

- 7           • The non-application of minimum lot size and use regulations would be limited to  
8 the RR-5 zone restrictions.
- 9
- 10           • Establishment of additional land parcels, dwellings, and other uses on the subject  
11 property would be subject to all applicable public health and safety regulations,  
12 including but not limited to land division procedures, building codes, on-site  
13 sewage disposal rules and requirements, flood and geologic hazard area  
14 regulations, and state or county road approach permit requirements.
- 15

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

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

29           5. Excepting new land use regulations imposed after the date of this decision, and subject  
30 to applicable review rights as permitted under Measure 37, this final decision bars a subsequent  
31 Measure 37 claim against the County as to the subject property.  
32

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

38           7. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln  
39 County Clerk without payment of recording fees.  
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43           8. Copies of this Order be provided to the Planning Director, County Counsel, and  
44 claimants.

DATED this 5th day of April, 2006.

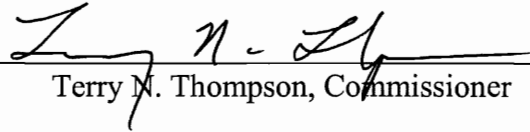
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



Don Lindly, Chair



Bill Hall, Commissioner



Terry N. Thompson, Commissioner

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DEPARTMENT OF PLANNING AND DEVELOPMENT

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Newport, OR 97365  
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## LAND USE REGULATION COMPENSATION CLAIM

### PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

**CASE FILE:** 32-LURCC-05

**DATE FILED:** 12/21/05

**CLAIMANT:** Raymond and Lorraine Walter

**REQUEST:** The claimants seek compensation for, or the modification or removal of, land use regulations that restrict land divisions and uses in the RR-5 zone.

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

1. **Lot Size:** 5.23 acres.
2. **Property Location:** The property is located at 2358 SE Nelson Wayside Drive and is identified as tax lot 101 on Lincoln County Assessor's map 13-11-29AC.
3. **Zoning Designation:** RR-5 (Rural Residential)
4. **Plan Designation:** Dispersed Residential
5. **Surrounding Land Use:** The subject property is located in an area characterized by rural residential home sites.
6. **Topography & Vegetation:** The subject property is relatively level and is residentially landscaped.
7. **Existing Structures:** One single-family dwelling.

8. **Utilities:** The following utilities are available to serve the subject property:

- a. Sewer: On-site
- b. Water: On-site.
- c. Electricity: Consumers Power.

9. **Development Constraints:** None identified.

**B. EVALUATION OF THE REQUEST:**

**1. Background:**

Raymond and Lorraine Walter filed a land use regulation compensation claim pursuant to Ballot Measure 37 on December 21, 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 Walter property is located east of the City of Waldport on SE Nelson Wayside Drive. The current zoning of the property is RR-5, rural residential. The claimants assert a diminution in the value of the property resulting from the restrictions of the RR-5 zone applied after their date of acquisition. The claimants state that their desired remedy to the claim is the removal or modification of the RR-5 zone restrictions in a manner that will permit the division of the subject property into one-acre home sites.

Claimant Raymond Walter has documented an acquisition date of October 1, 1965; claimant Lorraine Walter acquired her interest in the property On December 8, 1970. On neither date was the property subject to county zoning regulations.

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.

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."**

Claimant Raymond Walter acquired his original interest in the subject property on October 1, 1965 via Land Sales Contract, recorded at Book 260, page 442 of the Lincoln County Deed Records. Claimant Lorraine Walter acquired her

interest in the property on December 8, 1970 via Quit Claim Deed recorded at Book 22, Page 225. Records of the Lincoln County Assessor's office confirm that Raymond and Lorraine Walter 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 land use regulation applicable to the subject property is the RR-5 zone (LCC 1.1355). This regulation was enacted by Lincoln County and applies to the subject property, which is private real property. This regulation restricts the use of this private real property to only those uses expressly authorized. Specifically, in the case of the subject property, this regulation limits land divisions and places restrictions on the placement of additional single-family dwellings.

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

The currently effective requirements of the RR-5 zone limit land divisions to parcels of five acres or more and also limit uses. Claimants assert that these restrictions reduce fair market value of the property by an unspecified amount. No supporting market value data is provided for the claim. However, the information on its face; i.e. the market value difference between the current likely permissible development, versus the value based on the absence of any land use restrictions, leads the department to conclude that it is more likely than not that there has been at least some reduction in fair market value of the subject property as a result of the enactment and enforcement 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 development imposed by the RR-5 zone. This regulation was enacted to comply

with the Statewide Planning Goals. It does not directly address common nuisances, health and safety, adult businesses or activities, nor does it have any federal nexus.

The RR-5 zone restriction was enacted by Lincoln County on June 30, 1980 (Ordinance #139). The claimants have documented that their original interest in the property was acquired in October of 1965, prior to the enactment of the cited land use regulation.

- 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 regulation for which compensation is sought was enacted prior to the effective date of Ballot Measure 37 (Lincoln County has enacted no new land use regulations after December 3, 2004). The subject claim was filed on December 21, 2005, within two years of the December 3, 2004 effective date of Ballot Measure 37.

- f. **In lieu of compensation, the governing body may modify, remove or not apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.**

The claimant has documented a date of acquisition of 1965. For purposes of Section 8 of Measure 37, October 1, 1965 is the operative date for determining “a use permitted at the time the owner acquired the property.” As previously noted, the RR-5 zone restriction was enacted by Lincoln County on June 30, 1980.

### **C. Recommended Findings and Conclusions:**

The director recommends for the board’s consideration the following findings and conclusions:

#### **Findings:**

1. Raymond and Lorraine Walter filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on December 21, 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.

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3. The subject property is identified as tax lot 101 on Lincoln County assessor's map 13-11-29-AC, which is taxed as real property by Lincoln County.
4. The RR-5 zone (LCC 1.1355) provisions applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The RR-5 zone; specifically, as applied to the subject property, limits land divisions and other development.
6. The claimants have asserted a diminution in value caused by the RR-5 zone restrictions. Although the reduction in value has not been quantified by the claimants, the record as a whole supports a finding that it is more likely than not that there has been some diminution in value as a result of the RR-5 zone requirements enacted after the claimants' date of acquisition.
7. According to the Lincoln County deed records, claimant Raymond Walter first acquired an ownership interest in the subject property on October 1, 1965. Claimant Loraine Walter acquired her ownership interest in the subject property on December 8, 1970. Raymond and Lorraine Walter are the current owners of the property. The currently effective RR-5 zone restrictions were enacted by Lincoln County on June 30, 1980 (Ordinance # 139), after both claimants' dates of acquisition.
8. The RR-5 zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
9. The subject claim was filed on December 21, 2005, which is less than two years from the December 2, 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 by the owners, Raymond and Lorraine Walter, pursuant to Subsection (5) of Ballot Measure 37.

2. Based on the claimants' date of acquisition of October 1, 1965, the RR-5 zone (LCC 1.1355) provisions of the Lincoln County Code are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37, and after the date of acquisition of the claimants; 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, Raymond and Lorraine Walter, 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 RR-5 zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of these land use regulations, may modify, remove or not apply these restrictions in order to permit the owner to divide and use the property in a manner permitted at the time of his 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 and use restrictions of the RR-5 zone not be applied to the subject property. This would allow the claimants to divide the subject property into residential parcels and/or develop other uses on the property as was permitted at the time of the claimants' acquisition of the subject property in 1965. This allowance 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 currently effective restrictions of the RR-5 zone 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 RR-5 zone restrictions.

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- Establishment of additional land parcels, dwellings, and other uses 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 and geologic hazard area regulations, and state or 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 and use restrictions of the RR-5 zone applicable to the subject property, subject to applicable public health and safety regulations.

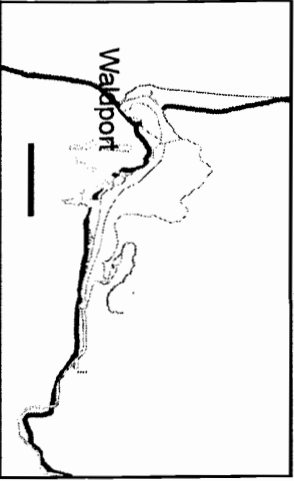
Respectfully submitted,

Matt Spangler  
Director

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Subject Property



Applicant: Raymond and Lorraine Walter  
Map and Tax lot: 13-11-29 AC / 101

