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

8
9 In the Matter of)
10)
11 *The Ballot Measure 37 Claim of Stimson Lumber Co.*) **ORDER NO. 5-07-562**
12 *Case File No. 104-LURCC-06*)

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

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

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

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

31
32 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for
33 compensation and make decisions on those claims. A determination to modify, remove or not apply
34 a land use regulation or compensate a property owner must be based on substantial factual
35 information and analysis; and
36

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

7
8 WHEREAS on December 1, 2006, Stimson Lumber Company filed a Measure 37 claim
9 seeking compensation for, or the modification or removal of, land use restrictions that limit land
10 divisions and the placement of dwellings in the T-C (Timber Conservation) zone. The property is
11 628 acres in size and is located south and east of the Siletz River in sections 20 and 21 of Township
12 8S Range 10W. It is identified as tax lots 1000 and 1001 on Lincoln County Assessor's Map #08-10,
13 and tax lot 100 on Lincoln County Assessor's Map #08-10-20. County records and the filed claim
14 are found in Lincoln County Planning Department File No. 104-LURCC-06 and by this reference are
15 incorporated into this order as if fully set forth; and

16
17 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
18 a hearing was held on April 5, 2007, on the claim before the County Counsel as Hearings Officer, for
19 the purpose of receiving facts and evidence related to determining the validity of the claim. There
20 was no testimony either in support of or in opposition to the claim; and

21
22 WHEREAS the Planning Director has issued his Department's Staff Report and
23 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
24 herein. That report finds and concludes that the claim when submitted was valid, and recommends
25 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
26 subject land use regulations; staff therefore recommends that the Board choose the non-application of
27 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that
28 the Board direct that the current minimum parcel size requirements and restrictions on dwellings in
29 the T-C zone not be applied to the subject property. This would allow the claimant to divide and site
30 dwellings on the subject property in accordance with the provisions of the T-C zone in effect on
31 January 26, 1981¹. This would allow the owner to use the property for a use permitted at the time of
32 the owner's acquisition in accordance with the requirements of ORS 197.352 (8); and

33
34 WHEREAS the Board has considered the report and recommendations of the Planning
35 Director and County Counsel, including the implications known at this time concerning ambiguous
36 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the
37 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this

¹ As noted in the staff report, at the time of claimant's acquisition of the property, county code provisions applicable to the subject property permitted the creation of 40 acre parcels in the T-C zone, and allowed dwellings on such parcels in conjunction with a forest management plan. Dwellings were permitted outright on parcels of 80 acres or greater in size.

1 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the claimant
2 on notice of possible future court decisions and interpretations. In addition, the Oregon Legislature is
3 considering changes to Measure 37 that may impact these claims; and
4

5 WHEREAS based on what is known at this time, the Board finds it is in the public interest,
6 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the
7 challenged land use regulation to the subject property and issue the “waiver” to claimant.
8

9 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

10 1. Claimant is placed on notice that Oregon courts continue to interpret provisions in
11 Measure 37 which may change the way claims are treated. Claimant proceeds in this matter
12 knowing that any action taken by the Lincoln County Board of Commissioners could be null and
13 void if a court of competent jurisdiction interprets Measure 37 in any fashion which alters the
14 Board’s approval. In addition, the Oregon Legislature is currently considering changes that may
15 impact these claims. Lincoln County does not waive any rights or remedies under law by granting a
16 “waiver” under the law.
17

18 2. The Measure 37 claim of Stimson Lumber Company, Lincoln County Case File No. 104-
19 LURCC-06, was a valid claim when filed on December 1, 2006. The Board of Commissioners
20 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to
21 modify, remove or not apply the current restrictions on minimum parcel size and dwellings in the T-
22 C zone (LCC 1.1375) to the subject property. This waiver is to the effect as follows:

- 23 • The non-application of regulations would be limited to the current provisions of LCC
24 1.1375. Instead, land divisions, dwellings and other uses would be subject to the
25 provisions of the applicable T-C zoning in effect on January 26, 1981. All other
26 provisions of the Lincoln County code would continue to apply.
- 27 • Establishment of additional land parcels and dwellings on the subject property would
28 be subject to all applicable public health and safety regulations, including but not
29 limited to land division procedures, building codes, on-site sewage disposal rules and
30 requirements, state and county road approach permit requirements, and the current fire
31 safety standards of the T-C zone.
32

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

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

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

9
10 6. Transferability of the "waiver" granted by the County under this decision is unknown
11 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent
12 permitted by law. Granting of this "waiver" does not commit the County to issuance of
13 development or building permits, if those actions are not allowed under law.

14
15 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln
16 County Clerk without payment of recording fees.

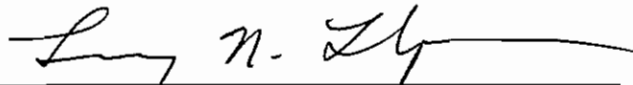
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18 8. Copies of this order be provided to the Planning Director, County Counsel, claimant and
19 claimant's agent.

DATED this 2nd day of May, 2007.

LINCOLN COUNTY BOARD OF COMMISSIONERS



BILL HALL, Chair



TERRY N. THOMPSON, Commissioner



DON LINDLY, Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

210 S. W. 2nd ST
Newport, OR 97365
(541) 265-4192
Fax (541) 265-6945

LAND USE REGULATION COMPENSATION CLAIM

PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

CASE FILE: 104-LURCC-06

DATE FILED: 12/01/06

CLAIMANT: Stimson Lumber Company, claimant; W & H Pacific, agent.

REQUEST: The claimant seeks compensation for, or the modification or removal of, land use regulations that restrict dwellings and establish an 80 acre minimum parcel size for land divisions in the T-C zone.

A. REPORT OF FACTS:

1. **Lot Size:** 628 acres
2. **Property Location:** The subject property is located south and east of the Siletz River in sections 20 and 21 of Township 8S Range 10W and is identified as tax lots 1000 and 1001 on Lincoln County Assessor's map 08-10, and tax lot 100 on Lincoln County Assessor's map 08-10-20.
3. **Zoning Designation:** T-C (Timber Conservation)
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Some scattered rural residential development is present along Highway 229, otherwise adjacent uses in the area consist exclusively of large tracts of industrial and public forest land.
6. **Topography & Vegetation:** The property consists of moderately to steeply sloping forested uplands.

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7. **Existing Structures:** None.

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

- a. Sewer: On-site sewage disposal
- b. Water: On-site wells or springs
- c. Electricity: Area not currently served.

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

B. EVALUATION OF THE REQUEST:

1. **Background:**

W & H Pacific filed a Land Use Regulation Compensation Claim on behalf of Stimson Lumber Company December 1, 2006. 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 Stimson property is located in the lower Siletz River drainage near river mile 7. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of the property resulting from the restrictions of the T-C zone applied after their date of acquisition, more specifically, the restriction limiting new parcel creations to a minimum of 80 acres and the current limitations on dwellings. The claimant states that the desired remedy to the claim is the removal or modification of the T-C zone lot size restriction in a manner that will permit the division of the subject property into parcels of 40 to 80 acres in size with home sites, which was permitted at the time of their acquisition.

Deed records submitted with the claim indicate the claimant's acquisition of the subject property occurred in 1981. At that time, county code provisions applicable to the subject property permitted the creation of 40 acre parcels in the T-C zone, and allowed dwellings on such parcels in conjunction with a forest management plan. Dwellings were permitted outright on parcels of 80 acres or greater in size.

On April 5, 2007, 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. There was no testimony either in support of or in opposition to the claim.

2. **Measure 37 Claim Requirements:**

ORS 197.352 (Ballot Measure 37) provides the following criteria for establishing eligibility for the supplemental right of compensation created by the measure:

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- 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, Stimson Lumber Company, an Oregon Corporation, acquired their original interest in the property by special warranty deed on January 26, 1981. Records of the Lincoln County Assessor’s office confirm that Stimson Lumber Company remains the owner 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 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 limit the division of the property through the establishment of an 80 acre minimum parcel size requirement and place restrictions on the authorization of dwellings.

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

As noted, the currently effective minimum lot size requirements of the T-C zone limit division of and the development of residences on the subject property.

Claimant asserts that these restrictions reduce fair market value of the property. In support of this claim, claimant has provided an analysis performed by licensed Oregon appraisers estimating the value, on a per acre basis, of the parcels that could be created in accordance with regulations in effect in 1981 on the claimant’s date of acquisition. Current market value is estimated by the claimant. Based on these estimates, the claimant asserts a value reduction of up to \$7,300 per acre, or a total of \$4.7 million for the entire tract. Because the estimate of potential market value is based on incorrect assumptions regarding the permissibility of dwellings on the subject property on the date of acquisition, and the estimate of current market value of the property is not supported by any expert testimony or evidence (e.g. an appraisal), it is difficult to substantiate the specific dollar amount demanded by the claimant as compensation. Nonetheless, the information on its face; i.e. the market value difference between current regulations versus the potential 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 imposed by the T-C zone. These restrictions were enacted to comply with Statewide Planning Goal 4, which mandates the conservation of forestlands. The purpose of the T-C zone is to conserve forestland for forest uses and to limit potentially conflicting uses such as residences. 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 January 26, 1981. The current dwelling restrictions and 80 acre minimum lot size requirement in the T-C zone were enacted in 1994, so the regulations giving rise to the claim were enacted after the date of acquisition of the present owner.

- e. For claims arising from land use regulations enacted prior to December 2, 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 dwelling restrictions and 80 acre minimum lot size requirements, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on December 1, 2006, within two years of the December 2, 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. W & H Pacific filed a Land Use Regulation Compensation claim on behalf of Stimson Lumber Company with the Lincoln County Department of Planning and Development on December 1, 2006.
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 1000 and 1001 on Lincoln County Assessor's map 08-10 and tax lot 100 on Lincoln County Assessor's map 08-10-20, 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 standard limits dwellings and limits the division of the subject property through the imposition of an 80 acre minimum parcel size requirement.
6. The claimant has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of estimated current versus potential values of the subject property. The estimate concludes that the land use regulations that prohibit the division of the subject property have the effect of reducing the fair market value of the property by \$4.7 million.
7. According to the Lincoln County deed records, the claimant, Stimson Lumber Company, first acquired an interest in the subject property in 1981 and has maintained an ownership interest continuously since that time.
8. The currently effective T-C zone regulations establishing the 80 acre minimum lot size for new land divisions and present restrictions on 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 December 1, 2006, 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 on behalf of the owner, Stimson Lumber Company, pursuant to ORS 197.352 (5).
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; they have the effect of reducing the fair market value of the property, and they are not subject to any of the exclusions provided for in ORS 197.352 (3).
3. The owner of the property, Stimson Lumber Company, 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 their 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 current minimum parcel size requirements and restrictions on dwellings in the T-C zone not be applied to the subject property. This would allow the claimant to divide and site dwellings on the subject property in accordance with the provisions of the T-C zone in effect on January 26, 1981. This would, in accordance with the requirements of ORS 197.352 (8), 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 current land division and dwelling restrictions of the T-C zone in order to permit the establishment of additional parcels and 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 current provisions of LCC 1.1375. Instead, land divisions, dwellings and other uses would be subject to the provisions of the applicable T-C zoning in effect on January 26, 1981. 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, state and county road approach permit requirements, and the current fire safety standards of the T-C zone.

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 for the allowance of the creation of 40 acre parcels on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director

104-LURCC-06

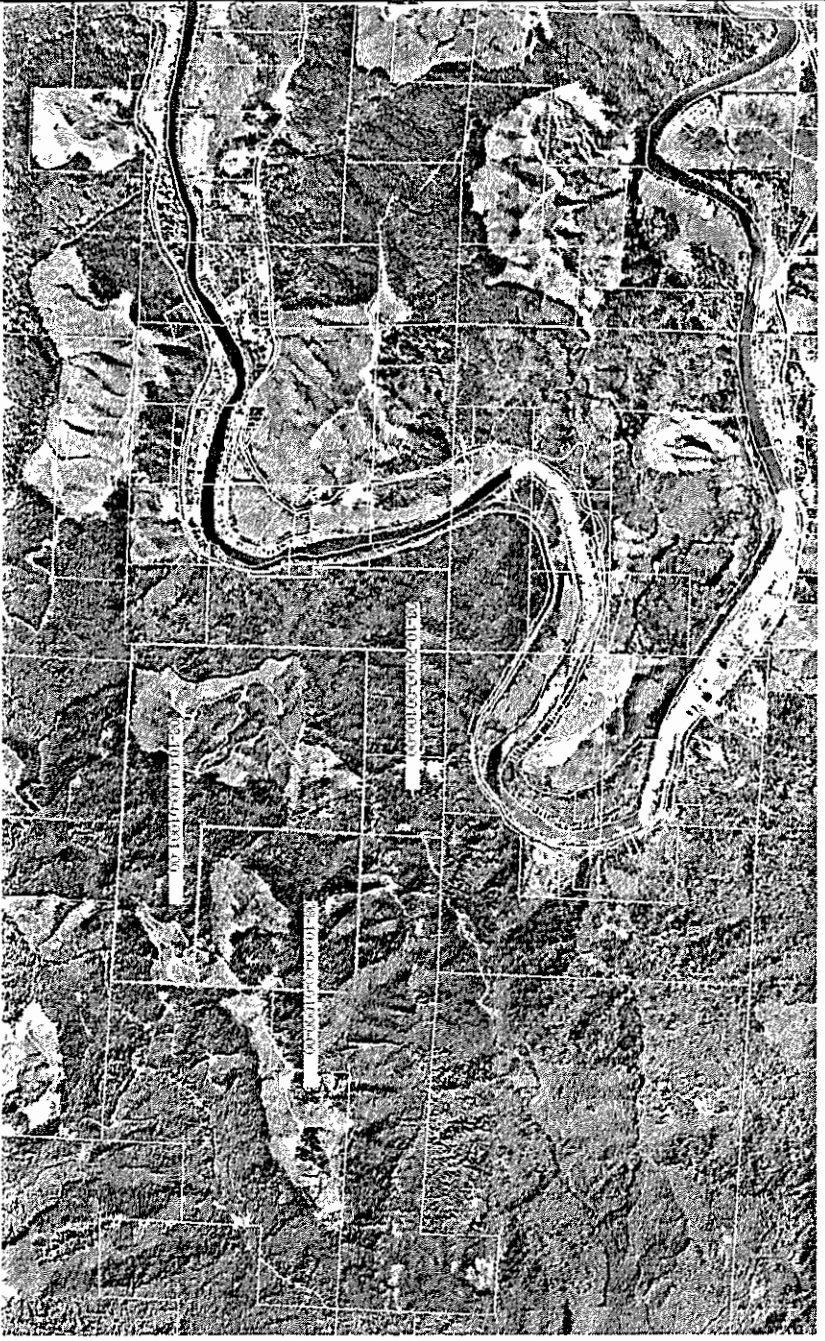
Geographic Info System

Taxlot
ParcelID 08-10-00-00-01000-00
Site Address

Owner
STIMSON LUMBER COMPANY
Address1 530 SW YAMHILL ST SUITE 700
Address2
Address3

City/State/Zip
PORTLAND, OR 97204-1330
Land Value 62410
Imp Value 0
Acres 160

Tax Account
Account R381951
Tax Code 461
Legal Desc TRNSHP 08, PNG 10, ACRES 160..



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