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

7  
8 In the Matter of )  
9 )  
10 *The Ballot Measure 37 Claim of Elmer and Kathleen Ostling* ) **ORDER NO. 5-07-564**  
11 *Case File No. 106-LURCC-06* )

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

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

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

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

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

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36 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and  
37 ambiguous provisions and that future litigation or legislative action will be necessary to clarify the  
38 measure’s terms. The County, therefore, adopted procedures in Board of Commissioners Orders #12-

1 04-318 and #4-05-120 to assess claims in a timely manner and to require factual and analytical  
2 information as part of the claim so the County will have a rational basis for its decision on each  
3 claim; and  
4

5 WHEREAS on December 1, 2006, Elmer and Kathleen Ostling filed a Measure 37 claim  
6 seeking compensation for, or the modification or removal of, land use regulations that restrict land  
7 divisions and the placement of dwellings in the A-C (Agricultural Conservation) and T-C (Timber  
8 Conservation) zones. The property is 116.56 acres in size<sup>1</sup> and located is located at 5071 South  
9 Beaver Creek Road. It is identified as tax lots 600, 700 and 800 on Lincoln County Assessor's Map  
10 #13-11-09. Tax lots 600 and 800 are zoned T-C (Timber Conservation), tax Lot 700 is zoned A-C  
11 (Agricultural Conservation). County records and the filed claim are found in Lincoln County  
12 Planning Department File No. 106-LURCC-06 and by this reference are incorporated into this order  
13 as if fully set forth; and  
14

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

21 WHEREAS the Planning Director has issued his Department's Staff Report and  
22 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated  
23 herein. That report finds and concludes that the claim when submitted was valid<sup>2</sup>, and recommends  
24 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the  
25 subject land use regulations; staff therefore recommends that the Board choose the non-application of  
26 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that  
27 the Board direct that the minimum parcel size requirements and the restrictions on dwellings in the  
28 A-C and T-C zones not be applied to the subject property. This would allow the claimants to divide  
29 tax lot 700 (A-C Zoned) into three, 20 acre parcels and establish one homesite on each resulting  
30 parcel. Claimants would also be able to establish one homesite each on tax lots 600 and 800 (both T-  
31 C zoned) in accordance with requirements in effect at the time the claimants' acquired the subject  
32 property. The recommendation would allow uses as requested by the claimants and as permitted at  
33 the time of acquisition of the subject property. This would allow the owners to use the property for a  
34 use permitted at the time of the owners' acquisition in accordance with the requirements of ORS  
35 197.352 (8); and  
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<sup>1</sup> Tax lot 600 is 38.87 acres, lot 700 is 67.69 acres, and lot 800 is 10 acres.

<sup>2</sup> The staff report details the acquisition history for the claimants and the impact on this recommendation. It is not necessary to repeat that history here, since claimants will receive what they requested.

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 concerning ambiguous  
3 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the  
4 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this  
5 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the  
6 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon  
7 Legislature is considering changes to Measure 37 that may impact these claims; and

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

12  
13 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

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22 2. The Measure 37 claim of Elmer and Kathleen Ostling, Lincoln County Case File No. 106-  
23 LURCC-06, was a valid claim when filed on December 1, 2006. The Board of Commissioners  
24 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to  
25 modify, remove or not apply the minimum parcel size requirements and the restrictions on  
26 dwellings in the A-C and T-C zones. This allows the claimants to divide tax lot 700 (A-C Zoned)  
27 into three, 20 acre parcels and establish one homesite on each resulting parcel. Claimants are also  
28 able to establish one homesite each on tax lots 600 and 800 (both T-C zoned) in accordance with  
29 requirements in effect at the time the claimants’ acquired the subject property. This waiver is to the  
30 effect as follows:

- 31
- 32 • The non-application of regulations would be limited to the current minimum parcel  
33 size requirements and restrictions on dwellings provided for in LCC 1.1373 and  
34 1.1375. Instead, the provisions of LCC 1.1373 and 1.1375 in effect on the date of  
35 acquisition of the property by the claimant owners would apply. All other provisions  
36 of the Lincoln County code would continue to apply.
  - 37 • Establishment of each additional land parcel and dwelling on the subject property  
38 would be subject to all applicable public health and safety regulations, including but  
39 not limited to land division procedures, building codes, on-site sewage disposal rules  
40 and requirements, flood hazard area regulations, and county road approach permit  
requirements.

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

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

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

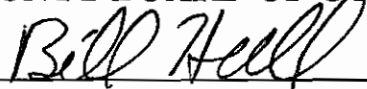
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18 6. Transferability of the "waiver" granted by the County under this decision is unknown  
19 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent  
20 permitted by law. Granting of this "waiver" does not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

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

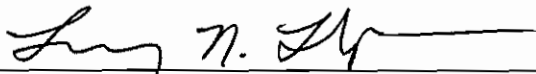
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26 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and  
27 claimants' agent.  
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DATED this 2nd day of May, 2007.

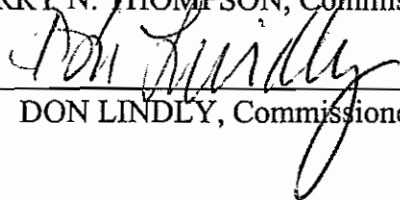
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



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:** 106-LURCC-06

**DATE FILED:** December 1, 2006

**CLAIMANT:** Elmer and Kathleen Ostling; Dawn Pavitt, agent

**REQUEST:** The claimant seeks compensation for, or the modification or removal of, land use regulations which limit land divisions and the placement of dwellings in the T-C (Timber Conservation) and A-C (Agricultural Conservation) zone.

**A. REPORT OF FACTS:**

1. **Lot Size:** Tax lot 600 is 38.87 acres, lot 700 is 67.69 acres, and lot 800 is 10 acres for a total of approximately 116.56 acres.
2. **Property Location:** The subject property is located at 5071 South Beaver Creek Road and is identified as tax lots 600, 700 and 800 on Lincoln County Assessor's Map #13-11-09.
3. **Zoning Designation:** Lots 600 and 800 are zoned T-C (Timber Conservation), Lot 700 is zoned A-C (Agricultural Conservation).
4. **Plan Designation:** Forest Land and Agricultural Lands.
5. **Surrounding Land Use:** Scattered rural residential home sites and forest/farm lands characterize the area.
6. **Topography & Vegetation:** The property consists of varying topography ranging from fairly level to steeper sloped forested lands.

EX-106-LURCC-06  
Page 1 of 7  
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7. **Existing Structures:** A barn is located on tax lot 700.
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
9. **Development Constraints:** Portions of the property are located within the 100-year flood zone. The National Wetlands Inventory map shows that portions of the property also contain jurisdictional wetlands. In addition, Environmental Bulletin 81 of the Alsea River Section also shows portions of the property located within the floodplain, and indicates areas of the property contain high groundwater table and landslide topography. No other constraints were identified.

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

### **1. Background:**

Dawn Pavitt, on behalf of Elmer and Kathleen Ostling, filed a Land Use Regulation Compensation Claim on 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 Ostling property is located at 5071 South Beaver Creek Road. The subject property consists of split zoning; T-C, (Timber Conservation) and A-C (Agricultural Conservation). Tax lots 600 and 800 are zoned T-C and tax lot 700 is zoned A-C. The claimant asserts a diminution in the value of their property resulting from the restrictions of the T-C and A-C zones applied after their date of acquisition, more specifically, those restrictions that preclude the division and the development of additional residences on the subject property. The claimant states that their desired remedy to the claim is the removal or modification of the T-C and A-C zone restrictions in a manner that will permit the division of tax lot 700 into three 20 acre parcels, each with a homesite, and permit one home site each on tax lots 600 and 800.

Deed records submitted with the claim document claimants' acquisition of tax lot 600 in 1989. At that time, acknowledged county code provisions applicable to the subject property allowed one dwelling used in conjunction with forest management or by conditional use. Claimant Kathleen Ostling first acquired an interest in tax lots 700 and 800 in 1984. At that time, acknowledged county code provisions applicable to tax lot 700 of the A-C 20 zone permitted the creation of 20-acre parcels, and the placement of one farm on each resulting parcel. Tax lot 800, zoned T-C, was subject to the same provisions as tax lot 600, allowing one homesite with an

approved forest management plan or by conditional use.

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. The claimant provided testimony in support of the claim. There was no testimony 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:

- 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.”

Claimants acquired their original interest in tax lot 600 by Warranty Deed on October 13, 1989 (recorded at Book 209 Page 2178, Lincoln County Deed Records). Claimant Kathleen Ostling acquired an interest in tax lots 700 and 800 by Personal Representative Deed on January 10, 1986 (recorded at Book 167 Page 1739, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Claimants Ostling remains the owners of the subject property.

- b. A public entity enacts or enforces a land use regulation that restricts the use of private real property:

The current A-C (LCC 1.1373) and T-C (LCC 1.1375) zone regulations at issue in the subject claim were enacted by Lincoln County in their present form by ordinance #347 in 1994. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the A-C/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 A-C/T-C zone.

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

The currently effective requirements of the A-C and T-C zones allow the creation of parcels with a minimum lot size of 80 acres. These requirements also restrict the placement of any additional dwellings on the property.

Claimants assert that these restrictions reduce fair market value of the property.

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In support of this claim, claimants have submitted a Letter of Opinion from a local real estate broker. This letter places a market value on the subject property under current regulations of \$825,000. The letter estimates the current value of the property with the ability to secure approvals as requested in the claim of up to of \$250,000 per parcel or a total of \$1,250,000. Therefore, the estimated loss in value is \$425,000.

- d. The land use regulation complained of is not a regulation; (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations; (c) required to comply with federal law; (d) restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.

The regulations addressed by the subject claim are the restrictions on land divisions and dwellings imposed by the A-C/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. The regulations addressed by the subject claim are the restrictions on land divisions and dwellings imposed by the A-C zone. The A-C zone was enacted to comply with Statewide Planning Goal 3, which mandates the placement of defined agricultural lands into exclusive farm use zones meeting the requirements of ORS Chapter 215. The purpose of the A-C zone is to preserve agricultural lands for agricultural uses. The A-C and T-C zones do 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 claimants' original interest in the property was acquired in 1986 and 1989. The A-C and T-C zones, in their present form, were enacted in 1994, so the regulations giving rise to the claim were enacted after 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 A-C and T-C zone restrictions on land divisions and dwellings, were enacted in their present

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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, 2006 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. Dawn Pavitt, on behalf of Elmer and Kathleen Ostling, filed a Land Use Regulation Compensation Claim with the Lincoln County Department of Planning 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 located at 5071 S. Beaver Creek Road and is identified as tax lots 600, 700 and 800 on Lincoln County Assessor's map 13-11-09, which is taxed as real property by Lincoln County.
4. The A-C (LCC 1.1373) and T-C (LCC 1.1375) zone provisions applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The A-C and T-C zoning restrict uses; specifically, the A-C and T-C zone standards restrict the division of the subject property and prohibit the establishment of additional single-family dwellings.
6. The claimant asserts a diminution in value caused by the A-C and T-C zone restrictions of \$425,000. The analysis indicates that the land use regulations that prohibit the division of and the establishment of additional dwellings on the subject property have the effect of reducing the fair market value of the subject property.
7. According to the Lincoln County deed records, claimants Elmer and Kathleen Ostling first acquired an interest in the subject property tax lot 600 in 1989, and claimant Kathleen Ostling acquired an interest in tax lots 700 and 800 in 1986. They have maintained an ownership interest continuously since that time.
8. The currently effective A-C and T-C zone regulations governing land divisions and the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimants' dates of acquisition.
9. The A-C and T-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as

set forth in ORS 197.352 (3).

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 Elmer and Kathleen Ostling, 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 1.1373 (A-C zone) and 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, Elmer and Kathleen Ostling, are therefore entitled to the payment of just compensation equal to the reduction in the fair market value of the subject property caused by the enforcement of the A-C and 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 A-C and 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 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 A-C and T-C zones not be applied to the subject property. This would allow the claimant to divide tax lot 700 into three, 20 acre parcels and establish one homesite on each resulting parcel and establish one homesite each on tax lots 600 and 800 in accordance with requirements in effect at the time the claimant acquired

600 700 800  
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600 700

the subject property. This would, in accordance with the requirements of ORS 197.352 (8), allow the owners to use the property for a use permitted at the time of their 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 A-C and T-C zones would allow the claimant owners use of the property as allowed at the time of their acquisition. The creation of these home sites would not be generally inconsistent with the prevailing land use pattern in the area.
3. Not applying the land division and dwelling restrictions of the A-C and T-C zones in order to permit the establishment of additional rural home sites 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 current minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1375. Instead, the provisions of LCC 1.1373 and 1.1375 in effect on the date of acquisition of the property by the claimant owners would apply. All other provisions of the Lincoln County code would continue to apply.
- Establishment of each 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 current minimum parcel size requirements and dwelling restrictions of the A-C and T-C zones on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director

# 106-LURCC-06

## Geographic Info System

### Taxlot

ParcelID  
13-11-09-00-000000-00  
Site Address

Owner  
OSTLING ELMER TRUSTEE &  
OSTLING KATHLEEN M TRUSTEE

Address1  
5154 S BEAVER CRK RD  
Address2  
Address3

City/State/Zip  
WALDPORF, OR 971394

Land Value  
172040  
Imp V alue  
0  
Acres  
28.87

### Tax Account

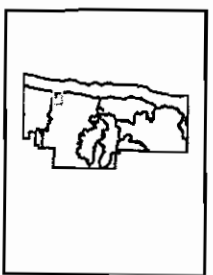
Account  
R445475  
Tax Code  
300

Legal Desc  
TWN51P 13, R4G 11, ACRES 38...



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1 in. = 2716 ft.



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