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

In the Matter of)
)
The Ballot Measure 37 Claim of Lester Hall) **ORDER NO. 5-07-572**
Case File No. 16-LURCC-06)

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

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 October 16, 2006, Lester Hall filed a Measure 37 claim seeking compensation
9 for, or the modification or removal of, land use restrictions that limit land divisions and the
10 placement of dwellings in the A-C (Agricultural Conservation) zone. The property is 146 acres in
11 size and located near mile 5 on Yachats River Road. It is identified as tax lot 300 on Lincoln County
12 Assessor's Map #14-11-33. County records and the filed claim are found in Lincoln County
13 Planning Department File No. 16-LURCC-06 and by this reference are incorporated into this order as
14 if fully set forth; and

15
16 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
17 a hearing was held on January 5, 2007, on the claim before the Planning Director as Hearings
18 Officer, for the purpose of receiving facts and evidence related to determining the validity of the
19 claim. At the hearing, the claimant's representative provided testimony in support of the claim.
20 There was no testimony in opposition to the claim. A portion of the subject property was subject to a
21 conveyance by claimant Hall to a third party in 1984. A review of this conveyance by legal counsel
22 concluded that this was not a full conveyance of all title interest, and that claimant Hall retained an
23 interest in the subject property. Therefore, for purposes of defining claimant Hall's ownership interest
24 in the subject property, the department concluded that the claimant has maintained some interest in
25 the entirety of the subject property continuously since his initial acquisition in 1945 ; and

26
27 WHEREAS the Planning Director has issued his Department's Staff Report and
28 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
29 herein. That report finds and concludes that the claim when submitted was valid, and recommends
30 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
31 subject land use regulations; staff therefore recommends that the Board choose the non-application of
32 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends not
33 applying the currently applicable provisions of LCC 1.1373 to allow the claimant to create up to three
34 land parcels and establish single-family dwellings on each of these parcels as requested by the
35 claimant and as permitted at the time of acquisition of the subject property. This would allow the
36 owner to use the property for a use permitted at the time of the owner's acquisition in accordance
37 with the requirements of ORS 197.352 (8); and

38
39 WHEREAS the Board has considered the report and recommendations of the Planning
40 Director and County Counsel, including the implications known at this time concerning ambiguous
41 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the
42 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this

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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 Lester Hall, Lincoln County Case File No. 16-LURCC-06, was a
19 valid claim when filed on October 16, 2006. The Board of Commissioners declines to pay just
20 compensation for the claim. In lieu of compensation, the Board elects to modify, remove or not
21 apply the current restrictions on minimum parcel size and dwellings in the A-C zone to the subject
22 property. This allows the claimant to create up to three land parcels and establish single-family
23 dwellings on each of these parcels as requested by the claimant and as permitted at the time of
24 acquisition of the subject property in 1946. This waiver is to the effect as follows:

- 25 • The non-application of regulations would be limited to the minimum parcel size
26 requirements and restrictions on dwellings provided for in LCC 1.1373. All other
27 provisions of the Lincoln County code would continue to apply.
- 28 • Establishment of any additional land parcels and dwellings on the subject
29 property would be subject to all applicable public health and safety regulations,
30 including but not limited to land division procedures, building codes, on-site
31 sewage disposal rules and requirements, flood hazard area regulations, and county
32 road approach permit requirements.
33

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

1 permits or other development applications will be processed or approved by Lincoln County unless
2 the state has issued, if appropriate, its own "waiver".

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

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

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

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

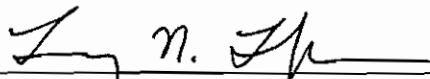
19
20 8. Copies of this order be provided to the Planning Director, County Counsel, claimant and
21 claimant's agent.

DATED this 9th 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
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LAND USE REGULATION COMPENSATION CLAIM

PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

CASE FILE: 16-LURCC-06

DATE FILED: October 16, 2006

CLAIMANT: Lester Hall

REQUEST: The claimant seeks compensation for, or the modification or removal of, land use regulations that prohibit land divisions and the establishment of additional single-family dwellings on the subject property.

A. REPORT OF FACTS:

1. **Lot Size:** 146 acres
2. **Property Location:** The property is located near mile 5 on Yachats River Road and is further identified on Lincoln County Assessor's map #14-11-33 as tax lot 300.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses include scattered rural residences along with lands in forest management and small scale farm use.
6. **Topography & Vegetation:** The property is level, open pasture south of the county road, with uplands in reproduction forest cover north of the road.

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7. **Existing Structures:** Two barns and a small shed are located on the subject property.
8. **Utilities:** The following utilities are available to serve the subject property:
 - a. Sewer: On-site sewage disposal
 - b. Water: On-site well
 - c. Electricity: Consumers Power
9. **Development Constraints:** None identified.

B. EVALUATION OF THE CLAIM:

1. Background:

Lester Hall filed this Land Use Regulation Compensation Claim on October 16, 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 Hall property is located approximately five miles up Yachats River Road from Yachats. The current zoning of the property is A-C, Agricultural Conservation. The claimant asserts a diminution in the value of the property resulting from the restrictions of the A-C zone applied after his date of acquisition, more specifically, those restrictions that preclude the division of and development of additional residences on the subject property. The claimant states that his desired remedy to the claim is the removal or modification of the A-C zone restrictions in a manner that will permit the creation of three parcels with dwellings as allowed on the date of acquisition.

Deed records submitted with the claim document acquisition of the subject property by the claimant in 1946.

On January 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's representative 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. **ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" of property, which is defined as the "present owner of the property, or any interest therein."**

The claimant, Lester Hall, acquired his original interest in the property by warranty deed on November 6, 1945 (Book 107, Page 366, Lincoln County Deed Records). Records of the Lincoln County Assessor's office confirm that Lester Hall as Trustee of the Lester Hall Trust 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 A-C zone regulations (LCC 1.1373) 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 zone. These regulations restrict the use of this private real property to only those uses expressly authorized in the A-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 zone restrict land divisions and the placement of dwellings. In accordance with current A-C zone standards, the property cannot be further partitioned.

Based on the fact that currently effective land use regulations applicable to the subject property prohibit the division of the property, claimant asserts that this restriction reduces fair market value of the property by \$650,000. In support of the claimed reduction in value attributable to the subject land use regulations the claimant has provided a competitive market analysis performed by a real estate broker.

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.

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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 zones that comply with the requirements of ORS Chapter 215. The purpose of the A-C zone is to conserve agricultural lands for farm 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 his original interest in the property was acquired by warranty deed on November 6, 1945. The A-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 by the claimant.

A portion of the subject property was subject to a conveyance by claimant Hall to a third party in 1984. A review of this conveyance by legal counsel concluded that this was not a full conveyance of all title interest, and that claimant Hall retained an interest in the subject property. Therefore, for purposes of defining claimant Hall's ownership interest in the subject property, the department concludes that the claimant has maintained some interest in the entirety of the subject property continuously since his initial acquisition in 1945.

- 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 zone restrictions on 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 16, 2006, within two years of the December 2, 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 1945. The subject property was not zoned at the time of the claimant's acquisition in 1945. Therefore, there were no minimum lot size requirements or zoning restrictions on the placement of single-family dwellings in effect on the present owner's date of acquisition.

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C. RECOMMENDED FINDINGS AND CONCLUSIONS:

The director recommends for the Board's consideration the following findings and conclusions:

Findings:

1. Lester Hall filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning and Development on October 16, 2006.
2. According to records of the Lincoln County Assessor, Lester Hall, Trustee of the Lester Hall Trust, is the current owner of the subject property.
3. 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.
4. The subject property is identified as tax lot 300 on Lincoln County Assessor's map 14-11-33, which is taxed as real property by Lincoln County.
5. The A-C zone provisions (LCC 1.1373) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
6. The A-C zoning restricts uses; specifically, the A-C zone standards, as applied to the subject property, prohibit land divisions and the establishment of additional single-family dwellings.
7. The claimant has reasonably established a diminution in value of the subject property.
8. According to the Lincoln County deed records, the claimant, Lester Hall acquired his present interest in the subject property on November 6, 1945 and has maintained an ownership interest continuously since that time.
9. The currently effective A-C zone regulations governing land divisions and the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the date of acquisition by the claimant.
10. The A-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in ORS 197.352 (3).
11. The subject claim was filed on October 10, 2006, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.

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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 Lester Hall pursuant to ORS 197.352 (5) (Ballot Measure 37).
2. The land use regulations which are the subject of the claim, specifically the restrictions on dwellings imposed by LCC 1.1373 (A-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, Lester Hall, 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 A-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 zone restrictions, may modify, remove or not apply these restrictions in order to permit the present owner to use the property for a use 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 either the payment of just compensation, or the modification, removal or non-application of land use regulations in a manner which will permit the present owner to use the property as allowed at the time of his acquisition. The selection of the remedy is at the discretion of the Board. Staff recommends that the Board choose the non-application of land use regulations as the appropriate resolution for this claim. Specifically, staff recommends not applying the currently applicable provisions of LCC 1.1373 to allow the claimant to create up to three land parcels and establish single-family dwellings on each of these parcels. 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 his 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 land division and dwelling restrictions of the A-C zone would allow the claimant owner to divide the existing 146 acres

APPROVED _____
DATE _____

into three parcels with home sites, which would not be inconsistent with the prevailing land use pattern in the area.

3. Not applying the land division and dwelling restrictions of the A-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 current minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1373. All other provisions of the Lincoln County Code would continue to apply.
- Establishment of any 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 allow the claimant's desired use, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director