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

In the Matter of )  
)  
*The Ballot Measure 37 Claim of* ) **ORDER NO. 5-07-573**  
*John Ucolano and Jenny Scholl* )  
*Case File No. 22-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 November 21, 2006, John Ucolano and Jenny Scholl 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 totals  
11 67 acres in size and is located at 729 N. Wolkau Road. It is identified as tax lots 603 and 702 on  
12 Lincoln County Assessor's Map #12-11-15. County records and the filed claim are found in Lincoln  
13 County Planning Department File No. 22-LURCC-06 and by this reference are incorporated into this  
14 order as 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 February 9, 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. The claimants provided testimony in support of the claim. There was written testimony in  
20 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, for the claimant owners Ucolano and Scholl, the minimum parcel size  
29 requirements and the restrictions on dwellings in the T-C zone not be applied to the subject property.  
30 This would allow the claimants to divide the subject property into eight parcels, each with a single-  
31 family dwelling. It was noted in the report that, according to title information provided by the  
32 claimants, there are other owners of title interests in the subject property who are not parties to this  
33 claim. No analysis of the ownership history or consequent Measure 37 rights associated with these  
34 non-claimant owners was performed. The department's recommendation for not applying regulations  
35 extends only to the ownership interests of claimants Ucolano and Scholl and not to any other parties  
36 who hold a title interest in the subject property. The recommended relief will permit the claimants to  
37 use the subject property in a manner set forth in their claim in accordance with ORS 197.352 (8) and  
38 allow the owners to use the property for a use permitted at the time of their acquisition; and

39  
40 WHEREAS the Board has considered the report and recommendations of the Planning  
41 Director and County Counsel, including the implications known at this time concerning ambiguous  
42 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the

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

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

9  
10 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

18  
19 2. The Measure 37 claim of John Ucolano and Jenny Scholl, Lincoln County Case File No.  
20 22-LURCC-06, was a valid claim when filed on November 21, 2006. The Board of Commissioners  
21 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to  
22 modify, remove or not apply the current restrictions on minimum parcel size and dwellings in the T-  
23 C zone to the subject property. This allows the claimants to divide the subject property into eight  
24 parcels, each with a single-family dwelling, as permitted at the time of acquisition of the subject  
25 property in 1971. This waiver is to the effect as follows:

- 26
- 27 • The waiver extends only to the ownership interests of claimants Ucolano and Scholl  
and not to any other parties who hold a title interest in the subject property.
  - 28 • The non-application of regulations would be limited to the current minimum parcel  
29 size requirements and restrictions on dwellings provided for in LCC 1.1375. All  
30 other provisions of the Lincoln County code would continue to apply.
  - 31 • Establishment of each additional land parcel and dwelling on the subject property  
32 would be subject to all applicable public health and safety regulations, including  
33 but not limited to land division procedures, building codes, on-site sewage  
34 disposal rules and requirements, flood hazard area regulations, and county road  
35 approach permit requirements.

36  
37 3. A State of Oregon “waiver” under Measure 37 may be required for the development or use  
38 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This  
39 order does not affect any land use regulations of the State of Oregon. The claimants are responsible

1 for seeking compensation or "waiver" from the state of any applicable state laws. The Planning  
2 Director shall send notice of the Board's decision to the Director of the Department of Land  
3 Conservation and Development. If a State Measure 37 claim is required, no use, development,  
4 permits or other development applications will be processed or approved by Lincoln County unless  
5 the state has issued, if appropriate, its own "waiver".

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

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

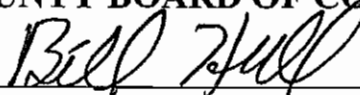
14  
15 6. Transferability of the "waiver" granted by the County under this decision is unknown  
16 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent  
17 permitted by law. Granting of this "waiver" does not commit the County to issuance of  
18 development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

19  
20 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln  
21 County Clerk without payment of recording fees.

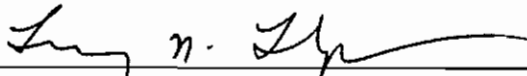
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23 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and  
24 claimants' agent.

DATED this 9<sup>th</sup> day of May \_\_\_\_\_, 2007.

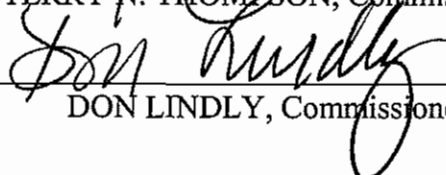
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



\_\_\_\_\_  
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:** 22-LURCC-06

**DATE FILED:** November 21, 2006

**CLAIMANT:** John Ucolano and Jenny Scholl; George Heilig, agent

**REQUEST:** The claimants seek compensation for, or the modification or removal of, land use regulations that limit land divisions and the placement of dwellings in the T-C (Timber Conservation) zone.

**A. REPORT OF FACTS:**

1. **Lot Size:** 67 acres.
2. **Property Location:** The subject property is located at 729 N. Wolkau Road, and is further identified on Lincoln County Assessor's Map #12-11-15 as tax lots 603 and 702.
3. **Zoning Designation:** T-C (Timber Conservation).
4. **Plan Designation:** Forest Lands.
5. **Surrounding Land Use:** The area is characterized by scattered home sites and forest lands.
6. **Topography & Vegetation:** The property consists of varying topography ranging from fairly level to steeper sloped forested lands.

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7. **Existing Structures:** Existing structures on the property include five dwellings, along with outbuildings.
8. **Utilities:** The following utilities serve the subject property:
  - a. Sewer: On-site sewage disposal
  - b. Water: On-site well
  - c. Electricity: Central Lincoln P.U.D.
9. **Development Constraints:** Environmental Bulletin 81 of the Yaquina River Section indicates the subject property is in an area containing landslide topography. No other constraints were identified.

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

### **1. Background:**

George Heilig filed a Land Use Regulation Compensation Claim on November 22, 2006 on behalf of claimant owners John Ucolano and Jenny Scholl. 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 Ucolano-Scholl property is located on Wolkau Road, off of North Beaver Creek. The current zoning of the property is T-C, Timber Conservation. The claimants assert a diminution in the value of their property resulting from the restrictions of the T-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the division of the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the T-C zone restrictions in a manner that will permit the division of the subject property into eight parcels each with a home site.

Deed records submitted with the claim document the claimants' acquisition of the subject property in 1971. There were no land use regulations in effect at the time the property was acquired by the claimants.

On February 9, 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 claimants 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.”**

The claimants, John Ucolano and Jenny Lynn Scholl, acquired their original interest in the property by contract sale on May 7, 1971 (recorded at Book 49 Page 1119, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that John Ucolano and Jenny Scholl remain 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 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 minimum lot size and use of this private real property to only those sizes and uses expressly authorized in the 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 T-C zone 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. As noted previously, there were no land use regulations in effect at the time the property was acquired in 1971 by claimants Ucolano and Scholl.

Claimants assert that these restrictions reduce fair market value of the property. The value estimated by the claimant is \$550,000. This estimate is based on a market analysis provided by a licensed 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**

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**pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.**

The regulations addressed by the subject claim are the restrictions on land divisions and dwellings imposed by the T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forest lands into zones which comply with the requirements of OAR 660, Division 6. The purpose of the T-C zone is to preserve forest lands for forest uses. It does not directly address common nuisances, health and safety, adult businesses or activities, nor does it have any federal nexus.

The claimants have provided documentation that their original interest in the property was acquired May 7, 1971. The T-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was 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 T-C zone restrictions on land divisions and dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on November 21, 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. John Ucolano and Jenny Scholl filed a Land Use Regulation Compensation Claim with the Lincoln County Department of Planning and Development on November 21, 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 729 N. Wolkau Road and is identified as tax lots 603 and 702 on Lincoln County Assessor's map 12-11-15, which is taxed as real property by Lincoln County.

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4. The T-C zone provisions (LCC 1.1375) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The T-C zoning restricts uses; specifically, the T-C zone standards restrict the division of the subject property and the establishment of additional single-family dwellings.
6. The claimant asserts a diminution in value caused by the T-C zone restrictions of \$550,000. 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, the claimants, John Ucolano and Jenny Scholl, first acquired their interest in the subject property in 1971, and have maintained an ownership interest continuously since that time.
8. The currently effective T-C zone regulations governing land divisions and the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance #347), after the claimants' 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 ORS 197.352 (3).
10. The subject claim was filed on November 21, 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 John Ucolano and Jenny Scholl, 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; and they have the effect of reducing the fair market value of the property.

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3. The claimant owners of the property, John Ucolano and Jenny Scholl, 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 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 these 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, for the claimant owners Ucolano and Scholl, the minimum parcel size requirements and the restrictions on dwellings in the T-C zone not be applied to the subject property. This would allow the claimants to divide the subject property into eight parcels, each with a single-family dwelling, as permitted at the time of their acquisition of the subject property. It should be noted that, according to title information provided by the claimants, there are other owners of title interests in the subject property who are not parties to this claim. No analysis of the ownership history or consequent Measure 37 rights associated with these non-claimant owners has been performed. The department's recommendation for not applying regulations extends only to the ownership interests of claimants Ucolano and Scholl and not to any other parties who hold a title interest in the subject property.

This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the dwelling restrictions of the T-C zone would permit the claimant owners to create eight parcels, each with a single-family dwelling, as permitted at the time of their acquisition of the subject property, which 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 minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1375. All other provisions of the Lincoln County Code would continue to apply.

APPROVED \_\_\_\_\_ A  
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- 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 minimum parcel size requirements and dwelling restrictions of the T-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director