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

In the Matter of)
)
The Ballot Measure 37 Claim of John and Nadine Beck) **ORDER NO. 4-07-540**
Case File No. 24-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 and Nadine Beck filed a Measure 37 claim seeking
9 compensation for, or the modification or removal of, land use regulations that restrict land divisions
10 and the placement of dwellings in the A-C (Agricultural Conservation) and T-C (Timber
11 Conservation) zones. The property is 44.84 acres in size and located is located fourteen miles east of
12 Waldport at 13692 E. Alsea Highway. It is identified as tax lot 900 on Lincoln County Assessor's
13 Map #13-10-36. County records and the filed claim are found in Lincoln County Planning
14 Department File No. 24-LURCC-06 and by this reference are incorporated into this order as if fully
15 set forth; and

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17 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
18 a hearing was held on February 9, 2007, on the claim before the Planning Director as Hearings
19 Officer, for the purpose of receiving facts and evidence related to determining the validity of the
20 claim. At the hearing, the claimants provided testimony in support of the claim. There was no
21 testimony in opposition to the claim; and

22
23 WHEREAS the Planning Director has issued his Department's Staff Report and
24 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
25 herein. That report finds and concludes that the claim when submitted was valid, and recommends
26 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
27 subject land use regulations; staff therefore recommends that the Board choose the non-application of
28 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that
29 the Board direct that the minimum parcel size requirements and the restrictions on dwellings in the
30 A-C and T-C zone not be applied to the subject property. This would allow the claimants to divide
31 the subject property into a total of 45 parcels, of roughly 1-acre each, as requested by the claimants
32 and as permitted at the time of acquisition of the subject property. This would allow the owners to
33 use the property for a use permitted at the time of the owners' acquisition in accordance with the
34 requirements of ORS 197.352 (8); and

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36 WHEREAS the Board has considered the report and recommendations of the Planning
37 Director and County Counsel, including the implications known at this time concerning ambiguous
38 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the
39 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this
40 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the
41 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon
42 Legislature is considering changes to Measure 37 that may impact these claims; and

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

5
6 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

14
15 2. The Measure 37 claim of John and Nadine Beck, Lincoln County Case File No. 24-
16 LURCC-06, was a valid claim when filed on November 21, 2006. The Board of Commissioners
17 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to
18 modify, remove or not apply the minimum parcel size requirements and the restrictions on
19 dwellings in the A-C and T-C zones. This allows the claimants to divide the subject property into a
20 total of 45 parcels, each approximately 1-acre in size, as requested by the claimants and as
21 permitted at the time of acquisition of the subject property in 1961. This waiver is to the effect as
22 follows:

- 23
- 24 • The non-application of regulations would be limited to the minimum parcel size
25 requirements and restrictions on dwellings provided for in LCC 1.1373 and LCC
26 1.1375. All other provisions of the Lincoln County code would continue to apply.
 - 27 • Establishment of additional land parcels, each with one single-family dwelling on the
28 subject property would be subject to all applicable public health and safety
29 regulations, including but not limited to land division procedures, building codes, on-
30 site sewage disposal rules and requirements, flood hazard area regulations, and county
31 road approach permit requirements.

32 3. A State of Oregon "waiver" under Measure 37 may be required for the development or use
33 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This
34 order does not affect any land use regulations of the State of Oregon. The claimants are responsible
35 for seeking compensation or "waiver" from the state of any applicable state laws. The Planning
36 Director shall send notice of the Board's decision to the Director of the Department of Land
37 Conservation and Development. If a State Measure 37 claim is required, no use, development,
38 permits or other development applications will be processed or approved by Lincoln County unless
39 the state has issued, if appropriate, its own "waiver."
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1 4. This "waiver" provision is void if the property owners or property owners' successors are
2 compensated by another governmental agency, including the state, for a reduction in value resulting
3 from the same or similar land use regulations on the subject property.

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

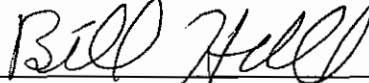
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9 6. Transferability of the "waiver" granted by the County under this decision is unknown
10 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent
11 permitted by law. Granting of this "waiver" does not commit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

13
14 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln
15 County Clerk without payment of recording fees.

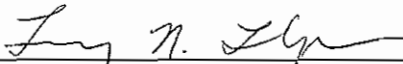
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17 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and
18 claimants' agent.

DATED this 11th day of April, 2007.

LINCOLN COUNTY BOARD OF COMMISSIONERS



BILL HALL, Chair



TERRY N. THOMPSON, Commissioner



DON LINDLY, Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

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LAND USE REGULATION COMPENSATION CLAIM

PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

CASE FILE: 24-LURCC-06

DATE FILED: November 21, 2006

CLAIMANT: John and Nadine Beck; Gary Hamilton, Agent

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

A. REPORT OF FACTS:

1. **Lot Size:** Approximately 44.84 acres.
2. **Property Location:** The property is located fourteen miles east of Waldport at 13692 E. Alsea Highway and is identified as tax lot 900 on Lincoln County Assessor's Map #13-10-36.
3. **Zoning Designation:** A-C (Agricultural Conservation)/T-C (Timber Conservation)
4. **Plan Designation:** Agricultural and Forest Land
5. **Surrounding Land Use:** Adjacent uses along Alsea Highway 34 are comprised primarily of scattered rural residences, with some small scale agricultural activities. Public forest ownerships predominate the uplands above the river corridor.
6. **Topography & Vegetation:** The property consists of moderately sloping to level open land.

7. **Existing Structures:** Existing structures on the subject property include a residence, constructed in 1963, along with outbuildings.
8. **Utilities:** The following utilities currently serve the subject property:
 - a. Sewer: On-site sewage disposal
 - b. Water: On-site well
 - c. Electricity: Consumers Power.
9. **Development Constraints:** A portion of the property, along the riverbank, is located in the 100-year floodplain. No other constraints were identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Gary Hamilton, agent for John and Nadine Beck, filed a Land Use Regulation Compensation Claim on November 21, 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 Beck property is located east of Waldport at 13692 E. Alsea Highway. Highway 34 splits the current zoning of the property. North of Highway 34, the claimants' property is zoned T-C (Timber Conservation). South of Highway 34, between the highway and the Alsea River, the property is zoned A-C (Agricultural Conservation). The claimants assert a diminution in the value of their property resulting from the restrictions of the A-C and T-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the division of and the development of additional residences on the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the A-C/T-C zone restrictions in a manner that will permit the division of the subject property into 45 one-acre parcels, and permit the establishment of one single-family dwelling on each of the resulting parcels. The subject property contains one existing dwelling, thus the total number of new home sites requested is 44.

Deed records submitted with the claim document the claimants' acquisition of the subject property in 1961. 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' representative provided testimony in support of the claim. There was no testimony in opposition to the claim.

2. **Measure 37 Claim Requirements:**

Measure 37 provides the following criteria for establishing eligibility for the supplemental right of compensation created by the measure:

- a. **Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” of property, which is defined in Measure 37 as the “present owner of the property, or any interest therein.”**

The claimants, John and Nadine Beck, acquired their original interest in the subject property in April of 1961 (recorded at Book 225 Page 155 Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that John and Nadine Beck remain the owners of the subject property.

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

The current A-C and T-C zone regulations (LCC 1.1373; LCC 1.1375 respectively) 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 and T-C zones. These regulations restrict the use of this private real property to only those uses expressly authorized in the A-C and T-C zones. Specifically, in the case of the subject property, these regulations prohibit the further division and the placement of any additional dwellings on the property.

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

As noted, the currently effective requirements of the A-C and T-C zones prohibit any division of the subject property; these restrictions also prohibit the placement of any additional dwellings on the property.

Claimants assert that these restrictions reduce fair market value of the property. In support of this claim, the claimants’ agent asserts a loss in fair market value. In support of this assertion, claimants have submitted a Letter of Opinion issued by a real estate broker licensed in the State of Oregon. This analysis concludes that the average value of one-acre riverfront parcels would be approximately \$85,000. It is not clear from this analysis how many such parcels could be created on the subject property, nor is any estimate of value provided for the non-riverfront portions of the property. Nonetheless, the information on its face, i.e. the market value difference between one home site versus the potential for

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44 additional 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 and dwellings imposed by the A-C and T-C zones. 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 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. These regulations do not directly address common nuisances, health and safety, adult businesses or activities, nor do they have any federal nexus.

The claimants have provided documentation that the claimants' original interest in the property was acquired April 25, 1961. The A-C and T-C zones, in their present form, were 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 A-C/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. Gary Hamilton, on behalf of John and Nadine Beck, filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning 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 identified as tax lot 900 on Lincoln County Assessor's Map #13-10-36 which is taxed as real property by Lincoln County.
4. The A-C and T-C zone provisions (LCC 1.1373; LCC 1/1375 respectively) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The A-C/T-C zoning restricts uses; specifically, the A-C/T-C zone standards prohibit the division of the subject property and the establishment of additional single-family dwellings.
6. The claimants' agent submitted evidence of a diminution in value caused by the A-C/T-C zone restrictions in the form of a Letter of Opinion from a real estate broker licensed in the State of Oregon. No specific dollar value was included in that opinion. However, based on the analysis provided, the Board finds 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 property.
7. According to the Lincoln County deed records, the claimants, John and Nadine Beck, jointly acquired an interest in the subject property in 1961, and have maintained an ownership interest continuously since that time.
8. The currently effective A-C and T-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimants' date 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 Subsection (3) of Ballot Measure 37.

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 the owners John and Nadine Beck, pursuant to Subsection (5) of Ballot Measure 37.
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, John and Nadine Beck, 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 owner to use the property for a use permitted at the time of her acquisition.

D. Recommended Decision

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires either 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 zone not be applied to the subject property. This would allow the claimants to divide the subject property into a total of 45 parcels, of roughly 1-acre each, as permitted at the time of claimants' acquisition of 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 payment of monetary compensation.
2. Not applying the land division and dwelling restrictions of the A-C and T-C zone 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 minimum parcel size requirements and restrictions on dwellings provided for in LCC 1.1373 and LCC 1.1375. All other provisions of the Lincoln County code would continue to apply.
- Establishment of additional land parcels, each with one single-family 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 A-C and T-C zones on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted

Matt Spangler
Director