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

In the Matter of)
)
The Ballot Measure 37 Claim of Miami Corporation) **ORDER NO. 4-07-541**
Case File No. 26-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 27, 2006, Miami Corporation filed a Measure 37 claim seeking
9 compensation for, or the modification or removal of, land use restrictions that limit land divisions and
10 the placement of dwellings in the T-C (Timber Conservation) zone. The property is 689.5 acres in
11 size and located south of the Salmon River off of Highway 18 near MP 7. It is identified as tax lots
12 100 and 600 on Lincoln County Assessor's Map #6-10-36 and as tax lots 1600 and 1700 on Lincoln
13 County Assessor's Map #6-9. County records and the filed claim are found in Lincoln County
14 Planning Department File No. 26-LURCC-06 and by this reference are incorporated into this order as
15 if fully set forth; and

16
17 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
18 a hearing was held on 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 claimant 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 T-
30 C zone not be applied to the subject property. This would allow the claimant to divide 78.2 acres of
31 the 689.5 acres of the subject property into approximately 27 parcels, ranging in size from 2.2 to 4.8
32 acres, each with a single-family dwelling, as requested by the claimant and as permitted at the time of
33 acquisition of the subject property in 1957, 1958, and 1974¹. This would allow the owner to use the
34 property for a use permitted at the time of the owner's acquisition in accordance with the
35 requirements of ORS 197.352 (8); and

36
37 WHEREAS the Board has considered the report and recommendations of the Planning
38 Director and County Counsel, including the implications known at this time concerning ambiguous
39 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the

¹ See Exhibit "A" Staff Report, paragraph 2.d. for details on ownership interest dates as they apply to individual parcels. .

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 claimant
3 on notice of possible future court decisions and interpretations. In addition, the Oregon Legislature is
4 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 claimant.
9

10 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

11 1. Claimant is placed on notice that Oregon courts continue to interpret provisions in
12 Measure 37 which may change the way claims are treated. Claimant proceeds 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 Miami Corporation, Lincoln County Case File No. 26-LURCC-
20 06, was a valid claim when filed on November 27, 2006. The Board of Commissioners declines to
21 pay just compensation for the claim. In lieu of compensation, the Board elects to modify, remove
22 or not apply the current restrictions on minimum parcel size and dwellings in the T-C zone to the
23 subject property. This allows the claimant to divide 78.2 acres of the 689.5 acres of the subject
24 property into approximately 27 parcels, ranging in size from 2.2 to 4.8 acres, each with a single-
25 family dwelling, as requested by the claimant and as permitted at the time of acquisition of the
26 subject property in 1957, 1958, and 1974. This waiver is to the effect as follows:

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

36 3. A State of Oregon "waiver" under Measure 37 may be required for the development or use
37 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This
38 order does not affect any land use regulations of the State of Oregon. The claimant is responsible
39 for seeking compensation or "waiver" from the state of any applicable state laws. The Planning
40 Director shall send notice of the Board's decision to the Director of the Department of Land

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1 Conservation and Development. If a State Measure 37 claim is required, no use, development,
2 permits or other development applications will be processed or approved by Lincoln County unless
3 the state has issued, if appropriate, its own "waiver."
4

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

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


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

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

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

DATED this 11th day of April, 2007.

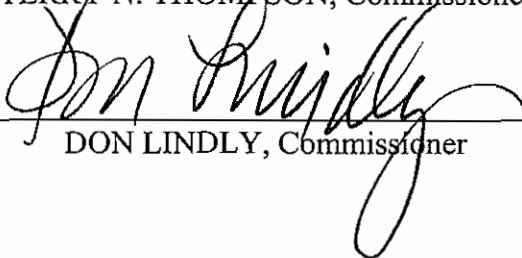
LINCOLN COUNTY BOARD OF COMMISSIONERS



BILL HALL, Chair



TERRY N. THOMPSON, Commissioner



DON LINDLY, Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

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: 26-LURCC-06

DATE FILED: November 27, 2006

CLAIMANT: Miami Corporation; Greg Corbin, 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) zone.

A. REPORT OF FACTS:

1. **Lot Size:** 689.5 acres.
2. **Property Location:** The subject property is located south of the Salmon River off of Highway 18 near MP 7, and is identified as tax lots 100 and 600 on Lincoln County Assessor's Map #6-10-36 and as tax lots 1600 and 1700 on Lincoln County Assessor's Map #6-9.
3. **Zoning Designation:** T-C (Timber Conservation).
4. **Plan Designation:** Forest Lands.
5. **Surrounding Land Use:** The subject property is situated south of Highway 18 and north of Slick Rock Road. The general area is comprised of rural homesites to the west and south of Slick Rock and Boulder Creeks, and large tracts in commercial forest use to the north and east.
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: None.

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: Not currently served.

9. Development Constraints: No development constraints were identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Greg Corbin, agent for Miami Corporation, filed a Land Use Regulation Compensation Claim on behalf of the property owner on November 27, 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 Miami Corporation property is located south of the Salmon River off Highway 18, near MP 7. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of the subject property resulting from the restrictions of the T-C zone applied after claimant's date of acquisition, more specifically, those restrictions that preclude the division of and the development of additional residences on the subject property. The claimant states that its desired remedy to the claim is the removal or modification of the T-C zone restrictions in a manner that will permit 78.2 acres of the 689.5 acres of the subject property to be divided into approximately 27 parcels and permit the establishment of one single-family dwelling on each of the resulting parcels. Parcels would range in size from 2.2 to 4.8 acres. Approximately 24 acres within the proposed subdivision would be dedicated common area. No additional remedy for the remainder property is requested.

Deed records submitted with the claim document the claimant's acquisition of the subject property at various times in 1957, 1958, and 1974. There were no land use regulations in effect on any of these dates of acquisition by claimant Miami Corporation.

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 claimant provided testimony in support of the claim. There was no testimony in opposition to the claim.

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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 claimant, Miami Corporation, acquired its original interest in the subject property in the following manner: Map #6-10-36, tax lot 600, was acquired by warranty deed in 1957 (recorded at Book 188 Page 55, Lincoln County Deed Records); Map #6-9, tax lots 1600 and 1700, were acquired by 2 separate warranty deeds in 1958 (recorded at Book 190 Page 148, and Book 194, Page 369, Lincoln County Deed Records); and Map #6-10-36, tax lot 100, was acquired by warranty deed in 1974 (recorded at Book 46, Page 1979, Lincoln County Deed Records). Records of the Lincoln County Assessor's office confirm that Miami Corporation remains the owner of the subject property.

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

The current T-C zone regulations (LCC 1.1375) at issue in the subject claim were enacted by Lincoln County in their present form by ordinance #347 in 1994. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the T-C zone. These regulations restrict the 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. However, 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 subject properties were acquired in 1957, 1958 and 1974 by claimant Miami Corporation.

Claimant asserts that these restrictions reduce fair market value of the property. In support of this claim, the claimant's agent asserts a loss in fair market value of \$640,000. A Summary Appraisal Report prepared by a State of Oregon Certified Appraiser was submitted to substantiate this value. The current market value was estimated at \$130,000 versus \$770,000 if the property were to be

developed as proposed. Thus, the claimant's agent asserts property's value diminishes by \$640,000 without the benefit of development rights.

- 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 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 claimant has provided documentation that the claimant's original interest in the subject property occurred over time in the following manner: Map #6-10-36, tax lot 600, was acquired by warranty deed on December 2, 1957 (recorded at Book 188 Page 55, Lincoln County Deed Records); Map #6-9, tax lot 1600, on March 3, 1958 and (recorded at Book 190 Page 148) and tax lot 1700 was acquired on September 18, 1958 (recorded at Book 194, Page 369, Lincoln County Deed Records); and Map #6-10-36, tax lot 100, was acquired by warranty deed on January 25, 1974 (recorded at Book 46, Page 1979, Lincoln County Deed Records). 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 27, 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. Greg Corbin, agent for Miami Corporation, filed a Land Use Regulation Compensation Claim on behalf of property owner Miami Corporation with the Lincoln County Department of Planning Development on November 27, 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 south of the Salmon River off of Highway 18 near MP 7, and is identified as tax lots 100 and 600 on Lincoln County Assessor's Map #6-10-36 and as tax lots 1600 and 1700 on Lincoln County Assessor's Map #6-9.
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 has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of an estimated value prepared by a State of Oregon Certified Appraiser of \$640,000.
7. 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.
8. According to the Lincoln County deed records, the claimant, Miami Corporation, acquired an interest in the subject property over time in 1957, 1958, and 1974. The claimant has maintained an ownership interest continuously since that time.
9. 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 claimant's date of acquisition.

10. The T-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
11. The subject claim was filed on November 27, 2006, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.

Conclusions:

Based on the above findings of fact, the Board reaches the following conclusions:

1. The subject claim for compensation for reduction in value of private real property from the enforcement of land use regulations was timely filed on behalf of the owner, Miami Corporation, 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 1.1375 (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 owner of the property, Miami Corporation, is therefore entitled to the payment of just compensation equal to the reduction in the fair market value of the subject property caused by the enforcement of the T-C zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of the T-C zone restrictions, may modify, remove or not apply these restrictions in order to permit the owner to use the property for a use permitted at the time of his 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 T-C zone not be applied to the subject property. This would allow the claimant to divide 78.2 acres of the 689.5 acres of the subject property into approximately 27 parcels, ranging in size from 2.2 to 4.8 acres, each with a single-family dwelling, as permitted at the time of acquisition of the

subject property. This would, in accordance with the requirements of ORS 197.352 (8) of Ballot Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition. This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the dwelling restrictions of the T-C zone would permit the claimant owner to create 27 parcels, ranging in size from 2.2 to 4.8 acres.
3. Not applying the land division and dwelling restrictions of the T-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 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.
- 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