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

In the Matter of )  
 ) **ORDER # 4-07-543**  
*The Ballot Measure 37 Claim of Craig and Kathleen* )  
*Kelson, Case File No. 28-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, Craig and Kathleen Kelson filed a Measure 37 claim  
9 seeking compensation for, or the modification or removal of, land use regulations which restrict land  
10 divisions, the placement of dwellings and land uses in the RR-5 zone. The property is 2.57 acres in  
11 size and located at 45 Olalla Road, at the intersection of Olalla Road and Highway 20. It is identified  
12 as tax lot 2005 on Lincoln County Assessor's Map #11-10-05. County records and the filed claim  
13 are found in Lincoln County Planning Department File No. 28-LURCC-06 and by this reference are  
14 incorporated into this 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. At the hearing, the claimants provided testimony in support of the claim. There was no  
20 testimony in 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 the minimum parcel size requirements, restrictions on dwellings and other land  
29 uses in the RR-5 zone not be applied to the subject property. County zoning code regulations  
30 applicable to the subject property in effect at the time of the claimants' acquisition, (A-2 Zone),  
31 permitted a minimum parcel size of one acre. This would allow the claimants to divide the subject  
32 property into 1 additional parcel, as requested by the claimants and as permitted at the time of  
33 acquisition of the subject property. This would allow the owners to use the property for a use  
34 permitted at the time of the owners' acquisition in accordance with the requirements of ORS 197.352  
35 (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  
40 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this  
41 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the

1 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon  
2 Legislature is considering changes to Measure 37 that may impact these claims; and

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

7  
8 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

16  
17 2. The Measure 37 claim of Craig and Kathleen Kelson, Lincoln County Case File No. 28-  
18 LURCC-06, was a valid claim when filed on November 27, 2006. The Board of Commissioners  
19 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to  
20 modify, remove or not apply the minimum parcel size requirements, restrictions on dwellings and  
21 other land uses in the RR-5 zone. County zoning code regulations applicable to the subject property  
22 in effect at the time of the claimants’ acquisition (A-2 Zone) permitted a minimum parcel size of  
23 one acre. This waiver allows the claimants to divide the subject property into 1 additional parcel, as  
24 requested by the claimants and as permitted at the time of acquisition of the subject property in  
25 1978. This waiver is to the effect as follows:

- 26  
27 • The non-application of regulations would be limited to zoning code requirements and  
28 restriction provided for in LCC 1.1355. All other provisions of the Lincoln county  
29 code would continue to apply, as would the A-2 use and minimum lot parcel size  
30 requirements in place in 1978.  
31  
32 • Establishment of additional land parcels, each with one single-family dwelling and  
33 other land uses permitted in the A-2 zone on the subject property would be subject to  
34 all applicable public health and safety regulations, including but not limited to land  
35 division procedures, building codes, on-site sewage disposal rules and requirements,  
36 flood hazard area regulations, and county road approach permit requirements.

37  
38 3. A State of Oregon “waiver” under Measure 37 may be required for the development or use  
39 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This  
40 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.

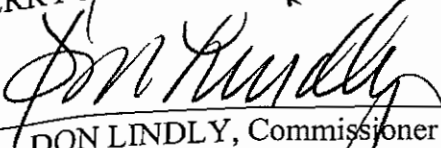
22  
23 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and  
24 claimants' agent.

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

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:** 28-LURCC-06

**DATE FILED:** November 27, 2006

**CLAIMANT:** Craig and Kathleen Kelson; Jeff Hollen, agent

**REQUEST:** The claimants seek compensation for, or the modification or removal of, land use regulations which restrict land divisions, the placement of dwellings and land uses in the RR-5 zone.

#### A. REPORT OF FACTS:

1. **Lot Size:** Approximately 2.57 acres.
2. **Property Location:** The property is located at 45 Olalla Road, at the intersection of Olalla Road and Highway 20, and is identified as tax lot 2005, on Lincoln County Assessor's Map #11-10-05.
3. **Zoning Designation:** RR-5 (Rural Residential).
4. **Plan Designation:** Dispersed Residential.
5. **Surrounding Land Use:** Following Highway 20 and Olalla Road are scattered rural residential homesites.
6. **Topography & Vegetation:** The property consists of moderately sloping land.
7. **Existing Structures:** Existing structures on the subject property include a residence, constructed in 1978, along with outbuildings.

EXHIBIT A  
P. 1 of 7

8. **Utilities:** The following utilities currently 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:** None identified.

**B. EVALUATION OF THE REQUEST:**

1. **Background:**

Jeff Hollen, agent for Craig and Kathleen Kelson, filed a Land Use Regulation Compensation Claim 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 Kelson property is located east of the City of Toledo at 45 Olalla Road. The current zoning of the property is RR-5 (Rural Residential). The claimants assert a diminution in the value of their property resulting from the restrictions of the RR-5 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 RR-5 zone restrictions in a manner that will permit the claimants to use the property in accordance with requirements in effect at the time of their acquisition.

Planning staff met with claimants prior to the filing of their claim and discussed in detail the basic elements of the claim. Deed records submitted with the claim document the claimants' acquisition of the subject property in 1978. At that time, county code provisions of the A-2 zone applicable to the subject property permitted the creation of one-acre parcels, each with one single-family dwelling.

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:

EXHIBIT     A      
P. 2 of 7

- 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, Craig and Kathleen Kelson, acquired their original interest in the subject property in June of 1978 (recorded at Book 89 Page 1034 Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Craig and Kathleen Kelson 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 RR-5 zone (LCC 1.1355) at issue in the subject claim was enacted by Lincoln County in its present form by ordinance #139 in 1980. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the RR-5 zone. These regulations restrict the use of this private real property to only those uses expressly authorized in the RR-5 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 RR-5 zone 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 of \$51,000. An appraisal prepared by a State Certified General Appraiser assigns a market value of \$69,000 subject to current RR-5 zoning, and \$120,000 if the property were zoned R-1 (single-family residential). Hence, the loss in value asserted is \$51,000. As noted previously, the property was zoned A-2 at the date of acquisition.

- 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, additional dwellings and other uses imposed by the RR-5 zone. The RR-5 zoning regulation was enacted to comply with Statewide Planning Goals, which limits the minimum lot size to five acres and permits one dwelling per parcel. They 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 their original interest in the property was acquired June 30, 1978. The RR-5 zone, in its present form, was enacted in 1980, so the regulation giving rise to the claim was enacted after the date of acquisition of the present owners.

- 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 RR-5 zone restrictions on land divisions, dwellings, and other uses, were enacted in their present form in 1980, 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. Jeff Hollen, on behalf of Craig and Kathleen Kelson, filed a Land Use Regulation Compensation claim 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 identified as tax lot 2005 on Lincoln County Assessor's Map #11-10-05 which is taxed as real property by Lincoln County.
4. The RR-5 zone provisions (LCC 1.1355) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The RR-5 zoning restricts uses; specifically, the RR-5 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 RR-5 zone restrictions in the form of an appraisal from of a State Certified Real Estate Appraiser. The appraisal 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 by \$51,000.
7. According to the Lincoln County deed records, the claimants Craig and Kathleen Kelson, acquired an interest in the subject property in 1978, and have maintained an ownership interest continuously since that time.
8. The currently effective RR-5 zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1980 (Ordinance # 139), after the claimants' date of acquisition.
9. The RR-5 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 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 owners, Craig and Kathleen Kelson 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, additional dwellings and other land uses imposed by LCC 1.1355 (RR-5 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, Craig and Kathleen Kelson, 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 RR-5 zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of the RR-5 zone restrictions, may modify, remove or not apply these restrictions in order to permit the owners to use the property for a use permitted at the time of their acquisition.
4. At the time of the claimants' acquisition, the subject property was zoned A-2 pursuant to Ordinance #34.

#### **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, restrictions on dwellings and other land uses in the RR-5 zone not be applied to the subject property. County zoning code regulations applicable to the subject property in effect at the time of the claimants' acquisition (A-2) permitted a minimum parcel size of one acre. This would allow the claimants to divide the subject property into 1 additional parcel. 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 the owners' 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 restrictions of the RR-5 zone would permit the claimant owners to create one additional parcel of land.
3. Not applying the land division, dwelling and other use restrictions of the RR-5 zone is the claimants' desired resolution.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to zoning code requirements and restriction provided for in LCC 1.1355. All other provisions of the Lincoln county code would continue to apply.

- Establishment of additional land parcels, each with one single-family dwelling and other land uses permitted in the A-2 zone 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, dwelling restrictions and other uses of the RR-5 zone on the subject property, subject to applicable public health and safety regulations. Future land uses would be governed by the A-2 zone in effect at the time of the claimants' acquisition.

Respectfully submitted

Matt Spangler  
Director