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

In the Matter of)
) **ORDER # 4-07-544**
The Ballot Measure 37 Claim of Joe and Janyce)
Steenkolk, Case File No. 30-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 29, 2006, Joe and Janyce Steenkolk 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 is
11 34.10 acres in size and located at 1711 Yasek Loop. It is identified as tax lot 900 on Lincoln County
12 Assessor's Map #10-10-32. County records and the filed claim are found in Lincoln County
13 Planning Department File No. 30-LURCC-06 and by this reference are incorporated into this order as
14 if fully set forth; and

15
16 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
17 a hearing was held on 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 and the restrictions on dwellings in the T-
29 C zone not be applied to the subject property. This would allow the claimants to divide the subject
30 property into a total of six parcels, roughly five acres in size, each with a single-family dwelling, as
31 requested by the claimants and as permitted at the time of acquisition of the subject property. This
32 would allow the owners to use the property for a use permitted at the time of the owners' acquisition
33 in accordance with the requirements of ORS 197.352 (8); and

34
35 WHEREAS the Board has considered the report and recommendations of the Planning
36 Director and County Counsel, including the implications known at this time concerning ambiguous
37 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the
38 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this
39 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the
40 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon
41 Legislature is considering changes to Measure 37 that may impact these claims; and
42

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

4
5 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

13
14 2. The Measure 37 claim of Joe and Janyce Steenkolk, Lincoln County Case File No. 30-
15 LURCC-06, was a valid claim when filed on November 29, 2006. The Board of Commissioners
16 declines to pay just compensation for the claim. In lieu of compensation, the Board elects to
17 modify, remove or not apply the minimum parcel size requirements and the restrictions on
18 dwellings in the T-C zone. This waiver allows the claimants to divide the subject property into a
19 total of six parcels, roughly five acres in size, each with a single-family dwelling, as requested by
20 the claimants and as permitted at the time of acquisition of the subject property in 1969. This
21 waiver is to the effect as follows:

- 22
- 23 • The non-application of regulations would be limited to the minimum parcel size
24 requirements and restrictions on dwellings provided for in LCC 1.1375. All other
25 provisions of the Lincoln County code would continue to apply.
- 26
- 27 • Establishment of each additional land parcel and dwelling on the subject property
28 would be subject to all applicable public health and safety regulations, including but
29 not limited to land division procedures, building codes, on-site sewage disposal rules
30 and requirements, flood hazard area regulations, and county road approach permit
31 requirements.
- 32

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

1
2 4. This "waiver" provision is void if the property owners or property owners' successors are
3 compensated by another governmental agency, including the state, for a reduction in value resulting
4 from the same or similar land use regulations on the subject property.

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

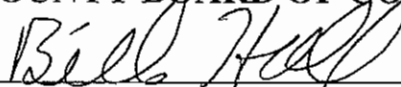
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10 6. Transferability of the "waiver" granted by the County under this decision is unknown
11 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent
12 permitted by law. Granting of this "waiver" does not commit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

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

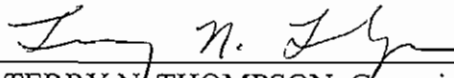
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18 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and
19 claimants' agent.

DATED this 11th day of April, 2007.

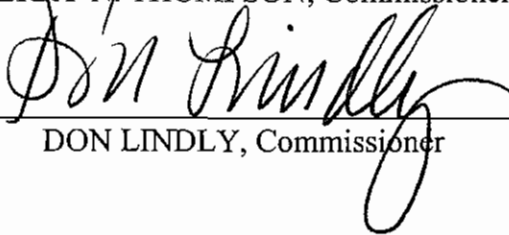
LINCOLN COUNTY BOARD OF COMMISSIONERS



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: 30-LURCC-06

DATE FILED: November 29, 2006

CLAIMANT: Joseph and Janyce Steenkolk; Dawn Pavitt, 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:** 34.10 acres.
2. **Property Location:** The subject property is located at 1711 Yasek Loop and is identified as tax lot 900 on Lincoln County Assessor's Map #10-10-32.
3. **Zoning Designation:** T-C (Timber Conservation).
4. **Plan Designation:** Forest Lands.
5. **Surrounding Land Use:** Widely scattered rural homesites are located along Yasek Loop, otherwise the area is comprised primarily of farm and forest lands.
6. **Topography & Vegetation:** The property consists of varying topography ranging from fairly level to steeper sloped forested lands.
7. **Existing Structures:** Existing structures on the property include a manufactured home, placed in 1968, along with outbuildings.

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: Central Lincoln P.U.D.

9. **Development Constraints:** Environmental Bulletin 81 of the Yaquina River Section indicates the area contains landslide topography. No other constraints were identified.

B. EVALUATION OF THE REQUEST:

1. **Background:**

Dawn Pavitt, agent for Joseph and Janyce Steenkolk, filed a Land Use Regulation Compensation Claim on behalf of property owners Steenkolk on November 29, 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 Steenkolk property is located at 1711 Yasek Loop, east of the City of Newport. 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 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 T-C zone restrictions in a manner that will permit the division of the subject property into a total of six parcels, each roughly five acres in size, and permit the establishment of one single-family dwelling on each of the resulting parcels. The subject property contains an existing residential improvement, thus the total number of new dwellings would be five.

Deed records submitted with the claim document the claimants' acquisition of the subject property in 1969. 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, Joseph and Janyce Steenkolk, acquired their original interest in the property by warranty deed in 1969 (recorded at Book 14 Page 149, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that claimants Steenkolk 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 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 property was acquired in 1969 by claimants Steenkolk.

Claimants assert that these restrictions reduce fair market value of the property. A Letter of Opinion issued by a real estate broker licensed in the State of Oregon, was submitted to substantiate the reduction in value associated with the current prohibition on dividing additional parcels. Because the claim does not include a complete analysis of the fair market value of the development rights sought by the claimants, it is difficult to substantiate the specific diminution in value caused by the T-C zone restrictions. Nonetheless, the information on its face, i.e. the market value difference between one home site versus the potential for a total of 6 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 T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forestlands 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 the claimants' original interest in the property was acquired September 5, 1969. 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 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 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 29, 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. Dawn Pavitt, agent for owners Joseph and Janyce Steenkolk, filed a Land Use Regulation Compensation Claim on behalf of the Steenkolks with the Lincoln County Department of Planning Development on November 29, 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 at 1711 Yasek Loop and is identified as tax lot 900 on Lincoln County Assessor's Map #10-10-32, which is taxed as real property by Lincoln County.
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 claimants' agent has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of an estimated value based on the opinion of a real estate broker licensed in the State of Oregon. 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, Joseph and Janyce Steenkolk, first acquired an interest in the subject property in 1969, 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 29, 2006, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.

creation of these homesites would not be generally inconsistent with the land use pattern in the area.

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 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.
- 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