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

In the Matter of)
)
The Ballot Measure 37 Claim of Mary Lou Wiles) **ORDER NO. 5-07-559**
Case File No. 96-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 December 1, 2006, Mary Lou Wiles 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 32.01 acres in
11 size and located at 688 Wright Creek Road, south of Toledo. It is identified as tax lot 1700 on
12 Lincoln County Assessor's Map #11-10-29C. County records and the filed claim are found in
13 Lincoln County Planning Department File No. 96-LURCC-06 and by this reference are incorporated
14 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 April 5, 2007, on the claim before the County Counsel as Hearings Officer, for
18 the purpose of receiving facts and evidence related to determining the validity of the claim. At the
19 hearing, the claimant provided testimony in support of the claim. There was no testimony in
20 opposition to the claim; and

21
22 WHEREAS the Planning Director has issued his Department's Staff Report and
23 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
24 herein. That report finds and concludes that the claim when submitted was valid, and recommends
25 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
26 subject land use regulations; staff therefore recommends that the Board choose the non-application of
27 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that
28 the Board direct that 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 claimant to divide the subject
30 property into three parcels as permitted at the time of acquisition of the subject property; one 5 acre
31 parcel and two 13 ½ acre parcels, each with a single-family dwelling, as requested by the claimant
32 and as permitted at the time of acquisition of the subject property in 1970. This would allow the
33 owner to use the property for a use permitted at the time of the owner's acquisition in accordance
34 with the requirements of ORS 197.352 (8); and

35
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 claimant
41 on notice of possible future court decisions and interpretations. In addition, the Oregon Legislature is
42 considering changes to Measure 37 that may impact these claims; and

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1
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 claimant.

5
6 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

7 1. Claimant is placed on notice that Oregon courts continue to interpret provisions in
8 Measure 37 which may change the way claims are treated. Claimant proceeds 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 Mary Lou Wiles, Lincoln County Case File No. 96-LURCC-06,
16 was a valid claim when filed on December 1, 2006. The Board of Commissioners declines to pay
17 just compensation for the claim. In lieu of compensation, the Board elects to modify, remove or not
18 apply the current restrictions on minimum parcel size and dwellings in the T-C zone to the subject
19 property. This allows the claimant to divide the subject property into three parcels, each with a
20 single-family dwelling, as permitted at the time of acquisition of the subject property; one 5 acre
21 parcel and two 13 ½ acre parcels, each with a single-family dwelling, as requested by the claimant
22 and as permitted at the time of acquisition of the subject property in 1970. This waiver is to the
23 effect as follows:

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

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 claimant is 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 owner or property owner's 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.

5
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.

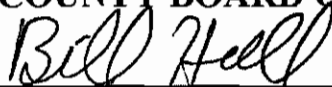
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10 6. Transferability of the "waiver" granted by the County under this decision is unknown
11 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent
12 permitted by law. Granting of this "waiver" does not commit 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.

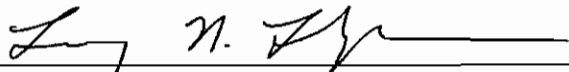
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18 8. Copies of this order be provided to the Planning Director, County Counsel, claimant and
19 claimant's agent.

DATED this 2nd day of May, 2007.

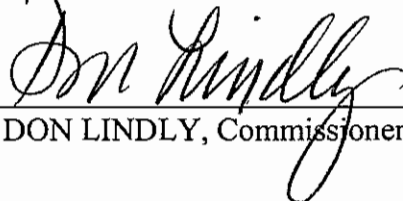
LINCOLN COUNTY BOARD OF COMMISSIONERS



BILL HALL, Chair



TERRY N. THOMPSON, Commissioner



DON LINDLY, Commissioner

7. **Existing Structures:** Existing structures on the property include a manufactured home placed in 1997, 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 subject property is in an area containing landslide topography. No other constraints were identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Mary Lou Wiles filed a Land Use Regulation Compensation Claim on December 1, 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 Wiles property is located on Wright Creek Road, south of Toledo. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of her property resulting from the restrictions of the T-C zone applied after her 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 her 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 three parcels; one 5 acre and two 13 ½ acre home sites.

Deed records submitted with the claim document the claimant's acquisition of the subject property in 1970. There were no land use regulations in effect at the time the property was acquired by the claimant.

On April 5, 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.

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, Mary Lou Wiles, acquired her original interest in the property by contract sale on July 6, 1970 (recorded at Book 23 Page 1915, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Mary Lou Wiles 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. 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 1970 by claimant Wiles.

Claimant asserts that these restrictions reduce fair market value of the property. The value estimated by the claimant is \$100,000. Because the claim does not include an analysis of the fair market value of the property subject to current regulations, 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 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,

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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 her original interest in the property was acquired July 6, 1970. 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 December 1, 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. Mary Lou Wiles filed a Land Use Regulation Compensation Claim with the Lincoln County Department of Planning and Development on December 1, 2006.

EXHIBIT A
2006-12-04 11:17

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 Toledo at 688 Wright Creek Road and is identified as tax lot 1700 on Lincoln County Assessor's map 11-10-29C, 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 claimant asserts a diminution in value caused by the T-C zone restrictions of \$100,000. The analysis indicates that the land use regulations that prohibit the division of and the establishment of additional dwellings on the subject property have the effect of reducing the fair market value of the subject property.
7. According to the Lincoln County deed records, the claimant, Mary Lou Wiles, first acquired an interest in the subject property in 1970, and has 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 claimant's 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 December 1, 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 Mary Lou Wiles, pursuant to ORS 197.352 (5).
2. The land use regulations which are the subject of the claim, specifically the restrictions on land divisions and dwellings imposed by LCC 1.1375 (T-C zone), are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37; they restrict the use of the

subject private real property; and they have the effect of reducing the fair market value of the property.

3. The owner of the property, Mary Lou Wiles, 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 the subject property into three parcels, each with a single-family dwelling, as permitted at the time of acquisition of the subject property; one 5 acre parcel and two 13 ½ acre parcels. This would, in accordance with the requirements of ORS 197.352 (8), 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 three parcels, each with a single-family dwelling, as permitted at the time of acquisition of the subject property; one 5 acre parcel and two 13 ½ acre parcels. The creation of these home sites would be generally consistent with the prevailing 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 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

EX-100-06
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96-LURCC-06

Geographic Info System

Taxlot

ParcelID
11-10-29-CR-01700-00

Site Address
668 WRIGHT CREEK RD

Owner
WILES MARY LOU

Address1
PO BOX 70

Address2

Address3

City/State/Zip
NEWPORT, OR 97165

Land Value
21750

Imp Value
0

Mag Name
111029c

Acres
32.01

The Account

Account
R15199

Tax Code
280

Legal Desc
TWNSHIP 11, RNG 10, ACRES 3.0...

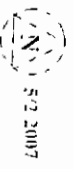
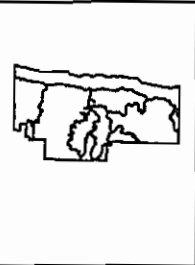
Account
R30866

Tax Code
260

Legal Desc
TWNSHIP 11, RNG 10, ACRES 27...



1 in. = 1217 ft



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