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

In the Matter of )  
)  
*The Ballot Measure 37 Claim of Steve Davenport* ) **ORDER NO. 4-07-525**  
*and Katie Davenport, Case File No. 23-LURCC-06* )

WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37. The measure amends ORS Chapter 197 to require, under certain circumstances, actions to address claims of owners of real property if government land use regulations reduce fair market property value; and

WHEREAS Ballot Measure 37 provides that to maintain a claim, an owner of real property must make a “written claim for compensation” to the government entity enacting, enforcing or applying a land use regulation that allegedly restricts the use of the owner’s property and has the effect of reducing its fair market value; and

WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims procedures with certain limitations; and

WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim that reduces fair market value of real property or, in the alternative and in lieu of payment of just compensation, allows the County to modify, remove or not apply the land use regulation allegedly supporting a claim reducing a property’s fair market value; and

WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for compensation and make decisions on those claims. A determination to modify, remove or not apply a land use regulation or compensate a property owner must be based on substantial factual information and analysis; and

1 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and  
2 ambiguous provisions and that future litigation or legislative action will be necessary to clarify the  
3 measure's terms. The County, therefore, adopted procedures in Board of Commissioners Orders #12-  
4 04-318 and #4-05-120 to assess claims in a timely manner and to require factual and analytical  
5 information as part of the claim so the County will have a rational basis for its decision on each  
6 claim; and

7  
8 WHEREAS on November 21, 2006, Steve Davenport and Katie Davenport filed a Measure 37  
9 claim seeking compensation for, or the modification or removal of, land use restrictions that prohibit  
10 the establishment of a single family dwelling in the T-C (Timber Conservation) zone. The property  
11 is 2.93 acres in size and located northeast of Toledo off of Olalla Road. It is identified as tax lot 100  
12 on Lincoln County Assessor's Map #10-10-33-00. County records and the filed claim are found in  
13 Lincoln County Planning Department File No. 23-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 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' representative provided testimony in support of the claim.  
20 Written testimony in opposition to the claim was received from Aron Rothstein and Wendy Green,  
21 who own adjoining property; 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 compensation claim when submitted was valid,  
26 however, it also notes the following:

27  
28 The claimants have documented a date of acquisition by a family member of 1953. Although  
29 ORS 197.352 (1) permits an owner to go back to the date of prior acquisition by a family  
30 member for purposes of determining just compensation, the "waiver" remedy provided for in  
31 Section 8 does not relate back to the prior date of acquisition by a family member. It applies  
32 only to the "present owner." Therefore, the transfer of ownership of the subject property to  
33 the claimant Steven Davenport in 1995 and to claimant Katie Davenport in 2006 established  
34 new dates of acquisition for purposes of the waiver remedy, regardless of the fact that the  
35 prior owner was a family member. So while both claimants' claims for compensation relate  
36 back to the original acquisition of the property by a family member in 1953, any waiver  
37 cannot extend to regulations that predate respective 1995 and 2006 acquisitions of the  
38 property by claimants Steven Davenport and Katie Davenport

39  
40 We recommend for this claim, that the Board, lacking funds for compensation, in the  
41 alternative modify, remove or not apply the subject land use regulations; staff therefore recommends  
42 that the Board choose the "waiver" remedy, meaning the non-application of land use regulations as

1 the appropriate resolution for this claim. The selection of the remedy is at the discretion of the  
2 Board. Specifically, staff recommends not applying any Lincoln County Code provisions enacted  
3 since May 22, 1995 for claimant Steven J. Davenport and not applying any code provisions enacted  
4 since June 7, 2006 for claimant Katie Davenport. This would, in accordance with the requirements of  
5 ORS 197.352 (8), allow the owners to use the property for a use permitted at the time of their  
6 acquisition. Based on these dates of acquisition, staff acknowledges that the recommended relief will  
7 not permit the claimants to use the subject property in the manner set forth in their claim; and

8  
9 WHEREAS the Board has considered the report and recommendations of the Planning  
10 Director and County Counsel, including the implications known at this time concerning ambiguous  
11 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the  
12 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this  
13 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the  
14 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon  
15 Legislature is considering changes to Measure 37 that may impact these claims; and

16  
17 WHEREAS based on what is known at this time, the Board finds it is in the public interest,  
18 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the  
19 challenged land use regulation to the subject property and issue the “waiver” to claimants.

20  
21 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

29  
30 2. The Measure 37 claim of Steve Davenport and Katie Davenport, Lincoln County Case File  
31 No. 23-LURCC-06, was a valid claim when filed on November 21, 2006. The Board of  
32 Commissioners declines to pay just compensation for the claim. The selection of the remedy is at  
33 the discretion of the Board. In lieu of compensation, the Board chooses the non-application of land  
34 use regulations as the appropriate resolution for this claim by not applying any changes to LCC  
35 1.1375 (T-C zone) enacted since May 22, 1995 for claimant Steven J. Davenport and not applying  
36 any T-C Zone code changes enacted since June 7, 2006 for claimant Katie Davenport. This would,  
37 in accordance with the requirements of ORS 197.352 (8), allow the owners to use the property for a  
38 use permitted at the time of their acquisition. Based on these dates of acquisition, the “waiver” will  
39 not permit the claimants to use the subject property in the manner set forth in their claim.  
40

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

9  
10 4. This "waiver" provision is void if the property owner or property owner's successors are  
11 compensated by another governmental agency, including the state, for a reduction in value resulting  
12 from the same or similar land use regulations on the subject property.

13  
14 5. Excepting new land use regulations imposed after the date of this decision, and subject to  
15 applicable review rights as permitted under Measure 37, this final decision bars a subsequent  
16 Measure 37 claim against Lincoln County as to the subject property.

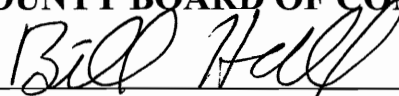
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18 6. Transferability of the "waiver" granted by the County under this decision is unknown  
19 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent  
20 permitted by law. Granting of this "waiver" does not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

22  
23 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln  
24 County Clerk without payment of recording fees.

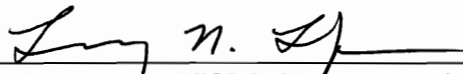
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26 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and  
27 claimants' agent.

DATED this 4<sup>th</sup> day of April, 2007.

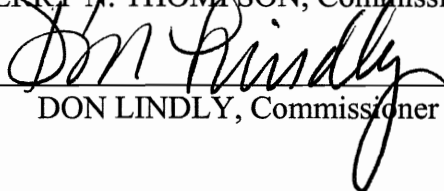
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



\_\_\_\_\_  
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:** 23-LURCC-06

**DATE FILED:** 11/21/06

**CLAIMANT:** Steven J. Davenport and Katie Davenport; Litchfield & Carstens,  
Agent.

**REQUEST:** The claimants seek compensation for, or the modification or removal of,  
land use regulations that prohibit the establishment of a single family dwelling on the  
subject property.

### **A. REPORT OF FACTS:**

1. **Lot Size:** 2.93 acres
2. **Property Location:** The property is located northeast of Toledo off of Olalla  
Road, and is further identified on Lincoln County Assessor's Map #10-10-33-00  
as tax lot 100.
3. **Zoning Designation:** T-C (Timber Conservation)
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Adjacent uses include scattered rural residences along  
with some lands managed for forest uses. To the south is the Olalla Valley Golf  
Course.
6. **Topography & Vegetation:** The property is moderately sloped and is cleared  
of most vegetation.

7. **Existing Structures:** None.

8. **Utilities:** The following utilities are available 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:** None identified.

## **B. EVALUATION OF THE CLAIM:**

### **1. Background:**

Litchfield & Carstens, LLP filed a Land Use Regulation Compensation Claim on behalf of property owners Steven J. Davenport and Katie Davenport (mother of Steven J. Davenport) on November 21, 2006. This claim was filed with the Department of Planning and Development in accordance with the procedure established for Ballot Measure 37 claims by Lincoln County Board of Commissioners Order # 12-04-318. The Davenport property is located off of Olalla Road near Olalla Valley golf course. 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 development of a residence 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 establishment of one single-family dwelling.

Deed records submitted with the claim document acquisition of the subject property by the claimants' family in 1953. Claimant Steven Davenport acquired title in 1995; claimant Katie Davenport acquired her current interest in the property in 2006. Prior to acquiring her current interest in the property, claimant Katie Davenport held an interest in the subject property from 1953, until conveying that interest to claimant Steven Davenport in 1995. Katie Davenport held no interest in the property from 1995 to 2006.

On February 9, 2007, a public hearing was held on the subject claim for the purpose of receiving facts and evidence related to determining the validity of the claim. Notice of the hearing was provided in accordance with Board of Commissioners order #4-05-120. The claimants' representative provided testimony in support of the claim. Written testimony in opposition to the claim was received from Aron Rothstein and Wendy Green, who own adjoining property.

## 2. Measure 37 Claim Requirements:

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

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

The claimant, Steven J. Davenport, acquired his current interest in the property by warranty deed in 1995 (recorded at Book 300, page 0141, Lincoln County Deed Records). Claimant Katie Davenport acquired her current interest in the subject property by bargain and sale deed on June 7, 2006. Records of the Lincoln County Assessor’s office confirm that Steven J. Davenport and Katie Davenport 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 use of this private real property to only those 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 restrict the placement of dwellings. Based on an evaluation of the requirements of LCC 1.1375 (2) and LCC 1.1375 (5), it does not appear that the subject property can qualify for the placement of a dwelling.

Stating that the currently effective land use regulations applicable to the subject property effectively prohibit the establishment of a dwelling, claimants assert that this restriction reduces fair market value of the property. In support of this claim, claimants have submitted a competitive market analysis and letter of opinion from a local real estate broker. This letter places a market value on the subject property under current regulations (i.e. absent the permissibility of placing a residence) of \$5,000. The letter estimates the current value of the property with the ability to secure approval for a residence to be in excess of \$75,000.

- 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 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 conserve 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' family's original interest in the property was acquired by bargain and sale deed in 1953 (conveyance to Leonard and Katie Davenport, mother and father of Steven Davenport, recorded at Book 159, page 59, Lincoln County Deed Records). Claimant Steven Davenport acquired title to the property on May 22, 1995 (Warranty deed recorded at Book 300, page 0141). After conveying her original interest to claimant Steven Davenport in 1995, claimant Katie Davenport acquired her current interest in the property in 2006. The T-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was enacted after the date of acquisition by a family member of the 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 dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on November 21, 2006, within two years of the December 2, 2004 effective date of Ballot Measure 37.

- f. **In lieu of compensation, the governing body may modify, remove or not apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.**

The claimants have documented a date of acquisition by a family member of 1953. Although ORS 197.352 (1) permits an owner to go back to the date of prior acquisition by a family member for purposes of determining just compensation, the “waiver” remedy provided for in Section 8 does not relate back to the prior date of acquisition by a family member. It applies only to the “present owner.” Therefore, the transfer of ownership of the subject property to the claimant Steven Davenport in 1995 and to claimant Katie Davenport in 2006 established new dates of acquisition for purposes of the waiver remedy, regardless of the fact that the prior owner was a family member. So while both claimants’ claims for compensation relate back to the original acquisition of the property by a family member in 1953, any waiver cannot extend to regulations that predate respective 1995 and 2006 acquisitions of the property by claimants Steven Davenport and Katie Davenport.

**C. Recommended Findings and Conclusions:**

The director recommends for the Board’s consideration the following findings and conclusions:

Findings:

1. Steven J. Davenport and Katie Davenport filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on November 21, 2006.
2. According to records of the Lincoln County Assessor, Steven J. Davenport and Katie Davenport are the current owners of the subject property.
3. 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.
4. The subject property is identified as tax lot 100 on Lincoln County Assessor’s map 10-10-33-00, which is taxed as real property by Lincoln County.
5. 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.
6. The T-C zoning restricts uses; specifically, the T-C zone standards, as

applied to the subject property, prohibit the establishment of a single-family dwelling.

7. The claimants have submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of a competitive market analysis prepared by a licensed real estate broker. The resulting letter of opinion states that the land use regulations that prohibit the establishment of a dwelling on the subject property have the effect of reducing the fair market value of the subject property by at least \$70,000.
8. According to the Lincoln County deed records, a family member of the claimants first acquired an interest in the subject property in 1953. The claimants, Steven J. Davenport and Katie Davenport, acquired their present interest in the subject property on May 22, 1995 and June 7, 2006, respectively, and have maintained an ownership interest continuously since that time.
9. The currently effective T-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the date of acquisition by the claimant's family member, but before the date of acquisition by the present owners.
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 21, 2006, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.

Conclusions:

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

1. The subject claim for compensation for reduction in value of private real property from the enforcement of land use regulations was timely filed on behalf of the owners, Steven J. Davenport and Katie Davenport, pursuant to ORS 197.352 (5)
2. The land use regulations which are the subject of the claim, specifically the restrictions on 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 owners of the property, Steven J. Davenport and Katie Davenport, 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 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 present 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 either the payment of just compensation, or the modification, removal or non-application of land use regulations in a manner which will permit the present owners to use the property as allowed at the time of their acquisition. The selection of the remedy is at the discretion of the Board. Staff recommends that the Board choose the non-application of land use regulations as the appropriate resolution for this claim. Specifically, staff recommends not applying any Lincoln County Code provisions enacted since May 22, 1995 for claimant Steven J. Davenport and not applying any code provisions enacted since June 7, 2006 for claimant Katie Davenport. This would, in accordance with the requirements of ORS 197.352 (8), allow the owners to use the property for a use permitted at the time of their acquisition. Based on these dates of acquisition, staff acknowledges that the recommended relief will not permit the claimants to use the subject property in the manner set forth in their claim.

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 for the application of the T-C zone provisions in effect on the respective dates of acquisition of the present owners, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director