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

In the Matter of )  
 )  
*The Ballot Measure 37 Claim of David Loomis* ) **ORDER NO. 4-07-524**  
*Case File No. 21-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, David Loomis 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 24.81 acres in  
11 size and located at 459 Pioneer Mountain Loop. It is identified as tax lots 1808 on Lincoln County  
12 Assessor's Map #10-10-27. County records and the filed claim are found in Lincoln County  
13 Planning Department File No. 21-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 claimant 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 claimant to divide the subject  
30 property into a total of 8 parcels, ranging in size from one (1) to five (5) acres, each with a single-  
31 family dwelling, as permitted at the time of his acquisition of the subject property, as he has  
32 requested and as permitted at the time of acquisition of the subject property in 1974 and 1979<sup>1</sup>. This  
33 would allow the owner to use the property for a use permitted at the time of the owner's acquisition  
34 in accordance 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

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<sup>1</sup> It was noted in the staff report and at the Board proceeding in this matter that the 20 acres (app) acquired in 1974 would have no minimum lot size, while the 4 acres (app) acquired in 1979 would be subject to a one acre minimum lot size. Because claimant has requested a waiver for 8 parcels ranging from one to five acres, it is not necessary to differentiate between the two acquisitions as they pertain to minimum lot sizes.

1 provisions in Measure 37 which are and will continue to be subject to judicial clarification for the  
2 foreseeable future. Given that status, the Board desires to proceed cautiously with processing this  
3 Measure 37 claim. Therefore, the Board will decide this Measure 37 claim after placing the claimant  
4 on notice of possible future court decisions and interpretations. In addition, the Oregon Legislature is  
5 considering changes to Measure 37 that may impact these claims; and  
6

7 WHEREAS based on what is known at this time, the Board finds it is in the public interest,  
8 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the  
9 challenged land use regulation to the subject property and issue the “waiver” to claimant.  
10

11 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

12 1. Claimant is placed on notice that Oregon courts continue to interpret provisions in  
13 Measure 37 which may change the way claims are treated. Claimant proceeds in this matter  
14 knowing that any action taken by the Lincoln County Board of Commissioners could be null and  
15 void if a court of competent jurisdiction interprets Measure 37 in any fashion which alters the  
16 Board’s approval. In addition, the Oregon Legislature is currently considering changes that may  
17 impact these claims. Lincoln County does not waive any rights or remedies under law by granting a  
18 “waiver” under the law.  
19

20 2. The Measure 37 claim of David Loomis, Lincoln County Case File No. 21-LURCC-06,  
21 was a valid claim when filed on November 21, 2006. The Board of Commissioners declines to pay  
22 just compensation for the claim. In lieu of compensation, the Board elects to modify, remove or not  
23 apply the current restrictions on minimum parcel size and dwellings in the T-C zone to the subject  
24 property. This allows the claimant to divide the subject property into 8 parcels, ranging in size from  
25 one (1) to five (5) acres, each with one single-family dwelling, as requested by the claimant and as  
26 was permitted at the time of the claimant’s acquisition of the subject property in 1974 and 1979.  
27 This waiver is to the effect as follows:

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

36  
37 3. A State of Oregon “waiver” under Measure 37 may be required for the development or use  
38 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This  
39 order does not affect any land use regulations of the State of Oregon. The claimant is responsible  
40 for seeking compensation or “waiver” from the state of any applicable state laws. The Planning

1 Director shall send notice of the Board's decision to the Director of the Department of Land  
2 Conservation and Development. If a State Measure 37 claim is required, no use, development,  
3 permits or other development applications will be processed or approved by Lincoln County unless  
4 the state has issued, if appropriate, its own "waiver."

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

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

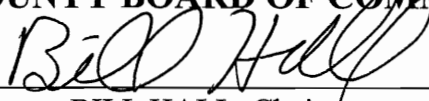
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14 6. Transferability of the "waiver" granted by the County under this decision is unknown  
15 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent  
16 permitted by law. Granting of this "waiver" does not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

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

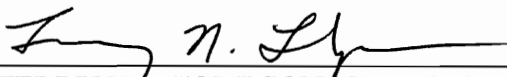
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22 8. Copies of this order be provided to the Planning Director, County Counsel, claimant and  
23 claimant's agent.

DATED this 4th 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  
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## LAND USE REGULATION COMPENSATION CLAIM

### PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

**CASE FILE:** 21-LURCC-06

**DATE FILED:** November 21, 2006

**CLAIMANT:** David Loomis; Dawn Pavitt, agent

**REQUEST:** The claimant seeks 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:** 24.81 acres.
2. **Property Location:** The subject property is located at 459 Pioneer Mountain Loop and is identified as tax lot 1808 on Lincoln County Assessor's Map #10-10-27.
3. **Zoning Designation:** T-C (Timber Conservation).
4. **Plan Designation:** Forest Land.
5. **Surrounding Land Use:** Widely scattered rural homesites are located along Pioneer Mountain Loop; otherwise the area is comprised of 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 (lot 1812) include a residence, constructed in 1974, 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: Consumers Power.
9. **Development Constraints:** Environmental Bulletin 81 of the Alsea River Section indicates the area contains landslide topography. No other constraints were identified.

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

### **1. Background:**

Dawn Pavitt, agent for David Loomis, filed a Land Use Regulation Compensation Claim on behalf of property owner Loomis 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 Loomis property is located at 459 Pioneer Mountain Loop, east of Toledo. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of his property resulting from the restrictions of the T-C zone applied after his 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 his 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 8 parcels, ranging in size from one (1) to five (5) acres and permit the establishment of one single-family dwelling on each of the resulting parcels.

Deed records submitted with the claim document the claimant's acquisition of an approximately 20-acre portion of the subject property in 1974 and the remainder 4+ acres in 1979. There were no land use regulations in effect at the time the original 20-acre portion of the property was acquired by the claimant. The zoning of the remaining 4+ acres was zoned A-2 in 1979. The A-2 zone permitted the creation of one (1) acre parcels, each with a 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 claimant provided testimony in support of the claim. There was no testimony in opposition to the claim.

## **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, David Loomis, acquired his original interest in a roughly 20-acre portion of the property by contract sale in 1974 (recorded at Book 48 Page 318, Lincoln County Deed Records). The claimant acquired the remaining 4+ acres in 1979 (recorded at Book 104 Page 595, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that David Loomis remains the owner of the subject property.

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

The current T-C zone regulations (LCC 1.1375) at issue in the subject claim were enacted by Lincoln County in their present form by ordinance #347 in 1994. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the T-C zone. These regulations restrict the minimum lot size and use of this private real property to only those sizes and uses expressly authorized in the T-C zone.

- c. **The land use regulation has the effect of reducing the fair market value of the property:**

The currently effective requirements of the T-C zone allow the creation of parcels with a minimum lot size of 80-acres. However, these requirements also restrict the placement of any additional dwellings on the property. As noted previously, there were no land use regulations in effect at the time the roughly 20-acre portion of the property was acquired in 1974 by claimant Loomis. At the time the remaining 4+ acres was acquired by claimant Loomis, county code provisions applicable to the subject property permitted the creation of one-acre parcels.

Claimant asserts that these restrictions reduce fair market value of the property. In support of this claim, the claimant’s agent asserts a loss in fair market value of \$554,000. A Letter of Opinion issued by a real estate broker licensed in the State of Oregon, was submitted to substantiate this value.

- d. The land use regulation complained of is not a regulation; (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations; (c) required to comply with federal law; (d) restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.

The regulations addressed by the subject claim are the restrictions on land divisions and dwellings imposed by the T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forest lands into zones which comply with the requirements of OAR 660, Division 6. The purpose of the T-C zone is to preserve forest lands for forest uses. It does not directly address common nuisances, health and safety, adult businesses or activities, nor does it have any federal nexus.

The claimant has provided documentation that the claimant's original interest in the roughly 20-acre portion of the property was acquired March 1, 1974 (recorded in Lincoln County Deed Records dated April 3, 1974). The claimant's original interest in the remaining 4+ acres was acquired August 2, 1979. The T-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was enacted after date of acquisition of the present owner.

- e. For claims arising from land use regulations enacted prior to December 2, 2004 (the effective date of Ballot Measure 37), written demand for compensation shall be made within two years of the effective date of the act.

The land use regulations for which compensation is sought, the T-C zone restrictions on land divisions and dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on November 21, 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 David Loomis, filed a Land Use Regulation Compensation Claim on behalf of property owner Loomis with the Lincoln County Department of Planning Development on November 21, 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 459 Pioneer Mountain Loop and is identified as tax lots 1808 on Lincoln County Assessor's Map 10-10-27, 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 has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of a competitive market analysis value prepared by 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 by \$554,000.
7. According to the Lincoln County deed records, the claimant, David Loomis, first acquired an interest in a portion of the subject property in 1974, and additional acreage was acquired in 1979. The claimant 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 Subsection (3) of Ballot Measure 37.
10. 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 owner, David Loomis, pursuant to Subsection (5) of Ballot Measure 37.
2. The land use regulations which are the subject of the claim, specifically the restrictions on land divisions and dwellings imposed by LCC 1.1375 (T-C zone), are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37; they restrict the use of the subject private real property; and they have the effect of reducing the fair market value of the property.
3. The owner of the property, David Loomis, 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 a total of 8 parcels, ranging in size from one (1) to five (5) acres, each with a single-family dwelling, as permitted at the time of his acquisition of the subject property. This would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition. This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the land division and dwelling restrictions of the T-C zone in order to permit the establishment of additional rural home sites

is the claimant's desired resolution.

This recommended resolution would be subject to the following limitations:

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

If the Board concurs with the above recommendation, you may direct staff to prepare an order for your adoption implementing this recommendation. This order will incorporate the above recited findings of fact and conclusions, and the appropriate directives to not apply the minimum parcel size requirements and dwelling restrictions of the T-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director