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

In the Matter of)
)
The Ballot Measure 37 Claim of Jack C. Eriksen) **ORDER NO. 4-07-521**
Case File No. 10-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 September 20, 2006, Jack C. Eriksen filed a Measure 37 claim seeking
9 compensation for, or the modification or removal of, land use restrictions that restrict land divisions
10 in the RR-2 zone. The property is 12.6 acres in size and located at 4399 SW Eriksen Avenue (south
11 of Waldport) and is identified as tax lots 400 and 2300 on Lincoln County Assessor's Map 13-12-36-
12 DB. County records and the filed claim are found in Lincoln County Planning Department File No.
13 10-LURCC-06 and by this reference are incorporated into this order as if fully set forth; and

14
15 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120,
16 a hearing was held on January 5, 2007, on the claim before the Planning Director as Hearings
17 Officer, for the purpose of receiving facts and evidence related to determining the validity of the
18 claim. At the hearing, the claimant provided testimony in support of the claim. There was no
19 testimony in opposition to the claim. Claimant has documented acquisition dates of March 1978 (tax
20 lot 2300) and September 1978 (tax lot 400) through a partnership entity in which the claimant was a
21 partner. At that time, the property was zoned A-2 (tax lot 400) and R-2 (tax lot 2300). Claimant
22 acquired title as an individual in 1993, at which time the property was zoned RR-1-2. Jack C.
23 Eriksen as an individual currently holds title; and

24
25 WHEREAS the Planning Director has issued his Department's Staff Report and
26 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
27 herein. That report finds and concludes that the claim when submitted was valid, and recommends
28 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
29 subject land use regulations; staff therefore recommends that the Board choose the non-application of
30 land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that
31 the Board direct that the current minimum parcel size restrictions of the RR-2 zone not be applied to
32 the subject property. Instead, the provisions of the A-2 zone (tax lot 400) and the R-2 zone (tax lot
33 2300) in effect on the present owner's dates of acquisition in 1978 would apply. This would allow the
34 claimant to divide tax lot 400 into residential parcels of not less than one acre in size, and to divide
35 tax lot 2300 into residential parcels of not less than 7,500 square feet, as was permitted at the time of
36 the claimant's acquisition of the subject property in 1978 permitting claimant to divide the subject
37 property to create up to 31 additional home sites as he has requested. This would allow the owner to
38 use the property for a use permitted at the time of the owner's acquisition in accordance with the
39 requirements of ORS 197.352 (8); and

40
41 WHEREAS the Board has considered the report and recommendations of the Planning
42 Director and County Counsel, including the implications known at this time concerning ambiguous

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 Jack C. Eriksen, Lincoln County Case File No. 10-LURCC-06,
21 was a valid claim when filed on September 20, 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 of the RR-2 zone to the subject property. Instead, the provisions of the
24 A-2 zone (tax lot 400) and the R-2 zone (tax lot 2300) in effect on the present owner’s dates of
25 acquisition in 1978 apply. This allows the claimant to divide tax lot 400 into residential parcels of
26 not less than one acre in size, and to divide tax lot 2300 into residential parcels of not less than
27 7,500 square feet, as was permitted at the time of the claimant’s acquisition of the subject property
28 in 1978. This will permit claimant to divide the subject property to create up to 31 additional home
29 sites. This waiver is to the effect as follows:

- 30 • The non-application of regulations would be limited to the current RR-2 zone minimum
31 lot size restrictions. In lieu of these restrictions, the requirements of the A-2 zone (tax lot
32 400) and the R-2 zone (tax lot 2300) in place at the time of the present owner’s acquisition
33 in 1978 would apply.
- 34 • Establishment of additional land parcels and dwellings on the subject property would be
35 subject to all applicable public health and safety regulations, including but not limited to
36 land division procedures, building codes, on-site sewage disposal rules and requirements,
37 flood hazard area regulations, and state or county road approach permit requirements.
38

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

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

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

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

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

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

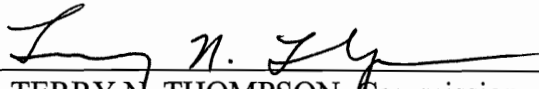
24 8. Copies of this order be provided to the Planning Director, County Counsel, and claimant.

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

Revised 3/14/07

CASE FILE: 10-LURCC-06

DATE FILED: 9/20/06

CLAIMANT: Jack Eriksen

REQUEST: The claimant seeks compensation for, or the modification or removal of, land use regulations that restrict land divisions in the RR-2 zone.

A. REPORT OF FACTS:

1. Lot Size: 12.6 acres.
2. Property Location: The property is located at 4399 SW Eriksen Avenue and is identified as tax lots 400 and 2300 on Lincoln County Assessor's map 13-12-36-DB.
3. Zoning Designation: RR-2 (Single Family Residential).
4. Plan Designation: Dispersed Residential
5. Surrounding Land Use: The subject property is located in an area of predominantly rural residential home sites south of Waldport.
6. Topography & Vegetation: The subject property is moderately sloped, and mostly cleared and developed.

7. **Existing Structures:** Two single-family residences are located on the property, along with greenhouses and other commercial buildings associated with the operation of the Oregon Coast Garden Center.

8. **Utilities:** The following utilities are available to serve the subject property:

- a. Sewer: On-site
- b. Water: Well.
- c. Electricity: Central Lincoln PUD.

9. **Development Constraints:** None identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Gary Hamilton of Litchfield & Carstens filed a land use regulation compensation claim pursuant to ORS 197.352 on behalf of claimant Jack C. Eriksen on September 20, 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 Eriksen property is located at 4399 SW Eriksen Avenue south of Waldport. The current zoning of the property is RR-2 (Rural Residential). The claimant asserts a diminution in the value of the property resulting from the current minimum lot size restrictions of the RR-2 zone applied after his date of acquisition. The claimant states that his desired remedy to the claim is the removal or modification of these lot size restrictions in a manner that will permit the division of the subject property to create up to 31 additional home sites.

Claimant has documented acquisition dates of March 1978 (tax lot 2300) and September 1978 (tax lot 400) through a partnership entity in which the claimant was a partner. At that time, the property was zoned A-2 (tax lot 400) and R-2 (tax lot 2300). Claimant acquired title as an individual in 1993, at which time the property was zoned RR-1-2. Jack C. Eriksen as an individual currently holds title.

On January 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.”**

Claimant acquired his present interest in the subject property on February 5, 1993 via bargain and sale deed, recorded at Book 256, page 2078 of the Lincoln County Deed Records. Records of the Lincoln County Assessor’s office confirm that Jack C. Eriksen 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 land use regulations applicable to the subject property are the RR-2 zone (LCC 1.1345). These regulations were enacted by Lincoln County and apply to the subject property, which is private real property. These regulations restrict the use of this private real property to only those uses expressly authorized. Specifically, in the case of the subject property, these regulations limit land divisions to parcels of not less than two acres in size.

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

The currently effective requirements of the RR-2 zone limit land divisions to parcels of two acres or more. Claimant asserts that these restrictions reduce fair market value of the property by approximately \$1.4 million. An opinion of value prepared by a licensed real estate broker along with supporting market value data has been provided for the claim. The opinion concludes that there has been reduction in fair market value of the subject property as a result of the enactment and enforcement 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 development imposed by the minimum lot size requirements of the RR-2 zone. These regulations were enacted to comply with the Statewide Planning Goals. They do not directly address common nuisances, health and safety, adult businesses or activities, nor does it have any federal nexus.

The current RR-2 zone lot size restriction applicable to the subject property was enacted by Lincoln County in 2000 (Ordinance #396). The claimant has documented that a legal entity in which he was a partner first acquired interest in the property in March 1978 (tax lot 2300) and September 1978 (tax lot 400), prior to the enactment of the cited land use regulations.

- 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 were enacted prior to the effective date of Ballot Measure 37 (Lincoln County has enacted no new land use regulations after December 2, 2004). The subject claim was filed on September 20, 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 claimant has documented dates of acquisition by HD & JD, a co-partnership consisting of Jack Eriksen and other family members, of March 7, 1978 (tax lot 2300) and September 11, 1978 (tax lot 400). Jack C. Eriksen acquired title to the subject property via a conveyance from the partnership on February 4, 1993. Based on the claimant's interest in the co-partnership HD & JD, for purposes of ORS 197.362 (8), March 7, 1978 (tax lot 2300) and September 11, 1978 (tax lot 400) are the operative dates for determining "a use permitted at the time the owner acquired the property." As previously noted, the current RR-2 zone lot size restriction applicable to subject property was enacted by Lincoln County in 2000.

C. **Recommended Findings and Conclusions:**

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

Findings:

1. Jack C. Eriksen filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on September 20, 2006.
2. The claim is based on an assertion of a reduction in fair market value of real property due to the enforcement of land use regulations by Lincoln County.
3. The subject property is identified as tax lots 400 and 2300 on Lincoln County assessor's map 13-12-36-BD, which is taxed as real property by Lincoln County.
4. The RR-2 zone (LCC 1.1345) provisions applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The RR-2 zone, as applied to the subject property, limits land divisions to parcels of not less than two acres in size.
6. The claimant has asserted a diminution in value of \$1.4 million caused by the RR-2 zone restrictions, which has been documented by an opinion of value provided by a licensed real estate broker.
7. According to the Lincoln County deed records, claimant Jack C. Eriksen first acquired an ownership interest in the subject property in March 1978 (tax lot 2300) and September 1978 (tax lot 400) through his interest in a co-partnership. The currently effective RR-2 zone restrictions were enacted by Lincoln County in 2000, after the claimant's date of acquisition.
8. The RR-2 zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
9. The subject claim was filed on September 20, 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 by the owner, Jack C. Eriksen pursuant to ORS 197.352 (5).

2. Based on the dates of acquisition by the claimant in 1978, the RR-2 zone (LCC 1.1345) provisions of the Lincoln County Code are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37, and after the date of acquisition of the claimant; 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, Jack C. Eriksen, 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 RR-2 zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of these land use regulations, may modify, remove or not apply these restrictions in order to permit the present owner to divide and use the property in a manner 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 current minimum parcel size restrictions of the RR-2 zone not be applied to the subject property. Instead, the provisions of the A-2 zone (tax lot 400) and the R-2 zone (tax lot 2300) in effect on the present owner's date of acquisition in 1978 would apply. This would allow the claimant to divide tax lot 400 into residential parcels of not less than one acre in size, and to divide tax lot 2300 into residential parcels of not less than 7,500 square feet, as was permitted at the time of the claimant's acquisition of the subject property in 1978. This allowance 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 currently effective restrictions of the RR-2 zone to allow the creation of residential parcels is the claimant's desired resolution.
3. The division of the subject property in the manner requested by claimant would result in additional rural home sites, which is the prevailing pattern of development in the area.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the current RR-2 zone minimum lot size restrictions. In lieu of these restrictions, the requirements of the A-2 zone (tax lot 400) and the R-2 zone (tax lot 2300) in place at the time of the present owner's acquisition in 1978 would apply.
- Establishment of additional land parcels and dwellings 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 state or 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 identified land use restrictions to the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director