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

In the Matter of )  
)  
*The Ballot Measure 37 Claim Larry Tenderella* ) **ORDER NO. 6-07-618**  
*Case File No. 146-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 4, 2006 Larry Tenderella filed a Measure 37 claim seeking  
9 compensation for, or the modification or removal of, land use regulations which restrict land  
10 divisions in the RR-2 zone (Rural Residential) to a two-acre minimum parcel size. The property is  
11 2.04 acres in size and located at 3823 Yaquina Bay Road. It is identified as tax lot 501 on Lincoln  
12 County Assessor's Map #11-11-22A. County records and the filed claim are found in Lincoln  
13 County Planning Department File No. 146-LURCC-06 and by this reference are incorporated into  
14 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 30, 2007, on the claim before the Planning Director as Hearings Officer,  
18 for the purpose of receiving facts and evidence related to determining the validity of the claim. At  
19 the hearing, the claimant's representative provided testimony in support of the claim. There was  
20 testimony in opposition to the claim from neighbors; 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 in the RR-2 zone enacted under  
29 Ordinance #396 in 2000 not be applied to the subject property. This would allow the claimant to  
30 divide the subject property into two one-acre residential parcels of land (assuming all other  
31 applicable regulations are met) as permitted at the time of acquisition of the subject property in 1997.  
32 This would allow the owner to use the property for a use permitted at the time of the owner's  
33 acquisition in accordance with the requirements of ORS 197.352 (8); and

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

Page 2

Office of Lincoln County Legal Counsel  
225 West Olive Street, Room 110  
Newport, Oregon 97365  
(541) 265-4108

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

4  
5 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

13  
14 2. The Measure 37 claim of Larry Tenderella, Lincoln County Case File No. 146-LURCC-  
15 06, was a valid claim when filed on December 4, 2006. The Board of Commissioners declines to  
16 pay just compensation for the claim. In lieu of compensation, the Board elects to modify, remove  
17 or not apply to the subject property the current restrictions on the minimum parcel size requirements  
18 in the RR-2 zone enacted under Ordinance #396 in 2000. This would allow the claimant to divide  
19 the subject property into two one-acre residential parcels of land (assuming all other applicable  
20 regulations are met) as permitted at the time of acquisition of the subject property in 1997. This  
21 waiver is to the effect as follows:

- 22 • The non-application of regulations would be limited to the minimum parcel size  
23 requirements provided for in LCC 1.1345. In place of these restrictions, the  
24 minimum lot size standards of LCC 1.1345 in effect on December 14, 1997 would  
25 apply. All other provisions of the Lincoln County Code would continue to apply.
- 26 • Establishment of any additional land parcels and dwellings on the subject  
27 property would be subject to all applicable public health and safety regulations,  
28 including but not limited to land division procedures, building codes, on-site  
29 sewage disposal rules and requirements, flood hazard area regulations, and county  
30 road approach permit requirements.

31  
32 3. A State of Oregon "waiver" under Measure 37 may be required for the development or use  
33 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This  
34 order does not affect any land use regulations of the State of Oregon. The claimant is responsible  
35 for seeking compensation or "waiver" from the state of any applicable state laws. The Planning  
36 Director shall send notice of the Board's decision to the Director of the Department of Land  
37 Conservation and Development. If a State Measure 37 claim is required, no use, development,  
38 permits or other development applications will be processed or approved by Lincoln County unless  
39 the state has issued, if appropriate, its own "waiver".  
40

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

4  
5 5. Excepting new land use regulations imposed after the date of this decision, and subject to  
6 applicable review rights as permitted under Measure 37, this final decision bars a subsequent  
7 Measure 37 claim against Lincoln County as to the subject property.

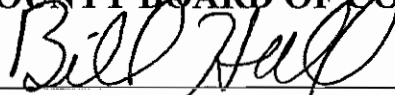
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9 6. Transferability of the "waiver" granted by the County under this decision is unknown  
10 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent  
11 permitted by law. Granting of this "waiver" does not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

13  
14 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln  
15 County Clerk without payment of recording fees.

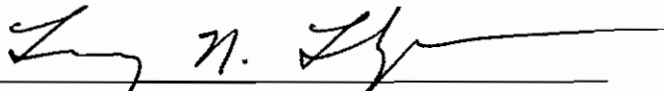
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17 8. Copies of this order be provided to the Planning Director, County Counsel, claimant and  
18 claimant's agent.

DATED this 20th day of June, 2007.

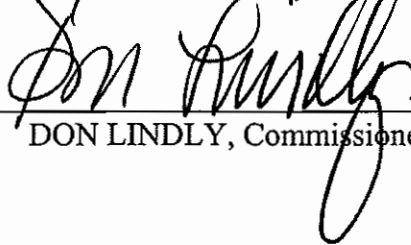
**LINCOLN COUNTY BOARD OF COMMISSIONERS**



\_\_\_\_\_  
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:** 146-LURCC-06

**DATE FILED:** December 4, 2006

**CLAIMANT:** Larry Tenderella

**REQUEST:** The claimant seeks compensation for, or the modification or removal of, land use regulations which restrict land divisions in the RR-2 zone (Rural Residential) to a two-acre minimum parcel size.

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

1. **Lot Size:** 2.04 acres.
2. **Property Location:** The subject property is located at 3823 Yaquina Bay Road and is identified as tax lot 501 on Lincoln County Assessor's Map #11-11-22A.
3. **Zoning Designation:** RR-2 (Rural Residential).
4. **Plan Designation:** DR (Dispersed Residential).
5. **Surrounding Land Use:** The subject property is located in a rural residential area.
6. **Topography & Vegetation:** The property is a moderately sloping hillside and is residentially landscaped.
7. **Existing Structures:** Existing structures include one single-family dwelling, built in 1950, with outbuildings.

8. **Utilities:** The following utilities currently 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 indicates the subject property contains landslide topography.

**B. EVALUATION OF THE REQUEST:**

**1. Background:**

Larry Tenderella filed a Land Use Regulation Compensation Claim on December 4, 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 Tenderella property is located at 3823 Yaquina Bay Road. 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 restrictions of the RR-2 zone applied after his date of acquisition, more specifically, those restrictions that preclude the division of the land and placement of an additional dwelling on the property. The claimant states that his desired remedy to the claim is the removal or modification of the RR-2 zone restrictions in a manner that will permit the division of the subject property into two one-acre parcels.

Deed records submitted with the claim document the claimant's acquisition of the subject property in 1997. At the time the property was acquired by the claimant, acknowledged county code provisions applicable to the subject property under the RR1-2 zone permitted the creation of one-acre parcels provided public water was available to the boundary line of each proposed parcel of land.

On April 30, 2006, 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's representative provided testimony in support of the claim. Joyce Burton offered testimony on behalf of the Back Bay homeowners association and on behalf of herself and her husband, James Burton in opposition to the claim.

**2. Measure 37 Claim Requirements:**

ORS 197.352 ("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 acquired his original interest in the property by warranty deed on December 14, 1997 (recorded at Book 349 Page 0342, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Larry Tenderella 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 RR-2 zone regulations (LCC 1.1345) at issue in the subject claim were enacted by Lincoln County in their present form by ordinance #396 in 2000. These regulations are applied to all private real property designated on the Lincoln County Comprehensive Plan and Zoning maps as being within the RR-2 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 RR-2 zone. Under current regulations, the minimum lot size for newly created lots is two acres.

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

As noted, the currently effective requirements of the RR-2 zone prohibit any division of the subject property, which as a result restricts the placement of an additional dwelling on the property.

The claimant, a licensed real estate broker, asserts that these restrictions reduce the fair market value of the property by \$130,000. 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 RR-2 zone restrictions. Nonetheless, the information on its face; i.e., the market value difference between one homesite on a two-acre parcel of land and two one-acre home sites, leads the department to conclude that it is more likely than not that there has been some reduction in fair market value of the subject property as a result of the enactment of the cited land use regulations.

- d. The land use regulation complained of is not a regulation; (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control

regulations; (c) required to comply with federal law; (d) restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.

The regulations addressed by the subject claim are the restrictions on land divisions and dwellings imposed by the RR-2 zone. The RR-2 zone was enacted to comply with Oregon Administrative Rule 660-011-0065 (Public Facilities Planning) which implements Statewide Planning Goal 11 (Public Facilities and Services). This rule enactment prohibited local governments from adopting or applying land use regulations that provide for increased density based on the availability of public or community water service. The net effect was to fix a two-acre minimum lot size for new parcel creations in the RR1-2 zone, irrespective of levels of service. 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 property was acquired in December of 1997. The RR-2 zone, in its present form, was enacted in 2000, 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 RR-2 zone restrictions on land divisions, were enacted in their present form in 2000, prior to the effective date of Ballot Measure 37. The subject claim was filed on December 4, 2006, within two years of the December 2, 2004 effective date of Ballot Measure 37. (Note: Because December 2, 2006 was a Saturday, the deadline for timely filing of compensation claims pursuant to ORS 197.352 (5) was extended through December 4, 2006.)

#### C. RECOMMENDED FINDINGS AND CONCLUSIONS:

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

Findings:

1. Larry Tenderella filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning and Development on December 4, 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 located at 3823 Yaquina Bay Road and is identified as tax lot 501 on Lincoln County Assessor's map 11-11-22A, which is taxed as real property by Lincoln County.
4. The RR-2 zone provisions (LCC 1.1345) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The RR-2 zoning restricts uses; specifically, the RR-2 zone standards prohibit the division of the subject property and the establishment of an additional single-family dwelling.
6. According to the Lincoln County deed records, the claimant, Larry Tenderella, first acquired an interest in the subject property in 1997 and has maintained an ownership interest continuously since that time.
7. The currently effective RR-2 zone regulations governing land divisions and the establishment of dwellings were enacted by Lincoln County in 2000 (Ordinance #396), 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 ORS 197.352(3).

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 claimant, Larry Tenderella, 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 1.1345 (RR-2 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, Larry Tenderella, 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 the RR-2 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 of the property.

**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 direct that the minimum parcel size requirements in the RR-2 zone enacted under Ordinance #396 in 2000 not be applied to the subject property. This would allow the claimant to divide the subject property into one-acre parcels of land with the potential for one additional homesite (assuming all other applicable regulations are met) in accordance with the provisions of LCC 1.1345 in effect on December 14, 1997. 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 RR-2 zone would permit the claimant owner to create two one-acre parcels of land in an area zoned for residential purposes. The creation of one additional parcel would not be inconsistent with the general pattern of land use in the area.
3. Not applying the land division restrictions of the RR-2 zone in order to permit the creation of an additional parcel of land 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 current minimum parcel size requirements provided for in LCC 1.1345. The provisions of LCC 1.1345 in effect on December 14, 1997 would apply, as would all other provisions of the Lincoln County Code.
- Establishment of an 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 RR-2 zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director

# Lincoln County Geographic Info System

Taxlot

Parcel ID  
11-11-22-A0-00001-00

Site Address  
3823 YAQUINA BAY RD

Owner  
TENDERELLA LARRY &

Address1  
KIMBERLY H

Address2  
3823 YAQUINA BAY RD

Address3

City/State/Zip  
NEWPORT, OR 97365

Land Value  
74480

Imp Value  
204900

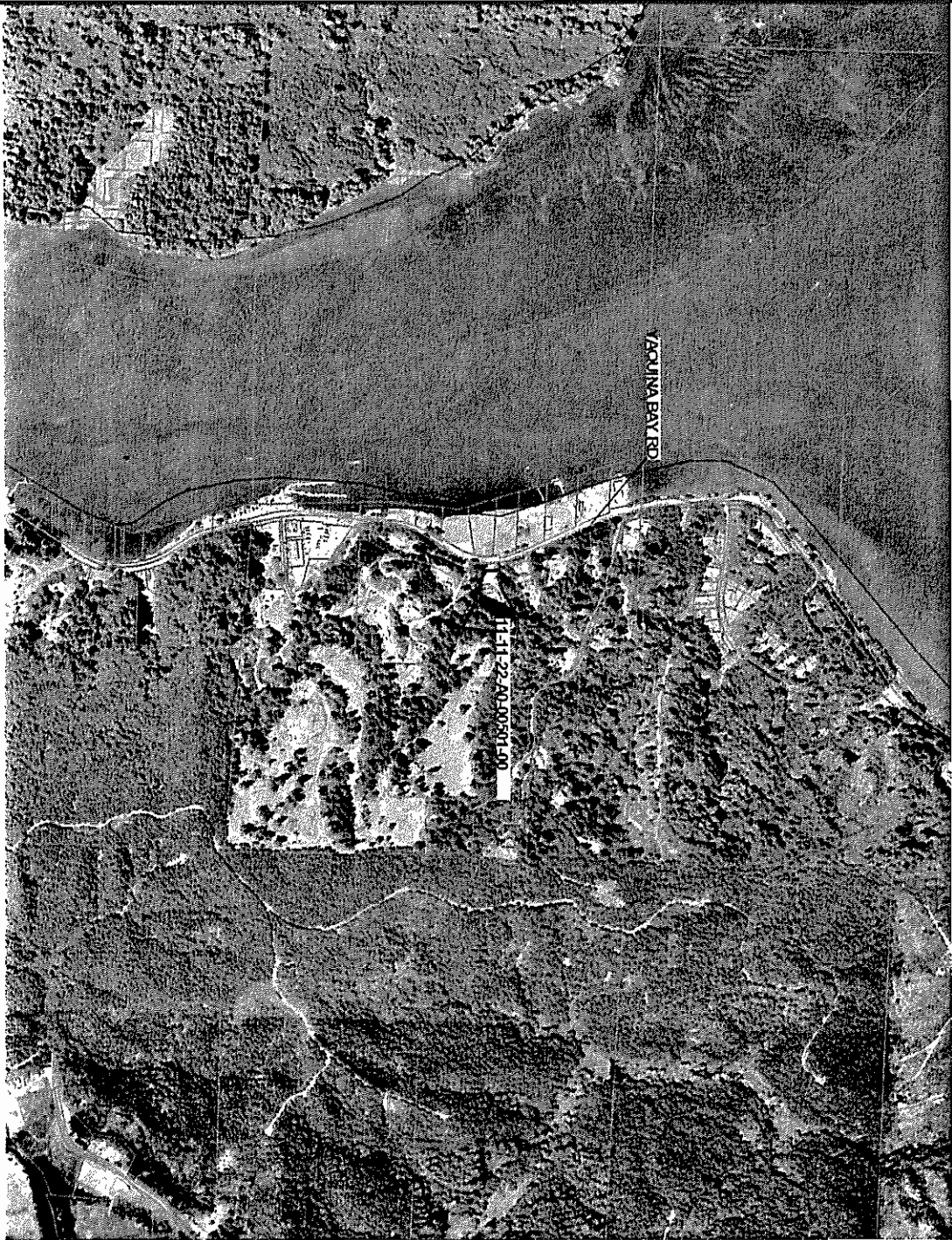
Acres  
2.04

Tax Account

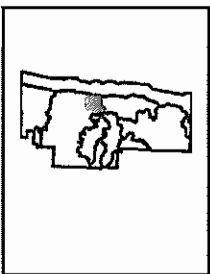
Account  
R300284

Tax Code  
133

Legal Desc  
TWN58P 11, R4G 11, ACRES 2.0



1 in. = 1012 ft.



5/23/2007



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