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

In the Matter of)
)
The Ballot Measure 37 Claim of Shari Hall Kiser) **ORDER NO. 4-07-522**
and Lester Hall, Case File No. 19-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 20, 2006, Shari Hall Kiser and Lester Hall filed a Measure 37
9 claim seeking compensation for, or the modification or removal of, land use restrictions that restrict
10 land divisions and the placement of dwellings in the A-C (Agricultural Conservation) zone. The
11 property is 121.25 acres in size and located east of the City of Yachats at 7662 Yachats River Road.
12 It is identified as tax lot 1200 on Lincoln County Assessor's Map #14-11-34 and tax lot 700 on Map
13 #15-11-00. County records and the filed claim are found in Lincoln County Planning Department
14 File No. 19-LURCC-06 and by this reference are incorporated 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' agent 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
29 A-C zone not be applied to the subject property. This would allow the claimants to divide the subject
30 property into a total of six parcels, each approximately 20-acres in size, as requested by the claimants
31 and as permitted at the time of acquisition of the subject property. This would allow the owner to use
32 the property for a use permitted at the time of the owners' acquisition in accordance with the
33 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
40 claimants on notice of possible future court decisions and interpretations. In addition, the Oregon
41 Legislature is considering changes to Measure 37 that may impact these claims; and

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 claimants.

4
5 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

6 1. Claimants are placed on notice that Oregon courts continue to interpret provisions in
7 Measure 37 which may change the way claims are treated. Claimants proceed 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 Shari Hall Kiser, Lincoln County Case File No. 19-LURCC-06,
15 was a valid claim when filed on November 20, 2006. The Board of Commissioners declines to pay
16 just compensation for the claim. In lieu of compensation, the Board elects to modify, remove or not
17 apply the minimum parcel size requirements and the restrictions on dwellings in the A-C zone.
18 This allows the claimants to divide the subject property into a total of six parcels, each
19 approximately 20-acres in size, as requested by the claimants and as permitted at the time of
20 acquisition of the subject property in 1971. This waiver is to the effect as follows:

- 21 • The non-application of regulations would be limited to the minimum parcel size
22 requirements and restrictions on dwellings provided for in LCC 1.1373. All other
23 provisions of the Lincoln County code would continue to apply.
- 24 • Establishment of additional land parcels on the subject property, each with one single-
25 family dwelling, would be subject to all applicable public health and safety
26 regulations, including but not limited to land division procedures, building codes, on-
27 site sewage disposal rules and requirements, flood hazard area regulations, and county
28 road approach permit requirements.

29
30 3. A State of Oregon “waiver” under Measure 37 may be required for the development or use
31 of the subject property. Lincoln County lacks authority to waive state regulations or laws. This
32 order does not affect any land use regulations of the State of Oregon. The claimants are responsible
33 for seeking compensation or “waiver” from the state of any applicable state laws. The Planning
34 Director shall send notice of the Board’s decision to the Director of the Department of Land
35 Conservation and Development. If a State Measure 37 claim is required, no use, development,
36 permits or other development applications will be processed or approved by Lincoln County unless
37 the state has issued, if appropriate, its own “waiver.”
38

1 4. This "waiver" provision is void if the property owners or property owners' 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.

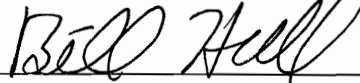
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9 6. Transferability of the "waiver" granted by the County under this decision is unknown
10 under the current status of Measure 37. Transferability of the "waiver" is allowed to the extent
11 permitted by law. Granting of this "waiver" does not commit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

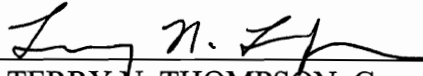
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17 8. Copies of this order be provided to the Planning Director, County Counsel, claimants and
18 claimants' agent.

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: 19-LURCC-06

DATE FILED: 11-20-06

CLAIMANT: Shari Hall Kiser and Lester Hall; Dawn Pavitt, agent

REQUEST: The claimants seek compensation for, or the modification or removal of, land use regulations that restrict land divisions and the placement of dwellings in the A-C (Agricultural Conservation) zone.

A. REPORT OF FACTS:

1. **Lot Size:** Approximately 121.25 acres.
2. **Property Location:** The property is located east of the City of Yachats at 7662 Yachats River Road and is further identified on Lincoln County Assessor's Map #14-11-34 as tax lot 1200 and Map #15-11-00 as tax lot 700.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses along Yachats River Road are comprised primarily of scattered rural residences, with some small scale agricultural activities.
6. **Topography & Vegetation:** The property consists of moderately sloping to level open land.

7. **Existing Structures:** Existing structures on the subject property (lot 700) include a residence, constructed in 1930, along 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: Consumers Power.
9. **Development Constraints:** A portion of the property, along the riverbank, is located in the 100-year floodplain. Environmental Bulletin 81 of the Alsea River Section indicates the general area contains a high groundwater table. No other constraints were identified.

B. EVALUATION OF THE REQUEST:

1. Background:

Dawn Pavitt, agent for Shari Hall Kiser and Lester Hall, filed a Land Use Regulation Compensation Claim on November 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 Hall property is located east of the City of Yachats at 7662 Yachats River Road. The current zoning of the property is A-C, Agricultural Conservation. The claimants assert a diminution in the value of their property resulting from the restrictions of the A-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the division of and the development of additional residences on the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the A-C zone restrictions in a manner that will permit the division of the subject property into six, twenty-acre parcels, and permit the establishment of one single-family dwelling on each of the resulting parcels. Tax lot 700 contains one existing dwelling, thus the total number of new homesites requested is five.

Deed records submitted with the claim document the claimants' acquisition of the subject property in 1971. There were no land use regulations in effect at the time the property was acquired by the claimants.

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. 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.”**

Claimant Lester Hall acquired his original interest in the subject property in October of 1971 (recorded at Book 29 Page 1548 Lincoln County Deed Records). Claimant Shari Hall Kiser acquired her original interest in the subject property in November of 1971 (recorded at Book 29 Page 1553). Records of the Lincoln County Assessor’s office confirm that Shari Hall Kiser and Lester Hall 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 A-C zone regulations (LCC 1.1373) 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 A-C zone. These regulations restrict the use of this private real property to only those uses expressly authorized in the A-C zone. Specifically, in the case of the subject property, these regulations prohibit the further division and the placement of any additional dwellings on the property.

- 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 A-C zone prohibit any division of the subject property; these restrictions also prohibit the placement of any additional dwellings on the property.

Claimants assert that these restrictions reduce fair market value of the property. In support of this claim, the claimants’ agent asserts a loss in fair market value of \$1,050,000. A Letter of Opinion issued by a real estate broker licensed in the State of Oregon, was submitted to substantiate this value. 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 A-C zone restrictions. Nonetheless, the information on its face, i.e. the market value difference between one home site versus the potential for five additional home sites permitted at the time of acquisition, leads the

department to conclude that it is more likely than not that there has been some reduction in fair market value of the subject property as a result of the enactment of the cited land use regulations.

- d. **The land use regulation complained of is not a regulation; (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, 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 A-C zone. The A-C zone was enacted to comply with Statewide Planning Goal 3, which mandates the placement of defined agricultural lands into exclusive farm use zones meeting the requirements of ORS Chapter 215. The purpose of the A-C zone is to preserve agricultural lands for agricultural 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' original interest in the property was acquired November 8, 1971. The A-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 A-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 20, 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, on behalf of Shari Hall Kiser and Lester Hall (father and daughter) filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on November 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 lot 1200 on Lincoln County Assessor's Map #14-11-34 and tax lot 700 on Lincoln County Assessor's map 15-11-(Index), which is taxed as real property by Lincoln County.
4. The A-C zone provisions (LCC 1.1373) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The A-C zoning restricts uses; specifically, the A-C zone standards prohibit the division of the subject property and the establishment of additional single-family dwellings.
6. The claimants submitted evidence of a diminution in value caused by the A-C zone restrictions in the form of an estimated value prepared by the claimants' agent. This value was based on the opinion of a real estate broker licensed in the State of Oregon of \$1,050,000. The analysis indicates that the land use regulations that prohibit the division of and the establishment of additional dwellings on the subject property have the effect of reducing the fair market value of the subject property.
7. According to the Lincoln County deed records, the claimants, Shari Hall Kiser and Lester Hall, jointly acquired an interest in the subject property in 1971, and have maintained an ownership interest continuously since that time.
8. The currently effective A-C zone regulations governing the establishment of dwellings were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimants' date of acquisition.
9. The A-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements as set forth in ORS 197.352 (3).
10. The subject claim was filed on November 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 on behalf of the owners Shari Hall Kiser and Lester Hall, 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 1.1373 (A-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, Shari Hall Kiser and Lester Hall, 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 A-C zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of the A-C zone restrictions, may modify, remove or not apply these restrictions in order to permit the owners to use the property for a use permitted at the time of their acquisition.

D. Recommended Decision

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires either 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 A-C zone not be applied to the subject property. This would allow the claimants to divide the subject property into a total of six parcels, each approximately 20-acres in size, as permitted at the time of acquisition of the subject property. This would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owners to use the property for a use permitted at the time of the owners' 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 A-C zone would permit the claimant owners to create 6 parcels of approximately 20-acres each. The creation of these homesites would not be generally inconsistent with the prevailing land use pattern in the area.
3. Not applying the land division and dwelling restrictions of the A-C zone in order to permit the establishment of additional rural home sites is the claimants' 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 1.1373. All other provisions of the Lincoln County code would continue to apply.
- Establishment of additional land parcels on the subject property, each with one single-family dwelling, 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 A-C zone on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted

Matt Spangler
Director