



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: 19-LURCC-05

DATE FILED: 07/28/2005

CLAIMANT: Matthew and Alice Gruber, Merrick Kriz, Cynthia Condon; David Hilgemann, Agent.

REQUEST: The claimants seek compensation for, or the modification or removal of, land use regulations that limit the division of new land parcels and the placement of additional single-family dwellings on the subject property.

A. REPORT OF FACTS:

1. **Lot Size:** 40.34 acres (Parcel I); 26 acres (Parcel II) and 56.86 acres (Parcel III)
2. **Property Location:** The property is located northeast of Toledo off of Olalla Road, and is further identified as tax lots 100 and 1300 on Lincoln County Assessor's map #10-10-33-D; tax lots 1403, 1411 and 1412 on map 10-10-32 and tax lots 101, 105 and 106 on map 10-10-33.
3. **Zoning Designation:** RR-5 (Parcels I and II) and T-C (Parcel III).
4. **Plan Designation:** Dispersed Residential (Parcels I and II) and Forest Land (Parcel III)
5. **Surrounding Land Use:** Adjacent uses include scattered rural residences along with lands managed for forest uses. To the south and west is the Olalla Valley Golf Course.

6. **Topography & Vegetation:** The property is moderately sloped and vegetated primarily with forest cover.
7. **Existing Structures:** None.
8. **Utilities:** The following utilities are available to serve the subject property:
 - a. Sewer: On-site sewage disposal
 - b. Water: On-site well
 - c. Electricity: Central Lincoln P.U.D.
9. **Development Constraints:** None identified.

B. EVALUATION OF THE CLAIM:

1. Background:

David Hilgemann, Attorney at Law, filed a Land Use Regulation Compensation Claim on behalf of property owners Matthew and Alice Gruber, Merrick Kriz and Cynthia Condon on July 28, 2005. 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 subject properties are located off of Olalla Road near Olalla Valley Golf Course. The current zoning of the property is RR-5, Rural Residential (Parcels I and II) and T-C, Timber Conservation (Parcel III). The claimants assert a diminution in the value of their property resulting from the restrictions of the RR-5 and T-C zones applied after their date of acquisition, more specifically, those restrictions that preclude the development of a residential subdivision on the subject property. The claimants state that their desired remedy to the claim is the removal or modification of the T-C zone restrictions in a manner that will permit the division of the property and the establishment of one single-family dwelling on the resultant parcels.

A chain of title report submitted with the claim documents the ownership history of the properties, which is complex and will be discussed in detail later in the report.

On October 25, 2005, 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. Written testimony in opposition to the claim was received from Dennis Bartoldus, an attorney representing Aron Rothstein and Wendy Green, who own adjoining property.

2. Measure 37 Claim Requirements:

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

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

Claimants Matthew and Alice Gruber acquired their current interest in Parcel I in 1980 by bargain and sale deed (recorded at Book 113, page 800, Lincoln County Deed Records) and in Parcel III in 2000 by bargain and sale deed (recorded at Book 400, page 1915). Claimants Kriz and Condon acquired their interest in Parcel II in 1996 by bargain and sale deed (recorded at Book 329, page 1274). Records of the Lincoln County Assessor’s office confirm that claimants Gruber, Kriz and Condon remain the owners of the respective subject parcels.

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

The current RR-5 regulations (LCC 1.1355) at issue in the subject claim were enacted by Lincoln County by ordinance #139 on June 30, 1980. The 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 RR-5 or T-C zone, respectively. These regulations restrict the use of this private real property to only those uses expressly authorized in the RR-5 or 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 RR-5 zone limit land divisions to parcels of not less than five acres in size. In addition, development in the RR-5 zone is further restricted by planned development limitations on clustering, and limits on public facilities (e.g. water and sewer). The currently effective T-C zone provisions restrict land divisions to a minimum of eighty acres and also limit the placement of dwellings.

Stating that the currently effective land use regulations applicable to the subject property limit the development of the subject property for residential subdivision purposes, claimants assert that these regulations reduce fair market value of the property. In support of this claim, claimants have submitted an appraisal prepared by an Oregon Certified General Appraiser which establishes value for the properties “as is”, and hypothetical values based on the ability to develop the property into one-acre home sites. This appraisal estimates this value difference at \$1.84 million.

It should be noted that the appraisal submitted by the claimants establishes a hypothetical “before regulation” value for the subject properties based on the assumption that a Measure 37 claim would extend back to the original date of acquisition by a family member, i.e. 1966. However, as discussed below, because, at the earliest dates of acquisition by a claimant family member, Parcels II and III were subject to zoning more restrictive than assumed by the appraisal, the county rejects as overstated the amount of value reduction asserted by claimants. Nonetheless, it appears likely that land use regulations enacted after the date of acquisition by claimants’ family in 1986 have reduced the value of Parcels II and III at least to some extent.

- 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 residential development imposed by the RR-5 and T-C zones. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forestlands into zones that comply with the requirements of OAR 660, Division 6. The purpose of the T-C zone is to conserve forestlands for forest uses. The RR-5 zone was enacted to provide for low-density residential development not exceeding rural levels. Neither of these zones directly addresses common nuisances, health and safety, adult businesses or activities, nor do they have any federal nexus.

The claimants have provided documentation that the claimants’ families’ original interest in the property was acquired in 1966. However, the subject properties were subsequently transferred to ownership by corporate entities

and, in the case of Parcels II and III, into the ownership of other individual entities, before being reacquired by the claimants. For purposes of evaluating the effective dates of ownership for Measure 37 compensation purposes, the deed records of Lincoln County indicate the following dates of acquisition: Parcel I: May 28, 1980 (Book 113, Page 800). Parcel II: October 21, 1986 (Book 175, Page 1697). Parcel III: October 21, 1986 (Book 175, Page 1697). The T-C zone regulations, which are the subject of this claim, were enacted in their present form in 1994. The RR-5 zone regulations were enacted on June 30, 1980. Based on these dates, certain of the regulations giving rise to the claim were enacted after the date of acquisition by a family member of the owner.

- e. **For claims arising from land use regulations enacted prior to December 3, 2004 (the effective date of Ballot Measure 37), written demand for compensation shall be made within two years of the effective date of the act.**

The land use regulations for which compensation is sought, the T-C zone restrictions on dwellings, were enacted in their present form in 1994, prior to the effective date of Ballot Measure 37. The subject claim was filed on July 20, 2005, within two years of the December 3, 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 a family member of 1980 (Parcel I) and 1986 (Parcel II). Although Measure 37, Section 1 permits an owner to go back to the date of prior acquisition by a family member for purposes of determining just compensation, the “waiver” remedy provided for in Section 8 does not relate back to the prior date of acquisition by a family member. It applies only to the “present owner”. Therefore, the transfer of ownership of the subject property to the present claimant owners establishes the date of acquisition for purposes of the waiver remedy, regardless of the fact that the prior owner was a family member.

In the case of the subject properties, the dates of acquisition for applying the waiver remedy are as follows: Claimants Matthew and Alice Gruber acquired their current interest in Parcel I in 1980 by bargain and sale deed (recorded at Book 113, page 800, Lincoln County Deed Records) and in Parcel III in 2000

by bargain and sale deed (recorded at Book 400, page 1915). Claimants Kriz and Condon acquired their interest in Parcel II in 1996 by bargain and sale deed (recorded at Book 329, page 1274).

C. Recommended Findings and Conclusions:

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

Findings:

1. David Hilgemann filed a Land Use Regulation Compensation claim on behalf of claimants Gruber, Condon and Kriz with the Lincoln County Department of Planning Development on July 20, 2005.
2. According to records of the Lincoln County Assessor, Alice S. Gruber is the current owner of Parcel I, Merrick Kriz and Cynthia Condon are the owners of Parcel II and Matthew and Alice Gruber are the owners of Parcel III. 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 100 and 1300 on Lincoln County Assessor's map #10-10-33-D; tax lots 1403, 1411 and 1412 on map 10-10-32 and tax lots 101, 105 and 106 on map 10-10-33 and is taxed as real property by Lincoln County
4. The T-C zone provisions (LCC 1.1375) and RR-5 zone provisions (LCC 1.1355) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The T-C and RR-5 zoning restrict uses; specifically, the T-C zone standards, as applied to the subject property, prohibit the further division of the property and the RR-5 zone limits land divisions to parcels of a minimum size of five acres. The claimants have submitted evidence of a diminution in value caused by the land use regulation restrictions in the form of an appraisal licensed Oregon General Appraiser. The resulting appraisal states that the land use regulations that limit the subdivision and placement of dwellings on the subject property have the effect of reducing the fair market value of the subject property by \$1.84 million. This appraisal assumes a "before" regulation value based on an acquisition date of 1966. Because,

at the earliest dates of acquisition by a claimant family member, Parcels II and III were subject to zoning more restrictive than assumed by the appraisal, the county rejects as overstated the amount of value reduction asserted by claimants. Nonetheless, it appears likely that land use regulations enacted after the date of acquisition by claimants' family in 1986 have reduced the value of Parcels II and III at least to some extent.

6. According to the Lincoln County deed records, family members of the claimant acquired an interest in the subject property in 1980 (Parcel I) and 1986 (Parcels II and III). Claimant Alice S. Gruber acquired her current interest in Parcel I on May 28, 1980; claimants Kriz and Condon acquired their interest in Parcel II on December 10, 1996, and claimants Matthew and Alice Gruber acquired their current interest in Parcel III on April 18, 2000.
7. The RR-5 zone regulations applicable to Parcel I were enacted by Lincoln County on June 30, 1980, after the date of acquisition of the current claimant owner.
8. The RR-5 zone restrictions applicable to Parcel II were enacted on June 30, 1980, after the date of acquisition by the claimant's family member, but before the date of acquisition by the claimant owner.
9. The currently effective T-C zone regulations applicable to Parcel III were enacted by Lincoln County in 1994 (Ordinance # 347), after the date of acquisition by the claimant's family member, but before the date of acquisition by the claimant owner.
10. The T-C zone and RR-5 restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
11. The subject claim was filed on July 20, 2005, which is less than two years from the December 3, 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, Matthew

and Alice Gruber and Merrick Kriz and Cynthia Condon, 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 imposed by LCC 1.1375 (T-C zone) and LCC 1.1355 (RR-5 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, Matthew and Alice Gruber and Merrick Kriz and Cynthia Condon are therefore entitled to the payment of just compensation equal to the reduction in the fair market value of the subject property caused by the enforcement of the T-C zone and RR-5 zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of these restrictions, may modify, remove or not apply these restrictions in order to permit the present 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 the payment of just compensation, or the modification, removal or non-application of land use regulations in a manner which will permit the present owner to use the property as allowed at the time of his acquisition. The selection of the remedy is at the discretion of the Board. Staff recommends that the Board choose the non-application of land use regulations as the appropriate resolution for this claim. Specifically, staff recommends the following:

Parcel I: Not applying any provisions of Lincoln County Code Chapter 1 enacted since May 28, 1980, which place restrictions on uses. 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.

Parcel II: Not applying any provisions of Lincoln County Code Chapter 1 enacted since December 10, 1996, which place restrictions on uses. 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.

Based on this date of acquisition, staff acknowledges the recommended relief will not permit the claimants to use the subject property in the manner set forth in their claim.

Parcel III: Not applying any provisions of Lincoln County Code Chapter 1 enacted since April 18, 2000, which place restrictions on uses. 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.

Based on this date of acquisition, staff acknowledges that the recommended relief will not permit the claimants to use the subject property in the manner set forth in their claim.

If the Board concurs with the above recommendation, you may direct staff to prepare an order for your adoption implementing this recommendation. This order will incorporate the above recited findings of fact and conclusions, and the appropriate directives for the application of the land use regulations in effect on the date of acquisition by the current owner, subject to applicable public health and safety regulations.

Respectfully submitted,



Matt Spangler
Director