



**DEPARTMENT OF PLANNING AND DEVELOPMENT**

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**LAND USE REGULATION COMPENSATION CLAIM**

**PLANNING DIRECTOR'S STAFF REPORT and  
RECOMMENDATION**

**CASE FILE:** 2-LURCC-05

**DATE FILED:** 01/03/05

**CLAIMANT:** Lowell Patton; William C. Cox, agent

**REQUEST:** The claimant seeks compensation for, or the modification or removal of, land use regulations that prohibit land divisions and limit permissible uses on the subject property.

**A. REPORT OF FACTS:**

1. **Lot Size:** 110 acres
2. **Property Location:** The property is located on the north side of Logsden Road, approximately 4.8 miles east of Siletz near Twin Bridges and is further identified as tax lot 305 on Lincoln County Assessor's map #10-09-06.
3. **Zoning Designation:** T-C (Timber Conservation)
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Immediately adjacent uses include scattered rural residential uses along Logsden Road, and lands in industrial forest management to the north.
6. **Topography & Vegetation:** The property consists of moderate slopes vegetated by a mix of conifers and alder, with typical coast range under story

species.

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(s)
  - c. Electricity: Central Lincoln P.U.D.
9. **Development Constraints:** None identified.

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

### **1. Background:**

William C. Cox, attorney for Lowell Patton, made a written demand for compensation pursuant to Ballot Measure 37 on behalf of property owner Patton on January 3, 2005. This demand letter was received by the Department of Planning and Development, and is being reviewed in accordance with the procedure established for Ballot Measure 37 claims by Lincoln County Board of Commissioners Order # 12-04-318. The Patton property is located on Logsden Road near Twin Bridges. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of the property resulting from the restrictions of the T-C zone applied after his date of acquisition. The claimant states that his desired remedy to the claim is the removal or modification of land use regulations in a manner that will permit the development of “ ... the property at the density permitted at the date of purchase ... without regard to any restrictions (overlays) other than the zoning designation.”

Claimant asserts an acquisition date of 1973, which is the date of his acquisition of all of the stock and assets, including the subject property, of Guy Roberts Lumber Company, Inc. The ownership history of the property is complex, and will be discussed in detail later in this report.

On May 24, 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’s representative provided testimony in support of the claim. Testimony in opposition to the claim was provided by Frederic Collazo and Wendy Moidel, and Sanford Collins. Written opposition testimony was received from Mr. Collazo and Ms. Moidel.

2. **Measure 37 Claim Requirements:** Measure 37 provides the following criteria for

establishing eligibility for the supplemental right of compensation created by the measure:

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

The claimant, Lowell Patton, acquired his current interest in the subject property in 1988 via Bargain and Sale Deed, recorded at Book 199, page 1841 of the Lincoln County Deed Records. Records of the Lincoln County Assessor’s office confirm that Lowell Patton 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:**

Current land use regulations applicable to the subject property are contained in the T-C zone (LCC 1.1375). 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 and place restrictions on the placement of dwellings and other improvements.

- 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 T-C zone limit any non-forest uses or development on the subject property; land divisions are prohibited. Claimant asserts that these restrictions reduce fair market value of the property. In support of this claim, claimant has provided an estimate of fair market value of the property if subject to regulations in effect in 1973 of \$6,300,000. Though no estimate is provided of the value of the property as currently regulated, it would presumably be substantially less. On this basis, claimant asserts a diminution in value of an unspecified amount. Because the estimate is not supported by any expert testimony or evidence (e.g., an appraisal), it is not possible to substantiate the specific dollar amount demanded by the claimant as compensation. Moreover, the estimate is based on incorrect assumptions regarding the permissible density of development on the claimant’s date of acquisition. The result, in staff’s opinion, is that these values are substantially overstated. Nonetheless, the information on its face; i.e., the market value difference between the current permissible uses in the T-C zone and the uses allowed at the time of the last change in ownership of the property (1988), leads the department to conclude that it is more likely than not that there

has been at least some minimal 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 land divisions and dwellings in the T-C zone applicable to the subject property. These regulations were enacted to comply with the Statewide Planning Goals 4, and have as their purpose the conservation of forest lands for forest uses. They do not directly address common nuisances, health and safety, adult businesses or activities, nor do they have any federal nexus.

The claimant has asserted that the claimant's original interest in the property was acquired in 1973, when he acquired all of the stock and assets of Guy Roberts Lumber Company, Inc., which assets included the subject property. According to claimant, Guy Roberts Lumber Company, Inc. was a legal entity owned by the claimant and, therefore, encompassed within the definition of "family member" as that term is used in Section 3 (E) of Measure 37. Ownership of the subject property was subsequently transferred to L.E.P., Inc. and later to Oregon Lumber Export, Inc., also legal entities owned by the claimant.

In 1988 Oregon Lumber Export Inc. filed a petition for Chapter 7 bankruptcy. In accordance with 11 U.S.C. Section 541, the filing of the petition for bankruptcy had the effect of transferring all of the assets of the bankrupt owner, Oregon Lumber Export, Inc. to the bankruptcy estate, a separate legal entity neither owned nor controlled by the bankrupt owner. These transferred assets included the subject property. Irrespective of any interest in the subject property acquired by the claimant in 1973 as a result of his ownership of the legal entity Guy Roberts Lumber Company, Inc., such interest was extinguished in 1988 through the Chapter 7 bankruptcy filing by Oregon Lumber Export, Inc. and the transfer of the subject property to the bankruptcy estate (Lincoln County Deed Records Book 198, page 2146). According to Lincoln County deed

records, the present owner, Lowell Patton, acquired the subject property from the bankruptcy estate by bargain and sale deed on December 14, 1988 (recorded at Book 199, page 1841). Therefore, pursuant to Section 3 (E) of Measure 37, only those land use regulations enacted prior to December 14, 1988 are subject to the right of compensation created by Section 1 of Measure 37.

Based on this date of acquisition, the only Lincoln County land use regulations applicable to the subject property subject to compensation under Ballot Measure 37 are the T-C zone restrictions enacted by Ordinance #347 in 1994. All other county land use regulations applicable to the subject property were enacted prior to December 14, 1988.

- 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 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 January 3, 2005, 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 asserted a date of acquisition of 1973, based on the date of his acquisition of a legal entity (corporation) owning the subject property. However, as discussed above, the 1988 bankruptcy petition severed the ownership interest of this corporation. Lowell Patton subsequently acquired the subject property on December 14, 1988 from the bankruptcy estate. For purposes of Section 8 of Measure 37, this is the operative date for determining “a use permitted at the time the owner acquired the property.”

Even if, *arguendo*, the bankruptcy petition did not extinguish all ownership interest of the corporation owned by Patton, the effect of this would be only to establish an earlier date for determining *compensation* pursuant to Section 1 of Measure 37. This is because Section 1 of Measure 37, which permits an owner to go back to the date of prior acquisition by a “family member,” defined to include a “legal entity owned by ... the owner of the property,” applies only to the determination of just compensation.

Conversely, the land use regulation waiver remedy provided for in Section 8,

which allows for a use permitted at the time of acquisition by the “owner” (defined as the present owner), makes no reference to “family member.” Therefore, any transfer of ownership establishes a new date of acquisition for purposes of the Section 8 waiver, regardless of whether a prior owner was a “family member” (including a legal entity owned by the owner). In the case of the subject property, that date of ownership transfer is December 14, 1988, when Lowell Patton acquired the property in his individual capacity. So while claimant Patton’s claim for compensation could arguably relate back to his original acquisition of Guy Roberts Lumber Company, Inc., any waiver cannot extend to regulations that predate his current ownership of the property as an individual.

### **C. Recommended Findings and Conclusions:**

The director recommends for the board’s consideration the following findings and conclusions:

#### Findings:

1. Lowell Patton filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on January 3, 2005.
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 305 on Lincoln County Assessor’s map 10-09-06, which is taxed as real property by Lincoln County.
4. The T-C zone (LCC 1.1375) applicable to the subject property is a land use regulation enacted and enforced by Lincoln County, a public entity.
5. The T-C zoning restricts uses; specifically, the T-C zone standards limit the division of the subject property to 80-acre minimum parcels and places restrictions on allowances for dwellings.
6. The claimant has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of an estimated value of the property subject to current regulations and an estimated value of the property if developed absent those regulations. This estimate concludes that the land use regulations that limit the division of and placement of dwellings

on the subject property have the effect of reducing the fair market value of the subject property by an unspecified amount. The county rejects this estimate of current value as overstated in that it is based on false assumptions regarding the permissibility of uses on the claimant's date of acquisition. Nonetheless, the record as a whole supports a finding that it is more likely than not that there has been some diminution in value as a result of the 80-acre minimum parcel size requirement enacted after the claimant's date of acquisition.

7. According to the Lincoln County deed records, the claimant, Lowell Patton, first acquired ownership of a legal entity (Guy Roberts Lumber, Inc.) with an interest in the subject property in 1973. The ownership interest of Guy Roberts Lumber Company, Inc. in the subject property was later transferred to Oregon Lumber Export, Inc., also a legal entity owned by the claimant. The ownership interest in the subject property of Oregon Lumber Export, Inc. was terminated in 1988 with the filing of a Chapter 7 bankruptcy petition, and the ensuing transfer of the property to the bankruptcy estate. Claimant Patton subsequently acquired his present interest in the subject property through purchase of the property from the bankruptcy estate on December 14, 1988, and has maintained an ownership interest continuously since that time.
8. The currently effective T-C zone restrictions were enacted by Lincoln County in 1994 (Ordinance # 347), after the claimant's date of acquisition. No other land use regulations applicable to the subject property have been enacted by Lincoln County since that time.
9. The T-C zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.
10. The subject claim was filed on January 3, 2005, which is less than two years from the December 2, 2004 effective date of Ballot Measure 37.

#### Conclusions:

Based on the above findings of fact, the Board reaches the following conclusions:

1. The subject claim for compensation for reduction in value of private real property from the enforcement of land use regulations was timely filed on behalf of the owner, Lowell Patton, pursuant to Subsection (5) of Ballot Measure 37.
2. Based on the claimant's date of acquisition of December 14, 1988, the land use regulations subject to the claim are limited to the restrictions of the T-C zone (LCC 1.1375) enacted by Ordinance #347. These provisions of the Lincoln County Code 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, Lowell Patton, 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 T-C zone restrictions enacted by Ordinance #347 or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of the T-C zone restrictions, may modify, remove or not apply these restrictions in order to permit the owner to use the property for a use permitted at the time of his acquisition.

#### **D. Recommended Decision**

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires either 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 T-C zone provisions enacted by Ordinance #347 in 1994 not be applied to the subject property. This would permit the application of the T-C zone regulations in effect on December 14, 1988, the claimant's date of acquisition of the subject property. This would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the property for a use permitted at the time of the owner's acquisition. This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the current T-C zone restrictions, and defaulting to the previously effective T-C zone provisions would provide for uses that would be generally consistent with the prevailing

land use pattern in the area.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the currently effective provisions of LCC 1.1375 as enacted by Ordinance #347. Instead, the provisions of LCC 1.1375 in effect on December 14, 1988 would apply to the subject property. **All other provisions of the Lincoln County Code would continue to apply.**
- Establishment of any permissible uses 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 direct application to the subject property of the T-C zone provisions in effect in 1988, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director