



**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:** 9-LURCC-05

**DATE FILED:** 01/04/05

**CLAIMANT:** Steven J. Davenport; Litchfield & Carstens, Agent.

**REQUEST:** The claimant seeks compensation for, or the modification or removal of, land use regulations that prohibit the establishment of a single family dwelling on the subject property.

**A. REPORT OF FACTS:**

1. **Lot Size:** 2.93 acres
2. **Property Location:** The property is located northeast of Toledo off of Olalla Road, and is further identified on Lincoln County Assessor's map #10-10-33-00 as tax lot 100.
3. **Zoning Designation:** T-C (Timber Conservation)
4. **Plan Designation:** Forest Land
5. **Surrounding Land Use:** Adjacent uses include scattered rural residences along with some lands managed for forest uses. To the south is the Olalla Valley Golf Course.
6. **Topography & Vegetation:** The property is moderately sloped and is cleared of most vegetation.

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:**

Litchfield & Carstens, LLP, filed a Land Use Regulation Compensation Claim on behalf of property owner Steven J. Davenport on January 4, 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 Davenport property is located off of Olalla Road near Olalla Valley golf course. The current zoning of the property is T-C, Timber Conservation. The claimant asserts a diminution in the value of his property resulting from the restrictions of the T-C zone applied after their date of acquisition, more specifically, those restrictions that preclude the development of a residence on the subject property. The claimant states that his desired remedy to the claim is the removal or modification of the T-C zone restrictions in a manner that will permit the establishment of one single-family dwelling.

Deed records submitted with the claim document acquisition of the subject property by the claimant's family in 1953. The claimant acquired title in 1995.

On May 12, 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. Written testimony in opposition to the claim was received from 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.”**

The claimant, Steven J. Davenport, acquired his original interest in the property by warranty deed in 1995 (recorded at Book 300, page 0141, Lincoln County Deed Records). Records of the Lincoln County Assessor’s Office confirm that Steven J. Davenport 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 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 T-C zone. These regulations restrict the use of this private real property to only those uses expressly authorized in the 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 T-C zone restrict the placement of dwellings. Based on an evaluation of the requirements of LCC 1.1375 (2)(x) and LCC 1.1375 (5), it does not appear that the subject property can qualify for the placement of a dwelling.

Stating that the currently effective land use regulations applicable to the subject property effectively prohibit the establishment of a dwelling, claimant asserts that this restriction reduces fair market value of the property. In support of this claim, claimant has submitted a competitive market analysis and letter of opinion from a local real estate broker. This letter places a market value on the subject property under current regulations (i.e., absent the permissibility of placing a residence) of \$5,000. The letter estimates the current value of the property with the ability to secure approval for a residence to be in excess of \$75,000.

- 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 dwellings imposed by the T-C zone. The T-C zone was enacted to comply with Statewide Planning Goal 4, which mandates the placement of defined forest lands into zones which comply with the requirements of OAR 660, Division 6. The purpose of the T-C zone is to conserve forest lands for forest uses. 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 family's original interest in the property was acquired by bargain and sale deed in 1953 (recorded at Book 159, page 59, Lincoln County Deed Records). The claimant acquired title to the property on May 22, 1995 (Warranty deed recorded at Book 300, page 0141). The T-C zone, in its present form, was enacted in 1994, so the regulation giving rise to the claim was 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 January 4, 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 documented a date of acquisition by a family member of 1953. 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 claimant in 1995 established a new date of acquisition for purposes of the waiver remedy, regardless of the fact that the prior owner was a family member. So while claimant Davenport’s claim for compensation relates back to the original acquisition of the property by his family member in 1953, any waiver cannot extend to regulations that predate his 1995 acquisition of the property.

**C. Recommended Findings and Conclusions:**

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

Findings:

1. Steven J. Davenport filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on January 4, 2005.
2. According to records of the Lincoln County Assessor, Steven J. Davenport is the current owner of the subject property.
3. 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.
4. The subject property is identified as tax lot 100 on Lincoln County Assessor’s map 10-10-33-00, which is taxed as real property by Lincoln County.
5. The T-C zone provisions (LCC 1.1375) applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
6. The T-C zoning restricts uses; specifically, the T-C zone standards, as applied to the subject property, prohibit the establishment of a single-family dwelling.
7. The claimant has submitted evidence of a diminution in value caused by the T-C zone restrictions in the form of a competitive market analysis prepared by a licensed real estate broker. The resulting letter of opinion states that the land use regulations that prohibit the establishment of a dwelling on the subject property have the effect of reducing the fair market value of the subject property by at least \$70,000.
8. According to the Lincoln County deed records, a family member of the claimant first acquired an interest in the subject

property in 1953. The claimant, Steven J. Davenport, acquired his present interest in the subject property on May 22, 1995, and has maintained an ownership interest continuously since that time.

9. The currently effective T-C zone regulations governing the establishment of dwellings 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 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 January 4, 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 owner, Steven J. Davenport, pursuant to Subsection (5) of Ballot Measure 37.
2. The land use regulations which are the subject of the claim, specifically the restrictions on dwellings imposed by LCC 1.1375 (T-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 owner of the property, Steven J. Davenport 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 T-C zone restrictions 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 present 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 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 not applying any Lincoln County Code provisions enacted since May 22, 1995. 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 claimant to use the subject property in the manner set forth in his 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 T-C zone provisions in effect in 1995, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler  
Director