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

In the Matter of)
)
The Ballot Measure 37 Claim of Walter and Sara Maguire,)
Gary Hamilton, Agent, Case File No.06-LURCC-06) **ORDER NO. 11-06-380**

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

WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and ambiguous provisions and that future litigation or legislative action will be necessary to clarify the measure's terms. The County, therefore, adopted procedures in Board of Commissioners Orders #12-04-318 and #4-05-120 to assess claims in a timely manner and to require factual and analytical information as part of the claim so the County will have a rational basis for its decision on each claim; and

WHEREAS on May 22, 2006, Walter and Sara Maguire filed a Measure 37 claim seeking compensation, or the modification, removal or non-application of land use regulations ("waiver") that restrict new parcel creations to a minimum of two acres. A "waiver" would allow the claimants to apply RR-2 zoning provisions in effect when they acquired the property in 1990, which allowed for a one-acre minimum lot size

1 on the subject property. The property is approximately 81 acres in size and is further identified as Tax Lot
2 300 on Lincoln County Assessor's Map 12-11-18; tax lot 100 on Map 12-11-18-AC; tax lots 100 and 101 on
3 Map 12-11-18-CA; and tax lots 16300 and 16400 on Map 12-11-18-DB. County records and the filed claim
4 are found in Lincoln County Planning Department File No. 06-LURCC-06 and by this reference are
5 incorporated into this order as if fully set forth; and
6

7 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-120, a
8 hearing was held on September 15, 2006, on the claim before the Planning Director as Hearings Officer, for
9 the purpose of receiving facts and evidence related to determining the validity of the claim. Prior to the
10 hearing, written testimony was received in opposition to the claim from two parties; two other parties provided
11 additional testimony in the form of comments. This written testimony is a part of the record of the subject
12 claim. At the hearing, the claimants provided testimony in support of the claim. There was no oral testimony
13 in opposition to the claim. The Board noted in consideration of this claim that wetlands, on site-sewage
14 requirements, and other development restrictions may limit the number of parcels that can be created. The
15 Board also noted that clustering uses under the planned development provisions of the LCC may be restricted
16 by Oregon Administrative Rules; and
17

18 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation that
19 is attached to this order as Exhibit "A" and by this reference incorporated herein. That report finds and
20 concludes that the claim when submitted was valid, and recommends that the Board, lacking funds for
21 compensation, in the alternative modify, remove or not apply the restrictions (commonly referred to as a
22 "waiver") by not applying the current RR-2 (Rural Residential) two-acre minimum zone regulations (LCC
23 1.1345) at issue in the subject claim that were enacted by Lincoln County in their present form by Ordinance
24 #396 in 1990. The current RR-2 zone standards at issue restrict the use of this private real property to only
25 those uses expressly authorized in the RR-2 zone; specifically, in the case of the subject property, these
26 regulations limit division of the property to parcels of not less than two acres through the establishment of a
27 minimum parcel size requirement (LCC 1.1345(3)(a)). Applying the "waiver" would allow the claimants to
28 apply the regulations to the subject property which allow parcels of not less than one acre in size, as permitted
29 by the RR-1-2 zoning in effect at the time of the claimants' acquisition of the subject property in 1990, in lieu
30 of the minimum two acre parcel-size restrictions in LCC 1.1345(3)(a) currently in place. This would, in
31 accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owners to use the property
32 for a use permitted at the time of the owners' acquisition; and
33

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

41 WHEREAS based on what is known at this time, the Board finds it is in the public interest, due to the
42 lack of resources to pay compensation, to modify, remove or choose not to apply the challenged land use
43 regulation to the subject property and issue the "waiver" to claimants.
44

45 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

- 46 1. Claimants are placed on notice that Oregon courts continue to interpret provisions in Measure 37
47 which may change the way claims are treated. Claimants proceed in this matter knowing that any action

1 taken by the Lincoln County Board of County Commissioners could be null and void if a court of competent
2 jurisdiction interprets Measure 37 in any fashion which alters the Board's approval. Lincoln County does
3 not waive any rights or remedies under law by granting a "waiver" under the law.

4
5 2. The Measure 37 claim of Walter and Sara Maguire, Lincoln County Case File No.6-LURCC-06,
6 was a valid claim when filed on May 22, 2006. The Board of Commissioners declines to pay just
7 compensation for the claim. In lieu of compensation, Lincoln County Code (LCC) Section 1.1345 is
8 modified, removed or not applied for (RR-2 Rural Residential 2-acre minimum) against the subject property
9 to the following effect:

- 10
11 ○ The non-application of regulations would be limited to restrictions on division of the
12 subject property provided for in RR-2 zoning, LCC 1.1345. This would allow the
13 claimants to apply for approval of dividing the subject property into additional
14 parcels of not less than one acre in size, as permitted by the RR-1-2 zoning in effect
15 at the time of the claimants' acquisition of the property in 1990. All other provisions
16 of the Lincoln County Code would continue to apply, including the previously
17 effective one-acre minimum parcel size requirement of the RR-1-2 zone.
18
19 ○ Establishment of additional land parcels on the subject property would be subject to
20 all applicable public health and safety regulations, including but not limited to: land
21 division procedures, building codes, on-site sewage disposal rules and requirements
22 and state highway approach permit requirements. Other requirements (including but
23 not limited to development clustering and wetlands) would also apply.

24
25 3. A state of Oregon "waiver" under Measure 37 may be required for the development or use of the
26 subject property. Lincoln County lacks authority to waive state regulations or laws. This order does not
27 affect any land use regulations of the State of Oregon. The claimants are responsible for seeking
28 compensation or "waiver" from the state of any applicable state laws. The Planning Director shall send
29 notice of the Board's decision to the Director of the Department of Land Conservation and Development. If
30 a State Measure 37 claim is required, no use, development, permits or other development applications will be
31 processed or approved by Lincoln County unless the state has issued, if appropriate, its own "waiver."

32
33 4. This "waiver" provision is void if the property owner or property owner's successors are
34 compensated by another governmental agency, including the state, for a reduction in value resulting from the
35 same or similar land use regulations on the subject property.

36
37 5. Excepting new land use regulations imposed after the date of this decision, and subject to applicable
38 review rights as permitted under Measure 37, this final decision bars a subsequent Measure 37 claim against
39 Lincoln County as to the subject property.

40
41 6. Transferability of the "waiver" granted by the County under this decision is unknown under the
42 current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law.
43 Granting of this "waiver" does not commit the County to issuance of development or building permits, if
44 those actions are not allowed under law.

45
46 7. This order be recorded in the Lincoln County Deed Records maintained by the Lincoln County
47 Clerk without payment of recording fees.

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

DATED this 8th day of November, 2006.

LINCOLN COUNTY BOARD OF COMMISSIONERS



DON LINDLY, Chair



BILL HALL, Commissioner



TERRY N. THOMPSON, 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: 6-LURCC-06

DATE FILED: 05/22/06

CLAIMANT: Walter and Sara Maguire; Gary Hamilton, agent

REQUEST: The claimant seeks compensation for, or the modification or removal of, land use regulations that establish a two-acre minimum parcel size for land divisions in the RR-2 zone.

A. REPORT OF FACTS:

1. **Lot Size:** Approximately 81 acres
2. **Property Location:** The subject property is located east of Highway 101 between 148th Drive and Makai and is identified as tax lot 300 on Lincoln County Assessor's map 12-11-18; tax lot 100 on map 12-11-18-AC; tax lots 100 and 101 on map 12-11-18-CA; and tax lots 16300 and 16400 on map 12-11-18-DB.
3. **Zoning Designation:** RR-2 (Rural Residential)
4. **Plan Designation:** Dispersed Residential
5. **Surrounding Land Use:** Adjacent uses in the area consist primarily of single family residences at densities varying from rural to suburban.
6. **Topography & Vegetation:** A substantial area of the western portion of the property consists of a sizable wetland area at the confluence of Pumphouse and Tracy Creeks. The property slopes upward from this area to the east, where it is

vegetated with typical coastal forest 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: Seal Rock Water District
 - c. Electricity: Central Lincoln P.U.D.

9. **Development Constraints:** Substantial areas of jurisdictional wetlands are identified on the National Wetlands Inventory.

B. EVALUATION OF THE REQUEST:

1. Background:

Gary Hamilton of Litchfield & Carstens, LLP filed a Land Use Regulation Compensation Claim on behalf of claimants Walter and Sara Maguire on May 22, 2006. This claim was filed with the Department of Planning and Development in accordance with the procedure established for Ballot Measure 37 (ORS 197.352) claims by Lincoln County Board of Commissioners Order # 12-04-318. The Maguire property is located north of the Makai development, east of Highway 101 near the intersection of 148th Street. The current zoning of the property is RR-2, Rural Residential, two-acre minimum. The claimants assert a diminution in the value of the property resulting from the restrictions of the RR-2 zoning applied after their date of acquisition, more specifically, the restriction on new parcel creations to a minimum of two acres. The claimants state that their desired remedy to the claim is the removal or modification of the RR-2 lot size restriction in a manner that will permit the division of the subject property into parcels of one acre in size which was, according to claimants, permitted at the time of their acquisition.

Deed records researched by the department document the claimants' acquisition of the subject property in 1990. At that time, acknowledged county code provisions applicable to the subject property permitted the creation of one-acre parcels.

On September 15, 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. Prior to the hearing, written testimony was received in opposition to the claim from two parties; two other parties provided additional testimony in the form of comments. This written testimony is a part of the record of the subject claim. At the hearing, the claimants provided testimony in support of the claim. There was no oral testimony 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 claimants, Walter and Sara Maguire acquired their original interest in the property by warranty deed on October 17, 1990 (recorded at Book 223, page 0482, Lincoln County Deed Records). Records of the Lincoln County Assessor’s office confirm that Walter and Sara Maguire 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 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 use of this private real property to only those uses expressly authorized in the RR-2 zone. Specifically, in the case of the subject property, these regulations limit division of the property to parcels of not less than two acres through the establishment of a minimum parcel size requirement [LCC 1.1345 (3)(a)].

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

As noted, the currently effective minimum lot size requirements of the RR-2 zone limit the division of the subject property to parcels of not less than two acres.

Claimants assert that these restrictions reduce fair market value of the property. In support of this claim, claimants have provided an estimate from a licensed real estate broker of the value of 40 potential residential parcels which could be created under present zoning, compared to the value of 80 potential residential parcels additional parcels that could be created based on the acquisition date regulations. This estimate is based on an evaluation of previous sales of similarly situated parcels in the area. Based on this estimate, claimants assert a diminution in value of \$3.36 million. This comparison uses gross sales receipts potential and does not factor in development or other costs associated with actually bringing these prospective parcels to market. Nonetheless, the information on its face, i.e., the market value difference between 40 home sites versus the 80 potential 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.

It should be noted that the claim identifies several provisions of the county land division regulations (LCC 1.3210-1.3257) as subject to compensation or removal pursuant to the provisions of ORS 197.352. There is no explanation or analysis indicating how these regulations act to restrict permissible uses of the property or how such regulations result in a reduction of fair market value. These land division regulations specify design standards for proposed subdivisions of land, and they set forth procedures and technical specifications for the creation and recordation for subdivision and partition plats. As these regulations do not, on their face, restrict uses that may be established on the property, the county rejects the assertion that any provisions of LCC 1.3210-1.3257 are subject to compensation under the requirements of Measure 37.

- 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 imposed by the RR-2 zone. These restrictions were enacted to comply with Statewide Planning Goals 11 and 14, which mandate limiting development intensity in areas outside of urban growth boundaries to rural levels. The purpose of the RR-2 zone is to limit development in rural areas to rural types and levels. 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 October 17, 1990. The two-acre minimum lot size requirement in the RR-2 zone was enacted in 2000, so the regulation giving rise to the claim was enacted after the 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 May 22, 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. Walter and Sara Maguire filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on May 22, 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 300 on Lincoln County Assessor's map 12-11-18; tax lot 100 on map 12-11-18-AC; tax lots 100 and 101 on map 12-11-18-CA; and tax lots 16300 and 16400 on map 12-11-18-DB.
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 limit the division of the subject property through the imposition of a two-acre minimum parcel size requirement.
6. The claimants have submitted evidence of a diminution in value caused by the RR-2 zone restrictions in the form of an estimated value of parcels which could be created under zoning in effect at the time of the claimants' acquisition, which is compared to an estimated value of the parcels which could be created under present RR-2 zone restrictions. The estimate concludes that the land use regulations that limit the division of the subject property have the effect of reducing the fair market value of the subject property by \$3.36 million.
7. According to the Lincoln County Deed Records, the claimants, Walter and Sara Maguire, first acquired an interest in the subject property in 1990, and have maintained an ownership interest continuously since that time.

8. The currently effective RR-2 zone regulations governing land divisions were enacted by Lincoln County in 2000 (Ordinance # 396), after the claimants' date of acquisition.
9. The RR-2 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 May 22, 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, Walter and Sara Maguire, 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 1.1345 (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 owners of the property, Walter and Sara Maguire, 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 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.

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 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 current minimum parcel size requirements in the RR-2 zone not be applied to the subject property. This would allow the claimants to divide the subject property into additional parcels of not less than one acre in size, as permitted by the RR-1-2 zoning in effect at the time of the claimants' 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 land division restrictions of the RR-2 zone in order to permit the establishment of additional 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 current two-acre minimum parcel size requirements provided for in LCC 1.1345. All other provisions of the Lincoln county code would continue to apply, including the previously effective one-acre minimum parcel size requirement of the RR-1-2 zone.
- Establishment of additional land parcels 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, and state highway 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 for the allowance of the creation of one-acre parcels on the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director

Case file # 6-LURCC-06



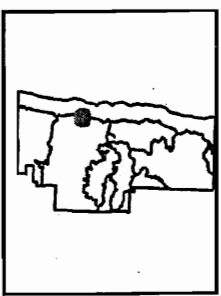
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1 in. = 800 ft.

Lincoln County
Geographic Info System

County
Shore2
Tandem-white

EXHIBIT A
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10/31/2006

