

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

3
4 In the Matter of)
5)
6 *The Ballot Measure 37 Claim of*) **ORDER NO. 1-06-11**
7 *Robert and Carol Howard*)
8
9

10 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot
11 Measure 37. The Measure amends ORS Chapter 197 to require, under certain circumstances,
12 actions to address claims of owners of real property if government land use regulations reduce fair
13 market property value; and

14
15 WHEREAS Ballot Measure 37 provides that to maintain a claim, an owner of real property
16 must make a “written claim for compensation” to the government entity enacting, enforcing or
17 applying a land use regulation that allegedly restricts the use of the owner’s property and has the
18 effect of reducing its fair market value; and

19
20 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims
21 procedures with certain limitations; and

22
23 WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim
24 that reduces fair market value of real property or, in the alternative and in lieu of payment of just
25 compensation, allows the County to modify, remove or not apply the land use regulation allegedly
26 supporting a claim reducing a property’s fair market value; and

27
28 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for
29 compensation and make decisions on those claims. A determination to modify, remove or not
30 apply a land use regulation or compensate a property owner must be based on substantial factual
31 information and analysis; and

32
33 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and
34 ambiguous provisions and that future litigation or legislative action will be necessary to clarify the
35 measure’s terms. The County, therefore, adopted procedures in Board of Commissioners Orders
36 12-04-318 and 4-05-120 to assess claims in a timely manner and to require factual and analytical
37 information as part of the claim so the County will have a rational basis for its decision on each
38 claim; and

39
40 WHEREAS on August 22, 2005 Robert and Carol Howard, filed a Measure 37 claim
41 seeking compensation, or the modification, removal or non-application of land use regulations that
42 establish an 80-acre minimum parcel size for land divisions and also restrict the establishment of

1 additional single family dwellings in the County A-C (Agricultural Conservation) zone which
2 applies to the subject property. There are two parcels that make up the subject property. Both are
3 located of Yasek Loop off of Highway 229. The first parcel, approximately 15.84 acres is located
4 at 1177 Yasek Loop and is further identified on Lincoln County Assessor's Map #0-10-29 as tax
5 lot 301. The second parcel, approximately 9.35 acres, does not have a street address, but is located
6 several hundred feet north of the first parcel and is further identified on Lincoln County Assessor's
7 Map #10-10-29 as tax lot 304. Together the two parcels comprise the subject property. County
8 records and the filed claim are found in Lincoln County Planning Department File No. 22-
9 LURCC-05 and by this reference are incorporated into this Order as if fully set forth; and

10
11 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-
12 120, a hearing was held on October 25, 2005 on the claim before the Planning Director as
13 Hearings Officer, for the purpose of receiving facts and evidence related to determining the
14 validity of the claim. The claimants provided testimony in support of the claim. There was no
15 testimony in opposition to the claim.

16
17 WHEREAS the Planning Director has issued his Department's Staff Report and
18 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
19 herein. That report finds and concludes that the claim when submitted was valid and recommends
20 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
21 restrictions (commonly referred to as a "waiver") from the current restrictions in Lincoln County
22 Code (LCC) Section 1.1373 (A-C Zone) (adopted in Ordinance #347 in 1994) that in their present
23 form require an 80-acre minimum parcel size for land divisions and also restrict the establishment
24 of additional single family dwellings on the subject property. This "waiver" would allow the
25 claimants to use the property for uses permitted at the time of their acquisition of the subject
26 property in 1969 in accordance with the requirements of Subsection (8) of Ballot Measure 37; and

27
28 WHEREAS subsequent to the application, hearing and staff report and recommendations,
29 Marion County Circuit Court Judge Mary Mertens James decided in *Macpherson, et al. v.*
30 *Department of Administrative Services, et al.* (Marion County Circuit Court Case No. 05C-10444)
31 that Measure 37 is unconstitutional. A final judgment was entered in that case, and no stay was
32 granted by either the circuit court or the supreme court. That decision is expected to be appealed
33 and the results of that appeal are very speculative. It is not known when a decision on the appeal
34 will be issued. It is legally unclear whether or not the Marion County Circuit Court's decision
35 applies directly to Lincoln County's actions concerning Measure 37 claims at this juncture;
36 therefore, the impacts on implementation of Measure 37 in Lincoln County continue to be
37 reviewed. What is known is that the circuit court decision applies to claims against the State of
38 Oregon and four other Oregon counties (not including Lincoln County). Those jurisdictions are
39 ordered to stop accepting and ruling on claims immediately; the State has taken the position that
40 the decision also invalidates State Measure 37 claims already granted; and

41
42 WHEREAS any claimant now proceeding on a claim does so at the risk of having any
43 County action on the claim declared null and void, and furthermore proceeds with the knowledge

1 that properties needing a waiver of State laws to move forward on development of a waiver are
2 invalid and cannot be honored by the County in any development application requiring such a
3 waiver; and
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5 WHEREAS the Board has considered the report and recommendations of the Planning
6 Director and County Counsel, including the implications known at this time for the circuit court
7 decision holding Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the
8 Board desires to proceed cautiously with processing this Measure 37 claim. Therefore, the Board
9 will decide this Measure 37 claim after placing the claimants on notice of the court decision.
10 However, where a State waiver is required to permit development, no permits will be issued, uses
11 allowed, or decisions taken by the County on development of the property until the case is finally
12 decided and the State issues, if appropriate, its own waiver or an existing waiver is reactivated by
13 the appeals court's decision; and
14

15 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is
16 in the public interest, due to the lack of resources to pay compensation, to modify, remove or
17 choose not to apply the challenged land use regulation to the subject property and issue the
18 "waiver" to claimants.
19

20 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

21 1. Claimants Robert and Carol Howard are placed on notice that the Marion County
22 Circuit Court has found Measure 37 unconstitutional. While appeals of that decision are
23 pending, it applies directly to Measure 37 claims made to the State of Oregon. Claimants
24 proceed in this matter knowing that any action taken by the Lincoln County Board of County
25 Commissioners could be null and void if the circuit court decision is upheld on appeal and that
26 Lincoln County does not waive any rights or remedies under law by granting a "waiver" under
27 the challenged law.
28

29 2. If Measure 37 is unconstitutional or otherwise void as found by the appeals courts, then
30 this Order shall be and is automatically rescinded without any further action by the Board of
31 Commissioners. Claimants have no vested right in this decision should the measure be
32 unconstitutional.
33

34 3. If Measure 37 is constitutional, the Measure 37 claim of Robert and Carol Howard,
35 Lincoln County Case File No. 22-LURCC-05, was a valid claim when filed on August 22, 2005.
36 The Board of Commissioners declines to pay just compensation for the claim. In lieu of
37 compensation, Lincoln County Code (LCC) Section 1.1373 is modified, removed or not applied
38 for Robert and Carol Howard against the subject property to the following effect:
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- 40 • The non-application of regulations would be limited to the minimum parcel size
41 requirements and restrictions on dwellings provided for in LCC 1.1373, thereby
42 allowing claimants to create up to six additional parcels and the placement of one

1 single family dwelling on each resultant parcel. All other provisions of the Lincoln
2 County Code would continue to apply.

- 3
- 4 • Establishment of additional land parcels and dwellings on the subject property is
5 subject to all applicable public health and safety regulations, including but not
6 limited to land division procedures, building codes, on-site sewage disposal rules
7 and requirements, flood hazard regulations, and County road approach permit
8 requirements.

9

10 4. Measure 37 is currently invalid as applied to claims against the State of Oregon. A
11 State of Oregon “waiver” under Measure 37 may be required for the development or use of the
12 subject property. Lincoln County lacks authority to waive state regulations or laws. This Order
13 does not affect any land use regulations of the State of Oregon. The claimants are responsible for
14 seeking compensation or “waiver” from the State of any applicable State laws. The Planning
15 Director shall send notice of the Board’s decision to the Director of the Department of Land
16 Conservation and Development. If a State Measure 37 claim is required, no use, development,
17 permits or other development applications will be processed or approved by Lincoln County until
18 the appeals of the Marion County Circuit Court are decided and the State has issued, if
19 appropriate, its own “waiver.” State waivers granted before the Marion County Circuit Court
20 decision are considered invalid by the State.

21

22 5. This “waiver” provision is void if the property owners or property owners’ successors
23 are compensated by another governmental agency, including the State, for a reduction in value
24 resulting from the same or similar land use regulations on the subject property.

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26 6. Excepting new land use regulations imposed after the date of this decision, and subject
27 to applicable review rights as permitted under Measure 37, this final decision bars a subsequent
28 Measure 37 claim against the County as to the subject property.

29

30 7. Transferability of the “waiver” granted by the County under this decision is unknown
31 under the current status of Measure 37. Transferability of the “waiver” is allowed to the extent
32 permitted by law. Granting of this “waiver” does not commit the County to issuance of
33 development or building permits, if those actions are not allowed under law.

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35 8. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln
36 County Clerk without payment of recording fees.

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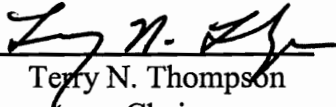
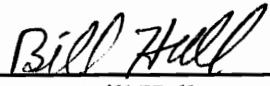
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1 9. Copies of this Order be provided to the Planning Director, County Counsel, and
2 claimants.

3 DATED this 4th day of January, 2006.

4
5 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

6
7
8  Excused 
9 Terry N. Thompson Don Lindly Bill Hall
10 Chair Commissioner Commissioner



DEPARTMENT OF PLANNING AND DEVELOPMENT

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LAND USE REGULATION COMPENSATION CLAIM

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

CASE FILE: 22-LURCC-05

DATE FILED: 8/22/05

CLAIMANT: Robert & Carol Howard; Kurt Carstens, agent

REQUEST: The claimants seek compensation for, or the modification or removal of, land use regulations that establish an 80-acre minimum parcel size for land divisions and restrict the establishment of additional single family dwellings on the subject property.

A. REPORT OF FACTS:

1. **Lot Size:** 25.19 total acres
2. **Property Location:** Two properties are the subject of this case. They are located on Yasek Loop off Highway 229. One of the properties (15.84 acres) has an address of 1177 Yasek Loop, and the other property (9.35 acres) is a few hundred feet to the north. They are also identified as Lincoln County Assessor's map 10-10-29 as tax lots 301 and 304, respectively.
3. **Zoning Designation:** A-C (Agricultural Conservation)
4. **Plan Designation:** Agricultural Land
5. **Surrounding Land Use:** Adjacent uses along Yasek Loop and Highway 229 are comprised primarily of scattered rural residences, with some small-scale

agricultural activities.

6. **Topography & Vegetation:** The properties are situated along Yasek Loop, which follows Depot Slough, a tributary of the Yaquina River. The properties rise in elevation from Yasek Loop approximately 80 feet at a 10 percent slope.
7. **Existing Structures:** A single-family dwelling exists on tax lot 304.
8. **Utilities:** The following utilities are proposed 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:** Roughly six acres of tax lot 301 (9.35 acres) is within the regulated flood hazard area of Depot Slough.

B. EVALUATION OF THE REQUEST:

1. Background:

Kurt Carstens, acting as agent, filed a Land Use Regulation Compensation Claim on behalf of property owners Robert and Carol Howard on August 22, 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 Howard property is located on Yasek Loop in between Toledo and Siletz, approximately 2.5 miles north of the Highway 20 – Highway 229 intersection. 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 parcels and permit the establishment of one single-family dwelling on each resulting parcel.

Planning staff met with claimants prior to the filing of their claim and discussed in detail the basic elements of the claim. Deed records submitted with the claim document the claimants' acquisition of the subject property in December of 1968. There were no land use regulations in effect in this area of Lincoln County in December of 1968.

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 claimants 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.”**

The claimants, Robert and Carol Howard, acquired their original interest in the property through a land sales contract entered into on December 16, 1968, and recorded in the Lincoln County Deed Records, beginning at Book 105, page 55. In 1989, the property was transferred to from Robert and Carol Howard to themselves, Robert and Carol Howard, which ownership remains effective at present.

- 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, claimants have submitted an appraisal prepared by a real estate broker. The appraisal states that the value of the six proposed

residential parcels is \$398,000. This value is based on the retail price of each parcel individually. The appraisal provides a statement of current fair market value of the property at \$75,000. Because the estimated retail value of the proposed parcels does not take into account development and other costs associated with bringing the properties to market, the difference in value of the property as is, versus as subject to regulations at the time of acquisition by the present owners, is likely less than the stated \$323,000. However, based on the information and evidence provided, the department concludes that there has been at least some diminution in value as a result of the current land use regulations imposed after the current owners' date of acquisition.

- 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 on December 16, 1969 (Book 105, page 55). The A-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 of the present 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 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 August 22, 2005, within two years of the December 3, 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. Robert and Carol Howard filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on August 22, 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 lots 301 and 304 on Lincoln County Assessor's map 10-10-29, 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 have submitted evidence of a diminution in value caused by the A-C zone restrictions in the form of an appraisal prepared by a real estate broker. The appraisal concludes 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 by \$323,000.
7. According to the Lincoln County deed records, the claimants, Robert and Carol Howard, first acquired an interest in the subject property on December 16, 1968, 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 Subsection (3) of Ballot Measure 37.
10. The subject claim was filed on August 22, 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, Robert and Carol Howard, 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, Robert and Carol Howard, 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 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 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 six parcels as proposed and to establish one single-family dwelling on each of the resultant parcels. As there were no zoning regulations in place at the time of the claimants' acquisition of the subject property in 1968, the allowance to partition the subject property and establish dwellings on the resultant parcels 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 dwelling restrictions of the A-C zone in the manner requested would permit the claimant owner to create six additional rural home sites on parcels of approximately 25 combined acres. The claimant's stated intent to create up to six parcels ranging from roughly two to five acres in size would be generally consistent 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 claimant's 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 in order to permit the creation of up to six additional land parcels and the placement of one single family residence on each resultant parcel. All other provisions of the Lincoln county code would continue to apply.
- Establishment of additional land parcels and dwellings 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 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