

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 Mary Jane Robb and*)
7 *Teresa Simmons*)

ORDER NO. 11-05-331

8
9 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37.
10 The Measure amends ORS Chapter 197 to require, under certain circumstances, actions to address claims
11 of owners of real property if government land use regulations reduce fair market property value; and
12

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

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

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

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

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

36 WHEREAS on June 28, 2005, Dennis Bartoldus, agent for Mary Jane Robb and Teresa Simmons
37 (hereinafter "claimants"), filed a Measure 37 claim on behalf of claimants seeking compensation, or the
38 modification, removal or non-application of land use regulations that regulate the minimum parcel size and
39 establish restrictions on dwellings provided for in Lincoln County Code (LCC) Section 1.1375, Timber
40 Conservation zone (T-C) on property located at 458 Steere Creek Road, further identified as Tax Lot 500
41 on Assessor's Map # 10-08-08, and Tax Lots 100, 102, 104, and 105 on Lincoln County Assessor's Map #
42 10-08-17. County records and the filed claim are found in Lincoln County Planning Department File No.
43 16-LURCC-05 and by this reference are incorporated into this Order as if fully set forth; and
44

45 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-120, a
46 hearing was held on August 8, 2005 on the claim before the Planning Director as Hearings Officer, for the

1 purpose of receiving facts and evidence related to determining the validity of the claim. The claimants'
2 agent provided testimony in support of the claim. There was no testimony in opposition to the claim.
3

4 WHEREAS the Planning Director has issued his Department's Staff Report and Recommendation
5 that is attached to this order as Exhibit "A" and by this reference incorporated herein. The report notes the
6 difference in acquisition dates for the two separate claimants (claimant Robb 1953 and 1977; claimant
7 Simmons 1990) that impacts the scope of the waivers that were sought and which could be granted. That
8 report further finds and concludes that the claim when submitted was valid and recommends that the
9 Board, lacking funds for compensation, in the alternative modify, remove or not apply the restrictions
10 (commonly referred to as a "waiver") on land divisions and dwellings imposed by LCC 1.1375 (T-C zone).
11 This "waiver" would allow the claimants to use the property for uses permitted at the time of their
12 acquisition of the subject property in 1953 (Robb) and 1990 (Simmons) respectively (Tax Lots 100, 102,
13 104 and 105 on Assessor's Map 10-08-17 called Property A in the staff report) and 1977 (Robb) and 1990
14 (Simmons) respectively (Tax Lot 500 on Assessor's Map 10-08-08 Property B in the staff report) in
15 accordance with the requirements of Subsection (8) of Ballot Measure 37; and
16

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

30 WHEREAS any claimant now proceeding on a claim does so at the risk of having any County
31 action on the claim declared null and void, and furthermore proceeds with the knowledge that properties
32 needing a waiver of State laws to move forward on development of a waiver are invalid and cannot be
33 honored by the County in any development application requiring such a waiver; and
34

35 WHEREAS the Board has considered the report and recommendations of the Planning Director
36 and County Counsel, including the implications known at this time for the circuit court decision holding
37 Measure 37 unconstitutional. Given that the status of Measure 37 is in flux, the Board desires to proceed
38 cautiously with processing this Measure 37 claim. Therefore the Board will decide this Measure 37 claim
39 after placing the claimant on notice of the court decision. However, where a State waiver is required to
40 permit development, no permits will be issued, uses allowed, or decisions taken by the County on
41 development of the property until the case is finally decided and the State issues, if appropriate, its own
42 waiver or an existing waiver is reactivated by the appeals court's decision; and
43

44 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is in the
45 public interest, due to the lack of resources to pay compensation, to modify, remove or choose not to apply
46 the challenged land use regulation to the subject property and issue the "waiver" to claimants.
47

1
2 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

3 1. Claimants Mary Jane Robb and Teresa Simmons are placed on notice that the Marion County
4 Circuit Court has found Measure 37 unconstitutional. While appeals of that decision are pending, it
5 applies directly to Measure 37 claims made to the State of Oregon. Claimants proceed in this matter
6 knowing that any action taken by the Lincoln County Board of County Commissioners could be null and
7 void if the circuit court decision is upheld on appeal and that Lincoln County does not waive any rights
8 or remedies under law by granting a “waiver” under the challenged law.
9

10 2. If Measure 37 is unconstitutional or other wise void as found by the appeals courts, then this
11 Order shall be and is automatically rescinded without any further action by the Board of Commissioners.
12 Claimants have no vested right in this decision should the measure be unconstitutional.
13

14 3. If Measure 37 is constitutional, the Measure 37 claim of Mary Jane Robb and Teresa Simmons,
15 Lincoln County Case File No. 16-LURCC-05, was a valid claim when filed on June 28, 2005. The Board
16 of Commissioners declines to pay just compensation for the claim. In lieu of compensation, Lincoln
17 County Code (LCC) Section 1.1375 is modified, removed or not applied for Mary Jane Robb and
18 Theresa Simmons against the subject property to the following effect:
19

- 20 • The non-application of regulations would be limited to the minimum parcel size
21 requirements and restrictions on dwellings provided for in LCC 1.1375. For Mary Jane
22 Robb, that would allow up to 67 three to five acre parcels with one dwelling per resultant
23 parcel for the aggregate Properties A and B. For Teresa Simmons, that would allow
24 creation of 40 acre parcels for the entire subject property with uses allowed under the T-C
25 zoning regulations in effect in 1990. All other provisions of the Lincoln County Code
26 would continue to apply.
27
- 28 • Establishment of additional land parcels on the subject property, if allowed, and placement
29 of dwellings would be subject to all applicable public health and safety regulations,
30 including but not limited to land division procedures, building codes, on-site sewage
31 disposal rules and requirements, flood hazard regulations, and county road approach
32 permit requirements.
33

34 4. Measure 37 is currently invalid as applied to claims against the State of Oregon. A State of
35 Oregon “waiver” under Measure 37 may be required for the development or use of the subject property.
36 Lincoln County lacks authority to waive state regulations or laws. This Order does not affect any land
37 use regulations of the State of Oregon. The claimant is responsible for seeking compensation or “waiver”
38 from the state of any applicable state laws. The Planning Director shall send notice of the Board’s
39 decision to the Director of the Department of Land Conservation and Development. If a State Measure
40 37 claim is required, no use, development, permits or other development applications will be processed
41 or approved by Lincoln County until the appeals of the Marion County Circuit Court are decided and the
42 State has issued, if appropriate, its own “waiver”.
43

44 5. This “waiver” provision is void if the property owner or property owner’s successors are
45 compensated by another governmental agency, including the state, for a reduction in value resulting from
46 the same or similar land use regulations on the subject property.

1
2 6. Excepting new land use regulations imposed after the date of this decision, and subject to
3 applicable review rights as permitted under Measure 37, this final decision bars a subsequent Measure 37
4 claim against the County as to the subject property.

5
6 7. Transferability of the "waiver" granted by the County under this decision is unknown under the
7 current status of Measure 37. Transferability of the "waiver" is allowed to the extent permitted by law.
8 Granting of this "waiver" does not commit the County to issuance of development or building permits, if
9 those actions are not allowed under law.

10
11 8. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln County
12 Clerk without payment of recording fees.

13
14 9. Copies of this Order be provided to the Planning Director, County Counsel, claimants' agent
15 and claimants.

16 DATED this 2nd day of November, 2005.

17 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

18
19 
20 _____
21 TERRY N. THOMPSON, Chair

22
23 
24 _____
25 DON LINDLY, Commissioner

26
27 
28 _____
29 BILL HALL, Commissioner

30 K:\Measure 37\M-37 Orders\order robb.simmons 16-LURCC-05.DOC