

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 Samuel and Cheryl*)
7 *Scheinberg and Scheinberg Family Trust*) **ORDER NO. 11-05-329**
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
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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
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18 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims procedures with
19 certain limitations; and
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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
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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
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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
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36 WHEREAS on May 27, 2005 Joan M. Chambers, agent for Samuel and Cheryl Scheinberg and the
37 Scheinberg Family Trust (claimants), filed a Measure 37 claim on behalf of claimants seeking
38 compensation, or the modification, removal or non-application of land use regulations that prohibit and
39 regulate land divisions and placement of additional residences on property located at 5590 NE Devils Lake
40 Road, further identified as Tax Lots 900 and 1102 on Lincoln County Assessor’s Map # 6-11-36. County
41 records and the filed claim are found in Lincoln County Planning Department File No. 13-LURCC-05 and
42 by this reference are incorporated into this order as if fully set forth; and
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44 WHEREAS, after notice to surrounding property owners in accordance with Order #4-05-120, a
45 hearing was held on August 8, 2005 on the claim before the Planning Director as Hearings Officer, for the
46 purpose of receiving facts and evidence related to determining the validity of the claim. The claimants’
47 representative provided testimony in support of the claim. Written testimony in opposition to the claim

1 was submitted into the record by Charles and Doris Cline, property owners and residents of the adjoining
2 Highland Estates development.

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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. That report finds
6 and concludes that the claim when submitted was valid, and recommends that the Board, lacking funds for
7 compensation, in the alternative modify, remove or not apply the restrictions (commonly referred to as a
8 "waiver") in the T-C zone provisions enacted by Ordinance #347 in 1994 and the prohibition against
9 Planned Developments in the T-C zone enacted by Ordinance #367. This would permit the application of
10 the A-2 zone regulations in effect on March 26, 1980 (the claimant's date of acquisition of the subject
11 property), along with the provisions of the Planned Development procedure. This would, in accordance
12 with the requirements of Subsection (8) of Ballot Measure 37, allow the owner to use the property for a
13 use permitted at the time of the owners' acquisition; and

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

27
28 WHEREAS any claimant now proceeding on a claim does so at the risk of having any County
29 action on the claim declared null and void, and furthermore proceeds with the knowledge that properties
30 needing a waiver of State laws to move forward on development of a waiver are invalid and cannot be
31 honored by the County in any development application requiring such a waiver; and

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

41
42 WHEREAS if Measure 37 is constitutional and still the law in Oregon, the Board finds it is in the
43 public interest, due to the lack of resources to pay compensation, to modify, remove or choose not to apply
44 the challenged land use regulation to the subject property and issue the "waiver" to claimants.

1 NOW, THEREFORE IT IS HEREBY ORDERED THAT:

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

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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.

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14 3. If Measure 37 is constitutional, the Measure 37 claim of Samuel and Cheryl Scheinberg and the
15 Scheinberg Family Trust, Lincoln County Case File No. 13-LURCC-05, was a valid claim when filed on
16 May 27, 2005. The Board of Commissioners declines to pay just compensation for the claim. In lieu of
17 compensation, Lincoln County Code (LCC) Sections 1.1375 and the current limitations of the Planned
18 Development procedure, LCC 1.1380, enacted by Ordinance # 367 are modified, removed or not applied
19 for Samuel and Cheryl Scheinberg and the Scheinberg Family Trust against the subject property to the
20 following effect:

- 21
22 • The non-application of regulations would be limited to the currently effective provisions
23 of LCC 1.1375 as enacted by Ordinance #347 and LCC 1.1380 as enacted by Ordinance
24 #367. Instead, the provisions of Ordinance #34 in effect on March 26, 1980 would apply
25 to the subject property. All other provisions of the Lincoln County Code would continue
26 to apply.
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28 • Establishment of any permissible uses on the subject property would be subject to all
29 applicable public health and safety regulations, including but not limited to land division
30 procedures, building codes, on-site sewage disposal rules and requirements, flood hazard
31 area regulations, and county road approach permit requirements.

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

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

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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.

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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.


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

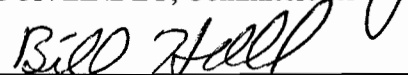
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14 9. Copies of this Order be provided to the Planning Director, County Counsel, and claimants.

15 DATED this 2nd day of November, 2005.

16 **LINCOLN COUNTY BOARD OF COMMISSIONERS**

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18 
19 TERRY N. THOMPSON, Chair

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21 
22 DON LINDLY, Commissioner

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24 
25 BILL HALL, Commissioner

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