

**SUPPLEMENTAL  
AGENDA COVER MEMO**



**DATE:** July 12, 2006  
**TO:** BOARD OF COUNTY COMMISSIONERS  
**FROM:** BILL VANVACTOR, COUNTY ADMINISTRATOR  
 KENT HOWE, PLANNING DIRECTOR  
**RE:** In the Matter of Considering a Ballot Measure 37 Claim and Deciding Whether to Modify, Remove or Not Apply Restrictive Land Use Regulations in Lieu of Providing Just Compensation (PA 05-6581, Bernheim)

This item was previously heard on June 14. At that hearing, there were questions regarding the ownership of the property. The claimant extended the processing timeline to July 12 and submitted additional information on June 21 and July 5.

Based on the evidence in the record on June 14, it appeared tax lots 105 and 106 were sold in 1969 and then reacquired in 2005. However, based on the information submitted on June 21, the deeds recorded on March 12, 1969, and April 9, 1969, released any interest Bernheim had acquired in any other International Paper property due to an incorrect legal description in a deed recorded on December 16, 1968. Based on this new evidence, it appears Bernheim acquired an interest in tax lots 105 and 106 on January 16, 1969 (WD 51150). That was the date the deed with the correct legal description was recorded.

The other issue raised at the hearing on June 14 concerned the current ownership of the property. An Option Agreement to purchase the property was signed on May 26, 2005. On that date, Bernheim agreed to sell the property to a certain person, for a certain amount. This option may be exercised at any time by the purchaser. That option is unusual because it does not have an expiration date. The Board must determine what significance that option agreement has, if any, on this Measure 37 claim.

The following tables summarize the acquisition dates for each lot, based on the evidence in the record as of the date of this memo.

**Table 1: Analysis of Acquisition dates**

Tax lot	Date	Deed	Acres
100	April 27, 1966	BS 7704952	363
101	Dec 16, 1959	WD 88332	159
101 (portion)	Nov 5, 1980	WD 8056544	1
105	Jan 13, 1969	WD 51150	17
106	Jan 13, 1969	WD 51150	9

**Table 2: Summary of Relevant Submitted Deeds**

<b>Document</b>	<b>Date</b>	<b>Seller/Buyer</b>	<b>Tax lots</b>
Warranty Deed 88332	Dec 16, 1959	Marcotte to Bernheim	Acquired 101, 105 and 106.
<i>Bargain and Sale Deed 7704952</i>	<i>April 27, 1966</i>	<i>West Coast Properties to Bernheim</i>	<i>Acquired tax lot 100.</i>
Warranty Deed 48289	Nov 12, 1968	International Paper Co. to Bernheim	105 and 106. Incorrect legal description.
Warranty Deed 51150	Jan 13, 1969	International Paper Co. to Bernheim	Acquired 105 and 106. Correct description.
Bargain and Sale Deed 44682	Mar 31, 1971	Stringfield to Bernheim	Acquired small parcel and added it to tax lot 101.
Warranty Deed 8056544	Nov 5, 1980	Bradford to Bernheim	Acquired small parcel and added it to tax lot 101.

#### **ATTACHMENTS**

The entire record is not attached to this memo. The entire record is in three notebooks entitled "Bernheim M37 Claim: PA 05-6581" that are available in the County Commissioners' office.

- Option Agreement dated May 21, 2005.
- Letter from Doug DuPriest dated June 14, 2006.
- Letter from Fidelity National Title Company of Oregon dated June 21, 2006.
- Letter from Joe Willis dated June 21, 2006.
- Letter from Doug DuPriest dated June 28, 2006.
- Letter from Joe Willis dated July 5, 2006.

## OPTION AGREEMENT

**PARTIES:** BERNARD BERNHEIM and MARGARET BERNHEIM,  
husband and wife (Bernheim)  
Address: 18975 Pinchurst Road  
Bend, Oregon 97701-8563

McDOUGAL BROS. INVESTMENTS, a partnership consisting  
of Melvin L. McDougal and Norman N. McDougal (Purchaser)  
Address: P.O. Box 518  
Creswell, Oregon 97426

**DATE:** May 26, 2005

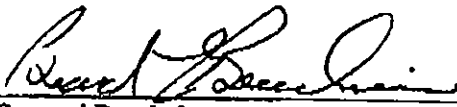
### AGREEMENTS:

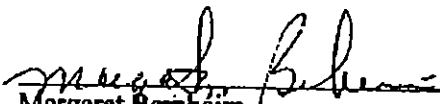
In consideration of the mutual covenants and conditions and upon the terms hereinafter set forth and for other valuable consideration, receipt of which is hereby acknowledged, Bernheim hereby grants to Purchaser the exclusive right and option to purchase the real property described on the attached Exhibit A (Property).

1. The purchase price for the Property is \$ [REDACTED] to be paid in full in cash on closing.
2. This option may be exercised by Purchaser at any time by giving written notice thereof to Bernheim.
3. Upon the exercise or deemed exercise of this option, the Sale Agreement attached hereto as Exhibit B shall become effective and the parties shall close the transaction and otherwise proceed pursuant to the terms and provisions of the Sale Agreement.
4. During the term of this Option Agreement, Bernheim shall commit no waste to the Property or take any action which will depreciate or reduce the value of the Property.
5. The parties shall execute, acknowledge, and record a Notice of Option in the form attached hereto as Exhibit C forthwith after the execution of this Option Agreement.
6. All risk of loss to the Property is allocated to and accepted by Purchaser.
7. All of the covenants, agreements, conditions and terms contained in this Option Agreement shall be binding upon, apply and inure to the benefit of the successors and assigns of the respective parties hereto. However, Purchaser may not assign any rights hereunder to [REDACTED] or any entity in which [REDACTED] has any interest.

8. Each of the parties hereto acknowledges that each party has been represented by counsel in connection with the preparation and execution of this Option Agreement and that each party has thoroughly reviewed this Option Agreement with that party's counsel. The rule of construction that a written agreement is construed against the party preparing or drafting such agreement shall specifically not be applicable to the interpretation of this Option Agreement.
9. Each of the parties shall, upon request of any other party, execute and deliver such additional documents as may be necessary or convenient for the purpose of evidencing or perfecting any rights or interests arising under this Option Agreement.
10. If any legal proceeding is commenced for the purpose of interpreting or enforcing any provision of this Option Agreement, the prevailing party in such proceeding shall be entitled to recover a reasonable attorney's fee in such proceeding, or any appeal thereof, in addition to the costs and disbursements allowed by law.
11. Any notices required or permitted to be given under the terms of this Option Agreement, or by law, shall be in writing and may be given by personal delivery or certified mail, directed to the parties at the addresses on page 1 of this Option Agreement, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law. Any notice given shall be effective when actually received or if given by certified mail, then 48 hours after the deposit of such notice in the United States mail with postage prepaid.
12. If any provision of this Option Agreement is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.
13. No waiver of any right arising out of a breach of any covenant, term or condition of this Option Agreement shall be a waiver of any right arising out of any other or subsequent breach of the same or any other covenant, term or condition or a waiver of the covenant, term or condition itself.
14. The person or persons executing and delivering this Option Agreement on behalf of Purchaser represent and warrant that each of them is duly authorized to do so and that the execution and delivery of this Option Agreement are the lawful and voluntary act of Purchaser.

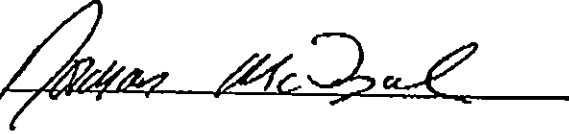
BERNHEIM:

  
Bernard Bernheim

  
Margaret Bernheim

PURCHASER:

McDOUGAL BROS. INVESTMENTS

By 



**Attorneys and  
Counselors at Law**

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in a Complex World.<sup>TM</sup>*

**200 FORUM BUILDING**

777 High Street

Eugene, Oregon

97401-2782

**PHONE**

541 686-9160

**FAX**

541 343-8693

[www.eugene-law.com](http://www.eugene-law.com)

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James K. Coons

John G. Cox

Douglas M. DuPriest

Frank C. Gibson

Stephen A. Hutchinson

Thomas M. Orr

William H. Sherlock

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E. Bradley Litchfield

Zack P. Mittge

Patrick L. Stevens

June 14, 2006

Lane County Board of Commissioners  
Courthouse/Public Service Bldg  
125 E 8<sup>th</sup> Ave  
Eugene, OR 97401

RE:           **Submittal for Hearing Today 6/14/2006 at 1:30 p.m.**  
                  **Property Information**  
                  PA 05-6581; Measure 37 Claim on Rodgers Road; Map 19-  
                  02-21 tax lots 101, 105, 106; and Map 19-02-17, tax lot 100.  
Our Clients: Norm and Amy Pendell

Dear Board of Commissioners:

On May 12, 2006, the applicants submitted a large number of documents ostensibly to support their Measure 37 claim. Planning Director Kent Howe notes that many of the applicants' supporting documents include deeds that are irrelevant to the claim at issue. It appears that applicants are trying to distract Lane County by inundating it with irrelevant information.

Applicants also submitted two "Recorded Documents Guarantee(s)" for tax lots 101 and 105 and 106, respectively. Although they come from a title company these documents are not a "title report." These documents do not even identify the Bernheims as current owners of the property, much less insure that title is vested in the Bernheims.<sup>1</sup>

Instead, these guarantees merely list deeds, and state that these are the only deeds in the Lane County Grantor/Grantee indices relative to the real property. These are very qualified guarantees.

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<sup>1</sup> In fact, the total potential liability of the title company for these "guarantees" is limited to \$350 per report.

**A. Applicant's Have Not Provided Any Basis For Their Measure 37 Claim on Lot 100.**

In particular, as noted by Mr. Howe, applicants provide no ownership information with regard to the largest portion of the property (lot 100 – 363 acres).

There is a good reason for this omission. The Bernheims did not acquire lot 100 until July 11, 1976. *See* Bargain and Sale Deed 7704953. At that time, the statewide planning goals (already in effect for more than a year) barred use of agricultural land for non-agricultural development (including the proposed subdivision). Goal 3 (1975) They also barred lot divisions below a minimum lot size set by "commercial agricultural enterprise in the area" and mandated a Goal 2 exception process for any "[c]onversion of rural agricultural land to urbanizable land." *Id.* Lane County was obligated to conform to these restrictions in all of its planning actions. ORS 197.175 (1973)

Hence, as applicants could not have divided lot 100 into residential lots when they acquired the property in 1976, there is no basis for Applicant's Measure 37 Claim with regard to Tax Lot 100<sup>2</sup> and applicants cannot subdivide this 363-acre agricultural parcel as a matter of law.

**B. The Bernheim's Do Not Own Tax Lots 101, 105 and 106.**

With regard to the three other tax lots the guarantees at issue do not provide a complete picture of the property's ownership. In particular, these guarantees are limited to deeds, contracts of assignment or contracts, recorded in Lane County and expressly excludes all "[i]nstruments, proceedings or other matters which do not specifically describe said land."

Thus, the guarantee, by its terms, excludes the purchase option agreement signed by the Bernheims and McDougal Bros. Investments on May 26, 2005. This purchase option agreement gave McDougal Bros. Investments the right to purchase lots 101, 105 and 106.

As you can see from the attached Multiple Listing Source report these properties were subsequently sold on June 14, 2005. This sale is further confirmed both by contemporaneous statements made by Mr. Bernheim to his neighbors the Walkers and the Ellises, and by subsequent representations

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<sup>2</sup> The same is true with regard to a portion of tax lot 101, which, as Mr. Howe notes, was not fully acquired by the Bernheim's until 1980.

by Greg Demers (a principal in Frontier Investments, LLC) to Mrs. Christa Gruner that he no longer no longer owned this property. The sale is further corroborated by no trespassing signs posted around the property by Frontier Resources, LLC, and by the involvement of Larry Gildea, counsel for McDougal Bros Investments, in this claim proceeding.

The reason that this sale is not included on the guarantees provided by the applicants, is that, as the Realtor indicated, this was a private and as yet unrecorded transaction.

Hence, it is clear that, as indicated by materials submitted by the Bernheims' neighbors, the Bernheims only appear to be the owners of the property. Since Frontier Resources, LLC has owned the property since at least 2005, it is not entitled to a Measure 37 waiver with regard to these lots either.

### **C. Unreasonable Compensation**

There are a number of factors that Lane Country should considered even if it were to permit a Measure 37 Waiver with regard to any portion of the property.

First, the applicants have provided no consistent or reasoned estimate of "just compensation" for the property. In their initial letter they sought \$6 million dollars, and now, apparently, \$19 million. The applicants provide no appraisal to substantiate this grossly inflated figure.

Mr. Schaefer, a "planner" of unknown credentials, has supplied a list of six "comparables" (three houses and three pieces of bare land). On the basis of these properties, the applicants claim that loss of value is in excess of \$19 million. However, there is little information on the existing property submitted into the application and insufficient information to determine whether these six other properties are comparable or not.

On the contrary, there are indications that these properties are not at all comparable. Mr. Schaefer relies on "comparables" that have wells and septic systems already installed. The applicants do not take into account the costs of installing such systems on the subject property, even if such installation were possible.

Moreover, as neighboring property owners will testify, the water table in the surrounding area would unlikely support 157 new wells (given the





severe limitations on the existing low-density rural water users). Additionally, given the prevalence of wetlands, steep slopes, and poor soils, 157 septic fields would likely overtax the site's limitations.

Finally, the proposed subdivision is substantially larger than any of the "comparables" provided by the applicants. Larger subdivisions have higher infrastructure costs. Since the applicants "comparables" do not take into account the necessary costs associated with things like constructing safe accesses for the proposed subdivision, this "valuation" information is so incomplete as to be misleading and should be wholly discounted by the Board of Commissioners.

Thus, as the Bernheims have not demonstrated that they are entitled to compensation much less that they have a Measure 37 claim, their claim should be denied.

Very truly yours,

HUTCHINSON, COX, COONS,  
DuPRIEST, ORR & SHERLOCK, P.C.

Douglas M. DuPriest  
Zack P. Mittge

Enclosure  
cc: Clients

**DONALD JOE WILLIS**

Direct Line: Portland (503) 796-2929; Bend (541) 749-4012

E-Mail: jwillis@schwabe.com

June 21, 2006

**BY HAND DELIVERY**

Lane County Board of Commissioners  
Anna Morrison, Commissioner West Lane  
Bill Dwyer, Commissioner Springfield  
Bobby Green, Commissioner North Eugene  
Faye Stewart, Commissioner East Lane  
Peter Sorenson, Commissioner South Eugene  
125 East 8th Avenue  
Eugene, OR 97401

Re: Bernard and Margaret Bernheim Property:  
Lane County Measure 37 Claim No. PA 05-6581

Dear Commissioners:

At the June 14<sup>th</sup> hearing, Staff questioned the clarity and sufficiency of the information we submitted to show when the Bernheims acquired their properties and that they still own them today. The information we submit today will clear up these questions. This letter briefly summarizes what the information shows about each of their properties and lists the contents of our present submission.

The Bernheim property consists of four tax lots: Lot 100, Lot 101, Lot 105, and Lot 106. I address each lot individually.

**Lot 100.** Bernheims acquired their ownership of this lot on April 20, 1966 from West Coast Associates. West Coast had recently bought the property from the Simonsens via a land sale contract which they assigned to the Bernheims, and the Bernheims assumed their obligations under that land sale contract. The deeds from Simonsens to West Coast and from West Coast to Bernheims were held in escrow until Bernheims paid the contract balance, at which time they were recorded. The West Coast to Bernheim deed was signed on April 20, 1966 and recorded when the land sale contract balance was paid in 1977. Under Oregon law, the contract vendor owns only a security interest in the property, and the contract vendee (here the Bernheims) owns the equitable interest and the right to possession (which the security interest owner does not have

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– the security interest is in the nature of a mortgage to secure performance of the land sale contract).

There are other deeds of record that reflect the contract vendor's security interest. The Simonsens and West Coast, in separate deeds, deeded the property, in trust, to Eugene Escrow Service, Inc., the collection escrow agent. Eugene Escrow deeded the property to Key Escrow Service, Inc. when Key Escrow bought out Eugene Escrow. Key Escrow then deeded the property to the Bernheims when they paid the contract balance.

We are submitting copies of these documents with this letter together with a letter from Fidelity National Title Company that confirms the accuracy of the above. Also, included is the Bernheims' Earnest Money Agreement and the Real Estate Broker's Closing Statement which show a substantial down payment was made on April 20, 1966. Lastly, Mr. Bernheim signed an affidavit that explains the transaction and confirms that he and Mrs. Bernheim have owned Lot 100 since April 20, 1966 and own it today.

**Lot 101.** Bernheims acquired nearly all of this lot on December 16, 1959 from the Marcottes. The deed was recorded on January 15, 1960. Lot 101 includes two very small parcels, each less than an acre, that Bernheims acquired at different times. They purchased a small triangular shaped piece from Stringfield on March 31, 1971. The deed was recorded on April 28, 1971. They purchased an even smaller triangular piece from Bradford on November 5, 1980. The deed was recorded on November 6, 1980. These properties are all identified on an ownership map prepared by Pacific Surveying, Inc. which is attached for your convenience.

**Lots 105 and 106.** Bernheims first acquired Lots 105 and 106 with the Marcotte purchase in 1959. They later sold a part of the Marcotte acquisition to International Paper Co., and that sale included the property now identified as Lots 105 and 106. They reacquired these lots from I.P. on January 13, 1969. The deed was recorded on January 16, 1969. The Bernheims have continuously owned these lots since then and own them today.

There were other deeds recorded that a raised question about Bernheims ownership of these lots. Here is what happened.

I.P. first deeded to Bernheims on November 12, 1968. The deed, recorded on December 15, 1968, contained an error in the legal description, which use the wrong initial point of beginning. The error was corrected with the January 13, 1969 deed (which was actually a correction deed), which used the correct initial point of beginning. The Bernheims then quitclaimed the property erroneously described in the November 12, 1968 deed to I.P. on March 12, 1969, recorded on April 9, 1969.

Last year, when preparing the title report for the Measure 37 claim, the 1985 deed from International Paper Company to International Paper Realty Corporation was discovered. We previously submitted a letter from Alan Brickley at First American Title explaining this deed was an error. Subsequently, we contacted International Paper, which provided quitclaims to remove



any cloud on the title resulting from the erroneous 1985 deed. The quitclaims were recorded January 20, 2006.

All of these deeds are part of our submissions. Fidelity National Title Co. and Mr. Bernheim confirm that the Bernheims acquired Lots 105 and 106 on January 13, 1969, have owned them continuously, and own them today.

**The Option.** Bernheims have not sold any of these properties. On May 26, 2005, they granted McDougal Bros. Investments an exclusive option to purchase all of these properties. McDougals have not exercised the option. Under Oregon law, an exclusive option to purchase real property does not give the holder of the property any interest whatever in the land. Bernheims own it all today.

The Oregon Supreme Court, in *Herndon v. Armstrong*, 148 Or 602 (1934), said: "Options to purchase real estate are merely offers to sell property and until acceptance and their conditions unconditionally performed, they confer no title to the realty." See also *The Texas Company v. Butler, et al*, 198 Or 368 (1953) to the same effect. These cases both correctly state Oregon law as of today.

You have requested a copy of the option between the Bernheims and McDougal Bros., and we provide it with this submission. We have redacted the option price, the name of a person the Bernheims did not want the option to be assigned to, and the exhibit to the option which would be the sale agreement if the option is exercised. The option price and the name of the person the Bernheims do not want the option assigned to is information the Bernheims want to remain confidential. The sale agreement attached to the option as an exhibit has not been signed and will not come into play unless McDougals exercise the option. Moreover, the terms of the sale, if one occurs, may be changed from the exhibit. The sale agreement, therefore, has no bearing on the issues at hand, and the Bernheims want it to remain confidential.

**The Pasture Lease.** On June 14<sup>th</sup> I explained that Bernheims had leased the land to Greg Demers. One of you requested a copy of the lease, and I agreed to provide you a copy. When I talked to Mr. Bernheim, he confirmed the agreement with Mr. Demers, but said that nothing had been signed. Mr. Bernheim's affidavit states that the lease agreement was never signed, but he and Mrs. Bernheim agreed that Mr. Demers could run cattle on the property. Mr. Demers obtained the Bernheims' permission to run cattle on the property and has done so.

**Loss of Value.** We include with this submission a Real Estate Market analysis prepared by Liz Kramer of Windermere Real Estate. Ms. Kramer's analysis shows that the Bernheims' property has lost value because of the present land use regulations. We think her analysis removes any doubt about this issue.

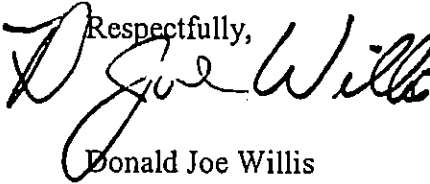
Here is the list of the documents we are submitting with this letter.

1. Affidavit of Bernard Bernheim.



2. Real Estate Market analysis prepared by Liz Kramer of Windermere Real Estate.
3. Bernheim Ownership Map prepared by Pacific Land Surveying, illustrating when and by what deeds the various parts of the Bernheim property were acquired.
4. Option Agreement dated May 26, 2005.
5. Title Commitment Letter from Fidelity National Title
6. Preliminary Title Report from First American Title
7. Letter of April 21, 1966 regarding Tax Lot 100 from attorney James Harrang to Charles Thompson, regarding assignment of West Coast Enterprises' interest in Tax Lot 100 to the Bernheims; along with a copy of the Assignment Agreement and exhibits to same.
8. Real Estate Broker's Closing Statement regarding Tax Lot 100, dated April 20, 1966, which demonstrates the Bernheims paid \$40,400 cash on that date, with the balance to be paid via the assigned land sale contract.
9. Earnest Money Agreement regarding Tax Lot 100 dated April 15, 1966, which outlines the terms of the land sale contract.
10. Ledger of contract payments regarding Tax Lot 100 from 1966 through 1969.
11. Vesting deed for Tax Lot 100, executed April 20, 1966. The deed was previously provided but this is a much better copy.
12. Letter of Jan 14, 1969 regarding Tax Lots 105 & 106 from International Paper to Title Abstract Co. explaining the deed correction.
13. Letter of Feb 10, 1969 regarding Tax Lots 105 & 106 from Title Abstract Co. to Bernheims explaining the deed correction and confirming that the Bernheims always held an interest in the property.
14. Tax statements showing Bernheims as owners for the years 1960-1961 through 2004-2005 tax year. The statements for 1980-1981 are not available.

In summary, the information in this submission shows beyond any question the dates the Bernheims acquired their properties, that their ownership has been continuous to this date, that they still own the property included in this claim, and that the County's land use regulations have reduced its value. We appreciate the opportunity to clarify these issues and look forward to your decision granting Bernheims a waiver of the applicable land use regulations.

Respectfully,  
  
Donald Joe Willis

JW:js

Enclosures

cc: Joseph Schaefer  
Kent Howe  
Bernard and Margaret Bernheim  
Steve Hopkins  
Steve Vorhes, County Counsel



**Fidelity National Title Company of Oregon**  
800 Willamette St, Ste. 500, Eugene, OR 97401  
Phone: (541) 683-5422 FAX: (541) 344-4534

June 21, 2006

Larry Gildea, Attorney at Law  
324 East 12<sup>th</sup> Street  
Eugene, OR 97401

Ref: Bernheim's Creswell Property  
Map 19 02 17 00 00100  
Map 19 02 21 00 00101  
Map 19 02 21 00 00105  
Map 19 02 21 00 00106

Dear Mr. Gildea,

The above referenced properties are being prepared for development. This Company and the surveyor, Dave Collier of Pacific Surveying, have researched the deeds to establish ownership, which was acquired in several different transactions. After completing a full chain of title search on the above referenced properties, this Company is prepared to issue title insurance on above properties. We have reached this conclusion on the following analysis from the Deed Records of Lane County, Oregon and the various un-recorded documents provided to us by you. See as follows:

Attached is map (Exhibit A) prepared by Dave Collier of Pacific Surveying that shows the said property and refers to the vesting deed for each area. Please use this map as a tool to follow each area's chain of title, as follows:

**1. Area 1 chain of title:**

See un-recorded contract as (Exhibit B) from Simonsen's to West Coast dated March 4, 1966 along with the recorded fulfillment deed dated March 4, 1966, recorded January 27, 1977 #7704951.

West Coast's vendee's interest was assigned to the Bernheim's by an un-recorded assignment (Exhibit C) dated April 20, 1966 along with recorded fulfillment deed and vesting deed to Bernard F. Bernheim and Margaret S. Bernheim, as tenants by the entirety dated April 20, 1966, recorded January 27, 1977 #7704952.

**\*\*Area 1 also has a chain of security interest only wherein certain escrow companies acted for the parties in trust, as follows:**

**Simonsen's to Eugene Escrow Services by un-recorded escrow instructions (Exhibit D) dated April 1, 1966 along with the deed dated March 26, 1966, recorded April 19, 1966 #44427.**

**Eugene Escrow Services to Key Escrow Services, Inc. by un-recorded escrow instructions (Exhibit E) dated June 11, 1976 along with deed dated January 6, 1971, recorded January 12, 1971 #32639.**

**Deed (Exhibit F) dated June 11, 1976, recorded January 27, 1977 #7704953, releasing the final security interest of Key Escrow Services, Inc. to the Bernheim's.**

**2. Area 2 vesting by Bargain and Sale Deed (Exhibit G) from Stringfield's to Bernard F. Bernheim and Margaret F. Bernheim, as tenants by the entirety dated March 31, 1971, recorded April 28, 1971 #44682.**

**3. Area 3 vesting by Warranty Deed (Exhibit H) from Bradford's to Bernard F. Bernheim and Margaret S. Bernheim, as tenants in common dated November 5, 1980, recorded November 6, 1980 #8056544.**

**4. Area 4 vesting by Warranty Deed (Exhibit I) from Marcotte's to Bernard F. Bernheim and Margaret F. Bernheim, as tenants by the entirety dated December 16, 1959, recorded January 15, 1960 #88332.**

**5. Area 5 chain of title:**

**See vesting deed (Exhibit J) from International Paper Company to Bernard Bernheim and Margaret Bernheim, as tenants by the entirety dated November 12, 1968, recorded December 16, 1968 #48289.**

**See correction deed (Exhibit K) from International Paper Company to the Bernheim's dated January 13, 1969, recorded January 16, 1969, #51150. This corrected a legal description error.**

**See Quitclaim Deed (Exhibit L) from the Bernheim's to International Paper Company dated March 12, 1969, recorded April 9, 1969 #60051. This deed had the effect of Bernheim's releasing to IP any interest they could have acquired in other IP land because of the deed with the incorrect legal description (Exhibit J). This deed does not change or otherwise affect Bernheim's ownership of Area 5.**

**The Bernheim's acquired ownership of these properties by the following dates: Area 1; 4-20-66, Area 2; 3-31-71, Area 3; 11-5-80, Area 4; 12-16-59, Area 5; 11-12-68 & 1-13-69, and have maintained continuous ownership.**

Thank you,



Londa Minyard

Assistant Vice President and Title Operations Manager



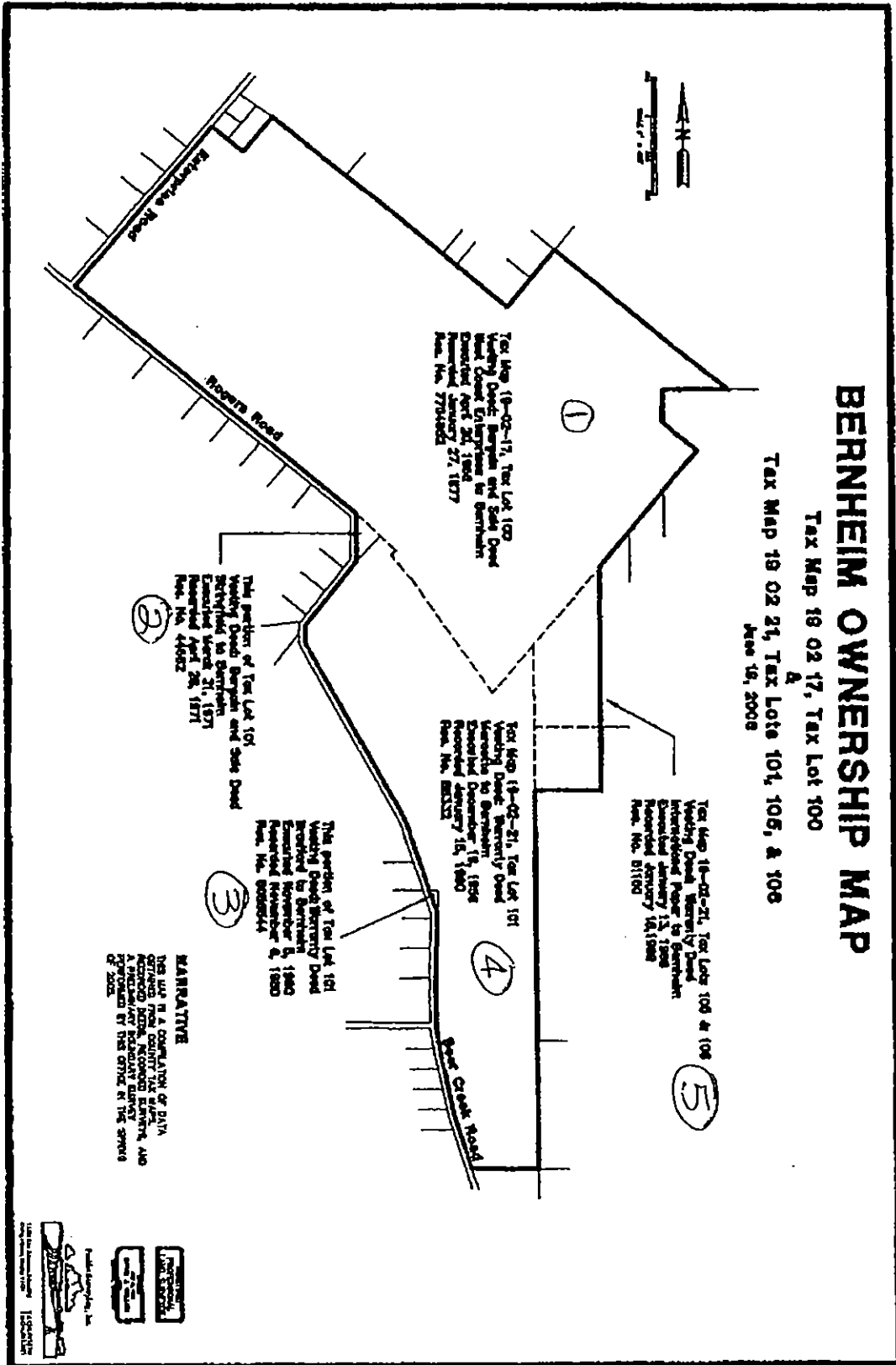


Exhibit "A"



05-28-06P04:01 RCVD

June 28, 2006

**Attorneys and  
Counselors at Law**  
*Established 1970*

*Experienced Advice  
in a Complex World.™*

**200 FORUM BUILDING**

777 High Street  
Eugene, Oregon  
97401-2782

**PHONE**

541 686-9160

**FAX**

541 343-8693

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Lane County Board of Commissioners  
Courthouse/Public Service Bldg  
125 E 8<sup>th</sup> Ave  
Eugene, OR 97401

RE: **Measure 37 Claim**  
PA 05-6581; Measure 37 Claim on Rodgers Road; Map 19-02-21 tax lots 101, 105, 106; and Map 19-02-17, tax lot 100.  
Our Clients: Norm and Amy Pendell

Dear Board of Commissioners:

The Board should deny the pending Measure 37 claim and waiver request for the following reasons:

**A. The Applicants Have Still Failed To Provide Accurate or Complete Information.**

The Board has a policy decision to make regarding this claim: whether to make decisions on Measure 37 claims based on less than full disclosure. The Board knows this claim is the product of back room deals between developers, who are seeking to use former owners to develop a piece of rural property. Moreover, as is reflected by the incomplete "Option to Purchase" (missing key terms like value and the attached sale contract), the applicants are seeking to obscure the existing ownership of the property.

This is not how the claim process is meant to function. Applicants who are entitled to a Measure 37 waiver would make full disclosure of all documents pertinent to the present ownership of the property. They would not play hide-the-ball to see what they can slip past the County. As these applicants are submitting incomplete information, it appears they have something to hide. And as these documents bear directly on who the currently owns the property, this incomplete claim should not be approved.

Moreover, the applicants have presented radically different estimates of value for the purported lost value to the property without substantiation by an appraisal. If Lane County accepts this claim it will be making policy. It

will be stating that claims, even without appraisal information, will be approved. This will only encourage a further deluge of incomplete and misleading claims to be submitted to Lane County.

We encourage the Board to be careful about the precedent that it sets with this case.

**B. The Bernheims Have Already Sold The Property.**

The Option presented to the Board has already been exercised and the sale has been concluded. "Bunk" Bernheim has consistently told his neighbors, both before and after the last hearing before the Board, that he has already "sold" (past tense) his Creswell property. See Affidavit of Tammy Ellis, Affidavit of Bill Walker and Judy Walker, and Affidavit of Claudia Bliss.

These repeated statements to the neighbors are admissible in court as admissions of a party opponent. Hence, the Board has more than adequate evidence from the purported applicant himself to conclude that he no longer owns the property and that no waiver or payment is due under Measure 37.

**C. The Sale of the Property Has Already Been Listed on the MLS.**

Mr. Bernheim's statement that the property was sold is further supported by the Multiple-Listing Service. The MLS listing reflects that the property was sold for \$3 million.

**D. The Deed Of Conveyance Is Likely Being Held Unrecorded.**

The fact that no deed has been recorded conveying the property to the McDougals is not dispositive. We know from the "applicant" that the property was sold, and that the only reason his name remains on the title is for this Measure 37 claim.

In all likelihood, this means that the missing sales contract and conveyance deed are signed and being held pending the outcome of this case to be recorded. And while they were requested for the Board's review, it is clear why the real applicants have opted not to disclose them.

**E. There is No Lease (Written or Otherwise) And Frontier Resources Is Acting As Owner, Not As Lessee.**

Mr. Willis represented to the Board at the last hearing that the property had not been sold but that Frontier Resources LLC was merely

operating under a written lease of the property that he would provide to the Board. There is no such lease on the property.

Despite the Board's request that the lease document be produced, Mr. Willis has failed to provide it and cannot establish that it exists. Instead, he urges the Board to believe that there is some kind of oral "lease" of the property between Mr. Bernheim and Mr. Demers.

This is a smokescreen intended to hide the fact that the Bernheim's have sold their property, and now the McDougals and Demers, through their respective entities, have all incidents of equitable ownership.

Oregon law does not allow for the kind of oral "lease" that Mr. Willis now claims is in existence. The Statute of Frauds, ORS 41.580(1)(e), states that an agreement to lease real property for more than one year is void, unless it is in writing and signed by the party to be charged, and that evidence of any such "shall not be received other than the writing." Thus, there is no lease.

Hence, it is clear that Mr. Willis' purported oral "lease" is nothing more than another attempt to mask the true ownership of the property.

**F. Even if the Option Had Not Been Exercised, It Is In Effect a Perpetual Conveyance of the Bernheim's Ownership Interest.**

In the alternative, even if the property had not been sold (and it is clear from the "applicant" that it has been), the Option to Purchase the property gives the McDougal Bros. Investments indefinite control over the property. Thus, in addition to no longer having equitable ownership of the property, the Bernheims have relinquished the ability to ever sell the property to anyone other than the McDougal Bros Investments.

The Option To Purchase submitted by Mr. Willis is a remarkable document. It is more notable for what it does not say, than for what it says. In particular, it contains no time limit on when it must be exercised. This term is included in virtually all options, to ensure that the holder of the option (the Optionee) cannot bar the sale of the property forever.

By its terms, the Option To Purchase provided by Mr. Willis is valid indefinitely. The Bernheims cannot sell the property to anyone else so long as the Option remains in existence and has not been cancelled or released by the McDougal Bros. Investments.

McDougal Bros. Investments, on the other hand, can freely sell this perpetual right to the property via an assignment of their rights to anyone else (other than the unknown person whose name has been blacked out).

The ability to freely convey one's real property is an essential property right. The Bernheims have irrevocably sold that right to the McDougal Bros. Investments.

**G. Given The Option, The Bernheim's Property Interest Is So Ephemeral That They Retain No Interest In the Property.**

Again, assuming that there has not been a sale (despite Mr. Bernheim's admissions to the contrary) and the "Option to Purchase" is the operable document, the Bernheim's interests in the property under this document are so ephemeral that they can hardly be termed ownership.

In particular, McDougals and Demers, by and through their respective entities, have control over the equitable title to the property. *See* Affidavit of Amy Pendell (regarding Frontier Resources timber cruises on the property) *and* Affidavit of Tammy Ellis. They also have indefinite control over conveyance of the property's title.

All that remains, therefore, for the Bernheims is paper title – the appearance of their name in Lane County Deeds and Records on the title.

However, even this title can vanish at any time and without notice to the Bernheims under the terms of the purchase option, when it is exercised. This so-called "ownership" is nothing more than a recording delay, and will not support a Measure 37 claim.

**H. The Claimants Fail to Disclose Payment Amounts Under the Option.**

Mr. Willis has failed to provide the County any information on the amount paid to obtain the Option or the amount to be paid for the exercise of the Option.

If, as the applicants represent, the sale reflected in the MLS report was only the sale of the Option, then, as reflected in that report, the McDougals paid the property's full price to secure the Option. Thus, it is entirely reasonable that the McDougals would require a mere nominal amount to exercise it. So, even if one were to assume that some amount must be paid to exercise the Option, it would not be large.

This arrangement would be akin to purchasing an indefinite "option" on a residence for \$250,000, and only requiring a \$500 payment upon exercising it. The "optionee" could then live in the house and would own all the valuable incidents of ownership, including their right to be placed on title. Yet, the prior owner of the home would still appear to have title.

The prior owner could not be said to have any interest, and neither could the Bernheims. Lane County should not honor this kind of shell game.

**I. The Conveyance of the Option Conveyed Property Rights to the McDougals.**

On the basis of case law that is 80 years old, Mr. Willis represents to the Board that the Option agreement conveyed no property rights to the McDougals or Demers. Not surprisingly, the law has changed over time, and Mr. Willis fails to acknowledge that change.

In 1964, the Oregon Supreme Court acknowledged that the conveyance of the option provided the optionee valuable property rights including the right to participate in a judgment of condemnation on the property that is the subject of the option. *See Fullington v. Phillips Co.*, 238 Or 321, 325 (1964). Hence, regardless of whether or not termed an "interest in land," it is clear that there were property rights attendant in the Option to Purchase, especially in light of the strictures placed on the Bernheims.

Thus, to the extent that the Option remains relevant in light of the applicants repeated statements that the property has been sold, it is clear that it acted as a conveyance of valuable property rights.

**J. At The Earliest, The Bernheims Acquisition Date For Tax Lot 100 Would Be 1976, Not 1966.**

Mr. Willis submitted a letter from Fidelity National Title, dated June 21, 2006. With respect to Tax Lot 100 (also referred to as Area 1), that letter states:

"Area 1 also has a chain of **security interest only** wherein certain escrow companies acted for the parties in trust as follows:  
[ list of 5 documents]." (Emphasis added.)

We have reviewed the documents listed and attached to the letter. The documents are not as clear as the title officer suggests.

There is a deed of conveyance (not a trust deed), dated 1971 and recorded in 1971, from Eugene Escrow to Key Escrow, Inc. It makes no reference of being for security purposes, instead of being an absolute conveyance. The claimants have provided no evidence that this recorded deed is entitled to be considered as less than the deed of conveyance than it purports to be. The title officer fails to support her opinion with written evidence.

Materials filed with the County in this proceeding reflect that Eugene Title obtained title to Tax Lot 100 as the result of a foreclosure. The documents submitted include an unrecorded letter, which refers to a "Trustee interest". But that letter does not say on whose behalf either of the title companies were acting. Typically, when a party acts as a Trustee, that fact is expressly noted on the face of the document and the party for whom they are acting as Trustee is also noted. That is not the case here.

The Chain of Title reflects fee title being first in Eugene Title, then in Key Escrow, and then in the Bernheims. That last deed is dated June 11, 1976 and was recorded on January 27, 1977. Thus, the Bernheims' first acquired their interest in Tax Lot 100 from a title holder on those dates, and not before.

**There is no evidence of conveyance of fee title into the Simonsens. The other entries, involving the Simonsens and West Coast Properties, are thus outside of the chain of fee title.** There is no evidence of any acquisition of an interest in the property by the Bernheims earlier than 1976, from anyone holding a fee title interest in Tax Lot 100.

The Bernheims have already parted with control and ownership of all of the property in question and the Measure 37 claim should be denied on that basis. In the alternative, should the County grant any waiver as to Tax Lot 100, such waiver should be dated in 1976 or 1977 (not to 1966, as has been requested).

**K. Measure 37 Was Enacted To Benefit Long Time Owners, Not Third Party Developers Who Have Only Recently Arrived On The Scene.**


Measure 37 was not adopted to benefit third-party developers, but was intended to address the perceived imbalances in the land use system for long time property owners. It should be readily apparent to the Board by now that the obfuscation, hidden dealings, and legal fictions that have been presented to it in this matter are not the work of Mr. Bernheim, by all accounts a responsible and honest individual.

Indeed, even after the last hearing, Mr. Bernheim was forthright enough to acknowledge that the property has been sold. Affidavit of Tammy Ellis.

Instead, this claim is the work of recent purchasers who are attempting to use a shell game to bend this well-intentioned law to their own ends. This is only the Bernheims' claim in name. In reality, this is the claim of the Bernheims' successors in interest. The Board should deny the claims of successors in interest that are merely masquerading as original property owners.

Very truly yours,

HUTCHINSON, COX, COONS,  
DuPRIEST, ORR & SHERLOCK, P.C.



Douglas M. DuPriest  
Zack P. Mittge

Enclosure  
cc: Clients





**DONALD JOE WILLIS**

Direct Line: Portland (503) 796-2929; Bend (541) 749-4012

E-Mail: [jwillis@schwabe.com](mailto:jwillis@schwabe.com)

July 5, 2006

**BY HAND DELIVERY**

Lane County Board of Commissioners  
Anna Morrison, Commissioner West Lane  
Bill Dwyer, Commissioner Springfield  
Bobby Green, Commissioner North Eugene  
Faye Stewart, Commissioner East Lane  
Peter Sorenson, Commissioner South Eugene  
125 East 8th Avenue  
Eugene, OR 97401

Re: Bernard and Margaret Bernheim Property:  
Lane County Measure 37 Claim No. PA 05-6581

Dear Commissioners:

On behalf of the Bernheims, we submitted a letter and fourteen attachments on June 21<sup>st</sup>. We received the opponents' written materials Friday afternoon (June 30<sup>th</sup>). This letter and its attachments constitute our rebuttal.

Under Measure 37, Bernheims must show (1) ownership of properties from the dates they allege to have acquired them; (2) that land use regulations enacted after their dates of acquisition restrict the use of their land; and (3) that they have been monetarily damaged as a result.

The land consists of tax lots 100, 101, 105, and 106. The Bernheims acquired Lot 100 on April 20, 1966. Written documentation supporting that conclusion includes the land sale contract and its assignment to Bernheims dated in April of 1966, an earnest money agreement of the transaction signed on or about April 15, 1966, the warranty deed dated April 20, 1966, Lane County Real Estate tax statements showing the Bernheims as owners of this property who paid taxes since on it since 1966 to the present time, and Mr. Bernheim's sworn statement that he and Mrs. Bernheim acquired the property on April 20, 1966 and still own it. We are astonished that the opponents maintain "There is no evidence of any acquisition of an interest in the property [Tax Lot 100] by the Bernheims earlier than 1976..." We urge you to read items 2, 5, 6, 7, 8, 9, 10 and 11 that are attached to our prior submittal.

The opponents challenge the Bernheims' present ownership of Lot 101, but not their date of acquisition. Similarly, most opponents do not challenge the acquisition date of Lots 105 and 106, but only whether Bernheims still own those lots.

The evidence of their present ownership includes two title reports from independent title companies (Fidelity National Title Insurance Co. and First American Title Insurance Co.), Mr. Bernheim's sworn statement, Lane County Tax Assessor Statements, and a lack of evidence to the contrary except statements that are no more than sheer speculation.

The opponents make much of a multiple listing service report that shows the property to be sold. We enclose with this letter an affidavit of Liz Kramer from Windermere Realty, one of the involved realtors, stating that the property did not sell, that the MLS reporting service does not include a term to reflect an option agreement as distinguished from a sale, and that in the Bernheims' case the property was reported as sold because the option agreement was signed and the property was no longer on the market. It is interesting that not a single opponent examined what the MLS report meant -- an illustration of the unreliability of hearsay comments repeated over and over again by unsuspecting people who did not confirmed the accuracy of their sources.

We note that the opponents provide no first hand evidence about the alleged sale from the parties to the alleged transaction, nor from the parties' representatives. An overwhelming number of opponents base their argument on Mr. Bernheim's statements that he sold the property, but set it up in such a way that he might also receive Measure 37 benefits. As with their reliance on the MLS report, though, they went no further. Not a single opponent commented on Mr. Bernheim's sworn statement that he and Mrs. Bernheim did not sell their properties. Not a single opponent said anything about the two independent title reports that show Bernheims to be the present owners of their land. Nor did a single opponent said anything about Bernheims' right to avail themselves of Measure 37 benefits, a measure passed to benefit Bernheims and people similarly situated.

The opponents challenge the Bernheims' assertion that the property is leased. First, since neither the County nor the opponents are parties to the lease, they lack the legal authority to challenge the lease based on the Statute of Frauds. *City of Medford v. Bessonette*, 255 Or 53 (1970). Second, even if the lease is unenforceable, that simply confirms that the Bernheim ownership is not subject to the lease rights of a tenant. Either way, the Bernheims have an interest in the property.

The Bernheims, as with all property owners, have a right to engage experienced developers to develop their property; and, as a part of the development process, they have a right to option their property to developers. In Oregon, an option agreement has never conveyed an interest in the land to the holder of the option. And that is the case with the Bernheims.

Sure, the Bernheims want to sell their property, and they will sell it in the future. But the opponents misconstrue *Fullington v. Phillips Co.*, because in that case the Oregon Supreme



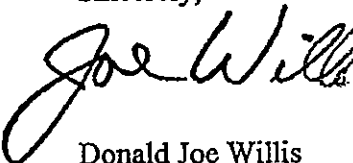
Court simply decided that the option holder could participate in the condemnation along with the property owner when the condemnation prevented the option holder from exercising the option. Again, the question is not whether the option holder has an interest in the property; rather, the question is whether the Bernheims do. This issue was recently acknowledged by the State of Oregon in the Crook County litigation, Crook County v. All Electors et al, Case No. 05CV0015.

Today the Bernheims still own the property. The opponents simply ignore the sworn affidavits of Mr. Bernheim, the two title reports, and the law as embodied in Measure 37, which applies to "private real property or any interest therein." The affidavits of the opponents should not be accepted at face value, since they contain double or triple hearsay, unsubstantiated statements of unnamed and unknown employees, and conclusory statements. Even if there was a secret deed of conveyance (which there is not), it wouldn't matter because it cannot convey anything without an effective delivery from the Bernheims to the buyer. To accept the notion that Bernheims have secretly sold their property and are involved in an attempt to defraud the Lane County would require you to find that Mr. Bernheim has lied to you under oath, that Liz Kramer as lied to you under oath, and that all people connected with this transaction have successfully misled two independent national title insurance companies.

The opponents are just that: opponents. They bear no responsibility for the financial risks to the County if you deny this claim and the Bernheims are successful in future proceedings. That risk is borne completely by the taxpayers. We ask you to recognize the importance of implementing the plain language of the law as it is written, not as the opponents would like it to be stretched.

Measure 37 is clear. If Bernheims own an interest in real property that they acquired before land use regulations restricted its use and reduced its value, they are entitled to your decision in their favor. We ask you to grant the waiver.

Sincerely,



Donald Joe Willis

JW:js

Enclosures

cc: Joseph Schaefer  
Kent Howe  
Bernard and Margaret Bernheim  
Steve Hopkins  
Steve Vorhes, County Counsel



Lane County Board of Commissioners  
July 5, 2006  
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bcc: Lawrence O. Gildea  
Mr. Gregory M. Demers





