

W. T. B.



Memorandum Date: September 25, 2006
Order Date: October 4, 2006

TO: Board of County Commissioners

DEPARTMENT: Public Works Dept./Land Management Division

PRESENTED BY: BILL VANVACTOR, COUNTY ADMINISTRATOR
KENT HOWE, PLANNING DIRECTOR

AGENDA ITEM TITLE: 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 (PA05-6581/Bernheim).

I. MOTION

Move to adopt the amended order.

II. AGENDA ITEM SUMMARY

On July 12, 2006, the Board heard the claim of Bernard and Margaret Bernheim and adopted Order No. 06-6-14-8, which waived the restrictive land use regulations for tax lots 101, 105 and 106. Although the record indicates the Board intended to include tax lot #100 in this order, it was inadvertently omitted. By adopting the Revised Order No. 06-6-14-8 attached to this report, the Board action on this claim will include tax lot #100. Nothing else in the original order will be changed.

The supplemental packet prepared for the July 12 hearing is included as Attachment "A" to indicate the status of ownership at that time.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

Applicant: Bernard and Margaret Bernheim

Current Owner: Bernard and Margaret Bernheim

Agents: Donald Joe Willis and Joseph Schaefer

Map and Tax lots: 19-02-17 #100; 19-02-21 #101, 105 and 106

Acreage: approximately 515 acres

Current Zoning: E40 (Exclusive Farm Use)

VII. ATTACHMENTS

Draft Revised Order No. 06-6-14-8.

Attachment "A": Supplemental cover memo dated June 14, 2006 hearing.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

REVISED ORDER No. 06-6-14-8) 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 (Bernard and Margaret Bernheim/
) PA05-6581).

WHEREAS, the voters of the State of Oregon passed Ballot Measure 37 on November 2, 2004, which added provisions to Oregon Revised Statutes (ORS) Chapter 197 to require, under certain circumstances, payment to landowners if a government land use regulation restricts the use of private real property and has the effect of reducing the property value; and

WHEREAS, the Board of County Commissioners of Lane County enacted Ordinance No. 18-04 on December 1, 2004, to establish a real property compensation claim application process in LC 2.700 through 2.770 for Ballot Measure 37 claims; and

WHEREAS, Board Order No. 06-6-14-8 adopted on July 12, 2006, inadvertently omitted mention of tax lot 100, but the testimony and evidence submitted to the Board made it clear Bernard and Margaret Bernheim continuously owned that property since they acquired an interest in it on April 20, 1966, and a revised order reflecting that ownership will clarify the Board action was intended to include that property; and

WHEREAS, the County Administrator has reviewed an application for a Measure 37 claim submitted by Bernard and Margaret Bernheim (PA05-6581), the owners of real property described in the records of the Lane County Assessor as maps 19-02-17, tax lot 100 and 19-02-21, tax lots 101, 105 and 106, consisting of approximately 549 acres in Lane County, Oregon; and

WHEREAS, the County Administrator has determined that the application appears to meet all of the criteria of LC 2.740(1)(a)-(d), appears to be eligible for just compensation and appears to require modification, removal or not applying the restrictive land use regulations in lieu of payment of just compensation and has referred the application to the Board for public hearing and confirmation that the application qualifies for further action under Measure 37 and LC 2.700 through 2.770; and

WHEREAS, the County Administrator has determined under LC 2.740(4) that modification, removal or not applying the restrictive land use regulation is necessary to avoid owners entitlement to just compensation under Ballot Measure 37 and made that recommendation to the Board; and

WHEREAS, the Board has reviewed the evidence and confirmed the application appears to qualify for compensation under Measure 37 but Lane County has not appropriated funds for compensation for Measure 37 claims and has no funds available for this purpose; and

WHEREAS, on June 14, 2006, the Board conducted a public hearing on the Measure 37 claim (PA05-6581) of Bernard and Margaret Bernheim and has now determined that the restrictive E40 (Exclusive Farm Use) zone dwelling and land division requirements of LC 16.212 were enforced and made applicable to prevent Bernard and Margaret Bernheim from developing the property as might have been allowed at the time it was acquired on December 16, 1959 (most of tax lot 101), April 20, 1966 (tax lot 100), November 12, 1968 (tax lots 105 and 106), March 31, 1971 (portion of tax lot

101) and November 5, 1980 (portion of tax lot 101), and that the public benefit from application of the current E40 restrictions on new dwellings to the applicants' property is outweighed by the public burden of paying just compensation; and

WHEREAS, Bernard and Margaret Bernheim request either \$19,000,000 as compensation for the reduction in value of their property, or waiver of all land use regulations that would prevent the division of the property, excluding that portion of tax lot 101 acquired on November 5, 1980, into lots containing less than 40 acres and placement of a dwelling on each lot, and placement of a dwelling on each lot, uses that could have otherwise been allowed at the time they acquired the property; and

WHEREAS, the portion of tax lot 101 that was acquired on November 5, 1980, and zoned FF20 (Farm Forest), could have been allowed a dwelling on a legally created lot at that time; and

WHEREAS, the Board finds that under LC 2.760(3) the public interest would be better served by modifying, removing or not applying the challenged land use regulations of the E40 zone to the subject property in the manner and for the reasons stated in the report and recommendation of the County Administrator incorporated here by this reference except as explicitly revised here to reflect Board deliberation and action to allow Bernard and Margaret Bernheim to make application for development of the subject property in a manner similar to what they could have been able to do under the regulations in effect when they acquired the property; and

WHEREAS, this matter having been fully considered by the Lane County Board of Commissioners.

NOW, THEREFORE IT IS HEREBY ORDERED that the applicants Bernard and Margaret Bernheim made a valid claim under Ballot Measure 37 by describing the use being sought, identifying the county land use regulations prohibiting that use, submitting evidence that those land use regulations have the effect of reducing the value of the property, showing evidence that they acquired the property before the restrictive county land use regulations were enacted or enforced and the Board hereby elects not to pay just compensation but in lieu of payment, the request of Bernard and Margaret Bernheim shall be granted and the restrictive provisions of LC 16.212 that prevent the division of the property into lots containing less than 40 acres and placement of a dwelling on each new lot in the E40 (Exclusive Farm Use) Zone shall not apply to Bernard and Margaret Bernheim, so that they can make application for approval to develop the property described in the records of the Lane County Assessor as maps 19-02-17, tax lot 100 and 19-02-21, tax lots 101, 105 and 106, in a manner consistent with the land use regulations in effect when they acquired the property on December 16, 1959 (most of tax lot 101), April 20, 1966 (tax lot 100), November 12, 1968 (tax lots 105 and 106), March 31, 1971 (portion of tax lot 101) and November 5, 1980 (portion of tax lot 101). That portion of map 19-02-21, tax lot 101 that was acquired on November 5, 1980, may be eligible for a dwelling if it is determined to be a legally created lot and otherwise in compliance with the regulations in effect on that date.

IT IS HEREBY FURTHER ORDERED that Bernard and Margaret Bernheim still need to make application and receive approval for division of the property or placement of dwellings under the other land use regulations applicable to dividing the property and placing a dwelling that were not specifically identified or established by Bernard and Margaret Bernheim as restricting the division of the property or placement of a dwelling, and it would be premature to not apply those regulations given the available evidence. To the extent necessary to effectuate the Board action to not apply the dwelling or division restrictions of the applicable zone described above, the claimant shall submit appropriate applications for review and approval of a new dwelling to show the specific development

proposals and in the event additional county land use regulations result in a restriction of those uses that have the effect of reducing the fair market value of the property, the County Administrator shall have the authority to determine those restrictive county land use regulations that will not apply to that development proposal to preclude entitlement to just compensation under Measure 37. All other Lane Code land use and development regulations shall remain applicable to the subject property until such time as they are shown to be restrictive and that those restrictions reduce the fair market value of the subject property.

IT IS HEREBY FURTHER ORDERED that this action making certain Lane Code provisions inapplicable to use of the property by Bernard and Margaret Bernheim does not constitute a waiver or modification of state land use regulations and does not authorize immediate construction of a dwelling. The requirements of state law may contain specific standards regulating development of the subject property and the applicants should contact the Department of Administrative Services (DAS - State Services Division, Risk Management - Measure 37 Unit, 1225 Ferry Street SE, U160, Salem, OR 97301-4292; Telephone: (503) 373-7475; website address: <http://www.oregon.gov/DAS/Risk/M37.shtml>) and have the State of Oregon evaluate a Measure 37 claim and provide evidence of final state action before seeking county land use approval.

IT IS HEREBY FURTHER ORDERED that the other county land use regulations and rules that still apply to the property require that land use, sanitation and building permits be approved by Lane County before any development can proceed. Notice of this decision shall be recorded in the county deed records. This order shall be effective and in effect as described in LC 2.770 and Ballot Measure 37 to the extent permitted by law. This order does not resolve several questions about the effect and application of Measure 37, including the question of whether the right of applicants to divide or build dwellings can be transferred to another owner. If the ruling of the Marion County Circuit Court in *MacPherson v. Dept. of Administrative Services*, (Marion County Circ. Ct. Case No. 00C15769, October 14, 2005) or any other court decision involving Ballot Measure 37 becomes final and that decision or any subsequent court decision has application to Lane County in a manner that affects the authority of this Board to grant relief under Ballot Measure 37 and LC 2.700 through 2.770 then the validity and effectiveness of this Order shall be governed by LC 2.770 and the ruling of the court.

DATED this _____ day of _____, 2006, *nunc pro tunc* July 12, 2006.

Bill Dwyer, Chair
Lane County Board of County Commissioners

APPROVED AS TO FORM

Date 9-26-2006 Lane County



OFFICE OF LEGAL COUNSEL

**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

ATTACHMENT "A"

Table 2: Summary of Relevant Submitted Deeds

Document	Date	Seller/Buyer	Tax lots
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.