

# PASSED

## 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.

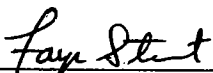
**IT IS HEREBY FURTHER ORDERED** that Bernard and Margaret Bernheim still need to make application and receive approval for division of the property or placement of dwellings under the other land use regulations applicable to dividing the property and placing a dwelling that were not specifically identified 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 18<sup>th</sup> day of October, 2006, *nunc pro tunc* July 12, 2006.

  
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Bill Dwyer, Chair  
Lane County Board of County Commissioners

APPROVED AS TO FORM  
Date 9-26-2006 Lane County  
  
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OFFICE OF LEGAL COUNSEL