

Memo Date: March 14, 2007
Hearing Date: April 17, 2007



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 (PA06-7165, Brewer1)

BACKGROUND

Applicant: Gordon E. Brewer and Carol E. Brewer (as individual ½ owners in tax lot 600 and as partners in the G.L. Brewer and Son partnership, the owner of tax lot 703)

Current Owner: Gordon E. Brewer and Carol E. Brewer (tax lot 600), G.L. Brewer & Son, a partnership (tax lot 703)

Agent: Steve Cornacchia, Hershner Hunter, LLP

Map and Tax lot(s): 19-01-04, tax lot 600 & 19-01-05, tax lot 703

Acreage: Tax lot 600 is approximately 102 acres & tax lot 703 is approximately 104 acres

Current Zoning: F2 (Impacted Forest), /FP (Floodplain Combining Zone)

Date Property Acquired: Tax lot 600 acquired was by Gordon E. Brewer on November 20, 1962 (BSD #90913)

On November 21, 1962, Carol E. Brewer acquired an undivided ½ interest in tax lot 600 (BSD #90912)

Tax lot 703 was acquired by G. L. Brewer and Son, a partnership, on November 10, 1971 (WD #73758)

Date claim submitted: November 30, 2006

180-day deadline: May 29, 2007

Land Use Regulations in Effect at Date of Acquisition: Both Tax lot 600 and 703 were unzoned on the dates they were acquired by the owners.

Restrictive County land use regulation: Minimum parcel size of eighty acres and limitations on new dwellings in the F2 (Impacted Forest) zone (LC 16.211).

ANALYSIS

To have a valid claim against Lane County under Measure 37 and LC 2.700 through 2.770, the applicant must prove:

1. Lane County has enacted or enforced a restrictive land use regulation since the owner acquired the property, and

Gordon E. Brewer acquired his interest in tax lot 600 on November 20, 1962 (BSD #90913). On November 21, 1962, Carol E. Brewer acquired an undivided ½ interest in tax lot 600 (BSD #90912). On November 10, 1971, the applicants, G.L. Brewer & Son, a partnership, obtained its interest in tax lot 703 (WD #73758).

Tax lots 600 and 703 were unzoned when they were acquired by the current owners. Currently, they are both zoned F2

2. The restrictive land use regulation has the effect of reducing the fair market value of the property, and

The minimum lot size and limitations on new dwellings in the F2 zone prevent Gordon and Carol Brewer and G.L. Brewer & Son from developing the subject property as could have been allowed when they acquired it. The alleged reduction in fair market value is \$6,520,000, based on the submitted appraisal.

The applicant is also claiming that the following sections of Lane Code have restricted the use of the subject property:

LC10.100-10, 30 & 40– These provisions only apply to those EFU (Exclusive Farm Use District) zoned properties within the Urban Growth Boundaries of a city and are not applicable to the subject property.

LC13.050 – These provisions apply to subdivision and partitioning of property. No evidence has been provided that demonstrates how these regulations have lowered the fair market value of the property.

LC15.070, 15.080, 15.137, 15.138 & 15.045(1) – These provisions apply to road and driveway approach spacing standards, requirements for roads serving land divisions and building setbacks from roads. No evidence has been provided that demonstrates how these regulations have lowered the fair market value of the property.

3. The restrictive land use regulation is not an exempt regulation as defined in LC 2.710.

The minimum lot size and restrictions on new dwellings in the F2 zone do not appear to be exempt regulations.

The regulations found within the /FP (Floodplain Combining Zone) of LC16.244 are exempt regulations as defined by LC 2.710 (2) and cannot be waived.

CONCLUSION

It appears this is a valid claim.

RECOMMENDATION

The County Administrator recommends the Board adopt the attached order to waive the restrictive land use regulations of the F2 zone.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,
OREGON**

ORDER No.) 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 (Brewer1, PA06-7165)

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 landowner 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, the County Administrator has reviewed an application for a Measure 37 claim submitted by Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son (PA06-7165), the owners of real property described in the records of the Lane County Assessor as map 19-01-04, tax lot 600 and map 19-01-05, tax lot 703 consisting of approximately 206 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 owner 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 April 17, 2007, the Board conducted a public hearing on the Measure 37 claim (PA06-7165) of Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership and has now determined that the restrictive F2 (Impacted Forest) zone dwelling and land division requirements of LC 16.211 were enforced and made applicable to prevent Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son from developing the property as might have been allowed at the time tax lot 600 was acquired on November 20, 1962 by Gordon E. Brewer and on November 21, 1962 by Carol E. Brewer, and at the time tax lot 703 was acquired by G.L. Brewer

& Son, a partnership, on November 10, 1971, and that the public benefit from application of the current F2 dwelling and division land use regulations to the applicants' property is outweighed by the public burden of paying just compensation; and

WHEREAS, Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son request up to \$6,520,000 as compensation for the reduction in value of their property, or waiver of all land use regulations that would restrict the division of land into multiple lots and placement of a dwelling on each lot, uses that could have otherwise been allowed on the dates they acquired the property; 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 F2 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 the owners 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 an interest in 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, Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership, 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 an interest in 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 Gordon E. Brewer and Carol E. Brewer and G.L. Brewer & Son, a partnership, shall be granted and the restrictive provisions of LC 16.211 that limit the development of dwellings and the division of land in the F2 (Impacted Forest) Zone shall not apply to Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership, so they can make application for approval to develop the property located at 39030 Place Rd, Fall Creek, OR and more specifically described in the records of the Lane County Assessor as map 19-01-04, tax lot 600 and map 19-01-05, tax lot 703, in a manner consistent with the land use regulations in effect on November 20, 1962 for Gordon E. Brewer and on November 21, 1962 for Carol E. Brewer, the dates they acquired an interest in tax lot 600 and on November 10, 1971, the date G.L. Brewer & Son, a partnership, acquired an interest in tax lot 703.

IT IS HEREBY FURTHER ORDERED Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership, still need to make application and receive approval of any division of the property or placement of a dwelling under the other land use regulations applicable to dividing the property or placing a dwelling that were not specifically identified or established by Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership, 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, and return to the Board for action, if necessary. 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 Gordon E. Brewer, Carol E. Brewer and G.L. Brewer & Son, a partnership, not constitute a waiver or modification of state land use regulations and does not authorize immediate division of the subject property or 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.

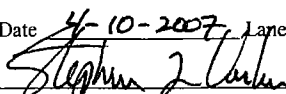
IT IS HEREBY FURTHER ORDERED that the other county land use regulations and rules that still apply to the property require that land use, sanitation and building permits be approved by Lane County before any development can proceed. Notice of this decision shall be recorded in the county deed records. 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 applicant 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 _____, 2007.

Faye Stewart, Chair
Lane County Board of County Commissioners

APPROVED AS TO FORM

Date 4-10-2007 Lane County



OFFICE OF LEGAL COUNSEL