ADMINISTRATIVE PROCEEDING
FILE NO. 3-4837

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
BERKLEY LAND AND INVESTMENT CORPORATION	:
(24W-3169)	:

INITIAL DECISION

Washington, D.C.
July 9, 1976

David J. Markun
Administrative Law Judge

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APPEARANCES: Edward A. Kwalwasser and John L. Krug, Attorneys for the Division of Corporation Finance.

Nathaniel S. Fulford, President of Berkley Land and Investment Corporation, for the Issuer.

BEFORE: David J. Markun, Administrative Law Judge

This is a proceeding pursuant to Section 3(b)[1/] of the Securities Act of 1933 ("Securities Act") and Rule 261[2/] of Regulation A[3/] thereunder to determine whether to vacate or make permanent an order issued by the Commission on December 30, 1975 ("Order"), temporarily suspending the exemption from registration under Regulation A of Berkley Land and Investment Corporation ("Berkley", or "Issuer").

On July 17, 1974, Berkley filed with the Washington, D.C. Regional Office of the Commission notification on Form 1-A[4/] and an offering circular for the purpose of obtaining an exemption under Regulation A to permit the public offering of subordinated debenture notes and common stock aggregating $490,000. On March 27, 1975, Berkley filed an amended notification and offering circular[5/] modifying and reducing its proposed offering to 450 units, each consisting of five 8% $100 subordinated debenture notes and 20 shares of common stock at an offering price of $800 per unit, for a total offering of $360,000.

No sales were made under the offering. At the request of the Issuer, through its president, Nathaniel S. Fulford ("Fulford"), a hearing was held in Arlington, Virginia, on March 17th and 18th, 1976.

1/ 15 U.S.C. 77c(b).

2/ 17 CFR 230.261.

3/ 17 CFR 230.251 — 230.263.

4/ 17 CFR 239.90

5/ All references hereinafter to the offering circular will be to the amended offering circular unless otherwise specified.

Rule 261, insofar as here pertinent, provides as follows:

> Rule 261. Suspension of Exemption.
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> (a) The Commission may, at any time after the filing of a notification, enter an order temporarily suspending the exemption, if it has reason to believe that —
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> (1) no exemption is available under this regulation for the securities purported to be offered hereunder or any of the terms or conditions of this regulation have not been complied with, including failure to file any report as required by Rule 260;
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> (2) the notification, the offering circular or any other sales literature contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;
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> (3) the offering is being made or would be made in violation of Section 17 of the Act;
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> * * *
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> (7) the issuer or any promoter, officer, director or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made hereunder.
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> * * *

The record in this proceeding discloses, as alleged in the Order, a number of omissions to state material facts necessary to keep various statements made in the offering circular, in light of the circumstances under which they were made, from being misleading. The record also discloses, as alleged, a number of other respects in which the terms or conditions of Regulation A have not been met by Berkley. In addition, the record discloses, as alleged, that Berkley, through Fulford, failed to cooperate with the Commission's staff by refusing to allow its books to be examined unless the staff accepted an unwarranted condition.

Schedule I of the Form 1-A notification required to be filed under Regulation A requires that the offering circular include, among other prescribed matters: the purposes for which the net cash proceeds to the issuer from the sale of the securities are to be used and an indication of the order of priority in which the proceeds will be used for the respective purposes; a brief description of the business or proposed business of the issuer, including a statement of the plants or other physical properties now held or presently intended to be acquired and the nature of the title under which such properties are held or proposed to be held; a statement of all direct and indirect interests held by officers, directors, and controlling persons of the issuer (i) in the issuer or its affiliates and (ii) in any material transactions within the past two years or in any material proposed transactions to which the issuer or any of its affiliates was or is to be a party; and designated financial statements of the issuer.

The record discloses that the Issuer failed, as alleged, to file appropriate financial statements as required by Schedule I and omitted, as alleged, to disclose material facts with reference to other items adverted to in its offering circular, with the result that what it did disclose respecting such matters was misleading.

The financial statement filed by the Issuer with its offering circular does not meet the requirements of Schedule I in that: (a) it does not contain a profit and loss statement covering operations of Issuer's predecessors for the period May 1, 1972 to April 30, 1973; (b) it does not contain a statement of changes in financial position either for Berkley's fiscal year ended April 30, 1974 or for its predecessors' fiscal year ended April 30, 1973; (c) it contains no allowance for doubtful accounts or an explanation as to the lack of

such an allowance; and (d) it is as of a date (April 30, 1974) more than 10 months prior to the offering circular (March 27, 1975). Although these deficiencies were in substance pointed out in a general letter of comment to Fulford from the Commission staff dated October 18, 1974, the Issuer has not rectified them, though Fulford indicated in his letter of March 25, 1975, forwarding Issuer's amended Form 1-A Notification and amended offering circular, that he intended to furnish Issuer's financial statement for its fiscal year ending April 30, 1975 as the financial statement for use in the offering circular and that he would ". . . take the section of your letter of comment headed 'Financial Comments' into account at that time."

Berkley was incorporated in Virginia on May 1, 1973. Its office is located in Fulford's home in Falls Church, Virginia. Fulford is the promoter, controlling stockholder, president, and a director of Berkley. Berkley has no paid personnel; Fulford receives certain commissions in connection with Berkley's land purchases, and his wife does some bookkeeping work for the firm without compensation.

The offering circular states that Berkley ". . . is engaged in the business of subdividing land into less than 10 acre parcels and selling same on easy terms." The offering circular goes on to state that the Issuer:

". . . owns the following subdivisions located in Virginia within a 150 mile radius of the Washington Metropolitan area, all of which are zoned agricultural; front on state maintained roads; and are served by both electricity and telephone except for Mountain Farms Subdivision which is presently served by electricity only:

Subdivision	County	Initial Acreage	Topography
Bull Run	Prince William	35	gently rolling
Mountain Farms	Madison	115	mountainous
Valley Brook	Orange	264	rolling
Chance Farms	Buckingham	272	rolling

The circular adds: "Overall, about 4/9 of the above acreage is presently either sold or under contract."

The foregoing description of the Issuer's business and its present land holdings is misleading in a number of respects. While indicating that the subdivisions are "zoned agricultural," which suggests the land holdings are being sold for farm purposes, the circular states that the land is being subdivided into less than 10 acre parcels (which could mean one-acre, half-acre or even smaller lots) thus suggesting, in conjunction with the statement of proximity to the Washington, D.C. area, that the land may be being offered for sale as vacation (or "second") homes, or for regular homesites for commuters, or even for commercial purposes. In short, the offering circular gives very confusing, and therefore misleading, signals as to the kind of business the Issuer is in. 6 /

In addition, the statement that about 4/9 of the acreage presently held by the Issuer is "either sold or under contract" (which could ordinarily

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6 / The record does not disclose what kinds of purchasers have bought land from the Issuer or the purposes for which they intend to use the land.

suggest a prospering business) is in the instant context misleading in that the Issuer did not disclose the breakdown betweens lands sold and lands "under contract", nor did it disclose exactly how "easy" the "easy terms" of sale were.

As to the use of proceeds, the offering circular states as follows:

> ". . . [Berkley] expects to use all of the net proceeds from the sale of the within securities, plus interest thereupon, to purchase unimproved land and pay interest arising on indebtedness incurred in the purchase of said unimproved land. To this end the Corporation will set up a special bank account wherein all monies received herefrom will be deposited, and all withdrawals therefrom shall be used to purchase land or make payments of principal and interest on Deferred Purchase Money Notes arising in the purchase of said land; except that withdrawals may also be used to pay interest payments on the Series "A" 8% Subordinated Debenture Notes thru 1980."

This statement is misleading in a number of respects. It implies, when read in conjunction with the sketchy statement of the Issuer's present business, discussed above, that the land to be purchased will be within the same general locations and in the same proximity to the Metropolitan Washington area as are lands presently owned by the Issuer. Yet the use-of-proceeds statement is not so restricted; it allows Issuer to buy "unimproved land" anywhere. Similarly, there is an implication that the land to be purchased with the proceeds would be subdivided and sold in the same general manner as are lands presently owned by the Issuer, but there are in fact no commitments or restrictions in the offering circular as to what the Issuer may do or must do with the land purchased with proceeds of the contemplated Reg. A offering. Further, while the statement as to use of proceeds suggests that leverage will be employed

in the purchase of lands, since it provides that proceeds of the offering may be used to "pay interest arising on indebtedness incurred in the purchase of said unimproved land," there is no indication of the extent to which such leverage may be employed, a very material consideration to any prospective investor. There is no indication of the proportions of the proceeds, even by approximation, that will be used respectively to buy land, to pay interest in connection with buying land, and to pay interest on the 8% subordinated debenture notes proposed to be issued in the Reg. A offering. As aptly stated in the Division's brief, the offering circular would give the Issuer a "blank check" with respect to an undetermined but presumably large portion of the proceeds of the proposed public offering.

Respecting relationships involving affiliates, the offering circular indicates that Berkley's business affairs and the engineering, maintenance, and construction of Berkley's subdividions are handled by Mid-Atlantic Realty and Management Corporation ("Real Corp") and Mid-Atlantic Contracting and Equipment Corporation ("Con Corp") , respectively. Real Corp and Con Corp are wholly owned by Fulford and are affiliates of Berkley.

The offering circular discloses that no completion bonds are required and that there are no restrictions on the quality, quantity or time of completion of work performed for Berkley by Con Corp.

The offering circular states that Berkley's management expects the relationship between Berkley and Con Corp ". . . to be a continuing one, involving ever increasing workloads, and does not expect the Corporation [Berkley] to entertain competitive bids from other engineering and construction firms, either at present or in the foreseeable future."

The offering circular shows that the payments from Berkley to Con Corp for subdivision maintenance, engineering or construction work are based on charges calculated pursuant to various formulas. The hourly equipment rental charged to Berkley by Con Corp for heavy equipment and vehicles is determined by the use of a formula which utilizes the cost of the equipment being used as one of the elements of the formula. The formula is followed by an asterisk and footnote which defines cost in the context of the formula utilized by Con Corp to determine the hourly rental charge for heavy equipment and vehicles "as the price of the equipment when new, irregardless [sic] of whether or not [Con Corp] actually purchased said equipment new or used."

The offering circular does not contain a statement disclosing the actual cost of the heavy equipment and vehicles utilized by Con Corp for the maintenance, engineering or construction work for Berkley's subdivisions, either specifically or by comparing it in general terms to the cost of new equipment.

And, of even broader significance, the offering circular does not contain a statement disclosing whether the impliedly-reasonable invoice cost, markups and profits realized by Con Corp on services rendered to Berkley, as disclosed in the circular, would be comparable, higher, or lower than those that might be charged by an unaffiliated entity. The failure to disclose these material facts, in light of the relationship between the Issuer and its affiliate and Fulford, was misleading. Failure to disclose such relevant information gave the prospective Reg. A purchaser no basis for judging whether the arrangements were or were not such as would allow Fulford to overreach the Issuer for his personal benefit.

As bearing on the question of dilution, the offering circular discloses that there are presently a total of 110,000 shares of Class A and Class B shares outstanding. Based on the financial statements dated April 30, 1974, contained in the offering circular, these outstanding shares have a book value of approximately $3.38 per share. The price attributable to the common stock of Berkley's proposed public offering of units is $15 per share. If all of Berkley's public offering of units were sold, there would be 119,000 shares of common stock outstanding with a book value of approximately $4.13 per share.

If all of the shares offered by Berkley were sold, the present stockholders would benefit in terms of book value to the extent of approximate $.75 per share without cost to them. The public investors purchasing pursuant to Berkley's proposed public offering would suffer an immediate and substantial dilution of approximately $10.87 per share from the public offering attributable to the common stock.

The offering circular does not contain a statement expressly disclosing the extent of the dilution to be experienced by investors purchasing stock pursuant to Berkley's proposed public offering. In view of the substantial dilution involved, failure to expressly disclose it was misleading. In the Matter of American Television & Radio Co., 40 S.E.C. 641, 647 (1961); In the Matter of Aetna Oil Dev. Co., Inc., 40 S.E.C. 784, 788 (1961).

The Commission's Order includes a charge that Berkley failed to cooperate with Commission staff by declining to make its books and records available for examination.

On July 9, 1975 two staff members of the Commission's Washington Regional Office went to the Berkley office (in Fulford's home) with the intention of examining such books and records of the Issuer as it would be necessary to examine in order to verify the adequacy and accuracy of the disclosures contained in the offering circular. The visit was prompted in part by the facts that Fulford had resisted an informal conference with Commission staff to discuss what staff personnel told him were gross inadequacies in the Issuer's original offering circular 7/ and that the offering circular filed after Fulford received the general letter of comment rectified hardly any of the deficiencies pointed out. Instead, Fulford kept demanding, in effect, a bill of particulars as to the specific deficiencies and the staff's specific legal authority for demanding the additional information suggested in the general letter of comment.

Fulford was upset by the fact that the two staff members called at his home without any prior arrangement. In addition, he stated he was in the midst of preparing for a shareholders meeting that was to take place in a few days. Fulford therefore declined to allow the Commission staff members to examine his books at that time. The Commission staff members indicated they'd be glad to come by after the shareholders meeting, but no alternative date was scheduled, Fulford having said he'd write them about the matter. Fulford thereafter wrote to the Washington Regional Office stating he would allow the Issuer's books to be examined only if SEC personnel conducted a full "audit" and made a copy available to him. He was advised that Commission personnel never conducted "audits"

7/ For some reason not evident from the record Fulford mistrusted staff personnel and preferred to have communications between them and him in writing even after being advised the deficiencies were so extensive that an oral conference was the only practical way to proceed.

of an Issuer's books and that their sole desire was to have such access to his books as would be required to verify the disclosures in the offering circular. Fulford persisted in his refusal to cooperate except on the unacceptable terms he imposed. At the hearing he was able to offer no satisfactory explanation of his continued refusal to make his books available for inspection; he testified he thought he was "entitled" to a full "audit" and a copy thereof, but could offer no authority in support of his position. It is concluded that this unfounded refusal to allow Issuer's books and records to be examined constituted a failure to cooperate in the making of an investigation by the Commission within the meaning of Rule 261(a)(7).

The Division urges that there are a variety of other material omissions from the Issuer's offering circular. A number of these, e.g. those relating to the business or proposed business of the Issuer and to the physical properties now held or presently intended to be acquired, would very probably have warranted findings adverse to the Issuer had Section II B of the Order charged such omissions as failures to comply with the terms and conditions of Regulation A, i.e. as failures to include in the offering circular the various items required by Schedule I to be contained therein.[8/] However, the Division chose not to do so -- Section II B of the Order is limited to matters relating to Issuer's financial statements and accounts. The language "among other things" contained in Section II B does not give

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8/ See p. 4 above for a partial enumeration of such items.

the Issuer adequate notice that he would have to meet more expanded contentions thereunder, of the kind here being discussed, nor does the Division contend that it does so.

Thus, the Division must prove that the remaining material omissions it urges be found were omissions that made statements that were contained in the offering circular misleading, as alleged in Section II A of the Order. This the record fails to support. While most of these remaining omissions asserted by the Division involve matters a potential investor might well consider material and want to be apprised of, they are not omissions that serve to make matters that are disclosed in the offering circular misleading. Accordingly, the charges as to material omissions, except as found herein to be substantiated and supported by the record, are hereby dismissed.

The exemption from registration provided by Regulation A is a provisional one predicated upon compliance with the terms and conditions of the regulation and, in the event of noncompliance, Rule 261 provides that the Commission may suspend the exemption. In view of the number and nature of the deficiencies in the offering circular of the Issuer and of its failure to cooperate, as found above, it is concluded that a permanent suspension is required to protect the public interest.[9/]

Accordingly, IT IS ORDERED pursuant to Rule 261 (17 CFR 230.261) of Regulation A under the Securities Act of 1933 that the temporary suspension Order of December 30, 1975 respecting Berkley Land and Investment Corporation, to the extent consistent with the findings made herein, is hereby made permanent.

9/ In view of the findings made herein, the offering if made under the offering circular discussed herein, would be, as alleged in the Order, in contravention of Section 17 of the Securities Act of 1933, as amended.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17 CFR §201.17(f).

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 10/

David J. Markun
Administrative Law Judge

Washington, D.C.
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10/ All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.