BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M124722
(BALLOT MEASURE 37) OF	)	
John C. Hill and Wesley S. Hill, CLAIMANTS	)	

Claimants: John C. Hill and Wesley S. Hill (the Claimants)

Property: Township 38S, Range 4W, Section 7, Tax lots 300 and 301, Jackson County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the laws to John and Wesley Hill's use of the 102.09-acre subject property for aggregate extraction for a temporary period of five to ten years: ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120 and 660-033-0120. These laws will not apply to the claimants only to the extent necessary for them to use the subject property for the use described in this report, and only to the extent that this use was permitted when they acquired the property on May 19, 1981.

2. The action by the State of Oregon provides the state's authorization to not apply ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120 and 0130 to the claimants' use of the subject property for the use described in this report.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent.

Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) or (2) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director

Cora R. Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 27th day of September, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Lindsay A. Ball

Lindsay A. Ball, Director
DAS
Dated this 27th day of September, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the

property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

September 27, 2006

OREGON CLAIM NUMBER:	M124722
NAMES OF CLAIMANTS:	John C. Hill Wesley S. Hill
MAILING ADDRESS:	14850 Highway 238 Grants Pass, Oregon 97527
IDENTIFICATION OF PROPERTY:	Township 38S, Range 4W, Section 7 Tax lots 300 and 301 Jackson County
OTHER CONTACT INFORMATION:	Daniel B. O'Connor Huycke, O'Connor, Jarvis & Lohman, LLP 823 Alder Creek Drive Medford, Oregon 97504
DATE RECEIVED BY DAS:	April 3, 2006
180-DAY DEADLINE:	September 30, 2006

I. SUMMARY OF CLAIM

The claimants, John and Wesley Hill, seek compensation in an amount between $925,000 and $1,400,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain real property. The claimants desire compensation or the right to mine aggregate from the property. The 102.09-acre subject property is located at 14850 Highway 238, Grants Pass, in Jackson County and is identified as tax lots 300 (25.22 acres) and 301 (76.87 acres). (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' request to excavate aggregate from the subject property for a period of five to ten years: ORS 215.283(2)(b) and 215.298 and Oregon Administrative Rule (OAR)

660-033-0120 and 660-033-0130, enacted or adopted after May 19, 1981. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 19, 1981. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

Comments Received

On August 14, 2006, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, six written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

The claim was submitted to the DAS on April 3, 2006, for processing under OAR 125, Division 145. The claim identifies statutes and administrative rules enacted since the claimants acquired interest in the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure37 (December 2, 2004), based on land use regulations enforced prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimants' grandparents, Callie R. and Louvella Hill, purchased the subject property in 1928 (tax lot 300) and 1937 (tax lot 301). The subject property has remained under family ownership since that time. The claimants acquired an ownership interest in the subject property on May 19, 1981, by a land sales contract[1] with Lester and Berteena Hill, recorded on May 27, 1981 (document #81-09765), a copy of which was submitted with the claim as "Exhibit C." As set forth in "Exhibit A" submitted with the claim, in 1993, Berteena Hill, conveyed her vendor's interest in the subject property, including the interest of Lester Hill (deceased), to the Bessie Berteena Hill Revocable Trust pursuant to two warranty deeds dated April 23, 1993, and recorded as document #93-21524 and #93-13329 in the official records of Jackson County (attached as "Exhibit D"). The land sale contract was completed when the Bessie Berteena Hill Revocable Trust conveyed its vendor's interest in tax lots 300 and 301 to John and Wesley Hill pursuant to a bargain and sale deed dated April 30, 1998, and recorded as document #98-13244 in the official records of Jackson County. A copy of this deed was submitted with the claim as "Exhibit E." Fifty percent of title was conveyed to John Hill through the John C. Hill Revocable Living Trust, and the remaining fifty percent was conveyed to Wesley Hill through the Wesley S. Hill Revocable Living Trust.[2] A March 27, 2006, title report submitted with the claim as "Exhibit H" establishes the claimants' current ownership of the subject property.

Conclusions

The claimants, John and Wesley Hill, are "owners" of the subject property, as that term is defined by ORS 197.352, as of May 19, 1981. The claimants' grandparents, Callie R. and Louvella Hill, are "family members" of the claimants, as defined by ORS 197.352(11)(A), and acquired the subject property in 1928 and 1937.

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[1] Consistent with Oregon law, a vendee is considered the owner of the real property, and therefore, the claimants' acquisition date was May 19, 1981. *See Sheehan v. McKinstry et al.*, 105 Or 676, 686 (1951); *Newman v. Randall*, 90 Or App 623–33 (1988).

[2] Transfer of property to a revocable trust does not result in a change in ownership for the purposes of ORS 197.352.

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, ORS 197.352(1) requires in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to mine aggregate from the subject property. The claim is based on three specific state laws: ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120 and 660-033-0130.

The claim lists the following two specific statutory provisions and one section of administrative rule provisions as the basis for this claim[3] and provides the following statements regarding the effect of the laws on their desired use of their property:

1. Oregon Administrative Rules

The following Oregon Administrative Rules limit or prevent the proposed use.

a) OAR 660, division 33. Implements regulations and restrictions on agricultural land. *Initial effective date of August 7, 1993.*

2. Oregon Revised Statutes.

The following Oregon Revised Statutes limit or prevent the proposed use.

a) ORS 215.283 (specifically ORS 215.283(2)(b)). Regulates uses allowed in areas zoned for exclusive farm use. *Originally Enacted in 1983.*
b) ORS 215.298(2). States that a permit for mining of aggregate in areas zoned for exclusive farm use shall only be issued if the site is included on an inventory in an acknowledged comprehensive plan. *Enacted in 1989.* (Claim "Exhibit A," pp. 6 and 7.) [Emphasis in original.]

The claimants' family first acquired the subject property in 1928 and 1937, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1928 or in 1937.

OAR 660-033-120 and 660-033-130 provide that aggregate mining may be allowed on land zoned exclusive farm use, subject to ORS 215.296 (requiring that the use not force a significant change in farm or forest practices on surrounding lands, and not significantly increase the cost of such practices). As a result, OAR 660-033-0120 and OAR 660-033-0130 restrict the claimants' desired use of the property.

[3] The claimants also refer to several provisions of the Jackson County Land Development Ordinance. However, the State has no authority to provide relief as to provisions of the county's land development ordinance.

ORS 215.283(2)(b) authorizes counties to permit operations for mining aggregate on land zoned exclusive farm use, subject to ORS 215.298.

ORS 215.298 authorizes counties to permit operations for mining aggregate if the site is on an acknowledged inventory. The subject property is not on Jackson County's acknowledged inventory of aggregate sites.[4] As a result, ORS 215.283(2)(b) and 215.298 restrict the claimants' desired use of the property.

When the claimants' family members acquired the subject property, none of the identified laws were in effect.

Conclusions

The claim is based on specific provisions of state law that restrict aggregate mining on land zoned for exclusive farm use. These provisions restrict the claimants' desired use of the subject property by requiring it to meet certain standards in the case of OAR 660-033-0120 and 660-033-0130, and by requiring the site to be on an acknowledged inventory in the case of ORS 215.283(2)(b) and 215.298.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate between $910,000 and $1,400,000, as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a letter from an aggregate company estimating the royalty value to the owners of the property, as well as the likely net profit to the owners from conducting the desired use themselves.

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Wesley Hill whose family members acquired the subject property in 1928 and 1937. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a maximum reduction of $1.4 million, assuming that the owners remove the gravel themselves.

[4] In 1995, the county eliminated its aggregate inventory, thus removing the property from any inventory of potentially significant aggregate sites.

Based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on specific state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants' family acquired the property. The state land use regulations identified in the claim are ORS 215.283(2)(b) and 215.298 and OAR 660, division 33. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property, and as a result, are not exempt under ORS 197.352(3)(E).

Some of the comments on this claim assert that the exemption under ORS 197.352(3)(B) apply. This exemption concerns laws "[r]estricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations." ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120, as a general matter, do not restrict activities in order to protect public health and safety. Laws administered by other state agencies that are not identified in this claim may come under this exemption, including but not limited to, laws administered by the Department of Geology and Mineral Industries, laws related to highway access, laws relating to any bridge over the Applegate River, laws relating to removal or fill of material from waters of the state and laws relating to water quality or threatened or endangered species. This claim does not address such laws, and to the extent they apply to the claimants' desired use, nothing in the department's action on this claim will affect that.

Conclusions

None of the three specific laws identified in this claim were in effect when the claimants' family acquired the property in 1928 and 1937. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other laws that may apply to the claimants' desired use and fall under one or more of the exemptions set forth in ORS 197.352(3)(A) to (D) are not affected by this recommended decision.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply a law to allow the present owner to carry out a use of the property permitted at the

time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by a maximum of $1.4 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when their family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow John and Wesley Hill to use the subject property for a use permitted at the time they acquired the property on May 19, 1981.

At the time the claimants acquired the subject property, it was subject to Jackson County's exclusive farm use-2 zone. When the claimants acquired the subject property, the claimants' desired use of the property was governed by the county's land development ordinance and the applicable provisions of Goal 3, as well as ORS 215.213, then in effect. In 1981, ORS 215.213(2)(b) (1981 edition) allowed aggregate operations on exclusive farm use land subject to local government approval. Goal 3 allowed aggregate operations, subject to the requirement that such uses be minimized in order to allow for maximum agricultural productivity.

This report addresses only those state laws that are identified in the claim. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the laws to John and Wesley Hill's use of the 102.09-acre subject property for aggregate extraction for a temporary period of five to ten years: ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120 and 660-033-0120. These laws will not apply to the claimants only to the extent necessary for them to use the subject property for the use described in this report, and only to the extent that this use was permitted when they acquired the property on May 19, 1981.

2. The action by the State of Oregon provides the state's authorization to not apply ORS 215.283(2)(b) and 215.298 and OAR 660-033-0120 and 0130 to the claimants' use of the subject property for the use described in this report.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) or (2) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 8, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.