



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 16, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: *Ballot Measure 37 (ORS 197.352) Claim Number M130371*

*Claimant: James Wilcox*



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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND  
THE DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES  
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M130371  
(BALLOT MEASURE 37) OF )  
James Wilcox, CLAIMANT )

Claimant: James Wilcox (the Claimant)

Property: Township 18S, Range 44E, Sections 30 and 31, Tax lot 8500, Malheur County  
(the Property)

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

Claimant 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 Reports and Recommendation of DLCD (the DLCD Report), and the Department of Geology and Mineral Industries (DOGAMI Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Department of Geology and Mineral Industries (DOGAMI) for the reasons set forth in the DOGAMI Report.

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 following laws to James Wilcox's development of two dwellings on the 137.23-acre subject property and to his excavation of aggregate on the remainder of the property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on May 21, 1963.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on May 21, 1963.
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 claimant first obtains 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.

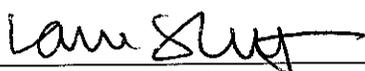
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

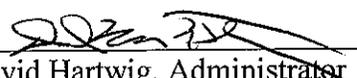
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

This Order is entered by the Director of the DOGMI as a final order of DOGMI under ORS 197.352, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD  
Dated this 19<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 19<sup>th</sup> day of April, 2007.

THE DEPARTMENT OF GEOLOGY AND  
MINERAL INDUSTRIES

  
\_\_\_\_\_  
Vicki McConnell, Director  
DOGAMI  
Dated this 19<sup>th</sup> day of April, 2007

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

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**

April 19, 2007

**STATE CLAIM NUMBER:** M130371

**NAME OF CLAIMANT:** James Wilcox

**MAILING ADDRESS:** 2330 Whitney Road  
Vale, Oregon 97918

**PROPERTY IDENTIFICATION:** Township 18S, Range 44E, Sections 30 and 31  
Tax lot 8500  
Malheur County

**DATE RECEIVED BY DAS:** October 23, 2006

**180-DAY DEADLINE:** April 21, 2007

**I. SUMMARY OF CLAIM**

The claimant, James Wilcox, seeks compensation in the amount of \$150,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to develop two additional dwellings on a portion of the 137.23-acre subject property and to excavate aggregate on the remainder of the property. The subject property is located at 2330 Whitney Road, near Vale, in Malheur County. (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 James Wilcox's development of two dwellings on the 137.23-acre subject property and his excavation of aggregate on the remainder of the property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on May 21, 1963. (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS ON THE CLAIM

#### Comments Received

On March 6, 2007, 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, one written comment was received in response to the 10-day notice.

The comment does 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 letter 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

This claim was submitted to DAS on October 23, 2006, for processing under OAR 125, division 145. The claim identifies OAR 632-030-0005 to 632-030-0070 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.<sup>1</sup>

#### Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

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<sup>1</sup> This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Geology and Mineral Industries are addressed in a separate report.

## 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 claimant, James Wilcox, acquired the subject property on May 21, 1963, as reflected by a quitclaim deed included with the claim. The Malheur County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, James Wilcox, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 21, 1963.

### **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 claimant’s 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimant desires to develop two additional dwellings on a portion of the 137.23-acre subject property and to excavate aggregate on the remainder of the property, and that the desired use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant’s property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant’s property is “agricultural land” as defined by Goal 3.<sup>2</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on that land.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under

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<sup>2</sup> The claimant’s property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils.

ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on May 21, 1963, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1963 and do not allow the desired residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **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 of \$150,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the subject property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is James Wilcox who acquired the subject property on May 21, 1963. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the property is a reduction of \$150,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, 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.

#### **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 state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Malheur County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

#### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general statutory, goal and rule restrictions on the development of the claimant's property were in effect when the claimant acquired it in 1963. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. 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 claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

### **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject property

in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject 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 of the department 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 claimant's 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 \$150,000. 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 compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he 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 James Wilcox to use the subject property for a use permitted at the time he acquired the property on May 21, 1963.

### **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 following laws to James Wilcox's development of two dwellings on the 137.23-acre subject property and to his excavation of aggregate on the remainder of the property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on May 21, 1963.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on May 21, 1963.
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 claimant first obtains 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) 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 claimant to use the subject property, it may be necessary for him 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 claimant 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 claimant.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 30, 2007. Under OAR 125-145 0100(3), the department provided an opportunity for the claimant or the claimant’s 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. The claimant submitted comments on the draft staff report that have been considered.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES**  
**Final Staff Report and Recommendation**

April 19, 2007

**STATE CLAIM NUMBER:** M130371

**NAME OF CLAIMANT:** James Wilcox

**MAILING ADDRESS:** 2330 Whitney Road  
Vale, Oregon 97918

**PROPERTY IDENTIFICATION:** Township 18S, Range 44E, Section 30 & 31  
Tax lot 8500  
Malheur County

**DATE RECEIVED BY DAS:** October 23, 2006

**180-DAY DEADLINE:** April 21, 2007

**I. SUMMARY OF CLAIM**

The claimant, James Wilcox, seeks compensation in the amount of \$150,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to develop two additional dwellings on a portion of the 137.21-acre subject property and to excavate aggregate on the remainder of the property. The subject property is located at 2330 Whitney Road, near Vale, in Malheur County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Geology and Mineral Industries (the department) has determined that the claim is not valid. Department staff recommends that the claim be denied because the department has not enforced any "land use regulations" with respect to the claimant's use of the property since the effective date of Measure 37, because the regulations listed in the claim are not "land use regulations," because the claim fails to establish that the fair market value of the property has been reduced, and because even if the regulations listed in the claim are "land use regulations," they are exempt under section 3 of Measure 37. (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS ON THE CLAIM

#### Comments Received

On March 6, 2007, 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, one written comment was received in response to the 10-day notice. The comment has been considered in preparing this report.

### 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

This claim was submitted to DAS on October 23, 2006, for processing under OAR 125, division 145. The claim identifies OAR 632-030-0005 through 632-030-0070 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.<sup>1</sup>

#### Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted 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."

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<sup>1</sup> This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Land Conservation and Development are addressed in a separate report.

## **Findings of Fact**

The claimant, James Wilcox, acquired the subject property on May 21, 1963, as reflected by a quitclaim deed included with the claim. The Malheur County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, James Wilcox, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 21, 1963.

## **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 claimant's 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 claimant or a family member acquired the property.

## **Findings of Fact**

The claim indicates that the claimant desires to develop two additional dwellings on a portion of the 137.21-acre subject property and to excavate aggregate on the remainder of the property, and that the desired use is not allowed under current land use regulations.

The claim is based OAR 632-030-0005 to 632-030-0070. According to a statement submitted by the claimant, these rules require a fee for a mined land reclamation permit, and require a bond.

OAR 632-030-005 to 632-030-0070 are rules applicable to certain surface mining activities. The rules implement the Oregon Mined Land Reclamation Act, which took effect in 1972. OAR 632-030-0005 to 0070 are rules of the Oregon Department of Geology and Mineral Industries. They are not rules governing farm or forest practices, and they are not rules of the Land Conservation and Development Commission. As a result, these rules are not included within the definition of the term "land use regulation" in ORS 197.352.

Under the rules and the Act, an operating permit is required for certain surface mining operations. Some operations are exempt. The department is unable to determine from the claim whether the intended operation would require an operating permit or not. The department has not acted on an application for an operating permit for this property in the period after the effective date of Measure 37 (December 2, 2004).

A DOGAMI operating permit was issued to Ontario Asphalt & Concrete Company for an aggregate site on a parcel owned by J A Wilcox in 1985. The mine site was located within tax lot 5400 sections 30, 31 T18S R44E Malheur County. Regrading of the excavation was completed in late 1988 and the landowner agreed to complete the seeding. The DOGAMI file was closed.

In 1996, an operating permit was applied for this same tax lot by Jim Mendiola. A permit was not issued to Mr. Mendiola. The application was assumed through a transfer in March 1997, by George Glerup. A DOGAMI operating permit was issued to Mr. Glerup in June 1997, and was maintained through September 2004.

In December 2003, it was determined this site was eligible for a Vegetation Permit, all earth moving required for final reclamation had been completed, with only revegetation required. A Vegetation Permit was issued to George Glerup in February 2005, and renewed through 2006. The vegetation permit expired in September 2006.

This site was declared reclaimed by DOGAMI with landowner concurrence in January 2007. The DOGAMI file was closed on January 9, 2007.

The landowner is exempt from all DOGAMI permit requirements so long as production remains under 5,000 cubic yards of material in any 12-month period and the area of mine disturbance does not exceed five acres.

### **Conclusions**

The Department has not enforced a "land use regulation" to restrict the claimant's use of the property since the effective date of Measure 37. In addition, the rules identified in the claim are not "land use regulations" under Measure 37.

This report addresses only those state laws that are identified in the claim. There may be other laws that currently apply to the claimant's desired use of the subject property.

### **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 of \$150,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the value of aggregate on the property. The claim does not establish that aggregate mining is the highest and best use of the property, and it appears from materials included with the claim that much of the property is currently in farm use.

### **Conclusions**

The claim fails to establish that the identified rules have reduced the fair market value of 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 certain rules of the department. Under ORS 197.352(3), land use regulations adopted to protect public health and safety, or adopted to prevent a public nuisance, are exempt from Measure 37. The rules were adopted to protect land and water resources affected by surface mining. OAR 632-030-0005. In ORS 517.760, the legislative assembly has found that: “\* \* \* Proper reclamation of surface-mined lands is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety and property rights of the citizens of this state.”

#### **Conclusions**

Even if the rules identified in the claim are “land use regulations” under ORS 197.352, they are exempt under section 3 of that statute.

### **VI. FORM OF RELIEF**

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

#### **Findings of Fact**

Based on the preliminary findings and conclusions set forth in this draft report, the claim fails to establish that the claimant is entitled to relief with respect to the rules of the department identified in the claim.

#### **Conclusions**

For the reasons set forth in this draft report, the department recommends that this claim be denied with respect to OAR 632-030-0005 to 632-030-0070.

### **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 30, 2007. Under OAR 125-145 0100(3), the department provided an opportunity for the claimant or the claimant’s 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. The claimant submitted comments on the draft staff report that have been considered.

## VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides an opportunity for the claimant or the claimant's 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management–State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.