Oregon
Theodore R. Kulongoski, Governor

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May 3, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130655

Claimant: Daniel Merrill

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 OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Daniel Merrill, CLAIMANT	))))	FINAL ORDER CLAIM NO. M130655

Claimant: Daniel Merrill (the Claimant)

Property: Township 4S, Range 2E, Section 33, Tax lot 1100, Clackamas 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 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 following laws to Daniel Merrill's extraction of aggregate on the 44.66-acre subject property: applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33, enacted or adopted after August 13, 2001. 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 August 13, 2001. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim.

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 August 13, 2001. At that time, the property was subject to applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, and 33, currently in effect and the provisions of OAR 660, division 23, then in effect.

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 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 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.

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

Cora R. Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 3rd day of May, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 3rd day of May, 2007.

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

May 3, 2007

STATE CLAIM NUMBER:	M130655
NAME OF CLAIMANT:	Daniel Merrill
MAILING ADDRESS:	14551 S Macksburg Road Molalla, Oregon 97038
PROPERTY IDENTIFICATION:	Township 4S, Range 2E, Section 33 Tax lot 1100 Clackamas County
DATE RECEIVED BY DAS:	November 9, 2006
180-DAY DEADLINE:	May 8, 2007

I. SUMMARY OF CLAIM

The claimant, Daniel Merrill, seeks compensation in the amount of $27 million 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 extract aggregate on the 44.66-acre subject property. The subject property is located at 14551 S Macksburg Road, near Molalla, in Clackamas 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 Daniel Merrill's extraction of aggregate on the 44.66-acre subject property: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 16, 23, and 33, enacted or adopted after August 13, 2001. 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 August 13, 2001. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 23, 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 is relevant to when the claimant became the present owner of the subject property. The comment has been considered by the department 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 November 9, 2006, for processing under OAR 125, division 145. The claim identifies Goal 5, "1972 reclamation and mining laws" and "1972 land use zoning laws" as the basis for the claim. Only laws that were enacted or adopted 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 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."

Findings of Fact

The claimant, Daniel Merrill, acquired the subject property on August 13, 2001, as reflected by a conservator's deed included with the claim.[1] The claimant's parents, Cornelius and Laura Merrill, acquired the subject property on November 7, 1969, as evidenced by a real estate contract included with the claim. The Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Daniel Merrill, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 13, 2001. The claimant's parents are "family members" as defined by ORS 197.352(11)(A) and acquired the subject property on November 7, 1969.

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 extract aggregate on the 44.66-acre subject property and that the desired use is not allowed under current state 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 by Clackamas County 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.[2] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.283, 215.296 and 215.298 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit or restrict aggregate operations on EFU-zoned land.

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[1] The department acknowledges receipt of the claimant's correspondence dated April 18, 2007, relative to the department's finding as to the claimant's date of acquisition of the subject property. The department has considered the comment and finds that the record before the department supports the department's initial determination of the claimant's date of acquisition.

[2] The claimant's property is "agricultural land" because it contains National Resources Conservation Service Class I–IV soils.

ORS 215.283(2)(b)(B) lists operations conducted for mining, crushing and stockpiling of aggregate as a use that may be established in an area zoned EFU subject to criteria in ORS 215.296 and 215.298.[3] These statutes were enacted in 1989.

ORS 215.298 includes the provisions for mining authorized under ORS 215.283(2)(b)(B) in EFU zones. For purposes of ORS 215.283(2)(b)(B), a land use permit is required for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one acre. ORS 215.298(2) provides that a permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan.

Aggregate and mineral resources are also subject to the provisions of Goal 5 and its implementing rules. Goal 5, also enacted in 1975, establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources. In 1981, the Commission adopted OAR 660, division 16, establishing the process for applying Goal 5 to significant aggregate sites. OAR 660-016-0030. In 1996, the Commission adopted OAR 660, division 23, which established a new process for inventorying, evaluating, and designating significant aggregate sites under Goal 5. The rule was later amended in 2004. The intent of Goal 5 and the implementing regulations is to identify and protect significant resources, including mineral and aggregate resources, to allow their use. The rule also protects significant resources (including aggregate sites) from conflicting uses associated with uses on neighboring properties.

The claimant's family first acquired the subject property in 1969, prior to the adoption of the statewide planning goals and their implementing statutes and rules. In 1969, the subject property was zoned GU by Clackamas County, which allowed a one-acre minimum lot size and permitted dwellings as an outright use. Aggregate extraction was a conditional use.

Conclusions

The current standards for aggregate extraction established by applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33, were all enacted or adopted after the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the 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."

[3] In addition to these statutes, administrative rules apply. OAR 660-033-0120 (Table 1) lists aggregate mining as a use subject to review and approval. OAR 660-033-0130(5) requires review and approval of the use under ORS 215.296.

Findings of Fact

The claim includes an estimate of $27 million 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 Daniel Merrill whose family members acquired the subject property in 1969. Under ORS 197.352, the claimant is 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 claimant's family 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 subject property is a reduction of $27 million.

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 since the claimant's 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 state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33, which Clackamas County has implemented through its current EFU zone.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired the property on November 7, 1969. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 one or more laws that restrict 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 the law in order 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 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 $27 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 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 the claimant's 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 Daniel Merrill to use the subject property for a use permitted at the time he acquired the property on August 13, 2001.

At the time the claimant acquired an interest in the subject property, it was zoned EFU by Clackamas County and subject to the standards for aggregate extraction under Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33, described in Section V.(2) of this report.

In addition to the applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33 in effect when Daniel Merrill acquired the property in 2001, there may be other land use regulations that apply to the property that have not been identified in this claim. 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.

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 Daniel Merrill's extraction of aggregate on the 44.66-acre subject property: applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, 23, and 33, enacted or adopted after August 13, 2001. 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 August 13, 2001. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim.

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 August 13, 2001. At that time, the property was subject to applicable provisions of Goals 3 and 5, ORS 215 and OAR 660, divisions 16, and 33, currently in effect and the provisions of OAR 660, division 23, then in effect.

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 April 12, 2007. OAR 125-145 0100(3), 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.