Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
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July 30, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130842

Claimants: Indian Hill, LLC, John P. Krauss and Fred R. Krauss

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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 OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Indian Hill, LLC, John P. Krauss and Fred R. Krauss, CLAIMANTS	)))))	FINAL ORDER CLAIM NO. M130842

Claimants: Indian Hill, LLC, John P. Krauss and Fred R. Krauss (the Claimants)

Property: Township 38S, Range 8W, Section 1: tax lot 290
Township 38S, Range 8W, Section 2: tax lot 100
Josephine 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

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

Cora R. Parker, Deputy Director
DLCD
Dated this 30th day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Lindsay A. Ball, Director
DAS
Dated this 30th day of July, 2006.

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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

July 30, 2007

STATE CLAIM NUMBER:	M130842
NAMES OF CLAIMANTS:	Indian Hill, LLC John P. Krauss Fred R. Krauss
MAILING ADDRESS:	PO Box 479 Merlin, Oregon 97532
PROPERTY IDENTIFICATION:	Township 38S, Range 8W Section 1: tax lot 290 Section 2: tax lot 100 Josephine County[1]
OTHER CONTACT INFORMATION:	Michael Bird, Attorney 612 NW 5th Street Grants Pass, Oregon 97526
DATE RECEIVED BY DAS:	November 17, 2006
DEADLINE FOR FINAL ACTION:[2]	May 10, 2008

I. SUMMARY OF CLAIM

The claimants, John and Fred Krauss and Indian Hill, LLC, seek compensation in the amount of $1.5 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 claimants desire compensation or the right to divide the 81.77-acre subject property into parcels of at least five acres each, to develop a dwelling and a guest house on each parcel and to use a portion of the property for an "aggregate operation." The subject property is located northwest of Draper Valley Road, near Cave Junction, in Josephine County. (See claim.)

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[1] The subject property includes two tax lots. Tax lot 100 consists of 80.69 acres, and tax lot 290 consists of 1.08 acres.

[2] ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

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 not valid as to John and Fred Krauss because they are not owners of the subject property; and is not valid as to Indian Hill, LLC because the claimants' desired use of the subject property was prohibited under the laws in effect when Indian Hill, LLC acquired the property in 1997.[3] (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 29, 2007, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, 25 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.

[3] The department acknowledges receipt of the claimant's agent's correspondence dated June 29, 2007, relative to the department's finding as to the claimants' 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 claimants' date of acquisition.

Findings of Fact

This claim was submitted to DAS on November 17, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215; OAR 660, division 6; and current aggregate regulations 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 claimants, John and Fred Krauss and Indian Hill, LLC, state in the claim that they acquired the subject property on June 2, 1977, when Rough and Ready Timber Company[4] acquired the property. Although claimants John and Fred Krauss have had an ownership interest in both Rough and Ready Timber Company and Indian Hill, LLC, according to title information included with the claim and Josephine County records, John and Fred Krauss have no ownership interest in the property.

Claimant Indian Hill, LLC acquired the subject property on December 30, 1997, as reflected by a warranty deed included with the claim.[5] The Josephine County Assessor's Office confirms Indian Hill, LLC's current ownership of the subject property.

Conclusions

Claimant Indian Hill, LLC is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 30, 1997. Claimants John and Fred Krauss are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C).[6]

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[4] Based on the information in the claim, Rough and Ready Timber Company is an inactive general partnership.
[5] Indian Hill, LLC, an Oregon corporation, is a domestic limited liability company registered with the Oregon Secretary of State.
[6] Under ORS 197.352(11)(A), legal entities can be "family members" of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to Indian Hills LLC are not considered family members of the LLC under the definition of family member in ORS 197.352(11)(A).

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 a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 81.77-acre subject property into parcels of at least five acres each, to develop a dwelling and a guest house on each parcel and to use a portion of the property for an "aggregate operation," and that current land use regulations prevent the desired use.
The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. Tax lot 100 is zoned Forest Commercial (FC) and tax lot 200 is zoned Woodlot Resource (WR) by Josephine County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the subject property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use.

Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, generally prohibit the division of forest-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 generally establishes an 80-acre minimum size for the creation of new lots or parcels on forest-zoned land and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.705 to 215.755 establish standards for the creation of new parcels and dwellings allowed in forest zones.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025 interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

Claimant Indian Hill, LLC acquired the subject property on December 30, 1997. At that time, the property was subject to the current laws in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4 and provisions applicable to forest-zoned lands in ORS 215 and OAR 660, division 6, were all enacted or adopted before Indian Hill, LLC acquired the subject property on December 30, 1997. These land use regulations do not allow the claimants' desired use of the subject property. Laws enacted or adopted since Indian Hill, LLC acquired the subject property in 1997 do not restrict the claimants' desired use of the property relative to when Indian Hill, LLC acquired it in 1997.

As explained in Section V.(1), claimants John and Fred Krauss are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Conservation and Development Commission (the Commission) or the department restrict the claimants' use of the subject real property with the effect of reducing the fair market value of 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 regulations (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 $1.5 million 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 the claimants' assessment of the value of the subject property.

Conclusions

As explained in Section V.(1) of this report, the claimants are Indian Hill, LLC, which acquired the property on December 30, 1997, and John and Fred Krauss. John and Fred Krauss are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict their use of the subject property with the effect of reducing the fair market value of the subject property. No state laws enacted or adopted since Indian Hill, LLC acquired the subject property restrict the use of the property relative to the uses allowed in 1997. Therefore, the fair market value of the subject property has not been reduced 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 the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Josephine County has implemented through its current FC and WR zones. As set forth in Section V.(2) of this report, all of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when Indian Hill, LLC acquired the property in 1997.

Conclusions

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when Indian Hill, LLC acquired the property. Therefore, these state land use

regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the subject property.

As explained in Section V.(1) of this report, claimants John and Fred Krauss are not "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to John and Fred Krauss.

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, the department finds that the claim is not valid as to John and Fred Krauss because they are not owners of the subject property; and is not valid as to Indian Hill, LLC because its desired use of the property was prohibited by the laws in effect when it acquired the property in 1997. Laws enforced by the Commission or the department do not restrict Indian Hill, LLC's desired use of the subject property relative to what was permitted when it acquired the subject property in 1997 and do not reduce its fair market value. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, claimants John and Fred Krauss and Indian Hill, LLC have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 19, 2007. 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.