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4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY**

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6 JOHN C. HILL, TRUSTEE OF THE JOHN C.  
7 HILL REVOCABLE LIVING TRUST and  
8 WESTLEY G. HILL, TRUSTEE OF THE  
9 WESLEY G. HILL REVOCABLE LIVING  
10 TRUST,

Petitioners,

vs.

11 JACKSON COUNTY, an Oregon Municipal  
12 Corporation,

Respondent,

and

13 LINDA FORD, MICHELE BROWN-RIDING,  
14 and STEVEN W. ROUSE, individuals,

Intervenor-Respondents.  
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**CASE NUMBER: 08-4687-Z7**

**OPINION ON WRIT OF REVIEW**

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18 This matter came before the Court upon Petitioner's Writ of Review, and the Court  
19 having reviewed the record, and the memoranda of counsel, and further having conducted oral  
20 argument on June 29, 2009 and having considered the argument of counsel, Sydney B. Dreyer on  
21 behalf of Petitioners and Ralph O. Bloemers on behalf of Intervenors, and Respondent Jackson  
22 County having waived appearance at said argument, and being otherwise fully advised in the  
23 premises, the Court sets forth the following Opinion and Order.  
24

25 **OPINION**

26 Pursuant to Ballot Measure 37, petitioners obtained valid land use regulation waivers  
27 from Jackson County on July 27, 2005, and from the State of Oregon on September 27, 2006.  
28 Petitioners' purpose in obtaining waivers from land use regulations which became effective after

1 petitioners' ownership of the property was to allow for the extraction of aggregate materials from  
2 petitioners' real property. On May 21, 2001, petitioners entered into a contract with Copeland  
3 Sand and Gravel, Inc. (hereinafter referred to as "Copeland") to allow Copeland to extract and  
4 remove aggregate from the real property. Before permits were issued to allow for actual  
5 extraction of aggregate, Ballot Measure 49 was passed. Ballot Measure 49 eliminated all rights  
6 associated with claims filed under Ballot Measure 37, with the exception of pre-December 6,  
7 2007 waivers to the extent that the claimants use of the property complied with the waiver and  
8 the claimant had a common law vested right to complete the use on the effective date of Ballot  
9 Measure 49.  
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12 The Jackson County Board of Commissioners determined that the appropriate method to  
13 finalize vested rights determinations would be by way of the procedures set forth in Jackson  
14 County Ordinance Number 2008-3. Those procedures culminate in a final determination by the  
15 Review Authority. Jackson County Code 1230.06.01. An appeal of the Review Authority's  
16 determination is to be made by Writ of Review. Jackson County Code 1230.07.02.  
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18 After reviewing the record and argument of counsel for the petitioners and other  
19 interested parties, the Review Authority issued the Final County Vesting Decision on August 21,  
20 2008. That determination denied petitioners' vested rights application on the grounds that the  
21 contract between petitioners and Copeland made Copeland the sole owner of the aggregate  
22 mineral interest that was the subject of the petitioners' claim. The Review Authority erred in so  
23 concluding. The Review Authority ruled that "the aggregate has been owned by Copeland from  
24 May 21, 2001 to date" (page 6 of the Final Vesting Decision). However, the aggregate  
25 agreement is a profit a prendre. As a result, Copeland does not own any aggregate unless and  
26 until it has been extracted and removed, none of which has occurred to date. *Willamette*  
27 *Quarries v. Wodtli*, 308 Or 406, 413-14 (1989). The contract itself does not state that Copeland  
28

1 has exclusive rights to the aggregate on the property. It would be possible for petitioners to enter  
2 into a similar contract with yet another party, or, perhaps, even extract aggregate themselves.  
3 Doing so might run the risk of a potential breach of contract dispute, in the event that petitioners  
4 or other extractor's removal of aggregate from petitioners' property prevented Copeland from  
5 extracting and removing "such quantity of (aggregate) as Copeland (desired)". (Paragraph 1 of  
6 the contract). That risk, however, does not negate the non- exclusivity of the contract itself.  
7

8 While it is true that Copeland thus acquired an interest in the property, the contract does  
9 not deprive petitioners from their ownership of the property.<sup>1</sup> The contract allowed for its  
10 termination by either party during the term of the contract. Further, the contract has a limited  
11 duration.<sup>2</sup> Therefore at the very least, petitioners maintain a reversionary interest in all non-  
12 extracted aggregate.  
13

14 In ruling that petitioners had transferred all of its ownership interest in the aggregate  
15 contained on the real property to Copeland, and thus had lost their right to proceed under the  
16 waivers obtained from the county and the state, the Review Authority made a finding not  
17 supported by substantial evidence, and improperly construed applicable law.  
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19 The parties appear to have invited the Court to make additional findings in an effort to  
20 finalize the matter in this forum. However, a writ of review proceeding is not a *trial de novo*.  
21 The Court is limited by statute in respect to its powers and obligations in a writ of review  
22 proceeding. In reviewing the history of the case, it appears that the issues and arguments  
23 regarding the proportionality of expenditures, the overall size of the project to be used as the  
24 denominator in the *Holmes* equation, petitioner's good faith, and other ancillary issues were first  
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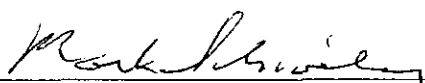
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27 <sup>1</sup> Once aggregate was extracted and removed by Copeland, petitioner would then no longer have an  
ownership interest in that aggregate.

28 <sup>2</sup> The Review Authority has found that the contract has been extended, pursuant to its terms, but even  
utilizing all potential extensions, the contract will expire ten years after its effective date. (Paragraph 6(a) of the  
contract).

1 interjected into the case in the Intervenor's Amended Motion to Set Aside the Judgment.  
2 Petitioners "took the bait," and a portion of the subsequent written and oral arguments dealt with  
3 these issues. However, the Review Authority did not make any findings in respect to those  
4 issues. Having found that the determination that the Review Authority did make is in error, the  
5 matter must be remanded to the Review Authority for further and additional findings on whether  
6 petitioners have a vested right to proceed with their desired use pursuant to county and state  
7 waivers under Ballot Measure 37. *Feitelson v. City of Salem*, 416 Or App 815, 820 (1980);  
8 *Salosha, Inc. v. Lane County*, 201 Or App 138, 145 (2005).  
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11 DATED this 30 day of July, 2009.

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14 MARK SCHIVELEY  
15 Circuit Court Judge  
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17 cc: Ms. Sydney B. Dreyer  
18 Mr. Ralph O. Bloemers  
19 Mr. Ryan Kirchoff  
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