

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	)	FINAL ORDER A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M129915
(BALLOT MEASURE 37) OF	)	
Vena Dilley, CLAIMANT	)	

Claimant: Vena Dilley (the Claimant)

Property: Township 18S, Range 2W, Section 21, Tax lot 500, Lane 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 Vena Dilley's division of the 31.93-acre subject property into four parcels and to her development of a dwelling on two of the three resulting undeveloped parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 . These land use regulations will not apply to Vena Dilley only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 19, 1949.
2. The action by the State of Oregon provides the state's authorization to Vena Dilley to use the subject property for the use described in this report, subject to the standards in effect on November 19, 1949.
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.

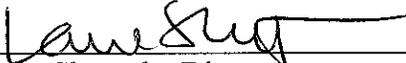
Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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) 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.

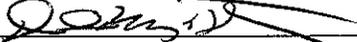
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director  
DLCD

Dated this 15<sup>th</sup> day of February, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of February, 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**

February 15, 2007

**STATE CLAIM NUMBER:**

M129915

**NAMES OF CLAIMANTS:**

Vena Dilley  
Darold Dilley  
Gerald Dilley

**MAILING ADDRESS:**

PO Box 1395  
Sisters, Oregon 97759

**PROPERTY IDENTIFICATION:**

Township 18S, Range 2W, Section 21  
Tax lot 500  
Lane County

**OTHER CONTACT INFORMATION:**

Steve Cornacchia  
Hershner Hunter, LLP  
180 E. 11th Avenue  
Eugene, Oregon 97401

**DATE RECEIVED BY DAS:**

August 24, 2006

**180-DAY DEADLINE:**

February 20, 2007

**I. SUMMARY OF CLAIM**

The claimants, Vena, Darold and Gerald Dilley, seek compensation in the amount of \$480,000 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 claimants desire compensation or the right to divide the 31.93-acre subject property into four parcels and to develop a dwelling on two of the three resulting undeveloped parcels. The subject property is located at 85496 Edenvale Road, near Pleasant Hill, in Lane 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 in part. 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 Vena Dilley's division of the 31.93-acre subject property into four parcels and to her development of a dwelling on two of the three resulting undeveloped parcels: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon

Administrative Rules (OAR) 660, division 33. These land use regulations will not apply to Vena Dilley only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 19, 1949.

The department has further determined that the claim is not valid as to Darold and Gerald Dilley because these claimants have not established their present ownership of the property. (See the complete recommendation in Section VI. of this report.)

### III. COMMENTS ON THE CLAIM

#### Comments Received

On December 15, 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, 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 August 24, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3 and 14; ORS 197.175, 197.200 and 215.203 to 215.296; OAR 660, divisions 14, 15, and 33; and Lane County zoning 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

Claimant Vena Dilley acquired the subject property on November 19, 1949, as reflected by a warranty deed included with the claim. On November 14, 1989, Vena Dilley conveyed an interest in the subject property to her sons Darold and Gerald Dilley, as reflected by a warranty deed included with the claim. However, the deed by which Vena Dilley conveyed an interest in the property to her sons expressly reserved in Vena Dilley a life estate in the property, thereby reserving in her the exclusive right to use of the property during her lifetime. Darold and Gerald Dilley's future ownership interest does not provide them with any present right to use the subject property, which can be restricted by land use regulations, during the term of Vena Dilley's life estate. The Lane County Assessor's Office confirms the claimants' current ownership of the subject property.

### Conclusions

Claimant Vena Dilley is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of November 19, 1949. Claimants Darold and Gerald Dilley are not "owners" of the subject property as that term is defined by ORS 197.352(11)(C) because their ownership interest is subject to Vena Dilley's life estate, and they do not have a present right to use the subject property that can be restricted by land use regulations.

### 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 31.63-acre subject property into four parcels and to develop a dwelling on two of the three the resulting undeveloped parcels and that the desired use is not allowed under current land use regulations.<sup>1</sup>

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 subject property is zoned EFU-25 by Lane County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the 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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Vena Dilley acquired the subject property in 1949, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1949. Darold and Gerald Dilley's future ownership interest does not provide them with any present right to use the subject property in a manner that can be restricted by land use regulations during term of Vena Dilley's life estate.

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<sup>1</sup> The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the subject property or do not restrict the claimants' desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

<sup>2</sup> The subject property is "agricultural land" because it contains National Resources Conservation Service Class I-VI soils.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after Vena Dilley acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when she acquired the property.

Darold and Gerald Dilley's ownership interest does not provide them with any present right to use the subject property in a manner that can be restricted by land use regulations during term of Vena Dilley's life estate. Therefore, no laws enforced by the Commission or the department restrict Darold or Gerald Dilley's use of the subject real property with the effect of reducing the fair market value of 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 uses that the claimants have identified. There may be other laws that currently apply to Vena Dilley's use of the subject property, and that may continue to apply to her 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 Vena Dilley 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 \$480,000 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 the claimants' assessment of the property's value.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Vena Dilley who acquired the subject property in 1949 and her sons, Darold and Gerald Dilley. Darold and Gerald Dilley do not have a present ownership interest in the subject property that can be restricted by land use regulations and therefore, are not entitled to compensation under ORS 197.352. Under ORS 197.352, Vena Dilley 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 Vena Dilley acquired the subject property restrict the her 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 reduction of \$480,000.

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 Lane County has implemented through its current EFU-25 zone. These land use regulations were enacted or adopted after Vena Dilley 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 division and development of the subject property were in effect when Vena Dilley acquired the subject property in 1949. As a result, these laws are not exempt under ORS 197.352.

As explained in Section V.(1) of this report, Darold and Gerald Dilley's are not present owners of the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to them.

Laws in effect when Vena Dilley acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to her use of the property. There may be other laws that continue to apply to the Vena Dilley'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 Vena Dilley seeks 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 use that the claimants have 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 claimants should be aware that the less information they 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 Vena Dilley's 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 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 has determined that Darold and Gerald Dilley are not entitled to relief under ORS 197.352 because they do not have a present ownership interest in the property that can be restricted by land use regulations and, therefore, are not "owners" of the property for purposes of ORS 197.352. The department has further determined that laws enforced by the Commission or the department restrict Vena Dilley'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 \$480,000. 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 claimants' desired use of the subject property was allowed under the standards in effect when Vena Dilley 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 Vena Dilley to use the subject property for a use permitted at the time she acquired the property on November 19, 1949.

### **Conclusions**

Based on the record, the department has determined that Darold and Gerald Dilley are not entitled to relief under ORS 197.352 as a result of land use regulations enforced by the Commission or the department because they are not present "owners" of the property under ORS 197.352. Therefore the department recommends that the claim as to Darold and Gerald Dilley be denied.

The department further recommends that Vena Dilley's 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 Vena Dilley's division of the 31.93-acre subject property into four parcels and to her

development of a dwelling on two of the three resulting undeveloped parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 . These land use regulations will not apply to Vena Dilley only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 19, 1949.

2. The action by the State of Oregon provides the state's authorization to Vena Dilley to use the subject property for the use described in this report, subject to the standards in effect on November 19, 1949.

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) 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 January 25, 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.

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 ) FINAL ORDER B  
(BALLOT MEASURE 37) OF ) CLAIM NO. M129915  
Darold Dilley and Gerald Dilley, CLAIMANTS )

Claimants: Darold Dilley and Gerald Dilley (the Claimants)

Property: Township 18S, Range 2W, Section 21, Tax lot 500, Lane County  
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from the Claimants by the State of Oregon (the Claim).

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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.

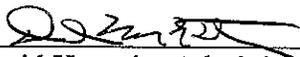
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FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director  
DLCD

Dated this 15<sup>th</sup> day of February, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 15<sup>th</sup> day of February, 2007.

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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.

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