



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

April 2, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130237*

*Claimants: Duane and June Day*

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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 )           FINAL ORDER  
COMPENSATION UNDER ORS 197.352 )           CLAIM NO. M130237  
(BALLOT MEASURE 37) OF )  
Duane and June Day, dba )  
J & D Investments, CLAIMANTS )

Claimants: Duane and June Day, dba J & D Investments (the Claimants)

Property: Township 4S, Range 4E, Section 15, Tax lot 401, Clackamas 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

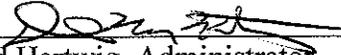
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the 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 Administrator for the State Services Division 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 2<sup>nd</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 2<sup>nd</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)

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

April 2, 2007

**STATE CLAIM NUMBER:** M130237

**NAMES OF CLAIMANTS:** Duane and June Day,  
dba J & D Investments

**MAILING ADDRESS:** PO Box 189  
Estacada, Oregon 97023

**PROPERTY IDENTIFICATION:** Township 4S, Range 4E, Section 15  
Tax lot 401  
Clackamas County

**OTHER CONTACT INFORMATION:** John C. Pinkstaff  
601 Southwest Second Avenue  
Suite 2100  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** October 10, 2006

**180-DAY DEADLINE:** April 8, 2007

**I. SUMMARY OF CLAIM**

The claimants, Duane and June Day,<sup>1</sup> seek compensation in the amount of \$350,000 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 20.81-acre subject property into four 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 27142 South Skinner Road, near Estacada, 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 this claim is not valid because the claimants

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<sup>1</sup> The claim form identifies the claimants as "Duane L. and June C. Day dba J & D Investments" and Duane and June Day each signed the claim form individually. However, the claim does not identify J & D Investments, which is a separate legal entity, as a claimant, and Duane and June Day did not sign the form as partners of J & D Investments. Accordingly, J & D Investments is not a claimant for purposes of this ORS 197.352 claim.

are not owners of the subject property. (See the complete recommendation in Section VI of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On February 21, 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, two 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on October 10, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100, ORS chapters 197 and 215, OAR 660-006-0000, -0026(1)(a) and -0027(1) and Clackamas County's RA1.5, TT-20 and TBR zones 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, Duane and June Day, state in the claim that they acquired the subject property on January 18, 1973, and continue to have an interest in the property. Based on the information provided in the claim, the claimants conveyed all of their ownership interest in the property to J & D Investments on October 1, 1977. The claimants assert they continue to have an interest in the property as business partners of J & D Investments. However, the claim does not establish that the claimants, as individuals, retained any ownership interest in the property when they conveyed it to J & D Investments. The Clackamas County Assessor’s Office confirms J & D Investments’ current ownership of the subject property. The claimants, Duane and June Day, no longer own the subject property.

### **Conclusions**

The claimants, Duane and June Day, are not “owners” of the subject property as that term is defined in ORS 197.352(11)(C).

### **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.

As explained in Section V.(1), the claimants, Duane and June Day, 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 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 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.”

As explained in Section V.(1) of this report, the claimants, Duane and June Day, 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.

#### **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.

As explained in Section V.(1) of this report, the claimants, Duane and June Day, 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 this claim.

### **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 record, the department finds that the claim is not valid because the claimants are not owners of the subject property.

#### **Conclusions**

Based on the record before the department, the claimants, Duane and June Day, 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 because they are not owners of the subject property. 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 March 12, 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.