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

July 11, 2007

To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130726

Claimants: James and Wilma Wells, John and Carolyn Wells, Gary and Maureen Wells, Scott Wells and Vermont Orchards, LLC

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. M130710
(BALLOT MEASURE 37) OF	)	
James and Wilma Wells, John and Carolyn Wells,	)	
Gary and Maureen Wells, Scott Wells and	)	
Viewmont Orchards, LLC, CLAIMANTS	)	

Claimants: James and Wilma Wells, John and Carolyn Wells, Gary and Maureen Wells, Scott Wells and Viewmont Orchards, LLC (the Claimants)

Property: Township 2N, Range 10E, Section 13, Tax lots 100 and 200
Hood River 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
DLCD
Dated this 11th day of July, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 11th day of July, 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

July 11, 2007

STATE CLAIM NUMBER:	M130710
NAMES OF CLAIMANTS:	James and Wilma Wells John and Carolyn Wells Gary and Maureen Wells Scott Wells Viewmont Orchards, LLC
MAILING ADDRESSES:	James and Wilma Wells 1712 Wells Drive Hood River, Oregon 97031 John and Carolyn Wells 2155 Wells Drive Hood River, Oregon 97031 Gary and Maureen Wells 2118 Wells Drive Hood River, Oregon 97031 Scott Wells 2710 Glass Drive Hood River, Oregon 97031 Viewmont Orchards, LLC 2124 Mason Road Hood River, Oregon 97031
PROPERTY IDENTIFICATION:	Township 2N, Range 10E, Section 13 Tax lots 100 and 200 Hood River County
OTHER CONTACT INFORMATION:	Steven Andersen PO Box 135 Hood River, Oregon 97031
DATE RECEIVED BY DAS:	November 13, 2006

DEADLINE FOR FINAL ACTION:[1] May 6, 2008

I. SUMMARY OF CLAIM

The claimants, James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells and Viewmont Orchards, LLC, seek compensation in the amount of $95,875 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 develop a second farm dwelling and golf course facilities on the 31.3-acre subject property[2]. The subject property is located at 2118 and 2124 Mason Road, near Hood River, in Hood River 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 not valid as to Viewmont Orchards, LLC because its desired use of the subject property was prohibited under the laws in effect when it acquired the property in 2001. The department has also determined that this claim is not valid as to James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells because they 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 May 16, 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, 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.)

---

[1] 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.

[2] The subject property includes two tax lots. Tax lot 100 consists of 26.21 acres, and tax lot 200 consists of 5.09 acres.

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 13, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 197 and 215 and OAR 660 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 Viewmont Orchards, LLC[3] acquired the subject property on November 20, 2001, as reflected by a bargain and sale deed included with the claim. Claimants James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells assert that they acquired the subject property on January 1, 1987, and now have an interest in the property as members of Viewmont Orchards, LLC. According to the information provided in the claim, on November 20, 2001, James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells each acquired an individual interest in the subject property from Walter Wells & Sons, an Oregon General Partnership and on that same

[3] Viewmont Orchards, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

date transferred their interests in the subject property to Viewmont Orchards, LLC, as reflected by bargain and sale deeds included in the claim.

The Hood River County Assessor's Office confirms Viewmont Orchards, LLC's current ownership of the subject property. James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells are not owners of the subject property.

Conclusions

Claimant Viewmont Orchards, LLC is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 20, 2001. Claimants James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells 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.

Findings of Fact

The claim indicates that the claimants desire to develop a second farm dwelling and golf course facilities on the 31.3-acre subject property, and that current land use regulations prevent that use.[4]

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 by Hood River County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.[5] 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 215.283 and 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3 establish standards for the development of dwellings and commercial uses on existing parcels on EFU-zoned land.

OAR 660-033-0120, Table 1, establishes the list of commercial activities allowed on agricultural lands, which is generally restricted to commercial activities in conjunction with a farm use.

---

[4] The claimants summarily list 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 the regulations either do not apply to the subject property or do not restrict the 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.

[5] The subject property is "agricultural land" because it contains National Resources Conservation Service Class I–IV soils.

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 under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994.[6]

Claimant Viewmont Orchards, LLC acquired the subject property on November 20, 2001, after the adoption of the statewide planning goals and their implementing statutes and regulations as identified above.

Conclusions

The current zoning requirements and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted before Viewmont Orchards, LLC acquired the subject property on November 20, 2001. Laws enacted or adopted since Viewmont Orchards, LLC acquired the subject property in 2001 do not restrict its desired use of the property relative to when it acquired the property in 2001.

As explained in Section V.(1), James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells 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 their use of private 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 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 $95,875 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 a land use consultant's assessment of the property's value, included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Viewmont Orchards, LLC, which acquired the subject property on November 20, 2001, and James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells. The individual claimants are not an "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 Viewmont Orchards, LLC acquired the subject property restrict the use of the property relative to the uses allowed in 2001. Therefore, the fair market

[6] The Commission adopted amendments to OAR 660-033-0130 et seq. to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict the OAR 660, division 33, development standards.

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 3, ORS 215 and OAR 660, division 33, which Hood River County has implemented through its current EFU zone. As set forth in Section V.(2) of this report, all of the state land use regulations restricting the claimants' desired use of the subject property were in effect when Viewmont Orchards, LLC acquired the property in 2001.

Conclusions

All of the state land use regulations that restrict Viewmont Orchards, LLC's desired use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Viewmont Orchards, LLC acquired the subject property.

As explained in Section V.(1) of this report, James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells 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 them.

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 for James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells because they are not owners of the subject property. The department further finds laws enforced by the Commission or the department do not restrict Viewmont Orchards, LLC's desired use of the subject property relative to what was permitted when it acquired the property in 2001 and do not reduce the fair market value of the property. 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, the claimants 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 4, 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.