



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 9, 2007



To: Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130712

Claimants: James G. and Wilma J. Wells, Viewmont 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. M130712
(BALLOT MEASURE 37) OF)
James G. Wells, Wilma J. Wells and)
Viewmont Orchards, LLC, CLAIMANTS)

Claimants: James G. Wells, Wilma J. Wells and Viewmont Orchards, LLC
(the Claimants)

Property: Township 2N, Range 10E, Section 24, Tax lots 4401 and 4403
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).

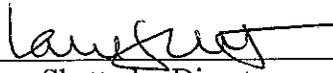
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 9th day of July, 2007.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Janice K. Dean, SSD Administrator
DAS, State Services Division
Dated this 9th 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 9, 2007

STATE CLAIM NUMBER: M130712

NAMES OF CLAIMANTS: James G. Wells
Wilma J. Wells
Viewmont Orchards, LLC

MAILING ADDRESSES: James and Wilma Wells
1712 Wells Drive
Hood River, Oregon 97031

Viewmont Orchards, LLC
2124 Mason Road
Hood River, Oregon 97031

PROPERTY IDENTIFICATION: Township 2N, Range 10E, Section 24
Tax lots 4401 and 4403
Hood River County

OTHER CONTACT INFORMATION: Steven B. Andersen
Cascade Planning Associates
PO Box 135
Mosier, Oregon 97040

DATE RECEIVED BY DAS: November 13, 2006

DEADLINE FOR FINAL ACTION:¹ May 6, 2008

I. SUMMARY OF CLAIM

The claimants, James and Wilma Wells and Viewmont Orchards, LLC, seek compensation in the amount of \$1,186,024 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 tax lot 4401 into 0.25-acre parcels and to develop a dwelling

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.

on each resulting parcel, and to develop a farm dwelling on tax lot 4403.² The subject property is located at 2880 and 2890 Thomsen 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 James and Wilma Wells because they are not owners of the property; and 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. (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, no written comments were received in response to the 10-day notice.

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 ORS 197 and 215, OAR 660 and provisions of Hood River County's Farm Zone A-2, Exclusive Farm Use (EFU), High Value Farmland (HVF) and Stream Protection Overlay 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.

² The subject property includes two tax lots. Tax lot 4401 consists of 1.86 acres, and tax lot 4403 consists of 24.55 acres.

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

James and Wilma Wells first acquired tax lot 4401 as individuals on April 6, 1978. On February 24, 1997, James and Wilma Wells conveyed tax lot 4401 to Walter Wells and Sons Partnership,³ as reflected by a bargain and sale deed included with the claim. James and Wilma Wells reacquired tax lot 4401 on November 20, 2001, then conveyed that tax lot to claimant Viewmont Orchards, LLC⁴ on the same date, as evidenced by bargain and sale deeds included with the claim.

James and Wilma Wells assert that they acquired an interest in tax lot 4403 on March 21, 1988, when Walter Wells and Sons, an Oregon general partnership, acquired tax lot 4403. However, the claimants have not substantiated their individual acquisition of that tax lot in 1988. James and Wilma Wells acquired tax lot 4403 as individuals on November 20, 2001, then conveyed that tax lot to Viewmont Orchards, LLC on the same date, as evidenced by assignments of contract interest and conveyance included with the claim.

Claimants James and Wilma Wells assert that they have an ownership interest in the subject property as “initial purchasers” and members of Viewmont Orchards, LLC. However, the claim includes no indication that they have retained any individual ownership in either of the subject tax lots.

The Hood River County Assessor’s Office confirms that claimant Viewmont Orchards, LLC is the current owner of the subject property. Claimants James and Wilma Wells do not own the subject property.

³ On January 8, 2001, Walter Wells and Sons, an Oregon general partnership, was converted to Walter Wells and Sons, an Oregon corporation, as evidenced by articles of conversion included with the claim. Walter Wells and Sons, an Oregon corporation, is an active domestic limited liability company registered with the Oregon Secretary of State, and does not have a present interest in the subject property.

⁴ Viewmont Orchards, LLC, an Oregon corporation, is an active domestic limited liability company registered with the Oregon Secretary of State.

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 and Wilma Wells are not owners of the subject property as that term is defined in ORS 197.352(11)(C).⁵

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 tax lot 4401 into 0.25-acre parcels and to develop a dwelling on each resulting parcel and to develop a farm dwelling on tax lot 4403, and that current land use regulations prohibit the desired use.⁶

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The subject property is zoned EFU HVF 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 3.⁷ 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 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-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 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 under

⁵ 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 Viewmont Orchards, LLC are not considered family members under the definition of family member in ORS 197.352(11)(A).

⁶ 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.

⁷ The subject property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

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, 1994.⁸

Claimant Viewmont Orchards, LLC acquired the subject property on November 20, 2001. At that time, the subject 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 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. These land use regulations do not allow the division of tax lot 4401 into 0.25-acre parcels and development of a dwelling on each resulting parcel, or the development of a farm dwelling on tax lot 4403. Laws enacted or adopted since Viewmont Orchards, LLC acquired the subject property in 2001 do not restrict the claimants' desired use of the property relative to when Viewmont Orchards, LLC acquired it in 2001.

As explained in Section V.(1), claimants James and Wilma 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 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 \$1,186,024 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' consulting land use planners' assessment of the value of the subject property.

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 and Wilma Wells. James and Wilma Wells 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 Viewmont Orchards, LLC acquired the subject property restrict the use of the property relative to the uses allowed in 2001. Therefore, the fair market value of the subject property has not been

⁸ 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.

reduced as a result of land use regulations enforced by the Commission or the department since Viewmont Orchards, LLC acquired the 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.

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 Hood River County has implemented through its EFU HVF zone. All of these regulations were in effect when Viewmont Orchards, LLC acquired the property in 2001.

Conclusions

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

As explained in Section V.(1) of this report, claimants James and Wilma 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 findings and conclusions set forth in this report, the department finds that the claim is not valid as to James and Wilma Wells because they are not owners of the subject property; and is not valid as to Viewmont Orchards, LLC because its desired use of the property was prohibited when it acquired the property, and no laws enforced by the Commission or the department restrict its desired use of the subject property relative to what was permitted when it acquired the property in 2001, with the effect of reducing 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 14, 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. In response to the draft staff report dated June 14, 2007, pursuant to OAR 125-145-0080 on June 26, 2007, the claimants' attorney submitted a letter. The Department has considered the comment.