



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: Claimants and Interested Persons

From: Lane Shetterly, Director

Re: Ballot Measure 37 (ORS 197.352) Claim Number M130713

Claimants: James G. Wells and Wilma J. Wells, John M. Wells and Carolyn S. Wells,
Gary W. Wells and Maureen W. Wells, Scott R. 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. M130713
(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 11E, Section 18: tax lots 2200 and 2700
Township 2N, Range 11E, Section 19: tax lots 1200, 1300, 1501, 1700 and 1800
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).

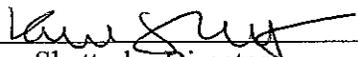
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under
OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred
the Claim to the Department of Land Conservation and Development (DLCD) as the
regulating entity. This order is based on the record herein, 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: M130713

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 11E
Section 18: tax lots 2200 and 2700
Section 19: tax lots 1200, 1300, 1501, 1700
and 1800
Hood River County¹

¹ The subject property includes seven tax lots. Tax lot 1200 consists of 9.70 acres; tax lot 1300 consists of 20.20 acres; tax lot 1504 consists of 8.38 acres; tax lot 1700 consists of 23.38 acres; tax lot 1800 consists of 1.17 acres; tax lot 2200 consists of 4.01 acres; and tax lot 2700 consists of 10.40 acres.

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:²

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 \$1,042,574 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 76.8-acre subject property into 20-acre parcels and to develop a dwelling and accessory buildings on each resulting parcel for "farm and accessory uses." The subject property is east of Eastside Road, south of the intersection of Eastside Road and Van Horn Drive, 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, Wilma, John, Carolyn, Gary, Maureen and Scott 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 17, 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.

² 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.

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 amendments to Exclusive Farm Use (EFU) and High Value Farmland (HVF) 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

The claimants, James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells and Viewmont Orchards, LLC,³ state in the claim that they acquired an interest in the subject property on January 1, 1987, and March 21, 1988, when Walter Wells and Sons,⁴ an Oregon general

³ Viewmont Orchards, LLC, an Oregon corporation, is an active domestic limited liability company registered with the Oregon Secretary of State.

⁴ According to Oregon Secretary of State documentation included with the claim, Walter Wells and Sons is an inactive Oregon general partnership. 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

partnership, acquired it. However, there is no indication in the claim that any of the claimants acquired an interest in the property on that date. The documentation in the claim establishes that James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells acquired an interest in the subject property on November 20, 2001, but subsequently transferred their interest in the property to Viewmont Orchards, LLC on the same day, as evidenced by assignments of contract interest and conveyance and bargain and sale deeds included with the claim. Although claimants James, Wilma, John, Carolyn, Gary, Maureen and Scott Wells have had an ownership interest in both Walter Wells and Sons and claimant Viewmont Orchards, LLC, there is no indication in the claim that any of them have an individual ownership interest in the subject property.

The Hood River County Assessor's Office confirms Viewmont Orchards, LLC's current ownership 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).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 the 76.8-acre subject property into 20-acre parcels and to develop a dwelling and accessory buildings on each resulting parcel for "farm and accessory uses," and that current land use regulations prevent 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 subject property is

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.

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 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 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 that desired use.

“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 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 the 76.8-acre subject property into 20-acre parcels and development of a dwelling and accessory buildings on each resulting parcel for “farm and accessory uses.” 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, 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.

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

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.

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 \$1,042,574 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 consulting land use planner’s 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, Wilma, John, Carolyn, Gary, Maureen and Scott Wells, who are not “owners” of the subject property as that term is defined in ORS 197.352(11)(C). Because these claimants are not owners of the subject property, 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 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 Viewmont Orchards, LLC acquired the subject property.

As explained in Section V.(1) of this report, 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). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to these claimants.

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, Wilma, John, Carolyn, Gary, Maureen and Scott Wells because they are not owners of the subject property; and is not valid as to Viewmont Orchards, LLC because no laws enforced by the Commission or the department restrict the claimants' desired use of the subject property relative to what was permitted when Viewmont Orchards, LLC acquired it 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 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.