

**BALLOT MEASURE 37 (CHAPTER 1, OREGON LAWS 2005)  
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**Final Staff Report and Recommendation**

July 27, 2005

**STATE CLAIM NUMBER:** M119607

**NAME OF CLAIMANTS:** Jerome Rush and  
Barbara A. Rush

**MAILING ADDRESS:** 17675 Southwest Alexander  
Aloha, Oregon 97006

**IDENTIFICATION OF PROPERTY:** Township 1N, Range 3W, Section 19  
Tax Lot 804,  
Washington County

**DATE RECEIVED BY DAS:** February 4, 2005

**180-DAY DEADLINE:** August 3, 2005

**I. CLAIM**

The claimants, Jerome Rush and Barbara A. Rush, seek compensation in the amount of \$250,000 for a 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 build a single-family, non-farm dwelling on their 5.1 acre property zoned Exclusive Farm Use (EFU). (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. Department staff recommends, in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants to allow them to build a single family, non-farm dwelling on the property: applicable provisions of Statewide Planning Goal 3 (Agricultural lands), Oregon Revised Statutes (ORS) 215, and Oregon Administrative Rules (OAR) 660, Division 33. These laws will not apply to the subject property only to the extent necessary to allow Barbara Rush a use of the subject property permitted at the time she acquired it on March 21, 1973, and to allow Jerome Rush a use

of the subject property permitted at the time he acquired it on February 19, 1982. (See the complete recommendation in section VI. of this report.)

### **III. COMMENTS RECEIVED**

#### **Comments received**

On February 15, 2005, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided notice to the owners of surrounding properties. According to DAS, no written comments, evidence or information were received in response to the 10-day notice.

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

Ballot Measure 37, Section 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 the measure (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 the measure (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**

The claim was submitted to DAS on February 4, 2005, for processing under OAR 125, division 145. The claim identifies Washington County's EFU zoning that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim (see citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules).

#### **Conclusions**

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### **1. Ownership**

Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in the measure. Ballot Measure 37, Section 11(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimants, Barbara and Jerome Rush, acquired the subject property on March 21, 1973 and February 19, 1982, respectively. The claim demonstrates ownership by a family member since at least January 6, 1894. Barbara Rush’s grandfather, William Kemper, acquired the property on January 6, 1894, and on January 2, 1930, Stephen and Elizabeth Kemper, Barbara Rush’s parents, acquired the property from William Kemper (see claim file). According to a Decree of Final Distribution filed with the claim, Barbara A. Rush acquired the property on March 21, 1973, through an inheritance upon the death of her mother, Elizabeth Kemper.<sup>1</sup> Claimant, Jerome Rush, did not become owner of the property until February 19, 1982 (Bargain and Sale Deed). The claim includes a recent property Tax Statement (November 10, 2004), and a Title Report indicating current ownership of the property by Jerome and Barbara Rush.

### **Conclusions**

The claimants, Jerome and Barbara Rush, are “owners” of the subject property, as that term is defined by Section 11 (C) of Ballot Measure 37. Barbara Rush has been an owner since March 21, 1973, and Jerome Rush has been an owner since February 19, 1982. The subject property has been owned by a family member since January 6, 1894.

### **2. The Laws that are the Basis for this Claim**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a law must restrict the claimant’s 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 claimant or a family member acquired the property.

### **Findings of Fact**

The claim states that the EFU designation on their land:

“denies re-issuing of building permit issued on January 15 [actually 5], 1984” for a non-farm dwelling.”

---

<sup>1</sup> The date of actual ownership by Barbara Rush would be the date that Elizabeth Kemper passed away. This information was not included in the application, and is not necessary to the evaluation of the claim.

The claim is based, in part, on Washington County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3 in accord with OAR 660, division 33, and ORS 215, because the claimants' property is "agricultural land" as defined by Goal 3.

Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215. 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.<sup>2</sup> Subsequent amendments to comply with HB 3326, (chapter 704, Oregon Laws 2001, and effective January 1, 2002) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The family acquired the subject property on January 6, 1894. At that time the property was not zoned. Current laws restrict the property relative to how it could have been used when acquired in 1894.

### **Conclusions**

The farm and non-farm dwelling standards currently applicable to the property were not in effect when the family member acquired the property in 1894. Laws and rules adopted since 1894 restrict the use of the property from what could have been done when the property was acquired by the family member in 1894.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that laws 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 states that the fair market value of the subject property has been reduced by \$250,000 as a result of land use laws enacted after the family acquired the property in 1894. The claimants submitted appraisal information about their property and similar adjacent properties that contain dwellings. (See claim.) The adjacent properties were appraised at \$230,000 and \$272,000. The claim also includes real estate values of other properties with similar acreage and a dwelling. Based on this information, the claimants assert that the net reduction in fair market value is \$250,000.

---

<sup>2</sup> For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4) requires, in part, that a non-farm dwelling may only be established on a parcel predominately composed of Class IV to VIII soils.

## **Conclusions**

As explained in section V. (1) of this report, Barbara and Jerome. Rush are current owners of the subject property as of March 21, 1973 and February 19, 1982, respectively. The claimants' family has owned the property since January 6, 1894. Thus, under Ballot Measure 37, Barbara and Jerome Rush are due compensation for land use laws that restrict the use of the property in a manner that reduces its fair market value. Based on the findings and conclusions in section V.(2) of this report, laws adopted since the claimants acquired the property prevent building a single family dwelling on the subject property. The claim asserts the reduction in value due to the restriction to be \$250,000. Without further documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations enforced by the Commission or the department.

### **4. Exemptions under section 3 of Measure 37**

Ballot Measure 37 does not apply to certain laws. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

## **Findings of Fact**

The claim is based on Washington County's EFU zone and the related provisions of state laws that have restricted use of the property and reduced its fair market value. These are Statewide Planning Goal 3, (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, Division 33. All of the specific state land use regulations administered by the Department or Commission were enacted after the claimants' family acquired the property in 1894, and do restrict the use of the property in a manner that likely reduces the fair market value. None of the laws identified in the claim appear to be exempt under Section 3(E) of Ballot Measure 37.

## **Conclusions**

It appears that the general statutory, goal and rule restrictions on the building of a single family dwelling apply to the owner's use of the property, and for the most part these laws would not come under any of the exemptions in Measure 37. There may be other specific laws that continue to apply under one or more of the exemptions in the Measure, because they are laws not covered by the measure to begin with.

## **VI. FORM OF RELIEF**

Section 1 of Measure 37 provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts 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 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 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 in this report, laws enforced by the Commission or the department, prevent the building of a single-family non-farm dwelling on the claimants' property. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$250,000. Although the claim provides an explanation of how the restrictions reduce the fair market value of the property, additional documentation is necessary to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, Measure 37 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Jerome and Barbara Rush to use the subject property for a use permitted at the time Barbara Rush acquired the property on March 21, 1973, and Jerome Rush acquired the property on February 19, 1982.

When Barbara Rush acquired the property in 1973, the Statewide Planning Goals and administrative rules had not been adopted and did not apply to the subject property. ORS 215.213 and 215.263 may have applied to the property at that time, if the property was zoned for farm use. If that is the case, then a dwelling customarily provided in conjunction with farm use would have been permitted.

When Mr. Rush acquired his interest in the property on February 19, 1982, it was zoned EFU-38 by Washington County. However, the County's zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. The Commission acknowledged Washington County's Comprehensive Plan and land use regulations as complying with Statewide Planning Goal 3 on July 30, 1984. Since the Commission had not acknowledged Washington County's plan, including the EFU-38 zone when Mr. Rush acquired the property on February 26, 1982, Statewide Planning Goal 3 applied directly to property on the date of acquisition.<sup>3</sup>

---

<sup>3</sup> Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on February 9, 1979 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the county's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v.*

When Jerome Rush acquired his interest in the property in 1982, Statewide Planning Goal 3 had been adopted as had provisions of ORS 215 and OAR 660, Division 5 establishing the standards for placing dwelling on agricultural land at that time. Under the standards in place in 1982, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling is compatible with farm uses, consistent with the intent of ORS 215.243, does not interfere seriously with accepted farming practices on adjacent lands, does not materially alter the stability of the land use pattern for the area, and is situated on land that is generally unsuitable for production of farm crops and livestock. Before a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must “be existing.”<sup>4</sup> Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.<sup>5</sup>

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under Measure 37, the State of Oregon will not apply the following laws to the claimants’ establishment of a single family dwelling on their property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660, division 33, and OAR 660-033-0135(7) enacted after March 21, 1973, as to Barbara Rush, and enacted after February 19, 1982 as to Jerome Rush. These land use regulations will not apply to Barbara Rush’s use of the property only to the extent necessary to allow her a use permitted at the time she acquired an interest in the property and will not apply to Jerome Rush’s use of the property only to the extent necessary to allow him a use permitted at the time he acquired an interest in the property.
2. The action by the State of Oregon provides the state’s authorization to Barbara Rush to use the property subject to the standards in effect March 21, 1973. On that date, the property was subject to state laws that include, but are not limited to, the provisions of

---

*Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>4</sup> *Mateo v. Polk County*, 11 OR LUBA 259, 263 (1984), *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (November 23, 1988).

<sup>5</sup> As evidence of what use was allowed when Mr. Rush acquired the property in 1982, the claimants submitted documents from Washington County in which the Board of County Commissioners approved the subdivision of the original 16.2 acres and a non-farm dwelling on their subsequent 5 acre parcel on February 26, 1982. A building permit was approved on January 5, 1984 and based on a vested right a building permit was also approved on April 3, 1986. The claimants did not build on the property even though it was approved in 1982.

ORS 215 and OAR 660, division 5, that existed at that time. The action by the State of Oregon provides the state's authorization to Mr. Rush to use the property subject to the standards in effect on February 19, 1982. On that date, the property was subject to state laws that include, but are not limited to Statewide Planning Goal 3 and applicable provisions of ORS 215 and OAR 660, Division 33.

3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the 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 215.412 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 Measure 37 including, without limitation, those laws exempted under section (3) of the Measure.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under Measure 37 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 Measure 37 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on July 5, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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. Comments received have been taken into account by the department in the issuance of this final report.