

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim Number CL 05-27 and CL 05-28,)
Submitted by Asbury Family LLC for Compensation) Order No. 79-2005
Under Measure 37)

WHEREAS, on June 22, 2005, Columbia County received two claims under Measure 37 from Asbury Family LLC, related to two parcels of property on Sykes Road in St. Helens, Oregon, having Tax Account Numbers 4201-000-03000 and 4201-000-03100; and

WHEREAS, according to the information presented with the claim, the Asbury Family LLC is the current owner of the two parcels and has continuously owned an interest in the property since August 14, 1998; and

WHEREAS, the Claimant states that CCZO Section 407.1 restricts the use of the property and reduces their value; and

WHEREAS, CCZO 407.1 was enacted prior to the 1998 acquisition date for the Asbury Family LLC;

NOW, THEREFORE, it is hereby ordered as follows:

1. The Board of County Commissioners adopts the findings of fact set forth in the Staff Reports for Claim Numbers CL 05-27 and CL 05-28, dated December 1, 2005, which are attached hereto as Attachments 1 and 2, respectively, and are incorporated herein by this reference.
2. The Board of County Commissioners finds that the Claimant is neither entitled to compensation under Measure 37, nor waiver of County regulations in lieu thereof.
3. The Board of County Commissioners denies Claim Number CL 05-27 and CL 05-28.

Dated this 14th day of December, 2005.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: Sarah W. Hanson
Assistant County Counsel

By: [Signature]
Anthony Hyde, Chair

By: [Signature]
Joe Corsiglia, Commissioner

By: [Signature]
Rita Bernhard, Commissioner

Order No. 79 -2005

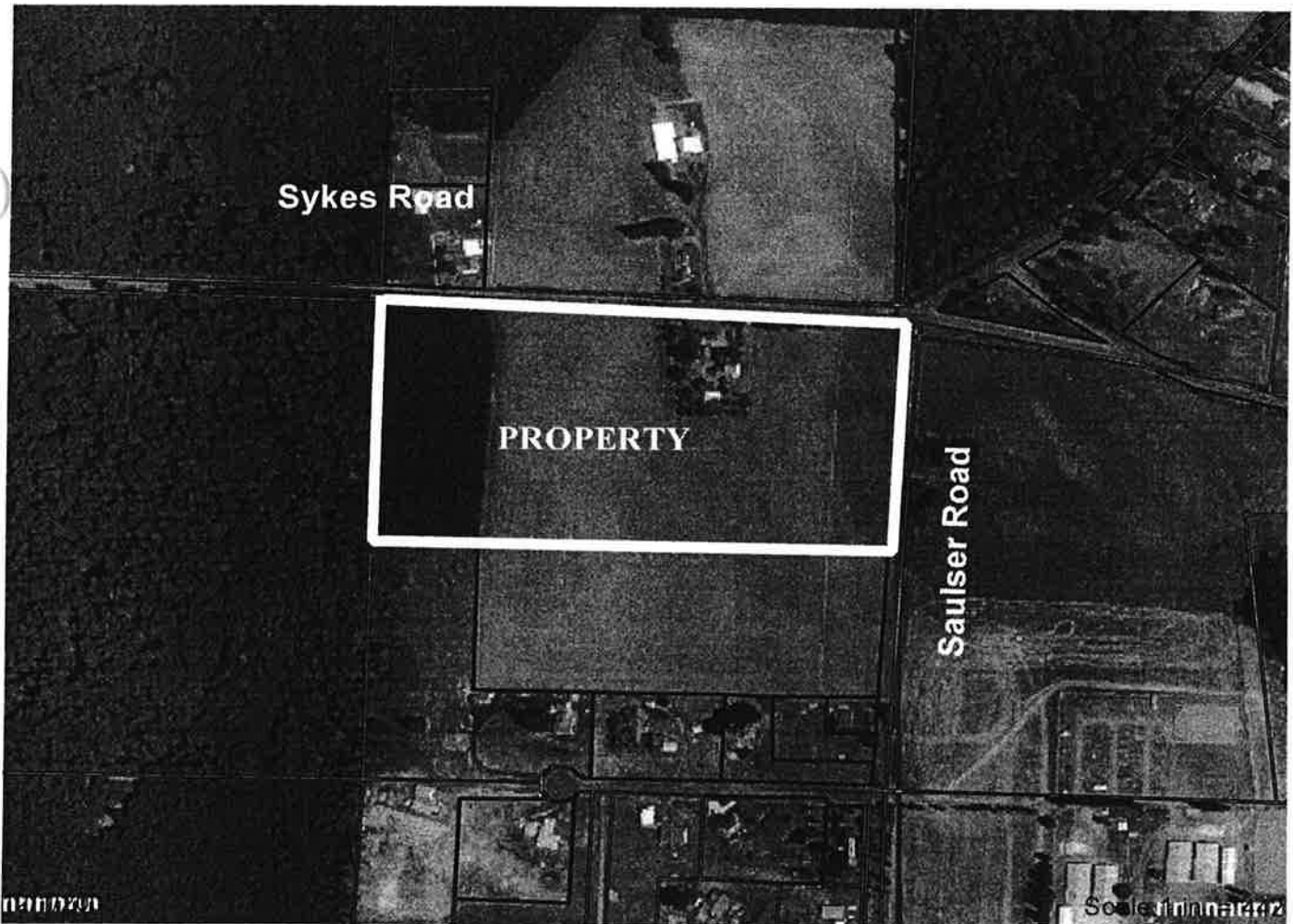
Attachment 1
**COLUMBIA COUNTY
LAND DEVELOPMENT SERVICES**

Measure 37 Claim

Staff Report

DATE: December 1, 2005
FILE NUMBER: CL 05-27
CLAIMANT Asburry Family LLC
OWNER: Same
PROPERTY LOCATION: 33676 Sykes Road
St. Helens, Oregon 97051

SUBJECT PROPERTY



TAX ACCOUNT NUMBER: 4201-000-03000

ZONING: Forest Agriculture(FA-19)
SIZE: 19.1 Acres
REQUEST: To divide FA-19 property into approximately 6 two acre parcels for residential development.(**Note:** At two acres each the property would accommodate 9 parcels)

CLAIM RECEIVED: 6/22/05 **180 DAY DEADLINE:** 12/20/05

I. BACKGROUND: The Asbury Family LLC filed a claim under Measure 37 on June 22, 2005. The amount of the claim is \$810,000. The claim is based upon the premise that the lot cannot be further divided under current FA-19, Forest/Agriculture, zoning minimum lot size regulations. The Claimant submitted current year Columbia County Tax Assessor real market value information for "as is" fair market value and an appraisal of the property as partitioned into two acre parcels prepared by Wallace Williams, an Oregon licenced appraiser.

II. CRITERIA FOR REVIEW WITH STAFF FINDINGS:

MEASURE 37

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

A. PROPERTY OWNER AND OWNERSHIP INTERESTS:

1. **Current Ownership:** The claimant submitted a Title Report issued by Columbia County Title and Escrow Services, Inc on May 25, 2005 which shows:
Vested In: Asbury Family LLC. in fee simple estate.
Subject to easements in favor of PGE and McNulty Water Association.

2. **Date of Acquisition:** According to the aforementioned Title Report and deeds the following chain of title has been established for the parcel:

December 31, 1943. Gwendolyn and Kenneth Asbury, husband and wife, acquired the property (Warranty Deed at Book 73, Page 464).

July 5, 1995. Gwendolyn Asbury conveyed her interest in the property to Kenneth R Asbury (Instrument 95-05618).

August 28, 1996. Order Approving Final Accounting in the Estate of Kenneth R. Asbury signed by judge granting Parcels 1 and 2 to Gwendolyn Asbury individually. Probate File P95-6552, closed October 14, 1996.

September 19, 1996, Gwendolyn Asbury as Personal Representative of the Estate of Kenneth R. Asbury deeded to Gwendolyn Asbury, Individually, by Personal Representative Deed (Instrument # 96-09798).

August 14, 1998, Gwendolyn Asbury, Individually to Asbury Family LLC by Statutory Warranty Deed (Instrument # 98-10074).

Property currently vested in Asbury Family LLC. The acquisition date for the LLC is August 14, 1998.

B. LAND USE REGULATIONS IN EFFECT AT THE TIME OF ACQUISITION

On August 14, 1998, the parcel was zoned FA-19.

C. LAND USE REGULATION(S) APPLICABLE TO SUBJECT PROPERTY ALLEGED TO HAVE REDUCED FAIR MARKET VALUE/EFFECTIVE DATES/CLAIMANT ELIGIBILITY

Claimant alleges that CCZO Forest Agriculture (FA-19) Regulations (CCZO 407.1) which prohibit land divisions of less than 19 acres, have reduced the fair market value of the property. CCZO 407.1 was enacted in July of 1984.

D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

The current owner of the property is the Asbury Family LLC., which acquired the property on August 14, 1998 from Gwendolyn Asbury. Gwendolyn Asbury is a member of the Asbury Family LLC. She and the other members of the LLC have personal property interests in the LLC. However, such members do not have personal or real property interests in the specific property of the LLC. ORS 63.239, "A member is not a co-owner of and does not have an interest in the LLC's real property."

Having acquired the property in 1998, the Claimant is not eligible for compensation or waiver of the cited regulation under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant states that Asbury Family LLC cannot divide the property as proposed due to CCZO Section 407.1. Staff finds that the cited regulation restricts the use of the property by preventing the division of the property into 2.0 acre parcels.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

To document the "as is" value of the 19.1 acre property, the Claimant submitted a 2005 County property tax statement indicating an assessed value for the land of \$206,400 and assessed value of the structure of \$93,500 for a total assessed value of \$299,900.

2. Value of Property Not Subject To Cited Regulations.

To document the "as developed" value of the property, an appraisal of the property as partitioned into two acre parcels was prepared by Wallace Williams, an Oregon licenced appraiser was submitted. The appraisal valued each 2 acre parcel at \$135,000.

3. Alleged Loss of Fair Market Value:

The Claimant alleges a loss of fair market value of \$810,000 (6 two acre parcels x \$135,000 per parcel). However, at 19.1 acres the property could accommodate up to 9 two acre parcels (9 two acre parcels x \$135,000 per parcel = \$1,215,000). The Claimant's analysis of the loss is flawed in several respects. The Claimant did not adjust the amount of loss in value by factoring in the current value of the property. In addition, the appraisal provides a raw retail land value and the claim did not take into account the costs of development in determining the reduction of value of the property. Should the Claimant be otherwise found eligible for compensation, staff finds the Claimant has failed to prove to any degree of certainty, what, if any, loss it has suffered due to CCZO 407.1.

G. COMPENSATION DEMANDED

\$810,000

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

CCZO Section 407.1 was enacted in 1984, prior to the date of acquisition by the Claimant, in 1998. The Asbury Family LLC is the current property owner and the LLC has no family members who owned the property prior to 1984. Therefore, Staff finds that pursuant to Section 3(E) of the Measure, the Measure does not apply to CCZO Section 407.1 and the Claimant does not qualify for compensation or waiver. Additionally, none of the members of the Asbury Family LLC (Gwendolyn Asbury, Kenneth R. Asbury and Irene Barnes) are current "owners" of the property, as defined in the Measure. The members of a Limited Liability Company are not co-owners of and have no interest in specific limited liability company property according to ORS 63.239. However, even if such members were considered current property owners due to their membership in the LLC, they would not be entitled to waiver of CCZO 407.1 because their date of acquisition for purposes of waiver is in 1998.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

Staff finds that the Claimant does not qualify for compensation under Measure 37.

(5) For claims arising from land use regulations enacted prior to the effective date of this act,

written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made 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.

The subject claim arises from the minimum lot size provisions of FA-19 zoning regulations which was enacted in 1984, prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on June 22, 2005 which is within two years of the effective date of Measure 37.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

The Claimant, Asburry Family LLC, acquired an interest in the property in 1998 after CCZO Section 407.1 became effective in 1984. The Board may only waive land use regulations enacted or enforced after acquisition of the property by the Claimant in 1998. The Board need not waive any specific regulations in response to this Claim.

STAFF RECOMMENDATION

Based on the above findings, it is Staff's opinion that the Claimant, Asburry Family LLC has not met the threshold requirements for compensation or waiver of the cited regulation under Measure 37.

The following table summarizes staff findings concerning the land use regulations cited by the Claimant as a basis for their claim. In order to meet the requirements of Measure 37 for a valid claim, the cited land use regulation must be found to restrict use, reduce fair market value, and not be one of the land use regulations exempted from Measure 37. The highlighted regulations below have been found to meet these requirements of a valid Measure 37 claim provided the other threshold criteria under Measure 37 have been found to be met.

LAND USE CRITERION	DESCRIPTION	RESTRICTS USE?	REDUCES VALUE?	EXEMPT?
CCZO 407.1	Minimum lot size for permitted uses is nineteen(19) acres.	Yes	Possible	Yes

Staff recommends the Board of County Commissioners take action to deny the claim

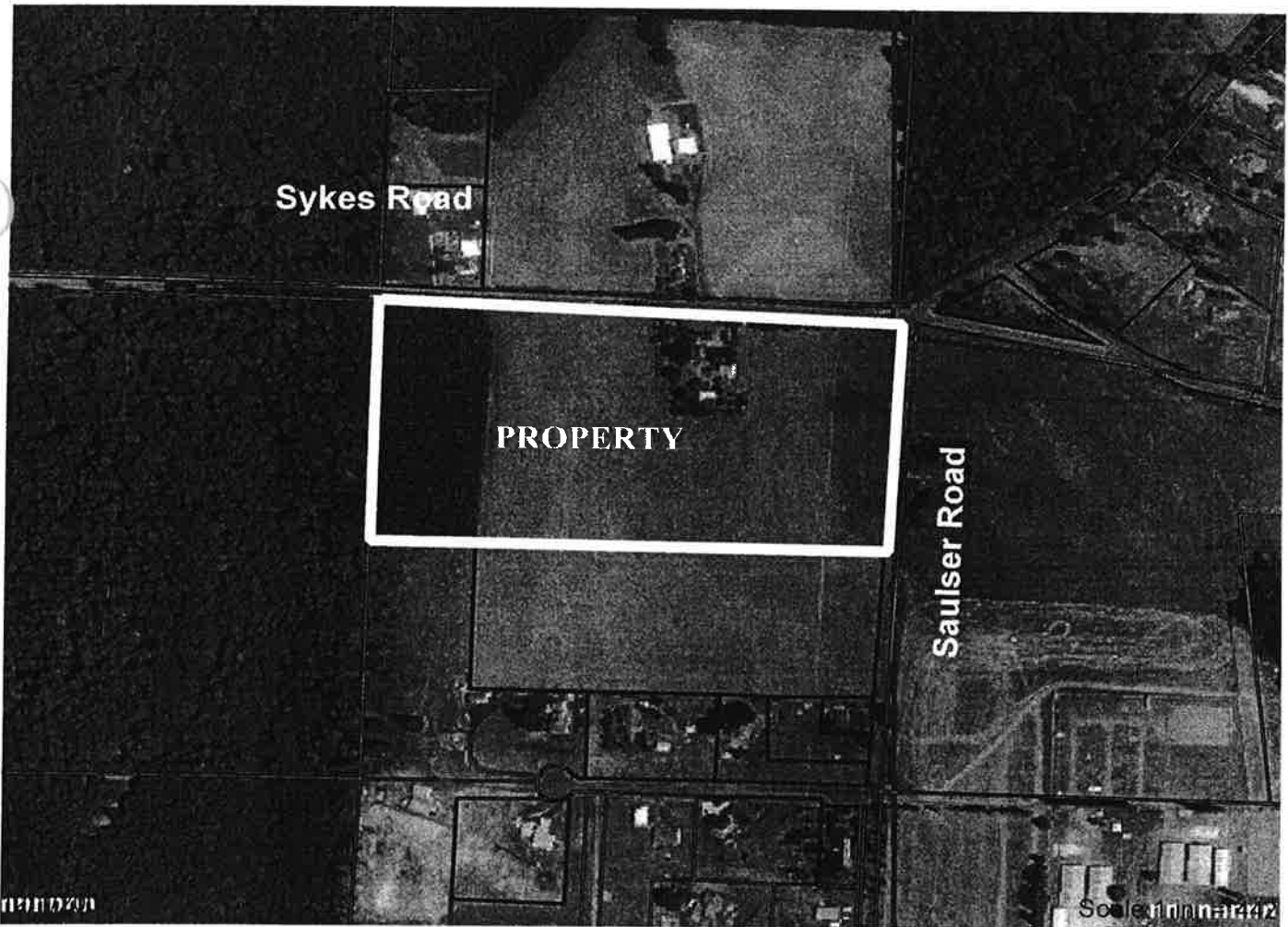
Attachment 2
COLUMBIA COUNTY
LAND DEVELOPMENT SERVICES

Measure 37 Claim

Staff Report

DATE: December 1, 2005
FILE NUMBER: CL 05-28
CLAIMANT Asbury Family LLC
OWNER: Same
PROPERTY LOCATION: 33676 Sykes Road
St. Helens, Oregon 97051

SUBJECT PROPERTY



AX ACCOUNT NUMBER: 4201-000-03100
ZONING: Forest Agriculture(FA-19)

SIZE: 9.85 Acres

REQUEST: To divide FA-19 property into approximately 6 two acre parcels for residential development. (Note: At 9.85 acres. The parcel could accommodate only 4 two acre parcels.)

CLAIM RECEIVED: 6/22/05

180 DAY DEADLINE: 12/20/05

I. BACKGROUND: The Asbury Family LLC filed a claim under Measure 37 on June 22, 2005. The amount of the claim is \$810,000. The claim is based upon the premise that the lot cannot be further divided under current FA-19, Forest/Agriculture, zoning minimum lot size regulations. The Claimant submitted current year Columbia County Tax Assessor real market value information for "as is" fair market value and an appraisal of the property as partitioned into two acre parcels prepared by Wallace Williams, an Oregon licenced appraiser.

II. CRITERIA FOR REVIEW WITH STAFF FINDINGS:

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(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

A. PROPERTY OWNER AND OWNERSHIP INTERESTS:

1. **Current Ownership:** The claimant submitted a Title Report issued by Columbia County Title and Escrow Services, Inc on May 25, 2005 which shows:
Vested In: Asbury Family LLC. in fee simple estate.
Subject to easements in favor of PGE and McNulty Water Association.

2. **Date of Acquisition:** According to the aforementioned Title Report and deeds the following chain of title has been established for the parcel:

August 14, 1962 Harry and Ruby Popejoy conveyed the property to Kenneth Asbury and Gwendolyn Asbury, Husband and Wife by warrant deed (Book 149, Page 763)

July 5, 1995. Gwendolyn Asbury conveyed her interest in the property to Kenneth R Asbury (Instrument 95-05618).

August 28, 1996. Order Approving Final Accounting in the Estate of Kenneth R. Asbury signed by judge granting Parcels 1 and 2 to Gwendolyn Asbury individually. Probate File P95-6552, closed October 14, 1996.

September 19, 1996, Gwendolyn Asbury as Personal Representative of the Estate of Kenneth R. Asbury deeded to Gwendolyn Asbury, Individually, by Personal Representative Deed (Instrument # 96-09798).

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D. CLAIMANT'S ELIGIBILITY FOR FURTHER REVIEW

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Having acquired the property in 1998, the Claimant is not eligible for compensation or waiver of the cited regulation under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant states that Asbury Family LLC cannot divide the property as proposed due to CCZO Section 407.1. Staff finds that the cited regulation restricts the use of the property by preventing the division of the property into 2.0 acre parcels.

F. EVIDENCE OF REDUCED FAIR MARKET VALUE

1. Value of the Property As Regulated.

To document the "as is" value of the 9.85 acre property, the Claimant submitted a 2005 County property tax statement indicating an assessed value for the land of \$87,400.

2. Value of Property Not Subject To Cited Regulations.

To document the "as developed" value of the property, an appraisal of the property as partitioned into two acre parcels was prepared by Wallace Williams, an Oregon licenced appraiser was submitted. The appraisal valued each 2 acre parcel at \$135,000.

3. Alleged Loss of Fair Market Value:

The Claimant alleges a loss of fair market value of \$810,000 (6 two acre parcels x \$135,000 per parcel).

However, at 9.85 acres, the property could accommodate only 4 two acre parcels (4 two acre parcels x \$135,000 per parcel = \$540,000). The Claimant's analysis of the loss is flawed in several respects. The Claimant did not adjust the amount of loss in value by factoring in the current value of the property. In addition, the appraisal provides a raw retail land value and the claim did not take into account the costs of development in determining the reduction of value of the property. Should the Claimant be otherwise found eligible for compensation, staff finds the Claimant has failed to prove to any degree of certainty, what, if any, loss it has suffered due to CCZO 407.1.

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The subject claim arises from the minimum lot size provisions of FA-19 zoning regulations which was enacted in 1984, prior to the effective date of Measure 37 on December 2, 2004. The subject claim was filed on June 22, 2005 which is within two years of the effective date of Measure 37.

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