

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Claim Number CL 05-26 Submitted by)
the Kenneth R. Asbury Family Trust for Compensation) Order No. 80-2005
Under Measure 37)

WHEREAS, on June 22, 2005, Columbia County received a claim under Measure 37 from the Kenneth R. Asbury Family Trust, related to a parcel of property on Sykes Road in St. Helens, Oregon, having Tax Account Number 4201-000-01800; and

WHEREAS, according to the information presented with the claim, the Asbury Family Trust is the current owner of the parcel and has continuously owned an interest in the property since September 19, 1996; 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 1996 acquisition date for the Kenneth R. Asbury Family Trust;

NOW, THEREFORE, it is hereby ordered as follows:

1. The Board of County Commissioners adopts the findings of fact set forth in the Staff Report for Claim Number CL 05-26, dated December 1, 2005, which is attached hereto as Attachment 1, and is 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 05-26.

Dated this 14th day of December, 2005.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Approved as to form

By: Sarah Hanson
Assistant County Counsel

By: [Signature]
Anthony Hyde, Chair

By: [Signature]
Joe Corsiglia, Commissioner

By: [Signature]
Rita Bernhard, Commissioner

Order No. 80 -2005

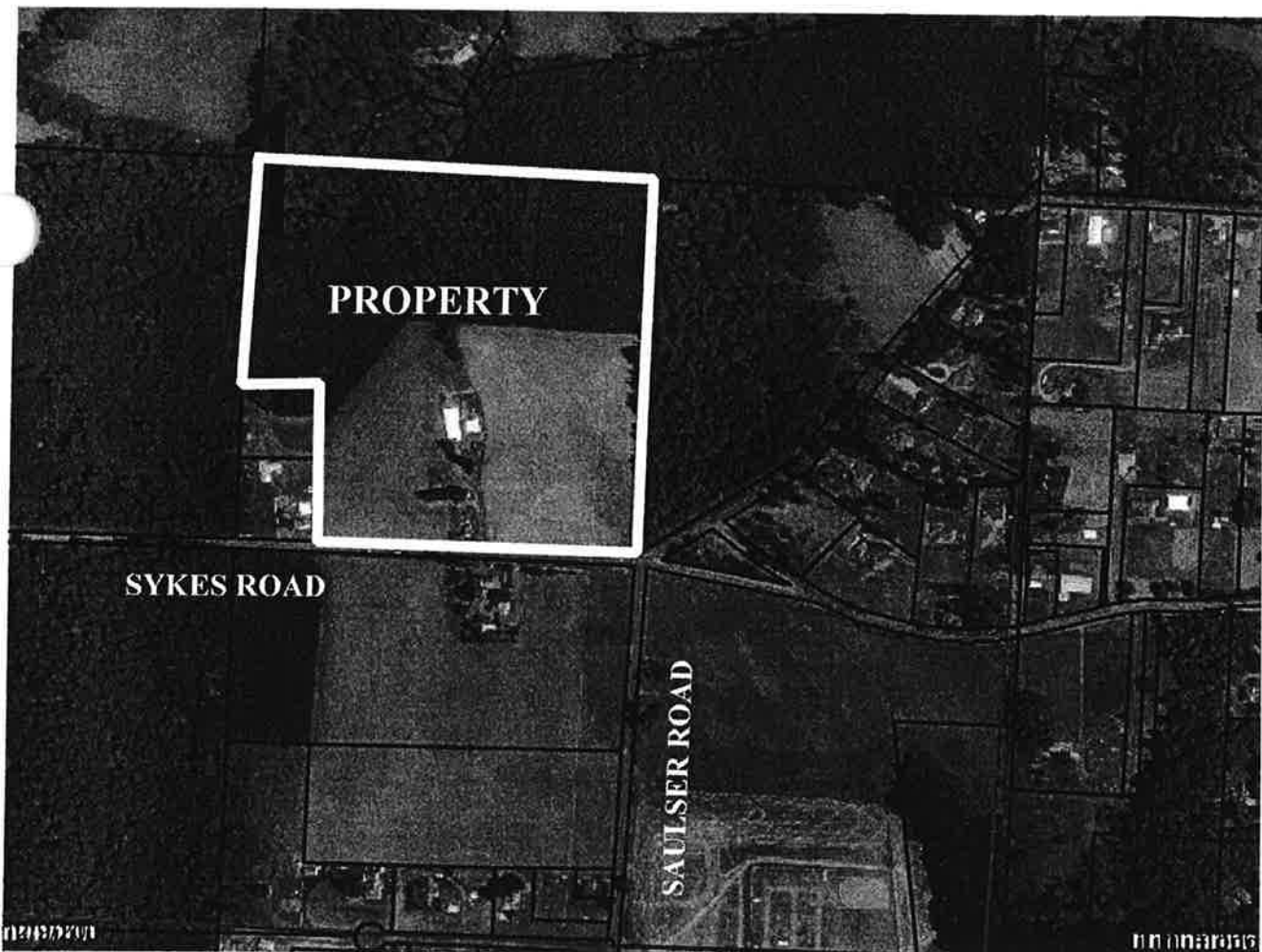
COLUMBIA COUNTY LAND DEVELOPMENT SERVICES

Measure 37 Claim

Staff Report

DATE: December 1, 2005
FILE NUMBER: CL 05-26
CLAIMANT Asburry Family Trust
OWNER: Same
PROPERTY LOCATION: 33676 Sykes Road
St. Helens, Oregon 97051

SUBJECT PROPERTY



CCOUNT NUMBER: 4201-000-01800
ZONING: Forest Agriculture(FA-19)

T A X

SIZE: 36.1 Acres

REQUEST: To divide FA-19 property into approximately 12 two acre parcels for residential development (Note: At 36.1 acres, the property could accommodate 18 two acre parcels).

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

I. BACKGROUND: Gwendolyn M. Asbury, Trustee on behalf of the Kenneth R. Asbury Family Trust ("Claimant"), filed a claim under Measure 37 on June 22, 2005. The amount of the claim is \$1,620,000. 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: Gwendolyn M. Asbury, Trustee of the Kenneth R. Asbury Family Trust 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:

May 18, 1949 Lois and Edmund Jordan to Kenneth and Gwendolyn Asbury as husband and wife, by the entirety and not by the community by warranty deed (Book 104, page 100).

August 28, 1996, Order approving Final Account of Kenneth Asbury Estate grants parcel 3 to Gwendolyn Asbury as Trustee of Kenneth Asbury Family Trust.

September 19, 1996. Gwendolyn Asbury as Personal Representative of the Estate of Kenneth R. Asbury to Gwendolyn Asbury, Trustee of the Asbury Family Trust dated September 10, 1982 by Personal Representative's Deed (Instrument # 96-09797).

Parcel 3 is currently vested in Gwendolyn Asburry, Trustee of the Kenneth R. Asburry Family Trust

Property was acquired by Claimant/current owner, Asburry Family Trust in 1996.

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

The property was zoned FA-19 when the Claimant acquired the property in 1996.

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 Kenneth R. Asburry Family Trust which acquired an interest in the property in 1996 from the Ken Asburry Estate. Gwendolyn Asburry is an income beneficiary of the Trust is not an "owner" of the property, as defined by the Measure. Having acquired an interest in the property in 1996, the Claimant is not eligible for compensation or waiver of the sited regulation under Measure 37.

E. STATEMENT AS TO HOW THE REGULATIONS RESTRICT USE

The Claimant states that Asburry Family Trust 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 36.1 acre property, the Claimant submitted a 2005 County property tax statement indicating a real market value for the improvements of \$54,700 and a real market value for the land of \$313,200 for a total value of \$367,900.

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 \$1,620,000 (12 two acre parcels x \$135,000 per parcel). 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 for the proposed two acre parcels and the appraisal did not take into account the costs of development in determining the reduction of fair market value of the property. Should the Claimant be otherwise found eligible for compensation, Staff finds that 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

\$1,620,000

(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 1996. The Kenneth R. Asbury Trust is the current property owner and the Trust 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 beneficiaries of the Trust are current "owners" of the property as defined by the Measure. The Trust is a separate and distinct legal entity. However, even if such beneficiaries were considered current property owners due to their status as beneficiaries, they would not be entitled to waiver of CCZO 407.1 because their date of acquisition for purposes of waiver is 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 Claim arises from the minimum lot size provisions of FA-19 zoning regulation 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, Kenneth R. Asbury Family Trust, acquired an interest in the property in 1996 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 1996. Therefore, 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, Asbury Family Trust has not met the threshold requirements for compensation 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.