



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Preliminary Evaluation**

March 18, 2010

STATE ELECTION NUMBER: E129720

CLAIMANTS: Gerald Smallwood Logging, Inc.
c/o Gerald Smallwood, President
Gerald and Barbara Smallwood
582 E Scott Creek Road
Tidewater, OR 97390

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 14S, Range 9W, Section 00
Tax lot 602
Lincoln County

AGENT CONTACT INFORMATION: Gary C. Hamilton
Litchfield & Carstens, LLP
PO Box 1730
Newport, OR 97365

I. ELECTION

The claimants, Gerald Smallwood Logging, Inc. and Gerald and Barbara Smallwood, filed a claim with the state under ORS 197.352 (2005) (Measure 37) on July 21, 2006, for property located at 20963 East Alsea Highway, near the community of Tidewater, in Lincoln County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed Measure 37 claims to elect supplemental review of their claims. The claimants have elected supplemental review of their Measure 37 claim under Section 6 of Measure 49, which allows the Department of Land Conservation and Development (the department) to authorize up to three home site approvals to qualified claimants.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that claimant Gerald Smallwood Logging, Inc. is not eligible for any relief under Measure 49 because the claimant would not have been lawfully permitted to establish any home sites when it acquired the property.

Based on the department's preliminary analysis, it appears that the claimants Gerald and Barbara Smallwood are not eligible for any relief under Measure 49 because the claimants no longer own the Measure 37 claim property.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANTS MAY QUALIFY

Under Section 6 of Measure 49, the number of home site approvals authorized by the department cannot exceed the lesser of the following: three; the number stated by the claimant in the election materials; or the number described in a Measure 37 waiver issued by the state, or if no waiver was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimants have requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes 50 home sites. Therefore, the claimants may qualify for a maximum of three home site approvals under Section 6 of Measure 49.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Preliminary Analysis

To qualify for a home site approval under Section 6 of Measure 49, a claimant must have filed a Measure 37 claim for the property with either the state or the county in which the property is located on or before June 28, 2007, and must have filed a Measure 37 claim with both the state and the county before Measure 49 became effective on December 6, 2007. If the state Measure 37 claim was filed after December 4, 2006, the claim must also have been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

The claimants, Gerald Smallwood Logging, Inc. and Gerald and Barbara Smallwood, filed a Measure 37 claim, M129720, with the state on July 21, 2006. The claimants filed a Measure 37 claim, 7-LURCC-06-808, with Lincoln County on July 21, 2006. The state claim was filed prior to December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Lincoln County.

In addition to filing a claim with both the state and the county in which the property is located, to qualify for a home site approval under Section 6 of Measure 49 the claimants must establish each of the following:

(a) The Claimant is an Owner of the Property

Measure 49 defines "Owner" as: "(a) The owner of fee title to the property as shown in the deed records of the county where the property is located; (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or (c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner."

According to the deed submitted by the claimants, Gerald Smallwood Logging, Inc. is the owner of fee title to the property as shown in the Lincoln County deed records and, therefore, is an owner of the property under Measure 49.

According to the information submitted by the claimants, Gerald and Barbara Smallwood have not established their ownership of the property for the purposes of Measure 49. Claimants Gerald and Barbara Smallwood conveyed their interest in the Measure 37 property to claimant Gerald Smallwood Logging, Inc. on December 3, 1990, as reflected by a recorded bargain and sale deed submitted by the claimants.

Because this requirement has not been met, claimants Gerald and Barbara Smallwood are not entitled to any relief under Measure 49, and, therefore, the remaining approval criteria will not be evaluated for those claimants.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimant Gerald Smallwood Logging, Inc. is the sole owner of the property. Therefore, no additional consent is required.

(c) The Measure 37 Claim Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property is located in Lincoln County, outside any urban growth boundary and outside any city limits, near the community of Tidewater.

(d) One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

As stated in Section III above, the claimant may qualify for up to three home site approvals.

The portion of the property located north of Alsea Highway is currently zoned Timber Conservation (T-C) by Lincoln County, in accordance with ORS chapter 215 and OAR 660, division 6, because the property is “forest land” under Goal 4. Applicable provisions of ORS chapter 215 and OAR 660 division 6, enacted or adopted pursuant to Goal 4, generally prohibit the establishment of a lot or parcel less than 80 acres in size in a forest zone and regulate the establishment of dwellings on new or existing lots or parcels.

This portion of the claimant’s property consists of 31.56 acres. Therefore, state land use regulations prohibit the claimants from establishing on this portion of the Measure 37 claim property the three home sites the claimant may qualify for under Section 6 of Measure 49.

The portion of the property located south of Alsea Highway is currently zoned Agricultural Conservation (A-C) by Lincoln County, in accordance with ORS chapter 215 and OAR 660, division 33, because the property is “agricultural land” as defined by Goal 3. Goal 3 requires agricultural land to be zoned exclusive farm use. Applicable provisions of ORS chapter 215 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, generally prohibit the

establishment of a lot or parcel less than 80 acres in size in an EFU zone, and regulate the establishment of dwellings on new or existing lots or parcels.

This portion of the claimant's property consists of 19.30 acres. Therefore, state land use regulations prohibit the claimants from establishing on this portion of the Measure 37 claim property the three home sites the claimant may qualify for under Section 6 of Measure 49.

(e) The Establishment of the Lot, Parcel or Dwelling Is Not Prohibited by a Land Use Regulation Described in ORS 195.305(3)

ORS 195.305(3) exempts from claims under Measure 49 land use regulations:

- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
- (b) Restricting or prohibiting activities for the protection of public health and safety;
- (c) To the extent the land use regulation is required to comply with federal law; or
- (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

Based on the documentation submitted by the claimant, it does not appear that the establishment of the three home sites for which the claimant may qualify on the property would be prohibited by land use regulations described in ORS 195.305(3).

(f) On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Lots, Parcels or Dwellings on the Property That Are Authorized Under Section 6 of Measure 49

A claimant's acquisition date is "the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates."

Lincoln County deed records indicate that claimant Gerald Smallwood Logging, Inc. acquired the property on December 3, 1990.

On December 3, 1990, the portion of the property north of the Alsea Highway (31.56 acres) was subject to Lincoln County's acknowledged Timber Conservation (T-C) zone. Lincoln County's T-C zone required 40 acres for the creation of a new lot or parcel on which a dwelling could be established. This portion of the Measure 37 claim property consists of 31.56 acres. Therefore, the claimant lawfully could not have established any home sites on this portion of the Measure 37 claim property on its date of acquisition.

The remainder of the claim property south of the Alsea Highway (19.30 acres) was subject to Lincoln County's acknowledged Agricultural Conservation (A-C) zone. Although Lincoln County's A-C zone was acknowledged to comply with the statewide planning goals, that zone

did not establish a fixed minimum acreage standard for the creation of a lot or parcel on which a dwelling could be established. Rather, the county determined minimum lot sizes for land division and development on a case-by-case basis and required the applicants demonstrate that their property had an acceptable commercial viability rating and farm management plan.

Because of uncertainty regarding the historic application of the county's acknowledged plan, the 2010 Legislative Assembly amended Measure 49. Senate Bill (SB) 1049 (2010) specifies that, for purposes of determining the number of home site approvals that would have been lawfully permitted when a claimant acquired Measure 37 claim property that was subject to an acknowledged resource zone that without a fixed minimum acreage standard, the minimum acreage standard is 40 acres unless the record for the claim demonstrates that the claimant was lawfully permitted to establish a home site on a lot or parcel of a different acreage.

This portion of the claimant's property consists of 19.30 acres. Therefore, claimant Gerald Smallwood Logging, Inc. lawfully could not have established any home sites on this portion of the Measure 37 claim property on its date of acquisition, unless the claimant establishes that the county's acknowledged plan and land use regulations would have lawfully permitted one or more additional home sites on a lot or parcel of a different acreage.

2. Preliminary Conclusion

Based on the preliminary analysis, the claimant, Gerald Smallwood Logging, Inc., does not qualify for Measure 49 home site approvals because the claimant was not lawfully permitted to establish the lots, parcels or dwellings on its date of acquisition.

Based on the preliminary analysis, the claimants, Gerald and Barbara Smallwood, do not qualify for Measure 49 home site approvals because they are no longer owners of the Measure 37 claim property.

V. NOTICE OF OPPORTUNITY TO COMMENT

A claimant or a claimant's authorized agent, a county and any third party may submit written comments, evidence and information in response to the preliminary evaluation. The comments, evidence and information must be filed with the department no more than twenty-eight (28) calendar days after the date this evaluation is mailed to the claimant and the claimant's agent and notice of this evaluation is mailed to third parties.

The department will mail a copy of all materials timely filed by a county or a third party with the department to the claimant and the claimant's agent. A claimant or a claimant's authorized agent may then file written comments, evidence or information in response to the materials filed by the third party or county. That response must be filed no more than twenty-one (21) calendar days after the date the department mails the materials to the claimant and the claimant's authorized agent.

All comments, evidence and information in response to the preliminary evaluation and all responses to materials filed by a third party or a county shall be delivered to Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540 and will be deemed timely filed either (1) if actually delivered to the department before the close of business on the final eligible calendar day, or (2) if mailed on or before the final eligible calendar day.

Note: Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." Comments must be submitted in original written form only. Comments submitted electronically or by facsimile will not be accepted.