



**OREGON DEPARTMENT OF LAND CONSERVATION AND  
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW  
OF MEASURE 37 CLAIM  
Final Order of Denial**

**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

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.

This Final Order of Denial is the conclusion of the supplemental review of this claim.

**I. ANALYSIS OF CLAIM**

**A. Maximum Number of Home Sites 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.

## **B. Qualification Requirements**

To qualify for a home site approval under Section 6 of Measure 49, the claimants must meet each of the following requirements:

### **1. Timeliness of Claim**

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.

### **Findings of Fact and Conclusions**

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.

The claimants timely filed a Measure 37 claim with both the state and Lincoln County.

### **2. 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."

### **Findings of Fact and Conclusions:**

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.

Lincoln County has confirmed that claimant Gerald Smallwood Logging, Inc. is the current owner of the property.

According to the information submitted by the claimants, Gerald and Barbara Smallwood are not owners 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.

**3. All Owners of the Property Have Consented in Writing to the Claim**

All owners of the property must consent to the claim in writing.

**Findings of Fact and Conclusions:**

All owners of the property have consented to the claim in writing.

**4. The Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City**

The Measure 37 claim property must be located entirely outside any urban growth boundary and entirely outside the boundaries of any city.

**Findings of Fact and Conclusions:**

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.

**5. One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling**

One or more land use regulations must prohibit establishing the requested lot, parcel or dwelling.

**Findings of Fact and Conclusions:**

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 Measure 37 claim property consists of 31.56 acres. Therefore, state land use regulations prohibit claimant Gerald Smallwood Logging, Inc. 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 Measure 37 claim property consists of 19.30 acres. Therefore, state land use regulations prohibit claimant Gerald Smallwood Logging, Inc. 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.

**6. 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.

**Findings of Fact and Conclusions**

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

**7. 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."

**Findings of Fact and Conclusions**

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 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 Measure 37 claim 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.

## **II. COMMENTS ON THE PRELIMINARY EVALUATION**

The department issued its Preliminary Evaluation for this claim on March 18, 2010. Pursuant to OAR 660-041-0090, the department provided written notice to the owners of surrounding properties. No written comments were received in response to the 28-day notice.

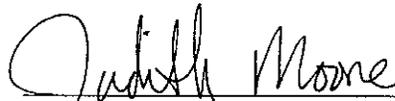
## **III. CONCLUSION**

Based on the analysis above, 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 analysis above, 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 for the purposes of Measure 49.

IT IS HEREBY ORDERED that this Final Order of Denial is entered by the Director of the Department of Land Conservation and Development as a final order of the department and the Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160.

FOR THE DEPARTMENT AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:



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Judith Moore, Division Manager  
Dept. of Land Conservation and Development  
Dated this 4<sup>th</sup> day of May 2010.

#### **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review is available to anyone who is an owner of the property as defined in Measure 49 that is the subject of this final determination, or a person who timely submitted written evidence or comments to the department concerning this final determination.
2. 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 must be filed in the Circuit Court in the county in which the affected property is located. Upon motion of any party to the proceedings, the proceedings may be transferred to any other county with jurisdiction under ORS 183.484 in the manner provided by law for change of venue.
3. Judicial review of this final determination is limited to the evidence in the record of the department at the time of its final determination. Copies of the documents that comprise the record are available for review at the department's office at 635 Capitol St. NE, Suite 150, Salem, OR 97301-2540. Judicial review is only available for issues that were raised before the department with sufficient specificity to afford the department an opportunity to respond.