

W.7.C.
SUPPLEMENTAL MEMO

SUPPLEMENTAL MATERIAL

DATE OF MEMO: July 11, 2006

TO: Board of County Commissioners

FROM: ^{JK} Jerry Kendall/Land Management Division

RE: **ORDINANCE NO. PA 1231 -- IN THE MATTER OF AMENDING THE RURAL COMPREHENSIVE PLAN TO REDESIGNATE LAND FROM "AGRICULTURAL" TO "MARGINAL LAND" AND REZONING OF THAT LAND FROM "E-40/EXCLUSIVE FARM USE" TO "ML/SR" ("MARGINAL LAND WITH SITE REVIEW"), AND ADOPTING SAVINGS AND SEVERABILITY CLAUSES (file PA 04-6092, Dahlen)**

Scheduled board date for fourth reading/deliberation is July 12, 2006.

Due to some additional editing, please substitute the attached updated findings for Attachment #3 provided in yesterday's memo.

Also, the enclosed document labeled "DRAFT" shows the changes between these updated findings and the findings originally recommended by staff and provided in the packet generated for the 2nd reading/public hearing.

Please contact me at x4057 if you have any questions or comments.

Attachments:

- Revised staff findings (recommended alternative)
- Comparison document

ORDINANCE NO. PA 1231 – Exhibit C
FINDINGS OF FACT AND CONCLUSIONS OF LAW
for
MINOR AMENDMENT OF THE LANE COUNTY
RURAL COMPREHENSIVE PLAN
and
ZONE CHANGE FROM EXCLUSIVE FARM USE
to
MARGINAL LAND
PA 04-6092
KAREN A. DAHLEN TRUST
P.O. BOX 5687
Eugene, OR 97405-0687

(REVISED ON 7-11-06) OLC ATTCH²
- 27^{no.}

PROPOSAL

Applicant: Karen A. Dahlen

Property Owner: Karen A. Dahlen Trust

Property Location: Located approximately ½ mile south of Eugene city limits,
west of Willamette Street

Assessor's Map and Lot: Assessor's Map No. 18-04-24-0300

Current County Zoning: Exclusive Farm Use (EFU 30)

Attorney-Consultant: P. Steven Cornacchia
Hershner Hunter
180 E. 11th Avenue
Eugene, Oregon 97401

1. **EVIDENCE.**

- 1.1 Application materials dated September 15, 2004, with exhibits;
- 1.2 Lane County Planning Commission Staff Report with attachments;
- 1.3 Marc Setchko Report, dated February 15, 2005.
- 1.4 Correspondence from Steve Cornacchia, dated April 19, 2005, with exhibits, including March 27, 2005, Setchko report;
- 1.5 Correspondence from Steve Cornacchia, dated May 24, 2005;
- 1.6 Correspondence from Steve Cornacchia, with exhibits, dated July 18, 2005;
- 1.7 Correspondence from Steve Cornacchia, dated July 25, 2005, with attachments, including a copy of LUBA Decision No. 2005-029, James Just v. Lane County (Carver) and affidavits of Art Moshofsky and Mark Minty;
- 1.8 Agronomic Analytics Dahlen Property Soil Investigation Report;
- 1.9 Correspondence, with exhibits, from Steve Cornacchia, dated September 29, 2005;
- 1.10 Correspondence, with exhibits, from Steve Cornacchia, dated May 9, 2006.

2. **INTRODUCTION.**

The property that is the subject of this application consists of a 316-acre parcel located immediately south of, but not adjacent to, the Eugene city limits and the Eugene-Springfield Metropolitan Plan Urban Growth Boundary, west off of Willamette Street. This application is for approval of a Minor Plan Amendment to the Lane County Rural Comprehensive Plan (RCP) diagram to designate the subject property from Agriculture to Marginal Lands, and a concurrent Lane County zoning map amendment from Exclusive Farm Use (EFU 30) to Marginal Lands (MLRCP).

3. **BACKGROUND INFORMATION**

3.1 **General Site Description.**

The subject property is described as Tax Lot 300 of Lane County Assessor's Map No. 18-04-24. Immediately to the east of the property is located Tax Lot 1300 of Lane County Assessor's Map

No. 18-03-19, a parcel of land consisting of approximately 67.16 acres, zoned Marginal Lands (ML) and owned by the applicant.

Property adjacent to the southern boundary of the subject property consists of six small parcels, all zoned Impacted Forest (F-2). Tax Lots 18-04-24-100 and 102 are adjacent to the northeast boundary of the subject property and are also zoned Impacted Forest (F-2). Tax Lots 18-04-24-200 and 201 are adjacent to the northwest boundary of the subject property and are zoned Marginal Lands (ML). Tax Lot 18-04-23-204 is adjacent to the western boundary of the subject property and is zoned Impacted Forest (F-2).

The subject property receives the following public services: Eugene School District 4J (schools); Lane Electric Co-op (electrical power); Eugene Rural Fire Protection District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and Oregon State Police.

3.2 Description of Proposed Amendments. The application before Lane County is for approval of the following:

a. An amendment to the county's comprehensive plan and map designating the subject property as Marginal Lands and re-zoning it to Marginal Lands (ML).

b. The Lane County Board of Commissioners also finds as follows:

4. PLAN AMENDMENT CRITERIA OF LANE CODE 16.400

This application to amend the Lane County Rural Comprehensive Plan was initiated by Karen Dahlen on September 15, 2004.

The following criteria apply to amendments of the comprehensive plan:

4.1 Lane Code 16.400(6)(h)(iii) (Method of Adoption and Amendment) provides that the Board may amend or supplement the Rural Comprehensive Plan upon making the following findings

(aa) For Major and Minor Amendments as defined in LC 16 400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules

(bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:

(i-i) necessary to correct an identified error in the Plan; or

(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; or

(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; or

(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements, or

(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decisions, to be desirable, appropriate or proper.

(cc) For Minor Amendments as defined in LC 16.400(8)(a), the Plan amendment or component does not conflict with adopted Policies of the Rural Comprehensive Plan and if possible, achieves policy support.

4.2 Lane Code 16.400(6)(i) provides that a change of zoning to implement a proposed Plan amendment may be considered concurrently with such amendment. In such case, the Board shall also make the final zone change decision, and the Hearings Official's consideration need not occur.

4.3 Lane Code 16.400(6)(h)(iii)(aa).

For Major and Minor Amendments as defined in LC 16 400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.

(1) Goal 1 - Citizen Involvement.

To ensure the opportunity for citizen involvement in all phases of the planning process.

Lane County has provided written notice of the proposed amendments and public hearings before its planning commission and board of commissioners in conformance with ORS 197.763. The information included in the notices conforms with ORS 197.763 (2) and (3) and enabled citizens to identify and comprehend the issues and to participate in a public process prior to final action by the county. Referral notices were also mailed to all federal, state, and private organizations as required by state law and Lane Code. The proposed amendments have been processed in a manner that assures full compliance with Goal 1.

(2) Goal 2 - Land Use Planning.

To establish a land use planning process and policy framework as a basis for all decisions and actions related to the use of land and to assure an adequate factual base for such decisions and actions.

Goal 2 establishes a land use planning process and policy framework as a basis for all land use decisions, and requires development of an adequate factual base to support those decisions. A minor change is one that does not have significant effects beyond the immediate area of change, and is based on special studies or information. The justification for the specific change must be established by substantial evidence in support of the conclusion that the applicable criteria have been met.

Lane County has adopted a comprehensive land use plan amendment process with specific standards that must be addressed to justify a minor change. Substantial compliance with the plan amendment criteria in Lane Code (LC)16.400 constitutes compliance with the applicable provisions. This plan amendment must also address and satisfy the criteria set forth in ORS 197.247 (1991 ed.). This application is supported by substantial evidence upon which the Lane County Board of Commissioners conclude that the applicable criteria have been met.

(3) Goal 3 - Agricultural Land.

To preserve and maintain agricultural lands.

The subject property is not agricultural land as defined by Goal 3. It contains soils predominantly classified as Class V-VII by the Soil Conservation Service and is of low suitability for farming as discussed in Section 4.2 below. Accordingly, this decision is consistent with Goal 3.

(4) Goal 4 - Forest Lands.

To preserve forest lands for forest use.

The subject property is not suitable for growing and sustaining Douglas-fir or other less merchantable tree species as discussed more fully in Section 4.2 below. No other species would grow as fast on the subject property or be as valuable and merchantable as Douglas-fir. Zoning the property for Marginal Lands maintains the property in a resource zone and capable of being used for limited, marginal, resource uses. The subject property's suitability for growing and sustaining merchantable tree species is discussed more fully in Section 4.2 below. Accordingly, this decision is consistent with Goal 4.

(5) Goal 5 - Open Space, Scenic and Historic Areas, and Natural Resource.

To conserve open space and protect natural and scenic resources.

Goal 5 is not applicable to this request. There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that no Goal 5 resources exist on subject site. The subject property has not been included in any inventory of needed open space or scenic areas defined by Goal 5, nor has it been identified in the comprehensive plan as having any historic, cultural or natural resources which need to be preserved and/or protected. The proposed amendments will not conflict with any Goal 5 resources.

(6) Goal 6 - Air, Water and Land Resources Quality.

To maintain and improve the quality of the air, water and land resources of the state.

Goal 6 requires that air, land and water resources of the state be maintained and improved by assuring that future development, in conjunction with existing development, does not violate applicable state and federal environmental quality standards, and does not exceed the carrying capacity of local air sheds, degrade land resources or threaten the availability of such resources. Lane County has sufficient regulatory measures in place so as to ensure that existing land use activities, as well as any future development on the site, will not produce any unanticipated impacts resulting from the proposed amendments.

The subject property lies within an area identified as a “broad areas of very limited groundwater” area in Lane Manual 13.010 and the availability of water commensurate with the proposed development of the subject property is demonstrated by the analysis and conclusions of EGR and Associates, Inc. (EGR). The results of the aquifer analysis by EGR, dated July 27, 2004, are provided as evidence by the attachment of the analysis to the original application as Exhibit E.

In that aquifer analysis EGR concludes that there is sufficient water available for domestic use from the aquifer for all of the proposed parcels without adverse effects to neighboring wells. The record contains no other evidence from professional consultants that the analysis and conclusion of EGR is inaccurate or in error. The EGR report is sufficient and substantial evidence of the availability of water on the subject property and within its vicinity and demonstrates that application approval would be consistent with Goal 6.

The proposed amendments will not produce results that will be in conflict or inconsistent with the purpose and intent of Goal 6. The proposed amendments change the use designation on the subject property and any additional uses or change of use will require compliance with Lane County’s existing regulatory system and measures.

(7) Goal 7 - Areas subject to Natural Disasters and Hazards.

To protect life and property from natural disasters and hazards.

No areas containing or prone to natural disasters or natural hazards have been identified on the subject property.

(8) Goal 8 - Recreational Needs.

To satisfy the recreational needs of the citizens of the state.

Goal 8 is not applicable to this request. There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that no Goal 8 resources exist on subject site. The subject property has not been included in any inventory of recreational needs as defined by Goal 8. The proposed amendments will not conflict with any Goal 8 resources.

(9) Goal 9 - Economy of the State.

To diversify and improve the economy of the state.

Goal 9 is directed towards the comprehensive plans of the state's political subdivisions. Lane County's Rural Comprehensive Plan has been acknowledged by the Land Conservation and Development Commission. Goal 9 is primarily focused on commercial and industrial development within urban areas. OAR 660-009-0010(1) specifically limits the application of Goal 9 to comprehensive plans for areas within urban growth boundaries. Goal 9 is not directly applicable to rural residential use in a non-resource designation.

Approval of the subject application will allow the subject property to be developed with eleven additional home sites. Goal 9 has limited, if any, applicability to the subject application.

(10) Goal 10 – Housing.

To provide for the housing needs of the citizens of the state.

Approval of this application would result in the development of up to eleven additional dwellings on the subject property. Approval of this application would be consistent with Goal 10.

(11) Goal 11 - Public Facilities and Services.

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban development.

The subject property receives the following public services: Eugene School District 4J (schools); Lane Electric Co-op (electrical power); Eugene Rural Fire Protection District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and Oregon State Police.

The subject property has access to the full range of public services specified for Communities in RCP Goal 11: Public Facilities and Services, Policy 6.j. No additional public facilities and services will be required beyond the present level. While Goal 11 is couched in terms of urban development, approval of the application will not result in any urban level of development in a rural area. The public services identified above are adequate to serve the level of rural uses that the application envisions and provide the demonstration of consistency with Goal 11.

(12) Goal 12 – Transportation.

The intent of Goal 12 is implemented through the provisions of the State Transportation Planning Rule (TPR) (OAR 660, Division 12), which was adopted by LCDC in 1991.

OAR 660-012-0060(1) requires that amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility.

To determine whether the proposed amendments will significantly affect a transportation facility, the TPR lists specific criteria against which the proposed amendments are to be evaluated. The

TPR provides that a plan or land use regulation amendment significantly affects a transportation facility if it:

- (a) Changes the functional classification of an existing or planned transportation facility;
- (b) Changes standards implementing a functional classification system;
- (c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or,
- (d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP (Transportation System Plan).

The Board finds that the approval of the proposal cannot result in any of the four situations provided by the TPR criteria listed above. Development of 11 parcels with dwellings will produce typically 10 trips per day for each parcel, resulting in a total trip per day count of approximately 110. Willamette Street, a major collector, will not experience a change in its functional classification as a result of an additional 110 trips per day and the total trips per day are not inconsistent for a major collector and will not reduce the level of service below the minimum acceptable level identified in the TSP (Transportation System Plan).

The engineering firm Branch Engineering has analyzed the traffic impact resulting from approval of the application and has concluded that it would not have a significant impact on transportation facilities.

Application approval is consistent with Goal 12.

(13) Goal 13 - Energy Conservation.

To conserve energy.

Goal 13 requires that land uses maximize conservation of all forms of energy based on sound economic principles. It is implemented by local plans and regulations that control location, orientation and density of development to minimize net energy consumption. Any development on the subject property will be subject to those rules.

(14) Goal 14 – Urbanization.

To provide for an orderly and efficient transition from rural to urban land use.

OAR 660-004-0040(2)(c)(G) specifically exempts marginal land from the provisions of Goal 14 and its implementing rules. The rule specifically states that it does not apply to marginal land. Upon application approval the subject property will be designated marginal land. Therefore, Goal 14 is has little, if any, application to this application.

The entire ownership of the applicant is within an area committed to rural uses, both resource and non-resource in nature, as designated and provided by Lane Code and the acknowledged Lane County Rural Comprehensive Plan. No urban uses are contemplated as a result of

approval of this application. No extension of urban services is necessary as a result of approval of this application. Approval of this application will not change the uses made on the subject parcel from rural to urban.

The uses on the subject parcels resulting from approval of this application would be resource and rural residential, both of which are rural in nature. The uses are not considered urban by the code in its implementation of the acknowledged Lane County Rural Comprehensive Plan. Therefore, approval of this application would not result in the establishment of urban land use or urban land use in transition from rural land use.

All parcels resulting from approval of the subject application shall be no less than 10 acres in size which will not prevent further urban development in the future if the subject property is included within the UGB and city limits.

Approval of the application will not result in any level of urbanization of the subject property or the surrounding area and, therefore, is consistent with Goal 14 as the goal may be relevant to the application.

(15) Goal 15 - Willamette River Greenway.

To protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.

The subject property is not located within the Willamette River Greenway. Goal 15 is not applicable to this application.

(16) Goal 16 - Estuarine Resources.

To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and

To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.

The subject property contains no estuarine resources. Goal 16 is not applicable to this request.

(17) Goal 17 - Coastal Shorelines.

To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelines, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics.

The subject property contains no coastal shorelines. Goal 17 is not applicable to this request.

(18) **Goal 18 - Beaches and Dunes.**

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas.

The subject property contains no beaches or dunes. Goal 18 is not applicable to this request.

(19) **Goal 19 - Ocean Resources.**

To conserve the long-term values, benefits, and natural resources of the nearshore ocean and the continental shelf.

The subject property contains no ocean resources. Goal 19 is not applicable to this request.

4.4 **Lane Code 16.400(6)(h)(iii)(bb).**

For Major and Minor Amendments as defined in LC 16.400(8) (a) below, the Plan amendment or component is:

(i-i) necessary to correct an identified error in the Plan; or

The subject property was designated Agriculture and zoned EFU 30 as part of the Lane County Rural Comprehensive Plan (RCP) adoption process in 1984. Nonetheless, it was so designated and zoned pursuant to County policy which determined that lands that might qualify as marginal lands should be addressed subsequently on a case-by-case basis pursuant to policies in the RCP and the statutory criteria in ORS 197.247.

(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; or

Not applicable.

(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; or

Not applicable.

(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements, or

ORS 197.247 (1991 ed.) authorizes counties to designate land as marginal land. Lane County has acted to utilize this authority through the adoption of RCP Goal 3, Policy 14 and Goal 4, Policy 3. Those policies require an applicant for a marginal lands designation and zoning to address and satisfy the requirements of ORS 197.247 (1991 ed.) and applicable Lane County policies and requirements. The subject application is implementing policies in the RCP which allow qualified resource lands to be designated as Marginal Lands rather than Agriculture or Forest.

In order to aid applicants, county planning staff and the general public in addressing the marginal lands criteria, the Lane County Board of Commissioners, in 1997, adopted an interpretation of and supplement to the County's marginal lands information sheet ("the Board interpretation") a copy of which has been made a part of the record of this decision. The Board interpretation clarifies how the marginal lands statute and criteria are to be applied in specific situations by addressing seven issues and providing policy direction for each. As discussed in these findings, the Board interpretation has particular relevance to this application in the context of evaluating the site's ability to grow merchantable timber.

ORS. 194.247(1) (1991 ed.) provides the following criteria:

(a) The proposed marginal land was not managed, during the three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing on average, over the growth cycle, of \$10,000 in annual gross income; and

(b) The proposed marginal land meets at least one of the following tests:

(A) At least 50 percent of the proposed marginal land plus the lots or parcels at least partially located within one-quarter mile of the perimeter of the proposed marginal land consists of lots or parcels 20 acres or less in size on July 1, 1983;

(B) The proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983; or

(C) The proposed marginal land is composed predominately of soils in capability classes V through VIII in the Agricultural Capability Class Classification System in use by the United States Department of Agriculture Conservation Service on October 15, 1983, and is not capable of producing eighty-five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range.

The applicant has addressed subsections (a) and (b)(C) of the statute for demonstrating that the subject property is suitable for Marginal Lands designation. The following findings address each of those criteria:

ORS 197.247(1)(a):

It is found that the applicant has demonstrated that the subject property was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income. Art Moshofsky and members of his family owned the subject property during and throughout the period between 1978 and 1983. Mr. Moshofsky has provided several affidavits, that demonstrate that the subject property was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income. In his affidavits, Mr. Moshofsky has provided evidence that the only farm use made of the subject property during the applicable period was the intermittent and limited grazing of cattle, usually less than 25 head at any one time, by C&M Livestock Company. The grazing was the product of an informal agreement between Mr. Moshofsky and the company that provided that the company would

graze a limited number of cattle on the property in exchange for fence maintenance and the human presence of the company. The company's presence on the property provided some security at the time for Mr. Moshofsky, who was an absentee owner residing in Portland faced with trespass and vandalism problems on the subject property. Mr. Moshofsky testified that at no time did monetary consideration between the parties for the grazing exceeded \$1000 annually. Mark Minty, a partner in C&M Livestock Company during that period, provided testimony in an affidavit in the record that Mr. Moshofsky's description of the activity and the agreement of the parties was accurate and that the company did not own or manage any property adjacent to, contiguous with or in the vicinity of the subject property. Mr. Minty also testified that it is his opinion that the subject property is of marginal value for grazing or other agricultural production and could not be managed as part of a farm operation capable of producing \$20,000 in gross income annually.

Furthermore it is found that the applicant has demonstrated that the subject property was not managed as part of a forest operation that produced an average, over the growth cycle, of \$10,000 in annual gross income.

The applicant's forester, Marc Setchko, provided an analysis to the record of the timber-growing potential of the subject property and concluded that the subject property could not be managed as a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. Mr. Setchko, with both professional credentials and 27 years of experience, is highly qualified to render such any analysis and conclusion.

Mr. Setchko's opinion was based on a detailed analysis of the existing soils, their ability to grow timber (primarily Douglas-fir) and conversion of that growth potential into dollars based upon log prices in 1983. Mr. Setchko's methodology is dictated by the Board interpretation (Direction for Issue 4). Mr. Setchko's analysis used a fifty-year growth cycle as directed by the Board interpretation (Direction for Issue 5).

Mr. Setchko, in his report dated March 27, 2005, conducted a forest income analysis of the subject property that included the entire 387.65 acres of common Moshofsky ownership in 1983. In that report Mr. Setchko calculated the average gross annual income of the property through a complete growth and harvest rotation. He calculated what the forest operation on the subject property was capable of, in terms of income, based on actual stocking of the property during the 1978-1983 period. His calculation is based upon the actual volume of timber removed from the property in 1990 by Mr. Moshofsky (Mr. Moshofsky's affidavit of that timber removal, dated March 15, 2005, is included in the record) and his timber cruise of the remaining portion of the property containing stands of merchantable Douglas Fir. Included in Mr. Setchko's report is a map of the property with areas of timber harvest and existing stands of merchantable Douglas Fir delineated. Mr. Setchko's earlier reports in the record of this proceeding, and incorporated herein by this reference, demonstrate that significant portions of the property have not had any merchantable trees growing thereon for at least 50 years (and likely 100 years), due primarily to the steep, rock-laden, barren slopes of the northern portion of the property and the continually moist bottom land throughout the middle of the property. Those areas of the property contain poor soils for timber production (138G, 52 D, and 28C) as shown in Mr. Setchko's numerous reports in the record of this proceeding. The record of this proceeding includes aerial photos of

the property, dating back to 1952, that display that those same areas have been devoid of any trees, merchantable or otherwise, long before the 1978-1983 period and continue to this day to be devoid of trees. Mr. Setchko was not required to make any assumptions on stocking levels in his analysis and calculations—he used the actual condition of the property during the applicable time period and its ability, at that time, to produce forest income over the growth cycle of the merchantable stands of timber existing at that time.

The applicant has provided testimony from Stephen Caruana, principal agronomist of Agronomic Analytics, regarding the relationship between the soils of the subject property in areas devoid of trees and the fact that no trees have grown in those areas for at least the past 50 years. Mr. Caruana testified, in his Dahlen Property Soil Investigation Report, that silvicultural requirements of Douglas fir demonstrate that Douglas fir grows poorly on shallow soils, germinates slowly in grassy, overgrown areas, and is especially subject to lethal conditions on hot, dry aspects. Mr. Caruana testified that such areas and conditions are prevalent in the areas of the subject property that are devoid of trees. He testified that the large open, grassy areas of the subject property, especially those on the hillsides with south and west exposures, exceeded the limiting conditions and are, consequently, severely limited for the propagation and survival of desirable tree species. Mr. Caruana further testified that shallow soils significantly contribute to the limiting conditions and that the pattern of forest cover on the subject property followed closely the presence of deeper soils. He found that those areas that do not now support trees (and appear not to have had for the last 100 years) are especially shallow and subject to excessively hot and dry conditions due to their predominantly south aspect. He further found that the non-forested floodplain area soils are more likely to reforest with non-commercial species of typical hydrophilic trees such as willows, alders, ashes and the associated brush, grasses and forbs rather than commercial tree species. Mr. Caruana concludes that the subject property's history of no trees on those particular areas is a direct result of the areas' soils having limited water holding capacity, shallow rooting depth and high hazards for erosion and potential runoff. Mr. Caruana's analysis and conclusions provide substantial evidence to support the conclusions of Mr. Setchko regarding the subject property's capability of producing forest income.

The applicant asserts that the income capability of the property in this case can be calculated by actual stocking conditions of the property before, during and after the applicable 1978-1983 period. Mr. Setchko's analysis and calculations of the actual timber available for harvest, throughout the growing cycle, demonstrates that the entire property was and is not capable of producing over \$10,000.00 in annual income over the growing cycle from a forest operation. Mr. Setchko concludes the subject parcel (tax lot 1300), coupled with tax lot 300, was capable of producing only \$7,477 in gross annual income during the five year period starting in 1978.

Goal One Coalition has challenged the applicant's demonstration that the subject property meets the agriculture and forest income tests of the statute. The Board finds that the challenges by Goal One Coalition are without legal foundation and do not include any supporting professional opinion regarding agriculture or forest income of the subject property and, therefore, are without merit.

The specific challenges of Goal One Coalition, which cover both ORS 197.247(1)(a) and (b)(C), are discussed and rejected as without merit as follows:

1. The income test “forest operation” has not been addressed.

Goal One Coalition argues that the applicant has not conducted any analysis of the “income-producing capability” of the proposed marginal lands using “current timber values” to calculate the potential gross income over the growth cycle. Goal One Coalition is correct in asserting that the calculation of the annual gross income for the ORS 197.247(1)(a) income test can be accomplished by the use of timber values. However, it is incorrect in its assertion that the calculation must use “current timber values.”

Goal One Coalition references language in *DLCD v. Lane County* (Ericsson)¹ that mentions that “current prices” were used in the calculations of the Ericsson application. In that case, however, the use of a particular year’s prices was not at issue and LUBA made no determination regarding such use. What the decision in Ericsson did establish, in addition to affirming Lane County’s approval of a Marginal Lands re-zoning application, was that on-site evaluation of forest productivity by a qualified expert is weightier evidence than published data or that provided by individuals not qualified as experts in forest management.

Mr. Setchko used 1983 Douglas-fir log prices and volumes in his calculation of the projected gross forest operation income of the proposed marginal land. In this case Mr. Setchko is the qualified expert with 27 years of forest management experience, including 17 years as a private consultant and a Master’s Degree in Forestry. Goal One Coalition has not established that it has any experience or credentials in forest management. Furthermore, it has not provided any testimony from a qualified expert in forest management to support its assumptions and conclusions.

Lane County, in response to and in reliance upon Ericsson, issued its interpretations of the Marginal Lands statutes in the Board of Commissioners’ 1997 Supplement to Marginal Lands Information Sheet. A copy of the supplement and the information sheet was provided to the record of this decision. It is a binding policy statement providing guidance and direction to applicants, county planning staff, the public and to the Lane County Planning Commission and Board of Commissioners regarding the statute. The Board direction stated in ISSUE 4 of the supplement provides:

“ISSUE 4: What price date should be used to calculate gross annual income for forest lands?”

Board’s Direction:

The legislative intent of the “management and income test” of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a “significant contribution” to commercial forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

¹ 23 Or LUBA 33 (1992)

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. **Using** the volumes calculated in step (1), and **1983 prices**, calculate the average gross income over the growth cycle.” (Emphasis added)

The Board’s direction to use 1983 prices was an essential and reasonable approach to determining the productivity of forest lands at that time and obviates the need to make annual adjustments for inflation as the years go by (by adjusting the \$10,000 income figure).

Mr. Setchko’s use of 1983 prices to determine average annual gross income is consistent with Lane County policy and is directed by the Board of Commissioners’ binding local level policy statement in the aforementioned supplement. Using 1983 prices, Mr. Setchko has determined that the subject property was not capable of being managed for forest operations producing at least \$10,000 in annual gross income. Goal One Coalition has provided no evidence that contradicts or refutes Mr. Setchko’s conclusions.

The Oregon Land Use Board of Appeals affirmed Lane County’s policy of utilizing 1983 log prices in the forest income test analysis. In *Just v. Lane County*, LUBA No. 2005-029, dated June 8, 2005, LUBA affirmed the use of 1983 log prices in another Marginal Lands case and stated:

“Although ORS 197.247(1)(a) does not expressly mandate that counties use 1983 timber prices in applying the gross income test, we agree with the county and intervenor that it implicitly does so. The purpose of the forest operation test is to identify lands that are not capable of meeting the specified \$10,000 threshold averaged over the growth cycle. Both the “farm operation” and “forest operation” prongs of the test are specifically linked to January 1, 1983.”

2. Mr. Setchko fails to explain his use of a 50-year growth cycle.

In ISSUE 5 of its 1997 Supplement, Lane County adopted the use of a 50-year growth cycle as the usual standard. Jim Just assigned that policy as an assignment of error in *Just v. Lane County* and LUBA rejected his arguments in that assignment and affirmed the county’s use of the 50-year growth cycle. It is found that the policy remains valid today and that the applicant’s use of a 50-year growth cycle in calculating forest income complied with the policy and adequately demonstrated, in part, that the forest income test had been appropriately met.

3. **Additional documentation is required concerning timber companies in which Mr. Moshofsky held financial interest, in order to ascertain if those companies conducted forest operations of which the subject property was part of, and if those operations grossed more than \$10,000 annual during 1978-1983.**

Goal One Coalition raised this issue in its letter to the Lane County Planning Commission, dated February 25, 2005. In that letter, Mr. Just provided documentation of several timber harvesting companies that were in whole or in part, owned by Mr. Moshofsky. The Board finds that such additional information is unnecessary, as the record contains Department of Forestry/Department of Revenue information on the 1990 harvest which occurred on the subject property. That document does not indicate that the harvesting was carried out by any of the companies with which Mr. Moshofsky was affiliated. The Board reasonably concludes that the subject tax lot (#300) and contiguous property (tax lot #1300) was not part of a larger forest operation during the period of 1978-1983. In this case, the owner of the property during the applicable period has testified that the subject property was not managed as part of a forest operation existing off site and owned by the owner of the subject property. The owner testified that when timber was harvested on the property in 1990 it was sold on the open market to third parties rather than being processed or used in any off site operation owned by the owner of the subject property. Goal One's assertion in this issue is without any legal foundation, is supported by no substantial evidence of its requirement and is rejected accordingly.

4. **All income from operations of C&M Livestock Company must be included in the calculations for the agriculture income test.**

Mr. Minty has testified that C&M Livestock Company owned no property contiguous to, adjacent to or nearby the subject property. Mr. Moshofsky testified that he requested that the cattle be grazed on the property to create a presence on the property in his absence and that the consideration for the grazing was primarily in the form of the presence and maintenance of fencing and never in an amount exceeding \$1000 in a particular year. It is found that Mr. Moshofsky, the owner of the property during the five-year period preceeding January 1, 1983, did not manage the property for or as a farm operation beyond the intermittent grazing of a limited number of cattle and that that farm operation did not produce \$20,000 or more in annual gross income. Therefore, it is found that the intermittent grazing of a limited number of cattle on the subject property should be reasonably considered as not contributing significantly to the agricultural economy of the area or state and that the subject property was not managed as part of a farm operation that produced more than \$20,000 in annual income during the subject period.

5. **The applicant has not established that the subject parcel is not capable of producing 85 cu.ft./ac./yr. of merchantable timber.**

Goal One Coalition argues two points within this argument. First it argues that the applicant's consulting forester has not applied a sanctioned methodology for determining forest productivity.

Mr. Setchko used information generated by Lane County and the Oregon State Forester's office consistent with LCDC regulations for providing such ratings.² Mr. Setchko calculated the forest productivity capability of the subject property using the same sources of ratings that were used in the Carver application (the subject of *Just v. Lane County* referred to hereinabove). Those sources of ratings and the use of the ratings were affirmed by LUBA in that decision. Mr. Setchko applied a rating to each of the soils of the proposed marginal land and concluded that the proposed marginal land produces less than 85 cu.ft./ac./yr. of merchantable timber.

The second part of Goal One Coalition's second argument is that "(A)n evaluation of a property's capacity for forest production must consider productivity for all merchantable forest tree species, not just Douglas-fir." Mr. Setchko has provided an analysis of the species that Goal One Coalition argues are "merchantable" and concludes that a majority of those species are not "merchantable." He further concludes that all other species that may be merchantable grow sufficiently slower than Douglas-fir on the subject soils and that they would not produce at least 85 cu.ft./ac./yr. on the subject property. Mr. Setchko includes that analysis in each of his "Forest Productivity Analysis" that were provided to the record in support of the application. Mr. Setchko's experience and expertise provides the conclusion that many of the species, especially KMX and hybrid poplar, have no established market and are, therefore, not merchantable. His overall conclusion is that if the proposed marginal land is not capable of producing an average of \$10,000 in annual gross income from Douglas-fir, then there are no other merchantable tree species that could produce any more than the calculated figures that he has provided in his analysis for Douglas-fir. Goal One Coalition has not provided any credible or scientific evidence that contradicts or conflicts with the findings and conclusion of the Setchko reports. It is found that the applicant, through the evidence provided by Mr. Setchko's reports, has demonstrated that the subject property is not capable of producing more than 85 cu.ft./ac./yr. of merchantable timber.

The Setchko report concludes that the subject property is not capable of producing eighty-five cubic feet of merchantable timber per acre per year. Mr. Setchko's report also contains an analysis of other tree species. Mr. Setchko's opinion includes an analysis of the species listed by Goal One Coalition in public testimony and concludes that they are either not merchantable, or would not produce an annual volume and income equal to Douglas-fir. Goal One Coalition has provided no substantial evidence to effectively refute or contradict Mr. Setchko's professional opinion regarding the merchantability and productivity of those particular species. Mr. Setchko opines that all other merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir. Mr. Setchko, in his analysis of the productivity of various tree species, provides a professional and scientific foundation to the reasoning of the SCS/NRCS in using Douglas-fir as the indicator species for productivity on Western Oregon soils.

Mr. Setchko, in response to continuing arguments made by Goal One Coalition in other Marginal Lands plan amendment applications, prepared an analysis of the Goal One Coalition's arguments regarding the productivity of Ponderosa Pine. Mr. Setchko opines that Goal One Coalition has

² See OAR 660-006-0005(2)

misapplied and misused information from various internet publications to conclude that Ponderosa Pine has a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. Mr. Setchko, in response to continuing arguments made by Goal One Coalition in other applications, prepared an analysis of the Goal One Coalition's arguments regarding the productivity and merchantability of Ponderosa Pine, Hybrid Poplar and KMX in the Willamette Valley. That analysis, dated September 8, 2004, and May 4, 2006, includes Mr. Setchko's opinion that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine, Hybrid Poplar and KMX have a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. His conclusions in his Ponderosa Pine analyses mirror his earlier opinions, provided as evidence herein, that all other potentially merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir.

Forest soil productivity data can be found in several sources:

- Soil Survey of Lane County Area, Oregon;
- Office of State Forester Memorandum (Exhibit 24);
- Lane County Soil Ratings for Forestry and Agriculture [LCOG] (Exhibit 23).

The Soil Survey contains productivity ratings for soil map units in Lane County, but does not provide forest productivity ratings for soils considered primarily farm soils or composite ratings for soil complex units. The State Forester memo provides ratings for those soils based upon a field review of soil map units in Lane County by State Forestry staff. The Soil Ratings document provides ratings for the soil complexes using a weighted average methodology for the complex-type soil map units. Of the three sources, the Soil Survey is considered the primary source of soils data for Lane County. The State Forester's ratings for the soils not rated in the Soil Survey is considered the second best source of forest productivity ratings since it was based upon field inspections of sites in Lane County and was produced by the Oregon Department of Forestry. The Soil Ratings document using a weighted average methodology for complex soil map units is considered the next credible forest productivity ratings data for those soil map units.

The Goal One Coalition submittal argues that the Goal 4 provisions found in OAR 660-006-0010 and 660-006-0005 govern the methodology to be used in the assignment of forest productivity ratings for the subject application. However, nothing in the statutory provisions identify these rules as requirements that apply to a Marginal Lands determination or prevent Lane County from determining forest productivity ratings from any credible source. The administrative rules may be useful to use as guidelines when making a determination regarding the appropriate ratings to assign a particular soil map unit, but they are not necessarily governing. LUBA made a footnote to this effect in the *Carver* decision (footnote 11).

The opponents maintain that these two soil map units have a higher productivity rating for Ponderosa Pine. The Ponderosa Pine productivity ratings assigned to the soil map units that opponents argue should be used instead are apparently taken from a document titled: "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003." Mr. Setchko testified that a complete reading of that

document reveals that it repeatedly states that its data is from a very small sample and should not be used at this time until more long term data can be collected. Goal One Coalition has not produced any evidence that refutes Mr. Setchko's analysis or conclusions regarding this matter.

Ponderosa Pine

The following observations are instructive on this issue:

- The opponents' assignment of values to the relevant soil map units is based upon a document titled "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003, which contains caveats that expressly limit its application.
- The opponents' conversion tables are difficult to understand. Lane County is unable to follow the analysis and to validate the numbers in the chart for Ponderosa Pine productivity.
- Mr. Setchko, a credible forestry expert, has addressed the issue in his testimony that, in addition to an analysis based upon his personal experience and training, Ponderosa Pine is worth considerably less money and has the same or slower growth rate as Douglas Fir and that the opponents have not provided any substantial evidence to refute his conclusions regarding the productivity of Ponderosa Pine in Western Oregon or upon the subject property.

Mr. Setchko's analysis and conclusions regarding the productivity of the subject property sufficiently and adequately demonstrates that the subject property is not capable of producing at least 85 cubic feet of merchantable timber per acre per year over the growing cycle.

Goal One Coalition has challenged the applicant's demonstration that the subject property meets the forest productivity test of the statute. The Board finds that the challenges by Goal One Coalition are without legal foundation, do not include any supporting professional opinion regarding forest productivity of the subject property that refutes the conclusions reached by Mr. Setchko, and, therefore, are without merit.

Other opponent challenges are discussed and rejected as without merit as follows:

1. The "forest operation" income test must be calculated by using timber prices for years prior to 1983.

Mr. Setchko used 1983 Douglas-fir log prices and volumes in his calculation of the projected gross forest operation income of the proposed marginal land. In this case Mr. Setchko is the qualified expert with 27 years of forest management experience, including 17 years as a private consultant and a Master's Degree in Forestry. Opponents have not established that they have any experience or credentials in forest management. Furthermore, they have not provided any testimony from a qualified expert in forest management to support their assumptions and conclusions.

Lane County, in response to and in reliance upon Ericcson, issued its interpretations of the Marginal Lands statutes in the Board of Commissioners' 1997 Supplement to Marginal Lands Information Sheet. A copy of the supplement and the information sheet was provided to the record of this decision. It is a binding policy statement providing guidance and direction to applicants, county planning staff, the public and to the Lane County Planning Commission and Board of Commissioners regarding the statute. The Board direction stated in ISSUE 4 of the supplement provides:

"ISSUE 4: What price date should be used to calculate gross annual income for forest lands?"

Board's Direction:

The legislative intent of the "management and income test" of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a "significant contribution" to commercial forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. **Using** the volumes calculated in step (1), and **1983 prices**, calculate the average gross income over the growth cycle." (Emphasis added)

The Board's direction to use 1983 prices was an essential and reasonable approach to determining the productivity of forest lands at that time and obviates the need to make annual adjustments for inflation as the years go by (by adjusting the \$10,000 income figure).

Mr. Setchko's use of 1983 prices to determine average annual gross income is consistent with Lane County policy and is directed by the Board of Commissioners' binding local level policy statement in the aforementioned supplement. Using 1983 prices, Mr. Setchko has determined that the subject property was not capable of being managed for forest operations producing at least \$10,000 in annual gross income. Opponents have provided no evidence that contradicts or refutes Mr. Setchko's conclusions.

The Oregon Land Use Board of Appeals affirmed Lane County's policy of utilizing 1983 log prices in the forest income test analysis. In *Just v. Lane County*, LUBA No. 2005-029, dated June 8, 2005, LUBA affirmed the use of 1983 log prices in another Marginal Lands case and stated:

“Although ORS 197.247(1)(a) does not expressly mandate that counties use 1983 timber prices in applying the gross income test, we agree with the county and intervenor that it implicitly does so. The purpose of the forest operation test is to identify lands that are not capable of meeting the specified \$10,000 threshold averaged over the growth cycle. Both the “farm operation” and “forest operation” prongs of the test are specifically linked to January 1, 1983.”

2. Mr. Setchko fails to explain his use of a 50-year growth cycle.

In ISSUE 5 of its 1997 Supplement, Lane County adopted the use of a 50-year growth cycle as the usual standard. Jim Just assigned that policy as an assignment of error in *Just v. Lane County* and LUBA rejected his arguments in that assignment and affirmed the county’s use of the 50-year growth cycle.

The Board direction stated in ISSUE 5 of the supplement provides:

ISSUE 5: What “growth cycle” should be used to calculate gross annual income?

Board’s Direction:

The consensus of the Board was that a 50-year growth cycle should be adopted as the usual standard, with the option that another standard could be used if substantiated by compelling scientific evidence presented by the applicant. The Board’s choice was based upon evidence that the USDA Natural Resource Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standardized figure.

It is found that the policy remains valid today and that the applicant’s use of a 50-year growth cycle in calculating forest income complied with the policy and adequately demonstrated, in part, that the forest income test had been appropriately met.

3. The applicant has not established that the subject parcel is not capable of producing 85 cu.ft./ac./yr. of merchantable timber.

Goal One Coalition argues two points within this argument. First it argues that the applicant’s consulting forester, Mr. Setchko, has not applied a sanctioned methodology for determining forest productivity.

Mr. Setchko used information generated by Lane County and the Oregon State Forester’s office consistent with LCDC regulations for providing such ratings. Mr. Setchko calculated the forest productivity capability of the subject property using the same sources of ratings that were used in the Carver application (the subject of *Just v. Lane County* referred to hereinabove). Those sources of ratings and the use of the ratings were affirmed by LUBA in that decision. Mr.

Setchko applied a rating to each of the soils of the proposed marginal land and concluded that the proposed marginal land produces less than 85 cu.ft./ac./yr. of merchantable timber.

The second part of Goal One Coalition's second argument is that "(A)n evaluation of a property's capacity for forest production must consider productivity for all merchantable forest tree species, not just Douglas-fir." Mr. Setchko has provided an analysis of the species that Goal One Coalition argues are "merchantable" and concludes that a majority of those species are not "merchantable." He further concludes that all other species that may be merchantable grow sufficiently slower than Douglas-fir on the subject soils and that they would not produce at least 85 cu.ft./ac./yr. on the subject property. Mr. Setchko includes that analysis in each of his "Forest Productivity Analysis" that were provided to the record in support of the application. Mr. Setchko's experience and expertise provides the conclusion that many of the species, especially KMX and hybrid poplar, have no established market and are, therefore, not merchantable. His overall conclusion is that if the proposed marginal land is not capable of producing an average of \$10,000 in annual gross income from Douglas-fir, then there are no other merchantable tree species that could produce any more than the calculated figures that he has provided in his analysis for Douglas-fir. Goal One Coalition has not provided any evidence that contradicts or conflicts with the findings and conclusion of the Setchko reports. It is found that the applicant, through the evidence provided by Mr. Setchko's reports, has demonstrated that the subject property is not capable of producing more than 85 cu.ft./ac./yr. of merchantable timber.

ORS 197.247(1)(b)(C):

The applicant has demonstrated, through use of the 1987 SCS Soil Survey of Lane County Area, Oregon, (1987 Soil Survey) that the subject property contains predominately classes V-VIII in the Agricultural Capability Class Classification System in use by the United States Department of Agriculture Conservation Service on October 15, 1983. The applicant has further demonstrated, with the inclusion of the Lane County Agricultural Lands Working Paper of the Lane Rural Comprehensive Plan ("Working Paper") published in November 1981, and its 1983 Addendum, the cover page and forward of the 1987 Soil Survey and the forward of the 1987 Soil Survey currently posted on the NRCS web site, that the soil map units and soil classifications contained in the 1987 Soil Survey were the classifications of the SCS system in use on October 15, 1983.

It further found that, in addition to the findings contained in the previous sub-paragraph 5. findings regarding Goal One Coalition arguments, that the applicant has adequately demonstrated, through the evidence provided by Marc Setchko, that the subject property is not capable of producing more than 85 cubic feet per acre per year in merchantable timber.

Conclusion: The subject property qualifies under ORS 197.247(1) as marginal land because:

- (a) it was not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income;

- (b) it was not managed as a part of a forest operation during that same time period which was capable of producing an average, over the growth cycle, of \$10,000 in annual gross income;
- (c) it is composed predominantly of soils in agricultural capability classes V through VIII, and
- (d) it is not capable of producing 85 cubic feet of merchantable timber per acre per year.

It is found that substantial evidence in the record, primarily, but not limited to, the Setchko reports, exists to support each of the above conclusions. No documentation, expert testimony or other substantial evidence has been submitted to the record that refutes or contradicts that evidence with regard to the resource capabilities of the subject property as measured by the statutory standards and criteria in ORS 197.247.

For the reasons set forth above, the Board finds that the policies in the RCP, specifically RCP Goal 3, Policy 14 and RCP Goal 4, Policy 3, authorize and allow certain qualified resource lands to be designated and zoned marginal lands. Approval of this application implements those policies which have been acknowledged by the Land Conservation and Development Commission to be in conformity with Statewide Planning Goals and ORS 197.247 (1991 ed.).

(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decisions, to be desirable, appropriate or proper.

The totality of this application's response to and treatment of applicable criteria, coupled with the benefits accruing to both the public and the applicant as demonstrated in this application, provides the Lane County Board of Commissioners with adequate foundation and reason to find that approval of the application is desirable, appropriate and proper and would be a demonstration of good public policy.

4.5 Lane Code 16.400(6)(h)(iii)(cc).

For Minor Amendments as defined in LC 16.400(8)(a), the Plan amendment or component does not conflict with adopted policies of the Rural Comprehensive Plan and if possible, achieves policy support.

There are no policies in the adopted and acknowledged RCP that conflict with this request for plan amendment. As discussed in the previous section, there are policies in the RCP that specifically support and encourage approval of marginal lands applications for qualified property. The subject property addresses and satisfies the marginal lands criteria that are set forth in ORS 197.247 (1991 ed.).

Approval of this plan amendment is also consistent with the Board's interpretation of the Marginal Lands statute (ORS 197.247 (1991 ed.)) and its application to individual requests for plan amendment. The application is supported by detailed and thorough analysis and testimony

provided by a qualified and experienced forester. The analysis and testimony was produced and provided in conformance with direction provided by the Board's interpretation.

Other RCP policies that may be relevant to this decision are as follows:

(1) GOAL ONE: CITIZEN INVOLVEMENT.

Notice to affected property owners and evidentiary hearings provided by Lane County ensures that the application meets and supports the citizen involvement goal and policies of the comprehensive plan.

(2) GOAL TWO: LAND USE PLANNING.

(a) Policy 25: Changes to Plan Diagram.

This application for amendment of the Plan Diagram designations for the subject property has been evaluated through the county's plan amendment procedure and approval of this application is based upon fulfillment of the criteria of Lane Code 16.400 which is addressed in Section 4 of these findings.

(3) GOAL THREE: AGRICULTURAL LANDS.

There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that the subject property is not agricultural land and is not High Value Farmland. Nonetheless, consideration of agricultural use of the subject property and application of all relevant criteria regarding agricultural considerations has been adequately provided in the application and during the evidentiary hearings.

(4) GOAL FOUR: FOREST LANDS.

(a) Policy 1: Conservation of forest lands.

The primary policy of both the comprehensive plan and statewide planning goals regarding forest lands is the conservation of those lands for multiple forest uses. Approval of this application is consistent with and supports Policy 1 of Goal Four of the Comprehensive Plan.

4.6 Lane Code 16.400(6)(h)(iii)(dd)

For Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is compatible with the existing structure of the Rural Comprehensive Plan, and is consistent with the unamended portions or elements of the Plan.

As discussed in previous sections, this plan amendment is consistent with and satisfies the criteria that are referenced and adopted by specific policies in the RCP. Those policies are RCP Goal 3, Agricultural Lands, Policy 14 and RCP Goal 4, Forest Lands, Policy 3 which specifically allow certain, qualified, resource lands to be designated and zoned as marginal lands. Approval

of this amendment is consistent with the RCP policies for farm (Goal 3) and forest (Goal 4) lands.

The Board interpretation recognizes this consistency. It states under “ISSUE 1”:

“Marginal land is intended to be a sub-set of resource land, i.e., there are ‘prime; resource lands and ‘marginal’ resource lands. The marginal lands are to be available for occupancy and use as small tracts than are required in the better resource lands. The criteria in the law define which lands may be designated as marginal. Evidence for this position is found in the legislative history and the fact that marginal lands are recognized in both Statewide Goal 3 – Agricultural Lands and Goal 4 – Forest Lands.”

Marginal lands are resource lands that are intended for occupancy with limited rural residential development.

Based on the evidence in the record which addresses and satisfies the criterion in ORS 197.247 (1991 ed.) and the above-referenced RCP resource policies, the Board concludes that approval of the subject plan amendment is compatible with the existing structure of the acknowledged RCP and is consistent with the unamended portions and elements of the RCP.

4.7 Zone Change Criteria of Lane Code 16.252

Lane Code 16.252(2)(Criteria).

Zonings, rezonings and changes in the requirements of this Chapter shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest. In addition, zonings and rezonings shall be consistent with the specific purposes of the zone classification proposed, applicable to Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged by the Land Conservation and Development Commission. Any zonings or rezonings may be effected by Ordinance or Order of the Board of County Commissioners, the Planning Commission or the Hearings Official in accordance with the procedures of this section.

This decision results in a change from Exclusive Farm Use to ML Marginal Lands. The facts relevant to the zone change standards are largely redundant with the facts relevant to plan policies and the Statewide Planning Goals and have been addressed in preceding sections of these findings of fact and are incorporated into these findings by this reference.

This zone change is consistent with the general purposes of LC Chapter 16 as set forth in LC 16.003 in that:

- 1) In conformity with various development rules discussed above, the subject property will be developed commensurate with the character and physical limitations of the land and will thus promote the health, safety and general welfare of the built environment;

- 2) It will provide home construction opportunities that will aid the economy;
- 3) It will conserve other farm and forest lands by locating residential opportunities within a resource zone that allows limited residential development;
- 4) It will aid the provision of affordable housing within the Metro area by providing reasonable selections for a place to live;
- 5) By its location near the Metro Plan UGB, it will provide for the orderly and efficient transition from rural to urban lands and the efficient provision of public facilities and services;
- 6) By virtue of regulations discussed above, it will protect the quality of the land, air and water of the county and will protect life and property in areas subject to flooding.

This zone change is consistent with the purposes of the Marginal Lands Zoning District because it provides an alternative to more restrictive farm and forest zoning and it will allow any of the uses permitted in the Marginal Lands zoning district and thereby provide opportunities for persons to live in a rural environment and to conduct part-time farm or forest operations. It is being applied to property in accordance with Lane Code Chapter 16 criteria and procedures, RCP plan policies and criteria in ORS 197.247 (1991 ed.).

CONCLUSION

This application has addressed the applicable criteria, shown consistency with that criteria, has demonstrated good public policy through the public and private benefits accruing from its proposals.

Based on the substantial evidence presented above and included in the record of this decision, the Board of County Commissioners finds and concludes that the subject application for plan amendment and zone change meets and satisfies all of the relevant criteria and hereby is granted approval.

ATTACHMENT

DIVIDE

ORDINANCE NO. PA 1231 – Exhibit C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

for

MINOR AMENDMENT OF THE LANE COUNTY

RURAL COMPREHENSIVE PLAN

and

ZONE CHANGE FROM EXCLUSIVE FARM USE

to

MARGINAL LAND

PA 04-6092

KAREN A. DAHLEN TRUST

**P.O. BOX 5687
Eugene, OR 97405-0687**

PROPOSAL

Applicant: Karen A. Dahlen

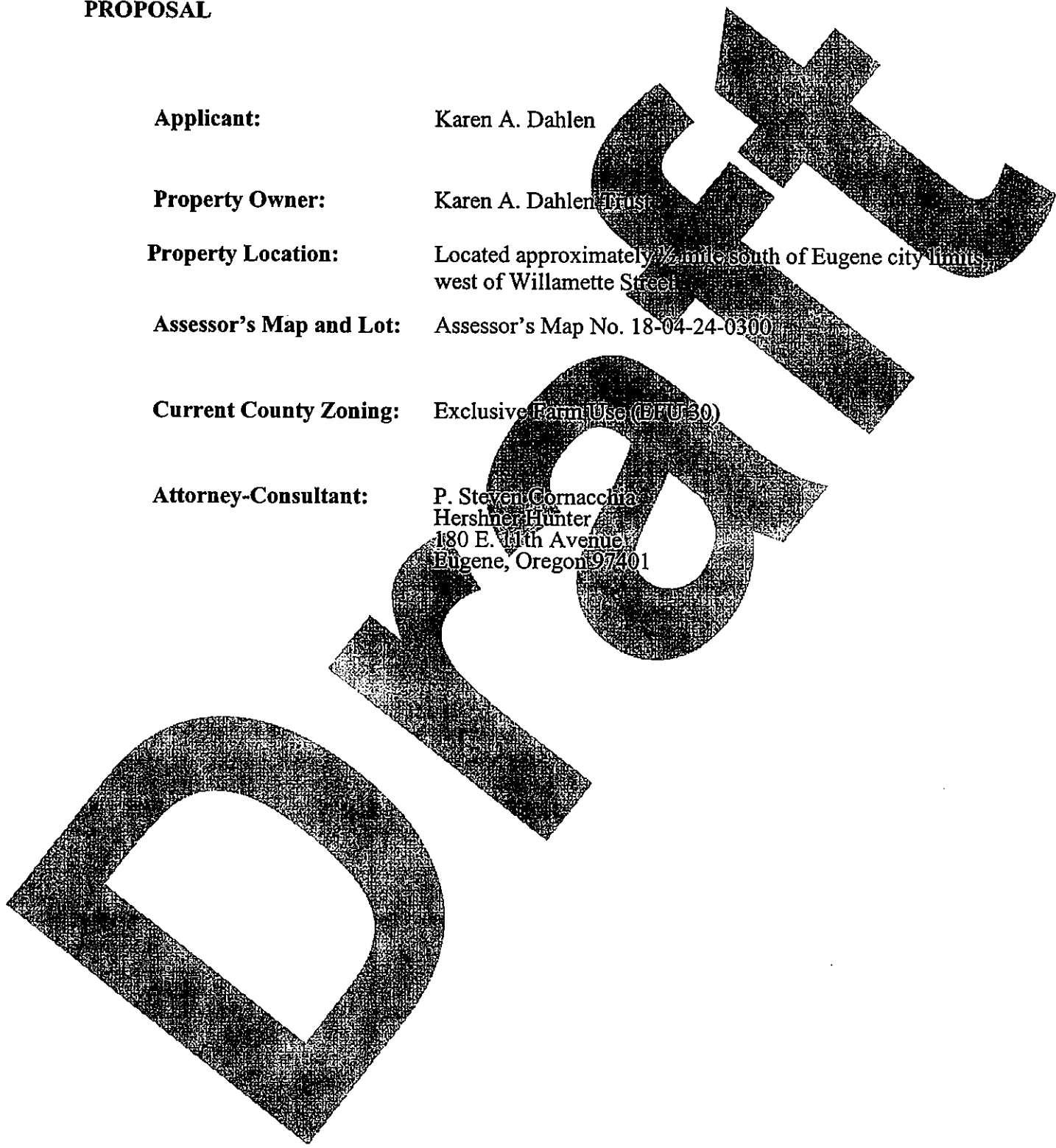
Property Owner: Karen A. Dahlen Trust

Property Location: Located approximately 1/2 mile south of Eugene city limits, west of Willamette Street

Assessor's Map and Lot: Assessor's Map No. 18-04-24-0300

Current County Zoning: Exclusive Farm Use (EFU-30)

Attorney-Consultant: P. Steven Cornacchia
Hershner Hunter
180 E. 14th Avenue
Eugene, Oregon 97401



1. **EVIDENCE.**

- 1.1 Application materials dated September 15, 2004, with exhibits;
- 1.2 Lane County Planning Commission Staff Report with attachments;
- 1.3 Marc Setchko Report, dated February 15, 2005;
- 1.4 Correspondence from Steve Cornacchia, dated April 19, 2005, with exhibits, including March 27, 2005, Setchko report;
- 1.5 Correspondence from Steve Cornacchia, dated May 24, 2005;
- 1.6 Correspondence from Steve Cornacchia, with exhibits, dated July 18, 2005;
- 1.7 Correspondence from Steve Cornacchia, dated July 25, 2005, with attachments, including a copy of LUBA Decision No. 2005-029, James Just v. Lane County (Carver) and affidavits of Art Moshofsky and Mark Minty;
- 1.8 Agronomic Analytics Dahlen Property Soil Investigation Report--;
- 1.9 Correspondence, with exhibits, from Steve Cornacchia, dated September 29, 2005;
- 1.10 Correspondence, with exhibits, from Steve Cornacchia, dated May 9, 2006.

2. **INTRODUCTION**

The property that is the subject of this application consists of a 316-acre parcel located immediately south of, but not adjacent to, the Eugene city limits and the Eugene-Springfield Metropolitan Plan Urban Growth Boundary, west off of Willamette Street. This application is for approval of a Minor Plan Amendment to the Lane County Rural Comprehensive Plan (RCP) diagram to designate the subject property from Agriculture to Marginal Lands, and a concurrent Lane County zoning map amendment from Exclusive Farm Use (EFU 30) to Marginal Lands (MLRCP).

3. **BACKGROUND INFORMATION**

3.1 General Site Description.

The subject property is described as Tax Lot 300 of Lane County Assessor's Map No. 18-04-24. Immediately to the east of the property is located Tax Lot 1300 of Lane County Assessor's Map No. 18-03-19, a parcel of land consisting of approximately 67.16 acres, zoned Marginal Lands (ML) and owned by the applicant.

Property adjacent to the southern boundary of the subject property consists of six small parcels, all zoned Impacted Forest (F-2). Tax Lots 18-04-24-100 and 102 are adjacent to the northeast boundary of the subject property and are also zoned Impacted Forest (F-2). Tax Lots 18-04-24-200 and 201 are adjacent to the northwest boundary of the subject property and are zoned Marginal Lands (ML). Tax Lot 18-04-23-204 is adjacent to the western boundary of the subject property and is zoned Impacted Forest (F-2).

The subject property receives the following public services: Eugene School District 4J (schools); Lane Electric Co-op (electrical power); Eugene Rural Fire Protection District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and Oregon State Police.

3.2 **Description of Proposed Amendments.** The application before Lane County is for approval of the following:

- a. An amendment to the county's comprehensive plan and map designating the subject property as Marginal Lands and re-zoning it to Marginal Lands (ML).
- b. The Lane County Board of Commissioners also finds as follows:

4. PLAN AMENDMENT CRITERIA OF LANE CODE 16.400

This application to amend the Lane County Rural Comprehensive Plan was initiated by Karen Dahlen on September 15, 2004.

The following criteria apply to amendments of the comprehensive plan:

4.1 Lane Code 16.400(6)(h)(iii) (Method of Adoption and Amendment) provides that the Board may amend or supplement the Rural Comprehensive Plan upon making the following findings

- (aa) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules
- (bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:
 - (i-i) necessary to correct an identified error in the Plan; or

(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; or

(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; or

(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements, or

(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decisions, to be desirable, appropriate or proper.

(cc) For Minor Amendments as defined in LC 16.400(8)(a), the Plan amendment or component does not conflict with adopted Policies of the Rural Comprehensive Plan and if possible, achieves policy support.

4.2 Lane Code 16.400(6)(i) provides that a change of zoning to implement a proposed Plan amendment may be considered concurrently with such amendment. In such case, the Board shall also make the final zone change decision, and the Hearings Official's consideration need not occur.

4.3 Lane Code 16.400(6)(h)(iii)(aa).

For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.

(1) Goal 1 - Citizen Involvement.

To ensure the opportunity for citizen involvement in all phases of the planning process.

Lane County has provided written notice of the proposed amendments and public hearings before its planning commission and board of commissioners in conformance with ORS 197.763. The information included in the notices conforms with ORS 197.763 (2) and (3) and enabled citizens to identify and comprehend the issues and to participate in a public process prior to final action by the county. Referral notices were also mailed to all federal, state, and private organizations as required by state law and Lane Code. The proposed amendments have been processed in a manner that assures full compliance with Goal 1.

(2) Goal 2 - Land Use Planning.

To establish a land use planning process and policy framework as a basis for all decisions and actions related to the use of land and to assure an adequate factual base for such decisions and actions.

Goal 2 establishes a land use planning process and policy framework as a basis for all land use decisions, and requires development of an adequate factual base to support those decisions. A minor change is one that does not have significant effects beyond the immediate area of change, and is based on special studies or information. The justification for the specific change must be established by substantial evidence in support of the conclusion that the applicable criteria have been met.

Lane County has adopted a comprehensive land use plan amendment process with specific standards that must be addressed to justify a minor change. Substantial compliance with the plan amendment criteria in Lane Code (LC)16.400 constitutes compliance with the applicable provisions. This plan amendment must also address and satisfy the criteria set forth in ORS 197.247 (1991 ed.). This application is supported by substantial evidence upon which the Lane County Board of Commissioners conclude that the applicable criteria have been met.

(3) Goal 3 - Agricultural Land.

To preserve and maintain agricultural lands.

The subject property is not agricultural land as defined by Goal 3. It contains soils predominantly classified as Class V-VII by the Soil Conservation Service and is of low suitability for farming as discussed in Section 4.2 below. Accordingly, this decision is consistent with Goal 3.

(4) Goal 4 - Forest Lands.

To preserve forest lands for forest use.

The subject property is not suitable for growing and sustaining Douglas-fir or other less merchantable tree species as discussed more fully in Section 4.2 below. No other species would grow as fast on the subject property or be as valuable and merchantable as Douglas-fir. Zoning the property for Marginal Lands maintains the property in a resource zone and capable of being used for limited, marginal resource uses. The subject property's suitability for growing and sustaining merchantable tree species is discussed more fully in Section 4.2 below. Accordingly, this decision is consistent with Goal 4.

(5) Goal 5 - Open Space, Scenic and Historic Areas, and Natural Resource.

To conserve open space and protect natural and scenic resources.

Goal 5 is not applicable to this request. There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that no Goal 5 resources exist on subject site. The subject property has not been included in any inventory of needed open space or scenic areas defined by Goal 5, nor has it been identified in the comprehensive plan as having any historic, cultural or natural resources which need to be

preserved and/or protected. The proposed amendments will not conflict with any Goal 5 resources.

(6) Goal 6 - Air, Water and Land Resources Quality.

To maintain and improve the quality of the air, water and land resources of the state.

Goal 6 requires that air, land and water resources of the state be maintained and improved by assuring that future development, in conjunction with existing development, does not violate applicable state and federal environmental quality standards and does not exceed the carrying capacity of local air sheds, degrade land resources or threaten the availability of such resources. Lane County has sufficient regulatory measures in place so as to ensure that existing land use activities, as well as any future development on the site, will not produce any unanticipated impacts resulting from the proposed amendments.

The subject property lies within an area identified as a "broad areas of very limited groundwater" area in Lane Manual 13.010 and the availability of water commensurate with the proposed development of the subject property is demonstrated by the analysis and conclusions of EGR and Associates, Inc. (EGR). The results of the aquifer analysis by EGR dated July 27, 2004, are provided as evidence by the attachment of the analysis to the original application as Exhibit E.

In that aquifer analysis EGR concludes that there is sufficient water available for domestic use from the aquifer for all of the proposed parcels without adverse effects to neighboring wells. The record contains no other evidence from professional consultants that the analysis and conclusion of EGR is inaccurate or in error. The EGR report is sufficient and substantial evidence of the availability of water on the subject property and within its vicinity and demonstrates that application approval would be consistent with Goal 6.

The proposed amendments will not produce results that will be in conflict or inconsistent with the purpose and intent of Goal 6. The proposed amendments change the use designation on the subject property and any additional uses or change of use will require compliance with Lane County's existing regulatory system and measures.

(7) Goal 7 - Areas subject to Natural Disasters and Hazards.

To protect life and property from natural disasters and hazards.

No areas containing or prone to natural disasters or natural hazards have been identified on the subject property.

(8) Goal 8 - Recreational Needs.

To satisfy the recreational needs of the citizens of the state.

Goal 8 is not applicable to this request. There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that no Goal 8 resources exist on subject site. The subject property has not been included in any inventory of recreational needs as defined by Goal 8. The proposed amendments will not conflict with any Goal 8 resources.

(9) Goal 9 - Economy of the State.

To diversify and improve the economy of the state.

Goal 9 is directed towards the comprehensive plans of the state's political subdivisions. Lane County's Rural Comprehensive Plan has been acknowledged by the Land Conservation and Development Commission. Goal 9 is primarily focused on commercial and industrial development within urban areas. OAR 660-009-0010(1) specifically limits the application of Goal 9 to comprehensive plans for areas within urban growth boundaries. Goal 9 is not directly applicable to rural residential use in a non-resource designation.

Approval of the subject application will allow the subject property to be developed with eleven additional home sites. Goal 9 has limited, if any, applicability to the subject application.

(10) Goal 10 - Housing.

To provide for the housing needs of the citizens of the state.

Approval of this application would result in the development of up to eleven additional dwellings on the subject property. Approval of this application would be consistent with Goal 10.

(11) Goal 11 - Public Facilities and Services.

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban development.

The subject property receives the following public services: Eugene School District 4J (schools); Lane Electric Co-op. (electrical power); Eugene Rural Fire Protection District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and Oregon State Police.

The subject property has access to the full range of public services specified for Communities in RCP Goal 11: Public Facilities and Services, Policy 6.j. No additional public facilities and services will be required beyond the present level. While Goal 11 is couched in terms of urban development, approval of the application will not result in any urban level of development in a rural area. The public services identified above are adequate to serve the level of rural uses that the application envisions and provide the demonstration of consistency with Goal 11.

(12) Goal 12 - Transportation.

The intent of Goal 12 is implemented through the provisions of the State Transportation Planning Rule (TPR) (OAR 660, Division 12), which was adopted by LCDC in 1991.

OAR 660-012-0060(1) requires that amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility.

To determine whether the proposed amendments will significantly affect a transportation facility, the TPR lists specific criteria against which the proposed amendments are to be evaluated. The TPR provides that a plan or land use regulation amendment significantly affects a transportation facility if it:

- (a) Changes the functional classification of an existing or planned transportation facility;
- (b) Changes standards implementing a functional classification system;
- (c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or,
- (d) Would reduce the level of service of the facility below the minimum acceptable level identified in the TSP (Transportation System Plan).

The Board finds that the approval of the proposal cannot result in any of the four situations provided by the TPR criteria listed above. Development of all parcels with dwellings will produce typically 10 trips per day for each parcel, resulting in a total trip per day count of approximately 110. Willamette Street, a major collector, will not experience a change in its functional classification as a result of an additional 110 trips per day and the total trips per day are not inconsistent for a major collector and will not reduce the level of service below the minimum acceptable level identified in the TSP (Transportation System Plan).

The engineering firm Branch Engineering has analyzed the traffic impact resulting from approval of the application and has concluded that it would not have a significant impact on transportation facilities.

Application approval is consistent with Goal 12.

(13) Goal 13 - Energy Conservation.

To conserve energy.

Goal 13 requires that land uses maximize conservation of all forms of energy based on sound economic principles. It is implemented by local plans and regulations that control location, orientation and density of development to minimize net energy consumption. Any development on the subject property will be subject to those rules.

(14) **Goal 14 – Urbanization.**

To provide for an orderly and efficient transition from rural to urban land use.

OAR 660-004-0040(2)(c)(G) specifically exempts marginal land from the provisions of Goal 14 and its implementing rules. The rule specifically states that it does not apply to marginal land. Upon application approval the subject property will be designated marginal land. Therefore, Goal 14 has little, if any, application to this application.

The entire ownership of the applicant is within an area committed to rural uses, both resource and non-resource in nature, as designated and provided by Lane Code and the acknowledged Lane County Rural Comprehensive Plan. No urban uses are contemplated as a result of approval of this application. No extension of urban services is necessary as a result of approval of this application. Approval of this application will not change the uses made on the subject parcel from rural to urban.

The uses on the subject parcels resulting from approval of this application would be resource and rural residential, both of which are rural in nature. The uses are not considered urban by the code in its implementation of the acknowledged Lane County Rural Comprehensive Plan. Therefore, approval of this application would not result in the establishment of urban land use or urban land use in transition from rural land use.

All parcels resulting from approval of the subject application shall be no less than 10 acres in size which will not prevent further urban development in the future if the subject property is included within the UGB and city limits.

Approval of the application will not result in any level of urbanization of the subject property or the surrounding area and, therefore, is consistent with Goal 14 as the goal may be relevant to the application.

(15) **Goal 15 – Willamette River Greenway.**

To protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway.

The subject property is not located within the Willamette River Greenway. Goal 15 is not applicable to this application.

(16) **Goal 16 - Estuarine Resources.**

To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and

To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.

The subject property contains no estuarine resources. Goal 16 is not applicable to this request.

(17) Goal 17 - Coastal Shorelines.

To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelines, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics.

The subject property contains no coastal shorelines. Goal 17 is not applicable to this request.

(18) Goal 18 - Beaches and Dunes.

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas.

The subject property contains no beaches or dunes. Goal 18 is not applicable to this request.

(19) Goal 19 - Ocean Resources.

To conserve the long-term values, benefits, and natural resources of the nearshore ocean and the continental shelf.

The subject property contains no ocean resources. Goal 19 is not applicable to this request.

4.4 Lane Code 16.400(6)(h)(iii)(bb).

For Major and Minor Amendments as defined in LC 16.400(8) (a) below, the Plan amendment or component is:

(i-i) necessary to correct an identified error in the Plan; or

The subject property was designated Agriculture and zoned EFU 30 as part of the Lane County Rural Comprehensive Plan (RCP) adoption process in 1984. Nonetheless, it was so designated and zoned pursuant to County policy which determined that lands that might qualify as marginal lands should be addressed subsequently on a case-by-case basis pursuant to policies in the RCP and the statutory criteria in ORS 197.247.

(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; or

Not applicable.

(iii-iii necessary to comply with the mandate of local, state or federal policy or law; or

Not applicable.

(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements, or

ORS 197.247 (1991 ed.) authorizes counties to designate land as marginal land. Lane County has acted to utilize this authority through the adoption of RCP Goal 3, Policy 14 and Goal 4, Policy 3. Those policies require an applicant for a marginal lands designation and zoning to address and satisfy the requirements of ORS 197.247 (1991 ed.) and applicable Lane County policies and requirements. The subject application is implementing policies in the RCP which allow qualified resource lands to be designated as Marginal Lands rather than Agriculture or Forest.

In order to aid applicants, county planning staff and the general public in addressing the marginal lands criteria, the Lane County Board of Commissioners, in 1997, adopted an interpretation of and supplement to the County's marginal lands information sheet ("the Board interpretation") a copy of which has been made a part of the record of this decision. The Board interpretation clarifies how the marginal lands statute and criteria are to be applied in specific situations by addressing seven issues and providing policy direction for each. As discussed in these findings, the Board interpretation has particular relevance to this application in the context of evaluating the site's ability to grow merchantable timber.

ORS. 194.247(1) (1991 ed.) provides the following criteria:

(a) The proposed marginal land was not managed, during the three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing on average, over the growth cycle, of \$10,000 in annual gross income; and

(b) The proposed marginal land meets at least one of the following tests:

(A) At least 50 percent of the proposed marginal land plus the lots or parcels at least partially located within one-quarter mile of the perimeter of the proposed marginal land consists of lots or parcels 20 acres or less in size on July 1, 1983;

(B) The proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983; or

(C) The proposed marginal land is composed predominately of soils in capability classes V through VIII in the Agricultural Capability Class Classification System in use by the United States Department of Agriculture Conservation Service on October 15, 1983, and is not capable of producing eighty-five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range.

The applicant has addressed subsections (a) and (b)(C) of the statute for demonstrating that the subject property is suitable for Marginal Lands designation. The following findings address each of those criteria:

ORS 197.247(1)(a):

It is found that the applicant has demonstrated that the subject property was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income. Mr. Moshofsky and members of his family owned the subject property during and throughout the period between 1978 and 1983. Mr. Moshofsky has provided several affidavits, that demonstrate that the subject property was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income. In his affidavits, Mr. Moshofsky has provided evidence that the only farm use made of the subject property during the applicable period was the intermittent and limited grazing of cattle, usually less than 25 head at any one time, by C&M Livestock Company. The grazing was the product of an informal agreement between Mr. Moshofsky and the company that provided that the company would graze a limited number of cattle on the property in exchange for fence maintenance and the human presence of the company. The company's presence on the property provided some security at the time for Mr. Moshofsky, who was an absentee owner residing in Portland faced with trespass and vandalism problems on the subject property. Mr. Moshofsky testified that at no time did monetary consideration between the parties for the grazing exceed \$1000 annually. Mark Minty, a partner in C&M Livestock Company during that period, provided testimony in an affidavit in the record that Mr. Moshofsky's description of the activity and the agreement of the parties was accurate and that the company did not own or manage any property adjacent to, contiguous with or in the vicinity of the subject property. Mr. Minty also testified that it is his opinion that the subject property is of marginal value for grazing or other agricultural production and could not be managed as part of a farm operation capable of producing \$20,000 in gross income annually.

Furthermore it is found that the applicant has demonstrated that the subject property was not managed as part of a forest operation that produced an average, over the growth cycle, of \$10,000 in annual gross income.

The applicant's forester, Marc Setchko, provided an analysis to the record of the timber-growing potential of the subject property and concluded that the subject property could not be managed as a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. Mr. Setchko, with both professional credentials and 27 years of experience, is highly qualified to render such an analysis and conclusion.

Mr. Setchko's opinion was based on a detailed analysis of the existing soils, their ability to grow timber (primarily Douglas-fir) and conversion of that growth potential into dollars based upon log prices in 1983. Mr. Setchko's methodology is dictated by the Board interpretation (Direction for Issue 4). Mr. Setchko's analysis used a fifty-year growth cycle as directed by the Board interpretation (Direction for Issue 5).

Mr. Setchko, in his report dated March 27, 2005, conducted a forest income analysis of the subject property that included the entire 387.65 acres of common Moshofsky ownership in 1983. In that report Mr. Setchko calculated the average gross annual income of the property through a complete growth and harvest rotation. He calculated what the forest operation on the subject property was capable of, in terms of income, based on actual stocking of the property during the 1978-1983 period. His calculation is based upon the actual volume of timber removed from the property in 1990 by Mr. Moshofsky (Mr. Moshofsky's affidavit of that timber removal, dated March 15, 2005, is included in the record) and his timber cruise of the remaining portion of the property containing stands of merchantable Douglas Fir. Included in Mr. Setchko's report is a map of the property with areas of timber harvest and existing stands of merchantable Douglas Fir delineated. Mr. Setchko's earlier reports in the record of this proceeding, and incorporated herein by this reference, demonstrate that significant portions of the property have not had any merchantable trees growing thereon for at least 50 years (and likely 100 years), due primarily to the steep, rock-laden, barren slopes of the northern portion of the property and the continually moist bottom land throughout the middle of the property. Those areas of the property contain poor soils for timber production (138G, 52 D, and 28C) as shown in Mr. Setchko's numerous reports in the record of this proceeding. The record of this proceeding includes aerial photos of the property, dating back to 1952, that display that those same areas have been devoid of any trees, merchantable or otherwise, long before the 1978-1983 period and continue to this day to be devoid of trees. Mr. Setchko was not required to make any assumptions on stocking levels in his analysis and calculations—he used the actual condition of the property during the applicable time period and its ability, at that time, to produce forest income over the growth cycle of the merchantable stands of timber existing at that time.

The applicant has provided testimony from Stephen Caruana, principal agronomist of Agronomic Analytics, regarding the relationship between the soils of the subject property in areas devoid of trees and the fact that no trees have grown in those areas for at least the past 50 years. Mr. Caruana testified, in his Dahlen Property Soil Investigation Report, that silvicultural requirements of Douglas fir demonstrate that Douglas fir grows poorly on shallow soils, germinates slowly in grassy, overgrown areas, and is especially subject to lethal conditions on hot, dry aspects. Mr. Caruana testified that such areas and conditions are prevalent in the areas of the subject property that are devoid of trees. He testified that the large open, grassy areas of the subject property, especially those on the hillsides with south and west exposures, exceeded the limiting conditions and are, consequently, severely limited for the propagation and survival of desirable tree species. Mr. Caruana further testified that shallow soils significantly contribute to the limiting conditions and that the pattern of forest cover on the subject property followed closely the presence of deeper soils. He found that those areas that do not now support trees (and appear not to have had for the last 100 years) are especially shallow and subject to excessively hot and dry conditions due to their predominantly south aspect. He further found that the non-forested floodplain area soils are more likely to reforest with non-commercial species of typical hydrophilic trees such as willows, alders, ashes and the associated brush, grasses and forbs rather than commercial tree species. Mr. Caruana concludes that the subject property's history of no trees on those particular areas is a direct result of the areas' soils having limited water holding capacity, shallow rooting depth and high hazards for erosion and potential runoff. Mr. Caruana's

analysis and conclusions provide substantial evidence to support the conclusions of Mr. Setchko regarding the subject property's capability of producing forest income.

The applicant asserts that the income capability of the property in this case can be calculated by actual stocking conditions of the property before, during and after the applicable 1978-1983 period. Mr. Setchko's analysis and calculations of the actual timber available for harvest, throughout the growing cycle, demonstrates that the entire property was and is not capable of producing over \$10,000.00 in annual income over the growing cycle from a forest operation. Mr. Setchko concludes the subject parcel (tax lot 1300), coupled with tax lot 300, was capable of producing only \$7,477 in gross annual income during the five-year period starting in 1978.

Goal One Coalition has challenged the applicant's demonstration that the subject property meets the agriculture and forest income tests of the statute. The Board finds that the challenges by Goal One Coalition are without legal foundation and do not include any supporting professional opinion regarding agriculture or forest income of the subject property and, therefore, are without merit.

The specific challenges of Goal One Coalition, which cover both ORS 197.247(1)(a) and (b)(C), are discussed and rejected as without merit as follows:

1. The income test "forest operation" has not been addressed.

Goal One Coalition argues that the applicant has not conducted any analysis of the "income-producing capability" of the proposed marginal lands using "current timber values" to calculate the potential gross income over the growth cycle. Goal One Coalition is correct in asserting that the calculation of the annual gross income for the ORS 197.247(1)(a) income test can be accomplished by the use of timber values. However, it is incorrect in its assertion that the calculation must use "current timber values."

Goal One Coalition references language in *DLCD v. Lane County* (Ericsson)¹ that mentions that "current prices" were used in the calculations of the Ericsson application. In that case, however, the use of a particular year's prices was not at issue and LUBA made no determination regarding such use. What the decision in Ericsson did establish, in addition to affirming Lane County's approval of a Marginal Lands re-zoning application, was that on-site evaluation of forest productivity by a qualified expert is weightier evidence than published data or that provided by individuals not qualified as experts in forest management.

Mr. Setchko used 1983 Douglas-fir log prices and volumes in his calculation of the projected gross forest operation income of the proposed marginal land. In this case Mr. Setchko is the qualified expert with 27 years of forest management experience, including 17 years as a private consultant and a Master's Degree in Forestry. Goal One Coalition has not established that it has any experience or credentials in forest management. Furthermore, it has not provided any

¹ 23 Or LUBA 33 (1992)

testimony from a qualified expert in forest management to support its assumptions and conclusions.

Lane County, in response to and in reliance upon Ericsson, issued its interpretations of the Marginal Lands statutes in the Board of Commissioners' 1997 Supplement to Marginal Lands Information Sheet. A copy of the supplement and the information sheet was provided to the record of this decision. It is a binding policy statement providing guidance and direction to applicants, county planning staff, the public and to the Lane County Planning Commission and Board of Commissioners regarding the statute. The Board direction stated in ISSUE 4 of the supplement provides:

“ISSUE 4: What price date should be used to calculate gross annual income for forest lands?”

Board's Direction:

The legislative intent of the “management and income test” of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a “significant contribution” to commercial forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. **Using the volumes calculated in step (1), and 1983 prices, calculate the average gross income over the growth cycle.”** (Emphasis added)

The Board's direction to use 1983 prices was an essential and reasonable approach to determining the productivity of forest lands at that time and obviates the need to make annual adjustments for inflation as the years go by (by adjusting the \$10,000 income figure).

Mr. Setchko's use of 1983 prices to determine average annual gross income is consistent with Lane County policy and is directed by the Board of Commissioners' binding local level policy statement in the aforementioned supplement. Using 1983 prices, Mr. Setchko has determined that the subject property was not capable of being managed for forest operations producing at least \$10,000 in annual gross income. Goal One Coalition has provided no evidence that contradicts or refutes Mr. Setchko's conclusions.

The Oregon Land Use Board of Appeals affirmed Lane County's policy of utilizing 1983 log prices in the forest income test analysis. In *Just v. Lane County*, LUBA No. 2005-029, dated June 8, 2005, LUBA affirmed the use of 1983 log prices in another Marginal Lands case and stated:

"Although ORS 197.247(1)(a) does not expressly mandate that counties use 1983 timber prices in applying the gross income test, we agree with the county and intervenor that it implicitly does so. The purpose of the forest operation test is to identify lands that are not capable of meeting the specified \$10,000 threshold averaged over the growth cycle. Both the "farm operation" and "forest operation" prongs of the test are specifically linked to January 1, 1983."

2. Mr. Setchko fails to explain his use of a 50-year growth cycle.

In ISSUE 5 of its 1997 Supplement, Lane County adopted the use of a 50-year growth cycle as the usual standard. Jim Just assigned that policy as an assignment of error in *Just v. Lane County* and LUBA rejected his arguments in that assignment and affirmed the county's use of the 50-year growth cycle. It is found that the policy remains valid today and that the applicant's use of a 50-year growth cycle in calculating forest income complied with the policy and adequately demonstrated, in part, that the forest income test had been appropriately met.

3. Additional documentation is required concerning timber companies in which Mr. Moshofsky held financial interest in order to ascertain if those companies conducted forest operations of which the subject property was part of, and if those operations grossed more than \$10,000 annual during 1978-1983.

Goal One Coalition raised this issue in its letter to the Lane County Planning Commission, dated February 25, 2005. In that letter, Mr. Just provided documentation of several timber harvesting companies that were in whole or in part, owned by Mr. Moshofsky. The Board finds that such additional information is unnecessary, as the record contains Department of Forestry/Department of Revenue information on the 1990 harvest which occurred on the subject property. That document does not indicate that the harvesting was carried out by any of the companies with which Mr. Moshofsky was affiliated. The Board reasonably concludes that the subject tax lot (#300) and contiguous property (tax lot #1300) was not part of a larger forest operation during the period of 1978-1983. In this case, the owner of the property during the applicable period has testified that the subject property was not managed as a part of a forest operation existing off site and owned by the owner of the subject property. The owner testified that when timber was harvested on the property in 1990 it was sold on the open market to third parties rather being processed or used in any other off-site operation owned by the owner of the subject property. Goal One's assertion in this issue is without any legal foundation, is supported by no substantial evidence of its requirement and is rejected accordingly.

4. **All income from operations of C&M Livestock Company must be included in the calculations for the agriculture income test.**

Mr. Minty has testified that C&M Livestock Company owned ~~no~~ property contiguous to, adjacent to or nearby the subject property. Mr. Moshofsky testified that he requested that the cattle be grazed on the property to create a presence on the property in his absence and that the consideration for the grazing was primarily in the form of the presence and maintenance of fencing and never in an amount exceeding \$1000 in a particular year. It is found that Mr. Moshofsky, the owner of the property during the five-year period preceding January 1, 1983, did not manage the property for or as a farm operation beyond the intermittent grazing of a limited number of cattle and that that farm operation did not produce \$20,000 or more in annual gross income. Therefore, it is found that the intermittent grazing of a limited number of cattle on the subject property should be reasonably considered as not contributing significantly to the agricultural economy of the area or state and that the subject property was not managed as part of a farm operation that produced more than \$20,000 in annual income during the subject period.

5. **The applicant has not established that the subject parcel is not capable of producing 85 cu.ft./ac./yr. of merchantable timber.**

Goal One Coalition argues two points within this argument. First it argues that the applicant's consulting forester has not applied a sanctioned methodology for determining forest productivity.

Mr. Setchko used information generated by Lane County and the Oregon State Forester's office consistent with LCDC regulations for providing such ratings.² Mr. Setchko calculated the forest productivity capability of the subject property using the same sources of ratings that were used in the Carver application (the subject of *Just v. Lane County* referred to hereinabove). Those sources of ratings and the use of the ratings were affirmed by LUBA in that decision. Mr. Setchko applied a rating to each of the soils of the proposed marginal land and concluded that the proposed marginal land produces less than 85 cu.ft./ac./yr. of merchantable timber.

The second part of Goal One Coalition's second argument is that "(A)n evaluation of a property's capacity for forest production must consider productivity for all merchantable forest tree species, not just Douglas-fir." Mr. Setchko has provided an analysis of the species that Goal One Coalition argues are "merchantable" and concludes that a majority of those species are not "merchantable." He further concludes that all other species that may be merchantable grow sufficiently slower than Douglas-fir on the subject soils and that they would not produce at least 85 cu.ft./ac./yr. on the subject property. Mr. Setchko includes that analysis in each of his "Forest Productivity Analysis" that were provided to the record in support of the application. Mr. Setchko's experience and expertise provides the conclusion that many of the species, especially KMX and hybrid poplar, have no established market and are, therefore, not merchantable. His overall conclusion is that if the proposed marginal land is not capable of producing an average of

² See OAR 660-006-0005(2)

\$10,000 in annual gross income from Douglas-fir, then there are no other merchantable tree species that could produce any more than the calculated figures that he has provided in his analysis for Douglas-fir. Goal One Coalition has not provided any credible or scientific evidence that contradicts or conflicts with the findings and conclusion of the Setchko reports. It is found that the applicant, through the evidence provided by Mr. Setchko's reports, has demonstrated that the subject property is not capable of producing more than 85 cu ft./ac./yr. of merchantable timber. Utilizing six possible sources of forest productivity data, Mr. Setchko concluded that the subject parcel has a range of productivity, from 26.4 cu ft./ac./yr., at worst, to 76.3 cu ft./ac./yr. at best. Utilizing the preferred 1990 productivity data from the Oregon Department of Forestry, the Board finds the parcel has a capability of 67.2 cu ft./ac./yr.

The Setchko report concludes that the subject property is not capable of producing eighty-five cubic feet of merchantable timber per acre per year. Mr. Setchko's report also contains an analysis of other tree species. Mr. Setchko's opinion includes an analysis of the species listed by Goal One Coalition in public testimony and concludes that they are either not merchantable, or would not produce an annual volume and income equal to Douglas-fir. Goal One Coalition has provided no substantial evidence to effectively refute or contradict Mr. Setchko's professional opinion regarding the merchantability and productivity of those particular species. Mr. Setchko opines that all other merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir. Mr. Setchko, in his analysis of the productivity of various tree species, provides a professional and scientific foundation to the reasoning of the SCS/NRCS in using Douglas-fir as the indicator species for productivity on Western Oregon soils.

Mr. Setchko, in response to continuing arguments made by Goal One Coalition in other Marginal Lands plan amendment applications, prepared an analysis of the Goal One Coalition's arguments regarding the productivity of Ponderosa Pine. Mr. Setchko opines that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine has a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. Mr. Setchko, in response to continuing arguments made by Goal One Coalition in other applications, prepared an analysis of the Goal One Coalition's arguments regarding the productivity and merchantability of Ponderosa Pine, Hybrid Poplar and KMX in the Willamette Valley. That analysis, dated September 8, 2004, and May 4, 2006, includes Mr. Setchko's opinion that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine, Hybrid Poplar and KMX have a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. His conclusions in his Ponderosa Pine analyses mirror his earlier opinions, provided as evidence herein, that all other potentially merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir.

Forest soil productivity data can be found in several sources:

- Soil Survey of Lane County Area, Oregon;
- Office of State Forester Memorandum (Exhibit 24);

- Lane County Soil Ratings for Forestry and Agriculture [LCOG] (Exhibit 23).

The Soil Survey contains productivity ratings for soil map units in Lane County, but does not provide forest productivity ratings for soils considered primarily farm soils or composite ratings for soil complex units. The State Forester memo provides ratings for those soils based upon a field review of soil map units in Lane County by State Forestry staff. The Soil Ratings document provides ratings for the soil complexes using a weighted average methodology for the complex-type soil map units. Of the three sources, the Soil Survey is considered the primary source of soils data for Lane County. The State Forester's ratings for the soils not rated in the Soil Survey is considered the second best source of forest productivity ratings since it was based upon field inspections of sites in Lane County and was produced by the Oregon Department of Forestry. The Soil Ratings document using a weighted average methodology for complex soil map units is considered the next credible forest productivity ratings data for those soil map units.

The Goal One Coalition submittal argues that the Goal 4 provisions found in OAR 660-006-0010 and 660-006-0005 govern the methodology to be used in the assignment of forest productivity ratings for the subject application. However, nothing in the statutory provisions identify these rules as requirements that apply to a Marginal Lands determination or prevent Lane County from determining forest productivity ratings from any credible source. The administrative rules may be useful to use as guidelines when making a determination regarding the appropriate ratings to assign a particular soil map unit, but they are not necessarily governing. TUBA made a footnote to this effect in the Carver decision (footnote 11).

The opponents maintain that these two soil map units have a higher productivity rating for Ponderosa Pine. The Ponderosa Pine productivity ratings assigned to the soil map units that opponents argue should be used instead are apparently taken from a document titled: "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003. Mr. Setchko testified that a complete reading of that document reveals that it repeatedly states that its data is from a very small sample and should not be used at this time until more long-term data can be collected. Goal One Coalition has not produced any evidence that refutes Mr. Setchko's analysis or conclusions regarding this matter.

Ponderosa Pine

The following observations are instructive on this issue:

- The opponents' assignment of values to the relevant soil map units is based upon a document titled "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003, which contains caveats that expressly limit its application.
- The opponents' conversion tables are difficult to understand. Lane County is unable to follow the analysis and to validate the numbers in the chart for Ponderosa Pine productivity.
- Mr. Setchko, a credible forestry expert, has addressed the issue in his testimony that, in addition to an analysis based upon his personal experience and training, Ponderosa Pine is

worth considerably less money and has the same or slower growth rate as Douglas Fir and that the opponents have not provided any substantial evidence to refute his conclusions regarding the productivity of Ponderosa Pine in Western Oregon or upon the subject property.

Mr. Setchko's analysis and conclusions regarding the productivity of the subject property sufficiently and adequately demonstrates that the subject property is not capable of producing at least 85 cubic feet of merchantable timber per acre per year over the growing cycle.

Goal One Coalition has challenged the applicant's demonstration that the subject property meets the forest productivity test of the statute. The Board finds that the challenges by Goal One Coalition are without legal foundation, do not include any supporting professional opinion regarding forest productivity of the subject property that refutes the conclusions reached by Mr. Setchko, and, therefore, are without merit.

Other opponent challenges are discussed and rejected as without merit as follows:

1. The "forest operation" income test must be calculated by using timber prices for years prior to 1983.

Mr. Setchko used 1983 Douglas-fir log prices and volumes in his calculation of the projected gross forest operation income of the proposed marginal land. In this case Mr. Setchko is the qualified expert with 27 years of forest management experience, including 17 years as a private consultant and a Master's Degree in Forestry. Opponents have not established that they have any experience or credentials in forest management. Furthermore, they have not provided any testimony from a qualified expert in forest management to support their assumptions and conclusions.

Lane County, in response to and in reliance upon Ericsson, issued its interpretations of the Marginal Lands statutes in the Board of Commissioners' 1997 Supplement to Marginal Lands Information Sheet. A copy of the supplement and the information sheet was provided to the record of this decision. It is a binding policy statement providing guidance and direction to applicants, county planning staff, the public and to the Lane County Planning Commission and Board of Commissioners regarding the statute. The Board direction stated in ISSUE 4 of the supplement provides:

ISSUE 4: What price date should be used to calculate gross annual income for forest lands?

Board's Direction:

The legislative intent of the "management and income test" of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a "significant contribution" to commercial

forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. Using the volumes calculated in step (1), and 1983 prices, calculate the average gross income over the growth cycle.” (Emphasis added)

The Board’s direction to use 1983 prices was an essential and reasonable approach to determining the productivity of forest lands at that time and obviates the need to make annual adjustments for inflation as the years go by (by adjusting the \$10,000 income figure).

Mr. Setchko’s use of 1983 prices to determine average annual gross income is consistent with Lane County policy and is directed by the Board of Commissioners’ binding local level policy statement in the aforementioned supplement. Using 1983 prices, Mr. Setchko has determined that the subject property was not capable of being managed for forest operations producing at least \$10,000 in annual gross income. Opponents have provided no evidence that contradicts or refutes Mr. Setchko’s conclusions.

The Oregon Land Use Board of Appeals affirmed Lane County’s policy of utilizing 1983 log prices in the forest income test analysis. In *Just v. Lane County*, LUBA No. 2005-029, dated June 8, 2005, LUBA affirmed the use of 1983 log prices in another Marginal Lands case and stated:

“Although ORS 197.247(1)(a) does not expressly mandate that counties use 1983 timber prices in applying the gross income test, we agree with the county and intervenor that it implicitly does so. The purpose of the forest operation test is to identify lands that are not capable of meeting the specified \$10,000 threshold averaged over the growth cycle. Both the “farm operation” and “forest operation” prongs of the test are specifically linked to January 1, 1983.”

2. Mr. Setchko fails to explain his use of a 50-year growth cycle.

In ISSUE 5 of its 1997 Supplement, Lane County adopted the use of a 50-year growth cycle as the usual standard. Tim Just assigned that policy as an assignment of error in *Just v. Lane County* and LUBA rejected his arguments in that assignment and affirmed the county’s use of the 50-year growth cycle.

The Board direction stated in ISSUE 5 of the supplement provides:

ISSUE 5: What "growth cycle" should be used to calculate gross annual income?

Board's Direction:

The consensus of the Board was that a 50-year growth cycle should be adopted as the usual standard, with the option that another standard could be used if substantiated by compelling scientific evidence presented by the applicant. The Board's choice was based upon evidence that the USDA Natural Resource Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standardized figure.

It is found that the policy remains valid today and that the applicant's use of a 50-year growth cycle in calculating forest income complied with the policy and adequately demonstrated, in part, that the forest income test had been appropriately met.

3. The applicant has not established that the subject parcel is not capable of producing 85 cu.ft./ac./yr. of merchantable timber.

Goal One Coalition argues two points within this argument. First it argues that the applicant's consulting forester, Mr. Setchko, has not applied a sanctioned methodology for determining forest productivity.

Mr. Setchko used information generated by Lane County and the Oregon State Forester's office consistent with LCDC regulations for providing such ratings. Mr. Setchko calculated the forest productivity capability of the subject property using the same sources of ratings that were used in the Carver application (the subject of *Just v. Lane County* referred to hereinabove). Those sources of ratings and the use of the ratings were affirmed by LUBA in that decision. Mr. Setchko applied a rating to each of the soils of the proposed marginal land and concluded that the proposed marginal land produces less than 85 cu.ft./ac./yr. of merchantable timber.

The second part of Goal One Coalition's second argument is that "(A)n evaluation of a property's capacity for forest production must consider productivity for all merchantable forest tree species, not just Douglas-fir. Mr. Setchko has provided an analysis of the species that Goal One Coalition argues are "merchantable" and concludes that a majority of those species are not "merchantable." He further concludes that all other species that may be merchantable grow sufficiently slower than Douglas-fir on the subject soils and that they would not produce at least 85 cu.ft./ac./yr. on the subject property. Mr. Setchko includes that analysis in each of his "Forest Productivity Analysis" that were provided to the record in support of the application. Mr. Setchko's experience and expertise provides the conclusion that many of the species, especially KMX and hybrid poplar, have no established market and are, therefore, not merchantable. His overall conclusion is that if the proposed marginal land is not capable of producing an average of \$10,000 in annual gross income from Douglas-fir, then there are no other merchantable tree

species that could produce any more than the calculated figures that he has provided in his analysis for Douglas-fir. Goal One Coalition has not provided any evidence that contradicts or conflicts with the findings and conclusion of the Setchko reports. It is found that the applicant, through the evidence provided by Mr. Setchko's reports, has demonstrated that the subject property is not capable of producing more than 85 cu.ft./ac./yr. of merchantable timber.

ORS 197.247(1)(b)(C):

The applicant has demonstrated, through use of the 1987 SCS Soil Survey of Lane County Area, Oregon, (1987 Soil Survey) that the subject property contains predominately (58.8%) classes V-VIII in the Agricultural Capability Class Classification System in use by the United States Department of Agriculture Conservation Service on October 15, 1983. The applicant has further demonstrated, with the inclusion of the Lane County Agricultural Lands Working Paper of the Lane Rural Comprehensive Plan ("Working Paper") published in November 1981, and its 1983 Addendum, the cover page and forward of the 1987 Soil Survey and the forward of the 1987 Soil Survey currently posted on the NRCS web site, that the soil map units and soil classifications contained in the 1987 Soil Survey were the classifications of the SCS system in use on October 15, 1983.

It further found that, in addition to the findings contained in the previous sub-paragraph 5. findings regarding Goal One Coalition arguments, that the applicant has adequately demonstrated, through the evidence provided by Marc Setchko, that the subject property is not capable of producing more than 85 cubic feet per acre per year in merchantable timber.

Conclusion: The subject property qualifies under ORS 197.247(1) as marginal land because:

- (a) it was not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income;
- (b) it was not managed as a part of a forest operation during that same time period which was capable of producing an average, over the growth cycle, of \$10,000 in annual gross income;
- (c) it is composed predominantly of soils in agricultural capability classes V through VIII, and
- (d) it is not capable of producing 85 cubic feet of merchantable timber per acre per year.

It is found that substantial evidence in the record, primarily, but not limited to, the Setchko reports, exists to support each of the above conclusions. No documentation, expert testimony or other substantial evidence has been submitted to the record that refutes or contradicts that

evidence with regard to the resource capabilities of the subject property as measured by the statutory standards and criteria in ORS 197.247.

For the reasons set forth above, the Board finds that the policies in the RCP, specifically RCP Goal 3, Policy 14 and RCP Goal 4, Policy 3, authorize and allow certain qualified resource lands to be designated and zoned marginal lands: Approval of this application implements those policies which have been acknowledged by the Land Conservation and Development Commission to be in conformity with Statewide Planning Goals and ORS 197.247 (1991 ed.).

(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decisions, to be desirable, appropriate or proper.

The totality of this application's response to and treatment of applicable criteria, coupled with the benefits accruing to both the public and the applicant as demonstrated in this application, provides the Lane County Board of Commissioners with adequate foundation and reason to find that approval of the application is desirable, appropriate and proper and would be a demonstration of good public policy.

4.5 Lane Code 16.400(6)(f)(ii)(cc).

For Minor Amendments as defined in LC 16.400(8)(a), the Plan amendment or component does not conflict with adopted policies of the Rural Comprehensive Plan and if possible, achieves policy support.

There are no policies in the adopted and acknowledged RCP that conflict with this request for plan amendment. As discussed in the previous section, there are policies in the RCP that specifically support and encourage approval of marginal lands applications for qualified property. The subject property addresses and satisfies the marginal lands criteria that are set forth in ORS 197.247 (1991 ed.).

Approval of this plan amendment is also consistent with the Board's interpretation of the Marginal Lands statute (ORS 197.247 (1991 ed.)) and its application to individual requests for plan amendment. The application is supported by detailed and thorough analysis and testimony provided by a qualified and experienced forester. The analysis and testimony was produced and provided in conformance with direction provided by the Board's interpretation.

Other RCP policies that may be relevant to this decision are as follows:

(1) GOAL ONE: CITIZEN INVOLVEMENT.

Notice to affected property owners and evidentiary hearings provided by Lane County ensures that the application meets and supports the citizen involvement goal and policies of the comprehensive plan.

(2) GOAL TWO: LAND USE PLANNING.

(a) **Policy 25: Changes to Plan Diagram.**

This application for amendment of the Plan Diagram designations for the subject property has been evaluated through the county's plan amendment procedure and approval of this application is based upon fulfillment of the criteria of Lane Code 16.400 which is addressed in Section 4 of these findings.

(3) **GOAL THREE: AGRICULTURAL LANDS.**

There has previously been a legislative determination by Lane County, as embodied in the acknowledged Lane County Rural Comprehensive Plan, that the subject property is not agricultural land and is not High Value Farmland. Nonetheless, consideration of agricultural use of the subject property and application of all relevant criteria regarding agricultural considerations has been adequately provided in the application and during the evidentiary hearings.

(4) **GOAL FOUR: FOREST LANDS.**

(a) **Policy 1: Conservation of forest lands.**

The primary policy of both the comprehensive plan and statewide planning goals regarding forest lands is the conservation of those lands for multiple forest uses. Approval of this application is consistent with and supports Policy 1 of Goal Four of the Comprehensive Plan.

4.6 **Lane Code 16.400(6)(h)(iii)(dd)**

For Minor Amendments as defined in EC 16.400(3)(a) below, the Plan amendment or component is compatible with the existing structure of the Rural Comprehensive Plan, and is consistent with the unamended portions or elements of the Plan.

As discussed in previous sections, this plan amendment is consistent with and satisfies the criteria that are referenced and adopted by specific policies in the RCP. Those policies are RCP Goal 3, Agricultural Lands, Policy 14 and RCP Goal 4, Forest Lands, Policy 3 which specifically allow certain, qualified, resource lands to be designated and zoned as marginal lands. Approval of this amendment is consistent with the RCP policies for farm (Goal 3) and forest (Goal 4) lands.

The Board interpretation recognizes this consistency. It states under "ISSUE 1":

"Marginal land is intended to be a sub-set of resource land, i.e., there are prime resource lands and 'marginal' resource lands. The marginal lands are to be available for occupancy and use as small tracts than are required in the better resource lands. The criteria in the law define which lands may be designated as marginal. Evidence for this position is found in the legislative history and the fact

that marginal lands are recognized in both Statewide Goal 3 – Agricultural Lands and Goal 4 – Forest Lands.”

Marginal lands are resource lands that are intended for occupancy with limited rural residential development.

Based on the evidence in the record which addresses and satisfies the criterion in ORS 197.247 (1991 ed.) and the above-referenced RCP resource policies, the Board concludes that approval of the subject plan amendment is compatible with the existing structure of the acknowledged RCP and is consistent with the unamended portions and elements of the RCP.

4.7 **Zone Change Criteria of Lane Code 16.252.**

a. **Lane Code 16.252(2)(Criteria)**

Zonings, rezonings and changes in the requirements of this Chapter shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest. In addition, zonings and rezonings shall be consistent with the specific purposes of the zone classification proposed, applicable to Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged by the Land Conservation and Development Commission. Any zonings or rezonings may be effected by Ordinance or Order of the Board of County Commissioners, the Planning Commission or the Hearings Official in accordance with the procedures of this section.

This decision results in a change from Exclusive Farm Use to ML Marginal Lands. The facts relevant to the zone change standards are largely redundant with the facts relevant to plan policies and the Statewide Planning Goals and have been addressed in preceding sections of these findings of fact and are incorporated into these findings by this reference.

This zone change is consistent with the general purposes of LC Chapter 16 as set forth in LC 16.003 in that:

- 1) In conformity with various development rules discussed above, the subject property will be developed commensurate with the character and physical limitations of the land and will thus promote the health, safety and general welfare of the built environment;
- 2) It will provide home construction opportunities that will aid the economy;
- 3) It will conserve other farm and forest lands by locating residential opportunities within a resource zone that allows limited residential development;
- 4) It will aid the provision of affordable housing within the Metro area by providing reasonable selections for a place to live;

5) By its location near the Metro Plan UGB, it will provide for the orderly and efficient transition from rural to urban lands and the efficient provision of public facilities and services;

6) By virtue of regulations discussed above, it will protect the quality of the land, air and water of the county and will protect life and property in areas subject to flooding.

This zone change is consistent with the purposes of the Marginal Lands Zoning District because it provides an alternative to more restrictive farm and forest zoning and it will allow any of the uses permitted in the Marginal Lands zoning district and thereby provide opportunities for persons to live in a rural environment and to conduct part-time farm or forest operations. It is being applied to property in accordance with Lane Code Chapter 16 criteria and procedures, RCP plan policies and criteria in ORS 197.247 (1991 ed.).

CONCLUSION

This application has addressed the applicable criteria, shown consistency with that criteria, has demonstrated good public policy through the public and private benefits accruing from its proposals.

Based on the substantial evidence presented above and included in the record of this decision, the Board of County Commissioners finds and concludes that the subject application for plan amendment and zone change meets and satisfies all of the relevant criteria and hereby is granted approval.