

W. T. C.

Agenda Cover Memo

Memorandum Date: November 12, 2006
Agenda Date: November 29, 2006

TO: Lane County Board of Commissioners

DEPARTMENT: Public Works Department, Land Management Division

PRESENTED BY: Bill Sage, Associate Planner
Stephen Vorhes, Assistant County Counsel

TITLE: DISCUSSION AND ORDER/IN THE MATTER OF RESPONDING TO THE LUBA REMAND OF THE DECISION ENACTING ORDINANCE NO. PA 1212 AND SUPPORTING THAT ORDINANCE BY ADOPTION OF SUPPLEMENTAL FINDINGS OF FACT TO INTERPRET THE TERMS "OWNERSHIP" AND "CONTIGUOUS" AS SPECIFICALLY USED IN THE RURAL COMPREHENSIVE PLAN – GENERAL PLAN POLICIES: GOAL FOUR, POLICY 15. (LMD File PA 04-5276 Kronberger)

I. MOTION

Move approval of the proposed Order with Exhibits A and B.

II. AGENDA ITEM SUMMARY

Ordinance No. PA 1212 amended the zoning designation from Nonimpacted Forest Land (F1) to Impacted Forest Land (F2) for four parcels ranging from 15.69 acres to 26.01 acres and totaling 83.58 acres. The ordinance was adopted by the Board of County Commissioners on June 15, 2005. That action was appealed to the Oregon Land Use Board of Appeals (LUBA). The decision was remanded by LUBA to Lane County for further action. In specific, to express an interpretation of "ownership" and explain the meaning of "contiguous" as specifically used in RCP Goal Four, Policy 15 and establish support for the rezone decision. This item presents the Board with a response to the LUBA remand supporting the amendments enacted by the Ordinance.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

The Board of County Commissioners has acted on three conformity determinations since 2004 that have involved a determination as to whether a Nonimpacted Forest Land (F1) or an Impacted Forest Land (F2) designation was warranted by the evidence in the

record. Two of the Board's decisions to approve a designation of F2 were appealed to the Oregon Land Use Board of Appeals (LUBA):

Ordinance No. PA 1211, Applicant: Earl Everett (PA 04-5252); and
Ordinance No. PA 1212, Applicant: Darren Kronberger (PA 04-5276).

Ordinance No. PA 1211 (Everett) was heard by LUBA in *Just v. Lane County*, 50 Or LUBA 399 (2005) and LUBA remanded the decision with the direction -- “. . . because the county's decision never expressly recognizes the ambiguity that is presented by the use of the undefined term 'ownerships' in RCP Goal 4, Policy 15(b) and (c), we believe remand for the county to adopt the needed interpretation is the appropriate course.”

Ordinance No. PA 1212 (Kronberger) was heard by LUBA in *Brown v. Lane County*, 51 Or 689 (2006) and LUBA remanded the decision with the direction -- “As we have discussed, the meaning of the term 'ownerships' is ambiguous. Because we must remand the decision for the county to interpret 'ownerships' in the context of Policy 27 the county will necessarily be required to explain the meaning of the term 'contiguous.’”

B. Analysis

The applicant has incorporated interpretations of the term “ownerships” and clarification of the terms “contiguous”, “generally contiguous” and “adjacent” in Exhibit “B” *Findings of Fact and Conclusions of Law*. The proposed findings also address other issues involved in the LUBA remand, including clarification of the portion of the RCP Conformity Determination policy relied upon for this rezone decision in Ordinance No. PA 1212.

Responding to the remand does not require reopening the record for additional evidence since the record contains sufficient evidence for the Board to address the specific remand issues of interpretation and clarification in the LUBA remand.

C. Alternatives / Options

1. Adopt the Order with Exhibits A and B.
2. Amend the Order or Exhibit B.
3. Do not adopt the Order and provide additional direction on the remand.

D. Recommendation

Option 1.

E. Timing

Action on the remand will conclude the LUBA direction on its review of Ordinance No. PA 1212 (Kronberger) and will be final unless appealed.

IV. IMPLEMENTATION/FOLLOW-UP

Notice of the final Board action will be provided to the parties.

V. ATTACHMENTS

Order with Exhibits A and B.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

ORDER No.

-) IN THE MATTER OF RESPONDING TO THE
-) LUBA REMAND OF THE DECISION ENACTING
-) ORDINANCE NO. PA 1212 AND SUPPORTING
-) THAT ORDINANCE BY ADOPTION OF
-) SUPPLEMENTAL FINDINGS OF FACT TO
-) INTERPRET THE TERMS "OWNERSHIPS" AND
-) "CONTIGUOUS" AS SPECIFICALLY USED IN THE
-) RURAL COMPREHENSIVE PLAN – GENERAL PLAN
-) POLICIES: GOAL FOUR, POLICY 15. (LMD File PA
-) 04-5276 Kronberger)

WHEREAS, on June 15, 2005, by means of Ordinance No. PA 1212 the Board of County Commissioners approved a Conformity Determination Amendment amending the zoning designation of tax lots 4100 and 4200 of Lane County Assessor’s map 19-01-08 and tax lots 401 and 1800 of Lane County’s Assessor’s map 19-01-17 from Nonimpacted Forest Land F-1, RCP (Lane Code 16.210) to Impacted Forest Land F-2, RCP (Lane Code 16.211), as requested by the application filed by Darren Kronberger; and

WHEREAS, that action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on May 5, 2006, LUBA remanded the action based on issues as described in the LUBA decision attached as Exhibit “A” and incorporated herein; and

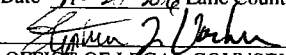
WHEREAS, in response to the LUBA remand, supplemental findings and analysis in support of Ordinance No. PA 1212 based on evidence already in the record, which is attached hereto as Exhibit “B” and incorporated herein, have been prepared containing interpretations and clarifications of terms in the Rural Comprehensive Plan - General Plan Policies, Goal Four, Policy 15 and Goal Two, Policy 27; and

WHEREAS, the Board of County Commissioners has reviewed the record and is now ready to take action based upon the evidence and testimony already in the record.

NOW THEREAFTER, IT IS HEREBY ORDERED that the findings previously adopted in support of Ordinance No. PA 1212 are further supplemented as described in Exhibit “B” attached and incorporated herein to establish compliance with applicable criteria, including Rural Comprehensive Plan – General Plan Policies, Goal Two, Policy 27 and Goal Four, Policy 15..

ADOPTED this _____ day of _____, 2006.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM
Date 11-29-2006 Lane County

OFFICE OF LEGAL COUNSEL

Recording Secretary for this Meeting of the Board

ORDER / IN THE MATTER OF RESPONDING TO THE LUBA REMAND OF THE DECISION ENACTING ORDINANCE NO. PA 1212 AND SUPPORTING THAT ORDINANCE BY ADOPTION OF SUPPLEMENTAL FINDINGS OF FACT TO INTERPRET THE TERMS "OWNERSHIPS" AND "CONTIGUOUS" AS SPECIFICALLY USED IN THE RURAL COMPREHENSIVE PLAN – GENERAL PLAN POLICIES: GOAL FOUR, POLICY 15. (LMD File PA 04-5276 Kronberger)

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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MERLE BROWN,
GWENDOLYN FARNSWORTH,
and JAMES JUST,
Petitioners,

MAY05'06 AM11:44 LUBA

vs.

LANE COUNTY,
Respondent,

and

DARREN KRONBERGER,
Intervenor-Respondent.

LUBA No. 2005-104

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

DAVIES, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

05/05/2006

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision that grants a zoning map change for four parcels from Non-Impacted Forest Land to Impacted Forest Land.

MOTION TO INTERVENE

Darren Kronberger (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

The subject property consists of four adjacent lots comprising approximately 84 acres located in unincorporated Lane County near the communities of Trent and Dexter. The property was part of a larger parcel that was originally zoned Impacted Forest Land (F-2) in 1984. The subject property, however, along with other properties, was subsequently rezoned to Non-Impacted Forest Land (F-1). Intervenor submitted an application to change the zoning of the property to F-2 under the county's Errors or Omissions Policy of the Rural Comprehensive Plan (RCP). The planning commission recommended denial of the application. The board of commissioners approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

RCP Goal 2 concerns "Land Use Planning" generally. Goal 2, Policy 27(a) sets out a number of circumstances that may establish that there have been "Errors or Omissions" that provide a basis for correcting the existing zoning of property. RCP Goal 2, Policy 27(a)(ii) permits the county to rezone property from F-1 to F-2 in circumstances where (1) the maps that the county relied on when the property was zoned F-1 did not show legal lots within or adjacent to the property alleged to be improperly zoned F-1, and (2) had legal lots been

1 accurately displayed on the maps that were originally used, Goal 4 policies would have
2 dictated F-2 zoning for the property at issue at that time.¹

3 Under the county's interpretation of the errors or omissions policy, if any of the eight
4 subsections of RCP Goal 2, Policy 27(a) apply then the county turns to determining the
5 proper zoning for the property. In the present case, the county found that subsection (a)(ii)
6 was satisfied and proceeded to determine the proper zoning classification under the Goal 4
7 policies. *See n 6 infra*. In applying the Goal 4 policies, however, the county applied those
8 policies to the current parcelization pattern rather than the pattern that existed at the time the
9 property was zoned F-1. Petitioners argue that the county misconstrued the applicable law by
10 analyzing the existing parcelization pattern.

11 In *Just v. Lane County*, 50 Or LUBA 399 (2005), we recently addressed this precise
12 issue. We held “* * * Goal 2, Policy 27(a)(ii) requires the county to apply the Goal 4 policies
13 to a correct view of parcelization as it existed [when the property was originally zoned F-1],

¹ RCP Goal 2, Policy 27 provides, as pertinent:

“Errors or Omissions. Lane County will * * * process applications to correct identified errors or omissions in the [RCP] and Zoning Plots resulting from the [RCP] or Zoning Plots not recognizing lawfully existing (in terms of the zoning) uses or from inconsistencies between the [RCP] and Zoning Plots. * * *

“a. Circumstances qualifying for consideration by the Board of Commissioners under the Errors or Omission Policy may include one or more of the following:

“* * * * *

“ii. Failure to zone a property [F-2], where maps used by staff to designate the property [F-1] did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

“* * * * *

“vii. Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.”

1 not to parcelization as it may exist today.” *Id.* at 411.² Because the county analyzed the
2 existing parcelization pattern rather than the parcelization pattern in 1984 when the property
3 was zoned F-1, the county misconstrued RCP Goal 2, Policy 27(a)(ii).

4 Intervenor argues that even if the county misconstrued Policy 27(a)(ii), the challenged
5 decision should be affirmed based on Policy 27(a)(vii), which allows the county to correct an
6 inconsistency between a zoning ordinance’s text and a zoning map. *See* n 1. Although
7 intervenor acknowledges that there are no findings addressing this subsection, he argues that
8 there is evidence that “clearly supports” the decision, and the decision should be affirmed
9 under ORS 197.835(11)(b).³ According to intervenor, the county originally zoned many
10 properties, including the subject property, F-2. Due to concerns from DLCD a number of
11 large properties were rezoned to F-1. Record 832. The subject property is depicted as
12 rezoned F-1 on the zoning map from the ordinance rezoning properties to F-1. Record 833.
13 An exhibit to that ordinance contains a computer-generated list of tax lots rezoned to F-1 that
14 does not include the subject property. Record 834. While there may be an inconsistency
15 between the text of the ordinance and the zoning map, the county’s decision to zone the
16 property F-2 is based entirely on Policy 27(a)(ii).⁴ The county did not approve the zoning
17 change under Policy 27(a)(vii).

² Our decision in *Just* had not been issued when the county made its decision in the present case.

³ ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record *which clearly supports the decision* or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.” (Emphasis added.)

⁴ The county’s decision explains in a footnote that because only one basis is needed to reach the question of proper zoning, it does not reach the question of an inconsistency between the text of the ordinance and the zoning map, pursuant to Policy 27(a)(vii). Record 15.

1 It is unclear to us whether ORS 197.835(11)(b) is available to affirm a decision based
2 on an alternative theory or approval standard that was not considered by the local
3 government. ORS 197.835(11)(b) provides that a decision that includes findings that are
4 deficient in one or more of several ways may be affirmed if there is relevant evidence in the
5 record which clearly supports the decision the local government made. In this case, the
6 county based its decision to correct the zoning on Policy 27(a)(ii); it explicitly declined to
7 base its decision, even in part, on Policy 27(a)(vii). This is not a circumstance where the
8 county's findings are defective because they fail to "recite adequate facts or legal
9 conclusions" or fail to "identify the standards or their relation to the facts." Rather, the
10 findings addressing Policy 27(a)(vii) are completely nonexistent. For whatever reason, the
11 county chose not to base its decision on Policy 27(a)(vii), and chose instead to rely solely on
12 Policy 27(a)(ii).

13 We need not decide whether ORS 197.835(11)(b) authorizes LUBA to affirm a
14 decision based on an alternative theory or approval standard that was not considered by the
15 local government. Even if it did, ORS 197.835(11)(b) does not provide a basis to affirm the
16 challenged decision based on compliance with Policy 27(a)(vii). The parties offer conflicting
17 interpretations of Policy 27(a)(vii), and it is unclear to us how the alleged conflict between
18 the text of an ordinance and an official planning or zoning map should be resolved under that
19 policy. No matter how clear the evidence of an ordinance text/plan or zoning map conflict,
20 the county must provide its own interpretation of Policy 27(a)(vii) in the first instance.⁵
21 Accordingly, intervenor cannot rely on ORS 197.835(11)(b) as a basis to affirm the county's
22 decision.

23 The first assignment of error is sustained.

⁵ While ORS 197.829(2) authorizes LUBA to provide its own interpretation where a local government fails to provide an interpretation, in this case, where the county chose not to rely on Policy 27(a)(vii) as a basis for its decision, we believe it is appropriate for the county to provide that interpretation in the first instance.

1 **SECOND ASSIGNMENT OF ERROR**

2 Under the county's interpretation of its code, once it is determined that one of the
3 eight subsections of RCP Goal 2, Policy 27(a) is met, then the county must determine
4 whether F-1 or F-2 zoning is appropriate pursuant to RCP Goal 4, Policy 15.⁶ Policy 15
5 requires the county to consider the characteristics of the property, and in particular, the size
6 and development of various "ownerships." In *Just*, we explained that although Policy 15
7 used the term "ownership" rather than more commonly understood terms such as "lot,"
8 "parcel," or "tract," the RCP does not provide any definition of "ownership." The petitioner

⁶ RCP Goal 4, Policy 15 provides:

"Lands designated within the Rural [Plan] as forest land shall be zoned [F-1] or [F-2]. A decision to apply one of the above zones * * * shall be based upon:

"a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsection b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

"b. Non-impacted Forest Land Zone [F-1] Characteristics:

"(1) Predominantly *ownerships* not developed by residences or nonforest uses.

"(2) Predominantly contiguous, *ownerships* of 80 acres or larger in size.

"(3) Predominantly *ownerships* contiguous to other lands utilized for commercial forest or commercial farm uses.

"(4) Accessed by arterial roads or roads intended primarily for forest management. Primarily under commercial forest management.

"c. Impacted Forest Land Zone [F-2] Characteristics:

"(1) Predominantly *ownerships* developed by residences or nonforest uses.

"(2) Predominantly *ownerships* 80 acres or less in size.

"(3) *Ownerships* generally contiguous to tracts containing less th[a]n 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

"(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences." (Emphases added.)

1 in *Just* argued that “ownership” meant “tract”, while the county argued that “ownership”
2 meant “legal lots or parcels.” We held that:

3 “* * * because the county’s decision never expressly recognizes the ambiguity
4 that is presented by the use of the undefined term ‘ownerships’ in RCP Goal 4,
5 Policy 15(b) and (c), we believe remand for the county to adopt the needed
6 interpretation is the appropriate course.” *Id.* at 409.

7 As noted, the decision challenged in this appeal was adopted before our opinion in
8 *Just* was issued. The county, therefore, did not attempt to answer the ambiguity presented by
9 the use of the undefined term “ownership” in Policy 15. Petitioners argue that the challenged
10 decision suffers from the same problems as the decision in *Just* and must be remanded for the
11 same reasons. Intervenor responds that the challenged decision goes into much greater detail
12 than the decision in *Just* and provides a reasonable interpretation of Policy 15.

13 While the challenged decision is more detailed than the decision in *Just*, it does not
14 provide an express interpretation of “ownerships.” Intervenor argues, however, that implicit
15 interpretations of “ownerships” can be deduced from the decision that explain any
16 ambiguity.⁷ According to the county, sometimes “ownerships” means the subject property;
17 sometimes it means the surrounding properties. According to intervenor this approach is
18 reasonable because “the [county] did not believe a single definition of ‘ownership’ is
19 appropriate or possible.” Response Brief 13. Intervenor also argues that “[t]here is nothing
20 inherently wrong or unreasonable in deciding that ‘ownerships’ means something different
21 for each characteristic.” *Id.* at 15.

22 First, we fundamentally disagree with intervenor’s contention that there is nothing
23 unreasonable in interpreting the term “ownerships” to have a different meaning for each
24 characteristic set forth in Policy 15. *See Racing Com. v. Multnomah Kennel Club*, 242 Or
25 572, 586, 411 P2d 65 (1966) (use of the same term throughout a statute indicates that the

⁷ We use the plural “interpretations” because the county appears to interpret “ownerships” in different ways throughout the decision.

1 term has the same meaning throughout the statute). To the extent intervenor intends to argue
2 that certain modifiers of the term may change the meaning of the term in a particular context,
3 such an express interpretation, if consistent with the text and context of the plan, might
4 survive the deferential review pursuant to ORS 197.829(1).⁸ See also *Church v. Grant*
5 *County*, 187 Or App 518, 69 P3d 759 (2003); *Clark v. Jackson County*, 313 Or 508, 836 P2d
6 710 (1992). However, the county did not make such an interpretation, either explicit or
7 implicit.⁹ The county is presumably considering the meaning of the term “ownerships”
8 pursuant to the remand in *Just*. As this appeal must be remanded in any event because the
9 county erroneously applied the Policy 15 analysis to the current parcelization pattern, the
10 county should reconsider this case pursuant to whatever express interpretation of
11 “ownerships” the county adopts in *Just*.

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 Goal 4, Policy 15(b)(2) and (3) and 15(c)(3) require consideration of contiguous
15 ownerships. See n 6. In addition to misconstruing the term “ownerships,” petitioners argue
16 that once the county began considering such contiguous areas, the county further erred by
17 considering lands to the east of a railroad right-of-way to be contiguous.

⁸ ORS 197.829(1) provides:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

⁹ We also question the county’s apparent belief that the different meanings of “ownerships” allows it to analyze a different area for each characteristic. If there is a basis in the text of the plan supporting this belief, the county must adopt explanatory findings on remand.

1 Lane Code 16.090 defines “contiguous” to mean:

2 “Having at least one common boundary line greater than eight feet in length.
3 Tracts of land under the same ownership and which are intervened by a street
4 (local access, public, County, State or Federal street) shall not be considered
5 contiguous.”

6 Intervenor argues that the definitions in the Lane Code do not apply to the RCP, but
7 we agree with petitioners that by its own terms Policy 27 invokes the “procedures and
8 requirements” of Lane Code Chapter 16, including its definitions.¹⁰ The Lane Code
9 definition of “contiguous” includes the term “ownership.” Goal 4, Policy 15 also uses the
10 terms “ownerships” and “contiguous” with various modifiers throughout the policy. As we
11 have discussed, the meaning of the term “ownerships” is ambiguous. Because we must
12 remand the decision for the county to interpret “ownerships” in the context of Policy 27 the
13 county will necessarily be required to explain the meaning of the term “contiguous.”
14 Accordingly, it would be premature to reach this assignment of error.¹¹

15 We do not reach the third assignment of error.

16 The county’s decision is remanded.

¹⁰ RCP Goal 2, Policy 27 provides:

“* * * Changes to correct errors or omissions shall comply with the procedures and requirements of Lane Code * * * Chapter 16 * * *.”

¹¹ We note, however, that Policy 15(c)(3) uses the phrase “generally contiguous” which is not necessarily the same as “contiguous.” Furthermore, Lane Code 16.090 only refers to intervening streets; it does not mention railroad right-of-ways. Petitioners rely on *Lovinger v. Lane County*, ___ Or LUBA ___ (LUBA No. 2005-098, January 12, 2006) *appeal pending*. In *Lovinger*, we merely held that where two parcels are divided by a fee interest in a strip of land owned by the county for use as a public roadway, the two parcels are not contiguous. It is not clear in this case, whether the railroad right-of-way at issue is an easement or is owned in fee. In any event, we need not determine the relevance of *Lovinger* here, because as we explained above, the county must explain the meaning of “contiguous” when it provides its interpretation of Policy 15.

Order No. _____

Exhibit “B”

Findings of Fact and Conclusions of Law

I. Introduction and Process History

This case concerns the rezoning of property under Lane County’s Conformity Determination process. The property that is the subject of this application is approximately 80 acres in size and consists of four legal lots that have been separately owned. They are described in detail in Section III of these findings (collectively referred to as “the Subject Property”). Conformity Determination, formerly called Errors or Omissions¹, allows property to be considered for land use re-designation or rezoning provided it falls within one or more of the eight categories that qualify the matter for further consideration. See Lane County Rural Comprehensive Plan (RCP) Goal 2, Policy 27, copy of which is attached as Exhibit “A” and by this reference incorporated herein (hereafter “Policy 27”). Conformity Determination along with Lane Code Chapters 12, 14 and 16 govern the process. Pursuant to Policy 27 and other applicable provisions of the County Code and RCP, together with the laws of the State governing appeals of land use decisions, the following events occurred:

- On June 12, 2005 the Board of County Commissioners (Board) deliberated, and by a majority of 3 to 2, approved a requested zone change from F-1 (Non-impacted Forest Lands) to F-2 (Impacted Forest Lands) for the Subject Property. As noted below, the rezoned property consists of four separately owned legal lots ranging from 15.69 acres to 26.01 acres and totaling 83.58 acres.
- On August 5, 2005 a Petition for Review of the Board’s decision was filed with the Oregon Land Use Board of Appeals (LUBA) by Merle Brown, Gwendolyn Farnsworth and James Just. The applicant for this rezoning intervened and filed a response brief.
- LUBA heard oral argument by the petitioner and applicant on the matter on April 13, 2006 and, on May 5, 2006 issued an opinion remanding the case to Lane County for further clarification of the bases of the County’s decision. Brown v. Lane County, 51 Or LUBA 689 (2006), copy of which is attached as Exhibit “B” and by this reference incorporated herein.

¹ The process, as set forth at RCP Goal 2, Policy 27, still retains the label “Errors or Omissions.” Policy 27 was adopted by Board Order PA 1192 on December 17, 2003. Later that same day, the Board adopted Order No. 03-12-17-14 amending Lane Manual to set fees for the Policy 27 process. The latter order changed the name to “Conformity Determination” in order to more accurately reflect that the purpose of the process is to “conform” the zoning to existing conditions.

For purposes of this remand and based on the decision of LUBA, County Planning Staff and Legal Counsel have determined that it is not necessary to conduct additional hearings before the Planning Commission. The Applicant has provided draft findings together with additional information in the form of portions of the County's Rural Comprehensive Plan. The record from the County's initial consideration and approval of this rezoning request is included as part of the overall remand record.

II. Basis of the Remand and Lane County's Response

In its remand, LUBA asked the County to respond to two issues:

- (1) Clarification of the ground by which the County is exercising its right to make a "conformity determination" in order to correct the zoning classification for the Subject Property.
- (2) Clarification of the meaning of "ownership" and "contiguous" as those terms are used in the RCP Goal 4, Policy 15, characteristics which distinguish large-scale industrial forest land (F-1) from small-scale non-industrial forest land (F-2).

In response, the Lane County Board hereby adopts the following four interpretations of terms and processes as found in the RCP and Lane Code. A detailed discussion of each interpretation is found at the location indicated at the end of each interpretation.

- (1) Conformity determination is a two-step process. The first step requires that a case meet one or more of the eight categories listed at RCP Goal 2, Policy 27(a) in order to qualify for further consideration. The eight categories serve a "gate-keeping" function and do not, by themselves, determine the final zoning designation. That authority is reserved for the second step of the process. See section IV.A. In this particular circumstance, there is a clear conflict between the map and the text of the ordinance which applied a zoning classification to the Subject Property and this inconsistency qualifies this case under RCP Goal 2, Policy 27 (a)(vii) for consideration under the conformity determination process in RCP, Goal 2, Policy 27.
- (2) Once a circumstance is qualified, the second step of the process is designed to "conform" the land use designation to the existing facts based on relevant criteria. In this case, the criteria are the factors found at RCP Goal 4, Policy 15 for identifying and designating F-1 and F-2 Forest Lands. Current facts rather than facts as they existed in 1984 are to be used. See section IV.B.
- (3) The term "ownership" as used in RCP Goal 4, Policy 15 is intended to identify and distinguish "small-grain" from large-grain property parcelization patterns in the present and for the foreseeable future. For that purpose "legal lots or parcels"

- are the functional equivalent of separate “ownerships” within the Subject Property unless the text of a specific characteristic requires otherwise. See section IV.C.
- (4) The term “contiguous” is defined in Lane Code 16.090 and is applicable in RCP Goal 4, Policy 15 as defined. However, the terms “generally contiguous” and “adjacent” require a broader view of the area surrounding the Subject Property which, in this case, includes the multiple developed and committed areas and the unincorporated communities of Trent and Dexter. See section IV.C.

Based on the record on remand, the Board finds that the Subject Property in this case qualifies for further consideration under RCP Goal 2, Policy 27(a)(vii). It is based on an inconsistency between the text of an order or ordinance adopted by the Board and an Official Plan or Zoning map. (Policy 27(a)(vii)).

Based on application of the above interpretations, the Board affirms its earlier decision to designate the Subject Property as F-2, Impacted Forest Lands. Findings of fact and conclusions of law supporting this decision are discussed in more detail in the following material. See section IV.

III. Overview of the Subject Property

The Subject Property consists of four legal lots in separate ownerships ranging in size from 15.69 acres to 26.01 acres and totaling 83.58 acres. The lots lie east of Rattlesnake Road near the Communities of Trent and Dexter. The property originally consisted of four separate legal lots verified by Lane County in 2001 totaling 202.41 acres. In 2003, the four legal lots were adjusted to the north and 118.83 acres was sold to an adjoining owner to the south through a property line adjustment. The four legal lots remained without the 118.83 acre parcel. See Exhibit “C”, attached hereto and by this reference incorporated herein.

The property was originally zoned as part of the County’s adoption of its Rural Comprehensive Plan in 1984. At that time, the entire rural area of the County was being either rezoned or zoning was being applied for the first time. It was a very busy and sometimes chaotic time for the County Planning Staff, the Planning Commission and the Board of Commissioners, and landowners in the rural parts of the County. Literally, thousands of properties were being rezoned and hundreds of property owners were actively participating in a process that stretched out well over a year. The County’s records were voluminous and County Planning Staff relied principally on tax lot information generated by the Assessor as a means of cataloging and inventorying properties and ownerships.

The Subject Property was depicted initially on zoning maps as being F-2, Impacted Forest Land. Subsequent maps seemed to change that zoning to F-1, Non-Impacted Forest Land. However, the ordinance which officially adopted zoning districts for the area of the County which included the Subject Property did not identify the Subject Property as being zoned F-1. After careful review of the County’s records, there is no clear indication that a zoning district for

the Subject Property was ever officially and finally adopted by the Board of Commissioners. At best, there is a conflict between the zoning maps and the text of the ordinances which applied zoning districts to individual properties.

In the vicinity of the Subject Property, there are 263 parcels of ten acres or less within one mile and more than 65 dwellings. The Subject Property abuts existing F-2 zoned land on the north and west. Rec 529. Thus, it is not surprising that the Subject Property was not singled out for separate consideration. Very few properties received such scrutiny during this County-wide process. In 1984, the Subject Property simply was either zoned with two separate zoning districts, F-1 and F-2, or was not zoned at all. In order to resolve this inconsistency, the applicant has requested the County zone the Subject Property F-2, Impacted Forest Lands pursuant to the Conformity Determination process set forth in RCP, Goal 2, Policy 27.

The property is accessed by a County collector road and full-service ingress-egress easement and is served by a full range of rural residential level public facilities and services. The property is largely composed of ridge summits with hill and foot slopes falling away in all directions. In general, the property has imperfect drainage, poor infiltration and other soil factors that do not lend themselves to large-scale, industrial forestry. There is substantial evidence in the record that supports a finding that the property is best suited for small woodland management by on-site residents.

These, and other pertinent facts, are described below and are verified by substantial evidence in the record previously relied on by this Board in making our initial decision to rezone the property to F-2.

IV. Specific Findings and Conclusions regarding the Conformity Determination Process

A. The first step of Conformity Determination is to determine whether the property qualifies for further consideration to determine the correct zoning. The Subject Property qualifies because of an inconsistency between the text and the zoning map that imposed F-1 zoning.

Conformity Determination is a two-step process designed to conform the zoning to actual current uses. As explained further below, the use must have existed in 1984 and still be in existence.

The first step performs a “gate-keeping” function that identifies property that qualifies for further consideration. The policy, codified at RCP Goal 2, Policy 27 (Exhibit “A”) lists eight categories, any one of which qualifies a property for a determination of the correct zoning. This application was made and asserted under the following two categories.

27.a.ii. – Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Nonimpacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the

subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

27.a.vii. – Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.

The first category has caused some confusion in this case because it emphasizes facts as they were in 1984. At the Planning Commission level, several questions were raised regarding whether Conformity Determination looks only at a “snapshot in time” or at the situation as it currently exists. The truth is that some of each is required under Policy 27.a.ii and this caused confusion with the Planning Commission, this Board and eventually with LUBA.

Fortunately, that confusion can be ignored because the case fully qualifies under RCP, Goal 2, Policy 27.a.vii. Substantial evidence in the record shows the following:

The Subject Property was originally zoned F-2 by Ordinance No. PA 884, effective February 29, 1984. Rec 828.² A later ordinance (PA 891, enacted September 12, 1984) contains conflicting maps and text. The ordinance text states as follows:

“The following parcels are redesignated and rezoned as set forth on the interim Plan Designation and Zoning Maps attached as Exhibit “A,” and further delineated in attached Exhibit ‘C.’”

Exhibit “C,” to PA 891 is a typed list of specific list of tax lots rezoned by the ordinance. Under the category of F-1 to F-2, it lists tax lots 1400 and 1600, but not Tax Lot 400 which included the area that is the subject of this application. The text, including Exhibit “C,” is directly inconsistent with the eventual Official Zoning Map, which indicates F-1 zoning for all three tax lots. The map exhibit to Ordinance PA 891, upon which the Official Zoning Map was based, portrays the same area as originally zoned F-2 by Ordinance No. PA 884. Thus, the text and map are inconsistent and can only be resolved by action of the Planning Commission and Board to determine the correct zoning.

B. The second step of the Conformity Determination process is to conform the zoning to actual use of the property. Application of the relevant criteria to the appropriate facts supports confirming F-2 zoning for the Subject Property.

Once a property qualifies for further consideration, the correct zoning is determined by a comparison of current facts with the relevant criteria. The necessity of using current facts rather than historic facts to determine the correct zoning is supported by common sense and legislative history.

² References to the original record of this zoning application which was transmitted to LUBA are preceded by “Rec” and the page number.

First is a simple common sense test. Assume that, in the 1984 inventory of existing land use, a rural store or industrial use was overlooked among the thousands of properties being surveyed. Assume further that, had the use been known, the property would have been zoned for either commercial or industrial use. However, in 1989, the store or industry burned to the ground and was never replaced and thereafter, for fifteen years the property has been growing grass or Christmas trees, a change of designation to commercial or industrial could not be justified based on today's facts.

Common sense is backed up by legislative history showing that existing facts must be considered. For example, on page 2 of the November 17, 2003 memo to the Board of Commissioners, County Planning staff states: "An errors or omission policy is a pact between a private property owner and the County to acknowledge existing circumstances and provide relief." (Emphasis added.) Later in the same memo, while describing the Policy 27 application forms, staff states: "The forms are intended to provide for the disclosure of the essential information necessary for the LCPC and BCC to conclude that the existing development warrants a change in designation." (Emphasis added.) A final piece of legislative history is the comment of County Administrator Bill Van Vactor to the Board of Commissioners at the December 17, 2003 meeting at which Policy 27 was adopted. In advising the Board that the policy should be titled "Conformity Determination," Mr. Van Vactor stated that any resulting re-designation would be a result of "conforming the zoning to the actual use." (Emphasis added.)

For the above reasons, we find that it is more reasonable and practical to consider a request for zoning pursuant to the Conformity Determination in the context of current facts and circumstances. The past uses and configuration of a particular property are secondary to what is actually happening on and in the vicinity of the Subject Property.

With the process fully understood attention may be directed toward the actual decision to restore F-2 zoning to the Subject Property. The Board takes notice that the property is already designated "Forest Lands" by the Rural Comprehensive Plan (RCP) and that the Plan designation will not change by rezoning the property F-2.

The choice between F-1 and F-2 zoning is governed by three RCP policies. They are Goal 4, Policies 1, 2 and 15. Substantial evidence for the application of those policies and the resultant decision to restore F-2 zoning was presented to the Board at the original hearings on this matter and is incorporated by reference into these findings. Nothing in the hearing on remand was presented to outweigh that evidence.

C. The term "ownership" as used in RCP Goal 4, Policy 15 is intended to identify and distinguish "small-grain" from large-grain property parcelization patterns in the present and for the foreseeable future. For that purpose "legal lots or parcels" are the functional equivalent of separate "ownerships." Furthermore, unless the specific text requires otherwise, the term "ownerships" refers to the property that is the subject of the zone change under consideration.

In *Just v. Lane County*, 50 Or LUBA 399 (2005), a prior case dealing with the choice between F-1 and F-2, LUBA held:

“***because the county’s decision never expressly recognizes the ambiguity that is presented by the use of the undefined term ‘ownerships’ in RCP Goal 4, Policy 15(b) and (c), we believe remand for the county to adopt the needed interpretation is the appropriate course.”

In this case, LUBA reached the same decision. Here, as in *Just*, the issue is whether “ownership[s]” is the same as “lot” or “parcel” or, as the appellant has argued, it means the same thing as “tract,” i.e. contiguous lots or parcels owned by the same party. For reasons explained in detail below, we interpret “ownerships,” for the purposes of RCP Goal 4, Policy 15, to be the same as “legal lots” and non-contiguous lots and parcels.

This interpretation is best understood by examining the fundamental land use decision at issue in 1984. At that time, the County crafted Policy 15 as a means of distinguishing large-scale industrial forest land from small-scale non-industrial forest land. Because this was a planning task, the charge was to look into the future and not just at the present

Through extensive background “working papers,” the County acknowledged that industrial forestry involves clear-cutting, aerial logging, aerial application of herbicides, pesticides and fertilizer, slash burning and other commonly accepted forest practices which can generate land use conflicts when conducted in proximity to small land holdings and non-resource uses. They reached the logical conclusion that industrial forestry worked best within large forested areas where common management practices could be employed with minimal impact to the operator and nearby lands, i.e. so-called non-impacted forest lands.

They also reasoned that there is another type of forest management in which “hands-on” family type operations work well. These were appropriate for areas with smaller lots and in which there were already other non-resource uses, residential and otherwise, which might be incompatible with large-scale industrial forestry practices.

With that “future orientation” in mind it is appropriate to look for a small-grained pattern of property lines, without regard to present ownership, when identifying F-2 lands. In looking for that fine-grained pattern it is important to understand and recognize the legal and practical implications of “legal lots.” In its simplest form “legal lots”, as defined by the Lane Code, are units of land that have been lawfully created and can be conveyed freely and used for uses allowed by the zoning district which is applied to a specific legal lot. In the case of the Subject Property, because there are four separate legal lots, this means there are four separate “ownerships” because each lot is capable of being owned and used separately.

Thus, the primary issue to be decided in connection with this Conformity Determination Amendment (which will apply forest zoning to the Subject Property) is whether the designation and zoning should be Non-Impacted Forest Lands (F-1, RCP) or Impacted Forest Lands (F-2,

RCP). We find unequivocally that the Subject Property qualifies for an Impacted Forest Lands (F-2, RCP) designation and zoning under the applicable criteria.

Lane County Rural Comprehensive Plan Goal 4: Forest Land - Policy 15 sets out the criteria for deciding whether forest land shall be designated and zoned as Non-Impacted Forest Lands or Impacted Forest Lands as follows:

15. Lands designated within the Rural Comprehensive Plan as forest land shall be zoned Non Impacted Forest Lands (F 1, RCP) or Impacted Forest Lands (F 2, RCP). A decision to apply one of the above zones or both of the above zones in a split zone fashion shall be based upon:

a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

b. Non impacted Forest Land Zone (F-I, RCP) Characteristics:

(1) Predominantly ownerships not developed by residences or non forest uses.

(2) Predominantly contiguous, ownerships of 80 acres or larger in size.

(3) Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm uses.

(4) Accessed by arterial roads or roads intended primarily for forest management.

(5) Primarily under commercial forest management

c. Impacted Forest Land Zone (F 2, RCP) Characteristics

(1) Predominantly ownerships developed by residences or non forest uses.

(2) Predominantly ownerships 80 acres or less in size.

(3) Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences.

A review of the evidence and testimony, including the objections raised around terms

contained in this policy makes it clear that the focus of the analysis must be on the property proposed for forest land zoning. For reasons that become clear when each of the various portions of the policy are addressed, the assessment of property for the area beyond the boundaries of the property proposed for zoning comes through the expression of the characteristics of each zone and does not rely on a precise definition of the term “ownerships” as either a “legal lot or parcel” or a “tract” of land. This is because the primary focus is on the land that is the subject of the zoning request itself. For that reason we reject the assertion that the term means more than the Subject Property.

We find that the term “ownerships” contained in the criteria of RCP Goal 4 Policy 15 should be considered as including only the land being proposed for rezoning (unless other qualifiers in a particular characteristic compels a different result) because of the introductory language in Policy 15 and that finding constitutes a reasonable interpretation of the term “ownerships” as contained in that policy. Such an interpretation is consistent with the text, context, purpose and intent of Policy 15. Sub-paragraph a. of Policy 15 states that a decision to apply one of the zones (or both in a split zone fashion) shall be based upon:

“a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. (Emphasis added)

The characteristics of the land, including the presence and number of legal lots, control the analysis. Policy 15 was crafted as a means of distinguishing large-scale industrial forest land from small-scale non-industrial forest land in the present and for the foreseeable future. The policy was intended to provide an analysis of the size and use of the Subject Property and of the land in the immediate vicinity. Size and use of land constitute the four sets of characteristics of each type of forest land required by Policy 15 to be analyzed and compared. The listed characteristics do not include any reference to a particular type of ownership or whether contiguous properties owned by the same person or entity constitute one or more ownerships. The critical focus of the analysis is on the property proposed for rezoning and the characteristics that property has in consideration of applying F-1 or F-2 zoning. This would include the presence and number of legal lots located within its area.

The term “ownership” as used in Goal Four, Policy 15, has been utilized to identify different lands and the uses thereon, which are to be considered in making an evaluation of whether a F-1 or F-2 designation is warranted for the land under consideration for zoning. This was due to the need to look within the subject land to identify the development patterns and uses present and to partially look beyond those boundaries to the lands in the general vicinity and identify the existing resource or nonresource uses and development on the surrounding lands. It really amounted to identifying a singular pattern within a more expansive tapestry.

When Goal Four, Policy 15 was originally adopted in 1984 as a component of the General Plan Policies of the Rural Comprehensive Plan, the two planning commissions and the Board of Commissioners were applying the “characteristics” of Policy 15(b) and (c) in a broad matrix designed to (1) acknowledge development existing at the time on specific properties; and (2)

analyze those commitments of specific lands in context with a broad-brush view or generalized sense of the surrounding parcelization and uses. Forest lands less than 80 acres in size and developed with residential uses or other nonforest uses, generally received Impacted Forest Land (F-2) designations. Public forested lands and larger commercially managed, forest lands that were larger than 80 acre and not impacted by nonforest uses, particularly in the ownership of industrial forest operators, were designated as Nonimpacted Forest Lands (F-1).

Prior analysis during the 1970s and the resulting Lane Code Chapter 10 zoning designations which were incorporated into the thirteen subarea plans, contributed to the final decision on a property by-property basis in 1984. At that time, the need for precise definition of the “ownership” term as legal lot, or parcel or tract was not important because the whole county was the subject of the zoning analysis. In considering the present day applications, looking at the area proposed for rezoning generally provides sufficient definition to the term “ownership”. In the case of the Subject Property, because of the existence of four legal lots, that comprise the property being addressed, the subject land would have been re-designated from FF-20 Farm-Forestry to F2 Impacted Forest Land as were other lands with similar characteristics in the area, at the time.

The critical focus of the analysis is on the property proposed for rezoning and the characteristics that property has that support consideration of applying F-1 or F-2 zoning. Properties subject to amendments in the past have included portions or combinations of tax lots as metes and bounds descriptions with single owners or multiple owners. Lane Code does not require legal lot determinations as a qualifier for application for a zone change in recognition of the variety of configurations of zoning that might make sense regardless of property boundaries. Legal lot status is a factor that comes into play in subsequent development permits, both planning and building, after a zoning designation has been applied. However, in applying Policy 15 in these circumstances, the present and future use of the property for forest-related purposes is greatly influenced by the number of legal lots, i.e. potential number of separate ownerships, that are present.

A reading of Goal Four, Policy 15 interpreting “ownership” to mean “land being proposed for rezoning” seems a reasonable approach that avoids debate over whether the focus should be more than the Subject Property, beyond the portion of that analysis determined by other text that clearly notes the connection of the Subject Property to surrounding lands.

Goal Four, Policy 15 uses three terms to define the areas to be reviewed when assessing the surrounding properties as well as the land being considered for rezoning. Those terms are “contiguous”, “generally contiguous” and “adjacent”. “Contiguous”, as defined in Lane Code 16.090 definitions, is used in Policy 15.b. (2) and (3) to look for the different characteristics of F-1 land. The definition of “contiguous” in LC 16.090 provides: “Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous.” In the case of 15.b.(2), the intent is to look within the land being

proposed for rezoning to determine whether or not that land being proposed for rezoning consists of contiguous land owned by the applicant that is 80 acres or larger in size. In the case of 15.b.(3), the intent is to determine whether other land contiguous to the land being proposed for rezoning is in commercial forest or commercial farm use. In these circumstances, the properties to the south and west are greater than 80 acres but all other contiguous properties are less than 80 acres.

Policy 15.c.(3) does not use the term “contiguous” to determine the same relationship between the land proposed for rezoning and the tapestry of uses and development in the surrounding area. Policy 15.c.(3) uses “generally contiguous” in a broader sense that looks beyond the definition of “contiguous” in LC 16.090 to determine if “tracts” owned by other property owners in the general area of the land being proposed for rezoning are less than 80 acres in size and developed with residences. The analysis is intended to venture beyond only the contiguous properties with common property lines. In some instances, common sense may push that analysis a distance in some or all directions to fully assess the characteristics of the surrounding uses and development in the general area of the subject site.

Policy 15.c.(3) also uses the term “adjacent” to look even further beyond the nearby tracts or across intervening right-of-way, like the adjacent rail line, to acknowledge the impacts of development within developed and committed exception areas in the general vicinity of the land being proposed for rezoning. In this case, this would be the rural community of Dexter which lies just east of the Subject Property on the other side of the railroad right-of-way. It is a broader look at the complete tapestry of uses and development, particularly non-resource uses, in the general area. It does not depend on strict contiguity for that consideration.

In this particular circumstance we find that contiguous “other lands” to the south and west of the Subject Property are managed for forest uses described in Policy 15.b.(3). However, tracts that are “generally contiguous” to the east of the Subject Property are located within the Community of Dexter and are certainly non-resource in character, i.e. located within a developed and committed exception area. Thus, we find that for purposes of Policy 15.b.(3) and c.(3), the Subject Property can be viewed as suitable for both F-1 and F-2 zoning. This is the result of different terminology in each policy as they require review of nearby properties

This interpretation affirms the Lane Code 16.090 definition of “contiguous” as it is used in Policy 15.b.(2) and 15.b.(3) in the assessment of F-1 characteristics. It also makes clear that “generally contiguous” and “adjacent” as used in Policy 15.c. (3) are different and broader in meaning and application when assessing the F-2 characteristics. It will remain for the Board of Commissioners to exercise discretion on a case-by-case basis, in making a final determination of how wide and how far that assessment pursuant to Policy 15.c.(3) would need to reach to provide a factual basis in arriving at a decision to approve or deny a request for rezoning. In all cases, the analysis under Goal Four, Policy 15 does not require a precise mathematical computation since the focus is on all the characteristics and whether, on balance, the land proposed for rezoning more closely corresponds to the F-1 or F-2 characteristics.

For this particular request, it is important that the Subject Property contains a total of 80 acres and four individual legal lots that are capable of being owned separately without any further land division approval. In the context of the RCP and County Zoning Code (Chapter 16), a legal lot is legal unit of land that was established pursuant to local land divisions laws at the time of creation, or one that was created by deed, court decree or similar means before there were local land division laws. Generally, Lane County began to regulate land divisions in the rural areas in 1975. The legal lots within the Subject Property were created long before this date. The significance of legal lots to planning policy is that, once created, legal lots never go away unless the land is further divided. See ORS 92.017. This means that multiple legal lots under one ownership today could become separately owned lots or parcels tomorrow with a stroke of a pen on a deed.

Thus, from the standpoint of understanding how any given geographic area will function over time, legal lots under common ownership are the functional equivalent of separately owned lots or parcels.

D. Following the policy interpretations noted above, the Subject Property qualifies for F-2 zoning designation based on application of the relevant criteria to the current facts.

Based on the analysis set forth below and the findings adopted in our previous approval of F-2 zoning for the Subject Property, copy of which is attached as Exhibit "D" and by this reference incorporated herein (Rec 10-31), we find that the characteristics of the Subject Property do not correspond closely with the Non-impacted Forest Land Zone (F-1, RCP) characteristics:

Policy 15.b(1):

Predominantly ownerships not developed by residences or non-forest uses.

The Subject Property contains 80 acres and is vacant land that consists of four legal lots, i.e. ownerships, which are approximately 20 acres in size. The site is being maintained as a forest operation. We find that the Subject Property can continue being maintained as a forest operation and further, based on evidence of the poor growing conditions, is likely to be more productive if managed by an on-site resident especially in four separate ownerships.

Policy 15.b(2):

Predominantly contiguous, ownerships of 80 acres or larger in size.

We believe, for the purposes of this factor, it is appropriate to consider only the ownerships, i.e. legal lots within the Subject Property. There are four legal lots, i.e. ownerships, which are each approximately 20 acres in size. See Exhibit "C". Viewing the ownerships within the Subject Property, we find that "predominantly" the contiguous ownerships are not 80 acres or

larger in size.

Policy 15.b(3):

Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm operations.

Our findings from our earlier decision are hereby reaffirmed and incorporated herein, (Rec 19-20), except as modified herein. Again, there are four “ownerships”. i.e. legal lots, within the Subject Property. There appear to be farm and forest operations being conducted on a majority of the lands that are contiguous to the Subject Property. However, as the record indicates, some of these parcels are also zoned F-2. We further believe and so find that the reference to the “other lands” directs us to look beyond those ownerships that are directly contiguous and examine the general area in which the property being considered is located. In these circumstances, we have found that the area within a mile of the Subject Property contains two rural communities, Dexter and Trent, and several developed and committed areas with residences and other non-resource uses. See Exhibit “E”, attached hereto and by this reference incorporated herein. In fact, the area in which the Subject Property is located is completely surrounded by non-resource zoning and uses. If the Subject Property was zoned F-1, Non-Impacted Forest Land, it would be an island of such zoning, disconnected from the other large areas of F-1 zoning located throughout Lane County. Therefore, we find there is a predominance of other lands within the general area of and completely surrounding the Subject Property that are not commercial forest or farm operations.

Policy 15.b(4):

Accessed by arterial roads or roads intended primarily for forest management.

The Subject Property is accessed from Rattlesnake Road which is a two-lane “major collector” road within the County’s road system. It is a general purpose road that is utilized by local residents, resource managers, tourists, public service providers and the public in general. It is not a road that is or was intended to be used primarily for forest management.

Policy 15.b(5):

Primarily under commercial forest management.

To the extent the Subject Property can be used for forest management purposes, it has been replanted after logging occurred in 1993. Based on evidence in the record regarding small woodlot forest operations, we find that the Subject Property, due to its small parcel sizes and marginal growing conditions, is particularly suited for that type of small-scale, resident-managed forest operation. We further find that for purposes of this factor such small-scale operations still fall within the general description of “commercial forest management”. We further find that for

this type of “commercial forest management” activity, F-2 zoning is likely more appropriate because of the allowance for residences in certain situations.

Based on the analysis set forth below and the findings adopted in our previous approval of F-2 zoning for the Subject Property, copy of which is attached as Exhibit “D” and by this reference incorporated herein, (Rec 10-31), we find that the characteristics of the Subject Property correspond closely with the Impacted Forest Land Zone (F-2, RCP) characteristics:

Policy 15.c(1):

Predominantly ownerships developed by residences or non-forested uses.

The four ownerships within the Subject Property are presently vacant and generally in forest use.

Policy 15.c(2):

Predominantly ownerships 80 acres or less in size.

The Subject Property contains four “ownerships”, i.e. legal lots, each of which is approximately 20 acres in size.

Policy 15.c(3):

Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

The discussion under Policy 15.b(3) above is incorporated herein by this reference. The tracts in the area surrounding the Subject Property, i.e. four ownerships therein, are predominantly smaller than 80 acres and contain a significant number of residences both within and outside the two nearby unincorporated communities of Trent and Dexter. In fact, we find that the unincorporated of Dexter is “adjacent” to the ownerships within the Subject Property. As we found previously, the Subject Property is an island of forest that is completely surrounded by non-resource uses and zoning. See Exhibit “E”, also found at Rec 778.

Policy 15.c(4):

Provided with a level of public facilities and services, roads, intended primarily for direct services to rural residences.

The record contains substantial evidence that the Subject Property is served by a level of service that is specified for rural, residential land in RCP Goal 11, Public Facilities and Services.

CONCLUSION REGARDING IMPACTED FOREST LAND (F-2, RCP) DESIGNATION AND ZONING:

After reviewing the record of this application on remand by LUBA of our first decision, we recognize that it was confused by our reliance on RCP Goal 2, Policy 27 (a)(ii) which required an examination of interpretations and definitions that are over twenty years old. Our present decision is much simpler. The Conformity Determination process is triggered by the inconsistency between the zoning map and ordinance on those applied to the Subject Property. Once that occurs, we are required to clarify and adopt appropriate zoning for the Subject Property. The RCP designates the Subject Property as Forest Land. No one is attempting to change the plan designation. The issue then becomes: should it be F-1, Non-impacted forest land, or F-2, Impacted forest land? The appeal of our initial decision in this case and the Just case resulted in LUBA finding that we had not sufficiently defined the terms “ownership” as it was used in the RCP, Goal 4, Policy 15 “characteristics” for distinguishing F-1 and F-2 zoned lands. As we have tried to explain in these findings, we believe the property that is the subject of the zone change must be considered the “ownerships” that are referred to in the Policy 15 characteristics. This is consistent with how those “characteristics” were applied in 1984 when the entire County was being rezoned and it still makes the most sense when only a small area is being considered as with the Subject Property in these circumstances. In this case, there are four “ownerships” within the Subject Property because there are presently four legal lots which are each approximately 20 acres in size.

Based on the “ownership” sizes within the Subject Property, the relatively poor quality of the soils and growing conditions and the fact that the Subject Property is generally surrounded by non-resource uses, we believe the site conforms more closely to the Impacted Forest Land Zone (F-2, RCP) characteristics. Accordingly, we find, conclude and decide that the Subject Property should, through the enactment of Ordinance No. PA 1212 and adoption of these supplemental findings, be designated and zoned Impacted Forest Land (F-2, RCP).

EXHIBIT LIST
FINDINGS OF FACT AND CONCLUSIONS OF LAW

- | | |
|-----------|---|
| EXHIBIT A | RCP, Goal 2, Policy 27 |
| EXHIBIT B | <i>Brown v. Lane County</i> , 51 Or LUBA 689 |
| EXHIBIT C | Map outlining the Subject Property |
| EXHIBIT D | Findings of Fact and Conclusions of Law (PA 1212) |
| EXHIBIT E | Map depicting surrounding zoning classifications |

Ordinance PA 1192
Exhibit A

Airport	Airport Safety District	/AS-RCP
Airport	Airport Operations	/AO-RCP
Nonresource	Rural Residential	RR-RCP
Public Facility	Inmate Work Camp	IWC-RCP

***NOTE:** The "Community" Plan Designation is implemented by various zoning districts as indicated, zones which also implement specific Plan designations other than "Community". A suffix "/C" shall be used in combination with these zoning abbreviations to denote the zoning inside unincorporated community plans adopted to comply with OAR 660 Division 22, the UC Rule: RR, RC, RI, RPF, and RPR.

26. Exceptions to resource goals shall be required for transmission line right-of-ways when in excess of fifty (50) feet.

27. Errors or Omissions. Lane County will annually initiate and process applications to correct identified errors or omissions in the RCP Official Plan and Zoning Plots resulting from the Official Plan or Zoning Plots not recognizing lawfully existing (in terms of the zoning) uses or from inconsistencies between the Official Plan and Zoning Plots. Changes to correct errors or omissions shall comply with the procedures and requirements of Lane Code Chapter 12 (Comprehensive Plan), Chapter 14 (Application Review and Appeal Procedures), and Chapter 16 (Land Use & Development Code), except as provided for in 27 c. and d., below.

a. Circumstances qualifying for consideration by the Board of Commissioners under the Errors or Omission Policy may include one or more of the following:

i. Lawful, structural development existing prior to September 12, 1984 and use of the structure(s) at the time qualified as an allowable use in a developed & committed zone designation other than that designated for the land on an Official Plan or Zoning Plot.

ii. Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Nonimpacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

iii. A property was actively managed primarily as either an agricultural or forestry operation in 1984 and since, and a resource designation other than the primary use was adopted on an Official Plan or Zoning Plot in 1984.

iv. Correction of a scrivener error on an adopted Official Plan or Zoning Plot.

v. Correction of an incompatible split-zoning of a legal lot resulting from a survey boundary line error that was discovered after September 12, 1984.

Ordinance PA 1192
Exhibit A

- vi. Compliance by a public jurisdiction or agency with a deed restriction on public land.
- vii. Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.
- viii. A circumstance other than as listed in 27. a. i. -vii. above, which the Planning Commission elects to forward a favorable recommendation for consideration by the Board of Commissioners.
- b. Errors or omissions in the Official Plan and Zoning Plots shall not include circumstances requiring that a committed exception be taken or situations involving the designation of Marginal or Nonresource Lands.
- c. By September 30th of each year, property owners who believe that they have errors or omissions in the official plan or zoning of their property and who want those errors corrected shall submit to the Planning Director a completed Lane County Errors or Omission Application. Within 45 days of receipt of the application, the Director shall review the application for completeness and provide the applicant with a written notice that explains why the application was accepted or not accepted. The Director shall not accept incomplete applications or applications for changes that do not qualify as errors or omissions; and
- d. By March 31st of each year, Lane County shall conduct the first public hearings with the Lane County Planning Commission for all pending errors or omission applications accepted within the deadline specified in Policy 27 c. above.
- e. To partly defray the expense in processing the errors or omission application, a fee shall be charged the applicant. The fee shall be established by order of the Board of County Commissioners.

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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MERLE BROWN,
GWENDOLYN FARNSWORTH,
and JAMES JUST,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

DARREN KRONBERGER,
Intervenor-Respondent.

LUBA No. 2005-104

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

DAVIES, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

05/05/2006

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a county decision that grants a zoning map change for four parcels from Non-Impacted Forest Land to Impacted Forest Land.

MOTION TO INTERVENE

Darren Kronberger (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

The subject property consists of four adjacent lots comprising approximately 84 acres located in unincorporated Lane County near the communities of Trent and Dexter. The property was part of a larger parcel that was originally zoned Impacted Forest Land (F-2) in 1984. The subject property, however, along with other properties, was subsequently rezoned to Non-Impacted Forest Land (F-1). Intervenor submitted an application to change the zoning of the property to F-2 under the county’s Errors or Omissions Policy of the Rural Comprehensive Plan (RCP). The planning commission recommended denial of the application. The board of commissioners approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

RCP Goal 2 concerns “Land Use Planning” generally. Goal 2, Policy 27(a) sets out a number of circumstances that may establish that there have been “Errors or Omissions” that provide a basis for correcting the existing zoning of property. RCP Goal 2, Policy 27(a)(ii) permits the county to rezone property from F-1 to F-2 in circumstances where (1) the maps that the county relied on when the property was zoned F-1 did not show legal lots within or adjacent to the property alleged to be improperly zoned F-1, and (2) had legal lots been

1 accurately displayed on the maps that were originally used, Goal 4 policies would have
2 dictated F-2 zoning for the property at issue at that time.¹

3 Under the county's interpretation of the errors or omissions policy, if any of the eight
4 subsections of RCP Goal 2, Policy 27(a) apply then the county turns to determining the
5 proper zoning for the property. In the present case, the county found that subsection (a)(ii)
6 was satisfied and proceeded to determine the proper zoning classification under the Goal 4
7 policies. *See n 6 infra*. In applying the Goal 4 policies, however, the county applied those
8 policies to the current parcelization pattern rather than the pattern that existed at the time the
9 property was zoned F-1. Petitioners argue that the county misconstrued the applicable law
10 by analyzing the existing parcelization pattern.

11 In *Just v. Lane County*, 50 Or LUBA 399 (2005), we recently addressed this precise
12 issue. We held “* * * Goal 2, Policy 27(a)(ii) requires the county to apply the Goal 4
13 policies to a correct view of parcelization as it existed [when the property was originally

¹ RCP Goal 2, Policy 27 provides, as pertinent:

“Errors or Omissions. Lane County will * * * process applications to correct identified errors or omissions in the [RCP] and Zoning Plots resulting from the [RCP] or Zoning Plots not recognizing lawfully existing (in terms of the zoning) uses or from inconsistencies between the [RCP] and Zoning Plots. * * *

“a. Circumstances qualifying for consideration by the Board of Commissioners under the Errors or Omission Policy may include one or more of the following:

“* * * * *

“ii. Failure to zone a property [F-2], where maps used by staff to designate the property [F-1] did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

“* * * * *

“vii. Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.”

1 zoned F-1], not to parcelization as it may exist today.” *Id.* at 411.² Because the county
2 analyzed the existing parcelization pattern rather than the parcelization pattern in 1984 when
3 the property was zoned F-1, the county misconstrued RCP Goal 2, Policy 27(a)(ii).

4 Intervenor argues that even if the county misconstrued Policy 27(a)(ii), the
5 challenged decision should be affirmed based on Policy 27(a)(vii), which allows the county
6 to correct an inconsistency between a zoning ordinance’s text and a zoning map. *See* n 1.
7 Although intervenor acknowledges that there are no findings addressing this subsection, he
8 argues that there is evidence that “clearly supports” the decision, and the decision should be
9 affirmed under ORS 197.835(11)(b).³ According to intervenor, the county originally zoned
10 many properties, including the subject property, F-2. Due to concerns from DLCD a number
11 of large properties were rezoned to F-1. Record 832. The subject property is depicted as
12 rezoned F-1 on the zoning map from the ordinance rezoning properties to F-1. Record 833.
13 An exhibit to that ordinance contains a computer-generated list of tax lots rezoned to F-1 that
14 does not include the subject property. Record 834. While there may be an inconsistency
15 between the text of the ordinance and the zoning map, the county’s decision to zone the
16 property F-2 is based entirely on Policy 27(a)(ii).⁴ The county did not approve the zoning
17 change under Policy 27(a)(vii).

² Our decision in *Just* had not been issued when the county made its decision in the present case.

³ ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record *which clearly supports the decision* or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.” (Emphasis added.)

⁴ The county’s decision explains in a footnote that because only one basis is needed to reach the question of proper zoning, it does not reach the question of an inconsistency between the text of the ordinance and the zoning map, pursuant to Policy 27(a)(vii). Record 15.

1 It is unclear to us whether ORS 197.835(11)(b) is available to affirm a decision based
2 on an alternative theory or approval standard that was not considered by the local
3 government. ORS 197.835(11)(b) provides that a decision that includes findings that are
4 deficient in one or more of several ways may be affirmed if there is relevant evidence in the
5 record which clearly supports the decision the local government made. In this case, the
6 county based its decision to correct the zoning on Policy 27(a)(ii); it explicitly declined to
7 base its decision, even in part, on Policy 27(a)(vii). This is not a circumstance where the
8 county's findings are defective because they fail to "recite adequate facts or legal
9 conclusions" or fail to "identify the standards or their relation to the facts." Rather, the
10 findings addressing Policy 27(a)(vii) are completely nonexistent. For whatever reason, the
11 county chose not to base its decision on Policy 27(a)(vii), and chose instead to rely solely on
12 Policy 27(a)(ii).

13 We need not decide whether ORS 197.835(11)(b) authorizes LUBA to affirm a
14 decision based on an alternative theory or approval standard that was not considered by the
15 local government. Even if it did, ORS 197.835(11)(b) does not provide a basis to affirm the
16 challenged decision based on compliance with Policy 27(a)(vii). The parties offer
17 conflicting interpretations of Policy 27(a)(vii), and it is unclear to us how the alleged conflict
18 between the text of an ordinance and an official planning or zoning map should be resolved
19 under that policy. No matter how clear the evidence of an ordinance text/plan or zoning map
20 conflict, the county must provide its own interpretation of Policy 27(a)(vii) in the first
21 instance.⁵ Accordingly, intervenor cannot rely on ORS 197.835(11)(b) as a basis to affirm
22 the county's decision.

23 The first assignment of error is sustained.

⁵ While ORS 197.829(2) authorizes LUBA to provide its own interpretation where a local government fails to provide an interpretation, in this case, where the county chose not to rely on Policy 27(a)(vii) as a basis for its decision, we believe it is appropriate for the county to provide that interpretation in the first instance.

1 **SECOND ASSIGNMENT OF ERROR**

2 Under the county's interpretation of its code, once it is determined that one of the
3 eight subsections of RCP Goal 2, Policy 27(a) is met, then the county must determine
4 whether F-1 or F-2 zoning is appropriate pursuant to RCP Goal 4, Policy 15.⁶ Policy 15
5 requires the county to consider the characteristics of the property, and in particular, the size
6 and development of various "ownerships." In *Just*, we explained that although Policy 15
7 used the term "ownership" rather than more commonly understood terms such as "lot,"
8 "parcel," or "tract," the RCP does not provide any definition of "ownership." The petitioner

⁶ RCP Goal 4, Policy 15 provides:

"Lands designated within the Rural [Plan] as forest land shall be zoned [F-1] or [F-2]. A decision to apply one of the above zones * * * shall be based upon:

"a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsection b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

"b. Non-impacted Forest Land Zone [F-1] Characteristics:

"(1) Predominantly *ownerships* not developed by residences or nonforest uses.

"(2) Predominantly contiguous, *ownerships* of 80 acres or larger in size.

"(3) Predominantly *ownerships* contiguous to other lands utilized for commercial forest or commercial farm uses.

"(4) Accessed by arterial roads or roads intended primarily for forest management. Primarily under commercial forest management.

"c. Impacted Forest Land Zone [F-2] Characteristics:

"(1) Predominantly *ownerships* developed by residences or nonforest uses.

"(2) Predominantly *ownerships* 80 acres or less in size.

"(3) *Ownerships* generally contiguous to tracts containing less th[a]n 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

"(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences." (Emphases added.)

1 in *Just* argued that “ownership” meant “tract”, while the county argued that “ownership”
2 meant “legal lots or parcels.” We held that:

3 “* * * because the county’s decision never expressly recognizes the ambiguity
4 that is presented by the use of the undefined term ‘ownerships’ in RCP Goal
5 4, Policy 15(b) and (c), we believe remand for the county to adopt the needed
6 interpretation is the appropriate course.” *Id.* at 409.

7 As noted, the decision challenged in this appeal was adopted before our opinion in
8 *Just* was issued. The county, therefore, did not attempt to answer the ambiguity presented by
9 the use of the undefined term “ownership” in Policy 15. Petitioners argue that the challenged
10 decision suffers from the same problems as the decision in *Just* and must be remanded for the
11 same reasons. Intervenor responds that the challenged decision goes into much greater detail
12 than the decision in *Just* and provides a reasonable interpretation of Policy 15.

13 While the challenged decision is more detailed than the decision in *Just*, it does not
14 provide an express interpretation of “ownerships.” Intervenor argues, however, that implicit
15 interpretations of “ownerships” can be deduced from the decision that explain any
16 ambiguity.⁷ According to the county, sometimes “ownerships” means the subject property;
17 sometimes it means the surrounding properties. According to intervenor this approach is
18 reasonable because “the [county] did not believe a single definition of ‘ownership’ is
19 appropriate or possible.” Response Brief 13. Intervenor also argues that “[t]here is nothing
20 inherently wrong or unreasonable in deciding that ‘ownerships’ means something different
21 for each characteristic.” *Id.* at 15.

22 First, we fundamentally disagree with intervenor’s contention that there is nothing
23 unreasonable in interpreting the term “ownerships” to have a different meaning for each
24 characteristic set forth in Policy 15. See *Racing Com. v. Multnomah Kennel Club*, 242 Or
25 572, 586, 411 P2d 65 (1966) (use of the same term throughout a statute indicates that the

⁷ We use the plural “interpretations” because the county appears to interpret “ownerships” in different ways throughout the decision.

1 term has the same meaning throughout the statute). To the extent intervenor intends to
2 argue that certain modifiers of the term may change the meaning of the term in a particular
3 context, such an express interpretation, if consistent with the text and context of the plan,
4 might survive the deferential review pursuant to ORS 197.829(1).⁸ See also *Church v. Grant*
5 *County*, 187 Or App 518, 69 P3d 759 (2003); *Clark v. Jackson County*, 313 Or 508, 836 P2d
6 710 (1992). However, the county did not make such an interpretation, either explicit or
7 implicit.⁹ The county is presumably considering the meaning of the term “ownerships”
8 pursuant to the remand in *Just*. As this appeal must be remanded in any event because the
9 county erroneously applied the Policy 15 analysis to the current parcelization pattern, the
10 county should reconsider this case pursuant to whatever express interpretation of
11 “ownerships” the county adopts in *Just*.

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 Goal 4, Policy 15(b)(2) and (3) and 15(c)(3) require consideration of contiguous
15 ownerships. See n 6. In addition to misconstruing the term “ownerships,” petitioners argue
16 that once the county began considering such contiguous areas, the county further erred by
17 considering lands to the east of a railroad right-of-way to be contiguous.

⁸ ORS 197.829(1) provides:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

⁹ We also question the county’s apparent belief that the different meanings of “ownerships” allows it to analyze a different area for each characteristic. If there is a basis in the text of the plan supporting this belief, the county must adopt explanatory findings on remand.

1 Lane Code 16.090 defines “contiguous” to mean:

2 “Having at least one common boundary line greater than eight feet in length.
3 Tracts of land under the same ownership and which are intervened by a street
4 (local access, public, County, State or Federal street) shall not be considered
5 contiguous.”

6 Intervenor argues that the definitions in the Lane Code do not apply to the RCP, but
7 we agree with petitioners that by its own terms Policy 27 invokes the “procedures and
8 requirements” of Lane Code Chapter 16, including its definitions.¹⁰ The Lane Code
9 definition of “contiguous” includes the term “ownership.” Goal 4, Policy 15 also uses the
10 terms “ownerships” and “contiguous” with various modifiers throughout the policy. As we
11 have discussed, the meaning of the term “ownerships” is ambiguous. Because we must
12 remand the decision for the county to interpret “ownerships” in the context of Policy 27 the
13 county will necessarily be required to explain the meaning of the term “contiguous.”
14 Accordingly, it would be premature to reach this assignment of error.¹¹

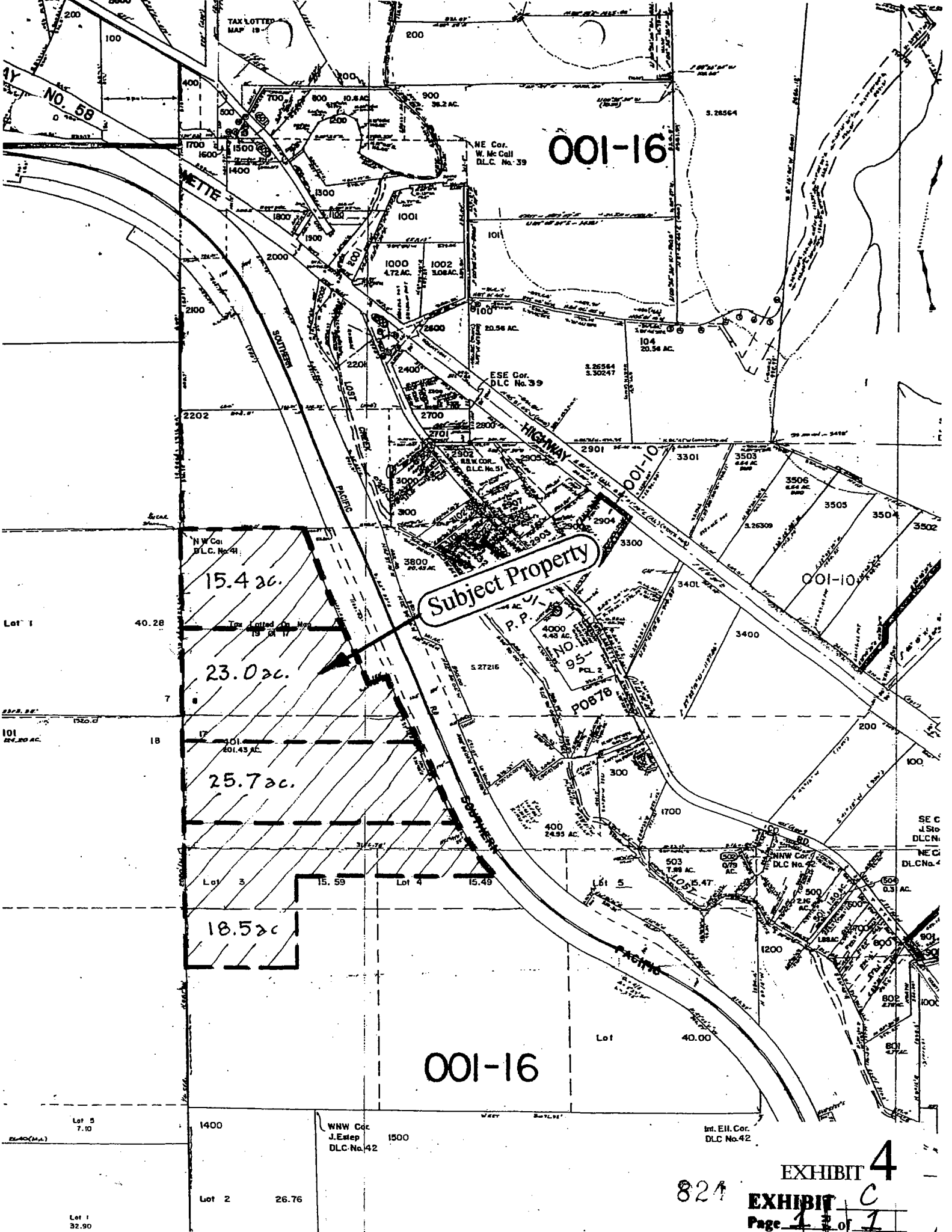
15 We do not reach the third assignment of error.

16 The county’s decision is remanded.

¹⁰ RCP Goal 2, Policy 27 provides:

“* * * Changes to correct errors or omissions shall comply with the procedures and requirements of Lane Code * * * Chapter 16 * * *.”

¹¹ We note, however, that Policy 15(c)(3) uses the phrase “generally contiguous” which is not necessarily the same as “contiguous.” Furthermore, Lane Code 16.090 only refers to intervening streets; it does not mention railroad right-of-ways. Petitioners rely on *Lovinger v. Lane County*, ___ Or LUBA ___ (LUBA No. 2005-098, January 12, 2006) *appeal pending*. In *Lovinger*, we merely held that where two parcels are divided by a fee interest in a strip of land owned by the county for use as a public roadway, the two parcels are not contiguous. It is not clear in this case, whether the railroad right-of-way at issue is an easement or is owned in fee. In any event, we need not determine the relevance of *Lovinger* here, because as we explained above, the county must explain the meaning of “contiguous” when it provides its interpretation of Policy 15.



001-16

Subject Property

001-16

EXHIBIT 4

EXHIBIT C
Page 1 of 1

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Ordinance no. PA 1212

Exhibit "B"

Findings of Fact and Conclusions of Law

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Ordinance No. PA 1212
Exhibit "B"
Findings of Fact and Conclusions of Law

I. OVERVIEW OF THE SUBJECT PROPERTY

The subject property consists of four legal lots in separate ownerships ranging in size from 15.69 acres to 26.01 acres and totaling 83.58 acres. The lots lie east of Rattlesnake Road near the Communities of Trent and Dexter. The property originally consisted of four separate legal lots verified by Lane County LMD in 2001 totaling 202.41 acres. In 2003, the four legal lots were reconfigured to the north and 118.83 acres was sold to an adjoining owner to the south.

The property was originally zoned F-2 Impacted Forest Land in early 1984, and then rezoned to F-1 Non-impacted Forest Land later in the year along with two adjacent tax lots to the south. The result was an island of F-1 zoning in a sea of "Developed and Committed" rural residential, commercial and industrial "Exception Areas." There are 263 parcels of ten acres or less within one mile of the subject property and more than 65 dwellings in the nearby area. The subject property abuts existing F-2 zoned land on the north and west.

The property is accessed by a County collector road and non-exclusive ingress-egress easement and is served by a full range of rural residential level public facilities and services.

The property is largely composed of ridge summits with hill and foot slopes falling away in all directions. In general, the property has imperfect drainage, poor infiltration and other soil factors that do not lend themselves to large-scale, industrial forestry. The property has been deemed appropriate for small woodland management. The applicant sought a rezone to F-2 zoning under the Conformity Determination process set forth in the Rural Comprehensive Plan at Goal 2, Policy 27.

These, and other pertinent facts, are described below and are verified by substantial evidence in the record relied on by the Board of County Commissioners in reaching the decision to rezone the property to F-2

II. CRITERIA FOR REZONING BY CONFORMITY DETERMINATION

This application was submitted under the "Conformity Determination" process. The Lane County Rural Comprehensive Plan (RCP) – General Plan Policies: Goal Two, Policy 27 provides a conformity determination amendment process for the correction of identified plan or zoning designations in the RCP Official Plan Diagram and Zoning Plot Maps resulting from the Official Plan or Zoning Plot Maps not recognizing lawfully existing (in terms of the zoning) uses or from inconsistencies between the Official Plan and Zoning Plot Maps.

The Conformity Determination process requires that changes to correct nonconformities shall comply with the procedures and requirements, as applicable, of Lane Code Chapter 12 (Comprehensive Plan), Chapter 14 (Application Review and Appeal Procedures), and Chapter 16 (Land Use and Development Code).

This application involves a change from F-1 to F-2, both of which are designated "Forest Lands" by the Comprehensive Plan. Because a change to the Plan Diagram is not involved, the provisions of Lane Code Chapter 12 and Lane Code 16.400 (Plan amendments) are not involved.

Because a zone change is involved, however, the provisions of Lane Code 16.252(2) (zone change criteria) are applicable.

Lane Code 16.252(2) requires that zone changes: a) achieve the general purpose of Chapter 16, b) shall not be contrary to the public interest, and c) be consistent with the specific purposes of the zone classification proposed (in this case, F-2 at Lane Code 16.211(1), and applicable Rural Comprehensive Plan elements and components.

Lane Code 16.252(2) further requires that changes in zone designation will be by ordinances.

Because all of rural Lane County has been acknowledged for compliance with the Statewide Planning Goals (Goals) by the Oregon State Land Conservation and Development Commission (LCDC), compliance with the Goals is not a requirement.

RCP – Goal 2, Policy 27(a) provides that circumstances qualifying for consideration by the Board of Commissioners may include one or more of eight listed categories. This application was made and asserted under the following two categories:

27.a.ii. – Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Nonimpacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

27.a.vii. – Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.

Once an application is deemed to meet any of the eight categories, the inquiry shifts to one of determining the correct zoning classification using the relevant criteria as applied to the specific facts. As explained in more detail below, the relevant facts for determining the correct zoning classification are the currently existing facts.

Three policies of the Rural Comprehensive Plan are deemed applicable to the designation of Forest Lands. Goal 4, Policy 1 deals with conservation of forest lands. Goal 4 policies 2 and 15 deal with the identification of impacted (F-2) and nonimpacted (F-1) lands. Each will be described and applied in more detail in section V. below.

The RCP Goal 4 policies for distinguishing between F-1 and F-2 lands focus on whether the subject property is developed with residences or non-forest uses, whether the subject property and "generally contiguous" lands are predominately ownerships of 80 acres or less, whether the property is "generally contiguous to residences and 'developed or committed' areas," whether the property is provided with a level of access and public facilities and services intended for direct services to rural residences and whether the subject property and contiguous ownerships are primarily under commercial forest management. The specific wording of these standards is spelled out and applied to the relevant facts in Section V. below.

III. PROCESS HISTORY

The Conformity Determination process and Lane Code Chapters 14 and 16 together allow an application to be submitted by a party with an ownership interest in the subject property. They further require a properly noticed public hearing by the Lane County Planning Commission (LCPC) with a resulting recommendation to the Board of County Commissioners (BCC) followed by a properly noticed de novo public hearing by the BCC. The BCC is the ultimate Approval Authority. The Rural Comprehensive Plan, Goal 2: Policy 3, requires that "[a]ll products of the County Planning Process shall be made available for public review and comment and shall be adopted through the hearing process." Pursuant to those laws and policies, the following events occurred:

- On July 14, 2004, a legal ad was published in The Register Guard, providing notice of the LCPC public hearings in Harris Hall of the Lane County Public Service Building on August 3, 2004.
- On July 15, 2004, LMD mailed to the Oregon Department of Land Conservation and Development (DLCD) a notice of the public hearing and pending adoption, and two copies of the proposed conformity determination amendment.
- On August 3, 2004, the LCPC conducted a public hearing on the proposed Conformity Determination Amendment (PA 04-5276) Ordinance No. PA 1212 requesting consideration of a change in zoning designation from Nonimpacted Forest Land (F-1, RCP) to Impacted Forest Land (F-2, RCP) pursuant to the qualifying circumstances of Goal Two, Policies 27.a.ii. and 27.a.vii:
- On October 5, 2004, the Lane County Planning Commission (LCPC) deliberated in a work session on the policy issue of what constituted a "legal lot" for the purposes of land use actions in 1984, which included qualifying for consideration under Rural Comprehensive Plan – General Plan Policy Two - Policy 27.a.ii.
- On October 5, 2004, the LCPC approved a motion by unanimous vote (7-0) to apply a common sense interpretation to the 1983-1986 definition for "legal lot" in Lane Code Chapter 13 and 16, based on the clarification of

ORS 92 with the enactment of HB 2381 in 1985 by the Oregon Legislative Assembly, and Lane County's adoption of three ordinances in 1986 (Ordinance No. 10-86, Ordinance No. 11-86, and Ordinance PA 921); that contiguous, discrete parcels created lawfully by recorded deeds or real estate contracts prior to the 1983-1986 period were not merged during that period, and were during that period and are today, discrete legal lots.

- On October 5, 2004, the LCPC reviewed the merits of the proposed amendment application pursuant to Goal Two, Policy 27.a.vii. and forwarded a recommendation to the Board of County Commissioners for denial of the Conformity Determination Amendment request (PA 04-5276). The LCPC decision was based on a conclusion that text errors were more likely to occur than map errors and did not expressly apply the Goal 4 Policies.
- On March 2, 2005, a legal ad was published in *The Register Guard* providing notice of the BCC public hearing in Harris Hall of the Lane County Public Service Building at 1:30 PM on March 30, 2005.
- On March 30, 2005, the Board of County Commissioners conducted a public hearing on the proposed Conformity Determination Amendment (PA 04-5276) Ordinance No. PA 1212 requesting consideration of a change in zoning designation from Nonimpacted Forest Land (F-1, RCP) to Impacted Forest Land (F-2, RCP) pursuant to the qualifying *circumstance* of Goal Two, Policy 27.a.ii. and Goal Four, Policy 15 *characteristics*, or Goal Two, Policy 27 a.vii. *circumstance*.
- On May 4, 2005, the Board of County Commissioners deliberated and by a majority of 3 to 2 tentatively approved the requested zone change from F-1 to F-2 subject to the preparation and adoption of Findings of Fact and Conclusions of Law in support of Ordinance No. PA 1212. As part of that decision, the Board of County Commissioners adopts, as its own, the LCPC interpretation of RCP Policy 27.a.ii. that contiguous, discrete parcels created lawfully by recorded deeds or real estate contracts prior to the 1983-1986 period were not merged during that period, and were during that period and are today, discrete legal lots.

IV. THE RECORD

The record in this matter consists of: 1) Application, 2) the testimony and evidence received before, during and following the LCPC public hearing on August 3, 2004, 3) the deliberations of the LCPC on October 5, 2004 including findings of fact, conclusions and recommendation to the Board of Commissioners (BCC), 4) the testimony and evidence received before, during and after the BCC public hearing on March 30, 2005, 5) the BCC deliberations of May 4, 2005, 5) Ordinance No. PA 1212 including these findings, and 6) the LMD files on this matter.

V. APPLICATION OF THE CRITERIA TO THE FACTS

Qualification for Consideration Under Conformity Determination

As noted above, the first step of Conformity Determination is to determine whether the application qualifies for further consideration under any one or more of the eight categories listed at RCP – Goal 2, Policy 27. a. The two categories asserted in the application and subsequent applicant statements were:

27.a.ii. – Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Nonimpacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.

27.a.vii. – Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.

Evidence was presented by the applicant indicating both that “maps used by staff to designate property Nonimpacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property,” and also that there was an inconsistency between the text of an ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram.

Opposition testimony asserted that the legal lots actually existing in 1984 could not have been recognized by Lane County because of certain wording in the Lane Code that appeared to merge the four legal lots into a single legal lot.

The BCC, by accepting as its own the LCPC recommendation regarding legal lots noted above, finds that there were four legal lots within the subject property, and others within the vicinity that were not identified on the maps used by staff in 1984. As a result, the BCC concludes that the application is eligible for further consideration as to the proper zoning.¹

Identification of F-2 and F-1 Forest Lands Using the Goal 4 Policies

The BCC takes notice that subject property is already designated “forest lands” by the Rural Comprehensive Plan (RCP) and that the designation will not change when the property is zoned F-2.

¹ The Board’s tentative motion included both a finding that the maps used by staff did not display actual existing legal lots and a conclusion that the Goal 4 policies would have dictated F-2 zoning. For clarity, these findings separate those two decisions into separate sections. The first deals with the map errors, the second with the determination of the proper zoning. Because a property need qualify under only one Conformity Determination category, it is unnecessary for the Board to find an inconsistency between the ordinance and map that established F-1 zoning on the subject property. The Board does, however, take notice that the Planning Commission’s consideration was based on a finding that such an inconsistency did exist.

As noted above, the choice between F-1 and F-2 is governed by three RCP policies. They are Goal 4, Policies 1, 2 and 15. Facts demonstrating that these policies are met are set forth immediately below. The zone change is also governed by criteria contained in Lane Code 16.252(2). Facts related to those criteria are set forth in Section V. below.

Goal 4, Policy 1. Conserve forest lands by maintaining the forest land base and protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

The BCC finds that the evidence demonstrates that this zone change will not adversely affect the economic efficiency of forest practices on the subject property. In fact, it will enhance the opportunity to make the property productive. Specifically, this property is part of a small, isolated area of F-1 zoned land. There are 263 parcels ten acres or less within one mile from the subject property. That parcelization pattern currently impacts the ability to perform large-scale industrial forest practices.

The BCC further finds that F-2 zoning will continue to conserve the land for forest use because only forest-compatible uses are allowed. Given the lack of highly productive soils and other site factors described by the evidence, the Board believes that forest practices that are uneconomical for an offsite manager could be carried out economically by a resident small woodland owner using more labor-intensive methods.

Based on the above facts, the BCC concludes that this zone change is consistent with RCP - Goal 4, Policy 1.

Goal 4, Policy 2. Forest lands will be segregated into two categories, Non-impacted and Impacted and these categories shall be defined and mapped by the general characteristics specified in the Non-Impacted and Impacted Forest Land Zones General Characteristics.

This policy refers to the characteristics set forth in Goal 4, Policy 15 that are applied to this application below. The record indicates uncontested evidence that these policies were crafted and used at a time when zoning was being established for the entire rural portion of Lane County.

The BCC finds that, in subsequent cases where individual parcels were rezoned, the Lane County Hearings Officials have commented that the criteria are not ideally suited for small-scale application. They note that the criteria were intended to look at entire neighborhoods or "large swaths" of land. The Board rejects the assertion that the Goal 4 criteria are restricted to considering only those parcels actually adjoining the subject property.

The BCC finds that this commentary by the Hearings Official is especially relevant to this case. As noted elsewhere, the subject property is adjacent to three parcels larger than 80 acres. They lie to the immediate west and south. If one looks one tier of lots further,

however, they will see hundreds of small parcels virtually surrounding the property, many with dwellings and zoned for Rural Residential use, all of which impact the ability of the subject property to be managed for large-scale industrial forestry. As explained below, it is appropriate to consider this neighborhood contextual pattern when applying the Policy 15 criteria.

Application of the Specific Goal 4, Policy 15 Criteria.

In cooperation with the Oregon State Department of Land Conservation and Development (DLCD), Lane County adopted a matrix of criteria to distinguish between F-2 and F-1 Forest Lands. The BCC takes notice that these criteria were adopted as Rural Comprehensive Plan Goal 4 - Policy 15 as follows in part:

"Goal Four - Policy 15. Lands designated with the Rural Comprehensive Plan as forest land shall be zoned Non-Impacted Forest Lands (F-1, RCP) or Impacted Forest Lands (F-2, RCP). A decision to apply one of the above zones or both of the above zones in a split zone fashion shall be based upon:

a. A conclusion that characteristics for the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b. and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion."

The following sections set forth each of the specific Goal 4, Policy 15 criteria followed by a recitation of the evidence found to be true and relied on by the Board of Commissioners.²

b. Non-impacted Forest Land Zone (F-1, RCP) Characteristics:

(1) Predominantly ownerships not developed by residences or non-forest uses.

Past Hearing Official decisions in requests to rezone property from F-1 to F-2 have applied this criterion to the subject property itself. The four legal lots within the subject property have no dwellings or non-forest uses on them. The BCC concludes that these facts taken alone support F-1 zoning. The Board notes, however, that the staff report documents the presence of 32 dwellings and a Lane County shop within the nearby area. This wider look at development patterns may be more in line with the original intent of the Goal 4 criteria to look at both the subject property and its surrounding context.

(2) Predominantly contiguous ownerships of 80 acres or larger in size.

² Staff noted, and the Board agreed, that there are actually five F-1 criteria and four F-2 criteria. Because of a typographical error in the current version of the Comprehensive Plan, two of the F-1 criteria are merged into one subsection (subsection b.(4)). For clarity and proper analysis, those two will be discussed separately.

The Board notes that, when this standard was originally implemented in 1984, it was applied to the "area" under consideration for zoning. Almost always, those 'areas' contained multiple tax lots and ownerships. The issue was whether the "area" was made up of contiguous large ownerships. If so, it merited F-1 zoning.

The Board believes that consistent application of this criteria would apply it to just the subject property because that is the relevant "area" under consideration for rezoning. This approach is consistent with facts set forth in the staff report. The subject property consists of four legal ownerships, all substantially smaller than 80 acres. The Board concludes that the property would, therefore, not possess this F-1 characteristic.

Past Hearing Official decisions have, with reluctance, focused on contiguous properties because the area proposed for rezoning in those cases contained only one lot.

This ambiguity in the use of this criterion is reflected in the most recent F-1 to F-2 decision, in which the Hearings Official commented:

"These characteristics are not clearly written so that they can easily apply to a question of redesignation. They were written to describe the original designation process, which looks at larger swaths of territory."

The Board believes that it is appropriate to look at both the subject property and the adjacent contiguous parcels.³ Logically, both will have an impact on whether the property is better suited to large-acreage industrial forestry or to smaller-scale woodland operation. Nearby smaller parcels can have an acknowledged chilling effect on large-scale industrial forest practices. Likewise, when the subject parcel itself is composed of small legal lots, they may be sold to individual owners and used as small woodlands consistent with relevant land use policies and laws. Either way, the result is not conducive to the type of large-scale, industrial forestry associated with F-1 zoning.

Adjacent Parcels

If one looks at just adjoining parcels, the result is evenly split between F-1 and F-2 characteristics as shown by the following uncontested facts:

The subject property's contiguous parcels to the west are Tax Lot 2600 (97.06 acres) and Tax Lot 101 (124.20 acres). To the south, Tax Lot 1400 is 139.23 acres. These three parcels would fall into the "over 80 acres" category.

Tax Lot 2202 to the north is 16.54 acres. A Southern Pacific Railroad right-of-way borders the subject property to the east. A previous hearings official decision suggests that one must look beyond the railroad right-of-way. East of the railroad lie Tax Lot 3800 (20.12 acres) and Tax Lot 1600 (21.49 acres). Thus, there are three contiguous parcels in the "under 80 acres" category.

³ In fact, this is actually built into the criteria further down at Policy 15 (c) (2), which has consistently been held to apply to the subject property itself.

The Board finds that, at this point, the analysis is indeterminate; half of the contiguous ownerships are larger than 80 acres and half are smaller.

Subject Parcels

When the four separate ownerships within the subject property are added to the equation, there are seven parcels under 80 acres and three parcels over eighty acres.

Based on these facts, the Board concludes that the subject parcel does not exhibit this F-1 characteristic. The Board takes notice that the staff report applies this criteria to just the subject parcel and notes that all of the parcels are less than 80 acres in size.

In conclusion, whether considering the subject property itself or the subject property plus its contiguous parcels, the Board concludes that the area under consideration for rezoning does not have the F-1 characteristic of being "predominantly contiguous ownerships of 80 acres or larger in size." These facts indicate F-2 zoning.

(3) Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm uses.

The following uncontested evidence relied on by the Board indicates that the lands contiguous to the subject property vary in their uses. To the north lies Tax Lot 2202, which contains a forest-related dwelling and is zoned F-2. This property is on forest tax deferral and appears to be growing trees. The Board presumes this is a small woodland operation.

To the west, Tax Lot 2600 appears to be primarily in farm use, with some trees growing on its eastern and southern sides. There are two residences on this parcel. A portion of this property is on forest tax deferral and the other portion is on farm tax deferral. Again, the Board presumes this is a commercial operation at some level.

Tax Lot 101 is in commercial forest use. This property has been logged in the past and is currently growing a new crop of trees. A portion of the property is also in farm use. This property is on farm/forest tax deferral.

Tax Lot 1400 to the south is in forest use including recreational bridal trails. Most of this parcel was originally part of Tax Lot 401 and was logged in 1993. Except for areas left intact in buffer zones, this area was replanted and is currently growing trees commercially.

The railroad parcels to the east are not in farm or forest use. Looking beyond the railroad, Tax Lot 3800 is an industrial site and is not in farm or forest use.

Tax Lot 1600, east of the railroad, contains a residence and trees. This parcel is not in farm use, nor does it appear to be in commercial forest use. It is a narrow, 21.49-acre parcel that lies between the railroad and Lost Creek. At its northern end lie several roads that provide access to the industrial property to the north. Likely, many of the trees growing on the property are not available for commercial forestry because of the stream

running lengthwise down the entire property. In the past, this parcel provided access to the forestry operation on Tax Lot 401 across the railroad. Access across the railroad is no longer available. This parcel is, however, on forest tax deferral.

In sum, the Board finds that commercial farm or forest uses predominate on adjacent properties. These facts indicate F-1 zoning. The Board notes, however, that three of the adjacent parcels are zoned F-2, which is exactly what this applicant seeks.

The Board also notes that the staff report lists facts suggesting that it is appropriate to consider uses beyond just the immediately adjacent property. Within that larger area there are two unincorporated communities, 65 dwellings outside of the communities plus a mixture of commercial industrial and public uses. The Board concludes that these facts support the applicant's position that the subject property lies within a developed area not ideal for F-1 zoning.

(4) Accessed by arterial roads or roads intended primarily for forest management.

The Board takes notice that the primary access road is Rattlesnake Road, a two-lane "major collector" county road within a 70-foot right-of-way and that such a road is not an "arterial." According to the County Surveyors records, Rattlesnake Road is neither a farm-to-market road nor a forest road. An easement through Tax Lot 2400, 2100, and 2202 provides unrestricted non-exclusive access from Rattlesnake Road to the subject property. Thus, the Board concludes that the property does not possess this F-1 characteristic.

(5) Primarily under commercial forest management.

Uncontested evidence indicates that the subject property is currently under commercial forest management. The majority of the subject property was logged in 1993. Some smaller portions were logged in 2000. The property has been replanted at a stocking rate of 200 trees per acre. The Board concludes that these facts indicate F-1 zoning.

c. Impacted Forest Land Zone (F-2, RCP) Characteristics:

a. Predominantly ownerships developed by residences or non-forest uses.

The Board finds that the subject parcel contains no residences or non-forest uses and concludes that this fact indicates F-1 zoning. But see comment at b.(1) above regarding nearby dwellings.

b. Predominantly ownerships 80 acres or less in size.

The Board notes, as stated above, that this standard has uniformly been held to apply to the area under consideration for rezoning. As such, the evidence relied on by the Board indicates that subject property contains four parcels in separate ownerships, each less than 80 acres. The Board concludes that this fact indicates F-2 zoning.

The opponents have indicated that they agree with the criteria used here but assert that the criteria should be applied to only those facts that existed in 1984. The Board rejects this interpretation based on the following:

- a. To begin, the Conformity Determination process itself expressly states that a basis for changing the zoning would be to reflect "lawfully existing (in terms of the zoning) uses."
- b. It would defy common sense, for example, to rezone property based on a prior commercial or industrial use that had been demolished and replaced by a resource use.
- c. The legislative history of the Conformity Determination process includes a statement that: "*An errors or omission policy (now known as Conformity Determination) policy is a pact between a private property owner and the County to acknowledge existing circumstances and provide relief.*" (Emphasis added.) It also includes a statement from the County Administrator that any resulting re-designation would be a result of "*conforming the zoning to the actual use.*"
- d. The Lane County Hearings Official recently held: "Rezoning requires that the original process of designation be revisited to see if the factors that originally supported designation as F-1 have changed to such an extent that a change to F-2 is now justified." (PA 99-5789 – West) (Emphasis added.)

- c. *Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.*

Again, as noted above, when only the immediately adjacent property is considered, there are three tracts containing more than 80 acres and three containing less than 80 acres. Of these, three contain residences and one contains an industrial site.

When the four parcels within the subject property are counted, there are 7 tracts less than 80 acres. There are no residences on the subject property.

The Board believes that, because this criterion is stated as "generally contiguous," it is appropriate to consider the larger, surrounding area just as was done when the original zoning of Lane County was created.

As described below, when the land use one tier of lots away from the subject property is considered, the uncontested evidence shows that the subject property is virtually surrounded by developed or committed rural residential and industrial areas developed as small parcels with residences.

Surrounding Area Analysis

Evidence relied on by the Board indicates that the area being considered for zoning in 1984 was more highly parcelized than the working map showed and should have been zoned F-2 as were the extensive areas to the west, southwest and north containing parcels smaller than 80 acres.

Uncontested evidence in the record shows that the subject property exists in the context of a neighborhood that includes two communities (Trent and Dexter) and that forms a ring of rural residential and industrial properties virtually surrounding the subject property.

Review of Assessor's maps shows that within a one-mile radius from the perimeter of the subject property there are 334 parcels. Of those, 263 parcels (79%) are less than 10 acres, 61 are between 10 and 80 acres, and only 10 parcels are over 80 acres.

Of the 10 parcels over 80 acres, two are zoned RPR - Rural Parks and Recreation, three are zoned EFU - Exclusive Farm Use, two are zoned F-2, and three are zoned F-1. The subject property, the two contiguous F-2 zoned parcels and the two contiguous F-1 zoned properties are a virtual island surrounded by rural residential, industrial, and small-scale EFU zoned properties.

Based on these facts, the Board concludes that this criterion indicates F-2 zoning.

d. Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences.

The Board notes that the Lane County Rural Comprehensive Plan, at Goal 11 Public Facilities and Services, Policy 6.b., specifies no minimum service level of public facilities and services for F-2 Impacted Forest Land. The record shows that the subject property is served by the level specified for Rural Residential lands, i.e.: schools, on-site sewage disposal capability, individual water supply capability, electrical service, telephone service, rural level fire and police protection and reasonable access to a solid waste disposal facility.

Opposition testimony had asserted that not every public facility and service was currently in place on the subject property. The Board notes that prior decisions have established that these services must be "generally available" in the neighborhood but need not be actually in place on the subject property.

Opposing testimony alleged that the access road was inadequate. The Board noted that access sufficiency along with specific service availability would be the subject of further permitting process if some sort of development were applied for, but is not a part of a rezoning process.

The record also shows that Tax Lot 2202, to the north, which is served by the same access road, was recently approved for a forest-related dwelling. That permit indicates approval of the access road by the County Public Works Department and the Dexter RFPD.

Based on the above facts, the Board concludes that this criterion indicates F-2 zoning.

Summary

In sum, when totaling all of the F-1 and F-2 characteristics, a conservative count of the criteria shows that the subject property exhibits four F-1 characteristics and five F-2 characteristics. Thus, the Board concludes that the subject property conforms more closely with the proposed F-2 zone than to the existing F-1 zone.

In addition, as explained below, the case for F-2 zoning is further supported by the rezoning criteria of Lane Code 16.252(2).

Application of Lane Code, Chapter 16 – Zone Change Criteria

Lane Code 16.252(2) states as follows:

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 Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged for compliance with the Statewide Planning Goals by the Land Conservation and Development Commission. Any zoning or rezoning 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 in this section."

The relevant individual criteria embodied in the above code section are addressed separately below. As noted above, consistency with the Statewide Goals is not required because there are no unacknowledged areas within Lane County.

General Purposes of Lane Code Chapter 16.

The following four general-purpose statements of LC 16.003 are relevant to this application

- a. *Insure that the development of property within the County is commensurate with the character and physical limitations of the land and, in general, to promote and protect the public health, safety, convenience and welfare.*

The Board believes that development patterns are often a good indicator of the character and physical limitations of the land. As noted above, the subject property exists in the context of an area comprised of small tract rural development and two designated communities.

Evidence relied on by the Board indicates that the subject property has been evaluated by experts and deemed to have soils of a low quality for large-scale commercial forestry. Such land, however, may be economically feasible for operation by a small woodland owner. Based on these facts, the Board concludes that F-2 zoning is consistent with this policy.

b. Protect and diversify the economy of the County.

The Board believes that economic diversity is encouraged by recognizing that not all lands are suited to large-scale industrial forestry and that more labor-intensive resident management is a productive use of some types of land. This diversity recognizes also that human enterprise can take many legitimate forms. The family forest operation, along with the family farm, has a rightful place in the economic matrix of Lane County.

The Board notes that 84 percent of the Lane County's land area is suited to large-scale industrial forestry and is appropriately zoned F-1. F-2 zoning has been applied to about 5 percent of the land area. As such, the Board believes this change will not set a precedent triggering a major shift from F-1 to F-2 zoning.

According to the "Forest Working Paper" produced by the Lane County Land Management Division, the F-2 area contains roughly 8 percent of the commercial forest land in the County. Other uncontested evidence in the record shows that, in the period from 1968 to 1977, that area produced an average of 4.2 percent of the County's annual timber harvest. In the period 1990 to 2003 it produced an average of 9.4 percent of the annual harvest according to the State Department of Forestry.

Thus, the uncontested evidence in the record shows that F-2 land is fully as productive as F-1. It simply uses different methods. Instead of aerial application of chemicals, for example, the tasks of fertilization and vegetation control are often done by mom, dad and the kids working with backpack sprayers and grub hoes.

The same evidence indicates that the economic significance of private, non-industrial small woodlands has become increasingly important over the last 20 years. Our nation has continued to demand affordable timber products. As the proportion of harvest on federal and state lands has declined, the balance must be made up by private lands.

The believes evidence that small woodlands have carried their share of this responsibility. For example, on a statewide basis, small woodlands make up 17% of the state's forest lands and annually produce more than 16% of all timber harvested in the state (Bliss, John C., Sustaining family Forests in Rural Landscapes: Rationale, Challenges, and an Illustration from Oregon, USA, Oregon State University, 2003.)

Based on the above evidence, the Board concludes that the subject property is best suited to making its contribution through F-2 zoning.

c. Conserve farm and forest lands for the production of crops, livestock and timber products.

The Board notes that the F-2 zoning designation has been acknowledged by LCDC to be consistent with Statewide Goal 4 – Forest Lands. The type of dwelling that would be allowed under F-2 zoning is, by definition, forest-related and, therefore conservative of the resource land. Therefore, the Board concludes that this criterion has been met.

d. Protect life and property in areas subject to floods, landslides and other natural disasters and hazards.

The uncontested evidence indicates that there are no flood prone areas on the property nor any identified areas of geologic instability. The applicant has expressed a willingness to execute deed covenants requiring that any forest dwelling development would be sited in recognition of any landslide potential identified through normal geological analysis. The Board notes that this type of restriction can be applied as a condition to any subsequent development permit.

Consistency with the Purposes of the F-2 Zone Classification

The Board notes that the purpose of the Impacted Forest Lands Zone, as stated by LC 16.211(1), is to implement the forest land policies of the Lane County Rural Comprehensive Plan. Those policies recognize that forest lands impacted by small tract development and non-forest uses should be treated differently than non-impacted forest lands in order to conserve and better manage land for forest uses. As demonstrated throughout these findings, the Board concludes that the subject property fits this situation.

Favorable to the Public Interest

Consistency with the public interest can be met by compliance with the Rural Comprehensive Plan (RCP), which is the basic legislative expression of public land use policy adopted by Lane County. See ORS 197.010(11) and 197.015(5). Facts relied on by the Board supporting the conclusion that this proposal is consistent with the RCP are set forth above.

The Board believes that one of the significant features of the RCP and its implementing ordinances is the recognition that forest lands can be conserved, managed and preserved by resident owner/managers. This real-world philosophy is embodied in the basic bifurcation of forest lands into the "impacted" (F-2) and "non-impacted" (F-1) categories, coupled with the ability to place a forest-related dwelling on the impacted lands provided certain standards are met.

The Board notes that this concept is embraced by other well-known and socially responsible resource management groups such as the Oregon Small Woodlands Association (OSWA). Evidence relied on by the Board shows that the OSWA is grassroots organization of more than 2000 members and works cooperatively with the State Department of Forestry, the Cooperative Extension Service and the OSU School of Forestry. The organization emphasizes protection, management and enhancement of Oregon's forest resources and supports family ownership as a means of promoting sustainability, bio-diversity and overall good stewardship of forest lands.

The following excerpts from OSWA adopted policy, as contained in the record in this matter, illustrate the link between forest management practices and on-site resident management:

"Non-industrial private forestry is a stewardship enterprise, and many forest benefits (wildlife habitat, clean water, clean air, open space) accrue to society outside the market place. Oregon's and America's dependence on wood grown on small woodlands continues to increase.

"Many landowners do a better job managing forests when they live on their property. OSWA supports land use laws and regulations that allow for dwellings that provide opportunities to enhance good forest management practices, if such dwellings will not cause conflicts with neighboring forest owners."

VI. Other Opposition Testimony

As is often the case, the record in this matter contains certain testimony and evidence that either do not address relevant criteria or are not stated with sufficient specificity as to be a rational basis for decision making. Included in the former are errors in stated acreage, incorrect assertions regarding the nature of the application, assertions that property line adjustments require a "replat" process and that the property to the north was developed for "housing." Examples of the latter are that approval would "unravel adopted land use plans." The Board concludes that all such testimony and evidence is irrelevant.










VII. CONCLUSION

As noted above, the subject property was originally zoned F-2 in 1984 and then changed to F-1. The evidence shows that, since then, more accurate information is known about the existence of legal lots and residences in the area. The subject property merits F-2 zoning based on the Goal 4 criteria dealing with small-tract parcelization, development in the area and the availability of public facilities and services. The Board finds and concludes that this information qualifies the property for rezoning consideration under the Conformity Determination process.

Also, the evidence presented shows that the economic and social importance of small woodland operation with on-site family management has increased. The Board recognizes the wisdom of its predecessors to create two forest land zoning districts. F-2 zoning provides the best opportunity for the subject property to meet the objectives of Statewide Goal 4. A zone change to F-2 will be consistent and blend nicely with zoning on adjacent lands to the west, north and east.

Based on all of the above, the Board of Commissioners concludes that the most appropriate zoning for the subject property is F-2.

Lane County Zoning Legend

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|---|---------------------------------------|---|--|
|  | F1 - Nonimpacted Forest Lands |  | RR5 - Rural Residential 5-Acre Min. |
|  | F2 - Impacted Forest Lands |  | RR10 - Rural Residential 10-Acre Min. |
|  | E40 - Exclusive Farm Use 40-Acre Min. |  | QM - Quarry & Mining Operations (Comb) |
|  | RPR - Rural Park and Recreation |  | M3 - Heavy Industrial |
|  | RPF - Rural Public Facility | | |

