

W. T. L.

AGENDA COVER MEMO



DATE: October 9, 2006 (Date of Memo)
October 25, 2006 (Date of First Reading)
November 8, 2006 (Date of Second Reading/Public Hearing)

TO: LANE COUNTY BOARD OF COMMISSIONERS

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

DEPT.: Public Works Department/Land Management Division

PRESENTED BY: Thom Lanfear/Land Management Division

AGENDA ITEM TITLE: ORDINANCE NO. PA 1235: IN THE MATTER OF AMENDING THE RURAL COMPREHENSIVE PLAN TO REDESIGNATE LAND FROM "FOREST" TO "MARGINAL LAND" AND REZONING THAT LAND FROM "F-2/IMPACTED FOREST LANDS" TO "ML/MARGINAL LAND", AND ADOPTING SAVINGS AND SEVERABILITY CLAUSES (file PA 04-6308; Dennis)

I. MOTION

1. OCTOBER 25, 2006: I MOVE APPROVAL OF THE FIRST READING OF ORDINANCE NO. PA 1220 AND SETTING THE SECOND READING AND PUBLIC HEARING FOR NOVEMBER 8, 2006 AT 1:30 P.M. IN HARRIS HALL.
2. NOVEMBER 8, 2006: ALTERNATIVE MOTIONS AFTER DELIBERATIONS:
 - A. I MOVE TO APPROVE ORDINANCE NO. PA 1235 WITH THE CURRENT FINDINGS.
 - OR
 - B. I MOVE TO TENTATIVELY APPROVE ORDINANCE NO. PA 1235 SUBJECT TO REVISED FINDINGS TO BE PREPARED FOR FINAL ACTION.
 - OR
 - C. I MOVE TO TENTATIVELY DENY THE APPLICATION IN FILE PA 04-6308 AND DIRECT STAFF TO PREPARE AN ORDER WITH APPROPRIATE FINDINGS FOR FINAL ACTION.

II. ISSUE

The Lane County Planning Commission has recommended a privately initiated minor amendment to the RCP, and companion rezoning request, for denial. This Ordinance sets the matter before the Board for adoption or denial.

III. PROCEDURE

The Board of Commissioners has established these hearing procedures:

1. Announce the hearing is de novo and explain the rules of conduct;
2. Disclose any ex parte contacts and call for abstentions;
3. Request the Director or staff to present an introductory report, explain any graphic or pictorial displays which are a part of the report, read findings and recommendations, if any, and provide such information as may be requested by the Board of County Commissioners ("Board", hereinafter);
4. Allow the applicant to be heard first, on his own behalf or by representatives;
5. Allow other persons to be heard;
6. Allow the Director to present any further comments or information in response to testimony and evidence offered by any interested persons.
7. Allow the applicant to rebut, on his own behalf or by representative, any testimony previously presented to the Board.
8. Conclude the hearing of testimony at this time and close the record, unless the Board continues the hearing or leaves the record open.
9. At the conclusion of the public testimony, the Board has several options:
 - a) Continue the hearing to a date and time certain for the purposes of hearing additional testimony before commencing with deliberations; or
 - b) Leave the record open for additional written testimony. The Board must determine and announce reasonable time periods for the record to remain open for the submittal of additional written information by the applicant and opponents; or
 - c) Close the record and set deliberations for a time specified by the Board, and make a decision based on findings of fact and conclusions in response to the record and testimony.
 - d) Close the record and move directly to deliberations, and make a decision based on findings of fact and conclusions in response to the record and testimony.
10. At the conclusion of deliberations, the Board has several options:
 - a) the Board may adopt the Ordinance with the supporting findings of fact prepared by the applicant; or
 - b) the Board may assign the drafting of revised findings of fact and conclusions to the applicant for adoption at a subsequent reading; or
 - c) the Board may assign the drafting of an Order for denial to the Director.

IV. DISCUSSION

A. Background

On November 29, 2004, application was made to redesignate a parcel of land from Forest Land to Marginal Land and rezone it from F-2/Impacted Forest Lands to ML/Marginal Land. The Lane County Planning Commission recommended denial of the request, following a public hearing on December 6, 2005 and deliberations on April 4, 2006.

The subject property is identified as Map 18-01-33 Taxlot 106. The property consists of one parcel, approximately 102.69 acres in size, located in the vicinity of the unincorporated community of Fall Creek, north of Jasper-Lowell Road

As evidenced in the attachments, the proposal was contested during Planning Commission review. Numerous revisions and supplements by the applicant enabled staff to conclude with a recommendation for approval of the request.

B. Analysis

The application is being made pursuant to Lane Code 16.400, which governs amendments to the Rural Comprehensive Plan, LC 16.252, which governs rezoning actions, and the provisions of 1991 ORS 197.247 (Marginal Lands). That statute no longer exists but its provisions are still available to marginal lands counties (of which Lane County is one) for designation of Marginal Lands. The provisions require evaluating history of use (e.g. income produced) and an analysis of either resource production capabilities of the subject property or an evaluation of the parcelization pattern surrounding the subject property. Although the applicant addressed both options during the Planning Commission review, the applicant has limited the request to the "resource production capability" option for Board review.

State statutory standards invoked by this application are as follows:

ORS 197.247(1)(a) The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. ["income test"]

and

ORS 197.247(1)(b)(C) The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification system used by the U.S. Department of Agriculture Soil Conservation Service, and is not capable of producing 85 cubic feet of merchantable timber per acre per year. ["productivity test"]

Also effective on the decision are several County criteria from Lane Code 16.400, having to do with adoption of a Plan amendment and information required to be developed in support of the request. The applicant's Statement (see Findings – Ordinance Exhibit "C") recites the appropriate local and state standards and applies them to the proposal.

1. Income Tests

ORS 197.247(1)(a) The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.

The review required by this criterion must include all property that makes up a farm or forestry operation during the five years prior to January 1, 1983. The original submittal analyzed only the subject property without consideration for the additional adjacent properties under common ownership during that period of time. The additional taxlots 100, 102, 104, 107 and 600 comprise an additional 12 acres to the south of the subject property. The original submittal was revised to include this acreage in the supplemental submittal of June 3, 2005.

The former owner of the property between 1978 and 1983 is deceased and the current owner purchased the property in 1987. During the applicable time period, the applicant states that he did not witness any farm operations on the subject property and it was not managed as part of a farm operation that produced \$20,000 or more in annual gross income. The

application also provides objective evidence in Exhibit E, examining the property's capabilities for farm uses. The report by Paul Day analyzes the potential for farming on the property and concludes that grazing, hay production, or crop production could not generate over \$20,000 annual gross income during the relevant time period.

The property was apparently managed for forestry operations during the relevant time period as evidenced by the reference to logging operations in the Setchko report (applicant's exhibit "G"). The forestry consultant's report and the supplemental submittal dated June 3, 2005 determine that the operation was capable of producing only \$6,821.74 in gross annual income over a 50 year cycle based on the existing soil types. This income capability is below the required \$10,000 standard.

2. Productivity Tests

ORS 197.247(1)(b)(C) The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification system used by the U.S. Department of Agriculture Soil Conservation Service on October 15, 1983, and is not capable of producing ... 85 cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range, as that term is defined in ORS 477.001(21).

There is no dispute in the record over the first part of the criterion regarding the Agricultural capability classes of the soils on the property. The parties contest the forest capability calculations for the productivity of the soils.

The applicant's forester originally estimated the parcel's capability at 78.175 cubic feet per acre annual, which is under the 85 cubic foot per acre annual statutory limit for ML designation. The supplemental submittal by the applicant [Exhibit 2] adds the additional 12 acres that were under common ownership during the relevant time period to the calculations to determine that the property was capable of producing 80.7 cu.ft./ac./yr. This figure is still below the 85 cu.ft./ac./yr. standard for Marginal lands designation. The analyses are found in the submittal Exhibits 1G and 2.

The Goal 1 Coalition has submitted soils information in Exhibits 43 and 50 which is in opposition to the applicant's conclusion. The analysis concludes that the property is capable of producing 121.6 cu.ft./ac./yr if Ponderosa Pine productivity is considered. Page 8 of 10 of the submittal contains a chart that quantifies the capability ratings to be assigned to each soil type identified on the property. The Goal 1 analysis assigns higher productivity values to the soil map units 43C, 43E, 107C, and 138E based upon the assumption that these soils are suitable for Ponderosa Pine species and values should be assigned to individual soil components of the soil complexes found on the subject property. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from a document that has not been entered into the record: *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003.

Soils forest productivity data can be found in several sources:

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

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

The Goal 1 Coalition submittal maintains that the Goal 4 provisions found in OAR 660-006-0010 and 660-006-0005 governs the methodology to be used in the assignment of forest productivity ratings for the subject application. However, nothing in the statutory provisions identify these rules as requirements that apply to a Marginal Lands determination or prevent Lane County from determining forest productivity ratings from any credible source. The administrative rules may be useful to use as guidelines when making a determination regarding the appropriate ratings to assign a particular soil unit, but they are not necessarily governing. LUBA made a footnote to this effect in the *Carver* decision (footnote 11).

Of the 8 soil units identified on the subject property, there are forest productivity ratings in the *Soil Survey* for two units only: Dixonville 41C & E.

Dixonville 41C & E

There is no dispute in the record over the ratings for these two soil units.

116G rock outcrop – Witzel

The rating for this soil unit has been taken from the *State Forester* memo by the applicant and is also not in dispute in the record.

The forest productivity ratings for the remaining 5 types of soil units are in dispute in the record.

113G Ritner

The 149 cu.ft./ac./yr. rating used by the applicant for this unit is derived from the 50-year site index rating in the LCOG publication which lists the latest Natural Resources Conservation Service data as the source. The opponents assign a productivity rating of 175 cu.ft./ac./yr. Both ratings are based upon Douglas Fir species but no source of data is provided by the opponents for the higher rating. It appears that this may just be a typographical error in the table on page 8 of Exhibit 13 since the rating assigned to this soil type is identical to the soil type listed immediately above it.

107C Philomath and 138E Witzel

The productivity capability for these soil units are rated by the applicant using the State Forester's ratings of 45 and 70 cu.ft./ac./yr. respectively. The opponents maintain that these two soil units have a higher productivity rating for Ponderosa Pine species with ratings of

175 and 87 cu.ft./ac./yr. respectively. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from a document that has not been entered into the record: *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003. The applicant's soil scientist has made a reference to the same document in Exhibit 1L: "In this paper it repeatedly states that this data is from a very small sample and should not be used at this time until more long term data can be collected." Unfortunately, neither the applicant's soil scientist nor the Goal 1 Coalition has submitted this document for review in this application.

43C & E Dixonville Philomath/Hazelair Complexes

The productivity capability for these soil units are rated by the applicant using the LCOG document ratings of 54 & 63 cu.ft./ac./yr. respectively. The LCOG ratings are based upon a weighted average methodology that uses a zero productivity rating for two of the three components of the complex. The Goal 1 submittal assigns ratings to each component of the complex and uses ratings for Ponderosa Pine from the unsubmitted Extension Service document for the components that have not been rated in the Soil Survey. The State Forester has assigned ratings of 45 cf/ac/yr to each soil unit. The State Forester's ratings are more reliable for assigning a rating for Douglas Fir productivity to this soil unit and were found to be suitable in the *Carver* LUBA decision (see pages 8 – 10 of Exhibit 25). Without the submittal and evaluation of the document relied upon by Goal 1 for assigning productivity ratings based upon Ponderosa Pine species, it is difficult to base a decision using those ratings in place of the Forester's ratings. The fact that the applicant has relied upon the higher LCOG ratings provides an overestimation of productivity for these two soil units.

Ponderosa Pine

Staff has reviewed the issue of incorporating Ponderosa Pine into the productivity ratings for the property's soil units with the following observations:

- The opponents assignment of values to the relevant soil units is based upon a document *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003 that has not been placed into the record;
- The conversion tables provided with the analysis in Exhibit 13 are difficult to understand but appear to rely upon Exhibit 4, Appendix 4-1. There is no identification of the source of the chart and no sample calculation to follow to verify the values assigned to the soil map units. Staff is unable to follow the analysis from the values in Exhibit 2 through Appendix 3 tables and Appendix 4-1 to validate the numbers in the chart for Ponderosa Pine productivity. No source is provided for Appendix 4-1.

The applicant's forester, a credible forestry expert, has addressed the issue by stating that Ponderosa Pine is worth considerably less money and has the same or slower growth rate as Douglas Fir.

3. Policy Analysis.

Reference is made in the application to Lane County RCP policy 3, Goal 4, as follows:

Forest Lands that satisfy the requirements of ORS 197.247 may be designated as Marginal Lands and such designations shall also be made in accordance with other

Plan Policies. Uses and land divisions allowed on Marginal Lands shall be those allowed by ORS 197.247.

Within the proposed findings is a discussion of applicable plan policies as required above; the findings conclude that policy compliance is achieved. Compliance with ORS 197.247 is satisfied by the Marginal Lands tests discussed earlier in this staff report.

4. Lane Code Requirements.

The remainder of the findings satisfactorily addresses compliance with the code aspects such as: fulfilling the purpose of the ML zone as found in LC 16.214(1); the Plan Amendment requirements of LC 16.400; and the rezone requirements of LC 16.252. Staff agrees with the statements as presented.

5. Lane County Planning Commission Action

The issues were presented to the LCPC for its evaluation in a public hearing on December 6, 2005. Deliberations were conducted on April 4, 2006 with the resulting recommendation of denial to the Board of County Commissioners by a 4-2 vote.

The applicant is expected to be on hand at the Board hearing to present the proposal and respond to questions. Should additional written materials or testimony be produced concerning this item, it will be delivered to the Board in a supplement or delivered at the hearing.

C. Alternatives/Options

Upon conclusion of Board deliberations, a variety of options are available to the Board:

1. If the Board finds that the application meets all applicable criteria for approval:
 - a) Move to adopt the Ordinance as presented with the applicant's findings; OR
 - b) Move to tentatively approve the application and direct the applicant to prepare revised findings corresponding to the Board deliberations for subsequent final adoption.
2. If the Board finds that the application does not meet all applicable criteria for approval, move to tentatively deny the application and direct staff to prepare a Board Order for denial of the application for subsequent final adoption.

D. Recommendations

Staff recommends Option 1(a) above.

E. Timing

The Ordinance does not contain emergency clause.

V. IMPLEMENTATION/FOLLOW-UP

Notice of action will be provided to DLCD, the applicant, and other parties to the proceedings.

VI. ATTACHMENTS

1. Proposed Ordinance PA 1235 with Exhibits "A", "B", and "C"
2. BCC Direction Regarding the Interpretation and Administration of Marginal Lands Applications
3. LCPC Minutes of April 4, 2006 Deliberations
4. LCPC Staff Report for April 4, 2006 Deliberations
5. LCPC Minutes of December 6, 2005 Public Hearing
6. LCPC Staff Report for December 6, 2005 Public Hearing
7. Record Exhibits*
8. File Record Content Sheet

* Includes all evidential materials. Process related exhibits excluded.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

ORDINANCE NO. PA 1235) IN THE MATTER OF AMENDING THE RURAL COMPREHENSIVE
) PLAN TO REDESIGNATE LAND FROM "FOREST" TO "MARGINAL
) LAND" AND REZONING THAT LAND FROM "F-2/IMPACTED
) FOREST LANDS" TO "ML/MARGINAL LAND", AND ADOPTING
) SAVINGS AND SEVERABILITY CLAUSES (file PA 04-6308; Dennis)

WHEREAS, the Board of County Commissioners of Lane County, through enactment of Ordinance PA 884, has adopted Land Use Designations and Zoning for lands within the planning jurisdiction of the Lane County Rural Comprehensive Plan; and

WHEREAS, Lane Code 16.400 sets forth procedures for amendment of the Rural Comprehensive Plan, and Lane Code 16.252 sets forth procedures for rezoning lands within the jurisdiction of the Rural Comprehensive Plan; and

WHEREAS, in November 2004, application no. PA 04-6308 was made for a minor amendment to redesignate tax lot 106 of map 18-01-33, from "Forest Land" to "Marginal Land" and concurrently rezone the property from "F-2/Impacted Forest Lands" to "ML/Marginal Land"; and

WHEREAS, the Lane County Planning Commission reviewed the proposal in public hearing of December 6, 2005, conducted deliberations on April 4, 2006, and on that date forwarded the matter to the Board with a recommendation for denial; and

WHEREAS, evidence exists within the record indicating that the proposal meets the requirements of Lane Code Chapter 16, and the requirements of applicable state and local law; and

WHEREAS, the Board of County Commissioners has conducted a public hearing and is now ready to take action;

NOW, THEREFORE, the Board of County Commissioners of Lane County Ordains as follows:

Section 1. The Lane County Rural Comprehensive Plan is amended by the redesignation of tax lot 106 of map 18-01-33, from "Forest Land" to "Marginal Land," such territory depicted on Plan Plot 527 and further identified as Exhibit "A" attached and incorporated herein.

Section 2. Tax lot 106 of map 18-01-33, is rezoned from "F-2/Impacted Forest Lands" (Lane Code 16.211) to "ML/Marginal Land" (Lane Code 16.214), such territory depicted on Rural Zoning Plot 527 and further identified as Exhibit "B" attached and incorporated herein.

FURTHER, although not a part of this Ordinance, the Board of County Commissioners adopts Findings as set forth in Exhibit "C" attached, in support of this action.

The prior designation and zoning repealed by this Ordinance remain in full force and effect to authorize prosecution of persons in violation thereof prior to the effective date of this Ordinance.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not effect the validity of the remaining portions hereof.

ENACTED this ____ day of _____, 2006.

APPROVED AS TO FORM

Date 10-17-2006 Lane County


OFFICE OF LEGAL COUNSEL

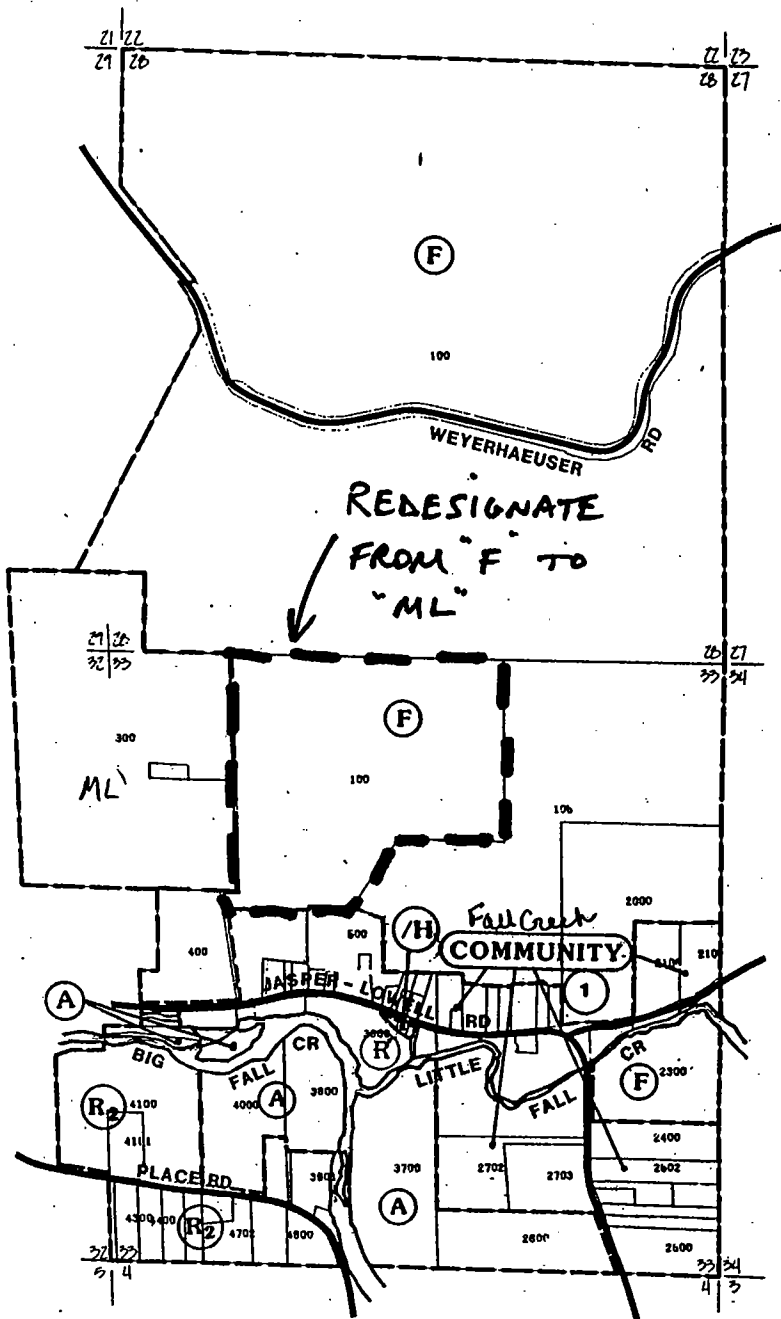
Chair, Lane County Board of County Commissioners

Recording Secretary for this Meeting of the Board

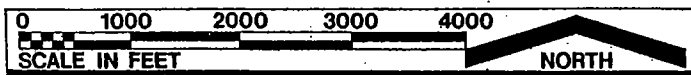
ORDINANCE NO. PA 1235 / IN THE MATTER OF AMENDING THE RURAL COMPREHENSIVE PLAN TO REDESIGNATE LAND FROM "FOREST" TO "MARGINAL LAND" AND REZONING THAT LAND FROM "F-2/IMPACTED FOREST LANDS" TO "ML/MARGINAL LAND", AND ADOPTING SAVINGS AND SEVERABILITY CLAUSES (file PA 04-6308; Dennis)

516

536



528



ane county



OFFICIAL PLAN MAP

PLOT# 527

Township Range Section
18 01 28

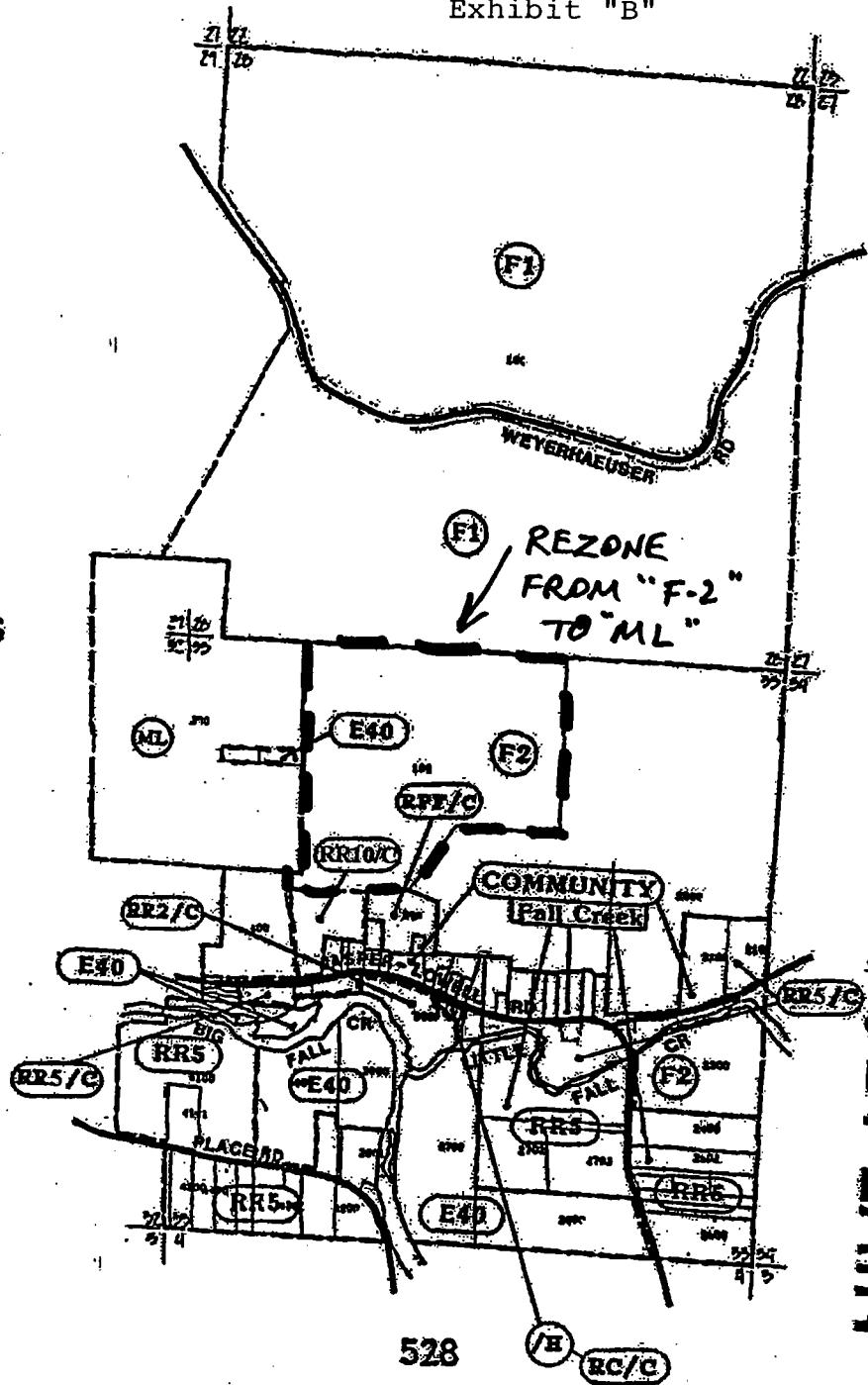
18 01 33

ORIGINAL ORD. # PA 884 DATE 2/29/1984 FILE #

REVISION # 2 ORD # PA1076 DATE 9 / 25 / 95 FILE # PA0658-95

516

536



528

0 1000 2000 3000 4000 SCALE IN FEET		NORTH	
county		PLOT# 527	
OFFICIAL ZONING MAP			
Township, Range, Section		18 01 28 / 18 01 33	
SIGNAL ORD. # PA 884 DATE 2/29/1984 FILE #			
SION # 3 ORD. # PA1076 DATE 9/25/95 FILE # PA0658-95			

FINDINGS OF FACT AND CONCLUSIONS OF LAW

for

MINOR AMENDMENT OF THE LANE COUNTY

RURAL COMPREHENSIVE PLAN

and

ZONE CHANGE FROM IMPACTED FOREST LAND

to

MARGINAL LAND

PA 04-6308

CAROL DENNIS

**P.O. BOX A
PORT ORFORD, OR 97465**

**Submitted by:
P. STEVEN CORNACCHIA
HERSHNER HUNTER, LLP**

Applicant: Carol (Sutton) Dennis
P.O. Box A
Port Orford, OR 97465

Property Owner: Carol (Sutton) Dennis

Property Location: Immediately north of the unincorporated community of Fall Creek

Assessor's Map and Lot: Assessor's Map No. 18-01-33, Tax Lot 106

Current County Zoning: Impacted Forest Land (F-2)

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

1. INTRODUCTION.

The applicant is requesting approval of an amendment of the Lane County Rural Comprehensive Plan (RCP) to re-designate the subject property from Impacted Forest Land (F-2) to Marginal Lands (ML) and an amendment of the RCP map to re-designate the subject property from Forestry to Marginal Lands.

2. BACKGROUND INFORMATION

2.1 General Site Description.

The property subject to this application consists of one parcel, approximately 102.69 acres in size, located in the vicinity of the unincorporated community of Fall Creek, north of Jasper-Lowell Road. The subject property is described as Tax Lot 106 of Lane County Assessor's Map No. 18-01-33. On October 6, 1994, the subject property was determined by Lane County to be a legal lot.

The subject property contains predominantly (80%) Class V-VIII soils, with no High Value agricultural soils, and is not capable of producing at least 85 cubic feet of merchantable timber per acre per year.

The subject property contains approximately 102.69 acres of predominantly open meadows and rock outcroppings. Ribbons of rock exist throughout the meadows where soil is extremely shallow and rock lies just beneath the surface. Approximately three acres of incense cedar are growing in a copse in the southwest portion of the property. The northern boundary of the property contains scattered, multi-aged Douglas-fir, incense cedar and ponderosa pine trees. The property slopes northwesterly from its northern boundary.

Property adjacent to the western boundary of the subject property is zoned Marginal Lands (ML), having been re-designated as Marginal Lands in PA 00-6304 (Donnelly). Property adjacent to the south boundary of the subject property consists of small parcels, all zoned for non-resource use and many of which are included within the unincorporated community of Fall Creek. Tax Lot 18-01-28-101 is adjacent to the north boundary of the subject property and is zoned Non-impacted Forest Land (F-1). Tax Lot 18-01-33-105 is adjacent to the east boundary of the subject property and is zoned Impacted Forest Land (F-2). Tax Lot 18-04-24-100 is adjacent to the northeast boundary of the subject property and is also zoned Impacted Forest (F-2).

The subject property receives the following public services: Lowell School District 71 (schools); Emerald Peoples' Utility District (electrical power); Lowell Rural Fire Protection District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and Oregon State Police.

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

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

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

3. **PLAN AMENDMENT CRITERIA OF LANE CODE 16.400**

The following criteria apply to amendments of the comprehensive plan:

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

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

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

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

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

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

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

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

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

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

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

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

3.3.1 Goal 1 - Citizen Involvement.

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

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

3.3.2 Goal 2 - Land Use Planning

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

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

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

3.3.3 Goal 3 - Agricultural Land.

To preserve and maintain agricultural lands.

The subject property is not agricultural land as defined by Goal 3. It contains soils predominantly classified as Class V-VII by the Soil Conservation Service and is of low

suitability for farming as discussed in Section 3.4 below. Accordingly, this decision is consistent with Goal 3.

3.3.4 Goal 4 - Forest Lands.

To preserve forest lands for forest use.

The subject property is not suitable for growing and sustaining Douglas-fir or other less merchantable tree species as discussed more fully in Section 3.4 below. No other species would grow as fast on the subject property or be as valuable and merchantable as Douglas-fir. Zoning the property for Marginal Lands maintains the property in a resource zone and capable of being used for limited, marginal, resource uses. The subject property's suitability for growing and sustaining merchantable tree species is discussed more fully in Section 3.4 below. Accordingly, this decision is consistent with Goal 4.

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

To conserve open space and protect natural and scenic resources.

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

3.3.6 Goal 6 - Air, Water and Land Resources Quality.

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

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

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

3.3.7 Goal 7 - Areas subject to Natural Disasters and Hazards.

To protect life and property from natural disasters and hazards.

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

3.3.8 Goal 8 - Recreational Needs.

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

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

3.3.9 Goal 9 - Economy of the State..

To diversify and improve the economy of the state.

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

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

3.3.10 Goal 10 – Housing.

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

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

3.3.11 Goal 11 - Public Facilities and Services.

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

The subject property receives the following public services: Lowell School District 4J(schools); Emerald Peoples' Utility District (electrical power); Lowell Rural Fire District 1 (fire and ambulance); Qwest (telephone); LTD (bus service); Lane County Sheriff's Department and

Oregon State Police. While Goal 11 is couched in terms of “urban development,” approval of the application will not result in any urban level of development in a rural area. Approval of the application will result in the creation of 10-acre and larger parcels which have been legislatively determined to be rural in nature and not constituting urban use. The subject property has access to the full range of public services specified for Communities in RCP Goal 11: Public Facilities and Services, Policy 6.j. No additional public facilities and services will be required beyond the current level. The public services identified above are adequate to serve the level of rural uses that the application envisions and provide the demonstration of consistency with Goal 11.

3.3.12 Goal 12 – Transportation.

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

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

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

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

The Board finds that the approval of the proposal cannot result in any of the four situations provided by the TPR criteria listed above. Development of 8 parcels with dwellings will produce typically 10 trips per day for each parcel, resulting in a total trip per day count of approximately 80. Jasper-Lowell Road, a rural major collector, will not experience a change in its functional classification as a result of an additional 80 trips per day and the total trips per day are not inconsistent for a rural major collector and will not reduce the level of service below the minimum acceptable level identified in the TSP (Transportation System Plan).

3.3.13 Goal 13 - Energy Conservation..

To conserve energy.

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

3.3.14 Goal 14 – Urbanization*To provide for an orderly and efficient transition from rural to urban land use.*

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

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

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

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

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

3.3.15 Goal 15 - Willamette River Greenway

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

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

3.3.16 Goal 16 - Estuarine Resources.

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

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

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

3.3.17 Goal 17 - Coastal Shorelines
To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelines, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics.

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

3.3.18 Goal 18 - Beaches and Dunes

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

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

3.3.19 Goal 19 - Ocean Resources

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

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

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

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

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

The subject property was designated Forestry and zoned Impacted Forest Land (F-2) as part of the Lane County Rural Comprehensive Plan adoption process in 1984. Nonetheless, it was so designated and zoned pursuant to County policy which determined that lands that might qualify as marginal lands should be addressed subsequently on a case-by-case basis pursuant to policies in the RCP and the statutory criteria in ORS 197.247(1991 ed).

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

Not applicable.

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

Not applicable.

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

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

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

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

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

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

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

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

(C) The proposed marginal land is composed predominately of soils in capability classes V through VIII in the Agricultural Capability Class Classification System in use by the United States Department of Agriculture Conservation Service on October 15, 1983, and is not capable of producing eighty-

five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range.

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

ORS 197.247(1)(a):

It is found that the applicant has demonstrated that the subject property was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income. The applicant purchased the subject property in 1987 and the prior owner, who owned the property during the applicable period, is deceased. Accordingly, the applicant is unable to provide actual income figures for any farm operations during the applicable period. The applicant, however, is familiar with the use of the subject property during the applicable period, having viewed and researched the subject property for purchase during the applicable period. During that period, the applicant witnessed no farm operations, including the raising of row crops, orchards or livestock, occurring on the subject property during the applicable period. Furthermore, the applicant has attempted to establish and maintain a filbert orchard and has seeded portions of the property for a grass/hay crop and has been uniformly and consistently unsuccessful—both attempts at establishing such farm use could not be maintained and sustained.

In response to the applicant's lack of personal knowledge of the income, if any, generated by farm operations on the subject property during the applicable period, the applicant provides the analysis and conclusions of Agricultural Consultant Paul E. Day. Mr. Day is a prior agricultural specialist with the Oregon State University Extension Office and is qualified to issue an opinion regarding the agricultural productivity of the subject property. Mr. Day has produced an "Agricultural Capacity Review" of the subject property, dated September 23, 2004. His review is attached as Exhibit E to the application.

Mr. Day concludes, for a variety of reasons, that the subject property could not have been managed as part of a farming operation that produced at least \$20,000 in annual gross income during any three years of the applicable period. He concludes that the production of row or specialty crops was not possible or practicable due to lack of available water and appropriate soils. He further concludes that, based upon the soil located on the subject property, cattle production would have been the most likely and most productive agricultural use of the property. He opines that even in a theoretical situation where the entire acreage was devoted to cattle production, it could not have produced \$20,000 in gross income in any of the applicable years. Mr. Day's conclusions demonstrate that the subject property qualifies for Marginal Lands designation and use because it could not have produced the requisite income from farm operations during the applicable period.

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

To demonstrate that the subject property was not managed during the subject period as part of a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income, the applicant provides the professional testimony of a consulting forester, Marc Setchko. Mr. Setchko provides an analysis of the timber-growing potential of the subject property and concludes that the subject property could not have been managed during the subject time period as a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. Mr. Setchko, with both professional credentials and 27 years of experience, is highly qualified to render such an analysis and conclusion. Mr. Setchko's opinion was based on a detailed analysis of the subject property's existing soils, as detailed by the Lane Council of Governments (LCOG) (whose soil map and listing of soils is attached as Exhibit F to the application), their ability to grow merchantable timber and conversion of that growth potential into dollars based upon Douglas-fir log prices of 1983. Mr. Setchko's methodology for determining forest income capability is dictated by the Board interpretation (Direction for Issue 4.). Mr. Setchko's analysis uses a fifty-year growth cycle as directed by the Board interpretation (Direction for Issue 5.) Mr. Setchko uses Douglas-fir log prices because Douglas-fir is the most valuable of all merchantable tree species and generates the most income of all tree species.

Mr. Setchko's analysis and conclusions include ratings for all soils on the subject property and discussion of other issues relevant to the discussion of ORS 197.247(a). Mr. Setchko's analysis is attached as Exhibits G and L to the application and is supplemented by his further testimony, dated June 3, 2005. Mr. Setchko concludes that, at best, the subject property would have been capable of generating an annual gross income from merchantable timber of only \$6,821.74. Mr. Setchko's analysis and conclusion support a finding that the subject property was not capable of being managed as a part of a forest operation that produced an average, over the growth cycle, of \$10,000 in annual gross income.

ORS 197.247(1)(b)(C)

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

Based upon the LCOG soils map and soils listing for the subject property, the capability classes

of soils can be determined by the Lane County Soil Ratings for Forestry and Agriculture, dated August 1997, and prepared by LCOG. A copy of that Lane County/LCOG document is attached as Exhibit K to the application. The document contains a preface on Page 1 that states: "The Lane County Land Management Division, with technical assistance from Lane Council of Governments, compiled this data to assist the public in preparing land use applications. The Natural Resources Conservation Service (NRCS) reviewed the data and methodology." The data contained in the document varies slightly from data contained in the Agricultural Capability Classification System in use by the United States Department of Agriculture Soil Conservation Service on October 15, 1983, but not in a manner that significantly changes the outcome of the calculations regarding percentage of capability classes. The slight variance is discussed below.

By using the Lane County/LCOG document's capability classifications listed with each soil type, a calculation of the percentage of soils in capability classes I-IV and the percentage of soils in capability classes V-VIII can be determined. Soils of the subject property are composed of 41.21% class I-IV soils and 58.79% class V-VIII soils. The noted variance in data in the document relates to the two soil complexes found on the subject property, Dixonville-Philomath-Hazelair complex, 3-12% slopes (43C) and Dixonville-Philomath-Hazelair complex, 12-35% slopes (43E). 43C is listed as Agricultural Capability Class III and 43E is listed as Agricultural Capability Class IV in the Lane County/LCOG document. In previous Soil Conservation Service (SCS) publications, particularly the 1987 publication of 1981 data, 43C and 43E are both listed as Class VI. Using the earlier classifications SCS classifications the calculations would have produced an even higher percentage of Class V-VIII soils than is calculated using the Lane County/LCOG document.

It further found that the applicant has adequately demonstrated, through the evidence provided by Marc Setchko, that the subject property is not capable of producing more than 85 cubic feet per acre per year in merchantable timber.

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

Mr. Setchko, in response to continuing arguments made by Goal One Coalition, prepared an analysis of the Goal One Coalition's arguments regarding the productivity of Ponderosa Pine.

Mr. Setchko opines that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine has a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. Mr. Setchko opines that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine, Hybrid Poplar and KMX have a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. His analysis and conclusions regarding the productivity and merchantability of each of the three species (pages 6-9 of his testimony) is attached as Exhibit L to the application. His conclusions mirror his earlier opinion (Exhibit G to the application) that all other potentially merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir.

Mr. Setchko originally estimated the parcel's capability at 78.175 cubic feet per acre annual, which is under the 85 cubic foot per acre annual statutory limit for ML designation. The supplemental submittal by the applicant adds the additional 12 acres that were under common ownership during the relevant time period to the calculations to determine that the property was capable of producing 80.7 cu.ft./ac./yr. This figure is still below the 85 cu.ft./ac./yr. standard for Marginal Lands designation.

Goal One Coalition has submitted soils information in Exhibits 43 and 50 which is in opposition to the applicant's conclusion. The analysis concludes that the property is capable of producing 121.6 cu.ft./ac./yr if Ponderosa Pine productivity from the opponents' perspective is considered. Page 8 of 10 of the submittal contains a chart that quantifies the capability ratings to be assigned to each soil type identified on the property. The Goal One Coalition argument assigns higher productivity values for Ponderosa Pine to the soil map units 43C, 43E, 107C, and 138E based upon the assumption that these soils are suitable for Ponderosa Pine species and values should be assigned to individual soil components of the soil complexes found on the subject property. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from a document titled: "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003.

Soils forest productivity data can be found in several sources:

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

The Soil Survey contains productivity ratings for soil map units in Lane County, but does not provide forest productivity ratings for soils considered primarily farm soils or composite ratings for soil complex units. The State Forester memo provides ratings for those soils based upon a field review of soil map units in Lane County by State Forestry staff. The Soil Ratings document provides ratings for the soil complexes using a weighted average methodology for the complex-type soil map units. Of the three sources, the Soil Survey is considered the primary source of

soils data for Lane County. The State Forester's ratings for the soils not rated in the Soil Survey is considered the second best source of forest productivity ratings since it was based upon field inspections of sites in Lane County and was produced by the Oregon Department of Forestry. The Soil Ratings document using a weighted average methodology for complex soil map units is considered the next credible forest productivity ratings data for those soil map units.

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

Of the 8 soil map units identified on the subject property, there are forest productivity ratings in the Soil Survey for two units only: Dixonville 41C & E.

Dixonville 41C & E

There is no dispute in the record over the ratings for these two soil map units.

116G rock outcrop – Witzel

The rating for this soil map unit has been taken from the State Forester memo by the applicant and is also not in dispute in the record.

The forest productivity ratings for the remaining 5 types of soil map units are in dispute in the record.

113G Ritner

The 149 cu.ft./ac./yr. rating used by the applicant for this unit is derived from the 50-year site index rating in the LCOG publication which lists the latest Natural Resources Conservation Service data as the source. The opponents assign a productivity rating of 175 cu.ft./ac./yr. Both ratings are based upon Douglas Fir species but no source of data is provided by the opponents for the higher rating. It appears that this may just be a typographical error in the table on page 8 of Exhibit 13 since the rating assigned to this soil type is identical to the soil type listed immediately above it.

107C Philomath and 138E Witzel

The productivity capability for these soil map units are rated by the applicant using the State Forester's ratings of 45 and 70 cu.ft./ac./yr. respectively. The opponents maintain that these two soil map units have a higher productivity rating for Ponderosa Pine species with ratings of 175 and 87 cu.ft./ac./yr. respectively. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from "Establishing and Managing Ponderosa Pine in the Willamette Valley," Oregon State University Extension Service, EM 8805, May 2003. The applicant's soil scientist has made a reference to the same document in Exhibit L: "In this (*Goal*

One Coalition) paper it repeatedly states that this data is from a very small sample and should not be used at this time until more long term data can be collected.” (Emphasis added) Goal One Coalition has not produced any evidence that refutes Mr. Setchko’s analysis or conclusions regarding this matter.

43C & E Dixonville Philomath/Hazelair Complexes

The productivity capability for these soil map units are rated by the applicant using the LCOG document ratings of 54 & 63 cu.ft./ac./yr. respectively. The LCOG ratings are based upon a weighted average methodology that uses a zero productivity rating for two of the three components of the complex. The opponents’ submittal assigns ratings to each component of the complex and uses ratings for Ponderosa Pine from the Extension Service document for the components that have not been rated in the Soil Survey. The State Forester has assigned ratings of 45 cf/ac/yr to each of those soil map units. The State Forester’s ratings are more reliable for assigning a rating for Douglas Fir productivity to these soil map units and were found to be suitable in the Carver LUBA decision (see pages 8 – 10 of Exhibit 25). Furthermore, Mr. Setchko has applied the higher LCOG ratings in his analysis that provides an overestimation of productivity for those two soil map units.

Ponderosa Pine

The following observations are instructive on this issue:

- The opponents’ assignment of values to the relevant soil map units is based upon a document titled “Establishing and Managing Ponderosa Pine in the Willamette Valley,” Oregon State University Extension Service, EM 8805, May 2003, that has been shown by Mr. Setchko to have limited applicability and probative value.
- The opponents’ conversion tables provided with the analysis in their Exhibit 13 are difficult to understand but appear to rely upon Exhibit 4, Appendix 4-1. There is no identification of the source of the chart and no sample calculation to follow to verify the values assigned to the soil map units. Lane County is unable to follow the analysis from the values in Exhibit 2 through Appendix 3 tables and Appendix 4-1 to validate the numbers in the chart for Ponderosa Pine productivity. No source is provided for Appendix 4-1;
- Mr. Setchko, a credible forestry expert, has addressed the issue in Exhibits G and L to the application by, in addition to an analysis based upon his personal experience and training, stating that Ponderosa Pine is worth considerably less money and has the same or slower growth rate as Douglas Fir and that the opponents have not provided any substantial evidence to refute his conclusions regarding the productivity of Ponderosa Pine on the subject property.

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

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

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

1. The "forest operation" income test must be calculated by using current timber prices.

Opponents argue that the applicant has not conducted any analysis of the "income-producing capability" of the proposed marginal lands using "current timber values" to calculate the potential gross income over the growth cycle. Opponents reference language in *DLCD v. Lane County* (Ericcson)¹ that mentions that "current prices" were used in the calculations of the Ericcson application. In that case, however, the use of a particular year's prices was not at issue and LUBA made no determination regarding such use. What the decision in Ericcson did establish, in addition to affirming Lane County's approval of a Marginal Lands re-zoning application, was that on-site evaluation of forest productivity by a qualified expert is weightier evidence than published data or that provided by individuals not qualified as experts in forest management.

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

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

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

Board's Direction:

¹ 23 Or LUBA 33 (1992)

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

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

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

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

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

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

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

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

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

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

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

Board's Direction:

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

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

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

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

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

The second part of Goal One Coalition's second argument is that "(A)n evaluation of a property's capacity for forest production must consider productivity for all merchantable forest

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

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

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

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

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

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

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

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

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

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

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

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

3.5.1 GOAL ONE: CITIZEN INVOLVEMENT.

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

3.5.2 GOAL TWO: LAND USE PLANNING.

3.5.1.1 Policy 25: Changes to Plan Diagram.

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

3.5.3 GOAL THREE: AGRICULTURAL LANDS.

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

3.5.4 GOAL FOUR: FOREST LANDS.

3.5.4.1 Policy 1: Conservation of forest lands.

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

3.5.5 GOAL FIVE: OPEN SPACES, SCENIC AND HISTORIC AREAS AND NATURAL RESOURCES

3.5.5.1 Policy 3: Adequacy of water supply

The adequacy of water supply for the proposed development of the subject property is discussed in Section 3.5.5.2 below.

3.5.5.2 Policy 5: Land use designation commensurate with groundwater aquifer capacities

The subject property and the local Fall Creek watershed are not within an area identified in Lane Manual 13.010 as an area of limited quantity or quality of groundwater. A domestic well exists on the subject property and produces between 25 and 50 gallons of water per minute (gpm). Lane County Application No. PA 00-6304 (Donnelly) includes a Well Data Summary Report as Exhibit "P" and is incorporated herein by reference as though fully set forth. That report was prepared by Casey Jones Well Drilling, Pleasant Hill, Oregon, for 101 wells in Sections 32, 33 and 34 of Township 18 Range 1 W. That report concludes that the area produces an average and median water production of 17 gpm and 15 gpm, respectively. PA 00-6304 also contains evidence that two wells exist on the adjacent property that produce 4.5 gpm and 30 gpm, respectively. That evidence is also incorporated herein as though fully set forth. Such evidence demonstrates that the maximum of eight parcels possible on the subject property will have an adequate supply of water for residential use and such use will not have a negative effect on the domestic water use of adjacent property.

3.5.6 GOAL SIX: AIR, WATER AND LAND RESOURCES

Goal Six considerations have been discussed in Section 3.5.5 of this application and are applicable to this section.

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

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

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

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

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

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

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

3.7 Zone Change Criteria of Lane Code 16.252 Lane Code 16.252(2)(Criteria).

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

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

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

- 1) In conformity with various development rules discussed above, the subject property will be developed commensurate with the character and physical limitations of the land and will thus promote the health, safety and general welfare of the built environment;
- 2) It will provide home construction opportunities that will aid the economy;
- 3) It will conserve other farm and forest lands by locating residential opportunities within a resource zone that allows limited residential development;
- 4) It will aid the provision of affordable housing within the Lane County area by providing reasonable selections for a place to live;
- 5) By virtue of regulations discussed above, it will protect the quality of the land, air and water of the county and will protect life and property in areas subject to flooding.

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

CONCLUSION

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

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

March 1997

Supplement to Marginal Lands Information Sheet

BOARD OF COUNTY COMMISSIONERS DIRECTION REGARDING THE
INTERPRETATION AND ADMINISTRATION OF MARGINAL LANDS
APPLICATIONS

On February 26, 1997, the Lane County Board of Commissioners reviewed the state Marginal Lands law and developed responses to seven issues in the law needing clarification for purposes of administration by Lane County. Those issues are identified below, followed by the direction provided by the Board. Any application for the Marginal Land designation within the Lane County Rural Comprehensive Plan's jurisdiction must be in compliance with the Board's directions. Refer to the Marginal Lands Information Sheet, or to Oregon Revised Statutes 197.247 (1991 laws), for an explanation of the law itself.

ISSUE 1: What is the Marginal Lands concept?

Board's Direction:

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

ISSUE 2: Definition of "Management".

When considering forest land, the entire growth cycle must be considered for evidence of management. This is because even the best managed forest operations may have nothing occurring on the land during the five-year window (1978 - 1982) stated in the marginal lands statute (ORS 197.247(1)(a)(1991 Edition). For farm operations, however, it is hard to conceive of an operating farm on which nothing occurred for five years.

Board's Direction :

No evidence of human activity on the land is required for forest land to be "managed". The conscious decision not to convert the land to another use is enough evidence of management to meet the statutory intent, provided there is a significant amount of merchantable or potentially merchantable trees on the property. Likewise, evidence of timber harvest since 1978 would suffice to show management even if there were no trees currently on the property. For farm land, no evidence of farm use during the 5-year statutory window would indicate that land was not managed for farm use.

ISSUE 3. Managed "as part of" a (farm or forest) operation during (1978-1982).

Does this phrase in ORS 197.247(1)(a)(1991) mean, for example, that if a large timber company owned and managed a 2000 acre tract during the five-year window, and then sold someone a 40 acre portion of non-forest land in 1985, that 40 acres would not be eligible for Marginal Lands designation?

Board's Direction :

The Board found that the law creates a general presumption that all contiguous land owned during 1978-82 was part of the owner's "operation". That presumption could be rebutted, however, by substantial evidence

that the parcel in question was not, in fact, a "contributing part" of the operation. The applicant would bear the burden of producing such evidence.

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

Board's Direction :

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

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

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

Board's Direction :

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

ISSUE 6: Weight of evidence.

One of the main holdings of the Ericsson case, which arose in Lane County, is that on-site evaluation by a qualified expert is weightier evidence than published data. Given this ruling, what is the appropriate role of the parcelization table in Lane Code 16.211(10)(b) and the legislative findings for Goal 4 of the Rural Comprehensive Plan as an income standard?

Board's Direction :

As a matter of administrative ease, and in the absence of other substantial evidence, the parcelization test could still be used. It is one method of identifying the acreage required of a given forest capability classification to achieve the \$10,000 income standard.

ISSUE 7: Ambiguities in the parcelization tests of ORS 197.247(1)(b)(A) & (B).

Is the parcelization test measuring the percent of an area (acreage) or the percent of the number of parcels a "parcel count"? If the test in ORS 197.247(1)(b)(A) is an area test, does the percentage requirement apply to the acreage or to the number of parcels that lie wholly or partly within the 1/4 mile of the subject tract?

Board's Direction :

Regard the tests in ORS 197.247(1)(b)(A) & (B) as "area" tests with the difference being that (A) specifies an area including the subject parcel and land within 1/4 mile and uses a 50% small lot test, whereas (B) increases the area to a minimum of 240 acres but raises the small lot test to 60%.

(Note: This is the position adopted by Lane County in the Jackson case. In that case, Lane County ruled that the area was limited to the 1/4-mile line, whereas DLCD argued that the area line should expand to include the entirety of any parcel partly located within the 1/4 mile boundary. DLCD threatened to appeal the Jackson case on that basis, but did not do so.)

MINUTES

Lane County Planning Commission
Harris Hall - Lane County Courthouse

April 4, 2006
7 p.m.

PRESENT: Ed Becker, Vice Chair; Lisa Arkin, Steve Dignam, Juanita Kirkham, Nancy Nichols, Jozef Zdzienicki, John Sullivan, Todd Johnston, members; Thom Lanfear, Jerry Kendall, Staff

ABSENT: James Carmichael, Chair;

I. Public Hearing: In the matter of adopting revisions to Lane Code Chapter 16.090 "Definitions" Lane Code 16.244 "Floodplain Combining Zone" and Lane Code 10.271 "Floodplain Combining Zone."

Commission Vice Chair Ed Becker convened the meeting at 7 pm.

Mr. Becker called for declarations of *ex parte* contact or conflicts of interest from the commissioners. None were declared.

Lane County Planning Staff Thom Lanfear said the proposal was to revise the flood plain ordinance to bring it up to FEMA standards. He said it was primarily a housecleaning function with a few changes to definitions. He said there had been problems identified with the document in the meeting packet in that the requirements listed in Chapter 16 (requirements applicable to the rural Lane County Area) did not match the provisions set in Chapter 10 (applicable within the urban growth boundary. He said staff would amend the document to have the two match. He stressed that there was no intention of having the standards be different within the urban growth boundary. He said staff would bring the document back at the main meeting.

He opened the public hearing. Seeing no one wishing to speak he continued the public hearing until the date certain of May 2, 2006.

II. Deliberations: PA 04-6308; Request for a Rural Comprehensive Plan Amendment to redesignate 102.69 acres from Forest to "Marginal Lands" and rezone from "Impacted Forest Lands" to "Marginal Lands pursuant to Lane Code 16.400 and 16.252. Tax Lot 106 of Map 18-01-33.

Commission member Juanita Kirkham said she would be unable to deliberate since she was not at the public hearing and had not had a chance to review the materials.

Commission member Todd Johnston declared a conflict of interest and said he would not participate in the first deliberation.

Commission member Nancy Nichols spoke to the inaccuracy of the soil survey map. She noted that the applicant's forestry consultant, Mr. Setchko, had represented that the maps were accurate to 1/1000 of an acre but stated that the area had not been intensively used and carefully mapped and read from a document that stated that some roughly circular included areas were as much as four acres were present in some delineations because they were smaller than the minimum size recommended in the publication scale. She said furnished map was not accurate enough to address the applicant's request.

Commission member Jozef Zdzenicki commented that page five of the supplemental staff report under the Philomath 107(c) 138 (b) section mentioned that the Goal One Coalition had given different productivity ratings for Ponderosa Pine species at 175 and 87 cubic feet per acre per year which exceeded the 85 that was necessary. He said the applicant maintained that Goal One had not provided the documentation to back up the numbers. He said it was up to the applicant to support data provided and not the opponent. He said it was up to the applicant to provide information rebutting the opposition's numbers which skewed the data that the applicant was providing.

Mr. Becker said he intended to vote against the application. He distributed and read prepared comments into the record:

The following is my deliberation for the Dennis/Sutton marginal land application. I am reading this so my comments can be placed into the record in a clear and concise manner.

I intend to vote in opposition to this application. The following are my reasons:

Inadequate Review of the Marginal Lands Proposal

It is important for the planning commission to understand that nobody **other than the applicant's paid consultant have had the opportunity to conduct a field review of the site.** The consultant's analyses indicate that the subject land can produce 80.7 cubic feet per acre, falling short of the 85 cubic feet per acre minimum standard by a mere 4.3 cubic feet per acre. There has been no on site validation of the consultant's analysis by any other interested party, even when only 4cfa separates this parcel from productive to being deemed "Marginal." All the site evidence before supporting their productivity and income test findings are provided solely by the applicant's paid attorney and consultants.

In order for the review process to be objective and transparent, especially when there are so many questions concerning the site's productivity, the County needs to conduct some level of site specific review of the applicant's input. Testimony during the public hearing, and the many photos and comments received afterwards, raises many doubts as to the marginality of this parcel. In this case I don not believe that **relying solely upon the applicant's paid consultants will allow for accurate staff analysis and good land use decisions.** For this reason, I cannot support the application. There are other reasons as well.

The Productivity Test's Conclusion of 80.7 Cubic Feet Per Acre is Highly Suspect

The applicant's attorney has chosen to use the productivity test as one to request rezoning to marginal land. Mr. Setchko has concluded in his June 2004 information that "the subject property

will only produce 80.7 cubic feet per acre per year.” That’s 4.3 cfa less than the 85 cfa minimum criteria, or imagine a cube approximately 1.6 feet X 1.6 feet X 1.6 feet spread over 43, 560 square feet of area, (about a football field in size!). In other words, that’s less than **one six inch dbh tree that is ten feet tall growing on one acre per year.** That is an extremely small amount of biomass for a western Oregon forest to produce, and a very close call to conclude that 102.61 acres near Fall Creek are “Marginal” for producing merchantable timber or agricultural crops. It is a fact that the foothills of the western cascade slope around Fall Creek is known for having excellent timber producing capability.

Furthermore, Mr. Setchko’s report calculates volume per acre using only soil rating tables to obtain site indices. No actual measurements were taken of the site’s timber because Mr. Setchko states in his previous report “selective thinning” removed the merchantable timber leaving only “pre-commercial size or of poor form and health.” Testimony from several of the applicant’s neighbors and photos we all received of the property contradict this statement.

ORS 197.247(c) specifically states “the proposed marginal land is composed predominantly of soils in capability classes V through VIII . . . on October 15, 1983 AND is not capable of producing 85 cubic feet of merchantable timber per acre per year. . .” The key point is that the applicant must not only provide soils analysis **but also provide additional evidence that the subject land is truly not productive. Mr. Setchko’s report provides nothing more than soil rating calculations to determine productivity.**

The methodology Mr. Setchko uses for the Sutton Application is puzzling given his previous reports which state “**the productivity of the soil itself is only one determining factor of a soil’s potential site index rating. Other factors include aspect, ground water levels, moisture content, rainfall amounts, temperature averages, and variations in slope and elevation. These are the reasons that growth and/or productivity of a tree species growing in specific soil type are a reflection of all of the site conditions, not just of the soil itself.**”

You will not find any of this information in the Sutton forest productivity analysis. Why does Mr. Setchko rely completely upon soil type information when he also acknowledges that “. . .the variation within a particular soil type can be large.” Given the same soil, trees on a north slope will grow faster than on a south slope; trees in an area of high rainfall will grow faster than trees in an area of low rainfall, etc. etc.” Variation within and between soil mapping units does exist which is another reason this information alone is not a reliable indicator of site productivity and must be supplemented with field measurement of site index.

Mr. Setchko’s productivity report does not provide any of this information to support his assertion the parcel is unproductive timber land. No tree cruise measurements, no harvest volumes, and no site specific measurements of any type! All we are given is LCOG soil type information as the basis of his conclusion, without any additional environmental information that Mr. Setchko admits is crucial for determining site productivity.

The Lands Surrounding the Applicant’s Parcel Have Been Managed for Timber Harvest Successfully for Many Years.

During the public hearing several of the applicant’s neighbors testified as to how the Sutton Parcel was currently being managed. Though Mr. Setchko makes passing reference that “it has been several years since any logging activities were undertaken on the property.” Written testimony received by Mr. Watson, Ms. DeWees and oral testimony by other neighbors state that timber

harvesting was done in 1996 and 1997. Furthermore, according to the neighbors, trees of sufficient size do exist on the parcel which could be measured for determining site productivity.

This testimony is not only contrary to the statements made by Mr. Setchko regarding remaining timber, but also regarding the land's ability to support reforestation. Setchko states "the owners have planted new conifer seedlings more than once to establish new stands of trees; their efforts have been thwarted by extremely high mortality rates." However, testimony by many of the applicant's neighbors indicate they have never observed any reforestation attempts at all on the property even though they have harvested and successfully reforested their own adjacent lands for many years. Does the applicant have receipts from reforestation crews or of the purchase of nursery stock to validate their reforestation efforts? How can it be that the neighbor's surrounding lands are successfully managed for timber production while the applicant's 103 acres is described as an island of unproductive timberland?

Misleading Information Regarding the Forest Income Test

After acknowledging that "logging activities were undertaken on the property," Mr. Setchko provides no information on amount removed or value obtained. His conclusion that the average annual gross income would have been \$5,773 per year is **completely based again on soil type analysis**. This analysis is made even after acknowledging that recent logging has taken place on the property and cutout data from logging exists, but for some reason is not available from the applicant. Please see the neighbor's testimony on the frequency of logging that has occurred on this property, and how the property was purchased by Mr. Dennis.

In Mr. Setchko's 3/2005 report for the Dahlen application's average gross annual income through a complete rotation was calculated **using actual timber volume growing on the property using actual cutout data from past logging and cruise data of standing trees**. Mr. Setchko used both sets of data to determine the volume that was actually growing on the parcel at the present time. This cutout volume and the cruised volume were added together to calculate the total volume for the entire parcel.

Mr. Setchko's methodology for determining Dahlen's gross annual income is completely different than Sutton, even though they are both marginal land applications on recently logged parcels. When I specifically asked Mr. Cornacchia again for this information during the Sutton hearing, Mr. Cornacchia stated that it was "not relevant" for the income test though his own consultant has previously used it for the Dahlen income test. Why is different methodology being used for similar marginal lands applications?

Mr. Cornacchia further responded that applicant does not have the amounts of volume removed. Mr. Cornacchia later acknowledges that the applicant did receive \$90,000 in timber receipts following the harvest in 1997, but for some reason, neither he nor the applicant has any idea how much timber volume was removed during this harvest operation. Mr. Cornacchia also states that the \$90,000 received is a moot point given the fact that it is under the \$10,000 per year amount over the 50 year rotation. How do we know this if is not addressed in the application and investigated by County Staff?

I find it harder to believe that no other timber harvest has occurred on this property from 1955 through 1997. The fact is that this is forested land and it was likely managed for timber three of the five calendar years preceding 1/1/83. A quick review of the 1979 and 1989 resource photo flights would likely confirm this. (These photos are readily available from WAC in Eugene or the Forest Service Office in Lowell or McKenzie Bridge.)

Furthermore, the application submitted by Mr Cornacchia, (page 15), states that Mr. Stechko concludes that the subject property could not have been managed during the subject time period as a forest operation capable of producing an average over the growth cycle of \$10,000 in annual gross income. Mr. Setchko's opinion was based on a detailed analysis of the subject property's existing soils. Mr. Setchko's methodology for determining forest income capability is dictated by the Board Interpretation (Direction for Issue 4). **The Board's direction actually states the methodology to be used should be "based on the best information available regarding soils, topography etc, determine the optimal level of timber production for the tract assuming reasonable management,"**

It is clear the Board direction requires more than simply a soils analysis otherwise the County Staff could simply obtain the LCOG soils maps and complete the computations without the consultant's input. However, Mr. Setchko again relies exclusively on soil type information to compute the income test even though his own previous reports acknowledge that harvest and cruise volumes are the more accurate determination of the income test.

In my opinion the applicant has not met the burden of proof regarding their land's inability to produce a thriving stand of merchantable timber. Furthermore, the public testimony leads me to believe this is highly productive timberland, and if properly managed will easily exceed the minimum standards of which "Marginal" county lands are measured. Once the logging slash is cleaned up, drainages restored, hazardous chemicals and trash removed and proper reforestation completed, I believe current or future landowners will once again realize a healthy, thriving forest.

Ed Becker
Lane County Planning Commissioner

Commission member Steve Dignam, seconded by Commission member John Sullivan, moved to approve PA 04-6308.

Ms. Nichols read comments into the record:

I first bought forest land in 1970. At one time we had 160 acres certified in the tree farm system. Over the years, I've been to a lot of classes and seminars on growing trees. I've toured Roseburg and Swanson Superior sites. Foresters teaching seminars and leading tours have all been proud of their ability to get the land to produce more wood than one might expect from reading standard calculations like the Lane County Soils Maps. How does it happen that this landowner found such an unusual forest which is so negative about growing trees?

Therefore, even in intensively used and carefully mapped areas, roughly circular included areas as much as 2 acres in size and long narrow included areas as much as 4 acres in size are present in some delineations because they are smaller than the minimum size recommended at the publication scale. (Page 4 of Soil Survey of Lane County)

Mr. Setchko's calculations, assuming the soils maps are correct to 1/1000 of an acre can't be correct. Therefore I cannot give this testimony more weight than that of the adjoining landowners who report trees they planted in 1996 along their border with the Dennis property are doing well. They also report that Weyerhaeuser is growing Ponderosa Pine within a mile of this site. I believe

it is possible, maybe even likely, that this land is capable of growing 85 cubic feet per acre per year.

Mr. Cornacchia points out that no proof of DEQ violations has been provided by the neighbors. Has anyone in a rural area ever tried to get the cops to come without blood on the floor? No one will come even when you catch a thief.

Commission member Lisa Arkin said she would not support the motion. She opined that the land was productive timberland and had mismanaged rather than managed and property owners should not be rewarded for mismanagement of productive timberland. She added that there was no evidence the owner had attempted any hay harvesting which was also a way to make land productive. She said she had requested information from staff regarding trailers on the property and what condition those trailers were in as well as hazardous materials on the site. She said this indicated further mismanagement of the property. She said the applicant had shown no proof of reforestation efforts on the property. She said she agreed with the comments Mr. Becker had read into the record

Mr. Sullivan said he was also disturbed about the condition the land was in, but said there was nothing in marginal land requirements that made condition of land an issue. He added that some of the comments submitted into the record by Mr. Becker were actually facts that were not brought out during the hearing and it could be argued that Mr. Becker was entering new information into the record instead of deliberating.

Mr. Sullivan said approval of the application was not an approval of land division. He said if the application were approved it was not a mandate to divide the land. He said the landowner would have to meet numerous other tests before such a division could happen. He said the application was a proposed minor amendment change and addressed all the items in Lane County Code Section 16.4 and the Oregon State Law concerning Marginal Land.

Regarding the income test, Mr. Sullivan said the land had *not* been managed as a farm in the previous three to five years. He said the statute was very specific in stating that it must have been so managed. He stressed that the only expert witness that the commission had listened to had stated that the forest operation would not generate the required productivity. He said the applicant should not be penalized because the County could not fund an outside independent survey.

Regarding the second test, Mr. Sullivan noted that the applicant had voluntarily met the requirements of two tests rather than one:

- **Productivity:** The applicant had provided the only expert testimony and commonly accepted forest productivity and soil data to show the land's ability to meet productivity guidelines.
- **Parcelization:** There is a conflict of interpretation and the applicant had chosen to use the same parcel test that the Board of County Commissioners have said would be adopted in Lane County.

Mr. Sullivan said the basic logic and spirit of the law and the very well documented James Roberts memo on interpreting the SB 237 that was written in 1983, it only made sense to support the motion. He said there were other underlying factors that had no relevance to a decision made by the commission.

Mr. Becker said his deliberation was based on fact and also based on the record. He said he had tapes of all the meetings as well as written record and offered the material for Mr. Sullivan to review.

Mr. Sullivan said he respected Mr. Becker's efforts but said he did not recall the Dahlen application being brought into the record.

Mr. Sullivan said the commission as a body could not take new fact into consideration without offering the opportunity for rebuttal.

Mr. Dignam noted for the record that he had listened to the tapes of the public hearing. He said he intended to support his motion. He congratulated County Staff and said the staff report was one of the best he had seen in terms of addressing, in detail, the points that had been raised by the commission. He said the staff report had helped him tremendously to come to his decision to support the application. He said the key criteria was ORS 197.247 and added that the applicant had met the requirements of the Income Test. He added that, in part two, the applicant had met the requirements of both the productivity test and the parcelization test. He noted that the applicant had only been required to meet one of those tests and had chosen to meet the requirements of both. He said the applicant had properly applied the March 1997 Lane County interpretations as provided by the Board of Commissioners. He stressed that these were the factors that the commission decision should be based on. He added that other things such as trailers on the property, potential presence of oil drums, water issues and legal lot arguments were not relevant to the commission's decision. He said the testimony submitted regarding soil analysis, at a minimum, appeared to be unconvincing and, in his opinion, wrong. He added that the opposition's testimony about forestry methods were, at a minimum, unconvincing, and more appropriately, wrong. He said the opposition's testimony regarding parcelization appeared to him to be wrong. He stressed the applicant had met the relevant requirement tests as outlined in ORS 197.247 and as clarified in the March 1997 Board of Commissioner interpretation.

Commission member Jozef Zdzenicki said he was opposed to the application. He said Mr. Setchko was not very convincing. He said he did not trust his analyses.

Ms. Nichols said she had spent a lot of time reading the parcelization portion of the information in the record. She said she did not think that the parcelization test had been proven.

Ms. Arkin said a parcel that was surrounded other properties that had significant timber growth. She said she did not see an sense in saying that the one parcel was incapable of producing a timber harvest.

The motion failed 4:2 with Commissioners Dignam and Sullivan voting in favor.

Ms. Arkin, seconded by Mr Zdzenicki, moved to recommend denial the application to the Board of County Commissioners. The motion passed 4:2 with Commissioners Sullivan and Dignam voting in opposition.

LANE COUNTY PLANNING COMMISSION

Supplemental Staff Report

Meeting Date: April 4, 2006

File PA 04-6308

Report Date: March 28, 2006



LAND MANAGEMENT DIVISION

http://www.LaneCounty.org/PW_LMD/**I. PROPOSAL****A. Applicant / Owner:**

Carol Dennis
P.O. Box A
Port Orford, OR 97465

Agent:

Steve Cornacchia
180 East 11th Avenue
Eugene, OR 97401

B. Proposal

Request for a Rural Comprehensive Plan Amendment to redesignate 102.69 acres from "Forest" (F) to "Marginal Land" (ML) and rezone from "Impacted Forest Lands (F-2)" to "Marginal Lands (ML)" pursuant to Lane Code 16.400 and 16.252.

II. RECOMMENDATION

This proposal appears to meet applicable approval criteria and guidelines. Staff recommends:

- 1.) Approval of the Plan Amendment from Agricultural land to Marginal Land, and
- 2.) Approval of the Zone change from E-40 to ML.

III. BACKGROUND

The Planning Commission heard testimony on this proposal at the December 6, 2005 hearing. The record was left open for the submittal of additional materials. Attached as Attachment 1 is a listing of all materials submitted into the record for this application. Items #1 – 12 were distributed to the LCPC prior to the hearing. Items # 13 - 14 were distributed at the hearing. Copies of those two items are included with this packet in order to provide a complete record for any Commission members who were not in attendance at the December 6, 2005 hearing but wish to participate in the deliberations for this item. Those members will need to listen to the hearing tapes available in Land Management prior to the deliberations. Items #20 – 50 were submitted during the open record period after the hearing.

IV. DISCUSSION**A. APPLICABLE CRITERIA**

The proposal is a Minor Amendment pursuant to Lane Code 16.400(6)(h) and Oregon state law concerning the designation of Marginal Land (1991 ORS 197.247). State statutory standards invoked by this application are as follows:

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

operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. ["Income test"]
and

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

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

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

(C) The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification system used by the U.S. Department of Agriculture Soil Conservation Service, and is not capable of producing 85 cubic feet of merchantable timber per acre per year. ["Productivity test"]

Also effective on the decision are several County criteria from Lane Code 16.400, having to do with adoption of a Plan amendment and information required to be developed in support of the request. The applicant's Statement (attached to original staff report) recites the appropriate local and state standards and applies them to the proposal.

Approval of the Plan amendment and rezoning could result in a minimum of 5 parcels of 20 acres each as authorized in the Marginal Lands (ML) zone, Lane Code 16.214. A potential for 8 parcels is identified by the applicant. Parcel size is limited to a 20-acre minimum for all parcels adjacent to the resource lands (F-1, F-2, E40) to the north, east and west and 10-acre parcels can be authorized next to the lands to the west and south (ML, RR-5, and RPF). It needs to be noted here that approval of the Plan amendment/rezone does not constitute approval of land division, which is a separate administrative process involving conditions of approval and notice to neighboring landowners. No potential development plan for the parcels has been submitted.

B. Analysis

This analysis supplements the staff report created for the December 6, 2005 LCPC hearing. The application must comply with the "Income Test" portion of the statute [ORS 197.247(1)(a)] and one or more of the other tests found in ORS 197.247(1)(b): (A), (B) or (C). The applicant has chosen to show conformity with both the "Productivity test" (C) and the "Parcelization Test" (A) although it is necessary to meet only one of those tests.

1. Income Tests

ORS 197.247 (1)(a) (1991 ed.): The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross

income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.

The review required by this criterion must include all property that makes up a farm or forestry operation during the five years prior to January 1, 1983. The original submittal [Exhibit 1] analyzed only the subject property without consideration of the additional adjacent properties under common ownership during that period of time. The additional taxlots 100, 102, 104, 107 and 600 comprise an additional 12 acres to the south of the subject property. The original submittal and productivity analysis was revised to include this acreage in the supplemental submittal of June 3, 2005 [Exhibit 2]. This evidence was in the record prior to the hearing on December 6, 2005 and addresses the issue raised by the Goal 1 Coalition [Exhibit 43].

The former owner of the property between 1978 and 1983 is deceased and the current owner purchased the property in 1987. During the applicable time period, the applicant states that he did not witness any farm operations on the subject property and it was not managed as part of a farm operation that produced \$20,000 or more in annual gross income. The application also provides objective evidence in Exhibit 1E, examining the property's capabilities for farm uses. The report by Paul Day analyzes the potential for farming on the property and concludes that grazing, hay production, or crop production could not generate over \$20,000 annual gross income during the relevant time period.

The property was apparently managed for forestry operations during the relevant time period as evidenced by the reference to logging operations in the Setchko report (Exhibit 1G). The forestry consultant's report and the supplemental submittal dated June 3, 2005 determine that the operation was capable of producing only \$6,821.74 in gross annual income over a 50 year cycle based on the existing soil types. This income capability is below the required \$10,000 standard.

2. Productivity Tests

ORS 197.247 (1)(b)(C) (1991 ed.): The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification system used by the U.S. Department of Agriculture Soil Conservation Service, and is not capable of producing 85 cubic feet of merchantable timber per acre per year.

There is no dispute in the record over the first part of the criterion regarding the Agricultural capability classes of the soils on the property. The parties contest the forest capability calculations for the productivity of the soils.

The applicant's forester originally estimated the parcel's capability at 78.175 cubic feet per acre annual, which is under the 85 cubic foot per acre annual statutory limit for ML designation. The supplemental submittal by the applicant [Exhibit 2] adds the additional 12 acres that were under common ownership during the relevant time period to the calculations to determine that the property was capable of producing 80.7 cu.ft./ac./yr. This figure is still below the 85 cu.ft./ac./yr. standard for Marginal lands designation. The analyses are found in the submittal Exhibits 1G and 2.

The Goal 1 Coalition has submitted soils information in Exhibits 43 and 50 which is in opposition to the applicant's conclusion. The analysis concludes that the property is capable of producing 121.6 cu.ft./ac./yr if Ponderosa Pine productivity is considered. Page 8 of 10 of the submittal contains a chart that quantifies the capability ratings to be assigned to each soil type identified on the property. The Goal 1 analysis assigns higher productivity values to the soil map units 43C, 43E, 107C, and 138E based upon the assumption that these soils are suitable for Ponderosa Pine species and values should be assigned to individual soil components of the soil complexes found on the subject property. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from a document that has not been entered into the record: *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003.

Soils forest productivity data can be found in several sources:

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

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

The Goal 1 submittal maintains that the Goal 4 provisions found in OAR 660-006-0010 and 660-006-0005 governs the methodology to be used in the assignment of forest productivity ratings for the subject application. However, nothing in the statutory provisions identify these rules as requirements that apply to a Marginal Lands determination or prevent Lane County from determining forest productivity ratings from any credible source. The administrative rules may be useful to use as guidelines when making a determination regarding the appropriate ratings to assign a particular soil unit, but they are not necessarily governing. LUBA made a footnote to this effect in the *Carver* decision (footnote 11).

Of the 8 soil units identified on the subject property, there are forest productivity ratings in the *Soil Survey* for two units only: Dixonville 41C & E.

Dixonville 41C & E

There is no dispute in the record over the ratings for these two soil units.

116G rock outcrop – Witzel

The rating for this soil unit has been taken from the *State Forester* memo by the applicant and is also not in dispute in the record.

The forest productivity ratings for the remaining 5 types of soil units are in dispute in the record.

113G Ritner

The 149 cu.ft./ac./yr. rating used by the applicant for this unit is derived from the 50-year site index rating in the LCOG publication which lists the latest Natural Resources Conservation Service data as the source. The opponents assign a productivity rating of 175 cu.ft./ac./yr. Both ratings are based upon Douglas Fir species but no source of data is provided by the opponents for the higher rating. It appears that this may just be a typographical error in the table on page 8 of Exhibit 13 since the rating assigned to this soil type is identical to the soil type listed immediately above it.

107C Philomath and 138E Witzel

The productivity capability for these soil units are rated by the applicant using the State Forester's ratings of 45 and 70 cu.ft./ac./yr. respectively. The opponents maintain that these two soil units have a higher productivity rating for Ponderosa Pine species with ratings of 175 and 87 cu.ft./ac./yr. respectively. The Ponderosa Pine productivity ratings assigned to the soil map units are apparently taken from a document that has not been entered into the record: *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003. The applicant's soil scientist has made a reference to the same document in Exhibit 1L: "In this paper it repeatedly states that this data is from a very small sample and should not be used at this time until more long term data can be collected." Unfortunately, neither the applicant's soil scientist nor the Goal 1 Coalition has submitted this document for Planning Commission review in this application.

43C & E Dixonville Philomath/Hazelair Complexes

The productivity capability for these soil units are rated by the applicant using the LCOG document ratings of 54 & 63 cu.ft./ac./yr. respectively. The LCOG ratings are based upon a weighted average methodology that uses a zero productivity rating for two of the three components of the complex. The Goal 1 submittal assigns ratings to each component of the complex and uses ratings for Ponderosa Pine from the unsubmitted Extension Service document for the components that have not been rated in the Soil Survey. The State Forester has assigned ratings of 45 cf/ac/yr to each soil unit. The State Forester's ratings are more reliable for assigning a rating for Douglas Fir productivity to this soil unit and were found to be suitable in the *Carver* LUBA decision (see pages 8 – 10 of Exhibit 25). Without the submittal and evaluation of the document relied upon by Goal 1 for assigning productivity ratings based upon Ponderosa Pine species, it is difficult to base a decision using those ratings in place of the Forester's ratings. The fact that the applicant has relied upon the higher LCOG ratings provides an overestimation of productivity for these two soil units.

Ponderosa Pine

Staff has reviewed the issue of incorporating Ponderosa Pine into the productivity ratings for the property's soil units with the following observations:

- The opponents assignment of values to the relevant soil units is based upon a document *Establishing and Managing Ponderosa Pine in the Willamette Valley*, Oregon State University Extension Service, EM 8805, May 2003 that has not been placed into the record;
- The conversion tables provided with the analysis in Exhibit 13 are difficult to understand but appear to rely upon Exhibit 4, Appendix 4-1. There is no identification of the source of the chart and no sample calculation to follow to verify the values assigned to the soil map units. Staff is unable to follow the analysis from the values in Exhibit 2 through Appendix 3 tables and Appendix 4-1 to validate the numbers in the chart for Ponderosa Pine productivity. No source is provided for Appendix 4-1;
- The applicant's forester, a credible forestry expert, has addressed the issue in Exhibits 1G and 1L by stating that Ponderosa Pine is worth considerably less money and has the same or slower growth rate as Douglas Fir.

3. **Parcelization Test**

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

Conflicting arguments have been submitted regarding the correct interpretation of this provision. One interpretation characterizes this provision as a "parcel count" exercise whereby the applicant first identifies all lots or parcels that fall at least partially within a ¼ mile distance from the property proposed for Marginal Lands designation, and then determines that more than 50% of the lots or parcels are 20 acres or less in size. This is the interpretation preferred by the applicant in this submittal.

The other interpretation is that this is an "area" test whereby the applicant first identifies all lots or parcels that fall at least partially within a ¼ mile distance from the property proposed for Marginal Lands designation, and then determines that more than 50% of the area is comprised of lots or parcels that are 20 acres or less in size. This is the interpretation chosen by the opponents and supported by their submittal of Exhibit 42, a 1983 "draft" memorandum from the Department of Land Conservation and Development (DLCD).

Staff research found 29 Plan designation changes to Marginal Lands since 1984. Only two relied on findings addressing this particular criterion. Neither of those relied solely on either of the above interpretations. Those applications satisfied the criterion by demonstrating that the proposed marginal lands met the requirement as either an "area" test or a "parcel count" test. Staff could find no evidence in the records that the Planning Commission or the Board had interpreted this provision one way to the exclusion of the other in the past. There was however, an interpretation by the Board of the "area" test. During the 1993 review of the Jackson application PA 1609-92, DLCD submitted a copy of the "draft" memo from 1983. In the 1983 DLCD memo, DLCD maintained that the "area" to be used included all acreage in all parcels that were partially within the perimeter of the ¼ mile distance. For instance, a 100 acre parcel that had 10

acres within the perimeter was added to the acreage total as 100 acres. This is the position taken by the opponents to this application. Contrary to the DLCD position, the Board found that only the acreage of the parcels within the ¼ mile perimeter was to be added to the acreage total, that is, only the 10 acres within the perimeter. This decision was not appealed to LUBA by DLCD.

In the original submittal Exhibit 1H, the applicant has identified 38 parcels wholly or partially within ¼ mile of the perimeter of the subject property. 29 of the parcels (76%) are smaller than 20 acres which meets the required 50% standard under one of the possible interpretations of the criterion. Under the opponents' analysis using the methodology suggested in the 1983 draft DLCD memo, only 11% of the total 791 acres is made up of lots or parcels less than 20 acres in size. No analysis has been provided using the Board interpretation method of the "area" test using only the acreage within the ¼ mile perimeter.

The determination that this criterion is met in this application is not necessary if the Planning Commission determines that the application meets ORS 197.247(1)(b)(C) above ("productivity test"). If the Planning Commission chooses to recommend a preferred interpretation of this criterion to the Board, staff would point out that a comparison of the criteria found in ORS 197.247(1)(b)(A) and (B) reveals the reliance on a calculation of acreage within an area (240 acres) is found only in (B) which is not the criterion being addressed by the applicant. The relevant criterion (A) uses references only to "lots or parcels" within a distance (1/4 mile perimeter).

4. **Legal Lot status**

The legal lot status of the subject property is not a relevant criterion for review of the proposal for Marginal Lands designation. However, there are materials submitted into the record that demonstrate that the subject property is considered a legal lot. The adoption of Ordinance PA 1076 formally recognized the completion of the property line adjustment proposal reviewed under PA 1923-94 and recorded in Instruments 9471275 and 9471274.

IV. CONCLUSIONS

A. Summary Comments

If the Commission concurs with the applicant's arguments, a recommendation for approval to the Board of Commissioners is appropriate. Approval can be founded in Lane Code 16.400(h)(iii)(iv-iv), *necessary to provide for the implementation of adopted Plan Policy or elements*. The element in question is that portion of the Plan authorizing Marginal Lands.

B. Attachments to this Supplemental Staff Report

1. Exhibits 13, 14, 20 - 50

MINUTES

Lane County Planning Commission
Board of County Commissioners Conference Room - Lane County Courthouse

December 6, 2005
7:00 p.m.

PRESENT: Lisa Arkin, Ed Becker, James Carmichael, Todd Johnston, John Sullivan Nancy Nichols, Jozeph Zdzienicki, Lane County Planning Commission members; Kent Howe, Thom Lanfear, Staff

ABSENT: Steve Dignam, Juanita Kirkham

I. PUBLIC HEARING: PA 04-6308 Dennis - Request for Rural Comprehensive Plan Agreement to redesignate 102.69 acres from "Forest" F to "Marginal Land" ML and rezone from "Impacted Forest Lands" F2 to "Marginal Lands" ML pursuant to Lane Code 16.400 and 16.252. Tax Lot 106 of Map 18-01-33

Vice Chair James Carmichael convened the meeting. He stated that the Planning Commission was made up of volunteers who would listen to public testimony and provide a recommendation to the Board of County Commissioners who would make a final decision.

Mr. Carmichael called for declarations of *ex parte* contacts or conflicts of interest.

Commissioner Member Todd Johnston declared a conflict of interest and recused himself from the hearing.

Associate Planning Staff Thom Lanfear provided the staff report. Showing an overhead projection of the property he said the criteria for approval of the application came from ORS 197.247 as it existed in 1991. He said Lane County was one of two marginal lands counties in the State. He said the intent was to identify resource lands that were not as productive as prime resource lands. He said rezoning into marginal lands allowed division into smaller parcels. He said houses in marginal lands were permitted outright. He said there was a series of tests designed by the State that determined whether parcels could receive the Marginal Lands designation. He said two of the four tests had to be met. He said the land had to meet ORS 197.247(1)(a) which demonstrated that the land was not managed during three of the five calendar years preceding January 1, 1983, that the land was not managed as part of a farm operation that produced \$20,000 or more annual gross income, and that the not part of a forest operation capable of producing \$10,000 income during the growth cycle. He said the applicant had the option of meeting one of the next three tests. He noted that the applicant addressed two of the three tests in that they met the 50 percent of the proposed marginal land plus the lots or parcels at were at least partially located within one quarter mile of the perimeter of the proposed marginal land, and consisted of lots or parcels less than 20 acres in size before "July 1, 1983." The other test the applicant had met was the test to show that the lands were not cable of producing 85 cubic feet of marketable timber per acre per year.

Mr. Lanfear said he had received two written submittals since the publication of the staff report. He distributed copies of the submittals to the planning commission for the record. The first was from the Goal One Coalition and the other was from the land owner adjacent (to the north) to the land in question.

Mr. Lanfear said his initial assessment was that the applicant had met the criteria for the zone change but said he read the new materials that were submitted and noted that there were issues with the approval criteria. He predicted that there would be new testimony that evening.

Mr. Carmichael called for questions from the commission.

In response to a question from Commission Member Nancy Nichols regarding parcelization, Mr. Lanfear said the test was whether a majority of parcels within the test area were under 20 acres in size.

In response to a question from Commission member Lisa Arkin regarding availability of water on the site and whether it would be addressed by the applicant, Mr. Lanfear said that information was not included in the record. He said Lane Code stated that if parcels were over 20 acres in size then it was assumed that there was adequate water.

In response to a question from Commission member Jozef Zdzenicki regarding whether the analysis of the applicant with the analysis submitted by the Goal One Coalition, Mr. Lanfear said he had not had a chance to look at all the attachments in terms of methodology used but said that in terms of looking at whether 50 percent of the area was within the perimeter was not how the test had traditionally been used. He said the 50 percent figure was the number of parcels in that area. He said Goal 1 Coalition's statement was that the acreage of the parcels that were less than 20 acres had to add up to more than half of the land area.

Commission Member Ed Becker noted that the applicant had stated that the property was not suited for growing Douglas Fir to the amount specified by state statute. He questioned whether there was any trees harvested on the site and whether the scale volumes showed the income received.

Mr. Lanfear commented that the applicant had reported that trees were harvested from the property but noted that the record did not contain information on scale volumes of tree harvesting.

Regarding water availability, Commission Member John Sullivan commented that Goal Six implied that Lane County had sufficient rules in place for water availability and the commission did not need to concern itself with water issues.

Mr. Lanfear said water availability was addressed during the subdivision phase of development. He said there was a provision in Lane Code dealing with water availability and reiterated that if the proposed parcels were over 20 acres in size it was assumed that water was available.

In response to a question from Mr. Sullivan regarding whether staff was suggesting that the amount of traffic trips that would be generated if the land was subdivided and whether staff concurred with the applicant's assessment, Mr. Lanfear noted that he did not hear any objections from the County Transportation Planning Department.

Mr. Carmichael opened the public hearing.

Steve Cornacchia, 180 East 11th Avenue, spoke as the applicant's representative. He submitted written material into the record in response to the material submitted by the Goal One Coalition's objections to the number of parcels and the acreage on the land in question. He said the material contained the actual state statute defining the tests to be met.

Mr. Cornacchia stressed that the application was a criteria based decision. He said county staff had agreed that all criteria had been met to forward a recommendation for approval to the Board of County Commissioners.

Regarding water on the site, Mr. Cornacchia noted that the County determined water limited areas. He said areas that were not categorized as water limited areas did not have to meet any water established water provisions in the code. He acknowledged that there were statewide planning goals that needed to be met. He noted for the record that the property in question was not designated as 'water limited.' He also noted that water availability would have to be addressed with the County at a future development stage. He called attention to page 19 of the application where information was provided regarding wells on the property. He said the land adjacent to the property had been rezoned to marginal lands in 2001 and noted that in *that* application there had been well study done for 100 wells in the area. He reiterated that water was not an issue for the land in question.

Regarding transportation, Mr. Cornacchia said all parcels that abutted the land had to be 20 acres in size. The only parcels that would be smaller were those that abutted the smaller residential properties. He said the applicant had determined that, at a maximum there would be 80 trips per day. He noted that the Lane County Transportation did not have any objection to the application.

Regarding the issue of parcelization of the property, Mr. Cornacchia said the applicant had to meet two of four tests. He said there had been no opposition on the record from the forest/farm income test. He said part of the opposition was from the Goal One Coalition was that the compilation of parcels had been done inaccurately. He called attention to the ORS 197.247(1)(b) that stated that the applicant only had to meet one test. He stressed that the applicant had met *two* of the tests.

Mr. Cornacchia said the Goal One Coalition was objecting to the decision of the Board of County Commissioners to designate a legal lot. He said the decision had been made for the property in question in 1994 as well as the abutting property to the south. He said the property line adjustments had not created any new parcels. He said tax lot 100 had been separated from tax lot 106. He stressed that the Goal One Coalition's argument was that Lane County was required to approve lot line adjustments which was absolutely false.

Mr. Cornacchia said showing that a legal lot was not part of the approval criteria but noted that Lane County had determined the land as a legal lot. He said even though the status of the legal lot was not relevant to the decision but added that the applicant needed to know the dimensions of the lot to determine the parcelization and productivity tests.

Regarding income tests, Mr. Cornacchia stated that the property could not produce the requisite income for farm/forest test. He stressed that all of the income test data had been included in the applicant's report. He outlined on the map of the property and demonstrated that the applicant had 28 of 36 parcels put the rate