BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LUISE WALKER and
LANDWATCH LANE COUNTY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

KAREN DAHLEN,
Intervenor-Respondent.

LUBA No. 2006-138

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response brief and argued on behalf of respondent.

P. Steven Cornacchia, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hershner Hunter, LLP.

RYAN, Board Member; HOLSTUN, Board Member, participated in the decision.

BASSHAM, Board Chair did not participate in the decision.

REMANDED 02/15/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision amending the comprehensive plan designation for a 316-acre parcel of land.

MOTION TO INTERVENE

Karen Dahlen (intervenor), the applicant below, filed a motion to intervene on behalf of respondent. There is no opposition to the motion, and it granted.

FACTS

In September, 2004 intervenor applied to redesignate the subject property from "Agricultural" to "Marginal Land" and to rezone the property from"E-40/Exlusive Farm Use" to "ML/SR (Marginal Land with Site Review)." The subject property is located south of the Eugene-Springfield urban growth boundary. To the east of the subject property is a 67.16-acre parcel of land owned by intervenor and zoned "Marginal Lands." Other lands surrounding the subject property are variously zoned "Impacted Forest" and "Marginal Lands."

The planning commission held a hearing on the application and forwarded the application to the board of commissioners, with a recommendation for denial.[1] The board of commissioners held hearings on the application and voted to approve the application, adopting Ordinance No. PA-1231 on July 12, 2006. This appeal followed.

ASSIGNMENT OF ERROR

A. Introduction

Lane County is a "marginal lands" county, and therefore may designate certain lands as marginal lands, under *former* ORS 197.247. OAR 660-033-0020(8)(j). *Former* ORS 197.247 (1991) allowed a county to designate as "marginal lands" lands that met a

[1] Lane County Development Code Section 16.400 prescribes a procedure for comprehensive plan amendments in which the board of commissioners requests a recommendation from the planning commission.

series of tests, only one of which, the "income" test, is at issue in the appeal. The "income" test at ORS 197.247(1)(a) requires a finding that the proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of (1) a farm operation producing $20,000 or more in annual gross income, or (2) a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income. ORS 197.247(1) (1991) provided, in relevant part:

> "In accordance with ORS 197.240 and 197.245, the commission shall amend the goals to authorize counties to designate land as marginal land if the land meets the following criteria and the criteria set out in subsections (2) to (4) of this section:
>
> > "(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 county concluded that the subject property met the "income" test. Petitioners contend that the county erred by relying on various interpretations of language in ORS 197.247(1)(a) that contradict the language of the statute regarding the "income" test. Petitioners challenge the various errors in multiple sub-assignments of error, and we address each below.

B. First Sub-assignment of Error

1. Farm Operation

In their first sub-assignment of error, petitioners argue that the county erred by limiting its analysis of farm operations under the income test in ORS 197.247(1)(a) to operations occurring on the subject property, property adjacent to or contiguous with the subject property, and property in the vicinity of the subject property.[2] The county and

[2] In response to petitioners' challenge below, the county adopted the following findings:

intervenor (together, respondents) answer that (1) the county's interpretation of that provision of the statute as allowing the relevant inquiry to be limited to farm operations that were occurring only on nearby properties was reasonable, and (2) the evidence in the record shows that the subject property was not being managed as part of a farm operation.

The subject property was leased by the previous owners during the relevant period of inquiry set forth in the statute to C & M Livestock Company (C & M), which grazed approximately 25 head of cattle on the property. Record 664, 714. During the proceedings below, one of the previous owners of the property, Arthur Moshofsky (Moshofsky) submitted an affidavit in which he explained that he allowed C & M to graze cattle on the property "in order to create an activity and human presence on the property in [the owners'] absence."[3] Record 663. The existence of the lease to C & M led the county planning staff to inquire as to whether more "nearby lands were leased" by C & M. Record 433. An

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> "Mr. Minty has testified that C & M Livestock Company owned no property contiguous to, adjacent to or nearby the subject property. Mr. Moshofsky testified that he requested that the cattle be grazed on the property to create a presence on the property in his absence and that the consideration for the grazing was primarily in the form of the presence and maintenance of fencing and never in an amount exceeding $1000 in a particular year. It is found that Mr. Moshofsky, the owner of the property during the five-year period preceding January 1, 1983, did not manage the property for or as a farm operation beyond the intermittent grazing of a limited number of cattle and that that farm operation did not produce $20,000 or more in annual gross income. Therefore, it is found that the intermittent grazing of a limited number of cattle on the subject property should be reasonably considered as not contributing significantly to the agricultural economy of the area or state and that the subject property was not managed as part of a farm operation that produced more than $20,000 in annual income during the subject period." Record 33.

[3] Moshofsky's affidavit regarding the lease of the subject property to C & M stated in relevant part:

> "* * * During the [relevant inquiry period] I allowed a third party to graze a limited number of cattle on the subject property. The number of cattle was limited and never exceeded 25 head. My purpose in allowing the grazing was to create an activity and human presence on the property in our absence. The consideration received for allowing the grazing was the activity and presence and annual fence repair. In the years that I accepted a nominal payment for the grazing, the payment and other stated consideration never exceeded $1,000 in annual value. At no time during the aforementioned time period was the subject property managed as part of a farm operation capable of producing $20,000 in annual income." Record 663.

"Agenda Cover Memo" dated March 20, 2006 described the planning staff's concerns and actions as follows:

> "For both [planning staff and petitioners], [the existence of the lease] raised the question as to whether or not the C & M Livestock Company utilized other, *nearby lands* as part of their farm operation. While 25 head of cattle raised yearly would not exceed the $20,000 gross income limit of ORS 197.247(1)(a), it did represent a substantial portion of that total. Staff was interested in knowing if more *nearby lands* were leased.
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> "* * * The applicant took the position that the [m]arginal [l]ands statute does not require a reporting of the C & M holdings 'wherever located on the planet.' Staff, however, was not requesting such a widespread accounting, but rather a report on the activities of C & M *in the area*. The statute does not give guidance in determining the factors that allow one to conclude when farm use conducted by the same party on *non-contiguous properties* does or does not constitute being 'part of a farm operation.' * * *." Record 433-434. (Emphases added.)

In response to the staff's inquiries, a partner in C & M submitted an affidavit, which stated in relevant part:

> "At no time during the applicable period, and at no time thereafter, did C & M Livestock Company own or manage property *adjacent to or contiguous with* [the subject property] or *in the vicinity of that property*." Record 664. (Emphases added.)

Petitioners argue that the use of the subject property by C & M for grazing means that it was a part of the C & M "farm operation" as that phrase is used in the statute, such that the relevant inquiry is whether the entire C & M farm operation produced more than $20,000 in gross income during the relevant years specified in the statute. Petitioners point out, correctly, that the record does not include any evidence regarding whether the entire C & M farm operation produced more than $20,000 in annual income during the period in question.

Respondents argue that the county's interpretation of the statute is reasonable in light of ORS 197.247(5), which authorized counties to use objective criteria to calculate income for purposes of the "income" test.[4] Respondents argue that the Lane County Board of

[4] ORS 197.247(5) (1991) provided:

Commissioners' 1997 Supplement to Marginal Lands Information Sheet (1997 Supplement), adopted by the county commission in March, 1997, contains such objective criteria. The 1997 Supplement created a general presumption that all contiguous land owned during the relevant period of inquiry was part of a "farm operation." Record 1142-43.

Whatever weight the 1997 Supplement is entitled to under ORS 197.247(5), we do not understand how, in creating a presumption that common ownership of contiguous properties means the parcels are part of a farm operation, the 1997 Supplement can reasonably be read to *limit* the relevant geographic inquiry to only contiguous lands. In fact, the county's inquiry in the present case appears to have extended beyond merely contiguous lands to lands "in the vicinity" of the subject property.

The issue of the scope of the relevant inquiry regarding what constitutes a "farm operation" for purposes of the statute is one of first impression. Although the issue was not disputed in *Just v. Lane County*, 49 Or LUBA 456 (2005), we noted:

> "* * * ORS 197.247(1)(a) can be read to apply the gross income threshold test to the farm and forest operation itself, *not limited to the subject property*. In other words, the pertinent question under ORS 197.247(1)(a) may not be whether the *subject property* can produce $10,000 in average annual income * * * but whether the forest operation that the property is or was part of can produce $10,000 in average annual income. * * *." *Just*, 49 Or LUBA at 462 n 4 (emphasis in original).

In interpreting the meaning of a statute, we examine the text of the statute itself to give effect to the intent of the enacting body. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). ORS 197.247(1)(a) contains no express limits on the geographic scope of a "farm operation;" the term is not limited by any other word or words, such as "in the vicinity," "contiguous to," "adjacent to," or "nearby." We do not understand respondents to dispute that the subject property was managed as part of the C & M cattle

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> "A county may use statistical information compiled by the Oregon State University Extension Service *or other objective criteria* to calculate income for the purposes of paragraph (a) of subsection (1) of this section." (Emphasis added).

operation, although apparently a very small part of that cattle operation. We also do not understand respondents to contend that the C & M cattle operation is not a farm operation. Assuming the subject property was managed as part of C & M's cattle operation, the question then becomes whether the C & M cattle operation produced $20,000 or more in annual gross income during the relevant time period. The location of the individual properties that make up C & M's cattle operation is irrelevant in determining whether that cattle operation produced $20,000 or more in annual gross income during the relevant time period.[5]

The evidence in the record indicates that the property was leased to C & M, and C & M grazed approximately 25 head of cattle on the property during the period in question. County planning staff noted that grazing 25 head of cattle would produce income that could represent a substantial portion of the "income" test total of $20,000, and questioned the applicant regarding C & M's operations "in the area" of the subject property. C & M's response to the inquiry was similarly limited to lands "*adjacent to or contiguous with* [the subject property] *or in the vicinity of that property*." The county misconstrued the language of ORS 197.247(1)(a) when it limited the inquiry to C & M's farm operations that were close in geographic scope to the subject property.

2. Forest Operation

Petitioners also challenge the county's interpretation of the term "forest operation," arguing that the county erred in limiting its inquiry to whether the *subject property* was capable of meeting the income test for forest operations. Petitioners argue that the county should have considered other timber lands and timber business interests owned by the prior

[5] We do not mean to foreclose the possibility that C & M might operate separate cattle operations, for example a cattle operation in Lane County and separate cattle operations in Argentina or Deschutes County. However, the testimony that C & M does not own or manage property adjacent to or contiguous *with* the subject property or in the vicinity of that property is not sufficient to establish that the subject property was not managed as part of C & M's cattle operation.

owners or related companies during the relevant time period in determining whether the forest operations income test was met.

During the relevant inquiry period, January 1, 1978 through January 1, 1983, the property contained timber, and the prior owners of the subject property also owned timber-related businesses and timber lands. Record 730-738. In 1990, 900,000 board feet of timber on the subject property and adjacent property owned by the same owner was sold and harvested. Record 33. Petitioners argue that the presence of timber on the property during the relevant period of inquiry, the 1990 timber harvest, and the concurrent ownerships of the subject property and the interests in timber-related companies and timber lands are evidence that the property was being managed as part of the owners' larger forest operations. Therefore, petitioners argue, the relevant inquiry was whether the owners' larger forest operations were capable of meeting the "income" test.

We agree with petitioners that the relevant inquiry is whether the property was managed as part of a "forest operation," and the inquiry is not limited in geographic scope to only the subject property. The relevant question is whether the subject property was managed as part of a larger forest operation, regardless of location of the properties that make up that larger forest operation. However, while it is a close call, we agree with respondents that the evidence in the record supports the county's conclusion that the subject property was not being managed as part of the larger Moshofsky forest operations. Moshofsky testified that the timber was sold on the open market to third parties and not harvested by or used in any of his timber business operations. Record 33, 102, 255. The timber harvest that occurred in 1990 was not performed by one of the Moshofsky owned enterprises. Record 433, 832. Testimony from Moshofsky indicates that the subject property was not being managed as part of their forest operations, but was held with the original intent to build a golf course. Record 255. There is no evidence in the record indicating that the property was jointly managed with other properties in terms of planting or thinning of trees

on the property. Evidence in the record generally supports the conclusion that the 1990 harvest was inconsistent with Moshfosky's typical management procedures for his forest operations, supporting the county's conclusion that the property was not part of his other forest operations.

The first sub-assignment of error is sustained, in part.

C. Second Sub-assignment of Error

In their second subassignment of error, petitioners argue that intervenor's expert's use of 1983 log prices to calculate the gross annual income of forest operations during the relevant inquiry period was error. Petitioners argue that the statute requires examination of actual prices for timber in all of the years 1978 through 1982, and that if any three of those five numbers is at least $10,000, then the land is not marginal land. Respondents respond that the county's use of 1983 log prices to demonstrate that the forest operation on the subject property was incapable of producing "an average, over the growth cycle, of $10,000 in annual gross income" was a proper interpretation of the statute and was authorized by ORS 197.247(5) and the 1997 Supplement. *See* n 4.

We approved of the use of 1983 log prices as dictated by the 1997 Supplement in *Just*, and we upheld the county's use of the 1983 prices to calculate the gross income that the property was capable of producing. *Just*, 49 Or LUBA at 463-64. Petitioners have not put forward any arguments that lead us to reconsider that part of our decision in *Just*.

The second sub-assignment of error is denied.

D. Third Sub-assignment of Error

Petitioners also challenge the applicant's expert's use of a 50-year growth cycle in calculating the production capability of the subject property, arguing that the use of a 50-year growth cycle is not allowed by ORS 197.247(1)(a). Petitioners argue that the statute implies that an "income optimal growth cycle" should be used, and argue that the applicant should

have used a growth cycle related to the Culmination of Mean Annual Increment (CMAI).[6] Record 155.

Respondents argue, and we agree, that the 1997 Supplement's direction to use a 50-year growth cycle is an objective criterion that is allowed under ORS 197.247(5) and its use by the applicant's expert was reasonable. The 1997 Supplement adopted a 50-year growth cycle as the general standard, based on evidence that the United States Department of Agriculture Natural Resource Conservation Service (NRCS) had adopted the 50-year cycle for rating soil productivity. Record 1143. The applicant's forester testified that the majority of trees growing in the Willamette Valley have passed the CMAI by the age of 45 years. Record 192. Petitioners have not explained why the applicant's use of a 50-year growth cycle as directed by the 1997 Supplement is unreasonable.

The third sub-assignment of error is denied.

E. Fourth Sub-assignment of Error

In their fourth sub-assignment of error, petitioners challenge 1) the applicant's use of actual stocking rates for the subject property during the relevant inquiry period and 2) the assumption of reasonable management practices in calculating production capability. Respondents answer that the expert's use of actual stocking rates for the property and his assumption of reasonable management practices, as directed by the 1997 Supplement, was proper and supported by substantial evidence in the record.

In *DLCD v. Lane County (Ericsson)*, 23 Or LUBA 33, 36 (1992), we noted that actual production is not necessarily conclusive evidence of potential production without additional information regarding the operation. However, the unrebutted evidence in the record indicates that for the subject property, actual production was reflective of potential production capability for the subject property. The county relied on the testimony of the

[6] Petitioners do not explain how the use of a CMAI measurement would differ significantly from the 50-year growth cycle.

applicant's expert, who based his calculation of productivity for the relevant inquiry period on actual stocking rates. He calculated the actual stocking rates based on the actual volume of timber removed from the subject property when it was harvested in 1990, and a timber cruise of the remaining portions of the subject property containing merchantable Douglas Fir stands.

The expert also assumed reasonable management practices, based on the direction in the 1997 Supplement. In addition, he concluded that based on soil and topographic factors that made the establishment of fully stocked stands of Douglas Fir or Ponderosa Pine difficult, the actual stocking rate of the subject property would not change significantly with additional management. It was reasonable for the county to rely on this evidence in concluding that the property was not capable of meeting the "forest operation" income test.

The fourth sub-assignment of error is denied.

The county's decision is remanded.