

NATURE OF THE DECISION

Petitioner appeals a county decision that approves comprehensive plan and zoning map amendments.

MOTION TO INTERVENE

Darcy Bosshardt, the applicant below, moves to intervene on the side of the county in this appeal. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in the intervenor's response brief. The motion is granted.

MOTION TO STRIKE

In this appeal, petitioner contends that the county improperly interpreted and applied Goal 4 (Forest Lands) and the Land Conservation and Development Commission's (LCDC's) Goal 4 administrative rule. Attached to the petition for review are 28 pages of documents (Appendix A3-1 through A3-28). We understand petitioner to ask that LUBA take official notice of those documents as legislative history of Goal 4 and the Goal 4 administrative rule. Intervenor objects that the memorandum that appears at Appendix A3-14 through A3-22 is not legislative history and the remaining appendices are not properly authenticated as Goal 4 legislative history.

Regarding Appendix A3-1 through A3-13 and A3-23 through A3-28 those documents are clearly drafts of earlier versions of Goal 4, suggested text revisions, and minutes of an LCDC meeting at which Goal 4 revisions were considered. Although petitioner admittedly makes no attempt to authenticate those documents, intervenor offers no reason to believe those documents are not what they appear to be. We take official notice of those documents, and we deny that part of intervenor's motion to strike.

1 Although the author of the 1982 memorandum at Appendix A3-14 through A3-22 is
2 only identified as “Lloyd” and it is addressed only to “Staff,” that memorandum appears to
3 be an internal Department of Land Conservation and Development memorandum discussing
4 the history, interpretation and proper application of Goal 4. Petitioner offers no reason to
5 believe that memorandum was part of any LCDC deliberations on amendments to Goal 4 or
6 its deliberations in adopting or amending the Goal 4 rule. We therefore grant intervenor’s
7 motion to strike that memorandum.

8 **FACTS**

9 Goal 4 requires that counties conserve forest lands for forest and related uses. As
10 defined by Goal 4, “forest lands” include land that is “suitable for commercial forest uses.”¹
11 In addition to that Goal 4 language, two Goal 4 administrative rule requirements have a
12 bearing on this appeal. The first rule, OAR 660-006-0010, requires that counties inventory
13 forest lands and in doing so include “a mapping of average annual wood production
14 capability by cubic foot per acre (cf/ac).”² The second rule, OAR 660-006-0005(2), defines

¹ The complete Goal 4 definition of “forest lands” is set out below:

“Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.”

² OAR 660-006-0010 provides in part:

“Governing bodies shall include an inventory of ‘forest lands’ as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands or lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken are not required to be inventoried under this rule. Outside urban growth boundaries, *this inventory shall include a mapping of average annual wood production capability by cubic foot per acre (cf/ac)*. If site information is not available then an equivalent method of determining forest land suitability must be used. * * *

1 the concept of cubic feet per acre and limits the data that may be used to prepare the mapping
2 required by OAR 660-006-0010.³

3 This is the second LUBA appeal of a county decision approving comprehensive plan
4 and zoning map amendments for the subject property. The relevant facts appear in our prior
5 opinion and are set out below:

6 “The subject property includes two parcels, tax lot 1300 and tax lot 1400. Tax
7 lots 1300 and 1400 each include approximately 8 acres and extend east from
8 the Pacific Ocean onto a headland that is approximately 120 feet above the
9 ocean and higher than the properties to the south and east. Tax lots 1300 and
10 1400 are split zoned. The comprehensive plan map designation for the eastern
11 one-third of the tax lots is Rural Residential and the zoning is Rural
12 Residential – 5 (RR-5). Neighboring lands to the east and northeast are
13 similarly planned and zoned for rural residential use. The comprehensive plan
14 map designation for the western two-thirds of the tax lots is Forest and the
15 zoning is Forest Mixed Use. Property to the north and south of the western
16 two-thirds of the tax lots is similarly planned and zoned for forest use. The
17 challenged decision changes the comprehensive plan and zoning map
18 designations for the western two-thirds of the tax lots to Rural Residential and
19 RR-5 so that the tax lots are no longer split zoned.

20 “The challenged decision is based in part on county findings that the western
21 two-thirds of tax lots 1300 and 1400 does not qualify as forest lands and need
22 not be protected for forest uses under Statewide Planning Goal 4 (Forest
23 Lands). That finding was based in large part on a ‘Forest Suitability Report,’
24 that was prepared for the applicant, intervenor-respondent. The Forest
25 Suitability Report cited a number of factors in support of its conclusion that
26 the subject tax lots are not suitable for commercial forest use, but it did not
27 consider the annual wood production capability in cubic feet per acre per
28 year.” *Anderson v. Coos County*, 60 Or LUBA 247, 248 (2009) (*Anderson I*)
29 (footnote and record citations omitted).

³ OAR 660-006-0005(2) provides:

“‘Cubic Foot Per Acre’ means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resource Conservation Service (NRCS) soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other information determined by the State Forester to be of comparable quality. Where such data are not available or are shown to be inaccurate, an alternative method for determining productivity may be used. An alternative method must provide equivalent data as explained in the Oregon Department of Forestry’s Technical Bulletin entitled ‘Land Use Planning Notes Number 3 dated April 1998’ and be approved by the Oregon Department of Forestry.”

1 Because the county did not explicitly consider the wood fiber productivity of the
2 subject property in cf/ac/yr in determining that the subject property does not qualify as land
3 that is suitable for commercial forest use, we remanded the county’s first decision in this
4 matter:

5 “* * * To summarize, if this application is to proceed further, the county must
6 consider the wood fiber productivity of the subject property in cf/ac/year.
7 That cf/ac/year data must be from one of the sources authorized by OAR 660-
8 006-0005(2). If that data is not available or is shown to be inaccurate,
9 equivalent data may be used, as authorized by the rule and approved by the
10 Oregon Department of Forestry. *Anderson v. Lane County*, 57 Or LUBA
11 [562,] 573 [(2008)]. If the analysis required by OAR 660-006-0010 and 660-
12 006-0005(2) is not conclusive, the county may then consider other factors,
13 provided those other factors are ‘not accurately reflected in or accounted for
14 in the data described by OAR 660-006-0010 and 660-006-0005(2).’ *Just [v.*
15 *Linn County*, 60 Or LUBA 74, 86 (2009)].” *Anderson I*, 60 Or LUBA at 251-
16 52.

17 Following our remand, the county considered the subject property’s wood fiber
18 productivity in cf/ac/yr and determined that the subject property does not qualify as
19 commercial forest land. Petitioner challenges the county’s second decision in this appeal.

20 **INTRODUCTION**

21 In reaching the above conclusion in *Anderson I*, LUBA considered and resolved two
22 issues that the parties continue to dispute in this appeal. We describe those two issues and
23 our resolution of those issues in *Anderson I* before turning to petitioner’s assignments of
24 error and other arguments in this appeal.

25 **A. The Cf/Ac/Yr Commercial Forest Land Standard**

26 Under Goal 4 and LCDC’s Goal 4 administrative rule there is no objective cf/ac/yr
27 “standard” for the level of productivity that qualifies or disqualifies land as commercial

1 forest land. In our decision in *Anderson I* we relied on our decision in *Just*, to explain that a
2 more subjective inquiry is required under Goal 4 and the Goal 4 rule:⁴

3 “In our decision in *Just* we noted that the Land Conservation and
4 Development Commission (LCDC) has not established an objective or
5 absolute standard for the level of productivity that is required to qualify land
6 as suitable for commercial forest use:

7 “[A]lthough the Land Conservation and Development
8 Commission (LCDC) requires that cf/ac/yr data be considered
9 in determining whether to inventory land as suitable for
10 commercial forest use, it has not established a threshold or
11 thresholds for the level of cf/ac/yr productivity that qualifies
12 land as suitable for commercial forest use. LUBA’s cases on
13 that question similarly have not established bright-line
14 productivity standards. * * *

15 “Our cases suggest that land with a productivity of less than 20
16 cf/ac/yr may be unsuitable for commercial forest use unless
17 there are factors that compensate for the land’s relatively low
18 productivity. But land in a middle range from a low of
19 approximately 40 cf/ac/yr to a high of approximately 80
20 cf/ac/yr is unlikely to be unsuitable for commercial forest use
21 unless there are additional factors that render those moderately
22 productive soils unsuitable for commercial forest use. Rural
23 land with a wood fiber productivity of over 80 cf/ac/yr is
24 almost certainly suitable for commercial forest use, even if
25 there are limiting factors.” [*Just v. Linn Co*, 60 Or LUBA at
26 83-84] (footnote omitted).” *Anderson I*, 60 Or LUBA at 250.

27 Our decision in *Just* provided additional discussion of contextual statutes and
28 administrative rules that led LUBA to identify the “less than 20 cf/ac/yr,” “over 80 cf/ac/yr,”
29 and “middle range from a low of approximately 40 cf/ac/yr to a high of approximately 80
30 cf/ac/yr” analysis described in the last quoted paragraph above. That additional explanation
31 is set out below:

32 “While not directly applicable here, we note that the cf/ac/yr productivity of
33 property is used in the exclusive farm use zoning statutes to more strictly limit
34 non-resource use of lands with high wood fiber productivity, as compared to

⁴ There is more than one LUBA decision captioned *Just v. Linn County*. In this opinion all citations to *Just* are to *Just v. Linn County*, 60 Or LUBA 74 (2009).

1 lands with moderate or poor wood fiber productivity. Although those statutes
2 are not written in terms of suitability for commercial forest use, they are at
3 least some indication that the legislature may view the productivity level that
4 is indicative of land that is suitable for commercial forest use to be
5 approximately 20 cf/ac/yr in Eastern Oregon and approximately 50 cf/ac/yr in
6 Western Oregon. For example, ORS 215.263(4)(b)(D)(i) requires that new
7 parcels proposed for nonfarm dwellings in Western Oregon outside the
8 Willamette Valley not be capable of producing ‘50 cubic feet per acre per year
9 of wood fiber[.]’ That suggests that the legislature believes property in
10 Western Oregon outside the Willamette Valley that is capable of producing 50
11 cf/ac/yr is worthy of protection from nonfarm dwellings. In eastern Oregon,
12 ORS 215.263(5)(b)(D)(i) requires that new parcels for nonfarm dwellings not
13 be capable of producing ‘more than * * * 20 cubic feet per acre per year of
14 wood fiber[.]’ ORS 215.263(5)(b)(D)(i) suggests that the legislature believes
15 that property in Eastern Oregon that is capable of producing at least 20
16 cf/ac/yr is worthy of protection from nonfarm dwellings. ORS 215.284(4)
17 authorizes counties in the Willamette Valley to approve new parcels for
18 nonfarm dwellings if certain criteria are met. One of those criteria requires
19 that the parcel be ‘composed of at least 95 percent soils not capable or
20 producing 50 cubic feet per acre per year of wood fiber.’ ORS
21 215.284(4)(a)(C). ORS 215.284(4)(a)(C) suggests that the legislature
22 believes that property in the Willamette Valley that is capable of producing at
23 least 50 cf/ac/yr is worthy of protection from nonfarm dwellings.

24 “ORS 215.750 sets out standards for what are referred to as forest template
25 dwellings. Under ORS 215.750(1) the required level of parcelization within a
26 160-acre template to qualify for a forest template dwelling in Western Oregon
27 increases as the productivity of the soils increases from ‘0 to 49 cubic feet per
28 acre per year’ (three parcels) to ‘50 to 85 cubic feet per acre per year of wood
29 fiber’ (seven parcels) to ‘more than 85 cubic feet per acre per year of wood
30 fiber’ (eleven parcels). ORS 215.750 provides some idea of what the
31 legislature believes to be forest lands of low, moderate and high productivity
32 in Western Oregon. ORS 215.750(2) sets out a similar regulatory scheme for
33 forest template dwellings in Eastern Oregon where productivity ranges from
34 ‘0 to 20 cubic feet per acre per year,’ ‘21 to 50 cubic feet per acre per year’
35 and ‘more than 50 cubic feet per acre per year.’” *Just*, 60 Or LUBA at 84-85.

36 As we explain below, the county found, based on evidence submitted to the county
37 following our remand in *Anderson I*, that average productive capability of the soils on the
38 subject property is approximately 43 cf/ac/yr. Therefore under our decisions in *Just* and in
39 *Anderson I*, the subject property falls into the “middle range” and “land in a middle range
40 from a low of approximately 40 cf/ac/yr to a high of approximately 80 cf/ac/yr is unlikely to

1 be unsuitable for commercial forest uses unless there are additional factors that render those
2 moderately productive soils unsuitable for commercial forest use.” 60 Or LUBA at 250.

3 **B. Other Factors**

4 A second issue in *Anderson I* was whether a decision concerning whether property is
5 suitable for commercial forest uses must be decided based *exclusively* on the cf/ac/yr
6 productivity data required by the Goal 4 and the Goal 4 administrative rule. We concluded
7 that while LCDC intended that data must be considered, LCDC has not precluded
8 consideration of other factors that are not reflected in that data:

9 “Finally, the petitioner in *Just* argued that the decision about whether land is
10 suitable for commercial forest use must be based solely on the data described
11 in OAR 660-006-0010 and 660-006-0005(2) and the petitioner in this appeal
12 makes that same argument. We rejected the argument in *Just*, and we reject it
13 here for the same reason. Our reasoning in *Just* is set out below:

14 “Finally, petitioner appears to argue that the decision about
15 whether land qualifies as suitable for commercial forest use
16 must be based *solely* on the data described in OAR 660-006-
17 0010 and 660-006-0005(2), and cannot consider other factors.
18 We do not agree. It may be that the cf/ac/yr productivity for a
19 parcel using the data required by OAR 660-006-0010 and 660-
20 006-0005(2) could be so high that the parcel is suitable for
21 commercial forest use as a matter of law or that it could be so
22 low that the parcel is unsuitable for commercial forest use as a
23 matter of law. But this does not appear to be such a case,
24 because the evidence in the record suggests the soils’
25 productivity is approximately 60 cf/ac/yr. If the county on
26 remand determines that the cf/ac/yr productivity of the 15 acres
27 is not determinative, by itself, the county may consider the
28 other factors that bear on the suitability of the 15 acres for
29 commercial forest use. Based on the arguments presented in
30 this appeal, we believe at least some of the factors that the
31 county considered in reaching the challenged decision can be
32 considered. It seems likely that LCDC intended that the data
33 described by OAR 660-006-0010 and 660-006-0005(2) to be
34 the only direct measures of wood fiber productivity that can be
35 considered in determining whether the subject property is
36 suitable for commercial forest use. But the suitability of the
37 subject property for commercial forest use could also be
38 affected by a number of on-site and off-site physical impacts
39 and limitations that are not accurately reflected in or accounted

1 for in the data described by OAR 660-006-0010 and 660-006-
2 0005(2). We see no reason why the county could not consider
3 those impacts and limitations in making its decision on
4 remand. But the county must first consider the data that OAR
5 660-006-0010 and 660-006-0005(2) obligate the county to
6 consider. *Just*, [60 Or LUBA at 85-86] (italics in original;
7 underlining added; footnotes omitted).” *Anderson I*, 60 Or
8 LUBA at 250-51.

9 On remand, the county was entitled to consider other factors as discussed in the
10 underlined language above. Specifically, if the county determined that it would consider
11 factors other than the data described by OAR 660-006-0010 and 660-006-0005(2), those
12 factors must be factors that are not already reflected in or accounted for in that data.

13 **PETITIONER’S INITIAL ARGUMENT**

14 As we explain above, in *Anderson I* we declined petitioner’s invitation to adopt an
15 objective 20 cf/ac/yr standard for determining whether land is suitable for commercial forest
16 uses. Despite the fact that this issue was resolved in *Anderson I*, petitioner continues to
17 argue in this appeal that property that is capable of producing more than 20 cf/ac/yr of wood
18 fiber is suitable for commercial forest use as a matter of law, and petitioner cites the
19 legislative history discussed above under the motion to strike in support of that position.

20 Because this issue was resolved in *Anderson I*, and petitioner did not appeal that
21 decision to the Court of Appeals, petitioner may not raise that issue again in this appeal.
22 *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992); *Wetherell v. Douglas*
23 *County*, 226 Or App 320, 325, 203 P3d 300 (2009). But even if petitioner were not barred
24 from raising this issue, both the memorandum that is not subject to official notice and the
25 legislative history that we officially notice are entirely consistent with our conclusion in *Just*
26 and *Anderson I* that LCDC has refused to adopt an objective cf/ac/yr standard for the level of
27 productivity that qualifies land as commercial forest land. Those documents support the
28 general proposition that land that produces at least 20 cf/ac/yr is generally considered

1 suitable for commercial forest use.⁵ However, neither the legislative history that we
2 officially notice nor the memorandum that we do not officially notice support petitioner’s
3 position that property that is capable of producing more than 20 cf/ac/yr in all cases must be
4 considered commercial forest land. Neither the legislative history nor the memorandum are
5 inconsistent with our conclusion in *Just* and *Anderson* explained above that “land in a middle
6 range from a low of approximately 40 cf/ac/yr to a high of approximately 80 cf/ac/yr is
7 unlikely to be unsuitable for commercial forest use unless there are additional factors that
8 render those moderately productive soils unsuitable for commercial forest use.” Those
9 materials support the conclusion that for whatever reasons LCDC has declined to adopt a
10 single 20 cf/ac/yr standard or even regional objective cf/ac/yr standards. Given LCDC’s
11 refusal to do so, it would be particularly inappropriate for LUBA to accept petitioner’s
12 repeated invitations to establish 20 cf/ac/yr as a statewide objective standard for determining
13 whether land is suitable for commercial forest uses.

14 **FIRST ASSIGNMENT OF ERROR⁶**

15 There is no dispute that 31 percent of the subject property has soils that will produce
16 no wood fiber. The remaining 69 percent of the property has soils that will produce some
17 wood fiber. However, as explained below, the subject property is frequently subject to
18 extreme coastal winds of in excess of 100 miles per hour. Those high winds reduce the wood
19 fiber productivity of the property, affect the quality of that wood fiber and make reforestation
20 problematic. In fact there are very few harvestable trees on the subject property. The few

⁵ The acknowledged Coos County Comprehensive Plan (CCCP) also recognizes this general proposition:

“As the Forest Resources map indicates, much of the County is highly suitable for timber production of major commercial species. * * * A somewhat lower productivity is indicated on the coastal plain, where poorer soils and climate limit growth and in the Sikiyou National Forest in the southern part of the county where elevation and rocky soils are limiting factors. However, even these sites have a potential productivity well above 20 cu.ft./acre/year, which is the standard definition of commercial forest land.” CCCP 3.2-18 to 3.2.19.

⁶ Petitioner’s three assignments of error are all stated as subassignments of a single assignment of error.

1 harvestable trees on the property are all located in draws at the eastern and northern edges of
2 the property that offer those trees some protection from the extreme winds. Intervenor’s
3 expert determined that the productivity of the remaining 69 percent of the subject property’s
4 soils is nominally 77 cf/ac/yr but that level of productivity is further reduced to 62 cf/ac/yr by
5 the extreme winds. If that 62 cf/ac/yr is expressed as an average of the entire property, the
6 average productivity of the entire 16 acres is 43 cf/ac/yr. The county used the 43 cf/ac/yr
7 average for the entire 16-acre parcel in determining whether the subject property is “suitable
8 for commercial forest uses,” within the meaning of Goal 4. Petitioner argues:

9 “The term ‘average’ as it is used in OAR 660-006-0010 means average annual
10 production in cubic feet per acre per year over the growth cycle, at
11 culmination of mean annual increment. It does not mean average productivity
12 of any particular lot or parcel. LCDC could have specified that the forest
13 inventory be based on an evaluation of the average potential productivity of a
14 lot, parcel, or tract, if that is what [LCDC] had intended.” Petition for Review
15 15.

16 Petitioner is correct about the meaning of the word “average” in OAR 660-006-0010.
17 *See* n 2. OAR 660-006-0010 does not explicitly authorize a county to consider whether a
18 property should be planned and zoned for forest use based on the average cf/ac/yr
19 productivity of the soils on that property. The word “average” in OAR 660-006-0010 refers
20 to the average annual increase in wood fiber for the harvest cycle of the forest.

21 However, that does not mean the county erred by assessing the average productivity
22 of the 16-acre subject property. There is no dispute that subject property has some soils that
23 will produce no wood fiber and some soils that will generally produce approximately 77
24 cf/ac/yr of wood fiber, before the effect of the high winds is considered. The county does not
25 err in considering that the subject property has both kinds of soils. OAR 660-006-0010 is
26 simply silent on how the county can or must go about making a decision regarding how to
27 plan and zone a property that has different soils with different levels of wood fiber

1 productivity.⁷ In this case, the county determined it would consider the average productivity
2 of the soils. That is one way to proceed in considering the soil types on the property have
3 different levels of productivity and we see nothing in OAR 660-006-0010 that precludes the
4 county from doing so.

5 As petitioner correctly points out, we suggested in *Wetherell v. Douglas County*, 50
6 Or LUBA 167, 205, *remanded on other grounds* 204 Or App 732, 132 P3d 41 (2006), *rev'd*
7 *and remanded on other grounds* 342 Or 666, 160 P3d 614 (2007), that the county in that case
8 may have erred in making a decision concerning whether the property in that case was
9 suitable for commercial forest use based on the average productivity of the different soils as
10 opposed to the productivity of the predominant soil types. However, that suggestion was
11 based on language in the Douglas County Comprehensive Plan that the predominant soils
12 controlled. *Id.* Petitioner identifies no such language in the CCCP.

13 The first assignment of error is denied.

14 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

15 The county's decision on remand includes the following findings:

16 "In its decision to remand the present case back to us for further
17 consideration, LUBA offered the following observation * * *:

18 "Our cases suggest that . . . land in a middle range from [a low
19 of] approximately 40 cf/ac/yr to a high of approximately 80
20 cf/ac/yr is unlikely to be unsuitable for commercial forest use
21 unless there are additional factors that render those moderately
22 productive soils unsuitable for commercial forest use.'

23 "This language was picked up and repeated by Ms. Anderson in support of her
24 argument that, because [the property] is capable of producing 43 cf/ac/yr of

⁷ In contrast, Goal 3 expressly requires that the "predominant" soils be considered in determining whether the soil classification present on a property qualify as agricultural land. Goal 3 provides in part:

"Agricultural Land -- in western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service * * *."

1 wood fiber, it falls within LUBA’s ‘unlikely to be unsuitable’ range and
2 therefore must be suitable for commercial forest uses. However, our review
3 of these same cases indicates that, if anything, land in Coos County with wood
4 fiber productivity below 63 cf/ac/yr is likely to be unsuitable for commercial
5 forestry uses, unless additional factors indicate that it is suitable for such uses.

6 **“We find that the subject property is capable of producing 43 cf/ac/yr of**
7 **wood fiber, and is therefore unsuitable for commercial forest uses unless**
8 **other factors indicate that it is suitable for such uses.**

9 “In her appeal to LUBA, Ms. Anderson urged LUBA to hold that, on remand,
10 we should be limited to only considering the productivity of the subject
11 property, as measured by cf/ac/yr in making our decision regarding whether
12 the subject property was suitable for commercial forest uses. LUBA rejected
13 this argument and concluded that the County should be free to consider
14 additional on-site and off-site physical impacts and limitations in making our
15 decision, to the extent that they are not accurately reflected in or accounted for
16 in the measurement of wood fiber productivity. On remand, Ms. Anderson
17 provided no evidence or testimony to indicate that any additional factors exist
18 that would make the subject property suitable for commercial forest uses.

19 “The evidence that was submitted suggests that, if anything, the other factors
20 affecting the subject property are further indicators of its unsuitability for
21 commercial forest uses. For example, Mr. Frichtl testified that the physical
22 impact of wind on the subject property, in addition to restricting the quantity
23 of wood fiber productivity, severely impacts the quality of that productivity.
24 It was Mr. Frichtl’s observation that, as a direct result of the severe winds on
25 the property, the type of wood fiber that is produced is of extremely poor
26 quality that is unsuitable for production of saw logs, and is limited to
27 producing only pulp wood. It was also Mr. Frichtl’s expert opinion that a
28 property capable of producing 43 cf/ac/yr of pulp wood was significantly
29 inferior to another property capable of producing 43 cf/ac/yr of saw logs.
30 Although economic analysis of future yields is not respected by DLCD or
31 LUBA as a relevant factor in determining suitability for commercial forest
32 uses, we are unaware of any successful timber manager who would agree.
33 The fact that two separate forestry experts have testified that the subject
34 property would not attract any competent timber manager to consider the site
35 to be suitable for commercial forest uses, also cannot be ignored.

36 **“We find that there are no other or additional factors that would make**
37 **the subject property suitable for commercial forest uses. We further find**
38 **that there are significant additional factors that make the subject**
39 **property even more unsuitable for commercial forest uses.”** Record 8-9
40 (bold type and underlining in original).

1 **A. Additional Factors (Second Assignment of Error)**

2 As we have already explained, in remanding the county’s decision in *Anderson I*
3 LUBA stated:

4 “If the analysis required by OAR 660-006-0010 and 660-006-0005(2) is not
5 conclusive, the county may then consider other factors, provided those other
6 factors are ‘not accurately reflected in or accounted for in the data described
7 by OAR 660-006-0010 and 660-006-0005(2).’ *Just [v. Linn County, 60 Or*
8 *LUBA]* at 86.” *Anderson I, 60 Or LUBA* at 251-52.

9 In her second assignment of error, petitioner argues that the county erroneously considered
10 the effect of high winds on the quality of the wood fiber produced on the subject property.
11 According to petitioner, whether the wood fiber produced on the property is suitable for saw
12 logs or pulp wood, both pulp wood and saw logs qualify as wood fiber, and in drawing a
13 distinction between the two the county is engaging in a form of economic analysis that
14 LUBA has found impermissible in other cases. *See Oregon Shores Cons. Coalition v. Coos*
15 *County, 50 Or LUBA 444, 469 (2005), aff’d 204 Or App 254, 129 P3d 804 (2006)* (it is
16 impermissible to determine that land is not suitable for commercial forest use based on
17 economic analysis that projects investment costs and expected future revenue sixty years into
18 the future). Petitioner contends the only “additional factors” that the county may consider
19 are the other factors set out in the Goal 4 definition of forest lands, *i.e.*, “adjacent or nearby
20 lands which are necessary to permit forest operations or practices and other forested lands
21 that maintain soil, air, water and fish and wildlife resources.” *See n 1.*

22 We first note that interelevator argues petitioner waived the issues presented in this
23 appeal. We reject intervenor’s argument. The wood fiber quality factor was not identified
24 by the county until its decision in remand, and petitioner’s brief in *Anderson I* was submitted
25 after our decision in *Just* was issued. While it may be that petitioner could have challenged
26 our decision in *Anderson I* to adhere to our reasoning in *Just* by appealing our decision in
27 *Anderson I*, there is enough question in our mind on that point that we will decide the issue
28 on the merits.

1 Turning first to petitioner’s argument that the only additional factors that the county
2 may consider in determining whether the subject property qualifies as forest lands are the
3 factors listed in the Goal 4 definition of forest lands, petitioner contends that LUBA’s
4 decision in *Anderson I* that factors beyond the data described in the rules may be considered
5 improperly inserts words that are not present Goal 4 and OAR 660-006-0010 and 660-006-
6 0005(2), in violation of ORS 174.010.⁸ However, the question that the county was required
7 to answer in this appeal was whether the subject property is suitable for commercial forest
8 use. The Goal 4 definition of forest land offers absolutely no assistance in, and sets no limits
9 on, answering that question. The Goal 4 definition simply states that land is forest land if it
10 is suitable for commercial forest use and lists other kinds of land that may be forest lands
11 without regard to their suitability for commercial forest use. *See* n 1. In *Just* and *Anderson I*,
12 we determined that in deciding whether property is suitable for commercial forest uses, the
13 county must consider its productivity in cf/ac/yr as set out in OAR 660-006-0010 and 660-
14 006-0005(2):

15 “OAR 660-006-0010 describes how local governments are to go about
16 inventorying forest lands. OAR 660-006-0010 requires that a Goal 4
17 inventory ‘shall include a mapping of average annual wood production
18 capability by cubic foot per acre (cf/ac).’ *Although OAR 660-006-0010 does*
19 *not expressly say so, the required cf/ac/yr information presumably must be*
20 *used in determining whether property qualifies as forest land.* OAR 660-006-
21 0005(2) defines ‘Cubic Foot Per Acre.’ OAR 660-006-0005(2) requires that
22 in determining the wood fiber productivity of soils, expressed as cubic feet
23 per acre per year (cf/ac/yr), NRCS soil survey information or other
24 information establishing cf/ac/yr that the state forester finds to be comparable
25 must be used. Alternatively, if cf/ac/yr data are not available or are inaccurate,
26 an alternative method that provides equivalent data as described in a

⁸ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” (Emphasis added.)

1 Department of Forestry technical bulletin may be approved by the Department
2 of Forestry.” 60 Or LUBA at 81 (emphasis added.)

3 Although we determined in *Just* that LCDC must have meant that counties must
4 actually consider the information that is required by OAR 660-006-0010 and 660-006-
5 0005(2), as we also explained neither rule *expressly requires* that that information be
6 considered at all. While our inference that the rules envision that the required information
7 will actually be considered is a fair one, petitioner would have LUBA go much further in
8 interpreting those rules and say that under those rules *only* that information may be
9 considered in determining if land is suitable for commercial forest use and that the only
10 additional factors that may be considered whether land qualifies as forest land is whether the
11 land qualifies under one of the other factors in the Goal 4 definition of forest land. It is
12 petitioner who would violate ORS 174.010 by inserting limiting text that has been omitted
13 from Goal 4 and OAR 660-006-0010 and 660-006-0005(2). We adhere to our decisions in
14 *Just* and *Anderson I* that in making decisions about whether land is suitable for commercial
15 forest uses a local government may consider additional relevant factors that are not
16 accurately reflected in or accounted for in the data described by OAR 660-006-0010 and
17 660-006-0005(2).⁹

18 Turning to petitioner’s point that pulp wood and saw logs are both wood fiber,
19 petitioner is correct. But we do not understand petitioner to dispute that wood that is suitable
20 only for pulp wood is less valuable than wood that is suitable for saw logs. As instructed in
21 *Anderson I*, the county’s focus on remand was on the cf/ac/yr productivity on the subject

⁹ On page 86 at n 14 of our decision in *Just* we gave as an example of such additional relevant factors residences on the forested property, or on nearby properties, if those residences made it difficult or impossible to conduct necessary forest practices. Petitioner argues such dwellings might have some bearing on whether a physically developed or irrevocably committed exception should be approved for the forested property under OAR 660-004-0025 and 660-004-0028, but they would have little or no relevance in determining whether the forested property is suitable for commercial forest use. Although we need not decide the issue here, because the county in this appeal did not rely on such a factor in determining that the property is not suitable for commercial forest uses, petitioner is probably correct on that point.

1 property, which it found to be on the low end of the 40 to 80 middle range we discussed in
2 *Just* and *Anderson I*. The additional factor of the impact of the high winds on wood fiber
3 quality was appropriate, and that consideration is not similar to the easily manipulated 60-
4 year economic analysis that we rejected in *Oregon Shores Cons. Coalition v. Coos County*.

5 The second assignment of error is denied.

6 **B. Suitability for Commercial Forest Use**

7 **1. Erroneous Construction and Improper Reversal of the Burden**

8 As we have noted several times in this opinion, LUBA determined in *Just* and
9 *Anderson I* that “land in a middle range from a low of approximately 40 cf/ac/yr to a high of
10 approximately 80 cf/ac/yr is *unlikely to be unsuitable* for commercial forest use unless there
11 are additional factors that render those moderately productive soils unsuitable for
12 commercial forest use.” (Emphasis added.) The county determined that lands that are
13 capable of producing 20 cf/ac/yr to 119 cf/ac/yr of wood fiber in Coos County are
14 “unsuitable for commercial forest uses unless other factors indicate that it is suitable for such
15 uses.” Record 8. Later in its decision the county found “[o]n remand Ms. Anderson
16 provided no evidence or testimony to indicate that any additional factors exist that would
17 make the subject property suitable for commercial forest uses.” Record 9.

18 If the above was the sole basis for the county’s decision, remand would be required.
19 Just as petitioner may not continue to argue issues that were resolved adversely to her in
20 *Anderson I*, the county may not do so. We explained the analysis that is generally required
21 of counties for lands with wood fiber productivity of 40 cf/ac/yr to 80 cf/ac/yr in *Anderson I*.
22 Neither the county nor intervenor appealed our decision in *Anderson I*. Having failed to do
23 so, the county is not free in its decision on remand to reverse the suitability presumption that
24 we set out in *Anderson I* and shift the burden of proof to petitioner.

25 If we were to consider the county’s position on the merits, the county appears to be
26 relying largely on text in its comprehensive plan that immediately follows the text that we

1 quoted earlier at n 5 to support its different view about whether lands with wood fiber
2 productivity of between 20 cf/ac/yr and 119 cf/ac/yr are properly viewed as suitable for
3 commercial forest use.¹⁰ That text appears to be an attempt to describe the county’s view of
4 the “reality” of commercial forest operations in Coos County and other coastal counties. But
5 that text immediately follows other CCCP text set out at n 5 that recognizes that 20 cf/ac/yr
6 is the generally understood level of production that indicates land may be suitable for
7 commercial forest use. The text set out at n 10 suggests that in Coos County a higher level of
8 production is desired or required by large commercial forest operators, but the CCCP text
9 continues to recognize “low site class lands are technically ‘commercial’ forest lands * * *.”
10 Whatever the county may have intended when it adopted that CCCP language, it does not say
11 that land with wood fiber productivity of 20 cf/ac/yr to 119 cf/ac/yr is “unsuitable for
12 commercial forest uses unless other factors indicate that it is suitable for such uses.” If the
13 county wants to establish such a standard for Coos County, it must amend the CCCP to state
14 that intent, and demonstrate that such a standard is consistent with Goal 4.

¹⁰ Some of the text that the county relies on lends some support to its position, but in other parts of that text (emphasized below) the county appears to recognize that lands with much less productive potential, down to 20 cf/ac/year, generally are presumed to be suitable for commercial forest use. That text is set out below:

“Only the sand dune areas of the coastal fringes have so little growth potential that they fall outside the definition of ‘commercial forest lands.’

“Unlike the definition of ‘Agricultural Land’, which as a different standard in Eastern Oregon, the definition of ‘commercial forest lands’ is the same state-wide. However, in reality a rather different standard operates on the Oregon Coast, where the levels of forest productivity are generally very high. Land of lower site classes in Coos County (site class 4 or below) [below 119 cf/ac/yr for Douglas fir] is regarded as relatively poor timber growing land. Commercial timber production is only feasible on lower site class lands where large contiguous tracts are managed (for example in the Coos County Forest or the upper elevations of the Siskiyou National Forest.) There are a few large corporate holdings on the coastal plain in these lower site class areas which may still be economically feasible to manage. However, many citizens in this area have complained that most timber companies are not interested in purchasing land in the area for commercial timber production. *Thus, while these low site class stands are technically ‘commercial forest lands,’ in practice they are not often managed intensively, particularly where they are in smaller private ownerships.*” CCCP 3.2.19 to 3.2.20 (emphases added).

1 **2. The County’s Other Findings**

2 Although the county’s decision would have to be remanded if it relied solely on the
3 just-discussed reasoning, the challenged decision also applies the inquiry that we stated in
4 *Anderson I* must be applied when property is capable of producing between 40 cf/ac/yr and
5 80 cf/ac/yr. As the county explains in its decision, “if anything, the other factors affecting
6 the subject property are further indicators of its unsuitability for commercial forest uses.”
7 Record 9. The subject property includes 16 acres and is not part of a larger forest operation.
8 Based on the Frichtl study, the county found that the average productivity of the subject
9 property is 43 cf/ac/yr, near the low end of the midrange we identified in *Anderson I*. As we
10 have already explained, based on the Frichtl study, the county also found that the high winds
11 adversely affect the quality and value of the rather low volume of wood fiber that the
12 property produces. Finally, although not expressly mentioned in the county’s findings, the
13 Frichtl study also explains that the high winds make reforestation problematic:

14 “A second consideration needs to be reforestation. All attempts to grow trees
15 in the open portions of the property by the current owner have failed. This is
16 a very harsh site and reforestation would be expensive and spotty at best.”
17 Record 40.

18 The impact of high winds on productivity, quality and value are not factors that are
19 “accurately reflected in or accounted for in the data” described by OAR 660-006-0010 and
20 660-006-0005(2). Taken together with the evidence that it is extremely difficult to reforest
21 the subject property, we conclude that the county’s findings that the subject property is not
22 suitable for commercial forest use are sufficient and supported by substantial evidence in the
23 record.

24 The third assignment of error is denied.

25 The county’s decision is affirmed.