

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal Ordinance PA 1007 amending the
4 county's comprehensive plan designation for the subject
5 parcel from Forest Land to Marginal Land and rezoning the
6 parcel from Impacted Forest Lands to Marginal Land.

7 **MOTION TO INTERVENE**

8 Robert Ericsson, the applicant below, moves to
9 intervene on the side of respondent in this appeal
10 proceeding. Petitioners do not object to the motion, and it
11 is allowed.

12 **FACTS**

13 The subject property is 90 acres in size.
14 Intervenor-respondent applied to redesignate the subject
15 land from Forest Land to Marginal Land, and to change the
16 zoning for the subject parcel from Impacted Forest Lands to
17 Marginal Land.

18 The planning commission recommended approval of the
19 application. The board of commissioners approved the
20 planning commission's recommendation, and this appeal
21 followed.

22 **FIRST ASSIGNMENT OF ERROR**

23 "The county misconstrued the applicable law by
24 limiting the time period for evaluating production
25 capability and shifting the focus from the overall
26 timber production potential to past management of
27 the forest operation."

1 **SECOND ASSIGNMENT OF ERROR**

2 "The county misinterpreted the term 'capable of
3 producing' by basing the forest operation income
4 test on how the subject parcel is currently
5 managed."

6 ORS 197.247(1)(a) provides that a county may designate
7 land as marginal land if:

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

15 **A. Interpretation of ORS 197.247(1)(a)**

16 Petitioners contend the county erroneously read the
17 first part of ORS 197.247(1)(a), together with the portion
18 emphasized above, to determine whether the subject land was
19 managed during 1978 through 1982 as a part of a forest
20 operation "capable of producing" the specified \$10,000
21 annual gross income. Petitioners argue that for forest
22 operations, the above emphasized language in
23 ORS 197.247(1)(a) should be read alone. According to
24 petitioners, the county must determine whether over the
25 growth cycle, the subject land is capable of producing the
26 identified income, without reference to the management of
27 the land during the time period specified in the first part
28 of ORS 197.247(1)(a).

29 We reject petitioners' contention that the time frame
30 stated in ORS 197.247(1)(a) applies only to farm operations,

1 and not to forest operations. ORS 197.247(1)(a) only makes
2 grammatical sense if it is read as follows:

3 "The proposed marginal land was not managed,
4 during three of the five calendar years preceding
5 January 1, 1983, as part of [(1)] a farm operation
6 that produced \$20,000 or more in annual gross
7 income or [(2)] a forest operation capable of
8 producing an average, over the growth cycle, of
9 \$10,000 in annual gross income[.]"

10 Consequently, ORS 197.247(1)(a) requires a two part
11 inquiry to determine whether a forest parcel may be
12 designated as "marginal" land. First, the county must
13 determine whether the land was managed as part of a forest
14 operation during three of the five years from 1978 through
15 1982. This requirement of ORS 197.247(1)(a) simply provides
16 a period of time during which the management of the parcel
17 as a part of a forest operation was required.¹ However,
18 here, the parties do not dispute that the subject land was
19 managed as part of a forest operation during 1978 through
20 1982.

21 Second, ORS 197.247(1)(a) requires the county to
22 determine whether the forest operation in question is
23 capable of producing an average of \$10,000 in annual gross
24 income over the growth cycle. What occurred on the subject
25 parcel during the 1978-1982 time period is not the sole

¹If the parcel were not managed as part of a forest operation during three of the five years from 1978 through 1982, then there would be no further inquiry under ORS 197.247(1)(a). In that circumstance, the land could be designated as marginal land if it satisfies at least one of the three standards provided in ORS 197.247(1)(b)(A)-(C).

1 determinant of the "capability" of the subject parcel to
2 produce trees, because the growth cycle of trees may greatly
3 exceed the specified five year period. The issue in dispute
4 in this appeal is whether the forest operation on the
5 subject parcel is "capable of producing" the requisite
6 income level over the growth cycle of the trees.

7 The parties disagree about what is meant by the
8 ORS 197.247(1)(a) phrase "capable of producing." In this
9 context, the choice of the word "capable" requires the
10 application of an objective test in determining a parcel's
11 potential productivity. In other words, that a particular
12 forest operator may use poor management techniques, and
13 thereby cannot produce the requisite income from the parcel
14 over the growth cycle, would not establish that the parcel
15 was not "capable" of producing the requisite income level
16 over the growth cycle. The statutory requirement that the
17 land be "capable" of producing the specified annual income
18 "over the growth cycle" requires an evaluation of the income
19 potential of the property assuming the utilization of
20 reasonable forest management practices over the growth
21 cycle.

22 **B. Application of ORS 197.247(1)(a)**

23 Petitioners argue the challenged decision improperly
24 redesignates and rezones the subject land as "marginal land"
25 because the county failed to rely on the capability of the
26 soils on the property to determine whether the parcel is

1 "capable of producing" the required annual income.
2 Petitioners argue the county improperly based its
3 determination of the income that the forest operation is
4 capable of producing on how the property is currently
5 managed. Petitioners argue the county must conclude the
6 subject property is capable of producing the requisite
7 income because of the ratings of the soils on the subject
8 parcel for the production of forest products.

9 The county disagrees that its decision is based on how
10 the property is currently managed. The county states it "
11 * * did not agree with petitioners' assertion that soil
12 rating data is the only basis for determining forest income
13 capability under ORS 197.247(1)(a)." Respondent's Brief 6.

14 While the classification of the soils on the subject
15 parcel is relevant in determining the parcel's capability to
16 produce the requisite income over the growth cycle, we do
17 not agree with petitioners that the soils are dispositive of
18 the capability of the parcel to produce trees and,
19 therefore, of whether the parcel can generate the specified
20 income over the growth cycle. The issue is whether the
21 county determined the capability of the subject property to
22 produce an average annual gross income of \$10,000, over the
23 growth cycle, using reasonable management practices.

24 The challenged decision states:

25 "ORS 197.247(1)(a) should be interpreted to
26 require an evaluation of the actual timber growth
27 potential for the property in question during the

1 years 1978 to 1983." Record 6.

2 While this finding is somewhat unclear, we believe it
3 is clear enough, in view of the evidence cited in the
4 decision, to establish that the county analyzed the
5 capability of the subject land to produce the requisite
6 income over the growth cycle, assuming the use of reasonable
7 management practices. Specifically, the decision states:

8 "1. The applicant's forester * * * has been a
9 professional forester since 1968. He has a
10 degree in Forest and Timber Management from
11 the University of Montana and a Master's
12 Degree in Business Administration * * * from
13 the University of Oregon. He has been a
14 professional forester in Lane County since
15 1975.

16 "2. [The applicant's expert] conducted an on-site
17 evaluation to determine the volume of timber
18 located on the Subject Property prior to its
19 partial harvesting in 1988-89. After
20 determining that volume he calculated, using
21 current timber values, the amount of revenue
22 that could be generated on a yearly average
23 over the growth cycle of the trees. This
24 amount was \$3,000 per year.

25 "3. After analyzing the average income that could
26 be expected based on the actual stocking of
27 the Subject Property, [applicant's expert]
28 analyzed the property's timber volume
29 potential if it were fully stocked. Assuming
30 the entire parcel * * * was fully stocked,
31 [applicant's expert] concluded that the
32 yearly average income over the growth cycle
33 (45 years) would be approximately \$5,400 to
34 \$6,300. His conclusion was based upon his
35 observation of actual growth rates, soil
36 conditions, exposure, soil depth and past
37 forest management.

38 "4. [Applicant's expert] analyzed another parcel

1 in the area that contained soils similar to
2 the Subject Property which has a well stocked
3 stand of 60-year old timber. From this
4 analysis, he applied his findings to the
5 Subject Property to determine its
6 productivity over a 90-year growth cycle. He
7 concluded that the volume of timber would
8 only produce an average of \$7,000 to \$7,500
9 annual gross income.

10 "5. [The applicant's expert] did not question or
11 dispute the Oregon Department of Forestry's
12 timber growth rate estimates for the various
13 soil types on the Subject Property. He
14 concluded, however, that those growth rates
15 were not being achieved for the timber that
16 was actually growing on the Subject Property,
17 nor would it be achieved, even if the
18 property were fully stocked. [Applicant's
19 expert] stated he did not know the reason for
20 the lower growth rates on the subject
21 property but speculated it could be a
22 combination of factors, including, but not
23 limited to, soil compaction, exposure poor
24 drainage, soil depths, and over grazing.

25 "6. [Applicant's expert] affirmed, based on his
26 on-site analysis, the fact that the Subject
27 Property was not managed as a forest
28 operation capable of producing \$10,000 annual
29 gross income between 1978 and 1983.

30 "* * * * *" Record 5.

31 We conclude the challenged decision correctly applies
32 ORS 197.247(1)(a), and determines that the property is not
33 capable of producing, if reasonably managed, an average
34 annual gross income of \$10,000 over the growth cycle of the
35 trees.

36 The first and second assignments of error are denied.

37 The county's decision is affirmed.

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