

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

3
4 JAMES HECKER,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 WILHELM F. HAGEN,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2005-144

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 James Hecker, Florence, filed the petition for review. Jannett Wilson, Eugene, argued
25 on behalf of petitioner.

26
27 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response brief and
28 argued on behalf of respondent.

29
30 Wilhelm F. Hagen, Florence, filed a response brief and argued on his own behalf.

31
32 DAVIES, Board Member; BASSHAM, Board Chair, participated in the decision.

33
34 HOLSTUN, Board Member, did not participate in the decision.

35
36 AFFIRMED

06/19/2006

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

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NATURE OF THE DECISION

Petitioner challenges a county decision approving a comprehensive plan amendment redesignating a 71-acre property from “Forest Land” to “Nonresource” and rezoning the property from “F-2/Impacted Forest Land” to “RR-5/Rural Residential.”

MOTION TO FILE REPLY BRIEF

Petitioner moves to file brief a reply brief. There is no opposition to the motion, and it is granted.

MOTION TO DISMISS ORAL ARGUMENTS

Intervenor-respondent Wilhelm F. Hagen (intervenor) contends that petitioner’s counsel presented new evidence at oral argument. He argues that such new evidence is not permissible at oral argument, and that the oral argument “must be dismissed as inadmissible.” He also argues that the appeal must be dismissed. Petitioner responds that no new information was submitted at oral argument. He also alleges that intervenor’s motion includes argument on the merits of the appeal in an attempt to “have the last word” and moves to strike such argument.

LUBA’s review of challenged land use decisions and limited land use decisions is generally limited to the record. ORS 197.835(2)(a). Accordingly, presentation of new evidence at oral argument is improper and such evidence will not be considered. *See also* OAR 661-010-0040(5) (demonstrative exhibits presented at oral argument are limited to copies of materials already in the record). That said, it is not unusual for parties to attempt to introduce or to inadvertently introduce new evidence while presenting oral argument. To the extent oral argument includes evidence not in the record, we disregard such new evidence. However, any introduction of new evidence in this case does not provide a basis to strike oral argument of the offending party entirely, or to dismiss the appeal. Similarly, petitioner may be correct that intervenor’s motion includes substantive responses to issues raised in the

1 appeal, and is not limited to the issue of new evidence presented at oral argument. To the
2 extent it does, we will disregard them.

3 Intervenor's motion to dismiss oral arguments is denied; petitioner's motion to strike
4 portions of intervenor's motion is denied.

5 **FACTS**

6 The subject property is a 71-acre parcel identified as tax lot 1702. It is located south
7 of Mercer Lake Road and west of Collard Lake Road approximately one-half mile east of
8 Highway 101 and five miles north of Florence. The property is composed of mostly sandy
9 soils, and contains stabilized dunes, some with slopes over 25 percent. The timber on the
10 property is primarily shore pines with a scattering of some wind-damaged conifers such as
11 red cedar, Douglas fir, and hemlock. To the north and east is property zoned RR-1 and
12 developed with single-family residences. To the south and west are open sand dunes on
13 lands currently zoned F-2 and NR (Natural Resource).

14 On June 24, 2004, intervenor submitted an application for the subject plan
15 amendment and zone change approvals. The Lane County Planning Commission conducted
16 a hearing on the application, and on November 16, 2004, voted to recommend approval of
17 the requested application. On September 14, 2005, the Lane County Board of
18 Commissioners adopted findings approving the plan amendment and zone change. This
19 appeal followed.

20 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

21 There are two ways a county can justify a decision to allow nonresource use of land
22 previously designated and zoned for farm or forest uses. One is to take an exception to Goals
23 3 (Agricultural Lands) and 4 (Forest Lands). The other is to adopt findings which
24 demonstrate the land does not qualify either as agricultural land under Goal 3 or forest land
25 under Goal 4. *DLCD v. Klamath County*, 16 Or LUBA 817, 820 (1988). In this case,
26 intervenor took the second approach.

1 Petitioner assigns error to the county’s conclusion that the subject property is
2 nonresource land. Specifically, he contends that the county erred in concluding that the
3 subject property is not forest land. He cites to the definition of “forest lands” in Goal 4,
4 which provides:

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

11 Petitioner’s first assignment of error challenges the county’s conclusion that subject property
12 is not “lands which are suitable for commercial forest uses.” Petitioner’s second assignment
13 of error challenges the county’s conclusion that the subject property is not “other forested
14 lands that maintain soil, air, water and fish and wildlife resources.”

15 **A. First Assignment of Error (Suitable for Commercial Forest Uses)**

16 In addressing suitability of commercial forest uses, the county began its analysis by
17 setting forth the forest capability ratings provided by the Natural Resources Conservation
18 Service (NRCS).¹ The county determined that four of the soils on the property had a forest

¹ The county findings state, in relevant part:

“13. The 1987 Soil Survey for Lane County Area, Oregon, map sheet # 68 and the Lane County Soil Ratings of August 1997 indicates the property has the following soil classifications. ‘Ag’ refers to NRCS agricultural class, while ‘Forest’ refers to the forest capability rating for Douglas-fir in [cubic feet of wood fiber per acre per year] cu.ft./ac./year.

<u>Map #</u>	<u>Soil Type</u>	<u>Ag</u>	<u>Forest</u>	<u>% of Site</u>
94E	Netarts fine sand, 12 to 30 % slopes	VI	0	58
131G	Waldport fine sand, 30 to 70 % slopes	VII	0	21
44	Dune land	VIII	0	17
94C	Netarts fine sand, 3 to 12 % slopes	VI	0	3
21G	Bullards-Ferrelo loams 30 to 60 % slopes	VI	76	1

“14. Based on this evaluation all of the site area is properly classified as Agricultural Class VI to VIII. These classifications are not suitable for agricultural use. The ratings for forest use result in an average productivity of 0.76 cf/a/y. Height and age

1 capability rating of zero. Although the findings do not make it clear, the zero rating for those
2 four soils apparently reflects the absence of data for forest productivity for those soils.
3 Intervenor also conducted an on-site study of some of the trees found on the property and
4 concluded that the subject property is capable of producing an average of 1.8 cf/ac/yr. The
5 county concluded that the property is not suitable for commercial forest uses and, thus, that
6 the property is not forest land.²

measurements on Douglas fir result in 1.8 cf/a/y that is far below the 50 cf/a/y employed by Lane County as commercially viable forest land.” Record 42.

² The county’s Goal 4 findings state, in relevant part:

- “8. Approximately 99% of the Subject Property has soils which are nonresource, as they exist on the site. This determination was based on a professional evaluation and an independent analysis by Lane County. Only 1% of the parcel contains soils rated at 76 cu.ft./ac./year. The remaining soils have no rating for forest use resulting in a theoretical average of 0.76 cf/a/y. These sandy soils have non-agricultural ratings of VI-VIII.
- “9. To obtain more accurate productivity data than estimated by the soil ratings, a sufficient sampling of dominant and co-dominant Douglas fir were measured in height and age by increment boring. The results of these measurements resulted in an average productivity of 1.8 cf/a/y.
- “10. Shore pine were found to grow 5 % better than Douglas fir, still far below the 50 cf/a/y employed by Lane County as commercially viable forest land. Red cedar was measured to grow about 10 % slower than Douglas fir and hence does not provide an alternative. The situation for Hemlock is even worse because its economic value is less than one half that of Douglas fir.
- “11. This evaluation was reviewed by Oregon Department of Forestry staff, who agreed with the conclusion that the subject property is not forest land (AS Exhibit H-5).” Record 40.

Exhibit H-5 is a letter from the Department of Forestry staff indicating that he reviewed the report of intervenor:

“I have reviewed your data and spot checked several areas for site index in both of the parcels identified as follows: Map No. 17-12-35-40 Tax lot 500; Map No. 17-12-36-30 Tax lot 1702. It appears that your conclusions are correct. All correlations between site index and cubic feet of timber growth per acre per year fall well below the 20 cubic foot level and therefore do not fit the minimum level of lands suitable for reforestation as per OAR 629-610-0010.” Record 77.

The following additional findings support the county’s conclusion that the subject property is not suitable for commercial forest uses:

1 **1. Zero Productivity for Unrated Soils**

2 Petitioner argues, first, that the county erred in assuming that a lack of a NRCS forest
3 productivity rating equates to a zero productivity rating. He also alleges that the county
4 erred in relying on a qualitative study submitted by intervenor instead of on available NRCS
5 data.

6 Petitioner is correct that we have held that a local government cannot assume a zero
7 forest productivity rating where there is an absence of an NRCS rating for a particular soil.
8 *See Wetherell v. Douglas County*, 50 Or LUBA 167, 204 (2005), *rev'd and rem'd on other*
9 *grounds*, ___ Or App ___, ___ P3d ___ (2006) (“While OAR 660-006-0010 pertains to the
10 inventory of forest lands, it again shows that LCDC is concerned that determinations of
11 ‘forest land suitability’ be made based on empirical methods, and that counties cannot simply
12 assume from the fact that no NRCS productivity ratings exist for certain soils that such soils
13 are nonresource soils.”); *see also Carlson v. Benton County*, 34 Or LUBA 140, 149, *aff'd*
14 154 Or App 62, 961 P2d 248 (1998) (where NRCS data is not available, local government
15 must rely on an alternative method for determining productivity). The county argues,
16 however, that it did not rely exclusively on the zero ratings set forth in the table. Rather, it
17 adopted alternative findings of compliance based on intervenor’s on-site study. In that study,

“8. The Board adopts the forest land analysis of the Subject Property reviewed by Oregon Department of Forestry staff. The Board finds this analysis accurately identifies the constraints posed by the predominant soil type on the site, including excessive drainage. The Board finds no prudent forest manager would utilize this area for commercial forest production, given the impacts associated with this location.

“9. The Subject Property has a theoretical average forest capability of 0.76 cf/a/y, based on the published forest capability rating. Evidence has shown no commercial forest stands are present on this soil type in the general area, and the Subject Property has extremely sandy and permeable soils. Based on this evidence, the Board finds the soil type and sandy, excessively drained conditions that are present make it impossible for the Subject Property to meet the 50 cf/a/y threshold adopted by Board Order 84-9-12-3, September 12, 1984, as consisting of commercial forest land.” Record 44.

1 intervenor measured individual trees located on the property to calculate site index numbers
2 as a means of determining forest land suitability.

3 While it is not entirely clear that the decision's reliance on the site-specific study is
4 completely independent of its reliance on the zero ratings, we conclude that the findings can
5 reasonably be read that way. If the county had relied on the zero ratings, we would likely be
6 required to remand on that basis. However, we agree with the county that it adopted
7 independent alternative findings that the subject property is not suitable for commercial
8 forestry, based on intervenor's on-site study. Accordingly, if the county's reliance on
9 intervenor's on-site study is supportable, petitioner's argument that the county erred in
10 relying on those zero ratings does not provide an independent basis to reverse or remand the
11 challenged decision.

12 **2. 50 cf/ac/yr**

13 Neither Goal 4 nor the administrative rules implementing Goal 4 set forth a precise
14 methodology for determining whether land is suitable for commercial forestry. *Potts v.*
15 *Clackamas County*, 42 Or LUBA 1, 5, *aff'd* 183 Or App 145, 52 P3d 449 (2002). Counties
16 may develop more specific or objective standards as a threshold for Goal 4 protection.
17 *Sommer v. Josephine County*, 49 Or LUBA 134, 138, *aff'd* 201 Or App 528, 120 P3d 927
18 (2005). Such standards, if acknowledged, may replace direct application of the Goal 4
19 standard.

20 Petitioner contends that the county erred in concluding that the subject property is not
21 forest land because it is not suitable for commercial levels of forest production; *i.e.*, because
22 propagation and harvesting of commercial forest species would not be profitable enough for
23 a commercial forest operator. The county responds that none of the challenged findings
24 equate suitability for commercial forestry uses solely to profitability, and we agree.

25 Petitioner also challenges the county's reliance on a 50 cf/ac/yr minimum standard
26 for commercial forest lands. He argues that the 50 cf/ac/yr standard is found in a document

1 titled “Forest Lands Working Paper,” which is not incorporated into the comprehensive
2 plan.³ Because it is not part of the comprehensive plan, he asserts, it is not acknowledged to
3 be in compliance with Goal 4. The standard is inconsistent with Goal 4, petitioner asserts,
4 and the county erred in relying on it.

5 We need not determine, in this case, whether the county was entitled to rely on the 50
6 cf/ac/yr threshold in the working paper. Although the challenged findings reference the 50
7 cf/ac/yr standard, and even at times appear to apply it, the conclusion that the subject
8 property does not qualify as forest lands does not rely on it. As mentioned above, the
9 Oregon Department of Forestry (DOF) reviewed intervenor’s report, which concluded that
10 the subject property was capable of producing on average only 1.8 cf/ac/yr. The DOF
11 forester “agreed with the conclusion that the subject property is not forest land.” *See* n 2,
12 Finding 11. The record also includes a 1987 letter from DOF reviewing the conditions on
13 the property and concluding: “any attempt to produce commercial stands of conifers on this
14 property would be futile due to these environmental limitations.” Record 72. As discussed
15 in more detail below, the county’s conclusion that the subject property is not suitable for
16 commercial forest uses is supported by substantial evidence in the whole record that the
17 subject property is capable of producing only a fraction of 50 cf/ac/yr.

18 3. Average Productivity

19 Petitioner argues that the challenged findings are inadequate because they rely on an
20 *average* productivity of the property. He cites to *Wetherell* in support of his contention that
21 the proper determination is whether the *predominant* soils on the property are nonresource

³ Lane County Board Order 84-9-12-3, cited in the challenged findings, *see* n 2, adopted supplemental findings in support of PA 883, the ordinance adopting the Rural Comprehensive Plan. This Board Order, upon which petitioner relies for his contention that the 50 cf/ac/yr threshold does not appear in the comprehensive plan, provides:

“WHEREAS, in PA 883, the Rural Comprehensive Plan Ordinance that adopted the plan policies, 28 working papers, while not part of the Ordinance itself, were adopted in support thereof[.]”

1 soils. 50 Or LUBA at 205. Our opinion in *Wetherell*, however, does not require a
2 predominance calculation. In *Wetherell*, we noted that the forestry consultant in that case
3 averaged the cf/ac/yr data across the entire parcel. While we questioned whether averaging
4 the productivity across the parcel was the proper calculation, we did not hold, as petitioner
5 contends, that Goal 4 itself requires that forest productivity be determined by calculating
6 whether the property consisted predominantly of nonresource soils. Rather, we simply noted
7 that the Goal 4 element of the county’s comprehensive plan appeared to determine what Goal
8 4 zone applied based on whether the parcel consisted “predominantly” of soils with certain
9 cubic foot site classes.

10 In this case, petitioner does not provide a basis to conclude that the comprehensive
11 plan requires one type of calculation over the other, and we decline to provide that argument
12 *sua sponte*. Accordingly, petitioner’s contention that the findings are inadequate because
13 they do not address whether the predominant soils are nonresource does not provide an
14 independent basis to reverse or remand.

15 **4. Intervenor’s Study**

16 Petitioner argues that to the extent the county relies on intervenor’s study, it erred.
17 First, he contends that the county was required to rely on available NRCS data. Second,
18 even if the county was not required to rely on the NRCS data petitioner provided, petitioner
19 argues that reliance on a purely qualitative analysis is inconsistent with Goal 4. We will
20 address each argument in turn.

21 Petitioner argues, first, that the county erred in using data other than NRCS data in
22 determining the suitability of the subject property for commercial forest uses. He contends
23 that the NRCS soils data for the subject property indicates that, with the exception of one
24 soils type, all of the soils on the property have site indices of 80 or better. He cites to a table
25 included in the record that he contends includes the NRCS data for the subject property.

26 That table, appearing at Record 102, is reproduced here:
27

<u>Map Unit</u>	<u>Soil Name</u>	<u>Site Index</u>	<u>Productivity</u> <u>cf/ac/yr</u>	<u>Acres</u>	<u>Dominant</u> <u>Tree</u>
21G	Bullards-Ferrelo 12-30%	144	150	2	Douglas Fir
44	Dune Land	None	None	15	None
94C	Netarts, 3-12%	80	58	6	Douglas Fir
94E	Netarts, 12-30%	80	58	35	Douglas Fir
131G	Waldport, 30-70%	92	73	13	Lodgpole Pine

11 Apparently, the information included in that table is taken from what petitioner claims
12 constitutes the underlying documentation for the published NRCS data.⁴

13 The table that the county initially relied upon for capability information is cited above
14 in n 1, Finding 13. The NRCS data provided by the county, as explained above, provided
15 zero ratings for four of the soils found on the property. That data, according to the county, is
16 based on the 1987 Soil Survey for Lane County and the Lane County Soil Ratings of August
17 1997.⁵ In order to confirm that data, intervenor submitted additional information
18 demonstrating that the property is not suitable for commercial forest uses.

19 Petitioner contends that the county erred in not relying on the NRCS data provided in
20 the table set forth above, and instead relying on an independent analysis submitted by
21 intervenor. In support of his contention that the county was required to rely on his NRCS
22 data, petitioner cites to OAR 660-006-0010, which provides:

23 “Governing bodies shall include an inventory of ‘forest lands’ as defined by
24 Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural
25 lands or lands for which an exception to Goal 4 is justified pursuant to ORS

⁴ In the record, at Record 111-120, are what petitioner refers to as the NRCS “green sheets.” These sheets are dated from 1984 to 1986, and provide potential forest productivity site index numbers for the soils found on the subject property.

⁵ The “Lane County Soil Ratings for Forestry and Agriculture,” dated August 20, 1997, provides:

“Lane County Land Management Division, with technical assistance from Lane Council of Governments, compiled this to assist the public in preparing land use applications. The Natural Resources Conservation Service (NRCS) reviewed data and methodology.” Record 143.

1 197.732 and taken are not required to be inventoried under this rule. Outside
2 urban growth boundaries, this inventory shall include a mapping of forest site
3 class. If site information is not available then an equivalent method of
4 determining forest land suitability must be used. Notwithstanding this rule,
5 governing bodies are not required to reinventory forest lands if such an
6 inventory was acknowledged previously by the Land Conservation and
7 Development Commission.”

8 He then cites the following discussion of that provision:

9 “[OAR 660-006-0010] requires that local governments inventory ‘forest
10 lands’ and include a ‘mapping of forest site class.’ Significantly, ‘[i]f site
11 information is not available then an equivalent method of determining forest
12 land suitability must be used.’ Thus, in inventorying forest lands, local
13 governments must map ‘forest land suitability’ using a ‘forest site class’
14 method. The absence of data requires use of an ‘equivalent method.’ While
15 OAR 660-006-0010 pertains to the inventory of forest lands, it again shows
16 that LCDC is concerned that determinations of ‘forest land suitability’ be
17 made based on empirical methods, and that counties cannot simply assume
18 from the fact that no NRCS productivity ratings exist for certain soils that
19 such soils are nonresource soils.” *Wetherell*, 50 Or LUBA at 203-04.

20 We understand petitioner to argue that site information is available, *see* table at Record 102,
21 and that the county was required to rely on it. We disagree.

22 We do not believe that *Wetherell* or any other source petitioner has cited to us, stands
23 for the proposition that NRCS productivity ratings, if available, must always be used to
24 determine whether a parcel is forest land under the Goal 4 definition, and quantitative studies
25 and empirical evidence can never be used to demonstrate that those ratings are inaccurate for
26 a particular property, based on site-specific qualities. *Wetherell* suggests that studies relied
27 upon must employ a defensible methodology; however, it does not stand for the proposition
28 that where NRCS productivity figures are available, an applicant is precluded from
29 attempting to contradict those figures with empirical studies of the actual productivity of the
30 soils on the subject property.

31 Petitioner next argues that the county erred in relying on intervenor’s report because
32 it is not the type of empirical evidence that the above quoted language from *Wetherell*
33 suggests is required. We disagree. As the county points out, the study submitted by

1 intervenor is not merely a qualitative analysis. The study includes “analysis of the actual
2 growth occurring on the site, calculation of potential productivity using site index
3 information gained from the actual growth evidence and concurrence of the Oregon
4 Department of Forestry.” Respondent’s Brief 11. The actual growth evidence was converted
5 to “site index figures using the same method utilized by the NRCS system to arrive at an
6 ultimate 25 cubic feet per acre per year figure for the most productive areas of the site,
7 approximately 5 of the 71 acres.” Respondent’s Brief 11.⁶ We do not agree with petitioner
8 that intervenor’s evidence does not constitute quantitative, empirical evidence. Petitioner has
9 cited to no requirement in the rules or elsewhere that explicitly precludes the use of on-site
10 quantitative analysis, such as was supplied by intervenor in this case.

11 Petitioner next contends that the challenged findings are not supported by substantial
12 evidence because the evidence provided by intervenor is not the type of evidence upon which
13 a reasonable person would rely because 1) applicant does not qualify as an expert, and no
14 reasonable person would rely on his information, and 2) the sampling intervenor conducted
15 does not conform to professional or ODF standards. While intervenor may not qualify as an
16 expert, expert testimony is not required in order for this Board to conclude that the
17 challenged decision is based on substantial evidence. Substantial evidence is merely
18 evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes*
19 *County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). Further, intervenor
20 submitted his report for review to an ODF forester who confirmed the findings and agreed
21 with the conclusion. We do not agree that a reasonable person would not rely on evidence
22 that is reviewed and confirmed by a DOF forester.⁷

⁶ Petitioner argues that measuring the trees on the property is inadequate because it is possible that all of the productive trees on the property have been removed. However, he points to no evidence in the record that that is the case here.

⁷ Petitioner alleges that the county’s reliance on the ODF forester’s letter is misplaced because the letter “reveals that his review was extremely cursory,” and that “the forester did not conduct independent data

1 Petitioner also argues that the findings do not explain how the county came up with
2 the 1.8 cf/ac/yr figure. Intervenor’s study, which the county incorporated as findings in
3 supporting the challenged decision, provides detailed analysis and explanation for the
4 figures. *See* Record 39, 56-58.⁸

5 Intervenor provided a quantitative study that provides substantial evidence that the
6 subject property is not suitable for commercial forest uses. Viewing the record as a whole, a
7 reasonable person could conclude, as the county did, that the subject property is not suitable
8 for commercial forest uses.

9 Petitioner’s first assignment of error is denied.

10 **B. Second Assignment of Error (Other Forested Lands)**

11 Goal 4 also includes within the definition of “forest lands” “other forested lands that
12 maintain soil, air, water and fish and wildlife resources.” The county concluded that the
13 subject property does not have “significant grazing, watershed, wildlife or scenic values that
14 require maintaining a resource designation.” Record 40. The county also found that the
15 property is not within a Major Big Game Range and that there are no wetland resources, fish

collection or analysis.” Petition for Review 18. The evidence presented by intervenor, however, contradicts
petitioner’s unfounded skepticism:

“Jim Hall, Stewardship Forester at ODF has inspected the site, reviewed the data and
concluded that the site is not commercial forest land according to Goal 4 requirements.”
Record 58.

Clearly then, the forester did more than an extremely cursory review, as asserted by petitioner. The county’s
conclusion and intervenor’s study is further supported by the earlier 1987 ODF letter concluding that any
attempt at commercial forestry on this site would be futile due to environmental limitations. *See* Record 72.

⁸ The challenged decision provides:

“The following findings of fact and conclusions of law support an affirmative decision by the
Board to approve the proposed plan amendment and concurrent zone change for the ‘Subject
Property.’ Additional information is provided in the attached Applicant’s statement (AS)
dated June 24, 2004, and supplemental information (SI) as provided for the Planning
Commission Hearing on November 16, 2004. Those two documents are incorporated as part
of these findings.” Record 39.

The detailed analysis provided in the supplemental information is found at Record 56-58.

1 or waterfowl habitat or identified rare or endangered species habitats on the subject property.
2 Record 41-42. The findings state that the subject property is not identified in the
3 comprehensive plan as forest land necessary for watershed protection, special wildlife or
4 fisheries habitat. Record 44.

5 Petitioner first argues that the county’s finding that the subject property does not
6 contain any inventoried Goal 5 resources fails to address the inquiry under Goal 4. The
7 county does not disagree with petitioner on this point. *See DLCD v. Curry County*, 33 Or
8 LUBA 728, 742-43 (1997) (a finding that the subject property contains no identified Goal 5
9 resources is not adequate to address the requirement that other forested lands that maintain
10 soil, water, air fish and wildlife resources be designated as forest lands). However, the
11 county explains that the findings do not rely exclusively on the lack of identified Goal 5
12 resources.

13 1. Soil Resources

14 Petitioner contends that the county’s finding that “[w]hen the forest ground is
15 disturbed, dunal sand is exposed and susceptible to potential erosion” constitutes a finding
16 that the subject property constitutes “other forested lands” that maintain soil resources. We
17 agree with the county that the county’s finding merely describes site characteristics, and that
18 it is not a finding that the property is land that maintains soil resources, for purposes of the
19 Goal 4 definition of “forest lands.”⁹

⁹ The finding quoted by petitioner is located under the section of the findings labeled “Site characteristics,” and provides:

“When the forest ground is disturbed, dunal sand is exposed and susceptible to potential erosion. Dunal areas have been impacted by motorcycle and ATV use for many years and have little resource value for commercial timber or farm use. Unauthorized dumping, trespass, litter, vandalism and illegal campfires are continuous problems. Scotch broom has invaded disturbed areas and presents a potential fire hazard that requires continuous suppression.” Record 40.

1 **2. Water Resources**

2 Petitioner notes that the subject property is located within the Mercer Lake
3 watershed, which is within the North Florence Dunal Aquifer Protection Area. He presented
4 that evidence at the local proceedings. Record 102. He alleges that the current forest
5 designation serves to maintain groundwater quality in the watershed and qualifies as “other
6 forested lands” for purposes of the Goal 4 definition of “forested lands.”

7 In response to petitioner’s allegation below that the subject property is within the
8 Mercer Lake watershed, intervenor submitted the following response:

9 *“The land is not needed for watershed protection.*

10 *“The site is outside the Clear Lake Watershed Protection Area (Exh.C). A*
11 *small area in the southeast corner of the original tax lot 1702 was in the*
12 *CLWP zone, but that small area was eliminated from the present site by the*
13 *lot line adjustment documented in Exhibit I.” Record 58 (italics in original).*

14 The county concluded:

15 “National Wetlands Inventory Map ‘Mercer Lake OR. J3-3’ indicates there
16 are no wetland resources located on the Subject Property. The site is not
17 within a flood plain or watershed.” Record 41.¹⁰

18 The county relied on the evidence provided by intervenor that the subject property does not
19 fall within the Clear Lake Watershed Protection Area. That finding is supported by
20 substantial evidence and supports the county’s conclusion that the subject property is not
21 “other forested lands” for purposes of Goal 4. Petitioner does not otherwise explain why or
22 how the subject property is forested land that maintains water resources.

23 **3. Botanical Gardens**

24 Petitioner notes that the Darlingtonia Botanical Gardens are located to the west of the
25 subject property.¹¹ It is unclear what petitioner’s point is with regard to the botanical

¹⁰ It is unclear to us whether the watershed in question is the Clear Lake watershed or the Mercer Lake watershed. In any event, the county concludes that the site is not within a watershed, and as explained below, that conclusion is supported by substantial evidence.

1 gardens. He alleges that the findings fail to address potential impacts on this important off-
2 site resource. However, he fails to explain the significance of this allegation or how it relates
3 to the Goal 4 definition of “forest lands.” We therefore decline to address it further.

4 **4. Wildlife Resources**

5 At the local proceedings, petitioner alleged that the property is needed for wildlife
6 habitat. He stated that the United States Department of Fish and Wildlife has listed the bald
7 eagle and the coho salmon as endangered species “in the area of this property.” Record 103.
8 Petitioner challenges the county’s findings, arguing that the county failed to address this
9 issue.¹²

10 The county did address this issue, however. It specifically found that “[t]here are no
11 identified rare or endangered species habitats *on this site*.” See n 12, Finding 8. Without
12 some evidence that the subject property must remain in a forest designation in order to
13 protect habitat on other nearby lands, we believe that that finding is sufficient to respond to
14 petitioner’s evidence of endangered species in the area.

15 Petitioner also argues that there is no evidence in the record supporting the county’s
16 finding that the land is not necessary to meet wildlife requirements for food, water, shelter,

¹¹ It does not appear that the Darlingtonia Botanical Gardens were even mentioned during the local proceedings, much less that petitioner raised the specific issue he seeks to raise here.

¹² The county’s findings addressing wildlife habitat provide:

“8. The site has no fish or waterfowl habitat. There are no identified rare or endangered species habitats on this site. The site is not within a managed Major Big Game Range. The big game habitat is impacted by nearby subdivisions and dense development of over 100 homes on about one half acre lots. These housing developments preclude wildlife management, viable big game populations and reduce the area to the lowest quality habitat according to the March 1982 Flora and Fauna Working Paper. The Lane Code and RCP do not have any special requirements for wildlife protection in an impacted range area.

“9. There are no county inventories of specific site evidence that indicates the site is necessary to be preserved for wildlife, or to meet wildlife requirements for food, water, shelter, reproduction, wildlife migration corridors, big game range, nesting or roosting sites.” Record 42.

1 reproduction, migration corridors, big game range, or nesting or roosting sites. Record 42.
2 Even assuming that is true, other findings conclude that the property has no fish or waterfowl
3 habitat, and that any big game habitat is “impacted” and “of the lowest quality.” Record 42.
4 In conclusion, petitioner fails to demonstrate that the county’s findings supporting its
5 conclusion that the subject property is not other forested land that maintains wildlife
6 resources are inadequate or not supported by substantial evidence in the record.

7 Petitioner’s second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner argues that the challenged findings demonstrating compliance with
10 Statewide Planning Goal 11 (Public Facilities and Services) misconstrue and violate
11 applicable law. The county’s Goal 11 findings provide:

12 “the site receives a full range of rural facilities and services that can serve the
13 proposed rural residential development on the property[.]” Record 53.

14 Petitioner alleges that the challenged findings rely on provision of water to the subject
15 property by the Heceta Water District. He asserts that Goal 11 generally prohibits
16 community water systems outside urban growth boundaries or unincorporated communities,
17 and that the challenged decision therefore violates Goal 11.¹³

18 The county and intervenor argue that the issue was not raised during the local
19 proceedings and is thus waived. ORS 197.835(3); ORS 197.763(1).¹⁴ In his reply brief,

¹³ OAR 660-011-0065(2), the administrative rule implementing Goal 11, provides:

“Consistent with Goal 11, local land use regulations applicable to lands outside urban growth boundaries and unincorporated community boundaries shall not:

“* * * * *

“(c) Allow an increase in the allowable density of residential development due to the presence, establishment, or extension of a water system.”

¹⁴ ORS 197.835(3) provides:

1 petitioner contends that the issue of compliance with Goal 11 was raised in the county's
2 findings addressing Goal 11. Petitioner is wrong that he is entitled to raise an issue with
3 regard to Goal 11 in this appeal simply because the challenged findings address Goal 11.
4 ORS 197.835(3) and ORS 197.763(1) require that in order to raise an issue before this Board,
5 that issue must have been raised during the local proceedings. Petitioner has not identified
6 where such issues were raised below, and we will not search the record on petitioner's
7 behalf. *See Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248, 255 (1996)
8 (Where a party contends petitioners have failed to raise an issue below, and petitioners fail to
9 cite to the local record where that issue was raised, petitioners have waived their right to
10 raise the issue.). Therefore, those issues are waived.

11 Petitioner's third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioner also contends that the challenged findings fail to demonstrate compliance
14 with Goal 14 (Urbanization). Briefly, he argues that development of the subject property at
15 5-acre densities could convert the property as well as adjacent land to urban uses, in violation
16 of Goal 14. The county and intervenor again argue that petitioner failed to raise this issue
17 during the local proceedings. As far as we can tell, petitioner does not provide a focused
18 argument that the issue was in fact raised below. He contends, as he did in response to the
19 waiver argument above, that the challenged decision includes Goal 14 findings, and that

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 “petitioner is obligated to challenge” the county’s findings if he believes they are inadequate
2 or not supported by substantial evidence in the record. Reply Brief 4. However, in order to
3 challenge the adequacy of the county’s findings of compliance with an approval criterion or
4 the evidence supporting those findings, petitioner or another party must raise an issue
5 regarding that approval criterion below. *Lucier v. City of Medford*, 26 Or LUBA 213, 216
6 (1993); *c.f. Terra v. City of Newport*, 36 Or LUBA 582, 595 (1999) (generally, parties are not
7 required to raise issues below regarding the adequacy of findings, the evidence supporting
8 those findings, or interpretations of applicable criteria, when those findings or interpretations
9 appear for the first time in the challenged decision).¹⁵

10 Petitioner does not provide a record citation indicating where any issue regarding
11 Goal 14 was raised below, much less the specific issue raised in this assignment of error, and
12 we will not search the record to determine whether the issue was, in fact, raised.
13 Accordingly, we agree with the county and intervenor that this issue was waived.

14 Petitioner’s fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 Lane Code (LC) 16.400(6)(h)(iii) provides the applicable criteria for amendments to
17 the comprehensive plan.¹⁶ Petitioner’s arguments that the challenged findings fail to

¹⁵ Petitioner does not argue that he is entitled to raise Goal 14 issues because they appeared for the first time in the challenged decision.

¹⁶ LC 16.400(6)(h)(iii) sets out the criteria for amending the Rural Comprehensive Plan. It provides, in relevant part:

“The Board [of Commissioners] may amend or supplement the Rural Comprehensive Plan upon making the following findings:

“(aa) For Major Amendments 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 Amendments the Plan amendment or component is:

“(i-i) necessary to correct an identified error in the application of the Plan; OR

1 demonstrate compliance with LC 16.400(6)(h)(iii) rely on their previous assignments of
2 error, namely that the challenged decision fails to demonstrate that the subject property is
3 nonresource land.¹⁷ As discussed at length in our discussion of petitioner’s first and second
4 assignments of error, the county correctly determined that the subject property is not forest
5 land pursuant to Goal 4. Accordingly, petitioner’s fifth assignment of error is denied.

6 The county’s decision is affirmed.

“(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 [B]oard [of Commissioners], for reasons briefly set forth in its decision, to be desirable, appropriate or proper.”

¹⁷ Petitioner also cites to RCP Goal 2, Policy 19, which requires that domestic water supply availability be considered when approving rural development densities of one residence per five or ten acres, and RCP Goal 5, Water Resource Policies 3 and 5, which require adequate water supplies to support proposed development, and application of a plan designation and zoning consistent with groundwater aquifer capacities. He references his Goal 11 argument under his third assignment of error. As we explained with regard to that assignment of error, the issue was not raised. Again, we conclude that the issue was not raised, and decline to address it further.