

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

3  
4 ERIC CARLSON,  
5 *Petitioner,*

6  
7 vs.

8  
9 BENTON COUNTY,  
10 *Respondent,*

11 and

12  
13 ROBERT MOSER and LUCINDA MOSER,  
14 *Intervenors-Respondent.*

15  
16 LUBA No. 99-132

17  
18 FINAL OPINION  
19 AND ORDER

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21  
22 Appeal from Benton County.

23  
24 Anne C. Davies, Eugene, filed the petition for review and argued on behalf of  
25 petitioner.

26  
27 No appearance by respondent.

28  
29 David B. Smith, Tigard, filed the response brief and argued on behalf of intervenors-  
30 respondent.

31  
32 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,  
33 participated in the decision.

34  
35 REMANDED

04/14/2000

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.  
39

**NATURE OF THE DECISION**

Petitioner appeals the county’s approval of a forest template dwelling on land subject to Statewide Planning Goal 4 (Forest Lands).

**MOTION TO INTERVENE**

Robert Moser and Lucinda Moser, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

The county first approved a forest template dwelling for the subject property on May 15, 1996. That decision was appealed to LUBA, and we remanded the county’s decision. *Carlson v. Benton County*, 34 Or LUBA 140 (1998) (*Carlson I*). Our decision was affirmed by the Court of Appeals. *Carlson v. Benton County*, 154 Or App 62, 961 P2d 248 (1998) (*Carlson II*). The decision challenged in this appeal is the county’s attempt to respond to *Carlson I* and *Carlson II*.<sup>1</sup>

**A. The County’s May 15, 1996 Decision**

The relevant facts surrounding the county’s May 15, 1996 decision are set out in our decision in *Carlson I*:

“The subject property is a 19.6-acre parcel within the county’s Forest Conservation (FC) zone, a zone that implements Goal 4 and related regulations in chapter 660, division 6 of the Oregon Administrative Rules. The property is surrounded by FC zoned properties, of which the dominant land use is large tract resource use, both farm and forest. The subject property slopes gently east to west. The western half of the property contains stands of Oregon white oak interspersed with meadow, and a stand of approximately 30 fruit trees. The eastern half has a mix of Douglas fir, hardwoods and brush remaining from a 4.5-acre clearcut in 1994. The property benefits from a forest tax deferral.

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<sup>1</sup>The record in this appeal includes the record that was submitted by the county in *Carlson I*. We cite the record in *Carlson I* as “Record (*Carlson I*)” to distinguish that record from the record filed by the county in the current appeal of its decision on remand.

1 “The Natural Resource Conservation Service (NRCS) soil study for the  
2 county shows that the subject property is composed of 70 percent Bellpine  
3 soils, 20 percent Witham soils, eight percent Waldo soils, and two percent  
4 Dupee soils. The Bellpine soils have an NRCS productivity rating of 155  
5 cubic feet per acre per year (cf/ac/yr) of wood fiber. The NRCS does not rate  
6 the productivity of the other soils. The absence of an NRCS productivity  
7 rating in this context means that the soil is ‘typically used for agriculture’ and  
8 has been evaluated only for crop production; a nonrating does not determine  
9 whether the soil is productive for growing wood fiber. The Oregon  
10 Department of Forestry (ODF) rates the productivity of Witham soils in the  
11 county at approximately 80 cf/ac/yr of wood fiber, and Dupee soils at  
12 approximately 70 cf/ac/yr of wood fiber.

13 “\* \* \* \* \*

14 “In 1995, intervenors applied for a ‘forest template’ dwelling pursuant to ORS  
15 215.750(1), OAR 660-006-0027(1)(d) [(1998)], and Benton County Code  
16 (BCC) 60.108(2), each of which provide for a dwelling on land located within  
17 a forest zone if:

18 “\* \* \* the lot or parcel is predominantly composed of soils  
19 that are:

20 “(a) *Capable of producing 0 to 49 cubic feet per acre per*  
21 *year of wood fiber \* \* \*.*’ (Emphasis added.)<sup>21</sup>

22 “OAR 660-006-0005(2) defines ‘cubic feet per acre per year’ for purposes of  
23 the forest template test. It provides that:

24 “‘Cubic Foot Per Acre’ means the average annual increase in  
25 cubic foot volume of wood fiber per acre for fully stocked  
26 stands at the culmination of mean annual increment *as reported*  
27 *by the [NRCS]. Where [NRCS] data are not available or are*  
28 *shown to be inaccurate, an alternative method for determining*  
29 *productivity may be used. An alternative method must provide*  
30 *equivalent data and be approved by the Department of*  
31 *Forestry.’ \* \* \*.*

32 “Thus, the county can approve a forest template dwelling on the property only  
33 if intervenors establish through a method provided by OAR 660-006-0005(2)  
34 that the property is predominantly composed of soils capable of producing 0  
35 to 49 cf/ac/yr of wood fiber.

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<sup>21</sup>Under the statute, rule and county code provisions for forest template dwellings, additional criteria must be satisfied and those criteria vary depending on the productivity of the soil. Those criteria were not at issue in *Carlson I* and are not at issue in this appeal.

1 “To meet their burden of proof under ORS 215.750 and OAR 660-006-  
2 0005(2), intervenors submitted a soils study to ‘overcome’ the \* \* \* NRCS  
3 data that showed that the property was predominantly composed of soils  
4 capable of producing over 80 cf/ac/yr of wood fiber. Intervenors’ soils study  
5 is based on a more intensive survey scale than the NRCS survey. It states that  
6 the NRCS survey ‘correctly identified’ the major soil delineations on the  
7 property, but attributes the significant differences between the two surveys to  
8 the larger map scale and higher intensity of mapping in the soils study.

9 “Intervenors’ soils study determines that (1) the Bellpine soils on the property  
10 have inclusive pockets of Chehulpum-Steiwer and other nonrated soils; and  
11 (2) the Witham soils on the property are growing few if any Douglas fir trees.  
12 Intervenors’ soils study assigns a productive capability of zero to the Witham  
13 soils based on the absence of Douglas fir growing on that soil. It presumes a  
14 productivity of 0 to 49 cf/ac/yr for the other nonrated soils on the property,  
15 based apparently on a conclusion that nonrated soils are unsuitable for  
16 commercial timber production. The soils study then recalculates the relative  
17 percentages of soils, and ultimately concludes that 51.2 percent of the  
18 property is composed of soils with a capability of producing less than 50  
19 cf/ac/yr for wood fiber.

20 “After local appeals of approvals by planning staff and the planning  
21 commission, the county board of commissioners (commissioners) approved  
22 intervenors’ application. The county’s decision determines that NRCS data  
23 are available and accurate, but nonetheless applies intervenors’ soils study to  
24 ‘overcome’ the NRCS data. Based on the soils study, the county concludes  
25 that the subject property is predominately composed of soils capable of  
26 producing 0 to 49 cf/ac/yr of wood fiber, specifically Douglas fir.” *Carlson I*,  
27 34 Or LUBA at 142-45 (emphasis in *Carlson I*; footnotes and record citations  
28 omitted).<sup>3</sup>

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<sup>3</sup>Our decision in *Carlson I* included a chart that showed the differences between the NRCS soils data (which show the property as predominantly composed of soils that are capable of producing 155 cf/ac/yr of wood fiber) and the applicants’ data (which showed the property as predominantly composed of unrated soils). A modified version of that chart is set out below, with ODF productivity ratings shown in parentheses for certain soils that the NRCS has not rated.

**NRCS Data**

<i>NRCS Name</i>	<i>% of site</i>	<i>Productivity Rating (ODF)</i>
Bellpine	70.0	155 cf/ac/yr
Witham	20.0	Nonrated (~80 cf/ac/yr)
Waldo	8.0	Nonrated
Dupee	2.0	Nonrated (~70 cf/ac/yr)

**Applicants’ Data**

<i>NRCS Name</i>	<i>% of site</i>	<i>Productivity Rating (ODF)</i>
Bellpine	40.51	155 cf/ac/yr

1           **B.     LUBA’s Decision in *Carlson I***

2                   **1.     The Requirement of OAR 660-006-0005(2) for Equivalent Data**  
3                   **and Department of Forestry Approval**

4           In *Carlson I*, we first rejected the county’s interpretation of OAR 660-006-0005(2).  
5           The relevant language of OAR 660-006-0005(2) is as follows:

6                   “Where [NRCS] data are not available or are shown to be inaccurate, an  
7                   alternative method for determining productivity may be used. An alternative  
8                   method must provide equivalent data and be approved by the Department of  
9                   Forestry.”

10          In its May 15, 1996 decision, the county first found that NRCS data were both *available* and  
11          *accurate*. Based on this finding, the county adopted an unusual interpretation of OAR 660-  
12          006-0005(2), concluding that it could therefore ignore the accurate and available NRCS data  
13          concerning the soils on the property and rely instead on the applicants’ data, without regard  
14          to the requirement under the rule that the alternative data must be “equivalent” and obtained  
15          by a method that is approved by the “Department of Forestry.” We rejected that conclusion:

16                   “In our view, OAR 660-006-0005(2) applies here, and plainly requires that  
17                   decisions regarding soil capability be based on NRCS data, unless the local  
18                   government finds that data inaccurate or unavailable, in which case it may  
19                   consider ‘equivalent data’ generated by an approved method of determining  
20                   the capability of soils to produce wood fiber. \* \* \*” *Carlson I*, 34 Or LUBA  
21                   at 147.

22          However, we also concluded in *Carlson I* that, notwithstanding the county’s nominal  
23          finding that NRCS data were “accurate” and “available,” the county in fact found that the  
24          NRCS data were “inaccurate” and “not available,” within the meaning of OAR 660-006-

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Jory	2.29	155 cf/ac/yr
McAlpin	6.01	Nonrated (169 cf/ac/yr Lane Co.)
	Subtotal:	48.81%
Chehulpum-Steiwer	14.42	Nonrated
Witham	20.87	Nonrated (~80 cf/ac/yr)
Waldo	14.98	Nonrated
Dupee	.92	Nonrated (~70 cf/ac/yr)
	Subtotal:	51.19%

1 0005(2).<sup>4</sup> Therefore, we considered the county’s alternative arguments in *Carlson I* that, if  
2 OAR 660-006-0005(2) applies, the applicants’ soils study in *Carlson I* complies with the  
3 limitation imposed by the rule that such an “alternative method for determining productivity  
4 \* \* \* must provide equivalent data.”<sup>5</sup>

## 5 2. Wood Fiber

6 The county concluded that the term “wood fiber” in ORS 215.750 and OAR 660-006-  
7 0027(1)(d)(A) (1998) is limited in this case to “Douglas fir wood fiber” and that other  
8 “commercial forest species” need not be considered.<sup>6</sup> From that interpretation of ORS  
9 215.750 and OAR 660-006-0027(1)(d)(A) (1998), the county reasoned that the applicants’  
10 soils data need only consider the capability of the soils on the subject property to grow  
11 Douglas fir wood fiber and did not need to consider the capability of the soils to produce  
12 other commercial species.

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<sup>4</sup>In considering the question of whether the NRCS data for the subject property are accurate, we concluded:

“[T]he county’s determination that NRCS data are ‘accurate’ elevates semantics over substance. The clear import of intervenors’ soils study is that the NRCS data are significantly *inaccurate*, contradicting the straightforward conclusion drawn from the NRCS data that the property is predominantly composed of soils capable of producing 155 cf/ac/yr of wood fiber. Accordingly, we conclude that the county misapplied OAR 660-006-0005(2) in finding the NRCS data accurate.” *Carlson I*, 34 Or LUBA at 147-48 (emphasis in original).

Similarly, with regard to the question of availability of NRCS data, we rejected the county’s finding that the *absence* of NRCS data for particular soils could be viewed as *available* NRCS data that such soils would produce less than 49 cf/ac/yr of wood fiber.

“An NRCS nonrating provides no information, quantitative or otherwise, pertinent to the statutory test: whether the soil is capable of producing defined levels of wood fiber. We conclude that the absence of an NRCS productivity rating for a particular soil means only that NRCS data regarding that soil are ‘not available’ within the meaning of OAR 660-006-0005(2). The county erred in interpreting OAR 660-006-0005(2) to the contrary.” *Carlson I*, 34 Or LUBA at 148-49 (footnote and record citation omitted).

<sup>5</sup>We noted in *Carlson I*, that no issue was raised concerning the requirement of OAR 660-006-0005(2) that ODF approve the alternative method. 34 Or LUBA at 145 n 4.

<sup>6</sup>One of the county’s reasons for adopting this interpretation is the apparent fact that NRCS numerical data for Benton County are based on consideration of Douglas fir wood fiber production capacity, as an indicator species. As relevant in this appeal, NRCS apparently did not consider wood fiber production capacity for other species of trees.

1 In his petition for review in *Carlson I*, petitioner argued that where a county relies on  
2 an alternative method of measuring productivity of soils for producing wood fiber--for  
3 purposes of determining whether a property satisfies the ORS 215.750(1)(a)(A) and OAR  
4 660-006-0027(1)(d)(A) (1998) requirement that property be predominantly composed of  
5 soils that are capable of producing less than 49 cf/ac/yr--the alternative method must  
6 consider “the soils capability to grow a variety of commercial species, not just Douglas Fir.”  
7 Petition for Review (*Carlson I*) 17. We agreed with petitioner. *Carlson I*, 34 Or LUBA at  
8 151-52.

### 9 3. Nonrated Soils

10 We also concluded that the applicants’ soils study failed to comply with the OAR  
11 660-006-0005(2) requirement that an “alternative method must provide equivalent data”  
12 because the applicants’ soils study assumed that soils that are not rated by NRCS can be  
13 assumed to be capable of producing less than 49 cf/ac/yr of wood fiber. As noted above, we  
14 determined that no conclusion about the capability of soils to produce a particular number of  
15 cf/ac/yr of wood fiber can be drawn from the lack of an NRCS rating.

#### 16 C. The Court of Appeals’ Decision in *Carlson II*

17 In *Carlson II*, the Court of Appeals rejected the applicants’ argument that, in the  
18 circumstances presented in this case, the county could properly limit its consideration under  
19 OAR 660-006-0005(2) “to data relating to Douglas fir simply because [NRCS] has made no  
20 other data available.” *Carlson II*, 154 Or App at 68. The court went on to explain:

21 “\* \* \* OAR 660-006-0005(2) does not purport to say what kind or kinds of  
22 trees must be considered in the production capability determination that ORS  
23 215.750(1) requires. The rule simply defines the unit of measurement and  
24 prescribes the sources of the data to be used in making the determination.  
25 \* \* \*.” *Id.*

26 The court ultimately concluded that neither the text nor the context of ORS 215.750  
27 supported the applicants’ and the county’s reading of ORS 215.750. The court also observed

1 that “LUBA’s error, if any, would appear to be in its suggestion that the term [wood fiber in  
2 ORS 215.750] applies only to commercial species.”<sup>7</sup> *Carlson II*, 154 Or App at 67.

3 **D. The County Decision on Remand Following *Carlson I* and *Carlson II***

4 The board of commissioners identified four issues on remand.<sup>8</sup> The board of  
5 commissioners, in addressing those issues, concluded: (1) NRCS data for the subject  
6 property are both inaccurate and unavailable; (2) the applicants’ alternative method of  
7 determining wood fiber productivity has been approved by ODF; (3) the methodology  
8 employed to determine wood fiber productivity for the subject property may limit its  
9 consideration to tree species that are native to Benton County; and (4) the subject property is  
10 predominantly composed of soils that are not capable of producing more than 49 cf/ac/yr of  
11 wood fiber.

12 **FIRST ASSIGNMENT OF ERROR**

13 As noted earlier, a critical question in this case is whether the NRCS data are “not  
14 available or are shown to be inaccurate,” within the meaning of OAR 660-006-0005(2). The  
15 answer to that question determines whether an alternative method of mapping soils and

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<sup>7</sup>In making this observation, the Court of Appeals noted that the petitioner’s argument to LUBA in *Carlson I* was limited to his contention “that the statute applied to all commercial species and not that species of noncommercial varieties were also included.” *Carlson II*, 154 Or App at 67 n 3.

<sup>8</sup>As stated in the county’s decision on remand, those issues are:

- “[1] Whether [NRCS] data of soil productivity ratings for the subject property are inaccurate or unavailable.
- “[2] If those [NRCS] data are inaccurate or unavailable, whether the applicants’ soils and woodland productivity reports by Dr. Simonson and Mr. Rick Barnes are an alternative method for determining productivity pursuant to OAR [660-006-0115(2)] that has been approved by the Oregon Department of Forestry.
- “[3] Whether a productivity rating has been established for all soils used in determining that the property is predominantly composed of soils capable of producing 0 to 49 cubic feet per acre per year for all tree species native to Benton County.
- “[4] Whether there is substantial evidence that the subject property is predominantly composed of soils that are not capable of producing more than 49 cubic feet per acre per year of wood fiber from all tree species.” Record 7.

1 estimating the wood fiber production capability of soils may be used. On remand the county  
2 reconsidered its earlier finding in *Carlson I* that that NRCS data concerning the subject  
3 property are available and accurate. In the challenged decision, the county found that the  
4 applicant showed the NRCS data for the subject property are inaccurate by producing a more  
5 detailed soils survey which demonstrated that the subject property is not composed of 70  
6 percent Bellpine soils. The county found that NRCS data are unavailable for some of the  
7 soils identified on the subject site by the applicants' soils expert, because NRCS does not  
8 rate the wood fiber production capability of those soils.

9         Petitioner argues the county finding that NRCS data are available and accurate in its  
10 initial decision in this matter is the law of this case and that, under *Beck v. City of Tillamook*,  
11 313 Or 148, 831 P2d 678 (1992), the county was precluded from changing its position on  
12 remand. Petitioner also argues that LUBA *did not* determine in its decision in *Carlson I*  
13 whether the NRCS data were unavailable or inaccurate. Finally, petitioner argues that  
14 producing a more intense scale soils map does not establish that the less intense scale NRCS  
15 map is “inaccurate,” within the meaning of OAR 660-006-0005(2). Petitioner argues such a  
16 construction of the rule is at odds with the legislative history of ORS 215.750. According to  
17 petitioner, the legislature’s intent in adopting ORS 215.750 was to allow review of  
18 applications for forest template dwellings under clear and objective standards so that  
19 decisions on those applications could be rendered ministerially, *i.e.*, without needing to  
20 comply with the notice and hearing requirements that apply to “permit” decisions under ORS  
21 215.416(3).

22         We agree with intervenors that the county adopted an alternative finding in its initial  
23 decision to the effect that NRCS data for the subject property are neither available nor  
24 accurate.<sup>9</sup> Additionally, although our decision in *Carlson I* could have been clearer on this

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<sup>9</sup>The county’s actual finding was “the Board concludes that, in the alternative, that even if the rule’s requirement for an approved ‘alternative methodology’ and ‘equivalent data’ applies, the subject application

1 point, in rejecting the county’s strained interpretive findings addressing OAR 660-006-  
2 0005(2), we concluded in *Carlson I* that the county in fact found that the NRCS data are  
3 inaccurate and unavailable despite the county’s nominal findings to the contrary. *See* n 4.  
4 As we explained in *Carlson I*, the more detailed soils mapping prepared by the applicants  
5 shows a very different soils configuration for the subject property. We explained in *Carlson*  
6 *I* that such detailed soils mapping is sufficient to demonstrate that the less detailed NRCS  
7 soils mapping for the subject property is “inaccurate,” within the meaning of OAR 660-006-  
8 0005(2). To the extent petitioner’s arguments to the contrary are not barred by our decision  
9 to the contrary in *Carlson I*, we reject them. We also adhere to our conclusion in *Carlson I*,  
10 that “the absence of an NRCS productivity rating for a particular soil means only that NRCS  
11 data regarding that soil are ‘not available’ within the meaning of OAR 660-006-0005(2).”  
12 *Carlson I*, 34 Or LUBA at 148-49. Both the NRCS data and the applicants’ soils study show  
13 that there are several soil types on the property for which there is no NRCS productivity  
14 rating.

15 In summary, the county did not err in finding on remand that NRCS data for the  
16 subject property are, in some respects, unavailable and inaccurate. That finding is supported  
17 by the record and is consistent with the county’s findings in its initial decision in this  
18 matter.<sup>10</sup>

19 The first assignment of error is denied.

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and supporting substantial evidence shows that the rule is satisfied.” Record (*Carlson I*) 41. We agree with intervenors that this finding is sufficient to constitute an implicit alternative finding that the NRCS “data are not available or are \* \* \* inaccurate,” because an alternative method for determining productivity can only be used under the rule if the NRCS data are not available or are inaccurate.

<sup>10</sup>We question petitioner’s argument that the county would be precluded by *Beck* from adopting a different view concerning the accuracy and availability of NRCS data than it adopted in its initial decision. However, because we conclude the county’s decision on remand is not inconsistent with any issue that was finally resolved in the county’s initial decision or *Carlson I* or *Carlson II*, we need not and do not address that question.

1 **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

2 The parties’ arguments under these assignments of error reflect a fundamental  
3 misunderstanding of what ORS 215.750 and OAR 660-006-0005(2) allow and what they  
4 require. That misunderstanding began with the decision challenged in *Carlson I* and has  
5 continued through the county’s decision on remand and in the briefs in this appeal. Because  
6 the parties have a shared misunderstanding of the rule, they also have a shared  
7 misunderstanding of the significance of our decision in *Carlson I* and the Court of Appeals’  
8 decision in *Carlson II*. We first discuss the statute’s and the rule’s requirements briefly  
9 before turning to petitioner’s remaining assignments of error.

10 ORS 215.750(1)(a) imposes the relevant ultimate legal standard that must be met for  
11 the county to approve the requested dwelling. The statute requires that “the lot or parcel [be]  
12 predominantly composed of soils that are \* \* \* [c]apable of producing 0 to 49 cubic feet per  
13 acre per year of wood fiber \* \* \*.”

14 OAR 660-006-0005(2) controls *how* a decision maker must go about applying this  
15 ultimate legal standard.

16 “‘Cubic Foot Per Acre’ means the average annual increase in cubic foot  
17 volume of wood fiber per acre for fully stocked stands at the culmination of  
18 mean annual increment as reported by the [NRCS]. Where [NRCS] data are  
19 not available or are shown to be inaccurate, an alternative method for  
20 determining productivity may be used. An alternative method must provide  
21 equivalent data and be approved by the Department of Forestry.”

22 The first sentence of the rule supplies a working definition of the ultimate legal standard.  
23 The second sentence provides two options for data that may be consulted to determine  
24 whether the ultimate legal standard is met.

25 Petitioner, and to some extent the county and the applicants, misread OAR 660-006-  
26 0005(2) to require that an “alternative method for determining productivity,” must be  
27 equivalent to the *method* NRCS may have used to produce its data. The rule requires  
28 equivalent *data*; it does not require that an “alternative method” must be equivalent to the

1 methodology that may have been employed by NRCS.<sup>11</sup> Whatever lack of clarity may be  
2 present in the Land Conservation and Development Commission’s (LCDC’s) the choice of  
3 the word “data,” LCDC would not have used that word if it meant to require equivalent  
4 methodology.<sup>12</sup> Had that been LCDC’s intent, it would have written the rule to require “an  
5 alternative method must be equivalent to the method used by NRCS,” rather than writing the  
6 rule to require “an alternative method must provide equivalent data \* \* \*.”

7 OAR 660-006-0005(2) provides two ways to address the ultimate legal standard in  
8 ORS 215.750(1)(a). NRCS data are expressed directly in terms of the ultimate legal  
9 standard, *i.e.*, cubic feet per acre per year. Unless it is shown that NRCS data are unavailable  
10 or inaccurate, NRCS data must be relied upon to demonstrate compliance with ORS  
11 215.750(1)(a) and “the rule precludes any consideration of an alternative soils study.”  
12 *Carlson I*, 34 Or LUBA at 147. Where NRCS data are not available or are shown to be  
13 inaccurate, an alternative to NRCS data may be used to demonstrate compliance with ORS  
14 215.750(1)(a).

15 The rule’s requirement for “equivalent data” requires that any alternative  
16 methodology must be capable of expressing that data as “cubic feet per acre per year,” as

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<sup>11</sup>“Datum” is defined in *Webster’s Third New International Dictionary* 1236 (1981), in part, as follows:

“ \* \* \* something that is given either from being experientially encountered or from being  
admitted or assumed for specific purposes: a fact or principle admitted or assumed for  
specific purposes \* \* \* [.]”

<sup>12</sup>Indeed if that were what the rule required, we likely would have been compelled to agree with the county  
and intervenors in *Carlson I* that the applicants’ alternative methodology need only consider the subject  
property’s productive capability for Douglas fir.

1 NRCS does, or as equivalent data.<sup>13</sup> The rule simply does not impose a requirement that the  
2 alternative methodology must mimic the methodology that NRCS used.<sup>14</sup>

3 Under OAR 660-006-0005(2), an alternative methodology and the data that are  
4 generated by that alternative method must be substantial evidence, *i.e.* evidence a reasonable  
5 decision maker would rely upon. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
6 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). As the  
7 parties' arguments in this appeal make clear, a decision maker without formal training in  
8 soils science or forestry could easily have difficulty analyzing the reliability of competing  
9 methodologies. However, the rule's requirement that the alternative methodology must be  
10 "approved by the Department of Forestry" assists the county in determining whether the  
11 alternative methodology offered by an applicant is one that can reasonably be relied upon in  
12 cases, such as this one, where there is expert testimony that an applicant's methodology  
13 cannot reasonably be relied upon. In most if not all cases, a county could reasonably rely on  
14 an alternative methodology that has been reviewed and approved by ODF. Similarly, absent  
15 a showing that errors were made in applying the approved methodology, the county could  
16 rely on the data produced by such an approved alternative methodology.

17 With the above understanding of ORS 215.750(1)(a) and OAR 660-006-0005(2), we  
18 turn to petitioner's second, third and fourth assignments of error.

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<sup>13</sup>We have no occasion here to attempt to define the absolute parameters of what is meant by equivalent data. However, if the alternative data can be converted to cubic feet per acre per year by some reasonably workable and defensible formula, or the alternative data permit direct application of the ultimate legal standard without being converted to a precise numerical estimate of cf/ac/yr, such data would likely qualify as equivalent.

<sup>14</sup>In performing its obligation to approve alternative methods of providing data under OAR 660-006-0005(2), ODF might by administrative rule or on a case-by-case basis require that the NRCS methodology be followed, in whole or in part. However, that does not mean that OAR 660-006-0005(2) itself imposes that requirement.

1           **A.     Equivalent Data**

2           In his second assignment of error, petitioner alleges the county erred in finding that  
3 the applicants’ soils study provides “equivalent data,” as required by OAR 660-006-0005(2).  
4 Much of the argument under this assignment of error is directed at the *methodology*  
5 employed by the applicants’ experts, which petitioner argues is not equivalent to the NRCS  
6 methodology. As we have already explained, those arguments are based on a misreading of  
7 OAR 660-006-0005(2) and, for that reason, the arguments are rejected.

8           Petitioner also argues the applicants’ wood fiber productivity data are not sufficiently  
9 quantified. We understand petitioner to argue the applicants’ reports should be required to  
10 provide a precise numerical estimate of the cf/ac/yr of wood fiber the soils on the property  
11 will produce.

12           We believe the data are sufficiently equivalent. The applicants’ soils and wood fiber  
13 productivity studies appear at Record (*Carlson I*) 218-30 and 268-88, and Record 173-80.  
14 Our review of those reports shows that for each of the relevant soils on the subject property,  
15 the reports take the position that the soils will produce somewhere between 0 and 49 cubic  
16 feet per acre per year. Because the ultimate legal standard is whether the predominant soils  
17 will produce 0-49 cf/ac/yr, the data in those reports is sufficiently quantified.<sup>15</sup>

18           The second assignment of error is denied.

19           **B.     Interpretation of “Wood Fiber”**

20           In his third assignment of error, petitioner argues the county improperly interpreted  
21 “wood fiber” to include only tree species that are native to Benton County. In response to  
22 *Carlson I* and *Carlson II*, the applicants submitted a supplemental report. Record 173-80.  
23 The supplemental report concludes that the predominant soils on the subject property “are

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<sup>15</sup>We emphasize that all we decide here is that the data that were produced are sufficiently quantified to constitute equivalent data. The questions of whether the methodology used to generate that data has been approved by ODF and whether the methodology and data constitute substantial evidence are separate questions.

1 not capable of producing 50 cubic feet per acre per year of any native species or combination  
2 of native species.” Record 173. Petitioner argues that OAR 660-006-0005(2) requires that  
3 the applicants “submit evidence on all tree species.” Petition for Review 18.

4 Our decision in *Carlson I* and the Court of Appeals’ decision in *Carlson II* address  
5 the meaning of “wood fiber” in ORS 215.750(1)(a). The Court of Appeals simply  
6 determined that “wood fiber” as that term is used in ORS 215.750(1)(a) is not limited to any  
7 particular species of tree and that “OAR 660-006-0005(2) does not purport to say what kind  
8 or kinds of trees must be considered in the production capability determination that ORS  
9 215.750(1) requires.” *Carlson II*, 154 Or App at 68. Therefore, the standard imposed by  
10 ORS 215.750(1)(a) is whether the predominant soils will produce less than 49 cf/ac/yr of  
11 “wood fiber” as a generic commodity. However, neither *Carlson I* nor *Carlson II* held that  
12 in demonstrating compliance with ORS 215.750(1)(a) an applicant is required under OAR  
13 660-006-0005(2) to produce quantified productivity data for every tree species on earth.

14 On remand the applicants submitted additional data concerning a number of other tree  
15 species that are native to Benton County. This additional data was sufficient to allow the  
16 county to determine whether there is one or more species of tree that could reasonably be  
17 expected to produce more than 49 cf/ac/yr of wood fiber. Based on this broad sample, a  
18 reasonable decision maker could conclude that the predominate soils are not capable of  
19 producing more than 49 cf/ac/yr of wood fiber of any kind. Petitioner does not argue that he  
20 or some other party presented any reasonable basis for believing that the predominant soils  
21 on the subject property might produce more than 49 cf/ac/yr of wood fiber, if planted in one  
22 or more nonnative tree species. In the absence of such an argument and some evidence to  
23 that effect, we do not believe the county was obligated to require that the applicants produce  
24 additional data concerning the capability of the predominant soils on the subject property to  
25 produce nonnative species.

26 The third assignment of error is denied.

1           **C.       Approval of the Alternative Methodology by the Department of Forestry**

2           Petitioner acknowledges that the applicants' forester and soils scientist submitted  
3 studies in 1995 and that ODF approved those studies. As we noted in our decision in  
4 *Carlson I*, no question was raised in that appeal concerning ODF's approval of the  
5 methodology employed in those studies.<sup>16</sup> However, as we have already explained, in  
6 *Carlson I* and *Carlson II*, LUBA and the Court of Appeals concluded the county and  
7 applicants erred in assuming that soils that are not rated by NRCS will produce less than 49  
8 cf/ac/yr of wood fiber and in limiting their consideration of the potential of the predominant  
9 soils on the subject property to produce wood fiber to Douglas fir. On remand, the applicants  
10 submitted a supplemental report that addresses the capability of the nonrated soils on the  
11 subject property to produce Douglas fir and other tree species that are native to Benton  
12 County. Record 173-80.

13           The decision challenged in this appeal addresses the question of whether the  
14 applicants' methodology was approved by ODF:

15           “Staff requested comments from the West Oregon District Office of the  
16 Oregon Department of Forestry regarding ODF approval of the methodology  
17 used by Dr. Simonson and Mr. Rick Barnes to determine whether their  
18 alternative methodology produced ‘equivalent data’ to NRCS data. Their  
19 methodology is established in the record as site visits to map soils, using a  
20 high intensity Order 1 Soil Survey of the subject property and check soil  
21 productivity, and referral to literature and correspondence. ODF submitted a  
22 letter approving the method that Dr. Simonson and Mr. Rick Barnes used in  
23 their 1995 reports to generate their soils productivity data. \* \* \*

24           “On April 8, 1999, the applicants submitted additional evidence on remand.  
25 That evidence included a report by Mr. Rick Barnes that showed a  
26 methodology of site visits to subject property and other properties in the

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<sup>16</sup>It is, however, unclear precisely what methodology was approved by ODF. The studies submitted by the applicant in the proceedings that led to the decision challenged in *Carlson I* include reports dated December 21, 1995, October 26, 1995 and July 31, 1995. Record (*Carlson I*) 218-30, 268-88. In discussing ODF approval of the applicants' methodology in *Carlson I*, we cited a November 16, 1995 letter signed by “Steve Laam[,] Assistant District Forester.” Record (*Carlson I*) 262. Because that letter predates the December 21, 1995 report, we have some question whether it can be assumed that the methodology in the December 21, 1995 report was specifically approved by ODF.

1 County and literature research. The Board finds that this is the same  
2 methodology employed in 1995, which was approved by ODF. \* \* \*

3 “\* \* \* The appellants concede that Mr. Rick Barnes ‘conducted library  
4 research.’ Such research was an integral element of the methodology he  
5 employed in 1995, which was approved by ODF. \* \* \*” Record 9.

6 As far as we can tell, the ODF letter that is referred to in the above-quoted findings is  
7 the same letter that we referred to in *Carlson I*. 34 Or LUBA at 145 n 4. The applicants did  
8 not seek or receive ODF approval of the supplemental report. We are presented with two  
9 problems in determining whether the alternative methodology the county relied upon on  
10 remand has been approved by the Department of Forestry. First, it is not entirely clear what  
11 portions of the methodology that was employed in 1995 were approved by ODF. *See* n 16.  
12 Second, the references in the county’s findings to “site visits” and “library research” provide  
13 no meaningful assistance in determining whether ODF approves of the methodology  
14 employed in 1999. That site visits occurred in 1995 and 1999 does not mean that the  
15 activities that were carried out in the 1999 site visits constitute an ODF-approved  
16 methodology. The reference to “library research” is similarly meaningless. The survey of  
17 literature that was done in 1999 is critical to establish data that we and the Court of Appeals  
18 found to be lacking and necessary in *Carlson I* and *II*. While ODF may have been satisfied  
19 with the survey of literature that was conducted in 1995, we have no way of telling whether  
20 ODF agrees with the methodology employed in the survey of literature that was done in 1999  
21 to conclude that the nonrated soils on the subject property will produce less than cf/ac/yr.

22 Both of the above problems can be addressed by having ODF review and indicate that  
23 it continues to approve the 1995 methodology as supplemented by the 1999 report.  
24 However, absent such a review and approval by ODF, we cannot say ODF has approved the  
25 methodology that the county relied upon on remand.<sup>17</sup>

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<sup>17</sup>We do not preclude the possibility that the county might be able to adopt more detailed findings to explain that the methodology that was approved by ODF in *Carlson I* is the same methodology that was used on remand, rather than simply request that ODF specifically approve the methodology that was used on remand.

1 The fourth assignment of error is sustained.

2 **FIFTH ASSIGNMENT OF ERROR**

3 Petitioner argues that the county’s findings that the subject property is predominantly  
4 composed of soils capable of producing less than 49 cf/ac/yr of wood fiber are inadequate  
5 and are not supported by substantial evidence.

6 **A. Improper Reliance on the Record in *Carlson I***

7 Petitioner argues the county may not rely on the record in *Carlson I*, because it was  
8 not made part of the record on remand.

9 The record in the prior appeal is considered part of the record on remand unless the  
10 county expressly excludes that prior record. *Murphy Citizens Advisory Comm. v. Josephine*  
11 *County*, 27 Or LUBA 651, 652 (1994). The county proceeded as though the record in the  
12 prior appeal were part of the record of its proceedings on remand.

13 This subassignment of error is denied.

14 **B. Limit to Native Tree Species**

15 Petitioner argues the applicants’ 1999 report is not substantial evidence, because it is  
16 limited to tree species that are native to Benton County. Petitioner also cites his consultant’s  
17 criticism of the 1999 report, which faults it for “disregard[ing] the fact that Ponderosa Pine,  
18 Golden Chinkapin, Madrone, and Cherry, are commonly found native species in Benton  
19 County.” Record 65.

20 As we have already explained, a reasonable person could rely on a report that is  
21 limited to consideration of the productive capacity of soils to produce native tree species,  
22 unless some reasonable issue is raised concerning whether the soils might produce nonnative  
23 tree species at a rate that exceeds the relevant standard. Similarly, the failure of the 1999

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However, that approach would be particularly difficult in this case for at least two reasons. First, as our resolution of the fourth assignment of error makes clear, we do not agree that ODF’s single page November 17, 1998 letter gives blanket approval for any methodology that includes “site visits” and “library research.” Second, it is not at all clear what parts of the methodology that was used by the applicants in *Carlson I* were actually approved by ODF.

1 report to consider “Ponderosa Pine, Golden Chinkapin, Madrone, and Cherry,” which  
2 according to petitioner’s consultant are native species, is not fatal. Petitioner’s consultant  
3 made no claim that one or more of the subject soils, if planted in those native species, would  
4 produce more than 49 cf/ac/yr of wood fiber. Absent such a claim, we do not agree that the  
5 1999 report is thereby rendered sufficiently suspect to no longer constitute substantial  
6 evidence in support of the challenged finding.

7 This subassignment of error is denied.

8 **C. Failure to Consider Soils Capability**

9 Petitioner faults the 1999 report as being based on the applicants’ consultant’s failure  
10 to “find stands of trees growing on [the applicants’] property.” Petition for Review 23.  
11 According to petitioner the required test is objective, and must be based on the “capability”  
12 of the soils rather than on existing conditions.

13 To the extent petitioner’s argument is sufficiently developed for review, and to the  
14 extent we understand it, we disagree with it. The 1999 report is based in part on the wetness  
15 of the soils, which the 1999 report concludes distinguishes the productivity of the soils on the  
16 subject property from drier soils of the same type on adjoining properties. We see no error in  
17 taking into consideration site conditions that affect the capability of soils on the site to  
18 produce wood fiber.

19 This subassignment of error is denied.

20 **D. Failure to Quantify Productivity**

21 Petitioner argues the 1999 report, like the 1995 reports, is inadequate because it does  
22 not adequately quantify the estimated productivity of the soils. We have already rejected this  
23 argument under the second assignment of error. We reject it here for the same reason.

24 This subassignment of error is denied.

1           **E.       Improper Shifting of the Burden of Proof**

2           Petitioner claims that the 1999 report indicates that it “could find no evidence that the  
3 soils could produce 50 or more cf/ac/yr.” Petition for Review 24. Petitioner’s claim this  
4 shows the county improperly shifted the burden of proof from the applicants to the  
5 opponents.

6           As we explained in *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA  
7 51, 63-64 (1991), an isolated statement such as the one petitioner identifies is not sufficient  
8 to demonstrate the county improperly shifted the burden of proof. Viewing the county’s  
9 decision as a whole, it is clear that the county did not improperly shift the burden of proof in  
10 this case.

11          This subassignment of error is denied.

12           **F.       Remaining Substantial Evidence Challenges**

13          Petitioner cites evidence that the county might have relied upon to conclude that the  
14 property is predominately composed of soils capable of producing more than 49 cf/ac/yr of  
15 wood fiber.<sup>18</sup> However, petitioner’s argument fails to acknowledge the findings in the  
16 applicants’ reports that the wetter soils on the subject property reduce the productivity of the  
17 soils on the subject property for production of wood fiber. The evidence cited by petitioner  
18 does not so undermine the applicants’ evidence that a reasonable person would no longer rely  
19 on that evidence. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994).

20          The strongest evidence cited by petitioner is comprised of the reports prepared by his  
21 experts. Those reports measure productivity of Waldo and Witham soils on petitioner’s  
22 property, which adjoins the subject property, as well as on other sites in the county  
23 containing those soils. According to petitioner’s experts’ measurements, those soils are

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<sup>18</sup>Among the evidence cited by petitioner is the NRCS data, the county’s prior findings that such data are accurate, ODF data concerning Witham soils and petitioner’s consultants’ study, which concludes, based on measurements on nearby properties, that the soils on the subject property will produce more than 49 cf/ac/yr of wood fiber.

1 capable of producing approximately 100 cf/ac/yr of wood fiber. Petitioner also challenges  
2 particular findings in the challenged decision that (1) conclude that there is no Oregon Ash  
3 growing in Waldo soils on the subject property and (2) fault petitioner’s experts for not  
4 taking into account the slopes of less than 2 percent and wetter soils on the subject  
5 property.<sup>19</sup>

6 The applicants’ expert discounts the relevance of petitioner’s experts’ evidence,  
7 largely on the basis of an alleged failure to account for the extremely wet soils conditions on  
8 the subject property:

9 “[Petitioner’s expert] totally avoids the issue of the high water table on the  
10 Moser property. [He] does not address the conditions which are actually  
11 present on the Moser property.

12 “\* \* \* As I mentioned in my first report, and in my original testimony to the  
13 County Commissioners, there are trees established on a few small areas where  
14 there are small ridges in the soil. Trees grow fine for a few years until the  
15 roots get deep enough to be drowned out by the high water table. At this  
16 point, the trees die. There was no sign these trees have been browsed or  
17 grazed by animals. They obviously die due to the high water table.” Record  
18 30.

19 The fact that the county may have erroneously found that there are no Oregon Ash  
20 growing on the subject property does not provide a basis for reversal or remand where that  
21 finding is not shown to be critical to the decision. *Eola-Glen Neighborhood Assoc. v. City of*  
22 *Salem*, 25 Or LUBA 672, 677 (1993); *Bonner v. City of Portland*, 11 Or LUBA 40, 52  
23 (1984). Neither does the fact that at least some of the soils studied by petitioner’s experts  
24 had 1 percent slopes necessarily require remand.<sup>20</sup> The fundamental disagreement between

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<sup>19</sup>Petitioner cites to a photograph that purports to show an Oregon Ash growing either on the boundary of petitioner’s property and the subject property or on the subject property itself. Record 95, 98, 99; Supplemental Record 10, 13 and 14. Petitioner also cites to instances in his reports submitted below where areas with slopes of 1 percent were considered.

<sup>20</sup>Although petitioner cites some examples where measurements were taken on sites with 1 percent slopes, many of the measurements were taken on sites where no slope is specified or where slopes exceed 2 percent. Moreover, while the parties seem to assume a general correlation between slope and soil wetness, we are uncertain whether it can necessarily be assumed that all sites with a 1 percent slope have equally wet soils.

1 the applicants' and petitioner's experts is whether wet soil conditions distinguish the soils on  
2 the subject property from the same types of nonrated soils on other properties. Based on this  
3 record, we conclude that a reasonable decision maker could have accepted the view of either  
4 petitioner's or applicants' experts on that question. In reaching this conclusion, we  
5 emphasize that the issue for LUBA on review is not to reweigh the evidence or to determine  
6 which set of experts we would believe if we were called upon to make the decision in the  
7 first instance. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d  
8 441 (1992); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617 (1990). Rather the  
9 question is whether we believe a reasonable decision maker could make the decision the  
10 board of commissioners made, based on the conflicting evidence that was presented to it.  
11 We conclude that it could.

12 This subassignment of error is denied.

13 The fifth assignment of error is denied.

14 **SIXTH ASSIGNMENT OF ERROR**

15 In the county's May 15, 1996 decision, the board of commissioners rejected  
16 petitioner's argument that the soil conditions on the subject property are similar to those on  
17 petitioner's adjoining property:

18 “\* \* \* The Board also rejects the appellant's argument that ‘[t]here is no  
19 reason to believe that extraordinary soil conditions exist on the Moser parcel  
20 that would preclude productive tree growth.’ There is substantial evidence in  
21 the record that, with the Waldo and Witham soils, the slopes of these soils on  
22 the [applicants'] property is less than the slopes shown on the [NRCS] soils  
23 reports, and is less than on adjacent lands. [Applicants' expert's] report  
24 shows, as the slope increases, trees begin to grow and survive. He concludes  
25 the Waldo and Witham soils on the [applicants'] property are wetter than on  
26 adjacent lands, and are relatively unique in that regard. That is what makes  
27 those soils unproductive.” Record (*Carlson I*) 39.

28 Petitioner asserts the county erred on remand in refusing to consider evidence  
29 submitted during the original proceedings in *Carlson I* that the Waldo and Witham soils on  
30 his property have similar slopes and wetness as compared to the soils on the applicants'

1 property. In refusing to do so, the county quoted the above finding from *Carlson I* and  
2 concluded the petitioner “waived this issue by not challenging” that finding in his appeal in  
3 *Carlson I*. Record 11. Citing *Portland T. & S. Bank v. Lincoln Realty*, 187 Or 443, 211 P2d  
4 736 (1949) (“law of the case generally is not applicable to pure questions of fact”), petitioner  
5 argues that the county erred in refusing to consider evidence concerning the slope and  
6 wetness of the soils on his property.

7 We do not agree that the challenged finding concerns a pure question of fact. Even if  
8 it does, that would not necessarily mean it could not be waived by failing to raise the issue in  
9 *Carlson I*.<sup>21</sup> The issue of whether the soils on the subject property are different from the  
10 same types of soils on the adjoining and nearby properties is critically linked to the ultimate  
11 legal question, *i.e.* whether those soils capable of producing more than 49 cf/ac/yr of wood  
12 fiber. Petitioner recognized that linkage and raised that issue in the county proceedings that  
13 led to the decision in *Carlson I*. The county responded in its decision in *Carlson I* with the  
14 finding quoted above, in which it specifically finds that the slope and soil wetness distinguish  
15 the soils on the subject property from the same types of soils on adjacent and nearby  
16 properties. Petitioner did not assign error to the county’s finding on that issue in *Carlson I*.<sup>22</sup>  
17 Had petitioner challenged the evidentiary support for that finding in *Carlson I*, we would  
18 have been required to address that issue to “narrow the scope of the remand to those issues  
19 that require further exploration.” *Beck*, 313 Or at 152. Because petitioner did not raise that  
20 issue in its arguments to LUBA and the Court of Appeals in *Carlson I* and *Carlson II*, the  
21 county did not commit error by refusing to revisit that issue in the challenged decision on

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<sup>22</sup>The general substantial evidence challenge that was included in petitioner’s petition for review in *Carlson I* raised a number of issues. The issue of whether the county’s finding that the Witham and Waldo soils on the subject property differ in slope and wetness as compared to the soils on adjacent and nearby properties is not among the issues that were raised in that assignment of error.

1 remand. *ODOT v. Clackamas County*, 27 Or LUBA 141, 149 (1994); *Adler v. City of*  
2 *Portland*, 25 Or LUBA 546, 552 (1993).

3 The sixth assignment of error is denied.

4 The county's decision is remanded.