

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 RICHARD PALMER and JOHN S. CARLSON,
5 *Petitioners,*
6

7 vs.
8

9 LANE COUNTY
10 *Respondent,*
11

12 and
13

14 DEBORAH LANTZ, MARCIA LANTZ,
15 VAL BARNES, DIANE BARNES, JOE ELLIS
16 and JOANN ELLIS,
17 *Intervenors-Respondent.*
18

19 LUBA No. 2002-173
20

21 FINAL OPINION
22 AND ORDER
23

24 Appeal from Lane County.
25

26 Richard Palmer, Westlake, filed the petition for review and argued on his own behalf.
27 With him on the brief was John S. Carlson.
28

29 No appearance by Lane County.
30

31 Michael E. Farthing, Eugene, filed the response brief and argued on behalf of
32 intervenors-respondent.
33

34 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
35 participated in the decision.
36

37 AFFIRMED

04/04/2003
38

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

NATURE OF THE DECISION

Petitioners appeal a county decision that changes the Lane County Rural Comprehensive Plan (LCRCP) map and the Lane County zoning map designations for an 80.25-acre parcel. The LCRCP map designation is changed from “Forest” to “Nonresource.” The zoning map designation is changed from “F-2/Impacted Forest Lands” to “RR-10/Rural Residential.”

MOTION TO INTERVENE

Deborah Lantz, Marcia Lantz, Val Barnes, Diane Barnes, Joe Ellis and JoAnn Ellis move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is located outside the Dunes City municipal limits. The subject property lies east of Highway 101. The Oregon Dunes National Recreational Area lies across Highway 101 to the west. Dunes City abuts the property on its east and south sides. Clearlake Road adjoins the northern border of the property. A stabilized sand dune, which runs from the northwest part of the property to the southeast part of the property, bisects the property into an eastern part and a western part. In some places the slopes on the sand dune exceed 25 percent. The eastern part of the property is traversed by Woahink Creek and is mostly wetlands. There are wetlands in some areas of the southwestern part of the property as well. The record includes a map that shows that less than one-half of the property is suitable for onsite sewage disposal because more than half of the property is covered by sand dunes and areas with a high water table. Record 228.

An existing 36-lot subdivision is located on the southern 23.15 acres of the subject property. That subdivision was recorded in 1955 and has not been developed. The

1 challenged decision was adopted to facilitate the property owners’ desire to replat the entire
2 80.25-acre property into eight 10-acre lots for residential development.¹

3 Although the LCRCP map and zoning map designations for the 80.25 acres are
4 changed as a result of the decision, thus permitting residential development, the entire
5 property remains subject to the Beaches and Dunes combining zone, a zone that severely
6 limits development to protect beaches and dunes.² Portions of the property are also subject
7 to the Floodplain combining zone, which imposes limitations on development to minimize
8 flood hazards.

9 **FIRST ASSIGNMENT OF ERROR**

10 Statewide Planning Goal 4 (Forest Lands) requires that counties inventory forest
11 lands and zone those inventoried forest lands to protect them for forest use. The subject
12 property was inventoried as forest land and placed in a forest zone in 1984. Goal 4 does not
13 provide a clear or objective definition of forest lands. Where an acknowledged
14 comprehensive plan is being amended, Goal 4 identifies three general categories of forest
15 lands:

- 16 1. “Lands which are suitable for commercial forest uses.”
- 17 2. Lands that are adjacent to or near lands in category 1, “which are
18 necessary to permit forest operations or practices.”
- 19 3. “[O]ther forested lands that maintain soil, air, water and fish and
20 wildlife resources.”

21 Petitioners contend that the subject property falls within categories 1 and 3 and that the
22 county erred in concluding otherwise.

¹ An original plan to replat the existing subdivision and divide the remainder of the 80.25 acres into five-acre lots was abandoned in favor of the approved proposal.

² Lane Code (LC) 16.243(1) explains that the purposes of the Beaches and Dunes combining zone include “protection and conservation of coastal beach and dune resources,” and preventing “economic loss by encouraging development consistent with the natural capability of beach and dune landforms.”

1 **A. Lands Suitable for Commercial Forest Uses**

2 Petitioners rely heavily on two arguments in support of their view that the subject
3 property is protected under Goal 4 because it is suitable for commercial forest uses. First,
4 petitioners argue that it is undisputed that there are trees on the property, and they point to
5 photographs in the record that confirm the presence of trees growing on the property.³
6 Second, petitioners argue that a majority of the soils on the subject property have a United
7 States Soil Conservation Service (SCS) productivity rating that establishes that they will
8 produce approximately 29 cubic feet/acre/per year (cf/ac/yr) of shore pine. Record 556. The
9 record also includes pages from a “working paper” that the county used in 1984 to prepare
10 the forest lands component of the LCRCF. That working paper appears to take the position
11 that “‘commercial’ forest land” is made up of “land capable of producing crops of industrial
12 wood in excess of 20 cubic feet per acre annual growth.” Record 522. From these facts,
13 petitioners reason that the subject property is predominately commercial forest land as a
14 matter of law.

15 Intervenors contend that petitioners’ first argument does not establish that the county
16 erred in concluding that the subject property is not “suitable for commercial forest uses.” We
17 agree. The presence of some trees on the subject property does not establish that the subject
18 property is “suitable for commercial forest uses,” within the meaning of Goal 4.

19 Intervenors next dispute whether the wood fiber production threshold for including
20 land on the commercial forest land inventory in Lane County is 20 cf/ac/yr or 50 cf/ac/yr.
21 Intervenors note that the record includes a Lane County Board of Commissioners Order
22 dated September 12, 1984, which intervenors contend substituted a 50 cf/ac/yr threshold for

³ Petitioners also speculate that lands that receive as much rain as the subject property will always be able to produce commercial forests.

1 the 20 cf/ac/yr threshold.⁴ Intervenors contend the 50 cf/ac/yr threshold is the current Land
2 Conservation and Development Commission (LCDC) acknowledged standard.

3 Although petitioners suggest several times that the 20 cf/ac/yr standard is a state
4 mandated standard, they identify no statute, rule or other state regulation that provides that
5 lands capable of producing at least 20 cf/ac/yr of wood fiber must be viewed as land that is
6 “suitable for commercial forest uses,” as that concept is used in Goal 4. We are unable to
7 locate any such state standard.

8 On the other hand, even if we assume the above-noted board of commissioners’ order
9 was legally adequate to change the 20 cf/ac/yr threshold in the working paper to 50 cf/ac/yr,
10 we are unable to confirm that a 50 cf/ac/yr threshold was ever acknowledged by LCDC.⁵
11 Because the parties do not establish that the 20 cf/ac/yr or the 50 cf/ac/yr threshold should be
12 given the dispositive legal effect that they argue it should, we reject their arguments that rely
13 exclusively on the alleged 20 cf/ac/yr and 50 cf/ac/yr minimum thresholds.

14 The applicant submitted a forest land analysis prepared by a professional forester.
15 The analysis concludes that “the entire property is not suitable for commercial forest

⁴ The relevant language of the order is as follows:

“Appendix I of the Forest Lands Working Paper was intended as an example of commercial forest soils and their corresponding CFSC ratings. However, these soils and ratings are not complete and are not entirely accurate. Therefore, Appendix I should not be utilized when determining commercial forest soils. Instead, the most current soils Data and Soils interpretations as utilized by the U.S. Dept. of Agriculture [S]oil Conservation Service should be relied upon in conjunction with the definition of ‘commercial forest land’ (50 CFSC) as adopted by the Board of Commissioners in Ordinance No. PA 889, Exhibit C.” Record 563.

We are uncertain what the reference to 50 CFSC means. Intervenor apparently understands it to adopt a 50 cf/ac/yr standard. There is no “Exhibit C” attached to the order at Record 563. If the reference to PA 889 is to a separate ordinance that amended the LCRCP to adopt a 50 cf/ac/yr standard, no party has provided us with a copy of that ordinance.

⁵ Indeed it seems highly unlikely that either the 20 cf/ac/yr threshold or a 50 cf/ac/yr threshold was acknowledged by LCDC. As the order itself recognizes, the original working papers were viewed as supporting information rather than part of the LCRCP itself. The LCRCP states the “Working Papers [are] to be used to help interpret and understand [LCRCP] approaches but [are] not * * * designed to be adopted as legislative law.” LCRCP 4.

1 production.” Record 113. That same professional forester also stated that he “found no
2 evidence of stumps or * * * activity that would suggest that the area has been logged at any
3 time in history.” Record 544. Intervenors cite the following discussion in the forest land
4 analysis that they contend supports the ultimate conclusion that the property is not suitable
5 for commercial forest uses:

6 “I examined this property on May 7, 1996. * * * It is a stabilized sand dune
7 with [s]hore pine on mostly gentle sloping and varying aspects within the
8 dune area. Approximately 5 acres of the north part of the property on the east
9 side of the dune area has an unmanageable forest consisting of commercial
10 tree species including scattered Sitka spruce, [w]estern hemlock and [r]ed
11 cedar mixed with [s]hore pine. There are no other commercial tree species on
12 this site. * * *” Record 108.

13 “Usable non-forest land is represented on 57.8 acres or 72% of the subject
14 [property]. All of the 57.8 acres of non-forest land is situated on soils mapped
15 as Waldport fine sand * * * and Heceta fine sand * * *. This area is a
16 stabilized sand dune having small disturbed areas. The Soil Survey of the
17 Lane County Area does not report timber growing as one of the uses the non-
18 forest soils on this property will support, even though these soils are
19 producing a scattered stand of [s]hore [p]ine mixed with a component of very
20 slow growing Douglas [f]ir. Shore [p]ine grows slowly, typically produces a
21 poorly formed log and has a very limited commercial use. Douglas [f]ir on
22 these sandy soils grows slowly and mortality usually occurs prior to the trees
23 reaching commercial saw log sizes. Because of these conditions, the sandy
24 soils represented on the subject [property] are not suitable for timber
25 growing.” Record 112.

26 Petitioners provide no focused challenge to the above-described forest land analysis
27 or the county’s findings that accept and rely on that analysis to conclude that the subject
28 property is not suitable for commercial forest uses. Accordingly, we reject petitioners’
29 contention that the county erred in concluding that the subject property is not suitable for
30 commercial forest uses.

31 **B. Other Forested Lands that Maintain Soil, Air, Water and Fish and**
32 **Wildlife Resources**

33 There is no dispute that the subject property includes wetlands and fish and wildlife
34 habitat and that there are some trees growing on the subject property. From these undisputed

1 facts, petitioners reason that the subject property falls within the third category of forest
2 lands: “other forested lands that maintain soil, air, water and fish and wildlife resources.”

3 During the local proceedings the applicants argued that the subject property should
4 not be viewed as “other forested lands” under the third category of forest lands:

5 “* * * There is little commercial timber on-site. However, the harvesting of
6 even this limited amount of timber would significantly affect the existing soil,
7 air, water and fish and wildlife resources that presently exist on the site
8 because of its location near Woahink Creek. If this application is not
9 approved, the owners will have no choice but to log and clear the site in
10 accordance with [the] Oregon Forest Practices Act. Mr. Booth submitted a
11 supplemental report * * * which describes the scope of harvest activities that
12 would be allowed by the Act along Woahink Creek up to 10 feet from the
13 stream bank. * * *

14 “This application highlights the choice between allowing limited residential
15 development versus logging portions of the property * * * that are better left
16 in their natural state. The soil, air, water and fish and wildlife resources are
17 far better protected if this application is approved. The property is not ‘other
18 forested lands’ as contemplated by Goal 4. * * *” Record 237-238.

19 The board of county commissioners adopted the following findings:

20 “* * * The [LCRCP] has not identified the Subject Property as forest land
21 necessary for watershed protection, special wildlife or fisheries habitat or for
22 recreation purposes.

23 “* * * * *

24 “The Board [of Commissioners] finds that the entire Subject Property is
25 subject to the requirements of the [Beaches and Dunes] combining zone,
26 compliance with these regulations will ensure the maintenance of adequate
27 vegetative cover to protect against natural resource impacts. * * *” Record
28 22-23.

29 We understand the intervenors to have argued below, and the board of county
30 commissioners to have agreed, that the county is faced with two possibilities. First, if the
31 requested plan and zoning map amendments are approved, low density residential
32 development of the property at a density of one dwelling unit per 10 acres in the least
33 environmentally sensitive parts of the subject property will be authorized, subject to stringent
34 development regulations under the Beaches and Dunes combining zone. Second, if the

1 requested plan and zoning map amendments are not allowed, logging of the limited number
2 of merchantable trees on the subject property would be permitted under the FPA and that
3 logging would not be subject to the county’s Beaches and Dunes combining zone under ORS
4 527.722(1).⁶ This timber harvest and the potential to develop some of the existing 36 lots on
5 the southern part of the property could have negative impacts on the subject property’s
6 wetlands and fish and wildlife habitat.

7 Petitioners neither acknowledge nor challenge the county’s reasoning that the subject
8 property should not be viewed as “other forested lands” in the circumstances presented in
9 this case. Given the lack of any focused challenge to the county’s reasoning, we cannot say
10 the county’s conclusion that the subject property should not be viewed as “other forested
11 lands that maintain soil, air, water and fish and wildlife resources” is erroneous.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 LC 16.400(8)(c) requires that the applicant for a minor LCRCP amendment must
15 supply documentation concerning a number of factors. LC 16.400(8)(c)(iii)(gg) provides:

16 “For a proposed amendment to a Nonresource designation * * * [the applicant
17 must supply] an analysis responding to the criteria for the respective request
18 as cited in the * * * ‘Working Paper: Marginal Lands’ (Lane County, 1983).”
19 Record 552.

20 As relevant, the cited working paper provides:

21 “Land may be designated as NON-RESOURCE/NON-EXCEPTION LAND
22 upon submission of satisfactory factual information to support the following
23 findings:

⁶ ORS 527.722(1) provides in relevant part:

“[N]o unit of local government shall adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of an acknowledged urban growth boundary.”

The Beaches and Dunes combining zone expressly provides that its site and development restrictions do not apply to forest operations. LC 16.243(8); Intervenors’ Brief Appendix 10.

- 1 “1. The land is not composed of existing or potential forest lands which
2 are suitable for the commercial production of wood fiber products.
- 3 “2. The land is not needed for watershed protection.
- 4 “3. Designation of the land as NON-RESOURCE/NON-EXCEPTION
5 LAND will not adversely [a]ffect management of the land for big
6 game range or other wildlife, fish or waterfowl habitat.
- 7 “4. No extreme soil or climatic conditions exist to the extent to require
8 maintenance of existing vegetative cover to a degree not provided by
9 the NON-RESOURCE/NON-EXCEPTION designation.
- 10 “5. The land is not located in an agricultural or urban area and providing
11 needed urban buffers, wind breaks, wildlife and fisheries habitat,
12 livestock habitat, scenic corridors or recreational uses.” Record 553.

13 We reject petitioners’ challenge under the first of the above criteria for the same
14 reasons we rejected the first assignment of error. We turn to petitioners’ challenges under
15 the four remaining criteria.

16 **A. Land Not Needed for Watershed Protection**

17 The challenged decision includes the following to satisfy the second required finding
18 under LC 16.400(8)(c)(iii)(gg):

19 “The Subject Property is in the Siltcoos River watershed. The eastern portion
20 of the site drains into Woahink Creek, which flows easterly toward Siltcoos
21 Lake, approximately one-half mile to the southeast. The western portion of
22 the site drains into the Siltcoos River, which drains westerly to the Pacific
23 Ocean. There are no state or county inventories that identify this area as an
24 important watershed requiring specific protection for fisheries or wildlife
25 habitat or to prevent natural hazards. The Board [of Commissioners] finds the
26 Subject Property is not needed for watershed protection.” Record 27.

27 Petitioners neither acknowledge these findings nor make any attempt to explain why they are
28 not adequate to satisfy the second of the required findings under LC 16.400(8)(c)(iii)(gg).

29 **B. No Adverse Affect on Management of the Land for Big Game Range or
30 Other Wildlife, Fish or Waterfowl Habitat.**

31 The challenged decision adopts the following to satisfy the third required finding
32 under LC 16.400(8)(c)(iii)(gg):

1 “The Board [of Commissioners] finds the proposed residential zoning of one
2 dwelling per 10 acres and the eventual residential development density that
3 will take place on the site will not adversely affect management of big game
4 or other wildlife, fish or waterfowl habitat. The Subject Property is within an
5 inventoried Impacted Big Game Range. The [LCRCP] has not designated the
6 property as within a sensitive fish or wildlife area.” Record 27.

7 Petitioners do not specifically challenge the above findings. Instead, petitioners simply
8 disagree with the findings, expressing concern that lots will be developed and used in ways
9 that will damage the wildlife habitat values of the property. That expression of disagreement
10 is not sufficient to establish that the county’s findings are inadequate.

11 **C. No Extreme Soil or Climatic Conditions Require a Resource Designation**
12 **to Maintain Existing Vegetation**

13 The challenged decision adopts the following to satisfy the fourth required finding
14 under LC 16.400(8)(c)(iii)(gg):

15 “The entire Subject Property is within the boundaries of the [Beaches and
16 Dunes] combining zone. The provisions of this zone require the maintenance
17 of the greatest possible amount of existing vegetative cover, and act to
18 prohibit all development in areas where slopes exceed 25%. The Board [of
19 Commissioners] finds implementation of these practices during development
20 of the Subject Property will adequately maintain existing vegetative cover.”
21 Record 27-28.

22 Petitioners again do not address the above-quoted findings, but rather speculate that the
23 county will not enforce its land use laws to prevent the new lot owners from operating
24 all-terrain vehicles on the dune, which will cause it to break up and blow into Woahink
25 Creek. Petitioners’ arguments are inadequate to demonstrate error in the county’s findings.

26 **D. Property Does Not Provide Needed Urban Buffers, Wind Breaks, Wildlife**
27 **and Fisheries Habitat, Livestock Habitat, Scenic Corridors or**
28 **Recreational Uses.**

29 The challenged decision adopts the following to satisfy the fifth required finding
30 under LC 16.400(8)(c)(iii)(gg):

31 “The Board [of Commissioners] finds the Subject Property is not found within
32 an urban growth boundary nor is it agricultural land within the meaning of
33 Goal 3. It has not been identified as necessary to provide urban buffers; wind

1 breaks, wildlife, fisheries or livestock habitat; scenic corridors or recreational
2 uses.” Record 28.

3 We understand the above findings to conclude that the property is not needed for the
4 cited purposes for two reasons: (1) the subject property is not located in an agricultural or
5 urban area, and (2) no plan or other document identifies the subject property as necessary for
6 one of the cited purposes. Petitioners do not specifically challenge these findings.

7 Because petitioners do not establish that the findings the county adopted to address
8 LC 16.400(8)(c)(iii)(gg) are inadequate, the second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 OAR 660-004-0005 includes the following definitions:

11 “(2) ‘Resource Land’ is land subject to the statewide Goals listed in OAR
12 660-004-0010(1)(a) through (f), except subsection (c).^[7]

13 “(3) ‘Nonresource Land’ is land not subject to the statewide Goals listed in
14 OAR 660-004-0010(1)(a) through (f), except subsection (c). * * *”

15 Petitioner argues the county erred by designating the subject property as nonresource land
16 because it is not disputed that Goal 18 applies to the property.

17 Intervenor respond, and we agree, that OAR 660-004-0005(3) and LCRCP use the
18 term “nonresource land” to mean different things. Under the LCRCP and the challenged
19 decision the nonresource designation simply means that Goals 3 and 4 do not apply because
20 the subject property was found not to constitute farm or forest lands subject to protection
21 under those goals. Intervenor argue that the subject property remains subject to Goal 5
22 (Natural Resources, Scenic and Historic Areas, and Open spaces) Goal 6 (Air, Water and
23 Land Resources Quality), Goal 7 (Areas Subject to Natural Disasters and Hazards), Goal 18
24 and the Beaches and Dunes combining zone that the county applies to protect beaches and

⁷ The listed statewide planning goals are Goal 3, Goal 4, Goal 16 (Estuarine Resources), Goal 17 (Coastal Shorelands), and Goal 18 (Beaches and Dunes).

1 dunes under Goal 18.⁸ Intervenor also argue that Woahink Creek, the wetlands, and
2 wildlife resources on the property are all protected under the zoning ordinance under Goals 5
3 and 6.

4 As far as we can tell, the challenged decision’s designation of the subject property as
5 nonresource land has the legal effect of eliminating the protection for farm and forest uses
6 that would otherwise be required for the property under Goals 3 and 4. The challenged
7 decision does not remove the subject property from any acknowledged land use regulations
8 that the county may have adopted pursuant to Goals 16-18. In particular, as intervenors point
9 out, the continued applicability of the Beaches and Dunes combining zone was an important
10 factor in the county’s ultimate conclusion that the subject property does not qualify as other
11 forested lands, *i.e.*, the third category of forest lands.

12 The third assignment of error is denied.

13 **FOURTH ASSIGNMENT OF ERROR**

14 LCRCP Goal 14 Policy 1 provides in relevant part:

15 “The County shall encourage new residential, commercial and industrial
16 development to locate within existing incorporated cities or rural
17 communities. Any growth outside Urban Growth Boundaries must:

18 “a. Be restricted to committed or developed areas including approved new
19 development centers; or

20 “b. *Under certain specified conditions set forth in this plan, industrial,*
21 *commercial, and residential development is appropriate outside of*
22 *developed and committed areas provided a valid exception is taken*
23 *and/or all Statewide Goal requirements are met[.]” (Emphasis added.)*

24 Petitioners argue LCRCP Goal 14 Policy 1 is violated because the challenged
25 decision authorizes residential development outside an urban growth boundary and without
26 first approving an exception to the statewide planning goals.

⁸ Goals 5, 6, and 7 are not included in the list of resource goals at OAR 660-004-0005(2) and (3).

1 Intervenors argue that LCRCP Goal 14 Policy 1 must be read in context with LCRCP
2 Goal 2 Policies that specifically authorize the county to designate lands that are found not to
3 be “farm or forest lands” for “rural residential” development at development densities of
4 “one residence per five or ten acres.” LCRCP Goal 2 Policies 18 and 19.⁹ If Goal 14 Policy
5 1 is read together with LCRCP Goal 2 Policies 18 and 19, intervenors argue it is clear that
6 the challenged decision does not violate LCRCP Goal 2 Policy 1.

7 Although Goal 14 Policy 1 does not expressly authorize rural residential development
8 on lands that are found not to be farm or forest lands, we agree with intervenors’
9 interpretation of that policy in context. LCRCP Goal 14 Policy 1(a) appears to limit new
10 residential development to committed and developed exception areas. Nevertheless, Goal 14
11 Policy 1(b) allows new residential development “[u]nder certain specified conditions set
12 forth in this plan, * * * provided * * * all Statewide Goal requirements are met.” Although
13 the precise meaning of this language is a bit obscure, we agree with intervenors that it is
14 appropriately read to allow residential development of rural lands that are found not to be
15 farm or forest lands (making Goal 3 and 4 inapplicable), since LCRCP Goal 2 Policy 18 and
16 19 expressly allow such rural residential development.

17 The fourth assignment of error is denied.

18 The county’s decision is affirmed.

⁹ The Goal 2 Policies that intervenors cite as Policies 16 and 17 on page 18 of their brief appear in LUBA’s copy of the LCRCP as Goal 2 Policies 18 and 19. Despite the different policy numbers, the policies themselves are identical.