

44. Marginal Lands. “In-home commercial activities” are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCDC. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. A marginal lands county is not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot-of-record dwellings in approving dwellings under OAR 660-033-0130(4)(a)(D)(ii) and (iii). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where a neighbor describes observing, from their living room view, minimal orchard, meadow, and garden-related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other animals on the property between 1970 and 2004, and where the neighbor subsequently reiterates that there was no farm use, such as cattle or crops, between 1978 and 1983 and that, during the 1980s, owners of the property kept their show horses on the property, a local government may reasonably conclude that the property was “not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income” for purposes of former ORS 197.247(1)(a) (1991), even where the record includes (1) aerial photos from 1979 and 1982, (2) a 1979 permit for a new barn, (3) a 1987 farm dwelling approval, and (4) testimony from other area residents contradicting the neighbor’s testimony, where the record does not disclose the proximity of the other area residents’ properties to the subject property or whether those area residents had made firsthand observations of the subject property during the relevant statutory period. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. Under former ORS 197.247(1)(b)(A) (1991), an applicant is not required to show that at least 50 percent of the proposed marginal land is made up of lots or parcels that are 20 acres or less in size *and* that 50 percent of the land within one-quarter mile of the perimeter is made up of lots or parcels that are 20 acres or less in size; rather, the statute requires only one calculation, and an applicant is required to show that at least 50 percent of the proposed marginal

land *combined with* the land within one-quarter mile of the perimeter is made up of lots or parcels that are 20 acres or less in size. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. For purposes of designating marginal lands under *former* ORS 197.247 (1991), it is not enough for an applicant to provide a list of the allegedly qualifying lots or parcels; the applicant must provide foundational evidence that the lots or parcels are lawful and that lots or parcels that were in common ownership on July 1, 1983, are not overcounted. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. In redesignating and rezoning protected habitat from forest land to marginal land under *former* ORS 197.247 (1991), a local government errs by excluding adjacent forest land from the impact area under OAR 661-023-0040(3) without establishing that it is not also protected habitat. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. The "gross income" test under ORS 197.247(1)(a) requires a finding that the subject property was "not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income[.]" Sworn affidavits may be relied on to demonstrate that the gross income test is satisfied where the county commissioners concluded that the sworn affidavits were credible and where the petitioner has not shown why a sworn affidavit does not constitute substantial evidence. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. ORS 197.247(1)(b)(B) requires that marginal land must be "located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]" In applying the statute, a county need not determine whether the subject property includes lawfully created "lots" or "parcels." *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. In applying the 60 percent "parcelization test" described in ORS 197.247(1)(b)(B), the county's decision that the proposed marginal land was located within an area at least 60 percent of which is composed of "lawfully created parcels" that were 20 acres or less in size on July 1, 1983, is supported by substantial evidence in the record where the record includes copies of assessors' records, deeds and legal lot verifications for the parcels. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. A study area that is 680 acres in size is not disqualified under the 197.247(1)(b)(B) “parcelization” portion of the “marginal land” statute, which requires the proposed marginal land be located within an area not less than 240 acres, where the legislative history supports a conclusion that it was the legislature’s intent to allow an applicant wide latitude in meeting the test. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. OAR 660-006-0010, which requires that a forest land inventory include a mapping of forest site class, applies both to a local government’s initial inventory of forest lands and to subsequent county decisions that modify that inventory, such as designating forest land as “marginal lands” under ORS 197.247 (1991). *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. A county’s conclusion that OAR 660-010-0010 does not apply to a decision designating forest land as marginal lands under ORS 197.247 (1991) is harmless error, where the decision is supported by an analysis that is based on objective, empirical measurements of forest productivity consistent with the rule’s requirements. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. Because the legislature adopted the marginal lands statute in 1983, it is reasonable to assume that the \$10,000 threshold in ORS 197.247 (1991) for forest productivity is expressed in 1983 dollars, in which case it is also reasonable to assume that the legislature did not intend to preclude use of 1983 log prices in determining whether the subject property is capable of producing an average of \$10,000 in annual gross income over the growth cycle. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. LUBA will affirm a county’s choice to rely on expert testimony that a 50-year rotation or growth cycle is the predominant forest practice west of the Cascades in applying the forest productivity prong of the marginal lands test, over contrary evidence submitted by non-experts that does not conclusively establish that it is error to use a 50-year growth cycle. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. A county’s erroneous finding that designating forest land as marginal lands under ORS 197.247 (1991) is not subject to OAR 660-006-0010, which governs the inventory of forest lands, is harmless error, where the county’s decision nonetheless complies with the substantive requirements of the rule. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

44. Marginal Lands. A county reasonably relies on a forester’s opinion that Ponderosa pine is a more valuable species to grow on certain soils than Douglas fir, over conflicting opinions by persons who are not soil or forestry experts. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

44. Marginal Lands. A local government errs in geographically limiting its inquiry regarding what constitutes a “farm operation” for purposes of ORS 197.247(1)(a) to only lands “adjacent to” or “contiguous with” the property that is the subject of the marginal lands application. *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. ORS 197.247(1)(a) and 197.247(5)(1991) allow a county to rely on an assumption of a 50-year growth cycle in calculating the production capability of property. *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. Evidence of actual stocking rates for the property, when taken in conjunction with evidence that actual production was reflective of potential production for the property, is substantial evidence that the property is not capable of generating \$10,000 in annual gross income as required by ORS 197.247(1)(a) (1991). *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. ORS 197.247(1)(a) (1991), which allows counties to designate as marginal land property that was not managed during three of the five years preceding January 1, 1983 as part of a forest operation producing an average of \$10,000 in annual gross income, implicitly requires that counties use 1983 timber prices in estimating the annual timber revenue derived from the property. *Just v. Lane County*, 49 Or LUBA 456 (2005).

44. Marginal Lands. ORS 197.247(1)(b)(C) requires that counties use the agricultural classification system in use by the Soil Conservation Service on October 15, 1983, in determining whether proposed marginal lands are predominantly composed of Class VI soils. A county is entitled to rely upon a 1987 Soil Conservation Service soil survey that is a product of the classification system in use on October 15, 1983. *Just v. Lane County*, 49 Or LUBA 456 (2005).

44. Marginal Lands. ORS 215.316(1) (1993) expresses a legislative intent to retroactively prohibit counties from designating resource lands as marginal lands, and from adopting plan and code provisions allowing additional nonresource uses on such marginal lands, after January 1, 1993. ORS 215.316(1) (1993) does not express an intent to retroactively prohibit counties that have *not* designated marginal lands from applying either ORS 215.283 (1991) or the supposedly stricter provisions of 215.213(1) to (3) (1991) to their exclusive farm use zones. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

44. Marginal Lands. The language in ORS 197.247(1)(a) that “[t]he proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983 * * *” applies to forest as well as farm operations. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. ORS 197.247(1)(a) requires a two-part inquiry to determine whether a forest parcel may be designated as “marginal” land. First, a county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. Second, a county must determine whether the forest operation in question is “capable of producing an average of 10,000 dollars in annual gross income.” *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. Under ORS 197.247(1)(a), in determining whether a forest operation is capable of producing an average of 10,000 dollars in annual gross income over the growth cycle, what occurred on a particular parcel during the 1978-1982 time period is not the sole determinant of the “capability” of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five-year period. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. The requirement of ORS 197.247(1)(a) that land be “capable” of producing the specified annual income “over the growth cycle” requires an evaluation of the income potential of the property, assuming the use of reasonable forest management practices over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. Under ORS 197.247(1)(a), the classification of the soils on a particular parcel is not dispositive of such parcel’s capability to produce income over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).