BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DANIEL M. HOLLAND, Petitioner, vs. LANE COUNTY, Respondent, and TIMBERLANE LUMBER CO., an Oregon corporation, Participant-Respondent.	LUBA No. 87-106 FINAL OPINION AND ORDER

Appeal from Lane County.

Joseph J. Leahy, Springfield, filed the petition for review and argued on behalf of petitioner. With him on the brief was Harms, Harold, Leahy & Pace.

Bill Kloos, Eugene, filed a response brief and argued on behalf of Participant-Respondent Timberlane Lumber Company. With him on the brief was Johnson & Kloos.

No appearance by Lane County.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee; participated in the decision.

REMANDED 04/13/88

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals Lane County Ordinance No. PA 944 amending the Lane County Rural Comprehensive Plan (plan) designation for a 62 acre parcel from Forest to Nonresource and rezoning the parcel from Impacted Forest Land (F-2) to Rural Residential - 5 Acre Minimum (RR-5) and Rural Residential - 10 Acre Minimum (RR-10).

FACTS

Participant-respondent Timberlane Lumber Co. (respondent) applied for a plan map amendment from Forest to Nonresource and a zone change from F-2 to RR-5 for the subject 62 acre parcel. The parcel contains, near its western end, one dwelling approved by the county as a forest-related residence.

The urban growth boundary and city limits of the City of Eugene are contiguous with the eastern property line of the subject 62 acre parcel. Land adjoining the parcel to the east is zoned for urban residential use. There is one 9 acre parcel zoned RR-5 adjoining the subject parcel to the north. The remaining land adjoining the subject parcel to the north, west and south is comprised of large (34-80 acre) parcels zoned F-2 or Exclusive Farm Use (E40).

On November 4, 1987, the Lane County Board of Commissioners adopted Ordinance No. PA 944, which provides that "upon satisfying all of the Conditions of Approval" imposed by the board of commissioners, the plan designation for the 62 acre

parcel is amended from Forest to Nonresource and the zoning designation is changed from F-2 to RR-5 for the eastern 15 acres of the parcel and to RR-10 for the western 47 acres of the parcel.

FIRST ASSIGNMENT OF ERROR

> "Respondent County erred in finding that the subject property is not forest land as defined by Goal 4, and therefore need not be retained for the production of wood fiber and other forest uses."

A. Interpretation of Applicable Standard

Petitioner argues the county's decision violates Statewide Planning Goal 4 (Forest Lands) because the county did not properly determine that the subject parcel is not "suitable for commercial forest uses." Petitioner contends the county improperly applied its plan definition of "commercial forest land" in making this determination by interpreting it to encompass only potential for production of Douglas fir. According to petitioner, land is "commercial forest land," as defined in the plan, if it has the capability or potential to produce 50 or more cubic feet per acre per year of any industrial wood fiber, not just Douglas fir.

Respondent counters with alternative arguments. First, respondent argues the county may interpret its plan definition of "commercial forest land" as encompassing only production of Douglas fir, because the plan "was acknowledged [by LCDC] using only Douglas fir as the indicator species." Respondent's Brief at 9. Second, respondent argues that the county did not

interpret and apply its plan definition as concerning only suitability for Douglas fir, as the county's findings make no mention of Douglas fir.

The Goal 4 definition of "forest lands" includes:

> "(1) lands composed of existing and potential forest lands which are suitable for commercial forest uses;"

The county's decision concludes that the subject property is not suitable for commercial forest use "because the majority of the soils do not qualify as Commercial Forest Land." Record 16.[1]

The county adopted the following definition of "commercial forest land" as part of its "Working Paper: Forest Lands; March, 1982" (Forest Lands Paper) and "Addendum to Working Paper: Forest Lands; November, 1983" (Forest Lands Addendum) documents:[2]

> "'Commercial' forest land [is] land capable of producing crops of industrial wood in excess of 50 cubic feet per acre of annual growth."

Ordinance No. PA 889, Ex. C. The Forest Lands Paper, at p. 10, contains an inventory of "Acres of Commercial Forest Land by Cubic Foot Site Class, Forest Type and Ownership." This table recognizes the following commercial forest types -- "Douglas fir," "hemlock/cedar/spruce," "other conifers" and "deciduous." Respondent cites no language in the plan or implementing ordinances which supports its contention that Douglas fir is the sole indicator species for determining whether land is "commercial forest land." We therefore

conclude that the county's definition of "commercial forest land" cannot be interpreted as encompassing only Douglas fir production.

However, we agree with respondent that there is no basis in the county's decision for concluding that it did interpret its "commercial forest land" definition as applying only to Douglas fir production. As respondent has pointed out, there is no reference to Douglas fir production in the county's findings addressing this criterion. See Record 12-13, 16. We therefore conclude that the county properly interpreted its "commercial forest land" definition as including production of any industrial tree species.[3]

This subassignment of error is denied.

B. Substantial Evidence

Petitioner argues the county's decision that the property is not suitable for commercial forest uses is not supported by substantial evidence in the record. Petitioner argues the data demonstrating that the soil types found on the property lack suitability for timber production is not substantial evidence in light of other evidence in the record regarding current and past tree stocking and growth on the site and the owner's 1985 county-approved forest management plan. Petitioner also contends the record does not contain substantial evidence that the majority of the property is not suitable for production of 50 or more cubic feet per acre per year of industrial wood other than Douglas fir.

Substantial evidence is evidence which a reasonable mind could accept as adequate to support a conclusion. Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den (1976). See also, Christian Retreat Center v. Comm. for Wash. Co., 28 Or App 673, 679, 560 P2d 1100, rev den (1977). When we review the evidentiary support for a local government decision, we must determine whether, in light of all the evidence in the record, the decision is reasonable. Younger v. City of Portland, ___ Or ___, ___ P2d ___ (March 29, 1988).

To the extent petitioner makes a general argument that data on soil capability cannot constitute substantial evidence to support the county's productivity determination in light of contrary evidence in the record based on observations of current tree stocking and growth on the site, we must disagree. We cannot, as a matter of law, say that evidence of a commercial level of wood production based on current tree growth and stocking inherently so detracts from the weight of contrary credible evidence based on soil capabilities as to render the soil data not substantial.[4] See Universal Camera Corp. v. Labor Bd., 340 US 474, 488, 71 S Ct 456, 95 L Ed 456 (1951); Sane Orderly Development v. Douglas County Bd of Comm'rs, 2 Or LUBA 196, 206 (1981).

Petitioner also argues that the evidence in the record in this case does not support the county's determination that the subject property is not suitable for commercial forest production of species other than Douglas fir.[5] We must

therefore determine whether the county's conclusion that the "majority of the soils do not qualify as Commercial Forest Land" is supported by substantial evidence that the majority of the property is not suitable for production of 50 or more cubic feet per acre per year of industrial wood other than Douglas fir.

The county bases its decision on two mappings of the soils on the subject property, a general survey by the U.S. Soil Conservation Service (SCS survey) and a detailed 1981 soil survey by consulting soil scientist Steve Wert (Wert survey). The soil types identified by the two surveys are different. The county's findings state that "under either survey the majority of the soil [sic] on the property do not qualify as Commercial Forest Lands." Record 12. Therefore, we will consider whether there is substantial evidence in the record to support the county's decision, based on either survey.

1. SCS Survey

The SCS survey shows that the soils on the subject property are 55% Witzel very cobbly loam and 45% Dixonville-Philomath-Hazelair complex. Record 10. With regard to the Witzel soil, the county's findings state:

> "Although Witzel is rated at Cubic Foot Site Class 4, it is not suited to commercial wood production because special limitations restrict sustained productivity. Witzel is noted as a marginal forest soil because 'droughtiness and shallow rooting cause rapid decline after 30 years.' Lane County Soils, Farmland/Woodland (S.C.S. 1982) at 50." Record 12.

* * * * *

> "Under the proposed Soil Potential Rating System, both the Witzel as well as the Dixonville-Philomath-Hazelair complex are rated as 'Low' Woodland Grade in order to reflect these special limitations on sustained productivity." Record 13.

A Cubic Foot Site Class 4 rating equates to a potential annual yield of 85-119 cubic feet per acre.[6] Forest Lands Paper, App. II. Thus, the findings state that Witzel soil is rated as having a productivity which meets the county's commercial forest land definition, but nevertheless is not suitable for commercial forest use because "special limitations restrict sustained productivity."[7] Record 12.

The only evidence in the record on the capabilities of Witzel soil to which our attention has been directed is Steve Wert's 1985 addendum (Wert addendum) to his 1981 survey. Wert concludes that Witzel soil "just barely qualifies as a forest site" under the county's commercial forest land definition. Record 191. This evidence supports only a conclusion that Witzel soil does meet the county definition of commercial forest land.

The county's conclusion that Witzel soil is not suited to commercial forest production is not supported by substantial evidence in the record. Because the SCS survey finds Witzel soil comprises 55% of the subject property, this means that the county's decision that a majority of the soils on the property, as mapped by the SCS survey, do not qualify as commercial forest land is also not supported by substantial evidence in the record.[8]

2. Wert Survey

The Wert survey, as adopted in the county's findings, identifies 18 different soils on the subject property and gives the acreage and percent of total area for each.[9] Record 10-11. The county's conclusion that the majority of these soils do not qualify as "commercial forest land" is based on the following findings:[10]

> According to the detailed soil survey, Steve Wert found little, if any, Witzel on the property. 69 percent of the soils were classified as unsuited for wood production, 16.6 percent were classified as marginally suited, and only 14.4 percent were classified as suited for wood production. Marginal woodland is defined by Mr. Wert as soils capable of supporting a stand of timber but where the costs of establishing such a stand preclude profitable returns." Record 13.

The county's conclusion that a majority of the soils do not meet its commercial forest land definition is dependent on its determination that 69 percent of the soils are unsuited for wood production.[11] Petitioner challenges the county's determination of unsuitability with regard to three soil types -- (1) Dixonville-Dupee complex, 30-40% slopes (12.1% of total acreage); (2) Dupee, 20-30% slopes (0.3% of total); and (3) Dupee-Hazelair complex, 20-35% slopes (24.2% of total). The challenged soil types total 36.6% of the total acreage. Thus, without the challenged soil types, the county would only be able to conclude that 34.2% of the soils are unsuitable.

The 1981 Wert study concludes only that these soils are not suited for commercial management of Douglas fir.[12] The 1981

Wert study states that Dixonville soil will support Douglas fir and Hazelair soil will not support Douglas fir, but makes no mention of other commercial species. Record 178. The study also states that Dupee soil will "barely" support Douglas fir, but is "better suited to Ponderosa Pine." id. Thus, the 1981 Wert survey does not contain evidence that the challenged soil types are not suitable for commercial production of wood other than Douglas fir.[13]

The 1985 Wert addendum contains the following evidence concerning Dupee soils:

> "Someone might argue that Dupee should be considered a forest site. In some areas of Lane County the Dupee soil will grow Ponderosa Pine. On the subject parcel Dupee has a seasonal water table at 14" which is closer to the surface than most Dupees. In my opinion the cost of clearing the site, controlling vegetation, and the planting costs do not warrant trying to reforest Dupee." Record 190.

These statements do not support a conclusion that Dupee soil is not capable of producing more than 50 cubic feet per acre per year of Ponderosa Pine or other non-Douglas fir commercial species.

Respondent also relies on evidence in the record concerning the SCS's productivity ratings for the three challenged soil types. Respondent's June, 1987 "Soils Summary" chart for the subject property, based on the 1981 Wert soil mapping, listed the three challenged soil types as cubic foot site class 4 (which satisfies the county's commercial forest land definition). Record 361-362. The chart notes that cubic foot

site classes were estimated from similar mapping units which are recognized by the SCS as occurring in Lane County.

However, on August 14, 1987, respondent submitted a "Revised Soils Summary" chart and accompanying memorandum. Of the three challenged soil types, the revised chart lists only the Dixonville portion of the Dixonville-Dupee complex as cubic foot site class 4. Record 195. The remainder are shown as having no cubic foot site class rating. Id.

The change in the cubic foot site class listed for the Dupee portion of the Dixonville-Dupee complex, Dupee and Dupee-Hazelair complex mapping units is explained in the accompanying memorandum by respondent's attorney as follows:

> "The Dixonville series is the only series rated as cubic foot site class 4 by the S.C.S. The lack of woodland suitability information for Dupee, Hazelair, Panther and Philomath soil series is due to the fact that these series are not considered to be woodland soils. Personal communication with Jerry Proutt, S.C.S. Forester, Hillsboro. * * * " Record 194.

The attorney's memorandum is accompanied by excerpts from SCS documents which explain that the lack of woodland suitability information on SCS OR-SOILS-1 sheets means the subject soils "do not produce commercial trees." Record 199. These documents also indicate that at least Ponderosa Pine production is considered in addition to Douglas fir production in determining woodland suitability. Record 198. Attached to the memo are OR-SOILS-1 sheets for Dupee and Hazelair soils which show no woodland suitability rating. Record 200, 202.

There are two problems with relying on this evidence to

demonstrate that the challenged soil types do not meet the county's productivity standard for commercial forest land. One is that it does not establish that the SCS standard for "producing commercial trees" is the equivalent of the county's 50 or more cubic feet per acre per year.[14] Thus, soils capable of producing 50 or more cubic feet per acre per year of industrial wood might not be shown as having woodland suitability on SCS OR-SOILS-1 sheets. The other problem is that the Dupee and Hazelair mapping units for which there are OR-SOILS-1 sheets in the record do not exactly correspond to the three challenged mapping units.[15]

Furthermore, even if we could assume that a soil rated by the SCS as having no woodland suitability does not meet the county's commercial forest lands definition, there is conflicting evidence in the record as to whether the SCS rates the three challenged soils as having no woodland suitability. As previously stated, the OR-SOILS-1 sheets are inconclusive. Respondent's attorney testified that an SCS forester told him that Dupee and Hazelair soils are not considered woodland soils. Record 194. The professional forester testifying on behalf of petitioner stated that current SCS data verifies that the challenged soil types <u>are</u> cubic foot site class 4. Record 54. The county's own findings, quoting an SCS soil scientist, state that Hazelair soil is "Site Class IV" (which can correspond to a cubic foot site class of 2-5, depending on the species for which the site class is measured). Record 13.

Based on the evidence in the whole record, as described above, we find that there is not substantial evidence in the record to support a determination that the three challenged soil mapping units are incapable of producing 50 or more cubic feet per acre per year of industrial wood other than Douglas fir. Therefore, the county's decision that the subject property is not suitable for commercial forest use because a majority of soils on the subject property, as mapped by the Wert survey, do not qualify as "commercial forest land" is not supported by substantial evidence in the whole record.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

> "Respondent County erred in failing to comply with Goal 14."

A. Conversion of Rural Land to Quasi-Urban Land

Petitioner argues that the county decision converts "rural land" to "quasi-urban land" in violation of Statewide Planning Goal 14 (Urbanization). Petitioner argues that, after acknowledgment of the county's plan and land use regulations, land can only be "rural" if it is designated as resource land or an exception to a resource goal is adopted.[16] Therefore, petitioner contends the county's decision converted the subject property to "quasi-urban land." According to petitioner, the county's decision creating quasi-urban land outside an urban growth boundary (UGB) required an exception to Goal 14.

The Statewide Planning Goals define "rural land" as follows:

"Rural lands are those which are outside the urban growth boundary and are:

"(a) Non-urban agricultural, forest or open space lands or,

"(b) Other lands suitable for sparse settlement, small farms or acreage homesites with no or hardly any public services, and which are not suitable, necessary or intended for urban use."

Under this definition, land outside a UGB is "rural land" if it meets either part (a) or (b) of the definition. Petitioner argues that, as a matter of law, land outside a UGB cannot be "rural land" unless it is designated as resource land or is the subject of an exception to a resource goal. This argument appears to be based on the following discussion by the Supreme Court, in 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or 447, 500, 724 P2d 268 (1986), of the nature of "rural land" and "quasi-urban land:"

" * * * 'Rural land' is of the two types described by parts (a) and (b) of the definition. The 'something in between' 'rural land' and 'urban land' is obviously 'urbanizable land,' that land within the UGB which has not yet been converted to 'urban uses.' The 'something in between' rural resource lands (part (a) of definition) and 'urbanizable land' is 'part (b)' rural land, that land excepted from resource uses but not included within a UGB. The 'something in between' 'part (b)' rural land and 'urbanizable land' is the same thing that LCDC calls 'quasi-urban' land."[17]

Petitioner focuses on the court's description of "part (b)" rural land as "that land excepted from resource uses but not included within a UGB" (emphasis added). Petitioner believes the consequence of the quoted statement is that the subject property cannot be "part (b)" rural land since no exception

from a resource goal was adopted; and, therefore, the county's decision necessarily must have converted the property to "quasi-urban" land.

We believe petitioner reads too much into the court's above-quoted description of "part (b)" rural land. The court's discussion in 1000 Friends of Oregon v. LCDC (Curry Co.) applied to a portion of some 4,000 acres of land for which the county had adopted exceptions to Goals 3 and/or 4. 1000 Friends contended that an exception to Goal 14 was required as well. Id. at 462. In that case, the court was not concerned with "non-resource" land (land which meets neither Goal 3's definition of "agricultural land" nor Goal 4's definition of "forest land").

"Non-resource" land may be designated and zoned for non-agricultural and non-forest uses without an exception to Goals 3 or 4. "Non-resource" land outside a UGB is "part (b)" rural land if it is not designated or zoned to allow "urban" or "quasi-urban" uses. In this case, the county found that its decision would not allow "urban uses" on the subject property, stating that the approved residential density and level of services would be rural in character. Record 24-25. Petitioner has not challenged these findings or explained why the uses allowed by the county's decision, under its RR-10 and RR-5 zoning districts, should be considered "urban" in nature.

We cannot say, as a matter of law, the county's decision converted the subject property to "quasi-urban" land. This

subassignment of error is denied.

B. Impact on Urban Growth Boundary

Petitioner also argues that the Goal 14 prohibition against urbanization of rural land required the county to consider the impact of its decision on the adjacent UGB and the utilization of land within it, citing 1000 Friends of Oregon v. Clackamas County, 3 Or LUBA 316, 327 (1981).

Respondent argues that 1000 Friends of Oregon v. Clackamas County is inapplicable to this decision because of differences in the scale of the redesignations involved (1000 versus 6 potential additional dwellings), the minimum size of the lots, the services available and the conditions imposed. In the alternative, respondent argues that the county's findings and conditions meet the requirement of 1000 Friends of Oregon v. Clackamas County.

In 1000 Friends of Oregon v. Clackamas County, supra, we held that Goal 14 required a county to consider the impact of its action on a nearby UGB when it designated and zoned large areas of rural land for one-, two- and five-acre residential development. We reached a similar conclusion in Metropolitan Serv. Dist. v. Clackamas Cty., 2 Or LUBA 300, 307 (1981) (2.5-acre lot subdivisions 0.5 to 1.5 miles from a UGB). We believe the requirement to address the impact of proposed development on the UGB also applies in this case, where the county has approved five- and ten-acre residential zoning, but with a requirement for development by cluster subdivision,[18]

immediately adjacent to a UGB.

The county's findings state that a distinction between lots on the subject property and lots within the UGB will be retained, based on (1) minimum lot size; (2) maximum residential density; (3) level of services available; and (4) conditions imposed on development.[19] Record 25. However, the findings do not explain how this distinction between lots affects the impact of the allowed development on the UGB. Similarly, the other portions of the decision to which we are directed by respondent do not discuss the impacts of the development potentially allowed by this decision on the adjacent UGB.

This subassignment of error is sustained.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

> "Respondent County erred in failing to comply with Lane Code Section 16.004(4), which mandates: 'All requirements to affirmatively demonstrate adequacy of long term water supply must be met' 'prior to the zoning or rezoning of land.'"

Lane Code (LC) 16.004(4) provides as follows:

> "Prior to the zoning or rezoning of land under this Chapter, which will result in the potential for additional parcelization, subdivision or water demands * * * all requirements to affirmatively demonstrate adequacy of long-term water supply must be met as described in LC 13.050(13)(a)-(d)."

Petitioner argues that the county violated LC 16.004(4) by adopting an ordinance approving the rezoning of the subject property to RR-10 and RR-5 without a demonstration of the

long-term adequacy of the water supply. According to petitioner, LC 16.252(8)[20] does not authorize the county to condition the effectiveness of an approved zone change on a subsequent demonstration of the adequacy of long term water supply. Petitioner asserts that under the terms of the county's decision there will be no process or appeal provided by which petitioner will be able to challenge the county's eventual determination on the adequacy of the water supply for the approved residential development of the subject property.

Respondent replies that the county's decision does not violate LC 16.004(4) because the challenged ordinance provides that the rezoning will not occur until the requirement of LC 16.004(4) is satisfied. Record 4, 6. Respondent does not identify the procedures required of the county in determining compliance with this condition of approval, but argues that, because of the presumption of administrative regularity applying to local government actions, it must be assumed that the county will follow applicable procedures.

The county's ordinance states that "upon satisfying all of the Conditions of Approval * * * the Board of Commissioners Ordains" that the plan and zone maps are amended with regard to the subject property.[21] Record 4. The third of the attached "Conditions of Approval" provides:

> "The applicant shall affirmatively demonstrate the adequacy of long-term water supply on the property pursuant to the requirements of Lane Code 13.050(13)(a)-(d) within 90 days of this decision. Rezoning to Rural Residential is expressly conditioned on

compliance with the specific requirements of Lane Code 13.050(13)(c)(i), including water quality and aquifer tests." Record 6.

Thus, under the terms of the challenged ordinance, the rezoning will not actually occur until compliance with LC 13.050(13) has been demonstrated.[22] The decision, therefore, does not violate LC 16.004(4).

However, the county cannot defer consideration of compliance with this mandatory zone change approval criterion to a later stage in its approval process unless its regulations or decision require the full opportunity for public involvement provided in this initial zone change proceeding. See Spalding v. Josephine County, 14 Or LUBA 143, 147 (1985); see also Storey v. City of Stayton, ___ Or LUBA ___ (LUBA No. 86-057/058; December 30, 1986), Meyer v. City of Portland, 67 Or App 274, 280, 678 P2d 741, rev den 297 Or 82 (1984).

The challenged ordinance does not specify the procedures to be followed by the county in determining compliance with this condition of approval. Furthermore, we are cited to nothing in the county code which establishes procedures for determining compliance with conditions which must be satisfied in order for a rezoning to take effect. In such circumstances, we will not assume that the county is required to follow its basic zone change procedures in determining compliance with this mandatory condition of approval. There is no indication that the county's procedures for determining compliance with this condition, whatever they will be, will provide petitioner with

the opportunity to participate in the county's determination in the same manner provided for in the original zone change proceeding.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

> "Respondent County's failure to comply with the requirements of an affirmative demonstration of a long term water supply prior to the zoning or rezoning violates Goal 1."

Fairly read, petitioner argues the county's decision denies his right under Statewide Planning Goal 1 (Citizen Involvement) to citizen involvement in the plan and code amendment process. According to petitioner, the county's decision denies this right by approving the subject plan amendment and rezoning without making the required determination that there is an adequate long-term water supply.

Respondent argues that petitioner participated fully in the plan and zone change process which lead to the adoption of the challenged ordinance. Respondent also argues that the LC 13.050(13) requirements for proof of adequacy of long term water supply are requirements for any land division. Therefore, through the land division process, petitioner will have an opportunity to participate fully in a determination of adequacy of the water supply prior to any further development of the subject property.

Goal 1 requires local governments to adopt a citizen involvement program which "insures the opportunity for citizens

to be involved in all phases of the planning process," and sets out requirements for such programs. After acknowledgment of a local government's plan and land use regulations, a decision to amend the plan or regulations, other than an amendment to the citizen involvement program itself, complies with Goal 1 if it complies with the acknowledged citizen involvement program. Petitioner has not shown that the acknowledged program was not followed by the county, or that it was not applicable to the subject proceeding before the county. Petitioner, therefore, has not shown a violation of Goal 1.[23]

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "Respondent County's failure to comply with the requirements of an affirmative demonstration of a long term water supply prior to the zoning or rezoning violates Goal 5."

Petitioner argues that the subject property overlies a Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) resource, a "quantity limited aquifer." Petitioner asserts that the county has "an obligation to follow the Goal 5 inventory-analysis-program development pattern," and should have applied Goal 5 when making its decision. Petitioner also contends the county failed to comply with a plan policy that designations and zones be "commensurate with groundwater aquifer capacities."

Respondent replies that petitioner does not identify how the county's application of Goal 5 was inadequate. Respondent

agrees that the county designated the area a quantity limited aquifer. Respondent contends the county enacted LC 13.050(13) to ensure that additional rural parcelization would not be allowed unless an adequate water supply was demonstrated. According to respondent, acting consistently with the code mechanism is all that Goal 5 requires.

The county's findings recognize the subject property overlies a quantity limited aquifer, but state Goal 5 will be met if the condition imposed requiring a demonstration of compliance with LC 13.050(13) is satisfied. Record 17.

The county's "Working Paper: Water Resources; January, 1982" (Water Resources Paper) contains the acknowledged plan's inventory of water resources, identification of conflicting uses and determination of economic, social, environmental and energy (ESEE) consequences, as required by Goal 5 and OAR 660-16-000 and 660-16-005. The Water Resources Paper, at 10-12, identifies quantity limited aquifers as an inventoried groundwater resource, identifies "development" (i.e., any use of these aquifers) as a conflicting use, and analyzes the ESEE consequences of "development."

Under "conflict resolution," the Water Resources Paper concludes:

> "For a quantity limited aquifer otherwise acceptable development should be allowed if an adequate showing is made that water will be available for a foreseeable period in the future, and that the additional withdrawal will not negatively impact surrounding water users. Lane Code 13.080(2) allows consideration of available water for land divisions and partitions

> but only requires a showing that water will be available at the time of construction, not for any time in the future. This does not allow consideration of cumulative impacts on existing users of the aquifer. The subdivision ordinance should be strengthened in this regard. * * * " id. at 12-13.

Plan Water Resources policies 3-5, LC 16.004(4) and LC 13.050(13) carry out the recommendations of the above-quoted section of the Water Resources paper, and apparently were adopted at least in part as the "program to achieve the Goal" required by Goal 5 and OAR 660-16-010. As such, they represent a "3C," "limit conflicting uses," choice. OAR 660-16-010(3).

The county's acknowledged conflict and consequence analysis for quantity limited aquifers covers any type of development allowable under the plan and code. The county was not required by Goal 5 to determine the specific consequences of the proposed changes to the subject property's plan and zone designations on the underlying aquifer. Under the county's acknowledged Goal 5 "program," any type of development otherwise allowable under the plan and code is acceptable if it complies with applicable implementing measures for quantity limited aquifers, such as LC 16.004(4) and 13.050(13). However, in this case the county's decision improperly deferred a determination of compliance with these implementing measures, and consequently failed to comply with Goal 5 as well.[24]

The fifth assignment of error is sustained.

The county's decision is remanded.

FOOTNOTES

1

The county's decision assumes that the county's definition of "commercial forest land" is the equivalent of the "suitable for commercial forest uses" portion of Goal 4's "forest lands" definition, and that property is not suitable for commercial forest uses if a majority of it does not meet the county's definition of "commercial forest land." Record 16. The parties have not questioned these assumptions. Therefore, for the purposes of evaluating petitioner's assignment of error, we will assume, as have the parties, that a decision that a majority of the subject property is not "commercial forest land" as defined by the county is sufficient to establish that the subject property does not meet the first part of Goal 4's definition of "forest lands." But see 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 512, 724 P2d 268 (1986) (post-acknowledgment plan amendments apply statewide goals directly).

2

Ordinance No. PA 883 provides that these documents are to be "recognized as supportive technical information used in the preparation of this [Lane County Rural Comprehensive] Plan * * *."

3

Of course, one consequence of this interpretation and conclusion is that the county's decision must be supported by substantial evidence that the subject property is not capable of the required level of production of any industrial tree species (see subassignment B below).

4

We note that, in this case, petitioner has not challenged the qualifications or expertise of the soil scientists on whose data the county relied. Petitioner's argument seems to be based on the premise that one type of evidence is inherently more valid than the other.

5

Petitioner does not argue that the evidence in the record does not support a conclusion that the majority of the property is not suitable for commercial production of Douglas fir.

[6] Land with a Cubic Foot Site Class of 1-5 meets the county's "commercial forest land" definition of having a productivity of 50 or more cubic feet per acre per year. See Forest Lands Paper, App. II.

[7] The other findings concerning Witzel soil, quoted in the text above, state in addition that Witzel is a "marginal forest soil" and is rated as "'Low' Woodland Grade." Record 12, 13. There is no explanation in the decision as to the relationship between a soil being "marginal forest soil" or "Low Woodland Grade" and its ability to meet the county commercial forest land productivity standard or the Goal 4 suitability for commercial forest use standard. Furthermore, we are cited no evidence in the record which explains the relationship or supports these findings. The document referenced in support of the "marginal forest soil" finding, "Lane County Soils, Farmland/Woodland (S.C.S. 1982)," is not part of the record in this appeal. Thus, these findings do not support the county's conclusion that Witzel soil does not qualify as commercial forest land.

[8] We need not determine whether the county's decision is supported by evidence that the Dixonville- Philomath-Hazelair soil complex does not qualify as commercial forest land, because that soil type occupies only 45% of the subject property. However, we note that the findings state that, although the SCS rates Dixonville and Hazelair soils as "Site Class IV," this complex has been recognized by the SCS as a "non-resource soil," apparently because of a "30 year root-rot-blowdown problem" and the interspersed areas of Philomath soil which are "not suited to growing timber other than scattered white oak." Record 12-13.

There is no explanation of the relationship between being recognized by the SCS as a "non-resource soil" and meeting the county's commercial forest land definition. Site Class IV equates to a cubic foot site class of 4-5 or 2-3 (both of which meet the county's commercial forest land definition), depending on the commercial species for which the site index is measured. See Forest Lands Paper, App. II, p. II-1 and II-2. The statements by SCS staff quoted by the county in its findings to explain why the SCS considers this complex a non-resource soil are not in the county's record.

[9] We note that the soils listed in the county's findings actually total only 56.0 acres, and the percentages listed add up to only 90.3%. This appears to be due to the omission in the findings of one soil type identified in the Wert survey, Rockland-Soil A, 35 to 70% slope, of which Wert found 6.0 acres, 9.7% of the total. Record 176.

[10] Petitioner does not challenge the adequacy of these findings.

[11] The county's finding that 16.6% of the soils are "marginal woodland" does not support a conclusion that these soils are not "commercial forest land," as defined by the county. The explanation in the findings of the term "marginal woodland" does not indicate that such land is not capable of producing 50 or more cubic feet of industrial wood per acre per year.

[12] The following conclusions stated in the 1981 Wert study demonstrate that its conclusions were directed only at soil suitability for commercial production of Douglas fir:

> "In my opinion, the bulk of the parcel is not suited for commercial management of Douglas-Fir. According to the soil survey, 69% of the parcel has soils that are not suited to Douglas-Fir. * * * " Record 177.
>
> "Douglas-Fir could be managed on nine acres or 14.4% of the parcel. The mapping units that will support Douglas-Fir without a great deal of effort are:" Record 180.
>
> "There is an additional 16.6% or 10.2 acres that could be used for Douglas-Fir. However, the cost of putting it into production would be very high. * * * " Record 181.
>
> "About 69% of the parcel is not a Douglas-Fir site. The soils either are too shallow or too poorly drained to support Douglas-Fir. There is 14.4% of the parcel that could be used for production of Douglas-Fir. Another 16.6% once supported a low productive stand of Douglas-Fir and Ponderosa Pine. * * * " Record 182.

[13] The relevant statements in the 1981 Wert study are as follows:

> "The Dixonville-Dupee mapping unit is made up of about 60% Dixonville soils and 40% Dupee soils. The Dixonville is a moderately deep (20-40") well drained clay soil. It will support Douglas-Fir. The Dupee is a deep, somewhat poorly drained soil. Douglas-Fir will grow on this soil, but barely. Dupee has a seasonal wet table that comes within fourteen inches of the surface. Douglas-Fir roots will not tolerate wetness for extended periods of time. Dupee is better suited to Ponderosa Pine. This mapping unit has these two soils intermingled. If it were managed for tree production, Ponderosa Pine would be the best suited.
>
> * * * * *
>
> "Hazelair soil is a poorly drained soil with a dense clay layer. It is not a Douglas-Fir site because of the poor drainage." Record 178.

[14] It is quite possible that a soil which meets the county's commercial forest land definition might not reach the SCS threshhold for identifying woodland suitability. The 1985 Wert addendum states that an SCS site index of 80 corresponds to production of 58 cubic feet per acre per year, and notes that "this is the lowest their table will go." Record 191.

[15] Dupee and Hazelair soils have both "silt loam" and "silty clay loam" mapping units. Record 185, 188. The OR-SOILS-1 sheets in the record are for "Dupee Silt Loam, 3 to 20 percent slopes" and "Hazelair Silty Clay Loam, 7 to 20 percent slopes." Record 200, 202. The challenged mapping units are identified by Wert as Dixonville-Dupee complex, 30-40% slopes; Dupee, 20-30% slopes; and Dupee-Hazelair complex, 20-35% slopes. Thus, in view of the discrepancies in slope and lack of identification of the challenged Dupee and Hazelair mapping units by Wert as "silt loam" or "silty clay loam," we have no way of determining whether the OR-SOILS-1 sheets in the record are valid for the challenged mapping units.

[16] We are not sure whether petitioner does not recognize the

possbility of there being rural non-resource land after acknowledgment, or does not recognize the existence of such land at all.

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17 The Supreme Court goes on to point out that "quasi-urban" is the term LCDC and this Board use to describe "development of urban-like intensity located outside incorporated cities and UGBs." Id. The court held that any decision which allows "urban" (or "quasi-urban") uses of "rural land" outside a UGB "converts" that land and requires an exception to Goal 14. Id. at 502.

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18 A condition of approval requires that all residential development on the subject property be pursuant to the cluster subdivision standards of Lane Code (LC) 16.260(4). Under LC 16.260(4), there is no minimum lot size for residential development, so long as the number of lots does not exceed the density allowed, as determined by dividing the gross acreage by the minimum lot size of the zoning district.

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19 Petitioner has not questioned the existence of such a distinction between lots on the subject property and lots within the UGB. However, we note the requirement for clustering, while presumably not affecting retention of a distinction in density, would eliminate a distinction based on lot size.

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20 LC 16.252(8) provides:

> "Conditional Approval. The approving authority may impose reasonable conditions if the application [for rezoning] is approved to be completed within one year."

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21 The county may have logical difficulties in approving any subsequent development actions under the terms of this ordinance, as the plan and zone changes will not take effect until all conditions have been met. It would seem that some of the conditions (e.g., that code requirements regarding site and area stability be satisfied during actual construction) cannot be satisfied unless permits dependent on the plan and zone changes can be issued.

[22] Section 18(4) of the Charter for Lane County, Oregon (charter) provides that an ordinance enacted by the board of commissioners other than for the purpose of meeting an emergency "shall take effect on the 30th day after being enacted." At oral argument, petitioner maintained this charter provision made the zone change for the subject property take effect 30 days after the November 4, 1987 adoption of the challenged ordinance, before compliance with LC 16.050(13) was demonstrated. We agree with respondent that, while the ordinance took effect on December 4, as provided by the charter, the effect of that ordinance is to enact a plan/zone change when the conditions subsequent have been fulfilled.

We have held that an ordinance becomes final, for the purpose of our review, on the date it is enacted, rather than the date it takes effect. Hazen Investments, Inc. v. Lane County, 2 Or LUBA 151 (1981). However, we note that the parties have not questioned whether there has in fact been a "final decision" on this plan/zone change.

[23] Statewide Planning Goal 2 (Land Use Planning) includes the following requirement:

> "Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances."

Arguably, the county's deferral of consideration of a mandatory zone change criterion without providing for the opportunity for public involvement when consideration of that criterion occurs is a violation of this Goal 2 requirement. However, petitioner has not alleged a violation of Goal 2.

[24] Although petitioner's assignment of error alleges only a violation of Goal 5, petitioner argues that the county's decision violates plan Water Resources Policy 5 as well. This policy requires that plan designations and zones "shall be commensurate with groundwater aquifer capacities." LC 13.050(13)(c)(i) requires an applicant to "affirmatively demonstrate * * * that the proposed [zoning] is capable of sustaining the development anticipated with sufficient potable water." Thus, compliance with this code provision would ensure that Water Resources Policy 5 is met.

The county's decision states that this policy is satisfied because compliance with LC 13.050(13) "is required as a condition of development." Record 17. However, when the county improperly deferred its determination of compliance with this code provision, it failed to comply with Water Resources Policy 5 as well. As this plan policy is part of the county's Goal 5 "program" for water resources, failure to comply with it is also a basis for finding violation of Goal 5.