

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

3
4 JAMES JUST,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 ROY CARVER III,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2005-029

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 James P. Just, Lebanon, filed the petition for review and argued on his own behalf.

25
26 Stephen L. Vorhes, Lane County Legal Counsel, Eugene, filed the response brief and
27 argued on behalf of the respondent.

28
29 P. Steven Cornacchia, Eugene, filed the response brief and argued on behalf of intervenor-
30 respondent. With him on the brief was Hershner Hunter LLP.

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

34
35 AFFIRMED

06/08/2005

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

NATURE OF THE DECISION

Petitioner appeals an ordinance that changes the comprehensive plan designation for a 42.2-acre parcel from “Forest Land” to “Marginal Land,” and rezones the property from Impacted Forest Lands (F-2) to Marginal Lands (ML).

MOTION TO INTERVENE

Roy Carver III (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner seeks permission to file a reply brief, to address alleged new matters raised in the response briefs. There is no opposition to the reply brief, and it is allowed.

FACTS

The subject property is a 42.2-acre irregularly shaped parcel bordered on the north and east by the City of Eugene urban growth boundary. The northern portion of the property is relatively flat, rising to the south, and covered with scattered stands of Ponderosa Pine, Douglas Fir and oak trees. The property has received forest tax deferral since 1970. The adjoining properties to the north, west and east are in rural or urban residential zoning. To the south of the subject property lies a 53.60-acre parcel also zoned F-2.

In 1987, the Soil Conservation Service (SCS, now the National Resource and Conservation Service (NRCS)) published a soil survey for the county. According to the 1987 soil survey, the soils on the subject property consist of the following four soil types or complexes:

Unit 43C Dixonville-Philomath-Hazelair Complex, 3 to 12 percent slopes, agricultural capability class VI, 19 acres (48%);

Unit 43E Dixonville-Philomath-Hazelair Complex, 12 to 35 percent slopes, agricultural capability class VI, 1.145 acres (3.6%);

Unit 45C Dupee Silt Loam, agricultural capability class III, 15 acres (39%);

1 Unit 138E Witzel Very Cobbly Loam, agricultural capability class VI, 3.6 acres
2 (9%).

3 Thus, slightly more than half of the soils on the property consist of Units 43C and 43E, the two
4 Dixonville-Philomath-Hazelair complexes.¹ The 1987 soil survey rates the agricultural capability of
5 Units 43C and 43E as Class VIe.² However, the 1987 soil survey assigns higher capability
6 classifications to some of the individual soils that make up the Unit 43C and 43E complexes. Unit
7 41C (Dixonville silty clay loam, 3 to 12 percent slopes) is class IIIe, and Unit 41E (Dixonville silty
8 clay loam, 12 to 30 percent slopes) is class IVe. Similarly, Units 52B (Hazelair silty clay loam, 2 to
9 7 percent slopes) and 52D (Hazelair silty clay loam, 7 to 20 percent slopes) are rated IIIe and IVe,
10 respectively.

11 Lane County is a “marginal lands” county, and therefore may designate certain lands as
12 marginal lands, under *former* ORS 197.247. OAR 660-033-0020(8)(j). In September 2003,
13 intervenor applied to redesignate the subject property from “Forest Land” to “Marginal Land,” and
14 to rezone the property from F-2 to ML. Under the requested plan map and zoning map
15 designations, the property could develop at a density of one dwelling per 10 acres. The county

¹ The 1987 soil survey describes a soil complex as follows:

“A complex consists of two or more soils or miscellaneous areas in such an intricate pattern or in such small areas that they cannot be shown separately on the maps. The pattern and proportion of the soils or miscellaneous areas are somewhat similar in all areas. Dixonville-Philomath-Hazelair complex, 3 to 12 percent slopes, is an example.”

² The 1987 soil survey describes the composition of Unit 43C as follows:

“This unit is 30 percent Dixonville silty clay loam, 30 percent Philomath cobbly silty clay, and 25 percent Hazelair silty clay loam. The components of this unit are so intricately intermingled that it was not practical to map them separately at the scale used. Included in this unit are small areas of Panther, Ritner, and Witzel soils and Rock outcrop. Included areas make up about 15 percent of the total acreage.” Record 63.

The soil survey describes the composition of Unit 43E as follows:

“This unit is 35 percent Dixonville silty clay loam, 30 percent Philomath cobbly silty clay, and 20 percent Hazelair silty clay loam. The components of this unit are so intricately intermingled that it was not practical to map them separately at the scale used. Included in this unit are small areas of Ritner and Witzel soils and Rock outcrop. Included areas make up about 15 percent of the total acreage.” Record 64.

1 planning commission recommended approval. The county board of commissioners held a hearing
2 on December 15, 2004, and approved the application on January 12, 2005. This appeal followed.

3 **MOTION TO STRIKE**

4 Petitioner moves to strike appendices A-F, and H, attached to intervenor’s response brief,
5 arguing that the documents therein are not in the record, subject to official notice, or the subject of a
6 motion to take evidence under OAR 661-010-0045. Intervenor does not argue that any of the
7 cited appendices are in the record, request that we take official notice, or request that we consider
8 those documents pursuant to OAR 661-010-0045. Accordingly, we grant the motion to strike, and
9 will not consider appendices A-F and H, or the references to those appendices in intervenor’s brief.

10 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 *Former* ORS 197.247 (1991) allowed a county to designate as “marginal lands” lands that
12 met a series of tests.³ The “gross income” test at ORS 197.247(1)(a) requires a finding that the

³ ORS 197.247(1) (1991) provided, in relevant part:

“In accordance with ORS 197.240 and 197.245, the commission shall amend the goals to authorize counties to designate land as marginal land if the land meets the following criteria and the criteria set out in subsections (2) and (4) of this section:

“(a) The proposed marginal land 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; and

“(b) The proposed marginal land also meets at least one of the following tests:

“* * * * *

“(C) The proposed marginal land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification System in use by the United States Department of Agriculture Soil Conservation Service on October 15, 1983, and is not capable of producing * * * eighty-five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range, as that term is defined in ORS 477.011(21).”

In addition, ORS 197.247(5) (1991) provided:

1 proposed marginal land was not managed, during three of the five calendar years preceding January
2 1, 1983, as part of (1) a farm operation producing grossing \$20,000 or more in annual gross
3 income, or (2) a forest operation capable of producing an average, over the growth cycle, of
4 \$10,000 in annual gross income. The “productivity” test at ORS 197.247(1)(b)(C) requires a
5 finding that (1) the land is composed predominantly of Class V through VIII soils in the capability
6 classification system in use by SCS on October 15, 1983, and (2) the land is not capable of
7 producing 85 cubic feet of timber per acre per year (cf/ac/yr).

8 The county concluded that the subject property met both the “gross income” test and the
9 “productivity” test. Petitioner challenges both conclusions.

10 **A. Gross Income Test (ORS 197.247(1)(a))**

11 In 1997, the county board of commissioners issued an “information sheet” that sets out the
12 following methodology for applying the “forest operation” prong of the ORS 197.247(1)(a) gross
13 income test:

- 14 “1. Based on the best information available regarding soils, topography, etc.,
15 determine the optimal level of timber production for the tract assuming
16 reasonable management.
- 17 “2. Assume that the stand was, in 1983, fully mature and ready for harvest.
- 18 “3. Using the volumes calculated in step (1), and 1983 prices, calculate the
19 average gross income over the growth cycle.” Record 36.

20 The information sheet also directs that the methodology assume a 50-year growth cycle, *i.e.*, divide
21 by 50 the timber revenue produced at harvest of a (hypothetical) fully mature stand to determine the
22 average annual gross income. Intervenor does not dispute that the subject property was part of a
23 “forest operation” during three of the five calendar years preceding January 1, 1983. However,
24 intervenor submitted expert testimony using the county’s methodology concluding that the subject

“A county may use statistical information compiled by the Oregon State University Extension Service or other objective criteria to calculate income for the purposes of paragraph (a) of subsection (1) of this section.”

1 property is not capable of producing \$10,000 in average annual gross income over a 50-year
2 growth cycle, as measured in 1983 dollars.⁴

3 Petitioner contends that ORS 197.247 requires the county to use actual or projected
4 lumber prices at the time of harvest in applying the gross income test and, further, that there is no
5 basis in the statute to assume a 50-year growth cycle. According to petitioner,

6 “* * * The county’s findings assume a 50-year growth cycle. Actual growth cycles
7 could be considerably longer. Evidence in the record establishes that trees were
8 planted on the subject property at some time prior to March 1979, and that the
9 trees were still present in 1982. The projected harvest date for the trees planted on
10 the subject property would therefore be no sooner than sometime around 2029, a
11 minimum of fifty years following planting. There is no evidence in the record which
12 suggests that 1983 timber pricing would prevail in 2029, and no reasonable person
13 could conclude from evidence in the record that 1983 prices would be in fact be
14 obtained by the forest operation manager.

15 “ORS 197.247(1)(a) requires that average income be projected over the growth
16 cycle, and thus clearly anticipates that the harvesting of timber would occur at
17 different times over the growth cycle and that prices obtained would be those
18 prevailing at the time of harvest. Nothing in ORS 197.247(1)(a) mandates or ever
19 mentions the use of a 1983 timber harvest date or the use of timber prices prevailing
20 at that time. There is no basis whatsoever in law or in fact for the county’s reliance
21 on 1983 timber prices in its decision.” Petition for Review 18.

22 We understand petitioner to contend that the county must (1) estimate the harvest date of the trees
23 planted in 1979 based on the actual or optimal growth cycle, (2) estimate the timber prices on the
24 projected harvest date, and (3) based on those estimates determine whether the subject property is
25 capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.⁵

⁴ It is not clear whether the subject property was part of a larger forest operation involving multiple properties during three of the five calendar years preceding January 1, 1983, or whether the “forest operation” included only the subject property during the relevant period. ORS 197.247(1)(a) can be read to apply the gross income threshold test to the farm and forest operation itself, not limited to the subject property. In other words, the pertinent question under ORS 197.247(1)(a) may not be whether the *subject property* can produce \$10,000 in average annual income, the question that intervenor’s forestry consultant asked and answered, but whether the forest operation that the property is or was part of can produce \$10,000 in average annual income. However, petitioner does this challenge this aspect of the evidence submitted under the gross income test, and therefore we need not address or resolve that question.

⁵ In support of his view that the statute requires use of current timber values, petitioner also cites to *DLCD v. Lane County*, 23 Or LUBA 33 (1992) (*Ericsson*), in which LUBA affirmed a county decision that designated

1 Although ORS 197.247(1)(a) does not expressly mandate that counties use 1983 timber
2 prices in applying the gross income test, we agree with the county and intervenor that it implicitly
3 does so. The purpose of the forest operation test is to identify lands that are not capable of meeting
4 the specified \$10,000 threshold averaged over the growth cycle. Both the “farm operation” and
5 “forest operation” prongs of the test are specifically linked to January 1, 1983. There is no explicit
6 provision to adjust either threshold for inflation or other economic changes over subsequent
7 decades. The \$10,000 threshold would rapidly become outdated and incapable of performing its
8 intended function if counties (1) must use inflated timber prices but (2) cannot adjust the \$10,000
9 threshold to compensate for inflation since 1983. In a relatively short time it would become difficult
10 if not impossible to designate any marginal land under ORS 197.247(1)(a). Clearly, that was not
11 the legislature’s intent. The text and context of ORS 197.247(1)(a) make it reasonably clear that
12 the statute requires an “apples to apples” comparison. If the unadjusted threshold (\$10,000 in
13 1983 dollars) is used, then the estimate of annual average timber revenue derived from the property
14 must also be based on 1983 timber prices.⁶

15 To the extent resort to legislative history is warranted, the history directed to our attention is
16 consistent with the above textual analysis. Intervenor attaches to its brief transcripts of the House
17 and Senate committee hearings that led to adoption of ORS 197.247. Those transcripts make it
18 reasonably clear that the legislature intended the gross income test under ORS 197.247(1) to be
19 applied based on the five-year period preceding January 1, 1983, and not based on subsequent
20 years. The question of whether to include a mechanism to adjust the income test for inflation was

marginal lands under the ORS 197.247(1)(a) forest operation prong of the gross income test, based in part on evidence of then-current timber values. However, while *Ericsson* recites the county’s findings describing the methodology used by the applicant’s expert, no issue was raised regarding the expert’s use of current timber values, and our decision expressed no views on that point.

⁶ In response to petitioner’s arguments against using 1983 prices, intervenor’s consultant also calculated revenues based on current timber values, and concluded that even so calculated the average annual gross income fell below the \$10,000 threshold. Record 371. Intervenor argues that this evidence renders petitioner’s objections to using 1983 prices moot. Petitioner disagrees, arguing that use of current prices rather than the estimated price at the projected harvest date is also inappropriate. Our conclusion that the county did not err in using 1983 timber prices makes it unnecessary to address these contentions.

1 discussed, and apparently rejected as unnecessary, because the income test was linked to the five-
2 year period preceding January 1, 1983.⁷ Petitioner does not dispute that point with respect to the
3 “farm operation” prong of the gross income test, but argues there is no indication that the legislature
4 intended the “forest operation” prong to be also fixed at 1983 levels. However, the legislative
5 discussion of the question of adjusting for inflation, while directed at the farm operation element of
6 ORS 197.247(1)(a), seems equally applicable to the forest operation prong of that subsection. We
7 conclude that the legislative history of ORS 197.247(1)(a) brought to our attention does not support
8 petitioner’s view of the statute, and is more consistent with the county’s approach.

9 With respect to the 50-year growth cycle assumed under the county’s methodology,
10 petitioner does not explain why it is unreasonable to assume a 50-year growth cycle, or why
11 ORS 197.247(1)(a) compels the county to assume a longer or different cycle.

12 **B. Productivity Test (ORS 197.247(1)(b)(C))**

13 Petitioner challenges the county’s findings that the subject property is predominantly
14 composed of Class VI soils and that the property is not capable of producing 85 cf/ac/yr of
15 merchantable timber.

16 **1. Agricultural Capability Class**

17 As noted, according to the SCS soil survey maps, the predominant soils on the subject
18 property are Units 43C and 43E, two variants of the Dixonville/Philomath/Hazelair complex, both of
19 which the soil survey assigns a capability classification of VIe. Petitioner argues, however, that the
20 1987 soil survey assigns higher capability classifications to the majority of individual soils making up
21 the two complexes. Further, petitioner points out, the 1987 soil survey assigns percentages to each

⁷ See testimony of Richard Benner before the House Committee on Energy and Environment on SB 237, Tape 260, Side A:

“* * * [The gross income test] is intended to be the way it reads which is, you use the five-
year period preceding the effective date of the Act. The reason the farmers chose that
language was to get in part at Representative Parkinson’s point about inflation. If you look at
a set period in time, those numbers can’t inflate over time. Those figures are set, obviously,
and they have been. * * *”

1 of the individual soils in each complex, so that, for example, Dixonville soils (class IIIe) make up
2 approximately 30 percent of the Unit 43C complex. *See* n 2. If the relative portion of the individual
3 soils and their individual ratings are taken into account, petitioner argues, then it is clear that
4 approximately 53 percent of the subject property consists of Class III soils, while approximately 67
5 percent consists of Class III or IV soils.

6 In addition, petitioner argues that while the 1987 soil survey may have assigned a single
7 agricultural capability classification of VIe to Units 43C and 43E, the current NRCS practice is to
8 assign individual ratings to the soils making up those soil complexes, without an overall capability
9 classification. *See* Record 58 (NRCS table listing individual ratings for each soil in the Unit 43C
10 and 43E complexes) and Record 62 (memorandum from staff to the Lane Council of Governments
11 documenting the staff person’s understanding of the current NRCS practice, and explaining her
12 decision to assign a capability classification to a complex based on the predominant soil—the soil
13 first listed in the complex). According to petitioner, the former NRCS practice was to assign to the
14 complex as a whole the capability classification of the least productive soil in the complex (in Units
15 43C and 43E, the Philomath soils, Class VIe). The current NRCS practice, petitioner argues, is to
16 rate each individual soil separately, and not assign a composite rating based on the least productive
17 soil in the complex.

18 The county and intervenor respond that the predominant soil test under
19 ORS 197.247(1)(b)(C) must be based on the “Agricultural Capability Classification System in use
20 by the United States Department of Agriculture, Soil Conservation Service on October 15, 1983,”
21 not subsequent or modified classification systems. Even assuming that the NRCS has since revised
22 its system of classifying soils within complexes, which respondents do not concede, respondents
23 argue that ORS 197.247(1)(b)(C) requires evaluation under the system in use on October 15,
24 1983. According to respondents, the 1987 soil survey accurately reflects the classification system
25 in use on that date.

1 Petitioner responds that the above-described changes is simply a change in how the data
2 generated by the Class I through VIII classification system is reported, not a change in the Class I
3 through VIII *classification system* itself.

4 The documents cited to us in the record do not establish that the NRCS has in fact changed
5 the way it reports or classifies complex soils. Something more official than an obscure table and a
6 memorandum from a staff person at the Lane Council of Governments is necessary to establish that
7 claim. Accordingly, we need not resolve the parties' contentions regarding whether the purported
8 change is a change in the "classification system" that was in use on October 15, 1983, for purposes
9 of ORS 197.247(1)(b)(C).

10 Petitioner does not dispute that the 1987 soil survey is a product of, and consistent with, the
11 "Agricultural Capability Classification System in use by the United States Department of Agriculture,
12 Soil Conservation Service on October 15, 1983." The 1987 soil survey provides a single rating for
13 complex soils, such as Units 43C and 43E. Therefore, the county did not err in relying on that
14 composite rating in the 1987 soil survey to conclude that the predominant soils on the subject
15 property are Class VIe, for purposes of ORS 197.247(1)(b)(C).

16 **2. Wood Fiber Production Capability of 85 cf/ac/yr**

17 The NRCS rates the forest productivity of the Dixonville soils in Units 43C and 43D at 152
18 cf/ac/yr, but apparently publishes no forest productivity ratings for any of the soil units or soil
19 complexes on the property. Record 66. The county found, based on a report from intervenor's
20 forestry consultant, that the subject property is not capable of producing 85 cf/ac/yr of
21 merchantable timber. The consultant's report relied on several sources to estimate timber
22 productivity, principally (1) a document entitled "Lane County Soil Ratings for Forestry and
23 Agriculture," and (2) a document entitled "Lane County Forest Soil Ratings."⁸ Record 347-49.

⁸ The report also cites to "U.S. Dept. of Agriculture SCS Data, as presented in the Soil Survey of Lane County Area (Green Sheet)." Record 342. However, the cited source is not attached to the report and, as far as we can tell, not in the record. As noted above, no party has argued, and it does not appear to be the case, that either the SCS or NRCS has published timber productivity figures for Units 43C, 43E, 45C or 138E.

1 The first document rates the forest productivity of Units 43C and 43E at 54 cf/ac/yr and 64 cf/ac/yr,
2 respectively. Record 347. The second document rates both Units 43C and 43E at 45 cf/ac/yr,
3 Unit 45C (Dupee) at 70 cf/ac/yr and Unit 138E (Witzel) at 70 cf/ac/yr. Record 348-49. The cited
4 source of the pertinent ratings in the second document is a memorandum dated February 8, 1990,
5 from the Office of State Forester. *Id.* That memorandum is not in the record.

6 Petitioner contends that the county’s findings are inadequate, misconstrue the applicable
7 law, and are not supported by substantial evidence. According to petitioner, the county’s findings
8 under ORS ORS 197.247(1)(b)(C) are governed by OAR 660-006-0005(2), which defines the
9 term “cubic foot per acre” for purposes of the administrative rules implementing Statewide Planning
10 Goal 4 (Forest Lands).⁹ OAR 660-006-0005(2) requires that the county use productivity data “as
11 reported by [NRCS].” Where NRCS data are not available or are shown to be inaccurate,
12 OAR 660-006-0005(2) allows for alternative methods of determining productivity, if the alternative
13 method provides “equivalent data” and is approved by the state Department of Forestry (ODF).
14 *See, generally, Carlson v. Benton County*, 37 Or LUBA 897, 909-915 (2000), for an extensive
15 discussion of OAR 660-006-0005(2).

16 Petitioner argues that the county has not shown that the NRCS rating of 152 cf/ac/yr for the
17 Dixonville component of Units 43C and 43E is “inaccurate.” With respect to the soils on the
18 property not rated by NRCS for forest productivity, petitioner contends that the county has not
19 shown that ODF has approved the methodology used by the forestry consultant, or the

⁹ OAR 660-004-0005 provides, in relevant part:

“For the purpose of this division, the following definitions apply:

“* * * * *

“(2) ‘Cubic Foot Per Acre’ means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resource Conservation Service (NRCS). Where NRCS data are not available or are shown to be inaccurate, an alternative method for determining productivity may be used. An alternative method must provide equivalent data and be approved by the Department of Forestry.”

1 methodology used to generate the ratings in the two documents relied upon by the forestry
2 consultant. According to petitioner, an ODF publication entitled “Land Use Planning Notes,
3 Number 3X, April 1998,” found at Record 452-58, describes the methodology approved by the
4 department under OAR 660-006-0005 in circumstances where NRCS data is unavailable or
5 inaccurate.¹⁰ Petitioner contends that the forestry consultant did not follow the methodology
6 prescribed in that ODF publication.

7 Intervenor responds that the two documents the forestry consultant relied upon are
8 ultimately based on NRCS data and therefore there is no need under OAR 660-006-0005(2) to
9 use or seek approval for an alternate methodology. Even if the documents are not based on NRCS
10 data, intervenor argues, the documents provide “equivalent data” that was generated by an ODF-
11 approved methodology. Intervenor points out that the pertinent data in the “Lane County Forest
12 Soil Ratings” document are based on data from a February 8, 1990 memorandum from the Office
13 of the State Forester. Using data generated by the State Forester should be sufficient, intervenor
14 argues, to satisfy the requirements of OAR 660-006-0005(2).

15 We assume, without deciding, that OAR 660-006-0005(2) governs the forest productivity
16 element of ORS 197.247(1)(b)(C) (1991).¹¹ The only NRCS data cited to us indicates that the
17 NRCS does not rate the forest productivity of any soil on the property, with the exception of the
18 Dixonville soils. Intervenor has not established that the ratings in the “Lane County Soil Ratings for

¹⁰ The methodology described in the April 1998 ODF publication generally requires a field survey of selected trees on the property.

¹¹ We note that the statute, adopted in 1983 and repealed in 1991, does not require reliance on NRCS data in determining whether the property is capable of producing 85 cf/ac/yr of merchantable timber. The statute explicitly imposes such a requirement with respect to agricultural capability, but not forest productivity. OAR 660-006-0005(2), in turn, was adopted after the statute’s repeal and simply defines a term, “Cubic Foot Per Acre” for purposes of OAR chapter 660, Division 006. As far as we can tell, nothing in Division 006 governs designation of marginal lands under ORS 197.247. Instead, it appears that the term “Cubic Foot Per Acre” is used in Division 006 only with respect to forest template dwellings, under OAR 660-006-0027. It is possible that the Land Conservation and Development Commission did not intend the definition of “Cubic Foot Per Acre” to apply to designation of marginal land under the ORS 197.247(1)(b)(C) forest productivity test. One could also argue the converse. We need not resolve this question, as the county and the parties proceeded under the assumption that the rule definition is applicable to a marginal lands designation, and no party raises any arguments to us questioning that assumption.

1 Forestry and Agriculture,” or “Lane County Forest Soil Ratings” are based on NRCS or SCS data.
2 Because NRCS data are not available, intervenor can proceed under OAR 660-006-0005(2) only
3 by providing “equivalent data” pursuant to an “alternative method” that is approved by ODF.

4 As noted, the first document, “Lane County Soil Ratings for Forestry and Agriculture,” rates
5 Units 43C and 43E as 54 cf/ac/yr and 63 cf/ac/yr, respectively. Record 347. The source of that
6 rating and the methodology by which it was derived is not described. There is no indication in the
7 record that it is based on SCS, NRCS or ODF data.

8 The second document, “Lane County Forest Soil Ratings,” provides ratings for Units 43C
9 and 43E (both 45 cf/ac/yr), Dupee soils (70 cf/ac/yr) and Witzel soils (70 cf/ac/yr). Each of these
10 ratings is marked with asterisks (“**”). A footnote states that ratings marked with asterisks are not
11 derived from the SCS “green sheets.” A second footnote indicates: “** These estimated soils
12 ratings are taken from an Office of State Forester Memorandum, February 8, 1990, General File 7-
13 1-1.” Record 348-49.

14 Petitioner does not dispute that the documents relied upon provide “equivalent data” to
15 NRCS data, for purposes of OAR 660-006-0005(2). Nor does petitioner dispute that the
16 pertinent cf/ac/yr figures in the “Lane County Forest Soil Ratings” document are based on the
17 February 8, 1990 memorandum from the Office of State Forester. Instead, petitioner complains
18 that the February 8, 1990 memorandum is not in the record and there is no description of the
19 methodology used to generate the data in that memorandum, or any evidence that the methodology
20 used conforms to the methodology set out in the April 1998 ODF publication.

21 Petitioner is correct that, as a general matter, OAR 660-006-0005(2) requires that the
22 “alternative methodology” be described or set forth in the record, and that there is evidence that
23 ODF has approved the methodology. Presumably, use of the methodology set out in the April
24 1998 ODF publication would suffice to satisfy the rule. It also seems consistent with the rule to
25 obtain explicit ODF approval of a different methodology, on a case-by-case basis. However, we
26 believe that it is also consistent with the rule to use ODF-generated cf/ac/yr figures, if available, even

1 if the methodology that generated those figures is not described in the record. Here, petitioner does
2 not dispute that the cf/ac/yr figures in the “Lane County Forest Soil Ratings” accurately reflect the
3 ODF-generated figures for the pertinent soils. A decision maker could reasonably presume that
4 whatever methodology generated the ODF cf/ac/yr figures is one that ODF approves of. Even if
5 the ODF figures were generated under a different methodology than that set out in the April 1998
6 ODF publication, as petitioner contends, the ODF is presumably free to follow or approve a
7 different methodology for calculating timber productivity than the one set out in the April 1998
8 publication.

9 The first, second and third assignments of error are denied.

10 **FOURTH ASSIGNMENT OF ERROR**

11 ORS 215.327 provides for different minimum lot sizes for marginal lands, depending on the
12 character of the surrounding land.¹² Ten-acre lots are permissible if the subject property is not
13 adjacent to land zoned for exclusive farm or forest use or, if adjacent to such land, such land must
14 qualify for designation for marginal land. Otherwise the lot or parcel must be 20 acres or more in
15 size.

16 A 53.6-acre parcel south of the subject property is zoned for forest uses. The county
17 concluded that this parcel qualified for designation for marginal land, and thus that the subject
18 property could be divided into 10-acre lots. Petitioner argues that the county’s conclusion that the

¹² ORS 215.327 provides:

“A county may allow the following divisions of marginal land:

- “(1) Divisions of land to create a parcel or lot containing 10 or more acres if the lot or parcel is not adjacent to land zoned for exclusive farm use or forest use or, if it is adjacent to such land, the land qualifies for designation as marginal land under ORS 197.247 (1991 Edition).
- “(2) Divisions of land to create a lot or parcel containing 20 or more acres if the lot or parcel is adjacent to land zoned for exclusive farm use and that land does not qualify for designation as marginal land under ORS 197.247 (1991 Edition).”

1 adjacent property qualifies for designation as marginal land suffers from the same flaws described in
2 the first, second and third assignments of error.

3 Because petitioner's arguments under the first, second and third assignments of error do not
4 provide a basis for reversal or remand, neither do the incorporated arguments under this assignment
5 of error.

6 The fourth assignment of error is denied.

7 The county's decision is affirmed.