BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON SHORES CONSERVATION COALITION,
NORMA VAN NATTA, PAUL VAN NATTA,
DAVID FORD, MOLLY FORD,
CAM PARRY, KENDRA PARRY,
RICHARD DRESSLAR, CLARE DRESSLAR,
SUE CAMERON and HARRIET EGY,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

INDIAN POINT, INC.,
Intervenor-Respondent.

LUBA No. 2005-087

FINAL OPINION
AND ORDER

Appeal from Coos County.

James D. Brown, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Christopher Winter, Ralph O. Bloemers and Cascade Resources Advocacy Group.

No appearance by Coos County.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Steven L. Pfeiffer and Perkins Coie, LLP.

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

REMANDED 10/26/2005

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

provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal an ordinance amending the county comprehensive plan and zoning ordinance to allow urban residential development on a 184-acre area within an urban unincorporated community.

MOTION TO INTERVENE

Indian Point, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject site is a 184-acre upland portion of a 236-acre parcel located adjacent to South Slough and Ney Slough southwest of the City of North Bend. The parcel is designated and zoned Forest. The county soil survey indicates that the site is predominantly composed of Bandon and Bullards sandy loam soils with Douglas Fir site indexes ranging from 132 to 137, and which carry an agricultural capability class of IIIe. The property is treed, with 63 percent of the trees Port Orford Cedar, 17 percent Douglas Fir, 11 percent Sitka spruce and western hemlock, and 9 percent shore pine. The subject property was partially logged 30 years ago, and again seven years ago.

The parcel is a peninsula bordered on the northwest, west and southwest by sloughs. A county road borders the property to the east. South of the subject property is a property zoned Forest. Further south and to the southeast is a large area zoned Rural Residential 5-Acre minimum (RR-5). Adjoining the property to the southeast is a 38-acre parcel zoned Forest. An area zoned Rural Residential 2-acre minimum (RR-2) adjoins the property to the east and northeast. Further north across Ney Slough is a community known as Barview that is within an urban unincorporated community (UUC). Barview consists of approximately 150 dwellings and commercial uses along Cape Arago highway, and is zoned for urban residential uses with two small areas zoned for commercial uses.

In 1999, during periodic review, the county expanded the boundaries of the Barview UUC to include a number of properties, including the subject property. The county did not amend the plan designation or zoning for any of the included properties, and the subject property remained planned and zoned Forest. The periodic review work task that expanded the Barview UUC was acknowledged in 2000.

In 2004, the owner of the subject property placed a restrictive covenant on the property prohibiting development, in order to obtain approval for a large tract forestland dwelling on property in Curry County, pursuant to ORS 215.740(3).[1]

In August 2004, intervenor filed an application with the county requesting a plan amendment from Forest to Residential, and a zone change from Forest to Urban Residential-2 (UR-2). The intent of the application is to facilitate a proposed planned unit development with 1,068 to 1,093 residential units, known as Indian Point. The planning commission recommended approval. After conducting several hearings, the Board of Commissioners voted 2-1 to approve the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Coos County Zoning and Land Development Ordinance (ZLDO) 4.1.100(A)(10) provides that "[t]he 'UR-2' district shall only be used within Urban Growth Boundaries." There is no dispute that the subject property is not within an urban growth boundary. The county found that while

---

[1] ORS 215.740(3) provides, in relevant part:

> "(a) An owner of tracts that are not contiguous but are in the same county or adjacent counties and zoned for forest use may add together the acreage of two or more tracts to total 320 acres or more in eastern Oregon or 200 acres or more in western Oregon to qualify for a dwelling under subsection (1) of this section.
>
> "(b) If an owner totals 320 or 200 acres, as appropriate, under paragraph (a) of this subsection, the owner shall submit proof of nonrevocable deed restrictions recorded in the deed records for the tracts in the 320 or 200 acres, as appropriate. The deed restrictions shall preclude all future rights to construct a dwelling on the tracts or to use the tracts to total acreage for future siting of dwellings for present and any future owners unless the tract is no longer subject to protection under goals for agricultural lands or forestlands."

ZLDO 4.1.100(A)(10) is "straightforward," the code provision has failed to keep pace with developments in state and local land use laws that now provide for urban development within UUCs. The county also found that ZLDO 4.1.100(A)(10) is "inconsistent with the concept of UUCs" and "contrary to the purpose" of designating UUCs, and therefore the county interpreted the code provision to allow UR-2 zoning for the subject property.[2]

[2] The county's finding state, in relevant part:

> "The Cascade Resources Advocacy Group (CRAG), and others, contend that the Site may not be rezoned as proposed, because ZLDO 4.1.100 prohibits application of the UR-2 zoning district outside of an urban growth boundary. However, for the reasons described above, the applicable provisions of the CCCP [Coos County Comprehensive Plan] and state rules governing UUCs make clear that the purpose of including property inside a UUC boundary in Coos County is to allow for urban levels of development. As stated in CCCP Section 5.5.1, the majority of property inside the Barview UUC is zoned UR-2. Prohibiting urban residential development within the UUC would be inconsistent with the purpose of the UUC designation, and inconsistent with existing zoning patterns in the Barview UUC.
>
> "To support its contention, CRAG references language in ZLDO 4.1.100 that appears straightforward. However, that language fails to address or to be in any way responsive to the complexity of Oregon's land use system. Urban development is now allowed in several areas found outside urban growth boundaries. In fact, as explained in CCCP Section 5.5.1, the majority of property inside the Barview UUC is already zoned UR-2. With respect to UUCs, the applicable provisions of CCCP Section 5.5.1 and state rules governing UUCs make clear that the purpose of including property inside a UUC boundary in Coos County is to allow for urban levels of development. The ZLDO language referenced by CRAG fails to accommodate that fact and fails to recognize innovative changes in planning made by LCDC [Land Conservation and Development Commission] such as the creation of UUCs. Consequently, the Board of Commissioners also finds that the text of ZLDO 4.1.100, as originally written, is inconsistent with the concept of UUCs and the county's intent when designating areas, such as Barview and the Site, to be UUCs under the CCCP, which governs over the ZLDO.
>
> "The Board of Commissioners also finds that the term 'urban growth boundary' as used within the context of 4.1.100 fails to accommodate the need to authorize urban levels of development in other urbanizable areas within the county. As a matter of policy, the Board finds that an interpretation of the term is necessary to ensure consistency between the language of the ZLDO, and the intent and purpose of the CCCP and this Board to ensure that urban levels of development are allowed in all areas where this Board has found urban development to be appropriate and allowable. The Board of Commissioners further finds that prohibiting urban residential development within the county's UUCs is further contrary to the purpose of the county's designating such areas to be UUCs and inconsistent with existing zoning patterns in the Barview and other county UUCs. The Board of Commissioners interprets the applicable ZLDO and CCCP provisions to allow UR-2 zoning for the subject property." Record 234.

Petitioners argue that ZLDO 4.1.100(A)(10) unambiguously prohibits application of the UR-2 zone outside urban growth boundaries, and that the county's "interpretation" that it allows UR-2 zoning outside urban growth boundaries is not affirmable under ORS 197.829(1).[3]

Intervenor responds that the county correctly found that a UUC is the constructive equivalent of an urban growth boundary, in that both define areas in which urban residential development is allowed. Because prohibiting urban residential development within UUCs is inconsistent with the purpose and function of a UUC, intervenor argues, the county properly interpreted ZLDO 4.1.100, in context with CCCP policies providing for UUCs, to allow for UR-2 zoning on the subject property.

The ZLDO includes three urban residential zones, and the code descriptions of all three zones prohibit their application outside urban growth boundaries. The county is probably correct that the code prohibition on urban residential zones outside urban growth boundaries was adopted prior to 1994, when LCDC adopted the unincorporated communities rule at OAR Chapter 660, Division 022, and prior to the county's designation of its three UUCs. However, simply because the county now views ZLDO 4.1.100(A)(10) as being outdated does not mean that the county can ignore it.[4] ZLDO 4.1.100(A)(10) unambiguously prohibits application of the UR-2 zone outside

---

[3] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[4] There is no *necessary* conflict between designation of a UUC and regulations prohibiting application of an urban residential zone outside urban growth boundaries. While OAR Chapter 660, division 022 allows more intensive uses in unincorporated communities than allowed elsewhere outside urban growth boundaries, it limits

urban growth boundaries. That the comprehensive plan contemplates urban development within UUCs may be a compelling argument for amending ZLDO 4.1.100(10), but it does not provide a basis to ignore that language or interpret it out of existence.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in concluding that subject property lost its comprehensive plan and zoning Forest designation when it was included in the Barview UUC in 1999, and accordingly that it was unnecessary to take an exception to Goals 3 (Agricultural Lands) and 4 (Forest Lands) before redesignating the site for non-resource uses. According to petitioners, inclusion of resource land within a UUC does not automatically result in loss of resource designations. On the contrary, petitioners argue, OAR 660-022-0020(4) authorizes inclusion of resource land within a UUC only under limited circumstances, and specifically requires that lands so included shall remain "planned and zoned under Goals 3 or 4." OAR 660-022-0020(4)(d).[5]

---

the intensity of new industrial and commercial uses within rural and urban unincorporated communities and does not *require* that counties allow "urban" levels of residential development in UUCs. *See* OAR 660-022-0030(2) ("County plans and land use regulations may authorize any residential use and density in unincorporated communities, subject to the requirements of this division"). A county could, consistent with the unincorporated communities rule, choose to limit new residential development within UUCs to "rural" intensities under rural residential zoning. An even more likely scenario is that a county might allow some, but not all, of its urban zoning districts to be applied in UUCs.

[5] OAR 660-022-0020 provides, in relevant part:

> "(2) Counties shall establish boundaries of unincorporated communities in order to distinguish lands within the community from exception areas, resource lands and other rural lands. The boundaries of unincorporated communities shall be shown on the county comprehensive plan map at a scale sufficient to determine accurately which properties are included.
>
> "(3) Only land meeting the following criteria may be included within an unincorporated community boundary:
>
> "(a) Land which has been acknowledged as a Goal 3 or 4 exception area and historically considered to be part of the community provided the land only includes existing, contiguous concentrations of:
>
> "(A) Commercial, industrial, or public uses; and/or

Intervenor responds that the county correctly concluded that inclusion of the subject property within the Barview UUC is the equivalent of taking an exception to the resource goals.[6]

"(B) Dwelling units and associated residential lots at a greater density than exception lands outside rural communities.

"(b) Land planned and zoned for farm or forest use provided such land meets the criteria in section (4) of this rule.

"(4) Community boundaries may include land that is designated for farm or forest use pursuant to Goals 3 and 4 if all the following criteria [are] met:

"(a) The land is contiguous to Goal 3 or 4 exception lands included in the community boundary;

"(b) The land was occupied on the date of this division (October 28, 1994) by one or more of the following uses considered to be part of the community: Church, cemetery, school, park, playground, community center, fire station, museum, golf course, or utility facility;

"(c) Only the portion of the lot or parcel that is occupied by the use(s) in subsection (b) of this section is included within the boundary; and

"(d) The land remains planned and zoned under Goals 3 or 4.

"(5) Site specific unincorporated community boundaries that are shown on an acknowledged plan map on October 28, 1994, are deemed to comply with subsections (2) and (3) of this rule unless the boundary includes land designated for farm or forest use that does not meet the criteria in section (4) of this rule."

[6] Intervenor cites to the following findings:

"First, the Board of Commissioners concludes that the county's decision to include the property within the Barview UUC was, by definition, a determination that the Site is not appropriate for resource use under Goals 3 and 4 and should instead be developed for urban uses, consistent with DLCD rules and the county comprehensive plan provisions governing UUCs. The subsequent acknowledgment of that decision by LCDC represents the final and conclusive determination that the county's decision to include the Site in the UUC is consistent with all applicable Statewide Planning Goals and implementing rules, including Goals 2, 3, 4, 11 and 14, and OAR Chapter 660, Divisions 004 and 022. Although the Site was not rezoned as part of the 1999 decision, it was effectively removed from the county's inventory of resource lands at that time, and that decision cannot be collaterally attacked as part of this proceeding. * * *" Record 219.

"The Board of Commissioners finds that the fact that the Site was not rezoned residential at the time it was brought into the UUC is not indicative of the county's intent for the property. The October 18, 1999 memorandum from county planner Carol Parker reveals that the county intended that the areas taken into the UUC would be rezoned at a later date. That memorandum shows that DLCD, working with the county, determined that rezoning did not have to occur at Periodic Review or the time the area was taken into the Barview UUC to be

Intervenor notes that one purpose of the rule is to "reduce" the need to take exceptions to statewide planning goals when planning and zoning unincorporated communities. OAR 660-022-0000(1).[7] That purpose is not met, intervenor argues, if counties must take an exception to Goals 3 and 4 when planning and zoning former resource lands for nonresource uses allowed within unincorporated communities. With respect to OAR 660-022-0020(4), intervenor argues that the county correctly found that the subject property did not qualify for inclusion within the UUC under all four of the criteria in OAR 660-022-0020(4)(a) through (d), and therefore there is no obligation for the property to remain "planned and zoned under Goals 3 and 4." Intervenor contends that the county clearly included the subject property within the UUC in order to allow nonresource use on that property, and cites to evidence that DLCD worked with the county to find ways to postpone rezoning the property included in the UUC. Given that LCDC ultimately acknowledged the periodic review work task that included the subject property in the UUC, intervenor argues, the county reasonably concluded that LCDC acquiesced in the county's intent to rezone the property to allow urban residential uses.

We generally agree with petitioners that inclusion of resource land within a UUC does not automatically strip the land of resource designations under Goals 3 and 4, and that an exception to those goals is required in order to plan and zone resource lands for non-resource uses. Stated more broadly, inclusion of land within a UUC does not necessarily mean that the land can be rezoned to allow any or all urban uses, as the county appears to presume.

---

consistent with OAR 660-022-0020(4). It also shows that none of the properties brought into the UUC were rezoned at that time, and that the county chose to postpone rezoning and was not required to do so, and that this interpretation of the rule was endorsed by DLCD." Record 233.

[7] OAR 660-022-0000(1) provides:

"The purpose of this division is to establish a statewide policy for the planning and zoning of unincorporated communities that recognizes the importance of communities in rural Oregon. It is intended to expedite the planning process for counties by *reducing their need to take exceptions* to statewide planning goals when planning and zoning unincorporated communities." (Emphasis added.)

As defined by OAR 660-022-0010(10), an unincorporated community must consist "primarily" of lands for which exceptions to Goals 3 and 4 have been taken. OAR 660-004-0018(4)(c) provides that when a local government includes land within an unincorporated community for which a "reasons" exception was previously adopted, the plan and zone designations must limit the uses, density, public facilities and services and activities to those that were justified in the exception. Thus, even with respect to exception lands, the types and intensity of uses allowed on some exception lands within UUCs may be limited.

With respect to resource lands, OAR chapter 660, division 022 provides only two means to include such lands within a UUC. The first, already discussed, applies only in limited circumstances involving contiguous lands that are occupied by a limited number of uses that are part of the community, such as a church, and then only that portion of the resource land that is occupied by the use. OAR 660-022-0020(4). Significantly, such included resource lands must remain "planned and zoned under Goals 3 or 4." OAR 660-022-0020(4)(d). It is apparent that resource lands included within a UUC under OAR 660-022-0020(4) do not lose their resource designation, and that the only way to use such lands for new non-resource development is to take an exception to Goals 3 and 4.

The second means is under OAR 660-22-0040, which allows expansion of a UUC to include resource land under specified circumstances.[8] Such expansions must comply with the

---

[8] OAR 660-022-0040 provides, in relevant part:

> "(2) Counties may expand the boundaries of those UUCs with the following characteristics during regularly scheduled periodic review in order to include developable land to meet a demonstrated long-term need for housing and employment:
>
> > "(a) The UUC is at least 20 road miles from an urban growth boundary with a population over 25,000; and
> >
> > "(b) The UUC is at least 10 road miles from an urban growth boundary with a population of 25,000 or less.
>
> "(3) To expand the boundary of a UUC, a county shall demonstrate a long-term need for housing and employment in the community. * * * The county shall consider:

criteria for expanding an urban growth boundary under Goal 14. In particular, OAR 660-004-0020(4) requires that expansion of a UUC shall comply with the requirements for an amendment of an urban growth boundary. OAR 660-004-0020(4) makes it clear that such UUC expansions must comply with the requirements for a Goal 2, Part II exception, including OAR 660-004-

---

"(a) Plans to extend facilities and services to existing community land; and

"(b) The infill potential of existing land in the community.

"(4) If a county determines that it must expand the boundary of a UUC to accommodate a long-term need for housing and employment, it shall follow the criteria for amendment of an urban growth boundary in statewide planning Goal 14 and shall select land using the following priorities:

"(a) First priority goes to that developable land nearest to the UUC which is identified in an acknowledged comprehensive plan as exception area or nonresource land;

"(b) If land described in subsection (a) of this section is not adequate to accommodate the need demonstrated pursuant to section (3) of this rule, second priority goes to land designated in a comprehensive plan for agriculture or forestry, or both. Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use, with designated marginal land considered the lowest capability (highest priority for selection);

"(c) Land described in subsection (4)(b) of this section may be included if land of higher priority is inadequate to accommodate the need projected according to section (3) of this rule for any one of the following reasons:

"(A) Specific types of identified land needs cannot be reasonably accommodated on higher priority land; or

"(B) Public facilities and services cannot reasonably be provided to the higher priority area due to topographic or other physical constraints; or

"(C) Maximum efficiency of land use within the UUC requires inclusion of lower priority land in order to provide public facilities and services to higher priority land.

"(5) Counties shall apply plans and land use regulations to ensure that land added to a UUC:

"(a) Is used only to satisfy needs identified pursuant to section (3) of this rule[.]"

0020(2)(b)(c) and (d), as supplemented by OAR 660-004-0020(4)(a) and (b).[9] In other words, a local government that amends a UUC to include resource lands under OAR 660-022-0040 must justify an exception to the applicable resource goals. Even then, the county must apply plans and zoning regulations that ensure that the land is used only to satisfy the needs identified in OAR 660-022-0040(3), and not for other uses. OAR 660-022-0040(5)(a).

In sum, the county cannot lawfully include resource land within a UUC unless that land remains planned and zoned for resource uses under OAR 660-022-0020(4), or the county takes an exception to Goals 3 and 4. Any resource lands included in a UUC continue to carry their designation as resource lands unless and until an exception to Goals 3 and 4 is adopted. There is no contention in the present case that the county adopted exceptions to Goals 3 and 4 when including the subject property within Barview UUC in 1999. Nor is there a contention that the subject property qualified for inclusion under OAR 660-022-0020(4)(a) through (c). In fact, the county relies on the fact that the property did *not* qualify under OAR 660-022-0020(4) to support its conclusion that it can redesignate and rezone the subject property for non-resource use.[10] The

---

[9] OAR 660-004-0020(4) provides, in relevant part:

> "For the expansion of an unincorporated community defined under OAR 660-022-0010, or for an urban unincorporated community pursuant to OAR 660-022-0040(2), the exception requirements of subsections (2)(b), (c) and (d) of this rule are modified to also include the following: [setting forth additional criteria]."

[10] The county's findings state, in relevant part:

> "Several opponents have asserted that the Site was improperly included within the UUC because it does not comply with all of the criteria listed in OAR 660-022-0020(4), and that OAR 660-022-0020(4)(d) requires that the site remain planned and zoned for forest use under Goal 4. First, the county's decision to include the Site within the UUC was not challenged or appealed by anyone, and therefore that decision became final and effective in 2000, and cannot be revisited in this proceeding. Also, the Board of Commissioners finds that the language in OAR 660-022-0020(4) supports a determination that the Site was *not* intended to remain in farm or forest use after inclusion in the UUC. * * *
>
> "Under section (4), the only way that land 'designated for farm or forest use pursuant to Goals 3 and 4' can be included within the UUC is if all four criteria are met. Because all four of those criteria were *not* met, and yet the decision was approved and acknowledged by LCDC, the Board concludes that the Site was not intended to remain 'designated for farm or forest use'

principal support for that conclusion, however, appears to be the county's perception that (1) the subject property lost its resource designation when it was included in 1999, and (2) acknowledgment of the 1999 decision means that the subject property is non-resource land as a matter of law.[11]

The county is correct that the 1999 decision is final and unappealed, and is by operation of law acknowledged to comply with all applicable goals and administrative rules. That 1999 decision cannot be challenged in this appeal, and therefore the question of whether the property should have been included in the Barview UUC is not before us.

However, as relevant here all that the 1999 decision accomplished was to include the property within the UUC. The 1999 decision did not redesignate or rezone any of the property included in the UUC. As explained above, it does not follow from the mere fact that property is included within a UUC that the county can thereafter zone such property for any and all uses

---

when it was brought into the UUC. Instead, it was removed from resource use for the purposes of urban development consistent with UUC rules and the CCCP." Record 233.

[11] The county's reasoning on this point is articulated in several findings, including the following:

"* * * In the periodic review process that concluded in 2000, Coos County expressly designated the Site part of the Barview UUC as part of its periodic review work task #10. The decision to include this property in the UUC reflects the county's conclusion that the property should be developed for urban uses as contemplated by DLCD's rules for UUCs, and that the property is not appropriate for resource use under Goals 3 and 4. Because OAR 660-022-0020(3) provides that property cannot be included within a UUC unless it 'has been acknowledged as a Goal 3 or 4 exception area,' the county's decision to include the Site within the UUC, and the subsequent acknowledgment by LCDC of that decision, is the equivalent of approving an exception to Goals 3 and 4 for this property. * * *" Record 231.

"Evidence in the record indicates that DLCD staff actively participated in the process assisting the county with reviewing, evaluating and approving work task #10. By reviewing and acknowledging this property as a UUC as described in Section 5.5.1 of the CCCP, LCDC endorsed and affirmed the county's decision to remove from the property from a resource designation and to allow urban levels of development of the Site. That decision was not challenged or appealed, and is now final. The legal effect of acknowledgment is that the property has been deemed inappropriate for resource use, and the designation of the property as UUC is confirmed to be consistent with the Statewide Planning Goals, including Goal 2 (regarding exceptions), and Goals 3 and 4. Any attempt to question or change the prior decision through an appeal of this quasi-judicial map amendment process would be an impermissible collateral attack on the county's prior decision and LCDC's acknowledgment." Record 232.

typically allowed in urban zones. Nor does it follow from the fact that LCDC acknowledged the 1999 decision to include the subject property within the UUC that LCDC concurred with the county's apparent intent to later rezone the property to allow non-resource development. For all we know, LCDC's acknowledgment of the 1999 decision to include the subject property in the UUC may have been based on the fact that the county retained the existing plan designation and zoning for all included properties, or it may have been a simple oversight.[12] Whatever the case, the county has not shown that LCDC did anything more than acknowledge inclusion of the subject property within the Barview UUC.

OAR chapter 660, division 22 does not specify how resource land should be planned and zoned, where such land is included within a UUC by some means other than the two lawful ways to include resource land, under OAR 660-022-0020(4) or 660-022-0040. The rule assumes local governments will comply with the law. However, the rule clearly limits the ultimate use of any resource land that is included within an unincorporated community. Such lands are not necessarily available for the entire universe of uses otherwise potentially allowed within UUCs. The county's apparent position—that inclusion in the UUC automatically means that the property may be planned and rezoned for any urban use—is inconsistent with that scheme.

The county's position as we understand it boils down to the assertion that, because the Forest-designated subject property was included within the UUC with its Forest designation unchanged, the rule restrictions that would otherwise govern planning and zoning the property had it

---

[12] The 2000 letter acknowledging periodic review work task #10 is at Record 1503. It is a one-page letter that simply states that no objections to the 1999 ordinance were received and the ordinance is acknowledged. The county's findings quoted at n 6 discuss a 1999 memorandum from a county planner indicating that planning staff had been working with DLCD "to find a way to NOT rezone properties" proposed for inclusion in the UUC. Record 1850. However, that memorandum falls far short of demonstrating that either DLCD or LCDC knew of the county's apparent intent to later plan and zone the subject property for nonresource uses, and that DLCD or LCDC concurred in that intent. It suggests, at most, that DLCD staff were aware that the county did not want to redesignate and rezone property included in the UUC. There is no suggestion that DLCD staff were actually aware that one of the properties proposed for inclusion was planned and zoned for forest uses. The current position of DLCD, or at least that of its south coastal regional representative, is that LCDC "inadvertently acknowledged" including the subject property within the Barview UUC, and that an exception to Goals 3 and 4 is necessary in order to plan and zone the property for non-resource use. Record 1470.

been redesignated at the time it was included no longer apply. However, we do not see why that is the case. Assume, for example, the county attempted to include resource land within a UUC pursuant to OAR 660-022-0020(4) but the county made an error in doing so, because the property included was not, in fact, contiguous with exceptions lands included within the community boundary, as required under OAR 660-022-0040(4)(a), or was not in fact occupied by a qualifying use as of October 28, 1994, under OAR 660-022-0020(4)(b). Once that decision became acknowledged, the county's error in including the resource land within the UUC could not be collaterally challenged in a subsequent decision, on the basis of noncompliance with OAR 660-022-0020(4)(a) or (b). However, simply because the county made an error in including the resource land within the UUC under OAR 660-022-0020(4)(a) or (b) does not mean that in a subsequent decision the county can violate the mandate at OAR 660-022-0020(4)(d) that such resource lands remain "planned and zoned under Goals 3 and 4." Yet that is essentially what the county is attempting to do in the decision before us. While the acknowledgment process shields the county from certain collateral attacks on its acknowledged plan and ordinances, errors the county may have committed in that process do not obviate goal and rule requirements that govern *subsequent* post-acknowledgement plan decisions to change the comprehensive plan and zoning designation for such property.

For the foregoing reasons, we agree with petitioners that the county erred in redesignating and rezoning the subject property for non-resource uses.

The second assignment of error is sustained.

THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Apparently as an alternative to its conclusion that the subject property is no longer resource land because it is included in the UUC, the county adopted findings concluding that the subject property is not "agricultural land" protected under Goal 3 or "forest land" protected under Goal 4, and therefore the subject property may be planned and zoned for non-resource uses without taking an exception to those resource goals. Petitioners advance several challenges to those findings.

A. Fourth Assignment of Error: Goal 3 Agricultural Lands

The county's alternate conclusion that the subject property is not subject to Goal 3 consists of the following finding:

> "Finally, with respect to potential agricultural uses on the property, the applicant submitted a memorandum dated October 28, 2004, from Chris Hood of Stuntzner Engineering, which identifies and analyzes adjacent and nearby properties with respect to farm or forest uses. The memorandum concludes that the Site is surrounded by residential uses, and that with the exception of oyster beds in the estuary, no farming or forest uses are ongoing or likely to be initiated in the future. All adjacent properties within the Barview UUC have been zoned for residential uses, and farm or forest uses of the Site would not be compatible with such uses." Record 235.

Petitioners contend that this cursory finding is grossly inadequate. In particular, petitioners fault the county for failing to address the definition of agricultural lands at OAR 660-033-0020(1) and implementing local regulations, which define agricultural lands in relevant part as lands classified as predominantly Class I-IV soils in Western Oregon. Petitioners note evidence that at least 73.33 percent of the subject property is comprised of Class I-IV agricultural soils.

Intervenor responds that in addition to the above-quoted finding, the county expressly incorporated two supplemental memoranda as findings, the October 28, 2004 memorandum referenced above and a January 26, 2005 memorandum. According to intervenor, these memoranda include findings that are adequate to demonstrate that the subject property is not agricultural land protected by Goal 3.

We disagree with intervenor. First, while the county expressly adopted and incorporated a number of memoranda, the October 28, 2004 memorandum is not among them. Record 221. Even if the October 28, 2004 memorandum is considered part of the county's findings, it does not address OAR 660-033-0020(1) or explain why the subject property is not agricultural land under that definition.[13] The county clearly incorporated the January 26, 2005 memorandum, by the same

[13] Petitioner also points out that the October 28, 2004 memorandum cites no qualifications of the author, an employee of Stuntzner Engineering, with respect to agricultural matters other than "personal knowledge of the

author of the October 28, 2004 memorandum. *Id.* However, the January 26, 2005 memorandum also does not address OAR 660-033-0020(1), or provide an adequate explanation for why the subject property is not agricultural land under that definition.[14]

The fourth assignment of error is sustained.

B. Fifth Assignment of Error: Goal 4 Forest Land

The decision includes extensive findings addressing Goal 4, concluding that the subject property is not "suitable for commercial forest use" and hence not "forest land" as defined by Goal 4.[15] That conclusion is based on a March 11, 2004 report from intervenor's forestry consultant (hereafter, the Stuntzner report).

1. Stuntzner Report

The Stuntzner report first notes that the predominant Bandon and Bullards soils have 100 year site indexes of 137 and 132, respectively, and estimates that the 100 year site index for the property as a whole is 120, which is "considered fair for spruce/hemlock but well below a Southwest Oregon average for Douglas fir." Record 1671.[16]

---

area as a 15-year resident of the Coos Bay area and a 35-year resident of Coos County." Record 1510. To the extent the October 28, 2004 memorandum is cited as expert testimony regarding whether the subject property is agricultural land, we tend to agree with petitioners that nothing cited to us in the record demonstrates that the author is an expert on agricultural matters.

[14] The January 26, 2005 memorandum concludes, essentially, that it would not be sufficiently profitable to convert the subject property to "farm use" as defined at ORS 215.203(2)(a), given the costs of conversion and the expected rate of return on that investment. We need not and do not determine whether such evidence is sufficient to demonstrate that land is not "agricultural land" as defined by OAR 660-033-0020(1), since the decision does not address that definition. However, it is worth noting that OAR 660-033-0030(5) provides that "[n]otwithstanding * * * 215.203(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3 'Agricultural Land,' is applicable."

[15] Goal 4 defines forest lands as follows:

> "Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

[16] The report explains that a 100 year site index is determined by measuring the total height of the tree at 100 years of age. *Id.*

The report then finds that the Port Orford Cedars on the property, which comprise 63 percent of the tree species, are infected with an incurable root rot that kills the cedar before it reaches merchantable size, and that the Douglas fir stands, which comprise 17 percent of the trees, are infected with a needle disease that impacts growth. The report opines that these diseases affecting 80 percent of the existing stand will prevent most of the stand from reaching commercial maturity. Accordingly, the report states that the most appropriate course is to convert the property to a Sitka spruce/western hemlock forest, commercial tree species that are not affected by the disease organisms that infect the cedar and Douglas fir stands.[17]

However, the report goes on to conclude that the expected "internal rate of return" from harvest of spruce and hemlock trees at 60 years would only be .05 percent, after factoring in the costs of conversion, which "would not be acceptable [as] a knowledgeable forest investment." Record 1676.

In addition, the report cites a number of "logistical problems" that limit forest management of the property, including (1) high winds and salt spray, (2) required estuary and wetland buffers, (3) federal rules that restrict use of certain herbicides along salmon-supporting streams, which includes the adjoining sloughs and perhaps two small streams on the property, (4) proximity of rural residential development, (5) smoke management and burning restrictions imposed by the Department of Environmental Quality, (6) the cost of brush control, and (7) trespassers who cut down cedar trees to obtain floral boughs. Based on a combination of the foregoing factors and the relatively low return expected from converting the subject property, the report concludes that the subject property is not "suitable for commercial forest uses" under Goal 4.

DLCD submitted a response to the Stuntzner report, stating that DLCD had consulted with the Oregon Department of Forestry (ODF) on (1) how to evaluate the productivity of land for

[17] The report explains that these diseases have widely infected coastal stands in the county in recent decades, and that the forest service and others have worked to develop disease resistant cedar and Douglas fir seedlings, with some success. However, the report states that "only a limited amount of [disease-resistant] seedlings are available." Record 1663.

purposes of defining forest land under Goal 4, and (2) whether economic analysis is an appropriate tool to define whether forest land is "suitable for commercial forest uses" under Goal 4. According to DLCD, ODF responded that land capable of producing 20 cubic feet per acre per year (cf/ac/yr) is forest land under Goal 4. Further, ODF opined that economic analysis is not an appropriate means of determining whether land is protected by the goal, because such analysis depends on speculative assumptions regarding costs, prices and economic conditions that are far in the future.[18]

---

[18] The DLCD letter states, in relevant part:

> "* * * The Department has consulted with the Oregon Department of Forestry regarding forestland productivity and identification of forest land under statewide planning Goal 4. The Department of Forestry has offered the following responses to these issues:
>
> "**What Productivity Rating Indicates the Land is Defined as Forest under Goal 4?**
>
> "Goal 4 says, 'forest land shall include lands which are suitable for commercial forest uses.' There is a physical relationship and a well-developed consistent body of forestry practices that show that forestland is suitable for timber crops when the productivity reaches 20 cf/ac/yr.
>
> "Productivity ratings in excess of 20 cf/ac/yr indicate that the land is physically capable of producing forest species that are commercially valuable. Forestland with productivity ratings less than 20 cf/ac/yr grow mostly non-commercial species and will not support commercial crops of timber. For example, in eastern Oregon, where most of the lower productivity forest land is located, pine replaces juniper on sites when the productivity exceeds 20 cf/ac/yr.
>
> "Most government agencies and laws recognize the relationship that exists at 20 cf/ac/yr. The U.S. Department of Agriculture considers forestland capable of producing 20 cf/ac/yr to be 'timberland.' The Oregon Forest Practices Act requires reforestation after harvesting if the land is capable of producing more than 20 cf/ac/yr. Both the USDA Forest Service and the USDI Bureau of Land Management start managing land for timber when it exceeds a productivity of 20 cf/ac/yr. In addition, the industrial forest landowners in Oregon manage about a million acres of forestland that is capable of producing 20 to 50 cf/ac/yr.
>
> "**Is Economic Analysis an Appropriate Tool to Define Whether Forestland is Commercial?**
>
> "Economic analysis is not the appropriate tool to use to determine whether forestland is suitable for commercial timber production because it is based on assumptions about future costs and prices. All of the tract level forest economic analysis procedures are based on a land rent formula. The concept is similar to calculating the yield of government bonds. If you know the purchase price of the bond, and the amount the bond will be worth at the end of a given period of time, you can calculate the rate of return on your investment.

In turn, Stuntzner submitted a memorandum responding to the DLCD letter, opining that while 20 cf/ac/yr may be an appropriate threshold for federal lands and private ownership in eastern Oregon, it is not an appropriate standard of commercial suitability for private ownerships in western Oregon. Record 1514-15. With respect to economic analysis, the memorandum notes that DLCD has in the past used an economic analysis to determine whether it was practical to manage property for commercial forest use. The memorandum also disputes that the assumptions used in the economic analysis are speculative. Record 1515-16.

2. Measurements of Productivity

Petitioners first argue that measurements of productivity, expressed in terms of cf/ac/yr, are essential in determining whether land is forest land under Goal 4. Petitioners essentially agree with DLCD and ODF that 20 cf/ac/yr is the appropriate threshold for determining whether land is subject to Goal 4. Petitioners contend that such a threshold is consistent with statutes and rules authorizing forest template dwellings on Goal 4 lands, under standards that require that productivity be measured in cf/ac/yr, and rules implementing the Oregon Forest Practices Act that require reforestation of lands capable of producing 20 cf/ac/yr. Petitioners fault the county for not requiring and evaluating evidence of productivity expressed in terms of cf/ac/yr.

Intervenor responds that no rule or statute defines a threshold for lands suitable for commercial forestry under Goal 4, or requires the county to evaluate the productivity of the subject property in terms of cf/ac/yr. According to intervenor, the county correctly concluded that the Stuntzner report provides a sufficient basis to find that the subject property is not "suitable for

---

> "In forestry, the same concept is used to calculate the rate of return on forestry investments. However, because the actual costs of a forestry investment are unknown and the actual returns on a forestry investment would happen far into the future, a forest economic analysis is based on assumptions. Since both the costs and the returns of forestry investments are unknown, this type of analysis is not reliable enough to use in land use cases. With equal credibility, assumptions in such an analysis can be structured to support any desired position." Record 1471-72.

commercial forestry," notwithstanding that the report did not estimate the productivity of the soils on the property in terms of cf/ac/yr.

Intervenor is correct that no rule or statute defines a productivity threshold for lands suitable for commercial forestry under Goal 4. *Potts v. Clackamas County*, 42 Or LUBA 1, 5, *aff'd* 183 Or App 145, 52 P3d 449 (2002). Further, no rule or statute requires the county to evaluate timber productivity in terms of cf/ac/yr, in determining whether land is forest land subject to Goal 4. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285, 294 n 5 (1998), *rev'd on other grounds* 158 Or App 568, 976 P2d 68 (1999). Nonetheless, in *Dept. of Transportation* we stated that "measurements of productivity are relevant and perhaps essential to any inquiry into whether land is 'suitable for commercial forest uses[.]'" *Id.* at 294. Recently, we clarified that some measurement of productivity is indeed essential to any determination that land is suitable for commercial forest uses under Goal 4. *Wetherell v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2005-045, September 8, 2005) slip op 34, *appeal pending* (a purely qualitative analysis without an estimate of productivity is insufficient to demonstrate that land is not forest land under Goal 4). While that measurement of productivity need not be expressed in cf/ac/yr, we generally agree with petitioners that a determination whether property is suitable for commercial forestry under Goal 4 must be based on some measurement of the productivity of the land for growing commercial timber species.

However, petitioners have not demonstrated that the county failed to do so in the present case. The Stuntzner report estimated that the subject property has an overall site index of 120 for spruce/hemlock. While the report does not translate that figure into cf/ac/yr, petitioners do not explain why it must do so.[19] This subassignment of error is denied.

3. ORS 215.740.

As noted, in 2004 the owner of the subject property agreed to place a covenant on the site, pursuant to ORS 215.740, to prevent development of the site as long as it remained subject to the

[19] Apparently, it is possible to translate from a site index measurement to a cf/ac/yr measurement. *See* Record 1514 (Stuntzner memorandum indicating that "Site Index 60" is roughly equivalent to 66 cf/ac/yr).

resource goals, as a condition of obtaining a large tract forest dwelling on another property in Curry County. *See* n 1. A Curry County planning commission member testified with respect to the present application that while it is "apparently legal" to avoid the covenant by proposing redesignation and rezoning to allow non-resource uses, "it is certainly a matter of bad faith between the landowner and Curry County." Record 450.

Petitioners argue that the purpose of ORS 215.740 is to preserve large blocks of forest land in perpetuity, in exchange for allowing one dwelling under certain circumstances. We understand petitioners to argue that the necessary premise to application of ORS 215.740 is that the property subject to the covenant is forest land protected by Goal 4, and the landowner must have represented that to Curry County. At roughly the same time, petitioners argue, the landowner was representing to Coos County that the property is *not* forest land, either because the property was within a UUC or because it is not "suitable for commercial forest uses." According to petitioners, the landowner's representations to Curry County that the subject property is forest land undermines the county's conclusion that it is not forest land.

ORS 215.740 contemplates that land subject to the covenant may be removed from the protection of Goals 3 and 4. Therefore, the fact that the landowner sought and obtained dwelling approval from Curry County under ORS 215.740 does not preclude the landowner from later seeking a determination from Coos County that the property subject to the covenant is not protected by Goals 3 and 4. We tend to agree with the Curry County planning commission member that the landowner appears to have been less than forthright with that county. However, even if so that does not provide a basis to reverse or remand the challenged decision. This subassignment of error is denied.

4. Suitable for Commercial Forest Uses

Petitioners next challenge the county's conclusion that due to disease and other factors, and the relatively low "internal rate of return" to convert the existing stands to disease-resistant species, the property is not suitable for commercial forest uses.

Petitioners agree with DLCD and ODF that economic analysis is not an appropriate means to determine whether land is protected by Goal 4, because such analyses rely on speculative assumptions about economic conditions, prices and values 60 years or more in the future. Over such lengthy time periods, petitioners argue, one can manipulate slight variations in assumptions to yield very different results. Petitioners note several cases in which this Board rejected similar economic analyses designed to determine whether land is forest land under Goal 4 or whether forest uses are "impracticable" for purposes of taking a committed exception to Goal 4. *Potts*, 42 Or LUBA at 6 n 4 (evidence that the "present value" of a projected net yield of $81,300, discounted by eight percent over 50 years, is less than the initial investment of $7,450 is insufficient to demonstrate that land is not forest land); *Dhillon v. Clackamas County*, 40 Or LUBA 397, 400 n1 (2001), *aff'd* 179 Or App 742, 42 P3d 950 (2002) (evidence that "present value" of a projected net yield of $132,000, discounted by eight percent over 40 years, is less than the initial investment of $12,765 is insufficient to demonstrate that forest uses are impracticable); *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62, 74 n 10 (2000) (evidence that "present value" of projected net yield of $230,520, discounted by eight percent over 60 years, is less than the initial investment of $7,468 is insufficient to demonstrate that forest uses are impracticable).

Intervenor responds that the foregoing cases do not hold that economic analyses are categorically inappropriate in determining whether land is forest land under Goal 4, but rather that the local government in each case failed to provide an adequate explanation of the relevance of the economic analysis to that question. According to intervenor, the Stuntzner memorandum adequately explains why forest use of the subject property is not economically viable.

We agree with petitioners that economic analyses of the type employed here and in *Potts*, *Dhillon* and *Friends of Yamhill County* are impermissible means to determine whether land is subject to Goal 4. As DLCD and ODF argued, such analyses require a comparison of investment costs and expected future revenue that is necessarily based on speculations regarding economic conditions 60 or more years in the future. Such evidence is so highly speculative and variable-

dependent that, as ODF notes, almost any result could be justified under the right assumptions. As one example from the present case, the Stuntzner memorandum estimates a stumpage value for spruce harvested 60 years from now based on *current* log values, at $200.50 per thousand board feet. Record 1675. In other words, the memorandum appears to assume that timber prices 60 years from now will be the same as timber prices today. However, there is no basis cited for that assumption, and it is difficult to imagine what kind of evidence would support that assumption.[20] If one assumes even a slight annual appreciation (or decline, for that matter) in timber values over 60 years, then the analysis yields quite a different result.[21] The point is that any economic analysis that depends on precise quantification of prices and costs that far in the future is inherently unreliable. We believe it to be inconsistent with Goal 4 to rely on such analyses to determine whether land is forest land protected by the goal. This subassignment of error is sustained.

5. Infected Trees

Petitioners next argue that the county erred in assuming that the diseases infecting the cedar and Douglas fir on the property render the property unsuitable for commercial forest use involving those species. Petitioners cite to evidence that the two identified diseases are present throughout the county, and argues that if the mere presence of the diseases is sufficient to declare that land is not forest land, then much of the private forest land in the county is no longer protected by Goal 4. In addition, petitioners cite to evidence that disease-resistant cedar and Douglas fir seedlings are

[20] For another example, the memorandum calculates the net revenue from logging at 60 years (gross income less logging costs), but does not indicate how it determined the cost of logging the property in 60 years. Record 1676. The memorandum apparently assumes that the cost of logging will be same in 60 years as it is today. However, there is no cited basis for that assumption, and it seems highly questionable.

[21] As one of the supplemental memoranda notes, in 1989 DLCD apparently requested an economic analysis of forest land in the area of the subject property. We do not see that fact assists the county in the present case. DLCD is not bound to advocate the same approach in 2005. In any case, we note that DLCD requested that the analysis assume a stumpage appreciation rate of one percent above inflation. Record 1515. That assumption may be speculative, as well, but on its face it seems more reasonable than the assumption that stumpage values will remain unchanged for 60 years.

available, and argues that even if the existing trees cannot be salvaged the county must consider whether the subject property can be replanted with disease-resistant species.

Intervenor responds that the Stuntzner report is sufficient to establish that the infected trees cannot reach commercial maturity and that the only practicable course is to cut down the existing stands. As to replanting with disease-resistant seedlings, the March 11, 2004 Stuntzner memorandum indicates that there has been some success in developing disease-resistant Port Orford Cedar and Douglas fir seedlings, but states that the "process is lengthy and only a limited amount of seedlings are available." Record 1663.

We generally agree with petitioners that the presence of infected trees on the subject property is not a sufficient basis to conclude that the subject property is not "forest land" under Goal 4, at least where those diseases are widespread on other forest lands in the area and not somehow peculiar to the subject property. Even then, the county must consider whether the diseases are treatable or the impact can be mitigated. If non-susceptible species or disease-resistant seedlings of susceptible species are available, then the county must consider whether the subject property can be restocked. Here, as explained above, it appears that the subject property can be restocked with non-susceptible species. In addition, that only a limited amount of disease-resistant seedlings of susceptible species are currently available does not establish that the property cannot be restocked with such seedlings, now or in the foreseeable future. This subassignment of error is sustained.

6. Other Factors

As noted, the Stuntzner memorandum cites a number of "logistical problems" that limit the viability of commercial forest uses on the site. Petitioners argue that the same or similar constraints are present on other coastal forest lands in the area, and that the cited "problems" are not sufficient in themselves to support a conclusion that the subject property is not "forest land" under Goal 4.

We generally agree. The cited factors, such as proximity to rural residential dwellings or required estuarine buffers, may increase the cost of forest practices or reduce the potential yield of timber. However, such factors are presumably present on many parcels in the area planned and

zoned for forest uses. In any case, the Stuntzner memorandum lumps those factors in with economic analysis that we rejected above, and concludes that the cumulative weight of these considerations leads to the conclusion that the property is not suitable for commercial forestry. The memorandum does not state that the "logistical problems" in themselves are sufficient to support that conclusion, without the economic analysis. Accordingly, we agree with petitioners that the "other factors" are not sufficient in themselves to demonstrate that the subject property is unsuitable for commercial forest use. This subassignment of error is sustained.

C. Other Forested Lands that Maintain Soil, Air, Water and Fish and Wildlife Resources

The Goal 4 definition of forest lands includes "other forested lands that maintain soil, air, water and fish and wildlife resources." *See* n 15. Petitioners argue that the county's findings fail to adequately address whether the subject property is forest land under this element of the definition.

Petitioners cite to a letter from the Oregon Department of Fish and Wildlife (ODFW) expressing concerns regarding impacts of development allowed under the UR-2 zone on the estuary that adjoins the 236-acre parcel or the buffer areas on that parcel that protect the estuary.[22] According to petitioners, the county's decision ignores those concerns, and relies on unsupported conclusions in the Stuntzner memorandum that the property is not needed for watershed protection, wildlife or fisheries habitat.[23]

---

[22] The ODFW letter expressed concerns regarding urban residential uses that would increase impervious surfaces, increasing runoff and accumulation of pollutants and flushing those pollutants into the nearby sloughs. The letter also expressed concerns regarding marinas and other allowed uses that might disturb shellfish and other aquatic species, and golf courses or other uses with landscaped areas that might increase fertilizer and pesticide runoff into the sloughs. Record 857-58.

[23] The county's decision addresses the "other forested lands" element of the Goal 4 definition in the same findings that address a code provision that presumably implements Goal 4 and that defines "forest land" to include "other forest lands needed for watershed protection, wildlife and fisheries habitat and recreation." Those findings state, in relevant part:

> "* * * As concluded by the Stuntzner Report, the Site consists of approximately 184 acres and represents only about one percent of the Joe Ney and South Slough Watersheds. Also, the Site is located at the low point in the watershed and activities taking place at the Site will not affect a large area downstream. After reviewing the evidence in the record, and interpreting

With respect to the Stuntzner report, petitioners first question the qualifications of the author, a timber consultant, to evaluate whether land maintains "soil, air, water and fish and wildlife resources." With respect to impacts on the estuary, the report merely notes that the property constitutes only one percent of the watershed feeding the adjoining sloughs.

We agree with petitioners that the county did not adequately address whether the subject property is forest land under the "other forested lands" element of the Goal 4 definition. In *Doob v. Josephine County*, 48 Or LUBA 227, 243-44 (2004), we held that the "mere presence of trees on the property" or the fact that trees play some role in slowing erosion or supporting air and water quality is not a sufficient basis to conclude that land is "other forested lands" under that element of the Goal 4 definition. If the question in the present case was whether the "soil, air, water and fish and wildlife resources" on the subject 184-acre site considered in isolation render the subject property "forest lands" under that element, we might well agree with intervenor that the county's findings adequately demonstrate that the subject site is not forest land.

> this provision of the ZLDO, the Board of Commissioners finds that there is insufficient evidence to support a finding that the site includes forest land that is needed for protection of the watershed.
>
> "Regarding whether the subject property is needed for wildlife and fisheries habitat, the Stuntzner memorandum dated January 17, 2005, concludes that the Site has been fragmented and is no longer connected to other forest areas due to existing development in the area, thereby reducing its value for wildlife habitat. Also, the evidence in the record supports a finding that there are no threatened or endangered species present on the Site, and that there is no other significant wildlife habitat on the Site. Although evidence has been submitted regarding the general biological significance of the South Slough area to marine life, there is no evidence in the record to support a finding that this particular 184-acre Site includes forest land that is 'needed' for wildlife or fisheries habitat. * * *
>
> "* * * * *
>
> "* * * As described in the Stuntzner Report and supplemental materials, 80 percent of the trees on the Site are diseased and dying, and the Site therefore has no realistic chance of providing the environmental benefits to soil, air and water resources that are typically seen in a healthy forest. Conversion of the Site to a different type of forest is not a viable economic proposition for the landowner. Even if the conversion of the Site was a realistic option, it would require extensive logging and complete reforestation, which itself causes substantial disturbance to soil and vegetation. After reviewing all of the evidence in the record, the Board of Commissioners finds that the Site does not include forest lands that are necessary to maintain soil, air or water resources within the meaning of Goal 4." Record 222-23.

However, the subject property has extensive frontage on and has two small streams that drain directly into what everyone appears to agree is an ecological resource of considerable significance: the sloughs and estuary. There is testimony in the record from a state agency charged with protecting that resource expressing concerns regarding impacts on that resource from uses allowed under the plan and zone designations adopted by the decision. The county's decision does not address that testimony, but instead relies on a report submitted by a person who has no stated or obvious qualifications to render expert opinions regarding the role of forested lands in preserving estuarine resources from the impacts of urban development. The opinion rendered—based on the observation that the 184-acre site is only one percent of the entire *watershed*—does nothing to address ODFW's concerns regarding specific impacts on the slough and estuary. This subassignment of error is sustained.

D. Third Assignment of Error: Necessary to Permit Forest Operations

Under the third assignment of error, petitioners argue that the county failed to address whether the subject property is "forest land" under the second element of the definition of forest lands protected by Goal 4, which includes "adjacent or nearby lands which are necessary to permit forest operations or practices." *See* n 15. According to petitioners, the county's findings simply state that there are no forest operations on adjacent or nearby forest lands.[24]

Petitioners contend that the county ignores the fact that some of the adjoining parcels are planned and zoned for forest uses. In order to determine whether the subject property is forest land under the second element, petitioners argue, the county must evaluate uses on adjoining or nearby forest parcels and determine whether the subject property must remain in resource designation in order to permit forest operations and practices on such parcels.

---

[24] The county's findings state, in relevant part:

> "With respect to the second criterion under Goal 4 * * *, the Site does not include any land that is necessary to permit forest operations or practices on adjacent or nearby forest lands, because there are no forest operations on adjacent or nearby forest lands." Record 222.

Intervenor responds that petitioners waived this issue by not raising it below. In any case, intervenor argues, the county adopted additional findings based on or from the Stuntzner memoranda that discuss the adjoining forest parcels and conclude that they are developed with residential uses and show no sign of commercial forest operations or practices. Record 207-08, 1677, 1511, 1520. We need not address whether this issue was waived, because we agree with intervenor that the county adopted findings that adequately explain why the subject property is not forest land under the second criterion.

The third assignment of error is denied. The fourth assignment of error is sustained. The fifth assignment of error is sustained, in part.

The county's decision is remanded.