BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK HERRING, LESLIE HILDRETH,
JESSE ULLOA and JOANNE ULLOA,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2006-203

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 06/14/2007

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 a county ordinance that amends the comprehensive plan designation of a portion of a tract from Agricultural to Marginal Lands, and rezones the portion from E-40, Exclusive Farm Use, to Marginal Land with Site Review (ML/SR).

FACTS

The subject property was once part of a 114-acre parcel planned and zoned for agricultural use, adjacent to the southern city limits and urban growth boundary of the City of Eugene. In 1992, the northerly 40 acres of the original parcel was redesignated and rezoned to Marginal Lands. In 1995, the original 114-acre parcel was partitioned into two parcels known as tax lots 303 and 304. The partition line between tax lots 303 and 304 runs north and south down the middle of the original parcel, resulting in two split-zoned parcels. The northerly 20 acres of each tax lot is planned and zoned Marginal Lands, while the southern portion of each tax lot remains planned and zoned for agricultural uses. The southern portion of tax lots 303 and 304 that are zoned for agricultural use totals approximately 74 acres.

The southern 74-acre portion of tax lots 303 and 304 (the subject property) lies on a south-facing slope with 10 to 30 percent grades, and is vegetated with grasses, oak, cedar, Ponderosa pine and Douglas fir trees. Two powerlines cross the property, over easements that cover approximately nine acres. Soils on the subject property carry class VI and VII agricultural ratings. Of the six soils present on the property, three soils totaling approximately 15 acres possess forestry site class ratings and associated cubic feet per acre per year (cf/ac/yr) ratings. The predominant soils on the property, totaling approximately 59 acres, are not rated for forest productivity.

In 2005, the owners of tax lots 303 and 304 applied to have the 74-acre subject property redesignated and rezoned to Marginal Lands. The planning commission

recommended denial of the application. The county board of commissioners approved the application. This appeal followed.

INCORPORATED ARGUMENTS IN THE AMICUS BRIEF

The applicant below failed to file a timely motion to intervene, and subsequently filed a motion for permission to appear as amicus, along with a proposed amicus brief. We denied that motion and the proposed brief. *Herring v. Lane County*, __ Or LUBA __ (LUBA No. 2006-203, May 15, 2007, Order on Motion to Appear as Amicus). However, our order failed to appreciate that the county's response brief states that the county "incorporates the arguments of amicus as if fully set forth here." Response Brief 6.

Although our rules do not expressly provide for it, it is a common and convenient practice for parties before LUBA to incorporate into their briefs by reference the arguments made in other parties' briefs. We are not aware of any prior case where the incorporated arguments were part of a brief that was subsequently disallowed, because the brief was filed by a person whose participation in LUBA's review was denied. However, we see no reason why incorporation of arguments in a subsequently disallowed brief should necessarily fail, as long as the brief including the incorporated material otherwise complies with our rules. Here, the county's response brief including the incorporated material does not exceed the 50-page limit for briefs under OAR 661-010-0030(2) and OAR 660-010-0035(2), and does not appear to violate any other rule limitation. Accordingly, we shall consider the incorporated arguments from the amicus brief, as if they were fully set forth in the county's response brief.

INTRODUCTION

Lane County is a "marginal lands" county, and therefore may designate certain lands as marginal lands, under *former* ORS 197.247, if such lands meet a series of tests. Forest lands that are designated as marginal lands may be developed at higher densities than other forest lands.

The first test, the "gross income" test, requires a finding that the subject property was "not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income[.]" ORS 197.247(1)(a).[1] The second assignment of error challenge the county's findings under the forest operation "gross income" test.

The second test can be met in one of three ways. ORS 197.247(1)(b). In the present case, the county found that the "productivity" test under ORS 197.247(1)(b)(C) is met. *See* n 1. In relevant part, ORS 197.247(1)(b)(C) requires a finding that the subject property is "not capable of producing * * * eighty-five cubic feet of merchantable timber per acre per year * * *." The first and third assignments of error challenge the county's findings under the productivity test.

---

[1] 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)."

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that the subject property is not capable of producing 85 cf/ac/yr of merchantable timber, arguing that the county erred in failing to apply the administrative rules that implement Statewide Planning Goal 4 (Forest Lands).

Petitioners explain that OAR 660-006-0010, part of the Goal 4 administrative rule, requires counties to inventory forest lands as defined by Goal 4, including a mapping of "forest site class."[2] OAR 660-006-0010 specifies that "[i]f site information is not available then an equivalent method of determining forest land suitability must be used." According to petitioners, forest site class IV includes lands capable of producing 85 to 120 cf/ac/yr, while forest site class V includes lands capable of producing 50 to 85 cf/ac/yr. Thus, petitioners argue, if the county's forest lands inventory includes forest site class mapping for property proposed for a marginal lands designation, it is easy to determine whether the productivity test at ORS 197.247(1)(b)(C) is met or not. However, where as in the present case the county's inventory does not include complete forest site class information for the subject property, petitioners argue that OAR 660-006-0010 requires the county to use an "equivalent method of determining forest land suitability."

Similarly, petitioners argue that the productivity measure that ORS 197.247(1)(b)(C) references—cubic feet per acre per year—is defined in OAR 660-006-0005(2), as "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

---

[2] OAR 660-006-0010 is entitled "Inventory" and provides:

> "Governing bodies shall include an inventory of 'forest lands' as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands or lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken are not required to be inventoried under this rule. Outside urban growth boundaries, this inventory shall include a mapping of forest site class. If site information is not available then an equivalent method of determining forest land suitability must be used. Notwithstanding this rule, governing bodies are not required to reinventory forest lands if such an inventory was acknowledged previously by the Land Conservation and Development Commission."

Conservation Service (NRCS)."[3] OAR 660-006-0005(2) goes on to specify that, "[w]here 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." Petitioners contend that the definition at OAR 660-006-0005(2) applies to designations of marginal land under ORS 197.247(1)(b)(C) and, like OAR 660-006-0010, requires that where forest site class or NRCS data is not available the county's decision must be based on an "equivalent method" or one that provides "equivalent data." According to petitioners, the county erred in failing to apply OAR 660-006-0010 and 660-006-0005(2) and in failing to require the applicants to determine forest productivity of unrated soils based on an "equivalent method."

The county rejected petitioners' argument that OAR 660-006-0010 directly applies to a marginal lands determination under ORS 197.247.[4] On appeal, the county argues that neither OAR 660-006-0010 nor OAR 660-006-0005(2) applies to a marginal lands determination. In any case, the county argues, the applicant's consulting forester submitted a comprehensive analysis of the site's forest productivity that satisfies any requirement for

---

[3] OAR 660-006-0005 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."

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

> "We find that OAR 660-006-0010 does not apply directly to this application for Marginal Lands designation and zoning. It is a direction to counties for the preparation of rural comprehensive plans and inventorying forest land within those plans. There is nothing in ORS 197.247 or LCDC's rules (OAR 660) that requires or even suggests that OAR 660-006-0010 applies to this application." Record 31.

"equivalent data." According to the county, the forester analyzed each soil on the subject property, including those with no forest site class information or NRCS data, and arrived at an overall productivity figure of 69.327 cf/ac/yr. The county found that

> "[t]he methodology used by [the consultant] is consistent with State law, relevant court decisions, the [County Board of Commissioners'] 1997 Interpretation and the Department of Forestry's published and approved methodologies and is very persuasive. * * *" Record 34.

The county is correct that the definition of cubic feet per acre at OAR 660-006-0005(2) does not directly apply to a marginal lands determination under ORS 197.247. *See Wetherell v. Douglas County*, 50 Or LUBA 167, 202-03 (2005), *rev'd and rem'd on other grounds* 204 Or App 732, 132 P3d 41 (2006), *aff'd* __Or __, __P3d ___ (2007) (the definition of cubic feet per acre at OAR 660-006-0005(2) is not directly applicable to determining whether land is forest land under Goal 4, but is relevant context). The definitions at OAR 660-006-0005 apply "[f]or the purpose of this division," and the substantive rule provisions use the term "cubic feet per acre" only for purposes of approving dwellings in forest zones under OAR 660-006-0027. Nonetheless, as we noted in *Wetherell*, that definition is a contextual indication, among others, that in determining whether land is forest land the local government may not rely on the absence of forest productivity data for particular soils, but must make its decision based on objective, empirical measurements of productivity.

OAR 660-006-0010 governs the county's inventory of Goal 4 lands. While the rule does not expressly say so, we understand the rule to apply both to the initial development of the county's Goal 4 inventory, and also to any subsequent modifications to that inventory. Designating forest lands as marginal lands and amending the comprehensive plan designations and zoning for those lands from one Goal 4 designation/zone to another Goal 4 designation/zone is a modification of the county Goal 4 inventory. Therefore, we disagree

with the county that OAR 660-006-0010 does not apply directly to the present application for marginal lands designation and zoning.

Even if OAR 660-006-0010 were not directly applicable, ORS 197.247(1)(b)(C) requires the county to determine whether the subject property is "capable of producing * * * eighty-five cubic feet of merchantable timber per acre per year." Cubic feet per acre per year is an objective and well-established measurement of forest productivity, derived by one or more objective and well-established empirical methodologies. It is unlikely that any methodology that is sufficient to establish the cf/ac/yr of a site with soils that have no inventoried forest site class or NRCS ratings will differ significantly from the "equivalent methods" referenced in OAR 660-006-0010. It also seems unlikely that the resulting data will be significantly different from the "equivalent data" referenced in OAR 660-006-0005(2). In our view, the statute and the rule are congruent in requiring that modifications to the county's forest lands inventory—such as making a marginal lands determinations under the "productivity" prong—be based on objective, empirical measurements of cf/ac/yr.

That said, it is not clear that the county's conclusion that OAR 660-006-0010 does not apply is reversible error. The applicant's consulting forester conducted a forest productivity analysis of the subject property, including the soils that have no forest site class or NRCS rating. That productivity analysis resulted in cf/ac/yr figures for all individual soils and an overall average figure for the property as a whole. The county found that the methodology used by the forester is consistent with the published methodologies approved by the state Department of Forestry. Under the third assignment of error, below, petitioners challenge certain aspects of the forester's methodology and his conclusions, particularly with respect to a 24-acre portion of the property. However, we reject those and other specific challenges to the forester's analysis. For present purposes, it suffices to conclude that petitioners have not demonstrated that the analysis relied upon by the county is inconsistent

with any provision of the Goal 4 rules. Accordingly, any misconstruction of law in the county's findings regarding the applicability of the Goal 4 rules is at most harmless error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners urge us to limit or overturn holdings in two recent LUBA cases interpreting ORS 197.247. In those cases we affirm the county's approach to applying that statute, pursuant to a 1997 Lane County directive that sets forth how the county board of commissioners believes applicants may demonstrate that land is marginal land under the statute.

A. Use of 1983 prices

In *Just v. Lane County*, 49 Or LUBA 456 (2005), we rejected an argument that the $10,000 "annual gross income" test for forest operations under ORS 197.247(1)(a) should be based on projected future timber prices at the time any existing timber stand on the property is harvested. Because the statute had no mechanism to adjust the $10,000 threshold for inflation or other economic changes over time, we explained, under the petitioner's view the $10,000 threshold would rapidly become outdated and incapable of performing its intended function. Citing legislative history, we concluded that "the legislature intended the gross income test under ORS 197.247(1) to be applied based on the five-year period preceding January 1, 1983, and not based on subsequent years." 49 Or LUBA at 464. We then affirmed the county's decision to use 1983 timber prices, pursuant to the methodology set out in a document adopted by the county board of commissioners in 1997, entitled "Supplement to Marginal Lands Information Sheet" (1997 Supplement). The 1997 Supplement provides "direction regarding the interpretation and administration of marginal lands applications."

Record 49. The 1997 Supplement specifies that the forest operation gross income test be determined based on 1983 timber prices.[5]

In the present case, petitioners argue that use of 1983 timber prices is inconsistent with ORS 197.247(1)(a), for a different reason from that advanced in *Just*. According to petitioners, ORS 197.247(1)(a) applies a five-year scope of analysis to both farm operations and forest operations. *DLCD v. Lane County*, 23 Or LUBA 33, 35-36 (1992). For farm operations, petitioners argue, the county must examine the years 1978 through 1982 and, if the farm operation produced more than $20,000 in any three of those years, then the land is not marginal lands. For forest operations, although the statute looks at hypothetical income capability over a growth cycle rather than actual income, petitioners argue that the range of years (1978 to 1982) is the same. The correct analysis of forest operations under ORS 197.247(1)(a), petitioners contend, is not to hypothesize timber harvest in 1983 under 1983 log prices, as the 1997 Supplement indicates. Instead, petitioners argue, the county must hypothesize timber harvests in 1978, 1979, 1980, 1981 and 1982 using prevailing prices for those years, and divide by the growth cycle to get "average annual" income. If any of the resulting five annual numbers is at least $10,000, petitioners contend, the subject property

---

[5] We described that 1997 Supplement in *Just*:

> "In 1997, the county board of commissioners issued an 'information sheet' that sets out the following methodology for applying the 'forest operation' prong of the ORS 197.247(1)(a) gross income test:
>
> "'1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
>
> "'2. Assume that the stand was, in 1983, fully mature and ready for harvest.
>
> "'3. Using the volumes calculated in step (1), and 1983 prices, calculate the average gross income over the growth cycle.' Record 36.
>
> "The information sheet also directs that the methodology assume a 50-year growth cycle, i.e., divide by 50 the timber revenue produced at harvest of a (hypothetical) fully mature stand to determine the average annual gross income. * * *" 49 Or LUBA at 461.

does not meet the productivity test. Petitioners argue that if the county had followed that approach in this case, the resulting average annual income would be approximately 40 percent higher than that calculated using only 1983 prices, due apparently to higher log prices in earlier years.

The county responds that ORS 197.247(1)(a) does not specify which prices are applied to the forest operation analysis, and that the county's choice to use 1983 prices, the year the legislature adopted the marginal lands statute, is reasonable and should be affirmed.

Our opinion in *Just* rejected the argument that the county must use projected future log prices, and did not consider the argument made here, that the county must use average log prices during the five-year period specified in the statute. Petitioners are correct that, as written, ORS 197.247(1)(a) applies the five-year period from 1978 to 1982 to both the farm and forest operation gross income analyses. However, that five-year time period has a different significance for farm and forest operations. For farm operations, the question is whether the operation actually produced $20,000 in annual gross income during any three of the five years between 1978 and 1982. For forest operations, the question is whether the subject property was managed as part of a forest operation during three of five years between 1978-82 that was *capable* of producing an average annual gross income, over the growth cycle. Because forest operations do not produce annual revenue, the analysis of forest operations is necessarily more hypothetical than for farm operations, and the significance of the five-year period is less clear. The statute is simply silent as to how that five-year period is applied in determining whether the forest operation is "capable of producing an average, over the growth cycle, of $10,000 in annual gross income."

Because the statute is silent on this issue, the county has some latitude in determining how to resolve it. While the approach favored by petitioners may well be consistent with ORS 197.247(1)(a), we cannot say that it is inconsistent with the statute to use 1983 log prices to calculate whether the forest operation is "capable of producing an average, over the

growth cycle, of $10,000 in annual gross income," in other words, to hypothesize harvest of a fully stocked mature stand of trees in 1983, as opposed to 1978 or 1982, or an average of the years 1978-82. The legislature adopted the marginal lands statute in mid-1983, and it is reasonable to assume that the $10,000 threshold is expressed in 1983 dollars, not $10,000 in 1978 dollars or an average of dollar values during the years 1978-82. If so, then it also seems reasonable to assume that the legislature did not intend to preclude use of 1983 log prices to determine whether the forest operation exceeds the $10,000 threshold. As we stated in *Just*, ORS 197.247(1)(a) requires an "apples to apples" comparison. Given the historic pace of inflation during the period 1978-82, using 1978 log prices or averaged 1978-82 log prices to determine whether a $10,000 threshold expressed in 1983 dollars is exceeded is something less than an apples to apples comparison.

In any case, as the county notes, the applicants' consulting forester made an alternative calculation that used the 1978-82 log prices suggested by petitioners. While the result was higher than using 1983 log prices, the average annual income still fell below $10,000. Petitioners argue that the forester's analysis and the county decision include several cumulative errors that, if all of them were corrected, would likely push the average annual income above $10,000. We address and reject those arguments below, under the third assignment of error. Accordingly, petitioners' arguments under this sub-assignment of error provide no basis for reversal or remand.

B. Use of a 50-year growth cycle

The county's 1997 Supplement specifies that marginal lands applicants should use a 50-year growth cycle to calculate a forest operation's average annual income under ORS 197.247(1)(a), unless "another standard could be used [that is] substantiated by compelling scientific evidence presented by the applicant." The Supplement states that that "choice was based on evidence that the USDA [United States Department of Agriculture]

Natural Resource Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standardized figure." Record 50.

Petitioners argue that the 1997 Supplement is incorrect in stating that the NRCS uses a 50-year cycle for rating forest soil productivity. According to petitioners, the county misunderstands how NRCS rates forest productivity. Petitioners argue that NRCS tables use a 50 or 100-year "base age," which is a figure used in calculating the "site index" of a particular soil. Petitioners cite to various NRCS technical documents and data tables in the record, and argues that those documents demonstrate that for purposes of determining when a timber stand should be harvested (and hence what is the "growth cycle" for purposes of ORS 197.247(1)(a)) depends on its "culmination of mean annual increment" or CMAI. According to one cited document, CMAI is the age that is "the most efficient time to harvest as far as tree growth is concerned." Record 159. Petitioners contend that for most soils the CMAI for Douglas fir is typically 70-90 years. Based on these documents, petitioners argue that the 50-year base age has nothing to do with the harvest rotation or growth cycle, and the county erred in calculating average annual income based on a 50-year growth cycle, which significantly underestimates forest capability.

The county responds that petitioners have not demonstrated that a 50-year growth cycle is inconsistent with accepted forest practices or the marginal lands statutes. The county cites to testimony from the applicant's consulting forester, the only expert who testified below, that:

> "* * * Very few private woodland owners, and even fewer industrial forestland owners, use a 50 year rotation. The majority of trees grown west of the Cascades are harvested before 50 years old. The primary reason for this is because the growth of the trees is slowing down after 50 years of age; prior to 50 years of age the growth is accelerating." Record 80 (emphasis omitted).

According to the county, the county reasonably relied on this expert testimony to reject petitioners' contentions for a growth cycle based on a longer rotation.

ORS 197.247(1)(a) does not specify how the "growth cycle" is calculated, and given that legislative silence the county has some latitude to make that determination in the first instance. The county is correct that the only competent expert testimony in the record cited to us is that a 50-year rotation or growth cycle is the predominant forest practice west of the Cascades. The documents cited to us by petitioners are perhaps some evidence to the contrary, but those documents certainly do not conclusively establish that it is error to assume a 50-year growth cycle. The county's reliance on a 50-year growth cycle to calculate the average annual income for purposes of ORS 197.247(1)(a) is supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the county's conclusion, under ORS 197.247(1)(b)(C) that the subject property is "not capable of producing * * * eighty-five cubic feet of merchantable timber per acre per year * * *." Petitioners contend that the applicant's analysis was flawed in three particulars, and that the county erred in relying on that analysis.

A. Twenty-four Acres of Grassland

The applicant's consulting forester evaluated the soils and conditions on the subject property, assessing potential productivity for two tree species: Douglas fir and Ponderosa pine. The forester used NRCS data to estimate productivity for growing Douglas fir, and generated on-site data for estimating productivity for growing Ponderosa pine, based on those portions of the property that currently grow Ponderosa pine.

According to petitioners, the forester identified 24 acres of the property, approximately one-third of the site, as "grassland with exposed rock," on which no trees currently grow and, based on aerial photographs, on which no trees have grown for at least 70 years. The forester found that due to shallow soils and other factors, the 24-acre area cannot grow trees at all and effectively is capable of zero cf/ac/yr. The remaining 49 acres of

the property, the forester found, has the potential to produce slightly over 100 cf/ac/yr. However, when the 24-acre grasslands portion with its zero rating is averaged in, the result for the 74-acre property as a whole drops to 69.327 cf/ac/yr. Record 100.

Petitioners argue that the 24-acre area has two of the same soil types that either have NRCS ratings or on-site ratings developed by the forester, and that those same Philomath soil types currently grow Ponderosa pine trees elsewhere on the property. Petitioners contend that simply because no trees grow on the 24-acre area is not a basis to assume that that area has zero forest productivity. *See Wetherell v. Douglas County*, 50 Or LUBA at 203-04 (absence of a published NRCS productivity rating is not a sufficient basis to assume that soils produce zero cf/ac/yr, in determining whether land is forest land under Goal 4).

The applicant's consulting forester explained at length why the 24-acre area differed from other areas of the property with the same soil types. Record 88. The county adopted findings explaining why it chose to rely on that testimony, noting that petitioners presented no evidence indicating that a 24-acre area that has not grown trees in at least 70 years can be used to grow timber. Record 30. Petitioners challenge neither the forester's testimony at Record 88 nor the findings relying on that testimony. Further, the forester and county did not simply assume that the lack of NRCS productivity ratings for a particular soil means that the soil can produce zero cf/ac/yr, as in *Wetherell*. Instead, the forester evaluated the productivity of the Philomath soil types on the property, based on measurements of existing trees growing on those soils, and determined based on evidence petitioners do not dispute that 24 acres of those soils have not historically in the past and cannot in the future produce merchantable stands of timber. *See Just v. Linn County*, 52 Or LUBA 145, 155 (2006) (distinguishing *Wetherell*, where the applicant's forest consultant evaluated the actual productivity of the soils on the subject property and did not assume that lack of an NRCS rating meant zero productivity). Petitioners have not demonstrated that the county erred in

concluding that the 24-acre area is capable of producing zero cf/ac/yr, for purposes of ORS 197.247(1)(b)(C).

B. Merchantable Timber and Powerline Easements

Petitioners also argue that the county's analysis includes two other flaws: (1) the county evaluated only Douglas fir, and not other commercial tree species such as Ponderosa pine, as "merchantable timber," and (2) the county excluded from the analysis approximately nine acres of the property that is subject to powerline easements

The county responds that the analysis it relied upon did not, as petitioners contend, evaluate only Douglas fir or fail to take into account the acreage under the powerline easements. The county appears to be correct. The consulting forester evaluated the site's potential for producing both Douglas fir and Ponderosa pine and concluded that the property can at best produce an average of 69.327 cf/ac/yr. Record 100. We affirmed that conclusion above. Petitioners cite to findings that conclude that Ponderosa pine is not a "merchantable" species in the Willamette valley. However, even if those findings are erroneous, petitioners do not explain why any error would warrant reversal or remand, given the county's conclusion that even assuming the property were stocked with Ponderosa pine the property is not capable of producing 85 cf/ac/yr.

Similarly, the consulting forester conducted two analyses, one that excluded the land subject to the powerline easements and one that did not. The analysis that included the land subject to the powerline easement produced the estimate of 69 cf/ac/yr affirmed above. The other analysis produced an even lower estimate. Thus, even if the county erred in concluding that the land subject to the power line easements has no capability to produce timber, that error would not provide a basis for reversal or remand. These sub-assignments of error are denied.

The third assignment of error is denied.

The county's decision is affirmed.