BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLARK ANDERSON, LYNN ANDERSON,
PATRICIA CHOMYN, AMY DONNELLY,
MARTIN DREISBEICH, ROBERT EMMONS,
NENA LOVINGER, TIM McMAHEN,
JOHN A. RICHARDSON, JONNY B. WATSON
and ROBERT WINKLER,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

CAROL DENNIS,
Intervenor-Respondent.

LUBA No. 2006-236

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

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

P. Steve Cornacchia, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hershner Hunter LLP.

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

AFFIRMED 08/06/2007

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 an ordinance redesignating a 102-acre parcel from Forest Land to Marginal Land and rezoning the parcel from F-2/Impacted Forest Lands to ML/Marginal Land.

MOTION TO INTERVENE

Carol Dennis (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 property is a 102-acre parcel located north of the unincorporated community of Fall Creek. The property slopes upward towards the north, and is covered with a mixture of open meadow, brush and trees, including stands of Douglas fir, Ponderosa pine and cedar. The property has been selectively logged in the past. There are six types of soils on the property, with mixed ratings for forest productivity. Properties to the north, east and west consist of large parcels of resource lands, with the exception of one property immediately to the west that is zoned marginal lands. Properties to the south are generally zoned for rural residential uses.

Intervenor applied to the county to redesignate and rezone the subject property marginal lands, under *former* ORS 197.247 (1991). Marginal lands designation and zoning would permit the property to be subdivided into five to eight residential lots. The county planning commission recommended denial. On November 8, 2006, the county board of commissioners held a hearing on the application. After deliberations, the board approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In relevant part, ORS 197.247(1)(a)(1991) allows the county to designate as marginal lands land that "was not managed, during three of the five calendar years preceding January

1, 1983, as part of * * * a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income." ORS 197.247(1)(b)(C), the so-called "productivity" prong of that statute, requires a demonstration that the land is not capable of producing 85 cubic feet per acre per year [cf/ac/yr] of merchantable timber.

Petitioners argue that the county erred in concluding that OAR 660-006-0005 and OAR 660-006-0010, part of the rules implementing Statewide Planning Goal 4 (Forest Lands), do not apply to the county's marginal lands determination.[1] According to petitioners, the county failed to adopt findings that intervenor's forest consultant used an "equivalent method" or an "alternative method" that provides "equivalent data," in determining the forest productivity of the subject property, as required by OAR 660-006-0005 and OAR 660-006-0010.

Petitioners' argument is identical to one advanced in a recent similar case, in which the petitioners were represented by the same counsel as in the present case. *Herring v. Lane County*, __ Or LUBA __ (LUBA No. 2006-203, June 14, 2007). The petition for review in the present case was filed prior to our decision in *Herring*. We concluded in *Herring* that (1) OAR 660-006-0005 does not apply to the county's marginal lands determination, but that (2)

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[1] OAR 660-006-0005(2) defines the term "cubic foot per acre" to mean:

> "* * * 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."

OAR 660-006-0010 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."

OAR 660-006-0010 does apply. We held in relevant part that OAR 660-006-0010 and the marginal lands statute are "congruent in requiring that modifications to the county's forest lands inventory—such as making a marginal lands determination under the 'productivity' prong [of ORS 197.247(1)(b)(C)]—be based on objective, empirical measures of cf/ac/yr." *Id*. slip op at 8. However, we ultimately concluded that the petitioners had failed to demonstrate that the analysis by intervenor's forest consultant was inconsistent with OAR 660-006-0010 or the marginal lands statutes. The forest productivity analysis in that case supplied cf/ac/yr figures for all individual soils and an overall average figure for the property as a whole, and concluded that the property was not capable of producing eighty-five cubic feet of merchantable timber per acre per year—the relevant standard under ORS 197.247(1)(b)(C). We rejected the petitioners' legal and evidentiary challenges to those figures and the ultimate conclusion. Accordingly, we concluded that the county's error in finding that OAR 660-006-0010 did not apply was harmless error.

In the present case, the applicant's consulting forester conducted a detailed empirical analysis of forest productivity, and concluded that the subject property is capable of producing, at most, 80.7 cf/ac/yr of merchantable timber. Although petitioners challenge aspects of that analysis in other assignments of error, we address and reject each of those challenges, below. Petitioners have not demonstrated that the consulting forester's analysis is inconsistent with OAR 660-006-0010 or ORS 197.247(1)(b)(C). Accordingly, we conclude, as we did in *Herring*, that the county's error in finding that OAR 660-006-0010 does not apply to marginal lands determinations is harmless error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners advance three sub-assignments of error under the second assignment of error. In the first sub-assignment of error, petitioners argue that the county erred in using 1983 timber prices to determine under ORS 197.247(1)(a) whether the subject property was

managed, during three of the five calendar years preceding January 1, 1983, as part of a forest operation capable of producing an average of $10,000 in annual gross income over the growth cycle. In the second sub-assignment of error, petitioners contend that the county erred in using a 50-year growth cycle in making that same determination under ORS 197.247(1)(a).

Petitioners recognize that we rejected similar challenges in *Just v. Lane County*, 49 Or LUBA 456 (2005) and *Walker v. Lane County*, 53 Or LUBA 374 (2007), but argue that those cases were wrongly decided. In *Herring*, we rejected an identical request to overrule *Just* and *Walker*. Petitioners' arguments in the present case offer no new reason to overrule *Just* or *Walker*, and we reject the first and second sub-assignments of error without further discussion.

The third sub-assignment of error involves an allegation that the county and the consulting forester erred in considering only Douglas fir, and not other merchantable species such as Ponderosa pine, for purposes of determining whether the subject property is capable of producing an average of $10,000 in annual gross income over the growth cycle, under ORS 197.247(1)(a). We address this issue together with a similar issue under the third assignment of error, below, which challenges the county's findings under the ORS 197.247(1)(b)(C) productivity analysis.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the county erred in two respects in evaluating the productivity of the soils on the subject property.

A. Ponderosa Pine

Intervenor's consulting forester opined that Douglas fir is the most valuable of all merchantable tree species, and that other merchantable tree species, including Ponderosa Pine, would not produce on the subject property a volume in cubic feet that would equal the

growth rate of Douglas fir. Accordingly, the forester used Douglas fir to determine both whether the property is capable of producing an average of $10,000 in annual gross income over the growth cycle, under ORS 197.247(1)(a), and whether the property can produce eighty-five cubic feet of merchantable timber per acre per year, under ORS 197.247(1)(b)(C). The county accepted that approach, and rejected petitioners' argument to the contrary.[2]

Petitioners argue that that approach is not supported by the record, and cite to a May 2003 document issued by the Oregon State University (OSU) Extension Service, entitled "Establishing and Managing Ponderosa Pine in the Willamette Valley." According to petitioners, the OSU document in combination with other evidence in the record establishes that Ponderosa pine is more productive than Douglas fir on some of the soil types found on the subject property. Petitioners contend that there is no other substantial evidence to the contrary, and thus the county erred in refusing to evaluate whether portions of the property could be used to grow Ponderosa pine, in determining whether the subject property is marginal lands under ORS 197.247(1)(a) and ORS 197.247(1)(b)(C).

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[2] The county found, in relevant part:

> "* * * [The consultant's] reports include an analysis of the species listed by [opponent] Goal One Coalition in public testimony and concludes that they are either not merchantable, or would not produce an annual volume equal to Douglas-fir. An opponent, Goal One Coalition, has provided no substantial evidence to refute or contradict [the consultant's] professional opinion regarding the merchantability and productivity of those particular species. * * * [The consultant] opines that all other merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir. * * *
>
> "[The consultant] * * * prepared an analysis of the Goal One Coalition's arguments regarding the productivity of the Ponderosa Pine. [The consultant] opines that Goal One Coalition has misapplied and misused information from various internet publications to conclude that Ponderosa Pine has a much higher productivity potential on Western Oregon soils than is accurate and than can be scientifically verified. * * * His analysis and conclusions regarding the productivity and merchantability of [Ponderosa Pine] is attached as Exhibit L to the application. His conclusions mirror his earlier opinion (Exhibit G to the application) that all other potentially merchantable tree species would either not grow on the soils of the subject property or would not produce a volume in cubic feet that would equal the growth rate of Douglas-fir." Record 19-20.

Intervenor responds, and we agree, that the evidence petitioners cite to falls short of demonstrating that the county's analysis under ORS 197.247(1)(a) and ORS 197.247(1)(b)(C) is not supported by substantial evidence. Nothing cited to us in the 2003 OSU document clearly indicates that Ponderosa pine is more productive than Douglas fir on particular soil units in the Willamette Valley. That conclusion is apparently based on interpolation and self-generated analysis by opponents who do not appear to be soil or forestry experts. Intervenor's forestry consultant criticized the opponents' analysis at length, in Exhibit L, cited in the county's decision. Petitioners make no attempt to address the consultant's criticism of the evidence they cite, but simply argue that their evidence should be believed over conflicting expert testimony.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). Here, a reasonable person could rely on the consultant's reports and testimony to reject the opponents' claim that Ponderosa pine is more productive than Douglas fir on some soils of the subject property. Accordingly, petitioners have not demonstrated that the county erred in evaluating the capability and productivity of the subject property using Douglas fir.

B. Dixonville/Philomath/Hazelair Soils

Petitioners argue that the county miscalculated the productivity of two of the soil units on the subject property, 43C and 43E Dixonville/Philomath/Hazelair, which are

intermixed complexes of three individual soil types. The two soil units differ primarily by slope. The county found, based on the testimony of intervenor's forest consultant, that these two soil units have, at best, productivity ratings of 54 and 53 c/f/ac/yr, respectively, based on two different sources of data.[3] One source is data from the Lane Council of Governments (LCOG) and the other is data from the state forester. Petitioners argue that those productivity estimates are unreliable because the LCOG data erroneously assume zero productivity for the Hazalair and Philomath components of the 43C and 43E soil complexes, while both sources of data provide ratings only for Douglas fir.

We need not address petitioners' challenges to reliance on the LCOG data and how it measures the productivity of soil complexes, because even if the county's productivity estimates for the 43C and 43E Dixonville/Philomath/Hazelair soils are based solely on the state forester data, those estimates are supported by substantial evidence. The only challenge petitioners advance to the state forester's data is that the data provide ratings only for Douglas fir and not other species such as Ponderosa pine. As explained above, petitioners have not demonstrated that the county erred in determining that Douglas fir is the most productive and valuable merchantable tree species for the soils found on the subject property, and in evaluating the capability and productivity of the property based on Douglas fir.

The third assignment of error is denied.

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

> "The productivity capability for these soil map units are rated by the applicant using the LCOG [Lane Council of Governments] document ratings of 54 & 64 [cf/ac/yr] respectively. The LCOG ratings are based upon a weighted average methodology that uses a zero productivity rating for two of the three components of the complex. The opponents' submittal assigns ratings to each component of the complex and uses ratings for Ponderosa Pine from the Extension Service document for the components that have not been rated in the Soil Survey. The State Forester has assigned ratings of 45 cf/ac/yr to each of those soil map units. The State Forester's ratings are more reliable for assigning a rating for Douglas Fir productivity to these soil map units and were found to be suitable in [*Just v. Lane County*, 49 Or LUBA 456 (2005)]. Furthermore, [the consulting forester] has applied the higher LCOG ratings in his analysis that provides an *overestimation* of productivity for these two soil map units." Record 22 (emphasis in original).

The county's decision is affirmed.