

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARK HERRING, LESLIE HILDRETH,
5 JESSE ULLOA and JOANNE ULLOA,
6 *Petitioners,*

7
8 vs.

9
10 LANE COUNTY,
11 *Respondent.*

12 LUBA No. 2006-203

13
14
15 FINAL OPINION
16 AND ORDER

17
18 On remand from the Court of Appeals.

19
20 Jannett Wilson, Eugene, represented petitioners.

21
22 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

23
24 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
25 participated in the decision.

26
27 REMANDED

01/23/2008

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

INTRODUCTION

The present appeal is on remand from the Court of Appeals. *Herring v. Lane County*, 54 Or LUBA 417, *rev'd and rem'd* 216 Or App 84, 171 P3d 1025 (2007). The underlying decision is a county ordinance that amends the comprehensive plan designation of a portion of a tract from Agricultural to Marginal Lands, and rezones that portion of the tract from E-40, Exclusive Farm Use, to Marginal Land with Site Review (ML/SR), pursuant to *former* ORS 197.247. Under that statute, the county is permitted to designate certain resource lands as “marginal lands,” if such lands meet a series of tests, including the so-called “gross income” test at ORS 197.247(1)(a) (1991).¹ In relevant part, that 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 * * * forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income[.]” ORS 197.247(1)(a) (1991).

LUBA affirmed the county’s decision, rejecting arguments from petitioners that the decision is inconsistent with *former* ORS 197.247. Specifically, under the second assignment of error, LUBA rejected petitioner’s argument that the county erred in relying on 1983 log prices in determining that the property was not capable of producing an average annual gross income of \$10,000, pursuant to a 1997 directive adopted by the county describing how the gross income test should be applied. LUBA affirmed the county’s

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) to (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[.]”

1 approach, disagreeing with petitioners that ORS 197.247(1)(a) compels the county to instead
2 use log prices from the preceding five-year period from 1978-82.²

3 The Court of Appeals held, however, that ORS 197.247(1)(a) explicitly directs the
4 county to calculate potential annual gross income of a forest operation based on the five
5 calendar years preceding January 1, 1983, and does not authorize the county to use 1983
6 prices. While noting that the statute “may well be ambiguous as to some details of how the
7 legislature intended the potential annual income to be calculated,” the Court held that in this
8 respect the statute unambiguously requires the calculation to be based on the five calendar
9 years preceding 1983, rather than on 1983. Accordingly, the Court remanded our decision,
10 with instructions to remand the underlying decision to the county for further proceedings.

11 **SECOND ASSIGNMENT OF ERROR**

12 For the reasons set out in the Court’s opinion, the county’s decision is remanded for
13 further proceedings to apply the forest operation “gross income” test based on the five
14 calendar years preceding 1983. We write further only to address an issue that is likely to
15 arise on remand.

16 Before LUBA, the county argued that the applicant’s consulting forester had
17 responded to petitioners’ criticisms by submitting a supplemental study that calculated gross
18 income under the approach advocated by petitioners, including using log prices from 1978-
19 82 rather than 1983. The supplemental report concluded that using log prices from 1978-82

² We reasoned:

“* * * 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 [v. Lane County]*, 49 Or LUBA 456 (2005), 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.” 54 Or LUBA at 428.

1 yielded a potential average annual income of \$8,894, more than the \$5,173 resulting from use
2 of 1983 prices, but still less than the required \$10,000. Record 87. The county cited to and
3 relied on that supplemental report, including the figure of \$8,894, to reject petitioners'
4 arguments regarding the productivity of soils on the property. Record 28. We understood
5 the county to argue that even if the county erred in applying 1983 prices, the supplemental
6 report provided an alternative basis to affirm the county's decision. We stated:

7 "In any case, as the county notes, the applicants' consulting forester made an
8 alternative calculation that used the 1978-82 log prices suggested by
9 petitioners. While the result was higher than using 1983 log prices, the
10 average annual income still fell below \$10,000. Petitioners argue that the
11 forester's analysis and the county decision include several cumulative errors
12 that, if all of them were corrected, would likely push the average annual
13 income above \$10,000. We address and reject those arguments below, under
14 the third assignment of error. Accordingly, petitioners' arguments under this
15 sub-assignment of error provide no basis for reversal or remand." 54 Or
16 LUBA at 428-29.

17 On appeal, the Court rejected the county's attempt to rely on the above-quoted
18 language as an alternative basis to affirm our decision. The Court stated:

19 "To the extent that the county suggests on judicial review that LUBA's
20 ultimate conclusion may be affirmed based on that alternative rationale, we
21 disagree. Evidence in the record indicates that [the forester] did, indeed, make
22 alternative calculations of annual gross income based on 1978 through 1982
23 log prices. However, the county's findings were not based on those
24 calculations; instead, the county's approval of the application was expressly
25 based on [the forester's] calculations that used 1983 prices. Given our
26 respective review functions, and given that the county never purported to rely
27 on [the forester's] alternative calculations, neither we nor LUBA can affirm
28 on an alternative basis that there is other evidence in the record which might,
29 if accepted by the local decision-maker, have been sufficient to support its
30 initial determination. *See Newcomer v. Clackamas County*, 92 Or App 174,
31 184-85, 758 P2d 369, *adh'd to as modified on recons*, 94 Or App 33, 764 P2d
32 927 (1988) (court will not presume that county would have made a finding
33 that it did not, in fact, make)." 216 Or App at 95-96.

34 The Court is correct that the county's findings addressing petitioners' challenge to the
35 use of 1983 prices expressly affirm the use of 1983 prices, and do not cite to the alternative
36 approach used in the supplemental report. Record 27. While other sections of the county's

1 decision cite and rely on the alternative \$8,894 figure, the county did not do so in the context
2 of addressing petitioners' challenge to use of 1983 prices. Record 28. As the Court noted, it
3 is not clear whether the county would choose to rely on the supplemental report to also
4 conclude, based on the 1978-82 calendar years, that the subject property is not capable of
5 producing an average, over the growth cycle, of \$10,000 in annual gross income. On
6 remand, the county should address that issue.

7 The second assignment of error is sustained

8 The county's decision is remanded.