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. 2008-107

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 Goal One Coalition.

No appearance by Lane County.

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

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

RYAN, Board Member, did not participate in the decision.

REMANDED 10/14/2008

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 decision approving a comprehensive plan designation amendment from Forest to Marginal Lands and associated zoning amendments for a 107-acre parcel.

MOTION TO INTERVENE

Carol Dennis (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

In 2006, intervenor applied to the county to redesignate and rezone the subject property as marginal lands, under *former* ORS 197.247 (1991). In relevant part, ORS 197.247(1)(a)(1991) allows the county to designate as marginal lands property 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." This is called the "income" prong of that statute. 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.[1]

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[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:
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> "(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
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> "(b) The proposed marginal land also meets at least one of the following tests:
>
> "* * * * *

The county approved the application, and petitioners appealed that approval to LUBA. LUBA affirmed the decision, rejecting petitioner's challenges under both the ORS 197.247(1)(a) (1991) "income" prong and the ORS 197.247(1)(b)(C) (1991) "productivity" prong. In relevant part, we affirmed the county's approach to satisfying the income test based on 1983 timber prices, and rejected petitioners' argument that the county must use 1978-1982 timber prices. *Anderson v. Lane County*, 54 Or LUBA 669 (2007) (*Anderson I*).

Petitioners appealed to the Court of Appeals, which held, based on a similar recent case presenting identical legal issues, that ORS 197.247(1)(a) requires that the calculation of potential annual gross income be based on timber prices during the five calendar years preceding 1983, and that calculation cannot be based on 1983 timber prices. *Anderson v. Lane County*, 216 Or App 332, 172 P3d 302 (2007), *citing Herring v. Lane County*, 216 Or App 84, 171 P3d 1025 (2007) (*Anderson II*).

LUBA accordingly remanded the county's decision with the following instructions:

> Petitioners' second assignment of error, first sub-assignment of error, challenged the county's use of 1983 timber prices. As explained in *Herring*, the county erred in using 1983 timber prices to determine whether the subject property is "marginal land" under ORS 197.247(1)(a) (1991). Remand is necessary for the county to calculate potential annual gross income based on timber prices in the five calendar years that precede 1983.
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> The second assignment of error is sustained, in part. The Court's remand did not require changes to other dispositions in our decision, which remain in effect."

> "(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 477.001(21)."

Anderson v. Lane County, __ Or LUBA __ (LUBA No. 2006-236, March 24, 2008), slip op 2. (*Anderson III*).

Shortly after LUBA's remand to the county, the Land Conservation and Development Commission (LCDC) adopted amendments to OAR chapter 660, division 006, which implements Statewide Planning Goal 4 (Forest Lands). Specifically, LCDC amended the OAR 660-006-0005 definitions of "Cubic Foot Per Acre" and "Cubic Foot Per Tract Per Year" to modify the sources of data and means that may be used to calculate those measures of forest productivity.[2] LCDC also amended OAR 660-006-0010, which applies to a local government's inventory of forest lands, to require that the inventory include a mapping of average annual wood production capability expressed by cubic foot per acre (cf/ac), rather than expressed by "site class."[3]

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[2] OAR 660-006-0005 was amended as follows. The added language is in bold and underline; the deleted language is bracketed, and struck through.

> "(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) **soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other information determined by the State Forester to be of comparable quality**. Where **such** [~~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 **as explained in the Oregon Department of Forestry's Technical Bulletin entitled 'Land Use Planning Notes Number 3 dated April 1998'** and be approved by the **Oregon** Department of Forestry.
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> "(3) 'Cubic Foot Per Tract Per Year' means the average annual increase in cubic foot volume of wood fiber per tract for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resource Conservation Service **(NRCS) soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other information determined by the State Forester to be of comparable quality**. Where **such** [~~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 **as explained in the Oregon Department of Forestry's Technical Bulletin entitled 'Land Use Planning Notes Number 3 dated April 1998'** and be approved by the **Oregon** Department of Forestry."

[3] OAR 660-006-0010 was amended as follows. The added language is in bold and underline; the deleted language is bracketed, and struck through.

The amendments became effective on April 18, 2008. On March 31, 2008, intervenor submitted a revised analysis from her forest consultant that calculated potential annual gross income based on timber prices during the five calendar years preceding 1983. The revised analysis concluded that the subject property was not managed during the years 1978-82 as part of a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income.

The county held a public evidentiary hearing on June 18, 2008, limited to "correcting the deficiency that was the basis for the Court of Appeals' and LUBA's remands." Record 22. At the hearing, petitioners argued that the county must apply the amended administrative rules and that "the productivity test has to be redone in compliance with the new rule." Record 43. After some discussion of whether the amended rules applied, the commissioners closed the hearings and voted to approve the application. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners' single assignment of error is that the county erred "in determining that the applicant did not need to address the new Goal 4 rules * * *." Petition for Review 4. Initially, intervenor responds that the county's decision made no determination whatsoever regarding whether the amended Goal 4 rules apply. Because petitioners' assignment of error challenges only a determination that the county did not make, intervenor argues, the assignment of error should denied for that reason alone.

> "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 **average annual wood production capability by cubic foot per acre (cf/ac)** [~~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."

We disagree with intervenor that the assignment of error is limited to a challenge to a non-existent determination. In the argument supporting the assignment of error, petitioners argue that "the county commissioners failed to apply the then-current LCDC Goal 4 rules to the application for the comprehensive plan amendment." Petition for Review 6. Notwithstanding the phrasing of the assignment of error itself, it is clear that the gist of petitioners' assignment of error is that the county erred in not applying the amended Goal 4 rules.

On the merits, intervenor does not dispute that the amended Goal 4 rules were *potentially* applicable to the proceedings on remand. As petitioners correctly note, the "goal-post" statute at ORS 215.427(3) freezes as of the date of application the standards and criteria that govern an application for a permit, limited land use decision, or zone change, but does not freeze the standards that govern a comprehensive plan amendment. *Rutigliano v. Jackson County*, 42 Or LUBA 565, 574 (2002); *Hastings Bulb Growers, Inc. v. Curry County*, 25 OR LUBA 558, 563 (1993). Therefore, absent some other authority to the contrary, the amended Goal 4 rules applied to the county's remand decision on intervenor's application for a comprehensive plan amendment from Forest to Marginal Lands.

Intervenor offers three reasons why the county was not required to apply the amended Goal 4 rules on remand. First, intervenor argues that LUBA's remand was limited to recalculating the potential annual gross income based on timber prices from 1978-82 under ORS 197.247(1)(a), and did not require the county to revisit the productivity test under ORS 197.247(1)(b)(C). According to intervenor, the county is generally entitled to limit its proceedings on remand to remedying the deficiency that warranted remand, and is not required to address other issues. *CCCOG v. Columbia County*, 44 Or LUBA 438, 444 (2003); *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992).

Second, intervenor argues that allowing petitioners to raise new issues regarding the productivity test at ORS 197.247(1)(b)(C) during remand proceedings limited to accepting

new evidence regarding the income test would be inconsistent with the principle described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). In *Beck*, the Oregon Supreme Court held that when the record is reopened on remand,

> "* * * parties may raise new, unresolved issues that relate to new evidence. The logical corollary is that parties may not raise old, resolved issues again. When the record is reopened at LUBA's direction on remand, the 'new issues' by definition include the remanded issues, but not the issues that LUBA affirmed or reversed on their merits, which are old, resolved issues." 313 Or at 153 (footnote omitted).

We understand intervenor to argue that all challenges that were made or could have been made to the county's findings or the evidence regarding the productivity test at ORS 197.247(1)(b)(C) were resolved adversely to petitioners in *Anderson I* or *Anderson II*, and therefore *Beck* precludes petitioners from raising new challenges regarding that old, resolved issue.

Finally, intervenor argues that even if the county was required to address the amended Goal 4 rule on remand, the undisputed evidence in the record is that the amended forest productivity report that intervenor's consultant submitted on remand complies with the amended Goal 4 rules. Therefore, intervenor contends, LUBA should affirm the county's decision notwithstanding the lack of findings regarding the amended rules, because the evidence in the record "clearly supports" a finding that the application complies with the amended rules. ORS 197.835(11)(b).[4]

Intervenor is correct that, as a general matter, the county is entitled to limit the issues on remand to those that formed the basis for the remand, and need not open the proceedings

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[4] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

up to issues unrelated to the basis for remand. However, as the Court in *Beck* observed, where new evidence is submitted on remand the parties may raise new, unresolved issues that relate to the new evidence. In at least that circumstance, the local government must address the new issues, even if those new issues go beyond the scope of remand or LUBA's instructions.

More importantly in the present case, the parties may also raise new issues on remand that are related to applicable approval criteria that could not have been raised during the initial proceedings. In *Beck*, the Court held that LUBA and the courts may review an assignment of error alleging that the governing body was biased during the remand proceedings, even though earlier appellate review had resolved the issue of whether the governing body was biased during the initial proceedings, because the question of bias during the remand proceeding "was not and could not have been decided" in earlier rounds of appellate review.[5]

Here, on remand intervenor submitted a revised analysis that recalculated potential annual income based on 1978-82 timber prices. Record 112-18. Those income calculations were in turn based on the original forest productivity figures that the consultant generated based on particular data sources during the initial proceedings. In *Anderson I*, petitioners advanced challenges to those calculations under the *former* Goal 4 rule, LUBA rejected those challenges, and the Court of Appeals ultimately affirmed our resolution of those issues. In

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[5] The Court held in *Beck*:

> "In this instance, however, the issues were not identical in *Beck I* and *Beck II*. In *Beck I*, petitioners argued that there was clear and convincing evidence that the City was biased during the *first* hearing. In *Beck II*, petitioners argued that there was clear and convincing evidence that the City was biased during the *second* hearing. It is possible that the City could be biased on remand, after having been impartial in the initial hearing. Although petitioners rely on much of the same evidence to support their argument in *Beck II*, they also rely on new evidence from the second hearing. Accordingly, the question of bias in *Beck II* was not and could not have been decided in *Beck I*. Therefore, petitioners are entitled to judicial review of their fourth assignment of error in *Beck II*." 313 Or at 156 (emphasis in original, footnote omitted).

the normal course, *Beck* would preclude LUBA's review of any assignment of error that attempted to relitigate those resolved issues, or that attempted to raise new unresolved challenges to the productivity figures that could have been, but were not, raised during the initial proceedings or on appeal to LUBA. However, by extension, *Beck* does not preclude LUBA from reviewing an assignment of error based on a new issue that was raised on remand, but that could not have been raised during the initial proceedings or on appeal to LUBA. In the present case, we do not believe *Beck* precludes our review of petitioner's assignment of error, because petitioner's challenges to the productivity figures based on noncompliance with the *amended* Goal 4 rules was not resolved in *Anderson I* and could not have been raised during the initial proceedings or on appeal to LUBA.

The issue in *Anderson I* was whether the 85 cu/ft/ac/yr prong was met using the sources of information and methods that were permissible at the time that prong was first addressed. The issue that petitioners raised on remand was whether the 85 cu/ft/ac/yr prong was met using the sources of information and methods that were permissible under the new Goal 4 rule. Those issues were not the same, and the latter issue was not resolved (and could not have been resolved) in the initial proceedings.[6]

Similarly, we do not believe that on remand the county can ignore legitimate issues that are raised regarding applicable approval criteria that could not have been raised during the initial proceedings, simply because those issues were not part of the basis for LUBA's remand. The principle that local governments may generally confine the issues considered on remand to those that were the basis for remand is based on or a sub-set of the same general principles that underlie *Beck*. As explained above, there are circumstances under

[6] Although the ORS 197.247(1)(b)(C) requirement that the land is not capable of producing 85 cf/ac/yr was not itself amended, LCDC's amendment to OAR 660-006-0005 had the effect of making the definition of cf/ac/yr at OAR 660-006-0010(2) potentially applicable to intervenor's comprehensive plan amendment. Further, the amendments to OAR 660-006-0010(2) significantly changed the method and sources by which cf/ac/yr is determined and hence the means by which the productivity prong is satisfied.

Beck where the local government on remand must address issues beyond those that formed the basis for remand.

We disagree with intervenor that the record "clearly supports" the decision with respect to whether the revised productivity analysis complies with the amended Goal rules, and therefore that we may affirm the decision notwithstanding inadequate or absent findings, pursuant to ORS 197.835(11)(b). Intervenor argues, initially, that her forest consultant testified that the revised productivity analysis complies with the amended Goal 4 rule, citing to Record 44-45. However, that argument is not supported by the record. At Record 44, intervenor's attorney indeed claimed that the revised calculations "were done with the old and new administrative rule." However, we do not see that the following testimony of the consultant, at Record 44-45, includes a claim that the revised productivity analysis complies with the amended Goal 4 rules. We do not believe a bare assertion by the applicant's attorney on such a technical matter "clearly supports" the decision, within the meaning of ORS 197.835(11)(b).

We understand intervenor to argue that LUBA may itself determine whether the data sources relied upon by the revised productivity analysis comply with the amended Goal 4 rules. The county found that the revised productivity analysis is based on the "same methodology" as the original analysis. Intervenor asserts that that original analysis relied on two data sources: (1) the 1997 Lane County Ratings for Forestry and Agriculture and (2) the Lane County Soil Ratings. According to intervenor, the 1997 Lane County Ratings for Forestry and Agriculture were reviewed by the predecessor to the NRCS and are based on NRCS data. Further, intervenor argues that the "Lane County Forest Soil Ratings" are based on a memorandum from the Oregon Department of Forestry (ODF) Office of State Forester, dated February 8, 1990. Intervenor notes that LUBA held in *Just v. Lane County*, 49 Or LUBA 456, 464 (2005), that the "Lane County Forest Soil Ratings" document constitutes "equivalent data" for purposes of the third sentence of the *former* Goal 4 rules, because the

ratings are based on ODF data.[7] Intervenor contends that the amended Goal 4 rule also allows parties to rely on data sources that are themselves based on NRCS and ODF data, and therefore reliance on the 1997 Lane County Ratings for Forestry and Agriculture and the Lane County Forest Soil Ratings necessarily satisfies the amended Goal 4 rules.

Petitioners respond that LCDC intended the Goal 4 rule amendment to clarify and limit the types of data that may be relied upon in determining forest productivity, and that the record does not demonstrate that the two sources of data the county relied upon satisfy the amended rules.

We agree with petitioners. The first sentence of OAR 660-006-0005(2) and (3) now lists three sources of data instead of one, and provides that the State Forester may designate other sources of information that the State Forester determines are of "comparable quality."[8]

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[7] We stated in *Just*:

> "Petitioner does not dispute that the documents relied upon provide 'equivalent data' to NRCS data, for purposes of OAR 660-006-0005(2). Nor does petitioner dispute that the pertinent cf/ac/yr figures in the 'Lane County Forest Soil Ratings' document are based on the February 8, 1990 memorandum from the Office of State Forester. Instead, petitioner complains that the February 8, 1990 memorandum is not in the record and there is no description of the methodology used to generate the data in that memorandum, or any evidence that the methodology used conforms to the methodology set out in the April 1998 ODF publication.
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> "Petitioner is correct that, as a general matter, OAR 660-006-0005(2) requires that the 'alternative methodology' be described or set forth in the record, and that there is evidence that ODF has approved the methodology. Presumably, use of the methodology set out in the April 1998 ODF publication would suffice to satisfy the rule. It also seems consistent with the rule to obtain explicit ODF approval of a different methodology, on a case-by-case basis. However, we believe that it is also consistent with the rule to use ODF-generated cf/ac/yr figures, if available, even if the methodology that generated those figures is not described in the record. Here, petitioner does not dispute that the cf/ac/yr figures in the 'Lane County Forest Soil Ratings' accurately reflect the ODF-generated figures for the pertinent soils. A decision maker could reasonably presume that whatever methodology generated the ODF cf/ac/yr figures is one that ODF approves of. Even if the ODF figures were generated under a different methodology than that set out in the April 1998 ODF publication, as petitioner contends, the ODF is presumably free to follow or approve a different methodology for calculating timber productivity than the one set out in the April 1998 publication." *Id*. at 470.

[8] For convenience, we repeat the text of OAR 660-006-0005(2), as amended.

While the 1997 Lane County Ratings for Forestry and Agriculture may be based on NRCS data, as intervenor contends, and the Lane County Forest Soil Ratings may be based on ODF data, neither of those documents are among the three listed sources. Further, we understand the first sentence of OAR 660-006-0005(2) and (3) to require an actual determination by the State Forester that a particular source of data is of "comparable quality" to the three listed data sources. Nothing in the record cited to us indicates that the State Forester has made a determination that either the 1997 Lane County Ratings for Forestry and Agriculture or the Lane County Forest Soil Ratings are of comparable quality to the three listed sources.

The second and third sentences of OAR 660-006-0005(2) and (3) address circumstances where the first sentence does not apply, and allows an "alternative method" to be used that (1) provides equivalent data as explained in an April 1998 ODF technical bulletin and (2) is approved by the Oregon Department of Forestry. Intervenor does not contend that the method used to generate the data in the revised productivity analysis is consistent with the April 1998 ODF technical bulletin or that the method was approved by ODF.

Just provides little assistance to intervenor. It seems likely that the 2008 amendments to OAR 660-006-0005(2) and (3) were intended to legislatively overrule *Just* and other recent cases to the extent those cases have interpreted the rules broadly with respect to what constitutes "equivalent data." The language in *Just* that is perhaps most helpful to intervenor is our conclusion that it is reasonable to "presume that whatever methodology generated the

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> "'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) **soil survey information, USDA Forest Service plant association guides, Oregon Department of Revenue western Oregon site class maps, or other information determined by the State Forester to be of comparable quality**. Where **such** [~~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 **as explained in the Oregon Department of Forestry's Technical Bulletin entitled 'Land Use Planning Notes Number 3 dated April 1998'** and be approved by the **Oregon** Department of Forestry."

ODF cf/ac/yr figures is one that ODF approves of," even if that methodology does not conform to that specified in the April 1998 ODF technical bulletin. 49 Or LUBA at 470. The continued vitality of that presumption under the amended rules is not clear. As amended, the third sentence of OAR 660-006-0005(2) and (3) requires that the methodology conform to that described in the April 1998 ODF technical bulletin. Further, read in context with the amendments to the first sentence, the requirement that ODF approve the alternative methodology arguably requires that the applicant actually seek and obtain ODF approval of a particular proposed methodology. Arguably, the approval requirement cannot be satisfied by reliance on data found in an ODF memorandum and the mere presumption that ODF has implicitly approved whatever methodology generated that data. However, we need not consider that question further, as there is no dispute in the present case that neither the 1997 Lane County Ratings for Forestry and Agriculture nor the Lane County Forest Soil Ratings is based on a methodology that conforms to the April 1998 ODF technical bulletin.

In sum, the existing record does not demonstrate that the revised productivity analysis complies with the amended rules. We remand for the county to conduct additional evidentiary proceedings, if necessary, and to evaluate the application under the amended Goal 4 rules.

The assignment of error is sustained.

The county's decision is remanded.