BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES,
Petitioner,

and

MICHAEL L. WALKER,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

RICHARD WHITAKER, CHRISTINE WHITAKER,
and BOB HART,
Intervenors-Respondents.

LUBA No. 2011-037

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Sarah Vaile, Williams, filed the petition for review and argued on behalf of petitioner.

Michael L. Walker represented himself.

No appearance by Josephine County

Bob Hart, Grants Pass, filed a response brief and argued on his own behalf. Richard Whitaker and Christine Whitaker, Grants Pass, represented themselves.

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

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

REMANDED 07/26/2012

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

Petitioner appeals a decision amending the comprehensive plan map and zoning map designation of a 33-acre parcel, from forest use to residential use.

FACTS

The subject property is a vacant 33-acre parcel designated Forest and zoned Woodlot Resource (WR), located on a hillside above the Applegate River near the unincorporated community of Murphy. The county's official soil survey, which is incorporated into its comprehensive plan, identifies two soil types on the property: Vannoy Silt Loam 77E and Vannoy Silt Loam 78F. The county has a unique system for rating soils for forest productivity, known as the Internal Rate of Return and Composite Internal Rate of Return (IRR/CIRR) system. Under that system, many soils in the county soil survey are rated for forest productivity, including Vannoy 77E and 78F, both of which are identified as forest soils with IRR ratings above 3.50. Goal 11, Policy 2.B of the Josephine County Comprehensive Plan (JCCP) and Rural Land Development Code (RLDC) 46.040, provide that forest land may be redesignated and rezoned to non-resource land only if the IRR rating for the soil type on the property is below 3.50. If multiple rated soils are present, the ratings are averaged to obtain a CIRR rating. Based on the soil survey and application of the county's IRR/CIRR system, the CIRR rating for the subject property is 3.78.

The property owners, intervenors-respondents Richard Whitaker and Christine Whitaker, applied to the county for a comprehensive plan map amendment from Forest to Residential and a zoning map amendment from WR to Rural Residential 5-acre minimum (RR-5).[1] The applicants' soil scientist submitted testimony to the planning commission that

[1] The Whitakers were represented below by intervenor-respondent Bob Hart, who is a land use consultant. We question whether a person who appeared below as a representative and consultant for the applicant has "appeared" on their own behalf during the proceedings below for purposes of ORS 197.830(2) and (7). *See Doob v. Josephine County*, 49 Or LUBA 724, 727 (2005) (appearance as an expert on behalf of a participant to

the Vannoy 77E soil on the property more closely resembles soil in a different classification listed in the county's soil survey, Manita 53E, which has a lower IRR rating than Vannoy 77E. The applicants' planning consultant calculated the CIRR rating for the property, assuming that the Vannoy 77E soils on the property are actually Manita 53E. That calculation resulted in a CIRR rating of 3.46, less than the 3.50 threshold provided by JCCP Goal 11, Policy 2.B. The applicant also submitted a 2007 report from a consulting forester, who evaluated the existing trees on the property and concluded that the subject property is not suitable for commercial forestry. Based on that evidence, the planning commission recommended 5-3 to approve the requested comprehensive plan map and zoning map amendments.

The board of county commissioners approved the application, finding that the Vannoy 77E soils on the property are actually Manita 53E, and concluding that the property is not forest land as defined under either JCCP Goal 11, Policy 2.B or Statewide Planning Goal 4 (Forest Lands). This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county erred in failing to comply with the process for identifying forest land set out at OAR 660-006-0010, the administrative rule that implements Goal 4. OAR 660-006-0010 as amended since 2008 sets out a three-step priority scheme for identifying forest land protected under Goal 4.[2] To address the Goal 4 rule, the county relied

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the local proceedings is not sufficient to satisfy the appearance requirement of ORS 197.830(7)(b)(B)); *Wetherell v. Douglas County*, 54 Or LUBA 782, 784-85 (2007) (person who represented the applicants below did not "appear" on her own behalf or as the "applicant," and is not entitled to intervene under ORS 197.830(7)). That the county recognized Hart as a party for purposes of its proceedings below is not necessarily determinative of whether Hart "appeared" for purposes of establishing standing under ORS 197.830(7) to appear as a party before LUBA. However, because no party in this appeal disputes Hart's standing to intervene, we do not further address the matter.

[2] OAR 660-006-0010 provides:

> "(1) Governing bodies shall identify 'forest lands' as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands, lands for which

upon the 2007 report from the applicants' consulting forester, who examined trees on the property to estimate its suitability for commercial forestry.[3]

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an exception to Goal 4 is justified pursuant to ORS 197.732 and taken, and lands inside urban growth boundaries are not required to planned and zoned as forest lands. Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service.

"(2) Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land, in the following order of priority:

"(a) Oregon Department of Revenue western Oregon site class maps;

"(b) USDA Forest Service plant association guides; or

"(c) Other information determined by the State Forester to be of comparable quality.

"(3) Where data of comparable quality under subsections (2)(a)-(c) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry's Technical Bulletin entitled "Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010."

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

"* * ** In accordance with the provision of [OAR] 660-006, the property owner retained the services of a professional forester who made a direct measurement of forest productivity and found that the site yields less than 20 cubic feet per acre per year. The Board finds that the conclusion of the forester that the forest productivity on the taxlot is below the parameters for commercial timber production to be substantial and credible. The Board also notes that the forest report was submitted to the Oregon Department of Forestry and that a letter of approval of the methodology of the report was submitted into the record. The Board also reviewed objections to the forest report. The Board finds that it is the authority of the County to determine the data source that it will use in making the decision as set forth in the Land Use Planning Notes Number 3—April 2010. The data was gathered using the Douglas Fir trees data as required as a primary tree species. The opponents state that the number of trees tested were not sufficient in that 25 trees were not tested. The Board notes that the Land Use Planning Notes state that a sufficient number of trees <u>generally</u> consist of 25 dominant and co-dominant trees <u>if possible</u> (emphasis added). The Notes further state that a professional forester should determine whether or not adequate number of trees exist. The Notes also provide that if 25 tree clump is are not available, a smaller clump may be used. The Board finds that there is flexibility allowed in the methods used to examine the productivity of the site and that the Board concludes that the report and the concurrence of the ODF that a proper productivity examination was conducted and that the results meet the requirements of the OAR and the Land Use Planning Notes. The Board finds that the use of the IRR method and the forest productivity study are consistent to show that the property does not exhibit the characteristics to be commercial forest lands. The Board concludes that the subject property is not forest land protected under State Goal 4 and County Goal 3. The Board finds that the

A. Compliance with OAR 660-006-0010

Under OAR 660-0060-0010 as amended since 2008, lands suitable for commercial forest uses must be identified using mapping supplied by the USDA Natural Resources Conservation Service (NRCS). *See* n 2. Generally, a county's soil survey supplies the mapping under this first step. If NRCS data embodied in the county soil survey or elsewhere are not available or are shown to be inaccurate, lands suitable for commercial forestry must be identified based on three sources, in the priority listed. Finally, if data from the three sources are not available or shown to be inaccurate, suitability for commercial forestry may be established by the method described in the Oregon Department of Forestry's Technical Bulletin entitled "Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010." Because the county has not yet amended its comprehensive plan to reflect the 2008 and 2011 amendments to OAR 660-006-0010, petitioner argues that the amended rule applies directly to the county's land use decisions, pursuant to ORS 197.646(3).[4]

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request meets the criteria to determine that the property is non-resource based on rules of law and evidence provided to the Board.

"* * * In the unlikely event that the revised [OAR] on forest lands render the IRR system unusable, the Board finds that Section 46.050B2 of the RLDC provides that a combination of proofs based on testimony of expert witnesses and other sources may be used to determine that the property is not forest land protected by Statewide Planning Goal 4. The Board has considered all of the information submitted by experts in engineering, forestry and soils and concludes that the property is non-resource and not protected under goal 4." Record 31-32.

[4] ORS 197.646 provides, in relevant part:

"(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.

"* * * * *

"(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions. * * *"

Petitioner argues that the county's findings and record fail to establish compliance with OAR 660-006-0010 as amended since 2008. Petitioners note that the 2007 forestry report did not, and could not given its date, address the amended rule, or the 2010 updates to the Land Use Planning Notes.[5] The 2007 forestry report does not claim that the NRCS data in the county soil survey is unavailable or inaccurate, but instead recites, based on the county soil survey, that the two Vannoy soil types on the property are capable of growing commercial timber. Record 544. The 2007 forestry report does not consider the three alternate sources of data listed in OAR 660-006-0010(2), in the priority listed, or conclude that those alternate data sources are unavailable or inaccurate. Instead, petitioner argues, the 2007 forestry report develops its own data, but not one based on the 2010 Land Use Planning Notes, as OAR 660-006-0010(3) requires. Petitioner lists five ways in which the method conducted by the 2007 forestry report does not comply with the requirements of the 2010 Land Use Planning Notes.

Intervenor Hart responds that because the county concluded that the subject property is not forest land under its IRR/CIRR system, the property is not forest land for purposes of Goal 4, and therefore the Goal 4 rule, including OAR 660-006-0010, does not apply.

The county's IRR/CIRR system was acknowledged to comply with Goal 4, as part of periodic review in the 1990s. That means that to the extent the IRR/CIRR system varies from or is inconsistent with Goal 4, any such variance or inconsistency is not a basis to reverse or remand a post-acknowledgment plan amendment that applies the IRR/CIRR system. *Sommer v. Josephine County*, 49 Or LUBA 134, 149 (2005); *Doob v. Josephine County*, 48 Or LUBA 227, 242 (2004). However, that the IRR/CIRR system was acknowledged in the 1990s to comply with Goal 4 does not shield the county from the

[5] In fact, the 2007 forestry report does not, at least directly, reference or address Goal 4, earlier versions of the Goal 4 rule, or the 1998 version of the Land Use Planning Notes. Record 543-551.

obligation, at ORS 197.646(1) and (3), to conform its comprehensive plan and land use regulations to subsequently adopted amendments to the statutes, goals or administrative rules or, in the absence of such conforming amendments, to apply the new statute, goal or rule language directly in making land use decisions subject to the goals. As petitioner points out, OAR 660-006-0010 was amended in 2008 and 2011 to set forth a prioritized list of data sources a county must consider in determining whether land is forest land subject to Goal 4, and an alternate method for making that determination, if those listed data sources are unavailable or inaccurate. The county has not, apparently, adopted plan and regulatory amendments to reflect the new language of OAR 660-0060-0010. Therefore, pursuant to ORS 197.646(3), OAR 660-006-0010 as amended applies directly to the county's land use decisions.

Intervenor's argument that OAR 660-006-0010 does not apply to the challenged decision, because the subject property is not forest land under Goal 4, is a circular argument. OAR 660-006-0010 provides a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land *is* forest land subject to Goal 4. Application of OAR 660-006-0010 cannot be avoided by concluding, based on different data or a different methodology than set out in the rule, that the subject property is not forest land subject to Goal 4. Consequently, we agree with petitioner that the county is obligated to apply OAR 660-006-0010 in determining whether the subject property is forest land under Goal 4.[6]

[6] We note that applying the amended OAR 660-006-0010 directly to the county's decision, as required by ORS 197.646(3), is not inconsistent with the acknowledged status of the county's IRR/CIRR system. It simply means that, until the county incorporates the amended rule into its comprehensive plan and land use regulations as required by ORS 197.646(1), an applicant seeking to redesignate and rezone forest land must demonstrate that the property is not forest land under *both* the amended Goal 4 rule and the county's existing IRR/CIRR system.

Although the county's findings include some references to OAR 660-006-0010 and the 2010 Land Use Planning Notes, as noted the 2007 forestry report did not (and could not, given the date it was generated) address the amended rule or updated Notes. Remand is necessary for the county to comply with the requirements of the amended OAR 660-006-0010 and the 2010 Land Use Planning Notes. That remand will necessarily require additional evidence addressing at least the updates to the 2010 Land Use Planning Notes.

As noted, petitioner advances five specific critiques of the 2007 forestry report, arguing that it is inconsistent with the updated 2010 Land Use Planning Notes. It is quite possible that the additional evidence required on remand will moot or resolve some or all of petitioner's critiques, and therefore we do not address them in detail. The only critique that warrants discussion at this juncture is petitioner's contention that the 2007 forestry report analyzed only 15 trees, rather than the 25 or more trees required under the 2010 Notes.[7] In its findings, the county rejected that argument, concluding that the 2010 Notes contemplates circumstances when fewer than 25 trees may be measured. *See* n 3. Petitioner points out, accurately, that the 2010 Notes deems the 25-tree number adequate only if soil type, species and ground aspect are consistent throughout the sample area, and that additional trees may be needed to represent different soil types and aspects. *See* n 7. Petitioner argues that many more than 25 trees may be necessary, given the two soil types on the property and several different aspects. On remand, the county should consider that issue.

The first assignment of error is sustained.

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[7] The 2010 Land Use Planning Notes states, in relevant part:

> "Site index is based on measurements of breast-height tree age and total height. A sufficient number of measured trees generally consists of 25 dominant and co-dominant trees all of the same species, if possible. This number is adequate to determine forestland productivity as calculated by site index if soil type, species, and aspect of the ground are consistent throughout the sample area. Additional trees will be needed to represent different soil types, species and aspects if these exist on the tract in question."

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in justifying the non-resource designation based on a new soil type not found in the soil survey, or given a IRR/CIRR rating. According to petitioner, the applicant's soil scientist testified at two points that the portion of the property that the soil survey identifies as Vannoy 77E does not fall within any of the soil series recognized in the county's soil survey. The soil scientist ultimately concluded that the disputed soil correlates and most closely corresponds to Manita 53E, and should be reclassified as Manita 53E, which is a soil type recognized in the soil survey and that possesses an IRR/CIRR rating of 3.43. However, petitioner argues that the soil scientist's testimony on this point is undermined by the soil scientist's other statements, and is not substantial evidence supporting the county's finding that the disputed soil is in fact Manita 53E. Petitioner contends that other portions of the soil scientist's testimony instead supports the conclusion that the disputed soil is actually a new soil not recognized in the soil survey—a variant of neither Manita 53E nor Vannoy 77E—and which carries no IRR/CIRR rating. If so, petitioner argues, the county cannot apply the IRR/CIRR system to the subject property unless and until it amends its comprehensive plan and land use regulations to provide an IRR/CIRR rating for the new soil. *See Doob v. Josephine County*, 27 Or LUBA 293, 297 (1994) (justifying a non-resource designation based on application of the IRR/CIRR system to unlisted and unrated soils has the effect of improperly amending the county's comprehensive plan to include the new soils in the IRR/CIRR system without complying with post-acknowledgment plan amendment procedures).

From the soil scientist's testimony, it is reasonably clear that he believes, based on soil characteristics, that the disputed soil constitutes a variant of the Manita soil series, most closely corresponding to Manita 53E. The soil scientist ultimately concluded that the disputed soil should be reclassified to Manita 53E. While there are some equivocal statements in his testimony that petitioner selectively cites, based mostly on the subjectivity

of what constitutes a "variant" of a soil type, taken as a whole it is reasonably clear that the soil scientist does not believe that the disputed soil represents a new soil type not found in the county's soil survey. The only evidence on this point is that supplied by the soil scientist, and that evidence considered as a whole is substantial evidence supporting the county's finding that the disputed soils are properly classified as Manita 53E. Petitioner's remaining arguments under this assignment of error are premised on the conclusion that the disputed soil is a new soil type, and are rejected accordingly.

The second assignment of error is denied.

The county's decision is remanded.