

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 1000 FRIENDS OF OREGON  
5 and ROGUE ADVOCATES  
6 *Petitioners,*

7  
8 vs.

9  
10 JOSEPHINE COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 DON MARVIN,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2021-116

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Josephine County.

24  
25 Andrew Mulkey filed a petition for review and reply brief and argued on  
26 behalf of petitioners.

27  
28 No appearance by Josephine County.

29  
30 James R. Dole filed an intervenor-respondent's brief and argued on behalf  
31 of intervenor-respondent.

32  
33 RUDD, Board Chair; ZAMUDIO, Board Chair; RYAN, Board Member,  
34 participated in the decision.

35  
36 REMANDED

06/02/2022

37  
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

**NATURE OF THE DECISION**

Petitioners appeal a decision by the board of county commissioners approving amendments changing a property’s comprehensive plan map and zone map designations.

**FACTS**

The subject property is located four miles north/northeast of the city of Grants Pass, two and one-half miles north of the Grants Pass Urban Growth Boundary (UGB), and roughly one-half mile north of the Merlin North Valley Unincorporated Rural Community. Record 5, 13. The subject property contains approximately 63 acres of woodlands and 24 acres of meadows and seasonal wetlands and is undeveloped. It, like the property to its east, is zoned Woodlot Resource (WL). “The \* \* \* [WL] zone[] [is] intended to implement the goals and policies of the Josephine County comprehensive plan by conserving and protecting lands for forest uses.” Josephine County Code (JCC) 19.65.010. The WL zone also implements Statewide Planning Goal 4 (Forest Lands).<sup>1</sup>

---

<sup>1</sup> Statewide Planning Goal 4 (Forest Lands) is

“To conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

1           Residentially zoned property abuts the subject property to the north, south,  
2 and west. Record 11, 28. Intervenor applied to the county to change the subject  
3 property’s comprehensive plan designation from Forest to Residential and zoning  
4 from WL to Rural Residential (RR5), designations that allow rural residential  
5 subdivisions. “Amendments to a plan and zone map [must] demonstrate  
6 compliance with all applicable statewide and County goals and policies.” JCC  
7 19.46.040(A). JCC 19.46.040(B) provides that comprehensive plan and zone  
8 map “[r]equests involving changes for lands from a resource designation to a  
9 nonresource designation shall either comply with statewide exception criteria  
10 contained in ORS 197.732, and as implemented in OAR Chapter 660-004 or  
11 demonstrate the land is nonresource pursuant to the criteria contained in JCC  
12 19.46.050.” Intervenor seeks to demonstrate that the subject property is  
13 nonresource land.

14           In support of this argument, that the subject property is not Goal 4 resource  
15 land and should be reclassified as residential, intervenor submitted a forester’s  
16 report and an addendum to the forester’s report. Record 89, 538.

17           On June 7 and June 21, 2021, the planning commission held hearings and  
18 voted to recommend board of commissioner approval of the requested  
19 comprehensive plan map amendment and zone map change.

20           On September 27, 2021, the board of commissioners held a *de novo*  
21 hearing on the application. After the close of the hearing, the board of

1 commissioners voted to approve the application. The board of commissioners'  
2 findings approving the application include that,

3       “\* \* \* per JCC 19.46.050.B, the subject property is not forest land  
4 as defined by OAR 660-006-0005(7) and that the applicant properly  
5 followed the methods required by OAR 660-006-0010(2) to make  
6 that determination; that is, the study was guided by the Oregon  
7 Department of Forestry Land Use Planning Notes, No. 3, April  
8 1998, Updated for Clarity April 2010.” Record 18.

9       This appeal followed.

## 10 **FIRST ASSIGNMENT OF ERROR**

11       Petitioners' first assignment of error is that the board of commissioners  
12 erred in its determination that the subject property is not resource, in this case  
13 forest, land. We begin with a discussion of the statutory scheme controlling the  
14 manner in which that determination is properly made.

### 15 **A. Background**

#### 16 **1. OAR 660-006-0010**

17       OAR 660-006-0010 sets out the process by which governing bodies will  
18 identify “‘forest lands’ as defined by Goal 4 in the comprehensive plan.” OAR  
19 660-006-0010(1). Pursuant to OAR 660-006-0010(2),

20       “Where a plan amendment is proposed:

21       “(a) Lands suitable for commercial forest uses shall be identified  
22 using a mapping of average annual wood production  
23 capability by cubic foot per acre (cf/ac) as reported by the  
24 USDA Natural Resources Conservation Service. Where  
25 NRCS data are not available or are shown to be inadequate,

1 other site productivity data may be used to identify forest land  
2 in the following order of priority:

3 “(A) Oregon Department of Revenue western Oregon site  
4 class maps;

5 “(B) USDA Forest Service plant association guides; or

6 “(C) Other information determined by the State Forester to  
7 be of comparable quality.

8 “(b) Where data of comparable quality under [660-0010-  
9 002(c)(A)-(C)] are not available or are shown to be  
10 inadequate, an alternative method for determining  
11 productivity may be used as described in the Oregon  
12 Department of Forestry’s Technical Bulletin entitled ‘*Land  
13 Use Planning Notes, Number 3 April 1998, Updated for  
14 Clarity April 2010.*’

15 “(c) Counties shall identify forest land that maintain soil air, water  
16 and fish and wildlife resources.” (Emphasis added.)

17 We summarized the role of OAR 660-006-0010 in evaluating the productivity of  
18 forest land in *Anderson v. Coos County*, 60 Or LUBA 247, 251 (2009) (*Anderson*  
19 *I*). When evaluating an application to amend zoning based on the argument that  
20 the property does not qualify as Goal 4 forest land and need not be afforded Goal  
21 4 protection,

22 “the county must consider the wood fiber productivity of the subject  
23 property in cf/ac/year. That cf/ac/year data must be from one of the  
24 sources authorized by [LCDC’s rule]. If that data is not available or  
25 is shown to be inaccurate, equivalent data may be used, as  
26 authorized by the rule and approved by the Oregon Department of  
27 Forestry. *Anderson v. Lane County*, 57 Or LUBA at 573. If the  
28 analysis required by [LCDC’s rules] is not conclusive, the county  
29 may then consider other factors, provided those other factors are  
30 ‘not accurately reflected in or accounted for in the data described in

1 [LCDC's rules].” *Anderson I*, 60 Or LUBA at 251-52.

2 The Planning Notes cited in OAR 660-006-0010(2)(b) reiterate that the  
3 hierarchy of data sources must be used before turning to the methods of analysis  
4 set out in the Planning Notes.

5 “When NRCS soil survey information is available, it should always  
6 be considered first when making forest land site productivity  
7 determinations. *Where the county determines that NRCS or other*  
8 *established data sources approved by the State Forester are*  
9 *available and accurate for determining site productivity at the scale*  
10 *of the tract of interest, the county planning department must make*  
11 *its decision using these data.” Record 622 (Land Use Planning*  
12 *Notes, Number 3, April 1998, Updated for Clarity April 2010;*  
13 *emphasis added).*  
14

15 The Planning Notes also advise the user that the

16 “Existence of data listed in Step 1 does not prohibit a landowner  
17 from retaining a professional forester or professional soils classifier  
18 to measure the productivity of the land if they believe the published  
19 data are inaccurate. In such cases, the county must determine which  
20 data source it will use in making its decision.” Record 623.

21 However, the Planning Notes go on to say that “[t]he burden of proof is on the  
22 applicant and the consultant to demonstrate that information in the submitted  
23 report is more accurate than that available in established data sources.” Record  
24 628.

### 25 **B. Compliance with OAR 660-006-0010(2) Data Hierarchy Analysis**

26 Relying upon the forest productivity analysis provided by intervenor, the  
27 Forester’s Report dated May 7, 2018, and the March 31, 2021 Addendum to the  
28 Forester’s Report, the board of commissioners concluded that the subject

1 property is not forest land.<sup>2</sup> Record 14, 90, 538. The board of commissioners  
2 explained:

3 “The forester followed the Land Use Planning guidelines to measure  
4 and calculate the forest productivity on the property, but he did not  
5 explain the process that led up to the determination that direct  
6 measurement approach was the most appropriate. The applicant’s  
7 representative clarified that to the Board and illustrated the decision-  
8 making process in the PowerPoint presentation during the hearing.  
9 Since complete NRCS data was not available, the process was as  
10 follows:

11 “A. Oregon Department of Revenue site class maps indicate  
12 entire abutting townships and ranges. include that of the  
13 subject property, as Largely a single class – in this case FG or  
14 Site Class V That 36 square miles within a single township  
15 and range have the same productivity level is not only  
16 unrealistic given the multiple soil types, slopes, etc. in the  
17 county, but it does not indicate the actual productivity in  
18 terms of cubic feet per acre per year (cfy) on any specific  
19 property including the subject property.

20 “B. While the USDA Forest Service Plant Association Guide  
21 describes plant association, it does not calculate forest  
22 productivity (cfy) as required by the county and the state.

---

<sup>2</sup> The addendum was prepared by intervenor’s land use consultant and explains that it was submitted because

“[w]hile the professional forester’s report (Attachment D) follows state law in calculating cubic feet per acre per year (cfy), the steps taken to select the onsite survey were not completely addressed. Therefore, this addendum explains why the initial steps required by the state were not taken and an on-the-ground forest survey was conducted instead.” Record 539.



1           “C. The local Oregon Department of Forestry staff recommended  
2           a USDA Site Index Equations publication. This publication  
3           also does not calculate cfy at all, much less on specific  
4           properties.

5           “Since none of [OAR 660-006-0010(2)(a)] sources were useful or  
6           able to determine forest productivity on the subject property, the  
7           forester took direct on-site measurements and made calculations  
8           according to the Planning Notes guidelines. He found that trees on  
9           the property largely consisted of Oregon white oak, scattered  
10          Ponderosa pines, and a few Douglas firs. Conifer spacing and  
11          density did not constitute fully stocked forest stands, the Douglas  
12          firs were too few to sample, and that forest productivity calculated  
13          for the entire property was 22 cubic feet per acre per year. The local  
14          Oregon Department of Forestry forester agreed with the forester’s  
15          methods and results.” Record 14.

16          Petitioners’ first assignment of error is that the board of commissioners’  
17          decision fails to comply with OAR 660-006-0010(2) because it fails to follow the  
18          rule’s data hierarchy, contains numerous errors, and relies on a forest production  
19          capability analysis performed by an unqualified forester.<sup>3</sup> We will remand a land

---

<sup>3</sup> Petitioners argue:

“OAR 660-006-0010(2) does not allow an applicant to rely on the methods in [the] O[regon] D[epartment of] F[orestry]’s [ODF] Technical Bulletin unless the productivities indicated by NRCS and Department of Revenue site class maps are ‘not available or are shown to be inaccurate.’ OAR 660-006-0010(2)(b). Especially when considering the productivity of non-rated soils, the property’s overall productivity fits within the broad range of 50 to 84 cubic feet per acre per year described by the Department of Revenue site class maps. Although the resolution of the revenue site class maps is large, the applicant failed to demonstrate their ratings are inaccurate.” Petition for Review 13.

1 use decision if the local government improperly construes the applicable law, or  
2 the decision is not supported by substantial evidence in the whole record. ORS  
3 197.835(9)(a)(C), (D). We will not affirm a local government's interpretation that  
4 is contrary to an administrative rule that a land use regulation implements. ORS  
5 197.829(1)(d).

6 The addendum states that the majority of the soils on the property are not  
7 rated by NRCS for forest productivity, thus, other data sources may be used  
8 because NRCS data are not available for a substantial portion of the property.  
9 Record 539. With respect to this first level of the data hierarchy, the forester  
10 calculated the productivity across all soil types as averaging 37 cubic feet per  
11 acre, assuming zero productivity for 54.48 acres. Record 93. Petitioners argue,  
12 and we agree, that intervenor's forester fails to address four acres of soil on the  
13 property, analyzing only 83 of the 87.75 acres. *See* Record 91; *compare with*  
14 Record 111. Under the rule, the county *may*, in order to determine if property is  
15 forest land, consider data sources other than the NRCS, if the NRCS data is  
16 unavailable or inaccurate. In relying on the forester's report, the board of  
17 commissioners did not determine whether NRCS data was available for four  
18 acres.

19 In relying on the forester's report, the board of commissioners accepted  
20 the forester's conclusion that using NRCS data, the property had an average  
21 productivity of 37 cubic feet per acre per year. If the four acres the board of  
22 commissioners did not consider contain productive soils, the average

1 productivity of the property may well be above 40 cubic feet per acre using  
2 available NRCS data. We have held that a property is unlikely to be unsuitable  
3 for commercial forest use where its productivity range is between 40 and 80 cubic  
4 feet per acre per year. *Wetherell v. Douglas County*, 62 Or LUBA 80, 90-01  
5 (2010). Thus, the available NRCS data may be sufficient to determine that the  
6 property is productive forest land.

7 We agree with petitioners that the board of commissioners may not  
8 conclude that the lack of an NCRS rating means that soil has zero productivity  
9 capability. *Carlson v. Benton County*, 37 Or LUBA 897, 905 (2000) (“[N]o  
10 conclusion about the capability of soils to produce a particular number of cf/ac/yr  
11 of wood fiber can be drawn from the lack of an NRCS rating.”) Lacking an NRCS  
12 rating for certain soils, the forester (and the board) was required to consider other  
13 sources prior to concluding that the subject property is not productive forest land.

14 With respect to the second level of the data hierarchy, the addendum states  
15 that the Department of Revenue Site Class map (DR map) “is so general that it  
16 does not reflect the vast diversity of soils and productivity variation throughout  
17 the county, much less on a single parcel. Therefore, it is not useful for calculating  
18 on-site forest productivity.” Record 539. Despite the data source being dismissed  
19 in the addendum as not specific to the property, the forestry report concludes  
20 productivity based on the DR map ranges between 50 and 84 cfy. Record 93. The  
21 board of commissioners erred in proceeding to this level of analysis without  
22 considering the availability of NRCS data for all 87 acres. Once engaging in this

1 DR map analysis, the board of commissioners erred in finding that DR map data  
2 was not useful and again proceeding to the next data source absent a showing by  
3 intervenor that the Department of Revenue data was inaccurate.

4 With respect to the third level of the data hierarchy, USDA Forest Service  
5 Plant Association Guide, the addendum states that “these guides indicate plant  
6 communities that are associated with timber types but do not calculate actual  
7 forest production in general or provide method to calculate that productivity.”  
8 Record 539-40. This general statement is not substantial evidence that the data is  
9 unavailable or inaccurate as to this specific property. The plant association guide  
10 is specifically identified in the rule as a source that must be consulted. A prior  
11 OAR definition of “cubic foot per acre” included “the average annual increase in  
12 cubic foot volume of wood fiber per acre for fully stocked stands at the  
13 culmination of mean annual increment as reported by \* \* \* “USDA Forest  
14 Service plant association guides[.]” *Anderson v. Coos County*, 62 Or LUBA 38,  
15 n 3 (2010) (*Anderson II*). The forester has not explained how the plant association  
16 guide is generally intended to be used to calculate forest productivity and why  
17 that analysis may not be performed for the subject property. The board of  
18 commissioners erred in finding that this data was not useful absent a showing by  
19 intervenor that the data was incorrect or unavailable. The board of commissioners  
20 has not considered the USDA Forest Service Plant Association Guides as  
21 required by the rule.

1           Because the county failed to consider the first priority NRCS Soil  
2 information for the entire property, evaluating only 83 of the 87.75 acres, the  
3 county did not complete the first required step before proceeding to the second  
4 priority to evaluate unrated soils. Because the county did not find that the second  
5 priority data from the Oregon Department of Revenue was inaccurate, it was  
6 required to consider its evidence of productivity of 50 to 84 cubic feet per year.  
7 The county did not consider the third priority, U.S. Forest Service Plant  
8 Association, at all.

9           The fourth data source is “Other information determined by the State  
10 Forester to be of comparable quality.” OAR 660-006-0010(2)(a)(C). The  
11 addendum states

12           “The next alternative source recommended by the ODF forester in  
13 Josephine County was to use the ‘USDA Site Index Equations and  
14 Mean Annual Increment Equations for Pacific Northwest Research  
15 Station Forest Inventory and Analysis Inventories 1985-2001.’ This  
16 is a useful publication to explain forest productivity measurement  
17 methods, but it also does not calculate actual forest productivity in  
18 general or for a specific property.” Record 540.

19           The forester did not consider this information or explain why the information is  
20 incorrect and the board of commissioners erred in concluding that the OAR 660-

1 006-0010(2)(a)(C) data sources were not useful or able to inform forest  
2 productivity.<sup>4</sup>

3 The board of commissioners relied upon an analysis that did not comply  
4 with OAR 660-006-0010 and, in concluding that the analysis is adequate, the  
5 board of commissioners misconstrued the law and made a decision not supported  
6 by substantial evidence.<sup>5</sup>

---

<sup>4</sup> The forester's report states "The Oregon Department of Forestry does not reference other data sources for forest productivity that apply in Josephine County." Record 93.

<sup>5</sup> The board of commissioners found "the local Oregon Department of Forestry forest[er] agreed with the forester's methods and results." Record 14. The May 13, 2021 letter from Doug Thackery, Stewardship Forester, Grants Pass Unit, Oregon Department of Forestry, states:

"I have reviewed the Pioneer Meadows Forest Report prepared by Norman Foeller of Foeller Land & Forestry, LLC. The report's findings and conclusions are consistent with my expectations for the area, elevation, and aspect. Due to the soils and elevation, this property is biologically incapable of carrying a commercially viable stand of conifer to economic maturity. Historically this area was dominated by scrub oak savannah or scrub oak/brush savannah prior to the exclusion of wildfire. Even in the oak savannah historical vegetative areas individual conifers, primarily ponderosa pine, would be found in the wetter areas and north slopes and with the exclusion of fire these individual trees have spread to more individual conifers and small groups of conifers. As seen from I-5 there is continuing mortality of conifers due to drought stress/bark beetles because of 'artificially' higher conifer tree counts and density. With the changing climate trending toward warmer and dryer, the conifer mortality will probably accelerate in the future as the scrub oak savannah reasserts dominance. While I have not

1           It may be that, after correctly applying the data hierarchy and identifying  
2 the productivity of the land as predicted by these sources, the forester will be able  
3 to provide the board of commissioners with evidence that factors not considered  
4 in the data sources in the hierarchy result in the subject property not being forest  
5 land. In *Anderson II*, we affirmed a board of commissioners' decision amending  
6 a comprehensive plan and zoning map amendment where the county considered  
7 site specific conditions related to wind.

8           "As instructed in *Anderson I*, the county's focus on remand was on  
9 the cf/ac/year productivity on the subject property, which it found to  
10 be on the low end of the 40 to 80 middle range we discussed in [prior  
11 cases]. The additional factor of the impact of the high winds on  
12 wood fiber quality was appropriate \* \* \*." *Id.* at 53.

13 Unlike the respondent in *Anderson II*, the board of commissioners could not, on  
14 this record, proceed to consider alternative means of determining productivity  
15 because the record did not show the relevant data using the sources in the  
16 hierarchy to be unavailable or inaccurate. The report does not, for example,  
17 identify the influence of property features on forest productivity that are not

---

visited the site, I do drive by it daily and based on the view from I-  
5 further verify my expectations and reinforce the report's analysis."  
Record 885.

The Planning Notes explain, however, that "The Department of Forestry will not issue findings on whether these data sources or alternate methodologies have been employed correctly or if the resulting forest site productivity determinations are accurate. The Department of Forestry is not responsible for verifying field measurements." Record 621.

1 reflected in the required sources of information. Accordingly, the board of  
2 commissioners erred in relying on the forester's alternative analysis of  
3 productivity.

4 Petitioners also argue that, if we find that the county properly performed  
5 the steps necessary to reach the stage of the applying the Planning Notes'  
6 alternative analysis, we should conclude that the forester does not have the  
7 requisite qualifications and their report does not correctly apply with the  
8 alternative analysis.

9 First, petitioners argue that intervenor's forester does not have the requisite  
10 qualifications and made errors in their alternative analysis. The Planning Notes  
11 state, where tree measurements are undertaken, a professional forester who is  
12 either registered as a full member in good standing with the Association of  
13 Consulting Foresters or Certified by the Society of American Foresters *should* be  
14 retained by the landowner to take tree measurements and prepare a report. Record  
15 623. Petitioners argues that there is not evidence in the record that intervenor's  
16 forester has the listed certification.<sup>6</sup> Petitioners do not develop their argument that  
17 the provision that the forester "should" have certain certifications is mandatory.  
18 This element of the assignment of error is denied.

---

<sup>6</sup> The Forestry Report includes a copy of the forester's resume showing that the forester has a Bachelor of Science in Forest Management from Oregon State University, is a California Registered Professional Forester, and has decades of experience in forestry. Record 104.



1           Second, petitioners argue and provide great detail concerning alleged  
2 errors by the forester in the alternative analysis performed. For example,  
3 petitioners argue that the number of trees sampled is insufficient given the  
4 different soil types on the property, that the forestry samples are not sufficiently  
5 distributed across the plot area, and that the forestry report fails to document  
6 where trees sampled off the property are located and the characteristics of those  
7 properties. Because we sustained the assignment of error related to performance  
8 of the hierarchy analysis, we are remanding the decision for further analysis and  
9 will not address this element of the assignment of error.<sup>7</sup>

10           The first assignment of error is sustained, in part.

## 11   **SECOND ASSIGNMENT OF ERROR**

12           Statewide Planning Goal 14 (Urbanization) is “To provide for an orderly  
13 and efficient transition from rural to urban land use, to accommodate urban  
14 population and urban employment inside urban growth boundaries to ensure  
15 efficient use of land, and to provide for livable communities.” We have explained  
16 that Goal 14

---

<sup>7</sup> Recognizing that the forester’s analysis will have to be revised on remand, and that petitioners raised specific challenges to the manner in which the forester conducts the analysis including the lack of consideration of a 2019 soils report in the 2018 Forestry Report, we will not address the challenges to that analysis. If the board of commissioners determines on remand that the alternative methodologies may be employed, findings on remand should address the challenges to the adequacy of the alternative analysis.

1           “\* \* \* requires that local governments adopt urban growth  
2 boundaries (UGBs) to separate urban lands (lands inside UGBs)  
3 from rural lands (lands that lie outside UGBs). Goal 14 has been  
4 interpreted generally to prohibit urban uses of rural lands, unless an  
5 exception to Goal 14 can be justified. *1000 Friends of Oregon v.*  
6 *LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986).”  
7 *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240, 243  
8 (2010).

9           The subject property is located outside the Grants Pass UGB. Petitioners’  
10 second assignment of error is that the board of commissioners’ decision to  
11 redesignate and rezone the subject property violates Goal 14 and JCC  
12 19.46.040(C), and that the board of commissioners’ findings are not based on  
13 substantial evidence in the record.<sup>8</sup>

---

<sup>8</sup> JCC 19.46.040(C) provides:

“Requests involving changes to the plan and/or zone maps shall demonstrate the land has adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations. With the exception of subsection (C)(1) of this section, the application of any one criterion is not intended to be determinative of carrying capacity alone, unless the Review Body finds the importance of a specific benefit or detriment associated with the criterion overrides the consideration of other criteria. Nevertheless, in order to determine the adequacy of carrying capacity, the analysis must consider and address all of the listed criteria in relationship to one another. Sites may be altered to achieve adequate carrying capacity, but as alterations become more extensive, technical or difficult to perform or maintain, the greater the burden of proof shall be on the applicant to demonstrate compliance with the following criteria:

- “1. The proposed density and types of uses can be supported by the facility, service and other applicable development

---

standards contained in this title or contained in other applicable federal, state and local rules and regulations governing such densities and types of uses;

- “2. Other physical characteristics of the land and surrounding area make the land suitable for the proposed density and types of uses, to include consideration of existing or potential hazards (flood, wildfire, erosion), the degree of slopes, the presence of wetlands, geologic formations mineral deposits and any other similar natural or manmade conditions or circumstances.
- “3. The land in its natural state accommodates the proposed uses and densities, or special alterations or mitigation plans can make the land achieve the carrying capacity described under subsections (c)(1) and (2) of this section;
- “4. Development pursuant to the proposed uses or densities will not significantly increase the risk from hazards to the residents of the development, the area or the general public;
- “5. Features of the development will not result in future maintenance costs to the public for the infrastructure needed to serve the development and the area that are atypically higher than expenses for other developments in the same plan and zone designations (examples of infrastructure include streets, bridges, storm drain facilities, erosion and sediment control facilities, and other similar public infrastructure facilities); and
- “6. Special circumstances exist at or near the site that justify increased risks, expensive or complex mitigation plans or higher infrastructure costs to the public from the development. Examples of circumstances which might support the application of this criterion are changes in demographics; the location or discovery of unique natural resources; changes in infrastructure that are intended to support and encourage the kinds of development associated

1 We will reverse or remand a local government decision which misconstrues the  
2 law. ORS 197.835(9)(a)(D). We will reverse or remand a local government  
3 decision which is not supported by substantial evidence in the whole record. ORS  
4 197.835(9)(a)(C).

5 **A. First Subassignment of Error**

6 Petitioners' first subassignment of error is that the county failed to  
7 demonstrate that Goal 14 is met because the county misconstrued the law and  
8 made a decision not supported by substantial evidence, that is, evidence a  
9 reasonable person would rely upon to reach a decision. *Dodd v. Hood River*  
10 *County*, 317 Or 172, 179, 855 P2d 608 (1993).

11 With respect to Goal 14, the board of commissioners found:

12 "As described in detail below in subsection JCC 19.46.50, the  
13 application demonstrates that the subject property is non-resource  
14 land, *the minimum lot size of five acres is well above the two-acre*  
15 *minimum size in a rural residential zone per OAR 660-004-*  
16 *0040(6)(b), it is well outside the Grants Pass Urban Growth*  
17 *Boundary, and no urban services or infrastructure would be*  
18 *required. Per OAR 660-004-0040(2)(c) and [Sommer v. Josephine*  
19 *County, 49 Or LUBA 134 (2005)], an exception to Goal 14 is not*  
20 *required for nonresource land. OAR 660-004-0040(3)(c) states that*  
21 *'This rule does not apply to types of land listed in (A) through (H)*  
22 *of this subsection;'* that is, (F) or nonresource land, as defined by  
23 OAR 660-004-0005(3). Again, that is to say that "Nonresource

---

with the request; the development of rural communities; and  
any other circumstance that establishes a special need or  
benefit to the community that justifies increased risks and  
costs. This criterion shall not be used to modify the  
requirements of subsection (C)(1) of this section."

1 Land” is not subject to any of the statewide goals listed in OAR 660-  
2 004-0010(1)(a) though (g)’; that is Goal 3 Agricultural Lands (a)  
3 and Goal 4 Forest Lands (b). LUBA 2004-131 – *Sommer v.*  
4 *Josephine County* affirms that nonresource lands are not subject to  
5 a Goal 14 exception.” Record 8 (emphasis added).

6 The above findings, that a Goal 14 exception is not needed, rely first on  
7 the conclusion that the five-acre minimum lot size is well above the minimum  
8 two-acre lot size set out in OAR 660-004-0040(2)(c) and discussed in *Sommer v.*  
9 *Josephine County*, 49 Or LUBA 134, *aff’d* 201 Or App 528, 120 P3d 927 (2005).  
10 “The purpose of [OAR 660-004-0040] is to specify how Goal 14 ‘Urbanization’  
11 applies to rural lands in acknowledged *exception* areas planned for residential  
12 uses.” OAR 660-004-0040(1) (emphasis added).

13 “An ‘Exception’ is a comprehensive plan provision, including an  
14 amendment to an acknowledged comprehensive plan, that:

15 “(a) Is applicable to specific properties or situations and  
16 does not establish a planning or zoning policy of  
17 general applicability;

18 “(b) Does not comply with some or all goal requirements  
19 applicable to the subject property or situations; and

20 “(c) Complies with ORS 197.732(2), the provisions of this  
21 division and, if applicable, the provisions of OAR 660-  
22 011-0060, 660-012-0070, 660-014-0030 or 660-014-  
23 0040.” OAR 660-004-0005(1).

24 As we discuss in our resolution of the first assignment of error, the county found  
25 that the subject property is nonresource, that is, that given the quality of the land,  
26 the property was not properly characterized as forest land. Under the county’s

1 conclusion that the subject property is not properly characterized as forest land,  
2 an exception to Goal 4 is not required and no Goal 4 exception area was adopted.

3 Because the subject property is not part of a Goal 3 or 4 exception area,  
4 OAR 660-004-0040 is not applicable to the evaluation of Goal 14. OAR 660-  
5 004-0040(3)(a) explains that the rule applies to “rural residential areas,” that is,  
6 “lands that are not within an urban growth boundary, that are planned and zoned  
7 primarily for residential uses, and *for which an exception to Goal 3 ‘Agricultural*  
8 *Lands’, Goal 4 ‘Forest Lands’, or both has been taken.”* OAR 660-004-  
9 0040(2)(f) (emphasis added). OAR 660-004-0040(3)(c)(F) provides additional  
10 clarification that that the rule is inapplicable here, stating that the rule does not  
11 apply to nonresource land as defined in OAR 660-004-0005(3). “‘Nonresource  
12 Land’ is land not subject to any of the statewide goals listed in OAR 660-004-  
13 0010(1)(a) through (g) except subsections (c) and (d).” OAR 660-004-0005(3).  
14 The board of commissioners determined in this decision that the subject property  
15 was nonresource land so the rule does not apply. Record 17. The board of  
16 commissioners erred in relying on OAR 660-004-0040 to conclude that a Goal  
17 14 exception was not needed.

18 Despite the inapplicability of OAR 660-004-0040, the board of  
19 commissioners based its conclusion that a five-acre minimum parcel size was  
20 consistent with Goal 14, based on OAR 660-004-0040(6)(b). OAR 660-004-  
21 0040(6)(b) provides:

22 “A rural residential zone does not comply with Goal 14 if that zone

1 allows the creation of any new lots or parcels smaller than two acres.  
2 For such a zone, a local government must either amend the zone's  
3 minimum lot and parcel size provisions to require a minimum of at  
4 least two acres or take an exception to Goal 14. Until a local  
5 government amends the land use regulations to comply with this  
6 subsection, any new lot or parcel created in such a zone must have  
7 an area of at least two acres."

8 As we explained in *Sommer v. Josephine County*,

9 "OAR 660-004-0040 was adopted and became effective on October  
10 4, 2000. That rule sets out how Statewide Planning Goal 14  
11 (Urbanization) applies to rural lands for which exceptions to Goals  
12 3 and 4 have been approved, when they are planned and zoned for  
13 residential use.

14 "\* \* \* \* \*

15 "\* \* \* OAR 660-004-0040 does not apply to either 'resource land'  
16 or 'nonresource land.' Since the subject property is either resource  
17 land or nonresource land, OAR 660-004-0040 does not apply." 49  
18 Or LUBA at 157.

19 Thus, neither OAR 660-004-0040 nor *Sommer* support the board of  
20 commissioners' conclusion that zoning allowing lots larger than two acres in size  
21 is *per se* consistent with Goal 14. The board of commissioners misconstrued  
22 OAR 660-004-0040 and we sustain this element of the subassignment of error.

23 The first subassignment of error is sustained.

#### 24 **B. Second and Third Subassignments of Error**

25 In concluding that an exception to Goal 14 is not required, the board of  
26 commissioners also made findings that the amendments are consistent with Goal  
27 14 based upon the minimum lot size of five acres, the subject property's distance  
28 to the Grants Pass UGB, and the lack of a need for urban infrastructure and

1 services. Petitioners’ second subassignment of error is that board of  
2 commissioners’ analysis misconstrues applicable law and is not supported by  
3 substantial evidence.

4 **1. Lot Size**

5 First, petitioners argue in their second subassignment of error, and we  
6 agree, that the five-acre lot size does not ensure compliance with Goal 14. OAR  
7 660-006-0040(8) provides that a Goal 14 exception is required when creating a  
8 lot or parcel smaller than two acres in an exception area *but that it “shall not be*  
9 *construed to imply that creation of lots or parcels larger than two acres always*  
10 *comply with Goal 14.”*<sup>9</sup> We explained in *Columbia Riverkeeper v. Clatsop*  
11 *County* that where OAR 660-004-0040(8) was not applicable, an exception to  
12 Goal 14

13 “\* \* \* would only be required if the factors discussed in *1000*  
14 *Friends of Oregon v. LCDC (Curry County)*, 301 Or at 498-511  
15 make such an exception necessary. Those factors include lot size,  
16 density, proximity to urban growth boundaries, and services that

---

<sup>9</sup> OAR 660-004-0040(8)(a) states:

“The creation of any new lot or parcel smaller than two acres in a rural residential area shall be considered an urban use. Such a lot or parcel may be created only if an exception to Goal 14 is taken. This subsection shall not be construed to imply that creation of new lots or parcels two acres or larger always complies with Goal 14. The question of whether the creation of such lots or parcels complies with Goal 14 depends upon compliance with all provisions of this rule.”



1 will be needed for the residential development.”<sup>10</sup> 61 Or LUBA at  
2 244.

3 Similarly, if the county is correct that the subject property is nonresource land  
4 and an exception to Goal 4 is not required, the board of commissioners must  
5 consider the factors discussed in *1000 Friends of Oregon v. LCDC (Curry Co.)*  
6 (the Curry Factors) to determine if a Goal 14 exception is required. The board of  
7 commissioners has not explained why the five acre minimum lot size reflects a  
8 rural use.

9 Further, petitioners argue in their third subassignment of error that the  
10 acknowledgments in the findings that planned unit developments may be possible  
11 following the redesignation of the property is evidence that the use is urban. The  
12 findings illustrate that a planned unit development (PUD) may be possible on the  
13 subject property and that use of a PUD may enable certain criteria to be met. *See*  
14 Record 9. JCC 19.46.040(C) provides that requests to change

15 “\* \* \* the plan and/or zone maps shall demonstrate the land has  
16 adequate carrying capacity to support the densities and types of uses  
17 allowed by the proposed plan and zone designations. \* \* \*

18 “(1) The proposed density and types of uses can be  
19 supported by the facility, service and other applicable  
20 development standards contained in this title or  
21 contained in other applicable federal, state and local

---

<sup>10</sup> *See 1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 471-72 (discussing UGBs and the need for counties to “not simply ignore Goal 14.”); *see also id.* at 498-511 (discussing the factors to be considered when deciding if a Goal 14 exception is needed).

1 rules and regulations governing such densities and  
2 types of uses;

3 “(2) Other physical characteristics of the land and  
4 surrounding area make the land suitable for the  
5 proposed density and types of uses, to include  
6 consideration of existing or potential hazards (flood,  
7 wildfire, erosion), the degree of slopes, the presence of  
8 wetlands, geologic formations, mineral deposits and  
9 any other similar natural or manmade conditions or  
10 circumstances.”

11 The board of commissioners’ findings addressing these criteria state in part:

12 “Schott and Associates conducted a wetland delineation on the  
13 property and found a total of 2.59 acres of actual wetland on the  
14 property that can either be completely avoided with a Planned Unit  
15 Development or cluster subdivision design or mitigated. The 0.87  
16 acres of ditches caused by the interstate and other runoff can also be  
17 mitigated with properly sized culverts. All of these hazards can  
18 either be completely avoided or mitigated in future development  
19 with an updated engineering plan appropriate for the actual  
20 development.” Record 9.

21 JCC 19.46.050(D) provides that when rezoning or changing the comprehensive  
22 plan designation to non-resource land, criteria include “The land is not other  
23 forested lands that maintain soil, air, water and fish and wildlife resources.” The  
24 board of commissioners’ findings include

25 “The record shows that an erosion-stormwater drainage plan by a  
26 registered engineer is possible in order to preserve soil, water, and  
27 fish. Outside of fuels reduction in the wooded area, preservation of  
28 as many trees as possible will maintain air quality. There are no  
29 documented wildlife resources on the subject property. A future  
30 PUD or cluster subdivision design has the potential to preserve as  
31 much wildlife habitat as possible in the wooded areas.” Record 17.

1 Both these sets of findings refer to the ability of a PUD to serve as a mechanism  
2 to meet approval criteria.

3 JCC 19.55.020(A)(1) provides, in part:

4 “The Planning Commission shall have authority to approve tentative  
5 plans for planned unit subdivision, to include specified departures  
6 from development standard and zoning requirements \* \* \*.  
7 Approval may:

8 “(1) Allow individual lots to deviate from minimum lot size  
9 and shape requirements, and building heights, setback  
10 and other dimensional standards contained in Chapter  
11 19.71 and 19.72 JCC.”

12 Because the JCC allows the creation of PUDs with lot sizes lower than the zone  
13 minimum lot size and the board of commissioners relied on the ability to form  
14 PUDs to meet applicable criteria, petitioners argue that there is not substantial  
15 evidence in the record that density will not be at an urban level. We agree.

16 *Wood v. Crook County* concerns a decision amending the comprehensive  
17 plan designation for a property from exclusive farm use to nonresource and  
18 amending the zoning from EFU-1 to Rural Aviation Community. 49 Or LUBA  
19 682 (2005). The new zone allowed “up to 32 new residential lots 20 acres in size  
20 or smaller within a planned unit development, plus a dwelling on each of the five  
21 existing lots.” *Id.* at 688. We concluded

22 “As we understand the RAC zone, it allows clustering of up to 32  
23 new dwellings within a planned unit development without, any  
24 minimum lot size. As a general matter, Goal 14 is applicable to plan  
25 and zoning amendments that allowed residential density less than  
26 one dwelling per acres. Because the RAC zone effectively has no

1 minimum parcel size, it potentially would allow residential  
2 development at densities that clearly could be inconsistent with Goal  
3 14.” *Id.* at 693 (internal citations omitted).

4 We remanded for the county to amend the RAC zone or take an exception to Goal  
5 14. Here, the board of commissioners erred in relying on the minimum five-acre  
6 lot size to conclude that Goal 14 is met.

7 This subassignment of error is sustained.

## 8 **2. Proximity to UGB and Urban Services**

9 Petitioners argue in their second subassignment of error that the board of  
10 commissioners erred in its findings that the Goal 14 is met based on distance to  
11 the UGB and the level of services required. The board of commissioners made  
12 findings that the subject property “is well outside the Grants Pass Urban Growth  
13 Boundary, and no urban services or infrastructure would be required.” Record 8.

14 Adequate findings identify the relevant criteria, the evidence relied upon  
15 and why the evidence supports the conclusion that the criteria are or are not met.  
16 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The findings are  
17 inadequate because the bare facts provided do not explain what services or  
18 infrastructure will be provided or why the distance to the UGB makes the use  
19 non-urban.

20 This subassignment of error is sustained.

## 21 **3. Carrying Capacity**

22 The last element of petitioners’ third assignment of error is difficult to  
23 understand. To the extent we understand it, petitioners argue that a provision in

1 the county’s comprehensive plan relating to the carrying capacity of the subject  
2 property, implicates Goal 14 and requires a consideration of the cumulative  
3 impact of the rezoning of the subject property on other property.

4 JCC 19.46.040(A) provides that changes to comprehensive plan and  
5 zoning maps shall demonstrate compliance with all applicable county goals and  
6 policies. The board of commissioners found

7 “County Goal 3: According to this goal, lands that are shown to be  
8 non-resource in capability shall be placed in a rural residential land  
9 use classification (Policy 1) provided carrying capacity is  
10 demonstrated (Policy 3). Carrying capacity and consistency are  
11 addressed in detail below. Policy 3 also indicates that the land use  
12 allocation will accommodate the ‘need and public desire for rural  
13 residential homesites.’ Given the current housing shortage, there is  
14 surely a need for residential development in Josephine County.”<sup>11</sup>

---

<sup>11</sup> Comprehensive Plan Goal 3, “Provide Land Allocations to Encourage a Wide Variety of Safe and Affordable Housing,” is, in part,

“\* \* \* \* \*

“3. Land use allocations will, to the greatest extent possible, accommodate the identified need and public desire for rural residential homesites, while preserving the rural character of the area. Appropriate minimum lot sizes for rural residential areas shall be determined by land limitations, including the following:

- “A. Ability to provide adequate sewage disposal.
- “B. Availability of water supplies for domestic purposes.
- “C. Suitability of the area for development, including proximity of public roads and the lack of development

1 Record 7-8.

2 Petitioners direct our attention to a Department of Land Conservation and  
3 Development (DLCD) letter to the county, pointing

4 “out that the county has redesignated over 15,500 acres of land to  
5 nonresource, leading to more rural subdivisions, increased wildfire  
6 risk and cost, and less open space and natural buffers. Record 593-  
7 94. The county’s approval of the application will allow another  
8 subdivision outside of urban growth boundaries, an urban use  
9 requiring a goal exception, which will further strain the carrying  
10 capacity of the county’s remaining rural lands.” Petition for Review  
11 37.

12 Petitioners argue that the DLCD reference to other subdivisions in the county was  
13 evidence the county was required to consider in the context of Goal 14. Intervenor  
14 argues that petitioners have waived their assignment of error to the extent it is  
15 implying that the county was required to consider cumulative impacts, stating:

16 “\* \* \* Petitioners here both ignore ORS 197.763(1) which requires  
17 an issue be raised with sufficient specificity before the  
18 decisionmaker is required to address it with sufficient findings  
19 supported by substantial evidence. Suggesting that it was up to the  
20 applicant to disprove that this development would result in  
21 apparently excessive ‘cumulative impacts’ is unsupportable. \* \* \*  
22 Lead Petitioner is an experienced participant in land use proceedings  
23 throughout Oregon and this board should expect that it would have  
24 been able to articulate something in the way of ‘cumulative’ impact  
25 from this development which the applicant should be required to  
26 address.” Response Brief 15-16.

---

hazards, such as floodwater inundation, steep slopes,  
erosive soils, or extreme wildfire hazard.

“D. The character of the area and the desire of the property  
owner.”

1 Petitioners do not respond to this waiver argument and we do not address the  
2 cumulative impact element of the assignment of error further.

3 The second subassignment is sustained.

4 The third subassignment is sustained in part.

5 The second assignment of error is sustained.

6 The decision is remanded.