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

1000 FRIENDS OF OREGON
and ROGUE ADVOCATES,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent.

LUBA No. 2023-022

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioners.

Alison K. Smith filed the respondent's brief.

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

REMANDED 11/02/2023

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

Opinion by Rudd.

NATURE OF THE DECISION

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

FACTS

Petitioners appeal the board of commissioners' decision following our remand in *1000 Friends of Oregon v. Josephine County*, ___ Or LUBA ___ (LUBA No 2021-116, June 2, 2022) (*Marvin I*). As we explained in *Marvin I*:

> "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. 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).
>
> "[Applicant] applied to the county to change the subject property's comprehensive plan designation from Forest to Residential and zoning from WL to Rural Residential (RR5), designations that allow rural residential subdivisions. 'Amendments to a plan and zone map [must] demonstrate compliance with all applicable statewide and County goals and policies.' JCC 19.46.040(A). JCC 19.46.040(B) provides that comprehensive plan and zone map '[r]equests involving changes for lands from a resource designation to a nonresource designation shall either comply with statewide exception criteria contained in ORS 197.732, and as implemented in

> OAR Chapter 660-004 or demonstrate the land is nonresource pursuant to the criteria contained in JCC 19.46.050.' JCC 19.46.050 implements OAR 660-006. [Applicant sought] to demonstrate the subject property is nonresource land." *Id.* (internal footnote and Record citations omitted, brackets in original) (slip op at 3-4).

Our decision in *Marvin I* determined that the board of commissioners erred in its application of OAR 660-006-0010(2) and Goal 14 (Urbanization) and remanded the decision to the county. In resolving petitioners' assignment of error related to OAR 660-006-0010(2), we concluded, in part, that in evaluating whether the subject property is productive forest land, applicant's forester, Foeller, failed to address four acres of soil on the property, analyzing only 83 of the 87.75 acres. *Marvin I*, ___ Or LUBA at ___ (slip op at 10).

Applicant requested that the county conduct remand proceedings. The board of commissioners opened the record and accepted additional evidence from the applicant and petitioners. New material submitted included letters from the applicant's attorney dated September 14, 2022, letters from Foeller, dated September 5, 2022, and October 3, 2022, and comment letters from petitioners. The September 14, 2022, letter from the applicant's attorney stated, in part:

> "Accompanying this letter is the September 5, 2022, letter from Norm Foeller of Foeller Land & Forestry, LLC. In that letter, Mr. Foeller responds to the matters upon which LUBA based its remand decision regarding the property's suitability for commercial forestry. The board [of commissioners] will see that Mr. Foeller's conclusion that the property is unsuitable for commercial forestry remains intact and that, in fact, his analysis has been at all times correct. This is sufficient for the board [of commissioners] to conclude, as it did previously, that the subject property is not suitable for commercial forestry and, therefore, must be rezoned.

Mr. Foeller will be available to respond to questions and provide any further information." Record 167.

The United States Department of Agriculture's Natural Resources Conservation Service (NRCS) reports annual wood production capability by cubic foot per acre. OAR 660-006-005(3).[1] The NRCS "Web Soil Survey National Cooperative Soil Survey" explains:

> "Forest productivity is the volume of wood fiber that is the yield likely to be produced by the most important tree species. This number expressed as cubic feet per acre per year and calculated at the age of culmination of the mean annual increment (CMAI), indicates the amount of fiber produced in a fully stocked, even-aged, unmanaged stand." Record 52.

In their September 5, 2022, letter, Foeller concluded:

> "The first issue under the assignment of error involves a question [of] whether NRCS data was available for the entire property because of a contention that four acres may have been omitted from my initial evaluation. It appears from my records that, in fact, I made an inadvertent error in my report resulting from the apparent transposing [of] acreage numbers for the Siskiyou Gravelly Sandy Loam soil on the soils list on pages 1 and 3 of the Forest Productivity Analysis dated May 7, 2018. The correct acreage is 9.9 instead of 6. Be advised that 6 acres was not used in any calculations. The total acreage of 87.75 is from the Josephine County plat maps. As a result, I maintain that the total overall productivity for the property is, in fact, 37 cubic feet per acre and so it is clear the NRCS data does not support a conclusion that the property is potentially productive

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[1] OAR 660-006-005(3) defines "cubic foot per acre" as "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."

forestland." Record 269.

Foeller followed the September 5, 2022, letter with an October 3, 2022, letter. Foeller's October 3, 2022, letter states:

> "I had the opportunity to fully review the comments submitted by opponents to the application prior to the September 26, 2022, hearing.
>
> "I have thoroughly reviewed my records and the data relevant to my evaluation. My first task is to evaluate the property's suitability for commercial forestry based on the [NRCS] Soil Survey. The following table is what was submitted previously:

"Soil type	%Slope	CMAI*	Acreage	%Acreage	%CMAI
"12B & 12D (Brockman cobble clay loam)	2-20	NR	18.16	21	
"18B (Copsey Clay)	3-7	NR	36.32	42	
"42D (Holland sandy loam)	12-20	109	22.11	26	28
"70F & 71F	35-60	114	6.00	10	10
		"Total	87.75	100	38

> "I concur that the foregoing table requires adjustment. The correct total acreage on the above table is 82.59.
>
> "The property is, in fact, 87.75 acres. The following table corrects the calculation in acreage. The percent CMAI is the product of the NRCS CMAI multiplied by the percent acreage

"Soil type	% Slope	CMAI*	Acreage	%Acreage	% CMAI

"12B & 12D	2-20	NR	18.43	21	
"(Brockman cobble clay loam)					
"18B	3-7	NR	36.85	42	
"(Copsey Clay)					
"42D	12-20	109	22.82	26	28
"(Holland sandy loam)					
"70F & 71F	35-60	114	9.65	11	12
		"Total	87.75	100	40

> "The percent of acreage for each soil type and the total average are constants. How acreage is calculated (up or down) can vary results while still relying on the property's total acreage." Record 88 (underscoring, boldface, and emphases omitted).

The remand record includes comments from petitioners, including a letter from petitioners' forester, critiquing the analysis by Foeller.[2] On September 26,

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[2] Petitioners' forester submitted an October 10, 2022, letter critiquing Foeller's analysis, concluding:

> "The site productivity determination submitted by Foeller May 2018 is flawed in at least two respects. Site trees 1- 7 in tax lot 1900 page 92 are apparently located on Brockman 12 soils, a soil that Foeller indicates is nonproductive. *Further in the latest report page 2 paragraph 5, October 3, 2022* he asserts that trees 17 to 25 were located further north, off the property in question and also on Brockman soils. No location map is available. It appears that 16 of the 25 or 64 % of site data collected ponderosa pine trees were used to populate the list of ponderosa pine site index trees on page 92 were located on Brockman soils. Brockman soils must then be acknowledged as a productive forest soil given that sampling of

2022, and October 17, 2022, the board of commissioners conducted public hearings on the application. On October 17, 2022, the board of commissioners again approved applicant's application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Background

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

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> most of the site trees are located on that soil series. In summary, how could soil series be considered to have zero productivity[,] when most of the site trees were collected on said soil Brockman 12? Given data collected by Foeller and applying a site index of 82 to the Brockman soils, % CMAI for Brockman is then 22 on the NRCS survey on page 91 of the original report and *on the revised table provided in Foeller's October 3, 2022* letter. Total CMAI based on the revised table is then 62[.]
>
> "A second concern that I have is the Foeller report's penchant for reducing stand acreage on the soil types located on the property. Note the soil type table on page 91 of the original report. If Brockman 12 is included as a forest productive soil as it should be, the total acreage of Brockman, Holland and Siskiyou soils is nearly 51 acres. *Again see the updated table on page 1 of Foeller's October 3, 2022 letter that identifies 18.4 acres Brockman, 22.8 acres Holland and 9.7 acres Siskiyou.* The CMAI table on page 95 indicates only 26.5 acres (Assessor Forestland Designated Acreage). The Foeller report has in effect reduced acreage of forest stands found on the soil series used to establish site productivity without justifying the reduction or collecting additional data. On page 95 only 6 acres are indicated as forest land out of 18 acres of Brockman 12. The same is true for other soil series on the property." Record 62-63 (emphases added).

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."

Petitioners' first assignment of error is that, for numerous reasons, the board of commissioners erred in its determination that the subject property is not resource, in this case forest, land. Petitioners assert that the board of commissioners' decision violates OAR 660-006-0010(2), contains inadequate findings, and is not supported by substantial evidence.

As we explained in *Marvin I*:

"OAR 660-006-0010 sets out the process by which governing bodies will identify '"forest lands" as defined by Goal 4 in the comprehensive plan.' OAR 660-006-0010(1). Pursuant to OAR 660-006-0010(2),

"Where a plan amendment is proposed:

"(a) 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. Where NRCS data are not available or are shown to be inadequate, 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.

"(b) Where data of comparable quality under [660-0010-002(c)(A)-(C)] are not available or are shown to be inadequate, 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.*'

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

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

> "'the county must consider the wood fiber productivity of the subject property in cf/ac/year. That cf/ac/year data must be from one of the sources authorized by [LCDC's rule]. If that data is not available or is shown to be inaccurate, equivalent data may be used, as authorized by the rule and approved by the Oregon Department of Forestry. *Anderson v. Lane County*, 57 Or LUBA [562], 573 [(2008)]. If the analysis required by [LCDC's rule] is not conclusive, the county may then consider other factors, provided those other factors are 'not accurately reflected in or accounted for in the data described in [LCDC's rules.]' *Anderson I*, 60 Or LUBA at 251-52.

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

> "'When NRCS soil survey information is available, it should always be considered first when making forest land site productivity determinations. *Where the county determines that NRCS or other established data sources approved by the State Forester are available and accurate for determining site productivity at the scale of the tract of interest, the county planning department must make its decision using these data.*' Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010. [(E]mphasis added[.)]

"The Planning Notes also advise the user that the

> "'Existence of data listed in Step 1 does not prohibit a landowner from retaining a professional forester or professional soils classifier to measure the productivity of the land if they believe the published data are inaccurate. In such cases, the county must determine which data source it will use in making its decision.'

> "However, the Planning Notes go on to say that '[t]he burden of proof is on the applicant and the consultant to demonstrate that information in the submitted report is more accurate than that available in established data sources.'" ___ Or LUBA at ___ (slip op at 5-7) (internal Record citations omitted).

We will reverse or remand a local government land use decision that improperly construes the applicable law or is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C), (D).

B. Interpretation of OAR 660-006-0010(2)

1. Soil Mapping

First, petitioners argue that the board of commissioners' decision is not supported by substantial evidence because the board of commissioners determined that it was not required to consider non NRCS soil mapping in the

record, in violation of OAR 660-006-0010(2). Petition for Review 6, 9. Petitioners also argue that the board of commissioners improperly construed OAR 660-006-0010(2). For the reasons set out below, we reject the first argument and agree with the second.

In 2004, the owner of the property obtained a site-specific soil survey (the 2004 soil survey). *See* LUBA No. 2021-116 Record 237-40. The distribution of soil types on the property identified in the 2004 soil survey differed from that reflected in the NRCS soil mapping for the property. The board of commissioners nonetheless relied upon Foeller's revised report, which, in turn, relied on NRCS mapping. Petitioners maintain that given the evidence in the record that the NRCS mapping incorrectly classified soils on the property, this was error and the board of commissioners was required to consider the site-specific soil survey. Petitioners argue:

> "By evaluating productivity based on NRCS mapped soils, [Foeller] reviewed NRCS productivity ratings for soils in proportions that – according to the applicant's soil scientist – do not actually exist on the property. For that reason, [Foeller] failed to demonstrate that [their] report actually evaluated the correct 'mapping of average annual wood production capability' for NRCS-rated soils on the property pursuant [to] OAR 660-006-0010(2)(a)." Petition for Review 9.

The county maintains that it was within Foeller's professional judgment to disregard the 2004 soil survey, arguing:

> "Foeller did not rely on the 2004 soils report in lieu of NRCS mapping because he was not obligated to do so. He is free to exercise, independent, professional judgment and rely on the data he

determined to be sufficient for purpose of his report – the NRCS soil mapping.

> "In fact, even if [Foeller] had all the information from the January 28, 2004, soils report, it would have been within his professional judgment to decline considering it in favor of the NRCS mapping. The 2004 report is identified as an Order 1 Soil Survey to determine Land Capability Classification. The soils report refers to growing crops, not forest land. That is because a Land Capability Classification is a system of grouping soils primarily on the basis of their capability to support common cultivated crops or pasture plants." Respondent's Brief 7 (internal citations omitted).

The county concludes "nothing in the record compels a conclusion that the work to determine soil suitability for farming is interchangeable with a soils evaluation for determining commercial forest productivity." Respondent's Brief 8.

The county also responds:

> "[*Foeller] was entitled to use the NRCS mapping* unless he found the information to be 'not available or * * * shown to be inadequate * * *.' OAR 660-006-0010(2). If [Foeller] made the determination that the NRCS data was unavailable or inadequate, then he could refer to the other listed sources: Oregon Department of Revenue site class maps; USDA Forest Service plant association guides; or other information determined by the State Forester to be of comparable quality. [Foeller] *was not required to do more than rely on the NRCS mapping*." *Id.* (emphases added).

We agree with the county that OAR 660-006-0010(2) does not require Foeller, and therefore the county, to rely on a site-specific soil survey. OAR 660-006-0010(2)(a) provides:

> "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 [NRCS]*. 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 [order of priority provided in the remainder of the rule]." (Emphases added.)

In interpreting an administrative rule, we consider the text and context. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We will not insert what has been omitted. ORS 174.010. We understand petitioners to argue that the board of commissioners misconstrued OAR 660-006-0010(2)(a) by relying on the NRCS data because the record includes the 2004 soil survey, which shows a different distribution of soil types on the property. We agree with the county that petitioners' reading of the rule is incorrect. The rule provides that the county *may*, in certain circumstances, rely on evidence other than the NRCS reported data, not that it *must* do so. The county did not misconstrue OAR 660-006-0010(2)(a) in relying on the available NRCS data, and the NRCS data is substantial evidence, that is evidence which a reasonable person would rely upon.

This subassignment of error is denied.

2. Use of Hierarchy of Official Data Sources

Petitioners next argue that the board of commissioners' reliance on Foller's alternative analytic approach is not allowed because it is inconsistent with OAR 660-006-0010(2). Petition for Review 7. The county responds, in part:

> "[Foeller's] submissions on remand makes clear that he restricts his conclusion to N[RC]S mapping as dictated by OAR 660-006-0010(2). [NRCS] does not rate Brockman 12 as a soil productive of commercial forest species. *[Foeller] field-tested the data revealed by the N[RC]S data to determine if these soils were productive of commercial forest species.* He did not find commercial tree species of sufficient size or number to reflect Brockman 12 as productive

forestland." Record 9 (emphasis added).

We agree with petitioners that the board of commissioners relied on an analytic approach that is inconsistent with OAR 660-006-0010(2). Foeller's October 3, 2022, letter includes a table that identifies the NRCS productivity numbers for those soils identified by NRCS mapping of the subject property. Record 88. We refer to this as "Foeller's table." For those soils for which NRCS does not provide a productivity number, Foeller's table leaves the productivity column empty. Petitioners argue that under OAR 660-006-0010(2), it was incorrect to attribute a productivity number of zero to these soils.

The board of commissioners found that Foeller did not assume zero productivity based on the lack of an NRCS rating in their ultimate productivity conclusion. The board of commissioners found that Foeller

> "made clear that he did not assume the property's soils which are unrated have zero productivity. Rather, based on his personal observations on-site, his October 3, 2022, letter concludes that, in fact, the unrated soils have zero productivity. We incorporate his reasoning since it appears consistent with all other evidence that this property does not support significant commercial forest species." Record 8-9.

We agree with the county that where the NRCS does not provide a productivity number for a given soil, it is appropriate for the forester to consider other sources of information. OAR 660-006-0010 requires, however, that the forester identify the productivity based upon a hierarchy of sources set out in detail in that rule, and then, if the sources are incorrect or inaccurate, explain why they were so. Here, Foeller did not explain what productivity is reflected by the

sources identified in the rule and did not explain why those sources are inaccurate. We agree with petitioners that this approach is not allowed by OAR 660-006-0010.

Foeller's table did not include productivity numbers for two types of soil on the property. Foeller stated that they did not conclude that the productivity of those two soil types was zero based on the lack of NRCS productivity numbers for these types of soil. Instead, Foeller stated that their conclusion that the productivity for those two soil types was zero was based upon their personal inspection of the site.

First, Foeller stated that they only included the NRCS information for information purposes and that they did not rely on it when making their independent determination of productivity, and that they believe the NRCS to normally overstate productivity, explaining:

> "It should be noted that the above table is included because the Oregon Department of Forestry Planning Notes (Planning Notes) require a listing of soil types and percentages on their form 'Data Form for Forestland Site Productivity Determination using Site Index'. *It is for information purposes only. I do not use it when calculating the CMAI on my independent determination of CMAI.*
>
> "*Over my career, experience with NRCS data indicates that, if anything, it normally results in a significant overstatement of forest productivity. That is the case here.* The Oregon Department of Forestry Planning Notes report form requires a list of soil types and their percentages. I do necessary tree measurements and calculations and draw conclusions consistent with the Planning Notes. My report is site specific and represents actual forest conditions." Record 89 (emphases added, boldface omitted).

Foeller further explained:

"Consistent with professional standards, I did not solely rely here on NRCS mapping. I performed a site inspection. This confirms the property's poor forest productivity. For example, there were not enough stands of Douglas fir to sample with any hope of an accurate evaluation. So, I had to sample the next possible forest species, ponderosa pine. Nine trees sampled were from the applicants' adjoining property to the north. The result of my site inspection performed consistent with the Planning Notes resulted in a CMAI of 22 cubic feet per acre per year. This is well below the threshold for commercial forestland.

"I also evaluated the property based on other indicators of productivity. *While Department of Revenue Site Class Maps may exist for particular property, they are neither accurate nor useful for this property. [Oregon Department of Revenue (DOR)] Site Class Maps simply express a range of productivity but the range is not site specific for individual properties.* What that means for the subject property is that this resource is neither 'accurate' nor 'available' for use to accurately determine CMAI.

"*Other sources of information are similarly neither accurate nor available to a professional forester to perform a quantitative analysis of forest productivity. This includes the US Forest Service Plant Association Guides*. While this resource has information that could lead one to assume that an association could be commercial forestland, there is no information to determine the site index or CMAI for the subject property." Record 89 (emphases added, boldface omitted).

As we explained in *Marvin I*:

"It may be that, after correctly applying the data hierarchy and identifying the productivity of the land as predicted by these sources, the forester will be able to provide the board of commissioners with evidence that factors not considered in the data sources in the hierarchy result in the subject property not being

forest land. In *Anderson* [*v. Coos County*, 62 Or LUBA 38, 51 (2010) (*Anderson II*)], we affirmed a board of commissioners' decision amending a comprehensive plan and zoning map amendment where the county considered site specific conditions related to wind.

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

"Unlike the respondent in *Anderson II*, the board of commissioners could not, on this record, proceed to consider alternative means of determining productivity because the record did not show the relevant data using the sources in the hierarchy unavailable or inadequate. *The report does not, for example, identify the influence of property features on forest productivity that are not reflected in the required sources of information.* Accordingly, the board of commissioners erred in relying on the forester's alternative analysis of productivity." *Martin I* ___ Or LUBA at ___ (first brackets and emphasis added, second brackets in original) (slip op at 15-16).

The rule requires that the forester must consider each of the data sources in the rule and before proceeding to the next source, or resorting to a site-specific survey, determine why, for that specific property, each data source in the rule hierarchy is incorrect or inadequate. Here, Foeller does not explain *why* the NRCS data *for the subject property* is inadequate for the soils with NRCS productivity data. Foeller then proceeds to evaluate the productivity of the subject property based on their site inspection without first identifying the DOR class map productivity rating of the property. Petitioners contend that the DOR maps for the subject property "show a productivity of between 50 to 84 cubic feet per

are per year." Petition for Review 26. Instead of addressing the DOR productivity value for the subject property, Foeller states "DOR Site Class Maps simply express a range of productivity but the range is not site specific for individual properties." Record 89. Thus, the board of commissioners misconstrued OAR 660-006-0010 in relying on the Foeller's analysis that does not comply with that rule.

This subassignment of error is sustained.

C. Adequacy of Findings and Substantial Evidence

The decision must be supported by adequate findings. Adequate findings identify the relevant approval standards, the facts relied upon and explain how the facts relied upon lead to the conclusion that the approval standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is evidence that a reasonable person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

1. Evidence of Soil Productivity for Soils Not Rated by NRCS

Petitioners argue that the board of commissioners' conclusion that soils not rated by NRCS have zero productivity is not supported by substantial evidence. As we explained in our resolution of the prior subassignment of error, the forestry report that the board of commissioners relied upon did not identify the productivity of the various soils as reflected by sources in OAR 660-006-0010(2)(a)'s hierarchy and if those sources are inaccurate for the site, explain

what the source failed to consider, as required by the rule. We therefore agree with petitioners that the board of commissioners' conclusion that these soils have zero productivity is not supported by substantial evidence. Because the board of commissioners did not rely on evidence in the hierarchy required by the rule, we agree that the forester's conclusion is not substantial evidence upon which a reasonable person would rely.

Petitioners also argue that even if the board of commissioners could permissibly rely on Foeller's report, Foeller made data collection errors in the alternative analysis performed. Petitioners first argue that the number of trees sampled is insufficient given the different soil types on the property; that the forestry samples are not sufficiently distributed across the plot area; and that the forestry report fails to document where trees sampled off the property are located and the characteristics of those properties. Because we sustained the assignment of error related to performance of the hierarchy analysis, and the board of commissioners will have to consider whether there is sufficient evidence to proceed to a site-specific study, we are remanding the decision for further analysis and will not address this element of the assignment of error.

This subasignment of error is sustained.

2. Evidence of Soil Productivity Capacity Based on NRCS Data

Petitioners argue that the board of commissioners' finding that the commercial productivity of the subject property is 37 cubic feet per acre is not

supported by substantial evidence. The county responds that the board of commissioners was not required to and did not make a specific CMAI finding for the subject property.

In *Marvin I*, petitioners argued, and we agreed, that Foeller failed to address four acres of soil on the property, analyzing only 83 of the 87.75 acres. Here, the board of commissioners found that *Marvin I*

> "holds that the applicant's expert analysis, as previously submitted, did not constitute substantial evidence that the request complied with [OAR 660-006-0010]. The primary argument was that the analysis of N[RC]S data was flawed.
>
> "In the remand hearings, * * * the applicant's expert forester responded to [*Marvin I*]. He corrected an error in transposing acreage numbers for Siskiyou Gravelly Sandy Loam from the Forest Productivity Analysis dated May 7, 2018. The correct acreage is 9.9 rather than 6, although the correct acreage was used in [Foeller's] substantive analysis. *Based on this, [Foeller] maintains that the overall productivity for the property is 37 cubic feet per acre.* That is, he concludes that the N[RC]S data does not support a conclusion that the property is potentially productive forestland and, in fact, the property is not productive of commercial forest species." Record 8 (emphasis added).

The 37 cubic feet per acre estimate is found in Foeller's September 5, 2022, letter, where they concluded "I maintain that the total overall productivity for the property is, in fact, 37 cubic feet per acre and so it is clear the NRCS data does not support a conclusion that the property is potentially productive forestland." Record 269 (emphasis added).

The county does not set out the calculations described by Foeller's September 2022 letter. We agree with petitioners that contrary to Foeller's assertion in the September 2022 letter, replacing the six acres in the original calculation with 9.9 acres and carrying the additional 3.9 acres through the calculations leads to a different numeric result. Foeller's statement that the incorrect six acres was not used in any calculation is contradicted by other evidence in the record. Thus, there is not substantial evidence that the six acres was not used in any calculations.

Foeller followed the September 5, 2022, letter with an October 3, 2022, letter. Foeller's October 3, 2022, letter states:

> "I have thoroughly reviewed my records and the data relevant to my evaluation. My first task is to evaluate the property's suitability for commercial forestry based on the [NRCS] Soil Survey.
>
> "* * * * *
>
> "I concur that the [previous evaluation] requires adjustment. The correct total acreage on the above * * * is 82.59.
>
> "The property is, in fact, 87.75 acres. The following * * * corrects the calculation in acreage. The percent CMAI is the product of the NRCS CMAI multiplied by the percent acreage." Record 88.

Foeller's calculation in the October 2022 letter shows the CMAI for Douglas fir to be 40. The board of commissioners' conclusion that Foeller determined that NRCS data showed a CMAI of 37 is not supported by substantial evidence.

Foeller also concluded, without a mathematical demonstration, that the CMAI could range from 38 to 42 based on averaging, stating:

> "[CMAI] data is sufficiently reliable to prove this property's poor forest productivity; it is quite obviously not commercial forestland. Depending on NRCS data, the CMAI here could range from 38 to 42 depending on how the calculation is performed and things as simple as rounding can move the number up or down. Nevertheless, this range is below the commercial thresh hold for Douglas Fir." Record 89.

We agree with the county that the board of commissioners' findings do not expressly adopt the conclusion that the value may range from 38 to 42, but rather describe that statement by Foeller. However, the board of commissioners' findings state that the county relies on Foeller conclusions from contradictory reports, the September 5, 2022, and October 3, 2022, letters. As we explained in *Doob v. Josephine County*, a local government may rely on portions of two conflicting expert studies of soil classifications. 48 Or LUBA 227, 233 (2004). If so, then the final decision must include findings identifying the portions relied upon, and resolving any differences or contradictions between the studies. *Id.* at 233-34. The evidence relied upon by the board of commissioners is contradictory and the findings are inadequate to explain how the evidence leads to the board of commissioners' conclusion and are inadequate for our review.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

A. Background

Statewide Planning Goal 14 (Urbanization) is "To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure

efficient use of land, and to provide for livable communities." We have explained that Goal 14

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

The subject property is located outside the Grants Pass UGB. Petitioners' second assignment of error is that the board of commissioners' decision to redesignate and rezone the subject property violates Goal 14. We will reverse or remand an amendment to the comprehensive plan that is not in compliance with the goals. ORS 197.835(6).

B. Evaluation of Curry County Factors

An applicant bears the burden to establish that a post-acknowledgment plan amendment complies with applicable Statewide Planning Goals. *Hess v. City of Portland*, 23 Or LUBA 343, 345 (1992). At the same time, a petitioner who alleges that a decision violates Goal 14 by allowing conversion of rural land to urban uses must explain what urban use the decision allows. *Wood v. Crook County*, 55 Or LUBA 165, 176-77 (2007).

Petitioners divide this assignment of error into two subassignments. First, petitioners argue that this decision approves the leapfrogging of development and allows residential development at a scale that violates Goal 14 as a matter of law.

Petition for Review 36. Second, petitioners argue that the decision is inconsistent with Goal 14 considering the factors discussed in *Curry County* (the Curry Factors). *See* 301 Or at 498-511 (describing the Curry Factors).

Petitioners argue that with a minimum five-acre lot size, 16 homesites are possible on the subject property. Petitioners argue that this potential density of development allows "a residential neighborhood [in] the middle of undeveloped rural land outside a UGB." Petition for Review 36. Petitioners argue that residents of this neighborhood "will rely on the UGB and nearby unincorporated community for work, school, shopping, and entertainment." *Id.* Petitioners conclude that as a matter of law, the decision violates Goal 14. The county responds that its decision is not invalid as a matter of law and that there is substantial evidence supporting the board of commissioners' determination that the Curry Factors are met. We agree with the county and conclude that the first subassignment of error and the second subassignment of error address the same issue and are resolved by reviewing the board of commissioners' evaluation of the Curry Factors. Accordingly, we resolve the two subassignments together.

Petitioners contend that, with a minimum five-acre lot size, a 16-house neighborhood is possible and that number of new residences constitutes an urban level of development. Petition for Review 36.[3] Petitioners also argue that there is

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[3] Petitioners argue that the county's findings that five-acre lots do not necessarily result in an urban level of development are inadequate because the findings do not include consideration of the "scale at which the lot size is

not substantial evidence in the record that density will not be at an urban level because a planned development (PUD) is possible in the new zone and lot sizes as small as two acres may be approved if a PUD is approved. Petition for Review 41-42.

The board of commissioners concluded:

> "The facts in the record support finding that the *Curry* Factors do not necessitate an exception to Goal 14. First is lot size. Five-acre lots are typically many times the size of normal, urban lots. Five-acre lots are most likely to be rural but in unusual circumstances could have 'urban' attributes so it is necessary for us to consider other Curry Factors to determine if this rezoning would require an exception to Goal 14.
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> "The next important *Curry* Factor is whether development of this property would require reliance on urban levels of infrastructure. The applicant has established the property's carrying capacity to support residential development (water, septic, etc.) and that determination was not challenged in the initial decision. In other words, there is substantial evidence in the record to support a finding that the minimum, [five]-acre lots possible here can utilize on-site wells and septic and electric service no different than other rural lots in the area, regardless of zoning. The property will be served by existing county roads, public safety from the county sheriff and subscription-based fire protection, all typical of rural development. In other words, the record supports a finding that the lack of need for urban levels of infrastructure supports a finding that an exception to Goal 14 unnecessary.
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> "The property is approximately 2.5 miles from the Grants Pass

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occurring. * * * [I]ntroducing 16 homes into an area devoid of former development within close proximity of a UGB constitutes an urban use and violates Goal 14." Petition for Review 39 (emphasis omitted).

> [UGB]. The record, including all the maps and description of the area which are in the record, supports a finding that this is sufficiently far to conclude there is no likelihood this development would tend to pull the UGB in its direction or otherwise amount to urbanization of this rural area." Record 10.

The board of commissioners found that five-acre lots served by rural infrastructure was consistent with rural development. The board of commissioners also found that the scale of the development was not likely to impact the UGB. Petitioners argue that the Grants Pass UGB, 2.5 miles away, will attract residents seeking to benefit from the UGB without living in it. Petitioners argue that the unincorporated community located a half mile away allows residential dwelling classifications of two to five acres without a Goal 14 exception or analysis and that approving this rezone will allow uses identical to those within the unincorporated community without requiring compliance with regulations applicable to unincorporated communities. Petition for Review 51-52. As the county points out, the board of commissioners made findings that the subject property is well outside the Grants Pass UGB and there is no likelihood that the development would tend to pull the UGB in its direction or otherwise result in urbanization. Record 10. With respect to the unincorporated community, the board of commissioners found that "[n]othing in the record supports the finding that the mere existence of the [unincorporated community] a half mile or so away from the subject property makes a proposed subdivision of [five]-acre, fully self-contained rural homesites" urban. Record 11. While we agree with petitioners that these findings are somewhat conclusory with respect to the UGB

and unincorporated community, we agree with the county that, in the context of the broader findings, the findings are adequate and petitioners have not shown that the decision allows urban development.

Lastly, the board of commissioners found:

> "[*Marvin I*] holds that a planned unit development (PUD), as referenced by the applicant, might tend to render the rezoning urban and justify a Goal 14 exception. The record here does not support a conclusion that a PUD would be required or even possible here. It is simply raised by the applicant as a possible option to benefit preserving, rather than developing, large open spaces here in the event it was a benefit in relationship to necessary state and federal permitting. At this stage, that is hypothetical and requires no further consideration; there is no evidence in the record that a PUD is intended, required or expected in order to develop the property into rural homesites. If a PUD is proposed in the future at the time of an application to subdivide, it may implicate Goal 14 and an [applicant] might have to address the *Curry* Factors then. That is of no further relevance to our decision. At this stage, rezoning from resource to residential, we consider only the possibility of developing the subject property into a typical, rural [five]-acre subdivision." Record 10.

Petitioners argue that the county may not rely on the applicant's stated intent or the possibility that Goal 14 might be considered at a later stage to avoid addressing the possibility of higher density development. Petition for Review 45. We agree with petitioners. ORS 197.175(2)(d) (where a county's comprehensive plan has been acknowledged by the Land Conservation and Development Commission, the county shall make land use decisions in compliance with the acknowledged plan). To the extent the county concluded that a future application for a PUD would be required to demonstrate compliance with Goal 14, that

conclusion was error. However, that error is harmless where, as we address below, petitioners do not establish that the county's PUD provisions allow urban levels of density.

Petitioners maintain "Lot sizes in a PUD may be as small as two acres." Petition for Review 44 (citing JCC 19.55.040(A)(10)(c)). The county responds that elements of the county's PUD regulations in JCC 19.51 limit the potential number of homesites and, as a result, residential density remains below two acres.[4] Respondent's Brief 20-21.[5] We assume for purposes of this opinion that the county's PUD provisions are acknowledged to comply with Goal 14; at least,

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[4] *See* OAR 660-004-0040(2)(f) providing "'Rural residential areas' means lands that are not within an urban growth boundary, that are planned and zoned primarily for residential uses, and for which an exception to Goal 3 'Agricultural Lands', Goal 4 'Forest Lands', or both has been taken." This rule does not apply to non-resource land. OAR 660-010-0040(3)(c)(F).

We understand that OAR 660-004-0040 "applies to rural lands in acknowledged exception areas planned for residential uses[,]" and that the subject property is not an exception area. OAR 660-004-0040(1). OAR 660-004-0040(6)(b) provides "A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels *smaller than two acres*. For such a zone, a local government must either amend the zone's minimum lot and parcel size provisions to require a *minimum of at least two acres* or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of *at least two acres*." (Emphases added.)

[5] For example, the county argues that a PUD would allow at most two additional lots and would not allow a maximum density of more than 4.87 acres per homesite. Respondent's Brief 20.

petitioners do not argue otherwise. Accordingly, we assume that even development of two-acre lots pursuant to the PUD provisions would not violate Goal 14. More importantly, petitioners' argument does not explain why two-acre lots are urban in character given the board of commissioners' findings that the lots will not rely on urban infrastructure or draw the UGB or unincorporated community outward. Petitioners' argument is insufficiently developed.[6]

The second assignment of error is denied.

The decision is remanded.

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[6] Petitioner also references the cluster subdivision provisions in JCC 19.51.060(C), but does not develop any argument that a cluster subdivision would allow parcels smaller than two acres.