

Exhibit Divider

KENDALL Jerry

From: Jim Just [goal1@pacifier.com]
Sent: Tuesday, January 27, 2004 9:32 AM
To: KENDALL Jerry
Subject: Re: Ogle testimony

except that the "Autosaw simulations" need not be included.

----- Original Message -----

From: KENDALL Jerry
To: 'Jim Just'
Sent: Tuesday, January 27, 2004 9:25 AM
Subject: RE: Ogle testimony

And, as per our conversation, the attachments for this submittal are to be the same as your first.

-----Original Message-----

From: Jim Just [mailto:goal1@pacifier.com]
Sent: Tuesday, January 27, 2004 9:10 AM
To: Jerry Kendall
Subject: Ogle testimony

Mr. Kendall,

Attached please find additional testimony to be submitted into the record on behalf of LandWatch Lane County, the Goal One Coalition, and Mr. Just.

The MBF numbers appearing in the income calculations come from p. 4 of the Setchko Report.

Thanks for your help. If you have any questions or comments, please contact me.

Jim Just, Executive Director
Goal One Coalition
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Lebanon, OR 97355
phone/fax: 541.258.6074

Championing the role of citizens in decisions affecting the livability of their communities and the sustainability of the natural environment

Goal One Coalition

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January 26, 2004

Lane County Planning Commission
125 East 8th Avenue
Eugene, Oregon 97401

RE: PA 02-5838, Ogle

Dear Members of the Commission:

The Goal One Coalition (Coalition) is a nonprofit organization whose mission is to provide assistance and support to Oregonians in matters affecting their communities. The Coalition is appearing in these proceedings at the request of and on behalf of its membership residing in Lane County. Mr. Just is representing the Coalition, LandWatch Lane County, and himself.

This proposal would redesignate 73.74 acres of land on two parcels, identified as Tax Lot 304 and Tax Lot 303 (parcels #1 and #2 of Plat No. 94-PO510, respectively) totaling 113.74 acres, from "Agricultural Land" to "Marginal Land," and change the zoning from E-40/ Exclusive Farm Use to ML/Marginal Land. The northern portions of both Tax Lot 304 (TL 304) and Tax Lot 303 (TL 303), totaling 40 acres, were redesignated and rezoned Marginal Land in 1992. The subject lands are adjacent to F2-zoned land to the west and south, and to E40-zoned lands to the east. ORS 215.237 and LC 16.214 require a minimum parcel size of 20 acres if the parcel is adjacent to land zoned for farm or forest use that would not qualify as marginal land, and otherwise require that parcels be at least 10 acres in size.

The criteria for the designation of marginal land are set out in ORS 197.247 (1991 edition). The Staff Report refers also to Lane County guidelines for interpreting and administering marginal lands provisions, issued by the Board of Commissioners in March 1997. Because the provisions being applied are provisions of state statute, no deference is due or will be given to local interpretations of ORS 197.247.

ORS 197.247 establishes a two-part test for the designation of marginal land. Any proposal for a marginal land designation must first comply with the "income test" requirement of ORS 197.247(1)(a), which requires that the applicant prove that the subject land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation producing \$20,000 in annual gross income or as part of a forest operation capable of producing an average of \$10,000 in annual gross income over the growth cycle.

The second part of the marginal land test contains three options. ORS 197.247(1)(b)(A) and (B) are "parcelization" tests, which look at parcel sizes of adjacent and nearby lands. ORS 197.247(1)(b)(C) is the "productivity" test, which requires the applicant to demonstrate that the land is predominantly comprised of soils in capability classes V through VIII and is not

capable of producing 85 cf/ac/yr of merchantable timber. The applicant has submitted a Forest Productivity Analysis prepared by Marc. E. Setchko, Consulting Forester (Setchko Report). The Setchko Report indicates that the applicant has chosen to address the "productivity" option of the second prong of the marginal lands test.

ANALYSIS

Because calculation of average income over the growth cycle depends upon assumptions and evidence related to productivity of the proposed marginal lands, this analysis will first address issues concerning the "productivity" test of ORS 197.247(1)(b)(C) and then address "income" test issues relating to ORS 197.247(1)(a).

1. The "productivity" test

- a. **The applicants' information and the Setchko Report inadequately address the requirements of ORS 197.247(1)(b)(C) because they fail to consider productivity for timber species other than Douglas-fir.**

ORS 197.247(1)(b)(C) establishes that lands can qualify as marginal lands only if they are not capable of producing "eighty-five cubic feet of merchantable timber per acre per year[.]" "Merchantable stand of timber" means "any stand on forestlands containing living or dead timber which is being or can be harvested." ORS 321.005(8). Thus "timber" means "trees collectively." *Webster's New Universal Unabridged Dictionary*. A forest product is "merchantable" if it is salable, regardless of whether sold for profit or loss. *Ellingson Lumber Co. v. Department of Revenue*, 8 OTR 273 (1980). "Forestland" means "land that is used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied." ORS 527.620(7). "Forest tree species" means "any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products[.]" ORS 527.620(6).

An evaluation of a property's capacity for forest production must consider productivity for *all* merchantable forest tree species, not just Douglas-fir. Merchantable hardwoods include black cottonwood, Oregon ash, Oregon white oak, red alder, bigleaf maple and hybrid poplar. Merchantable conifers include ponderosa pine, grand fir, western red cedar, western hemlock, and KMX. *The Woodland Workbook*, R. E. Duddles and C. G. Landgren, Oregon State University Extension Service, EC 1196, November 1999.¹

- b. **The applicants' information and the Setchko Report are inadequate because they fail establish that information provided pertaining to Douglas-fir productivity for soils not rated by the NRCS provides data equivalent to NRCS data using methodology approved by the Department of Forestry.**

OAR 660-006-0005(2) provides:

¹ See Appendix. 2.

“‘Cubic Foot Per Acre’ means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resources Conservation Service (NRCS). Where NRCS data *are not available or are shown to be inaccurate*, an alternative method for determining productivity may be used. *An alternative method must provide equivalent data and be approved by the Department of Forestry.*” (Emphasis added.)

It is well established that lack of a soil productivity rating does not mean that a soil has no capability for forest production. James Hecker, NRCS Resource Conservationist, has stated:

"There is a misunderstanding when soils are not rated for forest production. It does not mean these soils are 'nonproductive,' but rather are 'typically' used for agriculture and have been rated for that use with predicted yields and given a Capability Class Rating for crop production."²

Thor Thorson, NRCS Soil Data Quality Specialist, in response to the question "Does the lack of [NRCS] data on site productivity indicate a soil is unsuitable for timber production?" has stated:

"No; only that suitable timber sites were not measured at the time the survey was conducted, or since the survey was completed. The soils therefore may or may not be capable of timber production at some level."³

James Johnson, Farm/Forest Coordinator with the Department of Land Conservation and Development, has stated that for purposes of OAR 660-06-005(2):

"The applicants cannot simply depend on a 'nonrating' to make a case that soils located on a site are not productive. OAR 660-06-005(2) * * * requires the applicants to provide other methods, with equivalent data, to show the productivity of the subject soils. A statement that the soils are unrated does not provide a method with data equivalent to NRCS data used to determine productivity."⁴

Forestry expert Marc Barnes has stated:

"[T]he lack of wood fiber productivity data in the Soil Survey of Benton County for certain soil types does not mean that the soil type is unsuitable for wood-fiber production, only that at the time the survey was conducted, wood fiber productivity data was not collected for these soil types, since they were being used predominately for other purposes -- mainly agriculture."⁵

Steve Campbell of the U.S. Department of Agriculture has stated:

² *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

³ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

⁴ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

⁵ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

“Absence of data does not mean that a soil map unit is not suitable for commercial forest use.”⁶

The *Lane County Soil Ratings for Forestry and Agriculture*, explaining Douglas-fir Site Index notations at p. 6, states:

“‘none’ Indicates soil map units that lack site index information on Douglas fir. The soil map unit may have the capacity to produce Douglas fir, but this productivity may be very low to very high. No site index has been collected by the NRCS due to lack of suitable sites or lack of time and or funds.”

LUBA rulings have established as law that the lack of a NRCS rating provides no information, quantitative or otherwise, pertinent to the statutory test of whether a soil is capable of producing defined levels of wood fiber. *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

There are no NRCS Douglas-fir site indexes or cf/ac/yr ratings for the Panther, Philomath and Steiwer soils. Instead, the Setchko Report relies on soil ratings from an Office of the State Forester Memorandum dated February 8, 1990 (1990 Memo). No cover letter or text of the 1990 Memo is provided. The Coalition contacted Kevin Birch, Planning Coordinator, Forest Resources Planning, Department of Forestry to obtain a copy of the 1990 Memo. Mr. Birch informed the Coalition that no “Office of State Forester Memorandum, February 8, 1990, General File 7-1-1” was to be found in ODF records.

Assuming the 1990 Memo exists as a valid document, there is no discussion of the methodology used to generate the data found in Setchko Report Exhibit 5. Footnotes state that soils ratings are *estimated* for *unmanaged* stands. It has not been established that the methodology produces data equivalent to NRCS data, nor has any evidence been presented that the methodology or results have been accepted by the Department of Forestry as accurate or reliable. Consequently, the consultant’s calculations of productivity and income based on this data cannot be relied upon to find compliance with the requirements of ORS 197.247.

- c. The Setchko Report is inadequate to address the requirements of ORS 197.247(1)(b)(C) because it fails to address productivity of the proposed marginal land.**

The Setchko Report addresses TL 303 and TL 304 together, failing to separately identify soils and address the applicable approval criteria that each parcel must satisfy if it is to be redesignated ML. The Setchko Report also fails to distinguish between the portions of TL 303 and TL 304 already designated ML and the portions proposed to be designated ML. Considering the parcels, existing marginal lands and proposed marginal lands together as one unit is appropriate for considering forest income potential over the growth cycle. However, that approach not adequate to address the third prong of the second part of the marginal lands

⁶ See Appendix 1.

test, the “productivity” test. Each distinct segment of land proposed for redesignation to marginal lands must satisfy the “productivity” test if the application is to be approved.

The applicants are required to establish that the proposed marginal lands are not capable of producing 85 cf/ac/yr of merchantable timber. Applicant Ogle is required to establish this for the non-marginal lands portion of TL 303. Applicant Childs is required to establish this for the non-marginal lands portion of TL 304. The Setchko Report fails to separately address the soils and timber productivity of the E-40 portion of either TL 303 or TL 404 and fails to address whether the E-40 portions of either tax lot is capable of producing 85 cf/ac/yr of merchantable timber. Therefore the Setchko Report fails to establish that the requirements of ORS 197.247(1)(b)(C) are satisfied.

d. The applicants’ information and the Setchko Report do not to adequately address the productivity of TL 303 and TL 304 for “forest tree species.”

ORS 197.247(1)(b)(C) establishes that lands can qualify as marginal lands only if they are not capable of producing “eighty-five cubic feet of merchantable timber per acre per year[.]” As previously discussed, the inquiry into productivity must consider “any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products[.]” ORS 527.620(6).

TL 303

The applicant’s submission states that the portion of TL 303 being proposed for the ML designation is entirely composed of soils with an agricultural site class capability of VI and VIII. The applicant has asserted that it is capable of producing, on average, only 11.96 cf/ac/yr. of merchantable timber. The forest productivity assertion is not supported by and is inconsistent with the Setchko Report, which was submitted by the applicant.

Exhibit 3 in the Setchko Report indicates that TL 303 is comprised of soil types McDuff clay loam, 81D; Panther silty clay loam, 102C; Philomath silty clay, 107C; Philomath cobbly silty clay, 108F; and Ritner cobbly silty clay loam, 113E. The Setchko Report does not give the acreage of individual soil types within the proposed marginal land area.

The Soil Survey indicates that McDuff clay loam has a site index for Douglas fir of 112 and a cf/ac/yr rating of 158.

The Soil Survey indicates that the Panther soils support hardwoods. Hardwoods that qualify as “merchantable timber” include black cottonwood, Oregon ash, white oak, and red alder. In addition, hybrid poplar can be grown in soils such as Panther.

The Soil Survey describes Philomath silty clay as “shallow and well-drained,” and indicates that it supports Oregon white oak and ponderosa pine. Researchers at Oregon State University have assigned Philomath silty clay loam a 50-yr site index of 104 for ponderosa pine.⁷

⁷ Fletcher, *Establishing and Managing Ponderosa Pine in the Willamette Valley*, EM 8805, Appendix 4.

The Soil Survey describes Philomath cobbly silty clay as “shallow and well-drained,” and states that “vegetation in areas not cultivated is mainly conifers, hardwoods, shrubs, and grasses.” It continues: “Much of this unit supports Oregon white oak, scattered Douglas-fir, [and] ponderosa pine[.]” This soil unit therefore could support merchantable hardwoods and conifers.

Rittner cobbly silty clay has a site index for Douglas-fir of 107 and a cf/ac/yr rating of 149.

Because the Setchko Report has not established that it adequately addresses the timber productivity of soils not rated for the production of Douglas-fir, and because it fails to consider productivity for merchantable timber species other than Douglas-fir, it has not been established that the portion of TL 304 proposed as marginal land qualifies as marginal land under the “productivity” test of ORS 197.247(1)(b)(C).

TL 304

The applicant shows the relevant portion of Tax Lot 304 to consist entirely of soils with an agricultural site class capability of VI, with an average forest capability of 48.38 cf/ac/yr. The forest productivity assertion is not supported by the Setchko Report, which was submitted by the applicant.

Exhibit 2 in the Setchko Report indicates that TL 304 is comprised of soil types Panther silty clay loam, 102C; Philomath silty clay, 107C; Philomath cobbly silty clay, 108F; and Ritner cobbly silty clay loam, 113G. The Setchko Report does not indicate acreage of individual soil types within the proposed marginal land area.

As discussed above regarding TL 303, the soils on TL 304 could support merchantable hardwoods and conifers.

Because the Setchko Report has not established that it adequately addresses the timber productivity of soils not rated for the production of Douglas-fir, and because it fails to consider productivity for merchantable timber species other than Douglas-fir, it has not been established that the portion of TL 304 proposed as marginal land qualifies as marginal land under the “productivity” test of ORS 197.247(1)(b)(C).

e. Calculation of productivity of TL 303 and TL 304 using available information

The Zone Change Application does provide detail of the proposed marginal lands portions of Tax Lot 303 and Tax Lot 304. The Application assumes zero forest productivity for soils other than Ritner or McDuff. It is possible to fill in missing data with available data giving productivity for non-NRCS rated soils for Douglas-fir (DF), and with available data assessing productivity for Ponderosa pine (PP).⁸ Available information does not readily convert site indexes for Ponderosa pine to cf/ac/yr equivalents. The conversion factor is normally substantially greater than one; i.e., for Ritner, a site index of 107 yields a cf/ac/yr rating of 149.

⁸ Fletcher, *Establishing and Managing Ponderosa Pine in the Willamette Valley*, EM 8805, Appendix 4.

An approximation derived from yield tables gives a cf/ac/yr yield of 110 for a site index of 104. Productivity calculations should be quite conservative.

| <u>Tax Lot 303</u> | Site index | Cf/ac/yr | Species | Acres | Productivity |
|--------------------|------------|----------|---------|--------------|----------------|
| 102C Panther | 3 (low) | 50 | DF | 12.936 | 647 |
| 107C Philomath | 104 | 110 | PP | 12.853 | 1414 |
| 108F Philomath | 104 | 110 | PP | 5.628 | 625 |
| 113G Ritner | 107 | 149 | DF | <u>2.741</u> | <u>408</u> |
| | | | | 34.158 | 3094 |
| | | | | = | 90.58 cf/ac/yr |

Tax Lot 304

| | | | | | |
|----------------|---------|-----|----|--------------|-----------------|
| 81D Mcduff | 112 | 158 | DF | 5.600 | 885 |
| 102C Panther | 3 (low) | 50 | DF | 1.747 | 87 |
| 107C Philomath | 104 | 110 | PP | 18.276 | 2010 |
| 108F Philomath | 104 | 110 | PP | 7.042 | 775 |
| 113G Ritner | 107 | 149 | DF | <u>6.914</u> | <u>1030</u> |
| | | | | 39.579 | 4787 |
| | | | | = | 120.95 cf/ac/yr |

The above calculations do not consider productivity for fast-growing forest tree species such as Hybrid poplar or KMX.

Conclusion: the portions of both TL 303 and TL 304 proposed to be redesignated marginal land are capable of producing in excess of 85 cf/ac/yr of merchantable timber. Therefore neither can be approved as marginal land.

2. The income test

TL 303 and 304 were under one ownership in 1983. Therefore income or potential income of the entire 113.74-acre tract must be considered for purposes of addressing the income test of ORS 197.247(1)(a).

The applicant has submitted an affidavit from the owner of the subject properties during the 5-year period preceding January 1, 1983 attesting that the proposed marginal lands were not managed as part of a farm operation producing \$20,000 or more in annual income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in gross income.

a. Farm income

The farm income part of the test is based on actual income, and addressing that test is straightforward: did or did not a farm operation produce \$20,000 or more in gross income during three of five calendar years preceding 1983? An affidavit attesting that the subject property was not part of a farm operation that grossed \$20,000 in income during the relevant period can constitute substantial evidence.

b. Forest income

Addressing the forest income part of the test is more difficult. "Managing" a forest operation can include doing nothing for extended periods of time, while a stand of timber grows and matures. Information provided by the applicants indicates that the property was in fact logged "within the last ten years." Department of Forestry records indicate that the 113-acre tract was logged of approximately 400,000 board feet by Brieden Bros. in 1992, and of approximately 175,000 board feet by Derek Jaros in 1997. The Setchko Report concedes at p. 2 that "[t]he parcel was logged over the last ten years, before the current owners purchased the property." The subject property was managed for timber production within the period 1978-1982 if it was subsequently harvested within the 50-year cycle. The applicants' information further indicates that the property is currently forested with "scattered" Douglas-fir, ponderosa pine and incense cedar. Property tax records indicate that all of the acres on the original, parent TL 300 were forest deferred. On the two new parcels, all of TL 303 is forest deferred, and all but 1.00 acre for the homesite is forest deferred on TL304. For all of these reasons, it cannot be disputed that the proposed marginal land was managed as a forest operation during the 1978-82 period.

i. The Setchko Report has failed to use current prices to determine average income over the growth cycle.

Forest income is prospective over the growth cycle. The applicants' submitted affidavit, which merely asserts that the proposed marginal lands were not, during the 1978-82 period, part of a forest operation capable of grossing \$10,000 in income over the growth cycle, is not substantial evidence. What is required is an evaluation of the ability of the forest operation of which the proposed marginal lands were a part to generate average income of \$10,000 from forest operations *over the growth cycle*, based on the potential capability of the lands comprising the forest operation assuming reasonable management practices.

In *DLCD v. Lane County (Ericcson)*, 23 Or LUBA 33, 36 (1992), LUBA explained:

"ORS 197.247(1)(a) requires a two part inquiry to determine whether a forest parcel may be designated as "marginal" land. First, the county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. * * * Second, ORS 197.247(1)(a) requires the county to determine whether the forest operation in question *is* capable of producing an average of \$10,000 in annual gross income over the growth cycle. What occurred on the subject parcel during the 1978-1982 time period is not the sole determinant of the "capability" of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five year period." (Emphasis added.)

Thus LUBA has held that, for purposes of calculating income, it did not make sense to limit the inquiry to the 1978-1982 period. In *Ericcson*, that's exactly what Lane County did, and what LUBA affirmed: the applicant's expert used, and Lane County accepted, (then) current 1988-89 timber values.

The applicants' analysis must use current timber values to calculate potential gross income over the growth cycle. More recent prices are considerably higher than those used in the Setchko Report. A table showing 2001 prices is provided in Appendix 3-4.

Because the applicants have failed to use reasonable prices in computing average income over the growth cycle, the information provided is not adequate to establish that ORS 197.247(1)(a) is satisfied.

Calculations of income for production as assumed by the applicant in the Setchko Report have been provided by the Oregon Department of Revenue using 1992 and 2003 values. These values are expressed as "stumpage", which results in lower total values than would result if the log prices used in the Setchko Report were used. Using log prices is appropriate, because "income" means "gross income" and "merchantable timber" means timber that can be sold, whether at a profit or a loss. Income must be gross income, before deducting for expenses such as harvesting as is done with "stumpage." Nevertheless, using Department of Revenue values and production cycle assumptions of the Setchko Report, the subject property proves capable producing more than an average of \$10,000 in annual income over the growth cycle.

| DF | MBF | \$/MBF 1992 value | | \$/MBF 2003 value | |
|---------|--------|-------------------|-----------|-------------------|-----------|
| 2S | 678.36 | \$451 | \$305,940 | \$432 | \$293,052 |
| 3S | 847.95 | \$368 | \$312,046 | \$388 | \$329,005 |
| 4S | 169.59 | \$300 | \$50,877 | \$336 | \$56,982 |
| TOTAL | | \$668,863 | | \$679,038 | |
| AVERAGE | | \$11,148 | | \$11,317 | |

ii. The Setchko Report fails to establish that it has adequately considered timber productivity for soils not rated for Douglas-fir production.

As previously discussed, the Setchko Report used cf/ac/yr ratings from the 1990 Memo to arrive at timber volumes for Douglas-fir on non-rated soils. It has not been established that the productivity data is equivalent to NRCS data, nor has it been established that the methodology or the data have been accepted by the Department of Forestry. Therefore it has not been established that the data meets the requirements of OAR 660-006-0005(2). The calculation of average income from soils not rated by the NRCS for Douglas-fir production is not adequate for the purpose of establishing that the "income" test of ORS 197.247(1)(a) is satisfied.

iii. The Setchko Report has failed to consider productivity for timber species other than Douglas-fir.

As previously discussed in relation to the "productivity" test, neither the applicants' narrative nor the Setchko Report consider productivity for any timber species other than Douglas-fir. Potential productivity for other hardwood and conifer species for non-rated soils found on the E-40 zoned portions of TL 303 and TL 304 was discussed in that context, and that discussion

is incorporated here by reference. These soils are or may be suitable for the production of merchantable hardwoods and conifers.

Species not considered in the Setchko Report may yield much more timber than Douglas-fir, as it is conceded that several of the soils are not particularly well suited for Douglas-fir production while they are productive for other forest tree species.

One additional non-rated soil, Steiwer silt loam, which was not addressed under the "productivity" discussion because it is not found on the proposed marginal lands, is found within the 113-acre parent tract. The Soil Survey describes Steiwer silt loam as "moderately deep [and] well-drained," and indicates that vegetation in areas not cultivated includes "mainly hardwoods [and] scattered conifers." This soil is or may be suitable for the production of merchantable hardwoods and conifers.

iv. The Setchko Report improperly uses a 60-year growth cycle to calculate average income for all forest tree species.

The Setchko Report uses a 60-year rotation to calculate average income over the growth cycle rather than the standard 50-year cycle. As a result, income at harvest is averaged over 60 years rather than 50 years, resulting in lower annual average income.

The March 1997 Supplement to Marginal Lands Information Sheet states:

"The consensus of the Board was that a 50-year growth cycle should be adopted as the usual standard, with the option that another standard could be used if substantiated by compelling scientific evidence presented by the applicant. The Board's choice was based on evidence that the USDA Natural Resources Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standard figure."

As this policy recognizes, NRCS is based on a 50-year growth cycle. The Setchko Report provides evidence that a 60-year cycle may be appropriate for Douglas-fir on the subject site.

The Setchko Report states at p. 2:

"A sixty year rotation (growth cycle to final harvest) was used, this time span being a reasonable rotation age on this site class, which is very poor."

This is the explanation provided for using a 60-year rotation to calculate average income for production of Douglas-fir, rather than the required 50-year rotation.

The consulting forester has conflated "site class" with the entire 113-acre tract under consideration. The 113-acre tract includes many "site classes" which are excellent for the production of Douglas-fir. The conclusion that the entire 113-acre site is "very poor" is inaccurate for Douglas-fir, as the Ritner and McDuff soils are excellent for production of Douglas-fir.

In addition, appropriate growth cycles for other potential merchantable species must be considered. At least two merchantable species are grown on much shorter rotations. Hybrid poplar is commonly grown on a 7-8 year cycle for pulp and a 15-year cycle for timber. KMX is commonly grown on a 20-year cycle.

The Setchko Report makes no attempt to establish that using a 60-year site index instead of a 50-year site index is a methodology providing data equivalent to NRCS data or that it has been accepted by the State Forester for species other than Douglas-fir.

The statutory requirement that the land be "capable" of producing the specified annual income "over the growth cycle" requires an evaluation of the income potential of the property assuming the utilization of reasonable forest management practices over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33, 36 (1992). Reasonable management would require that different soils on the 113-acre tract be planted with merchantable trees suited for the specific soils, site and exposure, with rotations suited to the specific forest tree species and growing conditions. It is not reasonable to assume that the entire 113-site, comprised of eight soil types with varying slopes, and exposures, would be planted with a single species receiving the same management practices and rotations.

Because assuming a 60-year rotation for the entire 113-acre tract does not comply with Lane County policy, has not been shown to be consistent with OAR 660-006-0005(2), and is not reasonable, the income calculations of the Setchko Report are not adequate to comply with the requirements of ORS 197.247(1)(a).

v. The Setchko Report income calculations are not correct.

The Setchko Report contains errors in its calculation of potential income from rated soils. At p. 3 the Setchko Report states that the 100 Year Site Index for McDuff clay loam is 112, and for Ritner cobbly silty clay loam 107. The Setchko Report then "adjusts" to arrive at 50-Year Site Indexes of 98 and 95, respectively.

The source of these site indexes is the *Lane County Soil Ratings for Forestry and Agriculture*. Douglas-fir site indexes and cf/ac/yr ratings found therein are calculated using 50-year Douglas-fir data unless otherwise noted. See *Lane County Soil Ratings*, p. 6. The Setchko Report has erred in further reducing indexes which are already 50-year indexes.

CONCLUSION

The applicants' information fails to address the fact that there are two parcels proposed as marginal land. For purposes of the "productivity" test, each parcel as an individual unit must satisfy the ORS 197.247 requirements to qualify as marginal land. Information provided does not address the relevant portion of either TL 303 or TL 304 as separate units of proposed marginal land; soils on the parcels are not identified or quantified, nor is timber productivity calculated for either parcel. Available information indicates that both proposed units of marginal land can produce in excess of 85 cf/ac/yr of merchantable timber.

In evaluating the capability of the parent 113-acre tract for forest income potential, the applicant relies upon the Setchko Report. The Setchko Report, in addressing the "income" test and the "productivity" test, has failed to establish that productivity data provided for non-rated soils is equivalent to NRCS data and that the methodology and the data have been accepted by the Department of Forestry.

The Setchko Report has improperly limited its consideration of "merchantable species" to Douglas-fir, and has not considered productivity for all merchantable timber species as required by ORS 197.247(1)(b). The Setchko Report assumes the same 60-year rotation for all species. The Setchko Report thus has not assumed "reasonable management practices."

For purposes of calculating potential average income, the Setchko Report uses 1983 prices rather than current prices. Income from production of merchantable species other than Douglas-fir is not considered. The Setchko Report fails to establish that Douglas-fir productivity data for soils not rated by the NRCS for Douglas-fir production is equivalent to NRCS data or that it has been accepted by the Department of Forestry. The Setchko Report erroneously "corrects" two capability ratings.

As a result, average income calculations are not reasonable or reliable and cannot establish compliance with ORS 197.247(1)(a). Calculations using more realistic prices provided by the Oregon Department of Revenue indicate that the parent 113-acre parcel is capable of producing average income in excess of \$10,000 per year over the growth cycle.

For these reasons this application must be denied.

Respectfully submitted,

Jim Just
Executive Director

Exhibit Divider

KENDALL Jerry

From: KENDALL Jerry
Sent: Tuesday, January 27, 2004 1:07 PM
To: HOWE Kent
Subject: Ogle ML PA.

I placed both the forestor's report and the submittal from Jim Just in your mailbox.

In regards to the Just submittal, while some of the issues raised are irrelevant in that they have been addressed, here are items that need our responses:

1.) Re: the productivity test in ORS 197.247(1)(b)(C), the 85 cu.ft./ac/yr. standard; Mr. J. (p.2) maintains that the term "merchantable timber" requires that species other than Doug fir be addressed. See also p.7, wherein he calculates over 85 cu.ft./ac./yr for other species.

We discussed this earlier today. You mentioned that the "response logic" was that DF is the fastest growing of the multiple species, having the highest volume yield. Use of DF only is an adequate response to this standard, as other species would only produce less at harvest time (50 year cycle). Did I state this properly?

Where was that explanation in the record? Was it during the forestor's testimony?

Comment of the conclusion that other species can exceed 85 cu.ft.ac.yr as per p.7?

2.) Mr. J. (p.2) maintains that it is not adequate to say that soils which have no NRCS rating cannot produce timber, and that any substitute ratings utilized must use methodology approved by the DOF as required by OAR 660-006-0005(2). He also maintains (p.4) that LUBA has ruled that lack of a NRCS rating provides no information, implying that the burden of addressing the productivity standard has not be carried.

Mr. J. maintains that the forestor did not use such approved data, and/or used no rating, justifying a denial.

Comment?

3.) Mr. J maintains that the income test requires use of current prices, versus 1983 as we are instructed by the Board. He cites *DLCD vs. Lane County/Ericson* (p.8).

I will look up the case, but do you have a comment?

4.) The Dept. of Revenue submitted info to the file at my request. Mr. J. uses it on p.9, and concludes that the \$10K test is exceeded using 1992 & 2003 \$\$ values for MBF.

Comment?

Do you know where they got the MBF numbers? Mr. J. told me from p.4 of the Setchko report, but they are different.

Jerry Kendall/Associate Planner
Dept. of Public Works
Land Management Division
125 E. 8th Ave.
Eugene, Or. 97401

Phone: 541-682-4057
FAX: 541-682-3947

Exhibit Divider

Michael E. Farthing

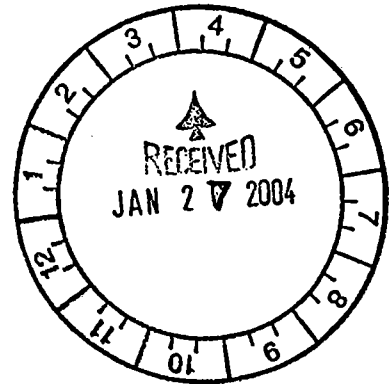
Attorney at Law

Smeede Hotel Building
767 Willamette Street, Suite 203
Eugene, Oregon 97401
Office (541) 485-1141 – Fax (541) 485-1174
email - mefarthing@yahoo.com

January 27, 2004

HAND DELIVERED

Lane County Planning Commission
% Jerry Kendall
Lane County Land Management Division
Courthouse Public Service Building
125 E. 8th Avenue
Eugene, OR 97401



Re: Application for Marginal Land Plan Amendment /Zone Change
PA 02-5838 Ogle-Childs, Applicants

Commissioners:

This firm has been retained by the applicants for the above-referenced plan amendment and zone change. The applicants' forester, Mark Setchko, has provided a supplement report to his initial report that was part of the application. Mr. Setchko's supplement report is the only new evidence that the applicants are submitting. The application is complete and thorough. Mr. Setchko's supplemental report explains his rebuttal testimony that he provided at the January 20th public hearing. The key point is the value of the timber that could be harvested from the subject property in 1983.

Mr. Setchko explains why the subject property could not produce \$10,000 per year in annual gross income. That is the standard that has been addressed by Mr. Setchko's report. Please read these reports. They explain why the subject property cannot produce an annual income of \$10,000 over the growth cycle for the subject property. The soils on the applicants' property are not good for forest reproduction. They do not grow Douglas Fir trees and the land does not grow any other merchantable species.

Please read Mr. Setchko's reports. It will provide a more detailed response to the opponent's testimony.

Sincerely

Michael Edward Farthing

cc: clients
Derek Jaros

#12 - 10.

Exhibit Divider

KENDALL Jerry

From: Jim Just [goal1@pacifier.com]
Sent: Wednesday, January 28, 2004 9:17 AM
To: Jerry Kendall
Cc: Lauri Segel
Subject: Fw: ponderosa pine soils ratings

Jerry,

I this morning received a response from Max Bennett regarding productivity ratings for ponderosa pine. I have recalculated the cf/ac/yr rating at p. 7, incorporating this information. Productivity for TL 303 is calculated to be 107 cf/ac/yr; for TL 304, 141 cf/ac/yr. Please replace the previous document with the amended document, and enter this email into the record as supporting exhibit.

Thanks for your help. Please contact me if you have any questions.

Jim Just, Executive Director
Goal One Coalition
39625 Almen Drive
Lebanon, OR 97355
phone/fax: 541.258.6074

Championing the role of citizens in decisions affecting the livability of their communities and the sustainability of the natural environment

— Original Message —

From: Bennett, Max
To: Fletcher, Rick ; Jim Just
Sent: Tuesday, January 27, 2004 5:09 PM
Subject: RE: ponderosa pine soils ratings

Jim & Rick:

I don't have any SW OR volume tables for ponderosa pine I can lay my hands on easily. Not sure they even exist per se. Maybe the closest we can come is from the following two pubs:

Oliver, W.W. and R.F. Powers. 1978. Growth models for ponderosa pine: I. Yield of unthinned plantations in northern California. Research Paper PSW-133. Berkeley CA: Pacific Southwest Forest and Range Experiment Station, Forest Service, USDA. 21 p.

Powers, R.F. and W.W. Oliver. 1978. Site classification of ponderosa pine stands under stocking control in California. Research Paper PSW-128. Berkeley CA: Pacific Southwest Forest and Range Experiment Station, Forest Service, USDA. 9 p.

I don't have copies, they are probably at the OSU library.

On the modelling front, there is SYSTUM-1, which models young stands up to age 20, at which point ORGANON takes over. Actual or hypothetical stand data is required. These models are calibrated with SW OR and N. CA stand data.

As a rough approximation, the Silvics handbook has the following yield table. To calculate the cubic ft/ac/year, determine the mean annual increment (MAI, = total stand volume divided by age) for a given site index. For example, for SI=120, the MAI at age 40 is 5,650 cubic ft / 40 years = 141 cubic ft per acre per year. For a 50 year base site index, would have to first convert to 100-base value.

Max

01/28/2004

#13 - 15 pp.

Table 1- Total volume inside bark of ponderosa pine 1.5 cm (0.6 in) and larger in d.b.h. (39)

| Age | Site index at base age 100 years ¹ | | | |
|--|---|------------------|-------------------|-------------------|
| | 18 m or 60 ft | 27 m or 90 ft | 37 m or 120 ft | 46 m or 150 ft |
| yr | m ³ /ha | | | |
| 20 | 28 | 94 | 168 | 262 |
| 40 | 122 | 238 | 396 | 588 |
| 60 | 192 | 340 | 570 | 861 |
| 80 | 238 | 413 | 696 | 1060 |
| 100 | 273 | 472 | 794 | 1204 |
| 120 | 308 | 518 | 868 | - |
| 140 | 336 | 556 | 928 | - |
| yr | ft ³ /acre | | | |
| 20 | 400 | 1,350 | 2,400 | 3,750 |
| 40 | 1,750 | 3,400 | 5,650 | 8,400 |
| 60 | 2,750 | 4,850 | 8,150 | 12,300 |
| 80 | 3,400 | 5,900 | 9,950 | 15,150 |
| 100 | 3,900 | 6,750 | 11,350 | 17,200 |
| 120 | 4,400 | 7,400 | 12,400 | - |
| 140 | 4,800 | 7,950 | 13,250 | - |
| ¹ Height of dominant and codominant trees of average d.b.h. | | | | |

: Fletcher, Rick

Sent: Tuesday, January 27, 2004 9:40 AM

To: Jim Just

Cc: Bennett, Max

Subject: RE: ponderosa pine soils ratings

Jim:

There are no published yield tables for Valley ponderosa like there are for Douglas-fir and other species. One logical approach would be to use the volume tables for ponderosa in SW Oregon. Max Bennett, our agent in Medford has some experience with Valley ponderosa and ponderosa in SW Oregon, so he may be able to help with this. I have included him in this email. Let's see what he might suggest.

Rick

From: Jim Just [mailto:goal1@pacifier.com]

Sent: Mon 1/26/2004 3:51 PM
To: Fletcher, Rick
Subject: ponderosa pine soils ratings

Rick,

How would you convert a site index for ponderosa pine into a cf/ac/yr rating? i.e. for Philomath soils, what cf/ac/yr rating could be expected from a site index of 104?

Thanks for your help.

Jim Just, Executive Director
Goal One Coalition
39625 Almen Drive
Lebanon, OR 97355
phone/fax: 541.258.6074

Championing the role of citizens in decisions affecting the livability of their communities and the sustainability of the natural environment

Goal One Coalition

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Lebanon, Oregon 97355
Phone: 541-258-6074
Fax: 541-258-6810
goal1@pacifier.com

January 26, 2004

Lane County Planning Commission
125 East 8th Avenue
Eugene, Oregon 97401

RE: PA 02-5838, Ogle

Dear Members of the Commission:

The Goal One Coalition (Coalition) is a nonprofit organization whose mission is to provide assistance and support to Oregonians in matters affecting their communities. The Coalition is appearing in these proceedings at the request of and on behalf of its membership residing in Lane County. Mr. Just is representing the Coalition, LandWatch Lane County, and himself.

This proposal would redesignate 73.74 acres of land on two parcels, identified as Tax Lot 304 and Tax Lot 303 (parcels #1 and #2 of Plat No. 94-PO510, respectively) totaling 113.74 acres, from "Agricultural Land" to "Marginal Land," and change the zoning from E-40/ Exclusive Farm Use to ML/Marginal Land. The northern portions of both Tax Lot 304 (TL 304) and Tax Lot 303 (TL 303), totaling 40 acres, were redesignated and rezoned Marginal Land in 1992. The subject lands are adjacent to F2-zoned land to the west and south, and to E40-zoned lands to the east. ORS 215.237 and LC 16.214 require a minimum parcel size of 20 acres if the parcel is adjacent to land zoned for farm or forest use that would not qualify as marginal land, and otherwise require that parcels be at least 10 acres in size.

The criteria for the designation of marginal land are set out in ORS 197.247 (1991 edition). The Staff Report refers also to Lane County guidelines for interpreting and administering marginal lands provisions, issued by the Board of Commissioners in March 1997. Because the provisions being applied are provisions of state statute, no deference is due or will be given to local interpretations of ORS 197.247.

ORS 197.247 establishes a two-part test for the designation of marginal land. Any proposal for a marginal land designation must first comply with the "income test" requirement of ORS 197.247(1)(a), which requires that the applicant prove that the subject land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation producing \$20,000 in annual gross income or as part of a forest operation capable of producing an average of \$10,000 in annual gross income over the growth cycle.

The second part of the marginal land test contains three options. ORS 197.247(1)(b)(A) and (B) are "parcelization" tests, which look at parcel sizes of adjacent and nearby lands. ORS 197.247(1)(b)(C) is the "productivity" test, which requires the applicant to demonstrate that the land is predominantly comprised of soils in capability classes V through VIII and is not

capable of producing 85 cf/ac/yr of merchantable timber. The applicant has submitted a Forest Productivity Analysis prepared by Marc. E. Setchko, Consulting Forester (Setchko Report). The Setchko Report indicates that the applicant has chosen to address the "productivity" option of the second prong of the marginal lands test.

ANALYSIS

Because calculation of average income over the growth cycle depends upon assumptions and evidence related to productivity of the proposed marginal lands, this analysis will first address issues concerning the "productivity" test of ORS 197.247(1)(b)(C) and then address "income" test issues relating to ORS 197.247(1)(a).

1. The "productivity" test

- a. **The applicants' information and the Setchko Report inadequately address the requirements of ORS 197.247(1)(b)(C) because they fail to consider productivity for timber species other than Douglas-fir.**

ORS 197.247(1)(b)(C) establishes that lands can qualify as marginal lands only if they are not capable of producing "eighty-five cubic feet of merchantable timber per acre per year[.]" "Merchantable stand of timber" means "any stand on forestlands containing living or dead timber which is being or can be harvested." ORS 321.005(8). Thus "timber" means "trees collectively." *Webster's New Universal Unabridged Dictionary*. A forest product is "merchantable" if it is salable, regardless of whether sold for profit or loss. *Ellingson Lumber Co. v. Department of Revenue*, 8 OTR 273 (1980). "Forestland" means "land that is used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied." ORS 527.620(7). "Forest tree species" means "any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products[.]" ORS 527.620(6).

An evaluation of a property's capacity for forest production must consider productivity for *all* merchantable forest tree species, not just Douglas-fir. Merchantable hardwoods include black cottonwood, Oregon ash, Oregon white oak, red alder, bigleaf maple and hybrid poplar. Merchantable conifers include ponderosa pine, grand fir, western red cedar, western hemlock, and KMX. The Woodland Workbook, R. E. Duddles and C. G. Landgren, Oregon State University Extension Service, EC 1196, November 1999.¹

- b. **The applicants' information and the Setchko Report are inadequate because they fail establish that information provided pertaining to Douglas-fir productivity for soils not rated by the NRCS provides data equivalent to NRCS data using methodology approved by the Department of Forestry.**

OAR 660-006-0005(2) provides:

¹ See Appendix. 2.

“‘Cubic Foot Per Acre’ means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resources Conservation Service (NRCS). Where NRCS data *are not available or are shown to be inaccurate*, an alternative method for determining productivity may be used. *An alternative method must provide equivalent data and be approved by the Department of Forestry.*” (Emphasis added.)

It is well established that lack of a soil productivity rating does not mean that a soil has no capability for forest production. James Hecker, NRCS Resource Conservationist, has stated:

"There is a misunderstanding when soils are not rated for forest production. It does not mean these soils are 'nonproductive,' but rather are 'typically' used for agriculture and have been rated for that use with predicted yields and given a Capability Class Rating for crop production."²

Thor Thorson, NRCS Soil Data Quality Specialist, in response to the question "Does the lack of [NRCS] data on site productivity indicate a soil is unsuitable for timber production?" has stated:

"No; only that suitable timber sites were not measured at the time the survey was conducted, or since the survey was completed. The soils therefore may or may not be capable of timber production at some level."³

James Johnson, Farm/Forest Coordinator with the Department of Land Conservation and Development, has stated that for purposes of OAR 660-06-005(2):

"The applicants cannot simply depend on a 'nonrating' to make a case that soils located on a site are not productive. OAR 660-06-005(2) * * * requires the applicants to provide other methods, with equivalent data, to show the productivity of the subject soils. A statement that the soils are unrated does not provide a method with data equivalent to NRCS data used to determine productivity."⁴

Forestry expert Marc Barnes has stated:

"[T]he lack of wood fiber productivity data in the Soil Survey of Benton County for certain soil types does not mean that the soil type is unsuitable for wood-fiber production, only that at the time the survey was conducted, wood fiber productivity data was not collected for these soil types, since they were being used predominately for other purposes -- mainly agriculture."⁵

Steve Campbell of the U.S. Department of Agriculture has stated:

² *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

³ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

⁴ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

⁵ *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

“Absence of data does not mean that a soil map unit is not suitable for commercial forest use.”⁶

The *Lane County Soil Ratings for Forestry and Agriculture*, explaining Douglas-fir Site Index notations at p. 6, states:

“‘none’ Indicates soil map units that lack site index information on Douglas fir. The soil map unit may have the capacity to produce Douglas fir, but this productivity may be very low to very high. No site index has been collected by the NRCS due to lack of suitable sites or lack of time and or funds.”

LUBA rulings have established as law that the lack of a NRCS rating provides no information, quantitative or otherwise, pertinent to the statutory test of whether a soil is capable of producing defined levels of wood fiber. *Carlson v. Benton County*, 34 Or LUBA 140, 149 (1998).

There are no NRCS Douglas-fir site indexes or *cf/ac/yr* ratings for the Panther, Philomath and Steiwer soils. Instead, the Setchko Report relies on soil ratings from an Office of the State Forester Memorandum dated February 8, 1990 (1990 Memo). No cover letter or text of the 1990 Memo is provided. The Coalition contacted Kevin Birch, Planning Coordinator, Forest Resources Planning, Department of Forestry to obtain a copy of the 1990 Memo. Mr. Birch informed the Coalition that no “Office of State Forester Memorandum, February 8, 1990, General File 7-1-1” was to be found in ODF records.

Assuming the 1990 Memo exists as a valid document, there is no discussion of the methodology used to generate the data found in Setchko Report Exhibit 5. Footnotes state that soils ratings are *estimated* for *unmanaged* stands. It has not been established that the methodology produces data equivalent to NRCS data, nor has any evidence been presented that the methodology or results have been accepted by the Department of Forestry as accurate or reliable. Consequently, the consultant’s calculations of productivity and income based on this data cannot be relied upon to find compliance with the requirements of ORS 197.247.

c. The Setchko Report is inadequate to address the requirements of ORS 197.247(1)(b)(C) because it fails to address productivity of the proposed marginal land.

The Setchko Report addresses TL 303 and TL 304 together, failing to separately identify soils and address the applicable approval criteria that each parcel must satisfy if it is to be redesignated ML. The Setchko Report also fails to distinguish between the portions of TL 303 and TL 304 already designated ML and the portions proposed to be designated ML. Considering the parcels, existing marginal lands and proposed marginal lands together as one unit is appropriate for considering forest income potential over the growth cycle. However, that approach not adequate to address the third prong of the second part of the marginal lands

⁶ See Appendix 1.

test, the “productivity” test. Each distinct segment of land proposed for redesignation to marginal lands must satisfy the “productivity” test if the application is to be approved.

The applicants are required to establish that the proposed marginal lands are not capable of producing 85 cf/ac/yr of merchantable timber. Applicant Ogle is required to establish this for the non-marginal lands portion of TL 303. Applicant Childs is required to establish this for the non-marginal lands portion of TL 304. The Setchko Report fails to separately address the soils and timber productivity of the E-40 portion of either TL 303 or TL 404 and fails to address whether the E-40 portions of either tax lot is capable of producing 85 cf/ac/yr of merchantable timber. Therefore the Setchko Report fails to establish that the requirements of ORS 197.247(1)(b)(C) are satisfied.

d. The applicants’ information and the Setchko Report do not to adequately address the productivity of TL 303 and TL 304 for “forest tree species.”

ORS 197.247(1)(b)(C) establishes that lands can qualify as marginal lands only if they are not capable of producing “eighty-five cubic feet of merchantable timber per acre per year[.]” As previously discussed, the inquiry into productivity must consider “any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products[.]” ORS 527.620(6).

TL 303

The applicant’s submission states that the portion of TL 303 being proposed for the ML designation is entirely composed of soils with an agricultural site class capability of VI and VIII. The applicant has asserted that it is capable of producing, on average, only 11.96 cf/ac/yr. of merchantable timber. The forest productivity assertion is not supported by and is inconsistent with the Setchko Report, which was submitted by the applicant.

Exhibit 3 in the Setchko Report indicates that TL 303 is comprised of soil types McDuff clay loam, 81D; Panther silty clay loam, 102C; Philomath silty clay, 107C; Philomath cobbly silty clay, 108F; and Ritner cobbly silty clay loam, 113E. The Setchko Report does not give the acreage of individual soil types within the proposed marginal land area.

The Soil Survey indicates that McDuff clay loam has a site index for Douglas fir of 112 and a cf/ac/yr rating of 158.

The Soil Survey indicates that the Panther soils support hardwoods. Hardwoods that qualify as “merchantable timber” include black cottonwood, Oregon ash, white oak, and red alder. In addition, hybrid poplar can be grown in soils such as Panther.

The Soil Survey describes Philomath silty clay as “shallow and well-drained,” and indicates that it supports Oregon white oak and ponderosa pine. Researchers at Oregon State University have assigned Philomath silty clay loam a 50-yr site index of 104 for ponderosa pine.⁷

⁷ Fletcher, *Establishing and Managing Ponderosa Pine in the Willamette Valley*, EM 8805, Appendix 4.

The Soil Survey describes Philomath cobbly silty clay as "shallow and well-drained," and states that "vegetation in areas not cultivated is mainly conifers, hardwoods, shrubs, and grasses." It continues: "Much of this unit supports Oregon white oak, scattered Douglas-fir, [and] ponderosa pine[.]" This soil unit therefore could support merchantable hardwoods and conifers.

Ritner cobbly silty clay has a site index for Douglas-fir of 107 and a cf/ac/yr rating of 149.

Because the Setchko Report has not established that it adequately addresses the timber productivity of soils not rated for the production of Douglas-fir, and because it fails to consider productivity for merchantable timber species other than Douglas-fir, it has not been established that the portion of TL 304 proposed as marginal land qualifies as marginal land under the "productivity" test of ORS 197.247(1)(b)(C).

TL 304

The applicant shows the relevant portion of Tax Lot 304 to consist entirely of soils with an agricultural site class capability of VI, with an average forest capability of 48.38 cf/ac/yr. The forest productivity assertion is not supported by the Setchko Report, which was submitted by the applicant.

Exhibit 2 in the Setchko Report indicates that TL 304 is comprised of soil types Panther silty clay loam, 102C; Philomath silty clay, 107C; Philomath cobbly silty clay, 108F; and Ritner cobbly silty clay loam, 113G. The Setchko Report does not indicate acreage of individual soil types within the proposed marginal land area.

As discussed above regarding TL 303, the soils on TL 304 could support merchantable hardwoods and conifers.

Because the Setchko Report has not established that it adequately addresses the timber productivity of soils not rated for the production of Douglas-fir, and because it fails to consider productivity for merchantable timber species other than Douglas-fir, it has not been established that the portion of TL 304 proposed as marginal land qualifies as marginal land under the "productivity" test of ORS 197.247(1)(b)(C).

e. Calculation of productivity of TL 303 and TL 304 using available information

The Zone Change Application does provide detail of the proposed marginal lands portions of Tax Lot 303 and Tax Lot 304. The Application assumes zero forest productivity for soils other than Ritner or McDuff. It is possible to fill in missing data with available data giving productivity for non-NRCS rated soils for Douglas-fir (DF), and with available data assessing productivity for Ponderosa pine (PP).⁸ Available information does not readily convert site indexes for Ponderosa pine to cf/ac/yr equivalents. The conversion factor is normally substantially greater than one; i.e., for Ritner, a site index of 107 yields a cf/ac/yr rating of 149.

⁸ Fletcher, *Establishing and Managing Ponderosa Pine in the Willamette Valley*, EM 8805, Appendix 4.

An approximation derived from yield tables gives a cf/ac/yr yield of 110 for a site index of 104. Productivity calculations should be quite conservative.

| <u>Tax Lot 303</u> | Site index | Cf/ac/yr | Species | Acres | Productivity |
|--------------------|------------|----------|---------|--------------|----------------|
| 102C Panther | 3 (low) | 50 | DF | 12.936 | 647 |
| 107C Philomath | 104 | 110 | PP | 12.853 | 1414 |
| 108F Philomath | 104 | 110 | PP | 5.628 | 625 |
| 113G Ritner | 107 | 149 | DF | <u>2.741</u> | <u>408</u> |
| | | | | 34.158 | 3094 |
| | | | | = | 90.58 cf/ac/yr |

Tax Lot 304

| | | | | | |
|----------------|---------|-----|----|--------------|-----------------|
| 81D Mcduff | 112 | 158 | DF | 5.600 | 885 |
| 102C Panther | 3 (low) | 50 | DF | 1.747 | 87 |
| 107C Philomath | 104 | 110 | PP | 18.276 | 2010 |
| 108F Philomath | 104 | 110 | PP | 7.042 | 775 |
| 113G Ritner | 107 | 149 | DF | <u>6.914</u> | <u>1030</u> |
| | | | | 39.579 | 4787 |
| | | | | = | 120.95 cf/ac/yr |

The above calculations do not consider productivity for fast-growing forest tree species such as Hybrid poplar or KMX.

Conclusion: the portions of both TL 303 and TL 304 proposed to be redesignated marginal land are capable of producing in excess of 85 cf/ac/yr of merchantable timber. Therefore neither can be approved as marginal land.

2. The income test

TL 303 and 304 were under one ownership in 1983. Therefore income or potential income of the entire 113.74-acre tract must be considered for purposes of addressing the income test of ORS 197.247(1)(a).

The applicant has submitted an affidavit from the owner of the subject properties during the 5-year period preceding January 1, 1983 attesting that the proposed marginal lands were not managed as part of a farm operation producing \$20,000 or more in annual income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in gross income.

a. Farm income

The farm income part of the test is based on actual income, and addressing that test is straightforward: did or did not a farm operation produce \$20,000 or more in gross income during three of five calendar years preceding 1983? An affidavit attesting that the subject property was not part of a farm operation that grossed \$20,000 in income during the relevant period can constitute substantial evidence.

b. Forest income

Addressing the forest income part of the test is more difficult. "Managing" a forest operation can include doing nothing for extended periods of time, while a stand of timber grows and matures. Information provided by the applicants indicates that the property was in fact logged "within the last ten years." Department of Forestry records indicate that the 113-acre tract was logged of approximately 400,000 board feet by Brieden Bros. in 1992, and of approximately 175,000 board feet by Derek Jaros in 1997. The Setchko Report concedes at p. 2 that "[t]he parcel was logged over the last ten years, before the current owners purchased the property." The subject property was managed for timber production within the period 1978-1982 if it was subsequently harvested within the 50-year cycle. The applicants' information further indicates that the property is currently forested with "scattered" Douglas-fir, ponderosa pine and incense cedar. Property tax records indicate that all of the acres on the original, parent TL 300 were forest deferred. On the two new parcels, all of TL 303 is forest deferred, and all but 1.00 acre for the homesite is forest deferred on TL304. For all of these reasons, it cannot be disputed that the proposed marginal land was managed as a forest operation during the 1978-82 period.

i. The Setchko Report has failed to use current prices to determine average income over the growth cycle.

Forest income is prospective over the growth cycle. The applicants' submitted affidavit, which merely asserts that the proposed marginal lands were not, during the 1978-82 period, part of a forest operation capable of grossing \$10,000 in income over the growth cycle, is not substantial evidence. What is required is an evaluation of the ability of the forest operation of which the proposed marginal lands were a part to generate average income of \$10,000 from forest operations *over the growth cycle*, based on the potential capability of the lands comprising the forest operation assuming reasonable management practices.

In *DLCD v. Lane County (Ericsson)*, 23 Or LUBA 33, 36 (1992), LUBA explained:

"ORS 197.247(1)(a) requires a two part inquiry to determine whether a forest parcel may be designated as "marginal" land. First, the county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. * * * Second, ORS 197.247(1)(a) requires the county to determine whether the forest operation in question *is* capable of producing an average of \$10,000 in annual gross income over the growth cycle. What occurred on the subject parcel during the 1978-1982 time period is not the sole determinant of the "capability" of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five year period." (Emphasis added.)

Thus LUBA has held that, for purposes of calculating income, it did not make sense to limit the inquiry to the 1978-1982 period. In *Ericsson*, that's exactly what Lane County did, and what LUBA affirmed: the applicant's expert used, and Lane County accepted, (then) current 1988-89 timber values.

The applicants' analysis must use current timber values to calculate potential gross income over the growth cycle. More recent prices are considerably higher than those used in the Setchko Report. A table showing 2001 prices is provided in Appendix 3-4.

Because the applicants have failed to use reasonable prices in computing average income over the growth cycle, the information provided is not adequate to establish that ORS 197.247(1)(a) is satisfied.

Calculations of income for production as assumed by the applicant in the Setchko Report have been provided by the Oregon Department of Revenue using 1992 and 2003 values. These values are expressed as "stumpage", which results in lower total values than would result if the log prices used in the Setchko Report were used. Using log prices is appropriate, because "income" means "gross income" and "merchantable timber" means timber that can be sold, whether at a profit or a loss. Income must be gross income, before deducting for expenses such as harvesting as is done with "stumpage." Nevertheless, using Department of Revenue values and production cycle assumptions of the Setchko Report, the subject property proves capable producing more than an average of \$10,000 in annual income over the growth cycle.

| DF | MBF | \$/MBF 1992 value | | \$/MBF 2003 value | |
|---------|--------|-------------------|-----------|-------------------|-----------|
| 2S | 678.36 | \$451 | \$305,940 | \$432 | \$293,052 |
| 3S | 847.95 | \$368 | \$312,046 | \$388 | \$329,005 |
| 4S | 169.59 | \$300 | \$50,877 | \$336 | \$56,982 |
| TOTAL | | \$668,863 | | \$679,038 | |
| AVERAGE | | \$11,148 | | \$11,317 | |

ii. The Setchko Report fails to establish that it has adequately considered timber productivity for soils not rated for Douglas-fir production.

As previously discussed, the Setchko Report used cf/ac/yr ratings from the 1990 Memo to arrive at timber volumes for Douglas-fir on non-rated soils. It has not been established that the productivity data is equivalent to NRCS data, nor has it been established that the methodology or the data have been accepted by the Department of Forestry. Therefore it has not been established that the data meets the requirements of OAR 660-006-0005(2). The calculation of average income from soils not rated by the NRCS for Douglas-fir production is not adequate for the purpose of establishing that the "income" test of ORS 197.247(1)(a) is satisfied.

iii. The Setchko Report has failed to consider productivity for timber species other than Douglas-fir.

As previously discussed in relation to the "productivity" test, neither the applicants' narrative nor the Setchko Report consider productivity for any timber species other than Douglas-fir. Potential productivity for other hardwood and conifer species for non-rated soils found on the E-40 zoned portions of TL 303 and TL 304 was discussed in that context, and that discussion

is incorporated here by reference. These soils are or may be suitable for the production of merchantable hardwoods and conifers.

Species not considered in the Setchko Report may yield much more timber than Douglas-fir, as it is conceded that several of the soils are not particularly well suited for Douglas-fir production while they are productive for other forest tree species.

One additional non-rated soil, Steiwer silt loam, which was not addressed under the "productivity" discussion because it is not found on the proposed marginal lands, is found within the 113-acre parent tract. The Soil Survey describes Steiwer silt loam as "moderately deep [and] well-drained," and indicates that vegetation in areas not cultivated includes "mainly hardwoods [and] scattered conifers." This soil is or may be suitable for the production of merchantable hardwoods and conifers.

iv. The Setchko Report improperly uses a 60-year growth cycle to calculate average income for all forest tree species.

The Setchko Report uses a 60-year rotation to calculate average income over the growth cycle rather than the standard 50-year cycle. As a result, income at harvest is averaged over 60 years rather than 50 years, resulting in lower annual average income.

The March 1997 Supplement to Marginal Lands Information Sheet states:

"The consensus of the Board was that a 50-year growth cycle should be adopted as the usual standard, with the option that another standard could be used if substantiated by compelling scientific evidence presented by the applicant. The Board's choice was based on evidence that the USDA Natural Resources Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standard figure."

As this policy recognizes, NRCS is based on a 50-year growth cycle. The Setchko Report provides evidence that a 60-year cycle may be appropriate for Douglas-fir on the subject site.

The Setchko Report states at p. 2:

"A sixty year rotation (growth cycle to final harvest) was used, this time span being a reasonable rotation age on this site class, which is very poor."

This is the explanation provided for using a 60-year rotation to calculate average income for production of Douglas-fir, rather than the required 50-year rotation.

The consulting forester has conflated "site class" with the entire 113-acre tract under consideration. The 113-acre tract includes many "site classes" which are excellent for the production of Douglas-fir. The conclusion that the entire 113-acre site is "very poor" is inaccurate for Douglas-fir, as the Ritner and McDuff soils are excellent for production of Douglas-fir.

In addition, appropriate growth cycles for other potential merchantable species must be considered. At least two merchantable species are grown on much shorter rotations. Hybrid poplar is commonly grown on a 7-8 year cycle for pulp and a 15-year cycle for timber. KMX is commonly grown on a 20-year cycle.

The Setchko Report makes no attempt to establish that using a 60-year site index instead of a 50-year site index is a methodology providing data equivalent to NRCS data or that it has been accepted by the State Forester for species other than Douglas-fir.

The statutory requirement that the land be "capable" of producing the specified annual income "over the growth cycle" requires an evaluation of the income potential of the property assuming the utilization of reasonable forest management practices over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33, 36 (1992). Reasonable management would require that different soils on the 113-acre tract be planted with merchantable trees suited for the specific soils, site and exposure, with rotations suited to the specific forest tree species and growing conditions. It is not reasonable to assume that the entire 113-site, comprised of eight soil types with varying slopes, and exposures, would be planted with a single species receiving the same management practices and rotations.

Because assuming a 60-year rotation for the entire 113-acre tract does not comply with Lane County policy, has not been shown to be consistent with OAR 660-006-0005(2), and is not reasonable, the income calculations of the Setchko Report are not adequate to comply with the requirements of ORS 197.247(1)(a).

v. The Setchko Report income calculations are not correct.

The Setchko Report contains errors in its calculation of potential income from rated soils. At p. 3 the Setchko Report states that the 100 Year Site Index for McDuff clay loam is 112, and for Ritner cobbly silty clay loam 107. The Setchko Report then "adjusts" to arrive at 50-Year Site Indexes of 98 and 95, respectively.

The source of these site indexes is the *Lane County Soil Ratings for Forestry and Agriculture*. Douglas-fir site indexes and cf/ac/yr ratings found therein are calculated using 50-year Douglas-fir data unless otherwise noted. See *Lane County Soil Ratings*, p. 6. The Setchko Report has erred in further reducing indexes which are already 50-year indexes.

CONCLUSION

The applicants' information fails to address the fact that there are two parcels proposed as marginal land. For purposes of the "productivity" test, each parcel as an individual unit must satisfy the ORS 197.247 requirements to qualify as marginal land. Information provided does not address the relevant portion of either TL 303 or TL 304 as separate units of proposed marginal land; soils on the parcels are not identified or quantified, nor is timber productivity calculated for either parcel. Available information indicates that both proposed units of marginal land can produce in excess of 85 cf/ac/yr of merchantable timber.

In evaluating the capability of the parent 113-acre tract for forest income potential, the applicant relies upon the Setchko Report. The Setchko Report, in addressing the "income" test and the "productivity" test, has failed to establish that productivity data provided for non-rated soils is equivalent to NRCS data and that the methodology and the data have been accepted by the Department of Forestry.

The Setchko Report has improperly limited its consideration of "merchantable species" to Douglas-fir, and has not considered productivity for all merchantable timber species as required by ORS 197.247(1)(b). The Setchko Report assumes the same 60-year rotation for all species. The Setchko Report thus has not assumed "reasonable management practices."

For purposes of calculating potential average income, the Setchko Report uses 1983 prices rather than current prices. Income from production of merchantable species other than Douglas-fir is not considered. The Setchko Report fails to establish that Douglas-fir productivity data for soils not rated by the NRCS for Douglas-fir production is equivalent to NRCS data or that it has been accepted by the Department of Forestry. The Setchko Report erroneously "corrects" two capability ratings.

As a result, average income calculations are not reasonable or reliable and cannot establish compliance with ORS 197.247(1)(a). Calculations using more realistic prices provided by the Oregon Department of Revenue indicate that the parent 113-acre parcel is capable of producing average income in excess of \$10,000 per year over the growth cycle.

For these reasons this application must be denied.

Respectfully submitted,

Jim Just
Executive Director

Exhibit Divider

KENDALL Jerry

From: Jim Just [goal1@pacifier.com]
Sent: Thursday, January 29, 2004 4:03 PM
To: Jerry Kendall
Cc: Lovinger Emmons; Lauri Segel
Subject: response

Jerry,

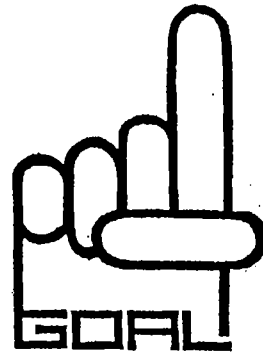
Attached is a letter in response to the new information submitted by the applicant. I will also put a hard copy in the mail, with the supporting documentation.

Jim Just, Executive Director
Goal One Coalition
39625 Almen Drive
Lebanon, OR 97355
phone/fax: 541.258.6074

Championing the role of citizens in decisions affecting the livability of their communities and the sustainability of the natural environment

GOAL ONE COALITION

39625 Almen Drive
Lebanon, Oregon 97355
Phone: 541-258-6074
Fax: 541-258-6810
goal1@pacifier.com



January 26, 2004

Lane County Planning Commission
125 East 8th Avenue
Eugene, Oregon 97401

RE: Lane County File # PA 02-5838, Ogle; response to new information

Members of the Planning Commission:

Please consider this letter, submitted in response to information contained in the revised Setchko Report (Setchko Report II) submitted by the applicant during the open record period.

The Setchko Report II recalculates income based on a 50-year growth cycle. Use of a 50-year cycle is suggested by the 1997 Lane County Board of Commissioners directive on interpretation and administration of Marginal Lands provisions, Issue 5: "What 'growth cycle' should be used to calculate gross annual income.?"

This directive erroneously states that "the USDA Natural Resource[s] Conservation Service has adopted the 50-year cycle for rating soil productivity[.]" This statement conflates a 50-year *site index* with a 50-year *growth cycle*. The two are not the same, and have little or nothing to do with each other. The site index simple measures average growth at 50 years. A growth cycle involves a choice of when to harvest.

Criteria and standards for marginal lands are established by ORS 197.247 (1991 edition). Local provisions implement the statutory provisions. Local interpretation of statutory provisions are not due and will be given any deference.

ORS 197.247 provides, in relevant part:

"(a) The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a . . . forest operation capable of producing an average, over the growth cycle, of \$10,000 in gross annual income[.]"

In determining whether a parcel is capable of producing the specified level of income one must assume "reasonable management practices." *DLCD v. Lane County (Ericcson)*, 23 Or LUBA 33, 36 (1992). "Reasonable management practices" include selection of the appropriate growth cycle for the particular species at the particular site under the particular conditions.

*Championing the role of citizens in decisions affecting the livability of their communities
and the sustainability of the natural environment*

In Setchko Report I the applicant demonstrated that the parent parcel would produce substantially greater income over the growth cycle if a 60-year cycle was used rather than a 50-year cycle. "Reasonable management practices" would then undoubtedly select the 60-year harvest cycle rather than a 50-year cycle, and provides compelling scientific evidence that it would be best to do so. This is in accord with the Lane County Board of Commissioners directive on Issue 5, which allows for a standard other than the 50-year standard if the alternative standard is substantiated by compelling scientific evidence.

The Setchko Report II again erroneously "converts" a supposedly 100-year site index to a 50-year index for the McDuff and Ritner soils.

Using Department of Revenue values and production cycle assumptions of the Setchko Report I, the subject property proves capable producing more than an average of \$10,000 in annual income over the growth cycle.

TABLE 1

| DF | MBF | \$/MBF 1992 value | | \$/MBF 2003 value | |
|---------|--------|-------------------|-----------|-------------------|-----------|
| 2S | 678.36 | \$451 | \$305,940 | \$432 | \$293,052 |
| 3S | 847.95 | \$368 | \$312,046 | \$388 | \$329,005 |
| 4S | 169.59 | \$300 | \$50,877 | \$336 | \$56,982 |
| TOTAL | | \$668,863 | | \$679,038 | |
| AVERAGE | | \$11,148 | | \$11,317 | |

The Setchko Report II also fails to consider productivity for soils other than Douglas-fir, thus failing to assume "reasonable management practices." The Setchko Report II, like the Setchko Report I, fails to separately calculate the productivity of Tax Lots 303 and 304.

The Zone Change Application does provide detail of the proposed marginal lands portions of Tax Lot 303 and Tax Lot 304. It assumes zero forest productivity for soils other than Ritner or McDuff. It is possible to fill in missing data with data found in the record addressing productivity for Douglas-fir (DF) for non-NRCS rated soils and productivity for Ponderosa pine (PP).

Available information does not readily convert site indexes for Ponderosa pine to cf/ac/yr equivalents. However, information provided by Max Bennett, a OSU forester and Ponderosa pine expert, enables an approximation of yields.¹ First, the 50-year site index must be converted to a 100-year index. Referring to applicant's Exhibit 8, a 50-year site index of 107 converts to a 100-year site index of 123. Using tables provided by Bennett, a site index of 120 yields 141 cf/ac/yr at stand age 40. Using that number, productivity calculations should be quite conservative.

¹ See Exhibit 1 to this letter.

TABLE 2

| <u>Tax Lot 303</u> | Site index | Cf/ac/yr | Species | Acres | Productivity |
|------------------------|------------|----------|---------|--------------|-----------------|
| 102C Panther | 3 (low) | 50 | DF | 12.936 | 647 |
| 107C Philomath | 120 | 141 | PP | 12.853 | 1812 |
| 108F Philomath | 120 | 141 | PP | 5.628 | 794 |
| 113G Ritner | 107 | 149 | DF | <u>2.741</u> | <u>408</u> |
| | | | | 34.158 | 3661 |
| | | | | = | 107.18 cf/ac/yr |
| <u>Tax Lot 304</u> | | | | | |
| 81D Mcduff | 112 | 158 | DF | 5.600 | 885 |
| 102C Panther | 3 (low) | 50 | DF | 1.747 | 87 |
| 107C Philomath | 120 | 141 | PP | 18.276 | 2577 |
| 108F Philomath | 120 | 141 | PP | 7.042 | 993 |
| 113G Ritner | 107 | 149 | DF | <u>6.914</u> | <u>1030</u> |
| | | | | 39.579 | 5572 |
| | | | | = | 140.78 cf/ac/yr |

The above calculations do not consider productivity for fast-growing forest tree species such as Hybrid poplar or KMX.

CONCLUSION

“Reasonable management practices” would include selection of a 60-year growth cycle. Using the most reasonable available information on prices which might be expected over the growth cycle, the forest operation would average in excess of \$10,000 in annual income. Therefore the proposed marginal land does not qualify as marginal land.

The portions of both TL 303 and TL 304 proposed to be redesignated marginal land are capable of producing in excess of 85 cf/ac/yr of merchantable timber. Therefore neither piece of land can be approved as marginal land.

Respectfully submitted,

Jim Just
Executive Director

Exhibit Divider

Kent Howe, Planning Director
Land Management Division
125 E. 8th Ave.
Eugene, OR 97401

January 29, 2004

Dear Mr. Howe:

I attended the public hearing held by the Lane County Planning Commission on Tuesday evening, January 20. I was one of the individuals speaking against the proposed rezoning application submitted by Ogle and Childs (file# PA 02-5838).

I have some concerns about the public process observed at the meeting.

According to Planner Jerry Kendall, additional documents pertaining to the application arrived (at the Lane Management Division) late that afternoon. Mr. Kendall requested a two week continuance, in order to read the reports, present findings to the Commission, and (as required) make the documents available for public review and comment.

To my surprise and disappointment, several members of the commission publicly expressed their impatience with the requested continuance, and suggested the new submissions did not warrant their attention. The message to the audience was clear: "let's get this over with quickly; we don't need any more papers to read". After an appeal from Mr. Kendall, the commission reluctantly granted a one-week continuance. Still, one member again expressed her "impatience" with not taking action immediately.

One of these new documents was a lengthy report from Jim Just, of the Goal One Coalition. An amended copy of his document was subsequently submitted to the LMD office on January 26.

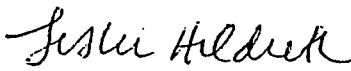
Just raised many questions in his report, including the following data: "ORS 215.237 and LC 16.214 require a minimum parcel size of 20 acres if the parcel is adjacent to land zoned for farm or forest use that would not qualify as marginal land.."

The lands surrounding the applicants' property are zoned F-2, E-30 and E-40. The public notice from the LMD office, and the staff report for this application, indicate the applicants propose dividing the land into "10 and 20 acre parcels"; this does not seem to agree with the 20 acre minimum parcel size referred to above.

Just also pointed out: "Each distinct segment of land proposed for redesignation to marginal lands must satisfy the "productivity" test if the application is to be approved. "

There is a question whether the applicants' productivity test was applied for each separate tax lot within the parcel, rather than for the parcel as a whole.

I hope the Planning Commission takes the time to read and consider Just's report, as well as any additional information that is received during the public comment period. I hope the commission bases its decision on facts, and not merely on the "convincing" testimony of the applicants' hired agents. That which is convincing is not always the most factual. In addition, the Commission should not be so quick to dismiss relevant information that is presented during the public comment process. Land planning decisions merit more respect and responsibility.


Leslie Hildreth
86460 Lorane Highway
Eugene, OR 97405

cc: Jerry Kendall; Lane Co. Planning Commission; Lane Co. Board of Commissioners

#15-1p.

Exhibit Divider

KENDALL Jerry

From: HOWE Kent
Sent: Wednesday, February 04, 2004 8:51 AM
To: KENDALL Jerry
Subject: RE: Ogle/meet?

Setchko came in late yesterday with their response to the Goal 1 arguments. I've talked with Setchko and believe that he has addressed the issues completely.

-----Original Message-----

From: KENDALL Jerry
Sent: Wednesday, February 04, 2004 6:35 AM
To: HOWE Kent
Subject: RE: Ogle/meet?

PS: responses to Ogle will also help with the Dahlen ML subdiv. I am doing for S. Cornacchia. I told him I would finish Friday, but Goal 1 is now expected to give comments before then (probably the same ilk as for Ogle).

-----Original Message-----

From: KENDALL Jerry
Sent: Wednesday, February 04, 2004 6:34 AM
To: HOWE Kent
Subject: Ogle/meet?

Have you made any progress on the Ogle forestry comments?

My report is due Tuesday. You are off Friday, and Thursday I have a hearing and PD process meeting all afternoon.

How about discussing this afternoon? Say 2?

Also, I'll be (back) in at 8:30 this morning, and leaving at 4:30: 1 hour CT taken.

Jerry Kendall/Associate Planner
Dept. of Public Works
Land Management Division
125 E. 8th Ave.
Eugene, Or. 97401

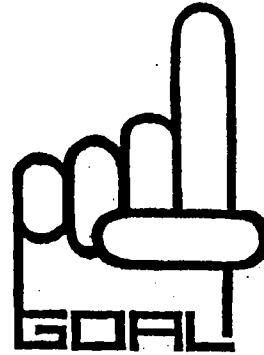
Phone: 541-682-4057
FAX: 541-682-3947

Exhibit Divider

GOAL ONE COALITION

39625 Almen Drive
Lebanon, Oregon 97355
Phone: 541-258-6074
Fax: 541-258-6810
goal1@pacifier.com

REC'D FEB 02 2004



January 26, 2004

Lane County Planning Commission
125 East 8th Avenue
Eugene, Oregon 97401

RE: Lane County File # PA 02-5838, Ogle; response to new information

Members of the Planning Commission:

Please consider this letter, submitted in response to information contained in the revised Setchko Report (Setchko Report II) submitted by the applicant during the open record period.

The Setchko Report II recalculates income based on a 50-year growth cycle. Use of a 50-year cycle is suggested by the 1997 Lane County Board of Commissioners directive on interpretation and administration of Marginal Lands provisions, Issue 5: "What 'growth cycle' should be used to calculate gross annual income.?"

This directive erroneously states that "the USDA Natural Resource[s] Conservation Service has adopted the 50-year cycle for rating soil productivity[.]" This statement conflates a 50-year *site index* with a 50-year *growth cycle*. The two are not the same, and have little or nothing to do with each other. The site index simple measures average growth at 50 years. A growth cycle involves a choice of when to harvest.

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#17-5788

In Setchko Report I the applicant demonstrated that the parent parcel would produce substantially greater income over the growth cycle if a 60-year cycle was used rather than a 50-year cycle. "Reasonable management practices" would then undoubtedly select the 60-year harvest cycle rather than a 50-year cycle, and provides compelling scientific evidence that it would be best to do so. This is in accord with the Lane County Board of Commissioners directive on Issue 5, which allows for a standard other than the 50-year standard if the alternative standard is substantiated by compelling scientific evidence.

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| TOTAL | | \$668,863 | | \$679,038 | |
| AVERAGE | | \$ 11,148 | | \$ 11,317 | |

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¹ See Exhibit 1 to this letter.

TABLE 2: PRODUCTIVITY

| <u>Tax Lot 303</u> | Site index | Cf/ac/yr | Species | Acres | Productivity |
|------------------------|------------|----------|---------|--------------|-----------------|
| 102C Panther | 3 (low) | 50 | DF | 12.936 | 647 |
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| | | | | 34.158 | 3661 |
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| <u>Tax Lot 304</u> | | | | | |
| 81D McDuff | 112 | 158 | DF | 5.600 | 885 |
| 102C Panther | 3 (low) | 50 | DF | 1.747 | 87 |
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| 108F Philomath | 120 | 141 | PP | 7.042 | 993 |
| 113G Ritner | 107 | 149 | DF | <u>6.914</u> | <u>1030</u> |
| | | | | 39.579 | 5572 |
| | | | | = | 140.78 cf/ac/yr |

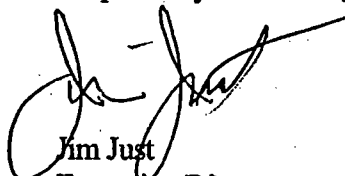
The above calculations do not consider productivity for fast-growing forest tree species such as Hybrid poplar or KMX.

CONCLUSION

"Reasonable management practices" would include selection of a 60-year growth cycle. Using the most reasonable available information on prices which might be expected over the growth cycle, the forest operation would average in excess of \$10,000 in annual income. Therefore the proposed marginal land does not qualify as marginal land.

The portions of both TL 303 and TL 304 proposed to be redesignated marginal land are capable of producing in excess of 85 cf/ac/yr of merchantable timber. Therefore neither piece of land can be approved as marginal land.

Respectfully submitted,



Jim Just
Executive Director

Jim Just

From: "Bennett, Max" <max.bennett@oregonstate.edu>
To: "Fletcher, Rick" <rick.fletcher@oregonstate.edu>; "Jim Just" <goal1@pacifier.com>
Sent: Tuesday, January 27, 2004 5:09 PM
Subject: RE: ponderosa pine soils ratings

Jim & Rick:

I don't have any SW OR volume tables for ponderosa pine I can lay my hands on easily. Not sure they even exist per se. Maybe the closest we can come is from the following two pubs:

Oliver, W.W. and R.F. Powers. 1978. Growth models for ponderosa pine: I. Yield of unthinned plantations in northern California. Research Paper PSW-133. Berkeley CA: Pacific Southwest Forest and Range Experiment Station, Forest Service, USDA. 21 p.

Powers, R.F. and W.W. Oliver. 1978. Site classification of ponderosa pine stands under stocking control in California. Research Paper PSW-128. Berkeley CA: Pacific Southwest Forest and Range Experiment Station, Forest Service, USDA. 9 p.

I don't have copies, they are probably at the OSU library.

On the modelling front, there is SYSTUM-1, which models young stands up to age 20, at which point ORGANON takes over. Actual or hypothetical stand data is required. These models are calibrated with SW OR and N. CA stand data.

As a rough approximation, the Silvics handbook has the following yield table. To calculate the cubic ft/ac/year, determine the mean annual increment (MAI, = total stand volume divided by age) for a given site index. For example, for SI=120, the MAI at age 40 is 5,650 cubic ft / 40 years = 141 cubic ft per acre per year. For a 50 year base site index, would have to first convert to 100-base value.

Max

Table 1- Total volume inside bark of ponderosa pine 1.5 cm (0.6 in) and larger in d.b.h. (39)

| Age | Site index at base age 100 years ¹ | | | |
|-----|---|------------------|-------------------|-------------------|
| | 18 m or 60 ft | 27 m or 90 ft | 37 m or 120 ft | 46 m or 150 ft |
| yr | m ³ /ha | | | |
| 20 | 28 | 94 | 168 | 262 |
| 40 | 122 | 238 | 396 | 588 |
| 60 | 192 | 340 | 570 | 861 |
| 80 | 238 | 413 | 696 | 1060 |
| 100 | 273 | 472 | 794 | 1204 |
| 120 | 308 | 518 | 868 | - |
| 140 | 336 | 556 | 928 | - |
| yr | ft ³ /acre | | | |
| 20 | 400 | 1,350 | 2,400 | 3,750 |

| | | | | |
|--|-------|-------|--------|--------|
| 40 | 1,750 | 3,400 | 5,650 | 8,400 |
| 60 | 2,750 | 4,850 | 8,150 | 12,300 |
| 80 | 3,400 | 5,900 | 9,950 | 15,150 |
| 100 | 3,900 | 6,750 | 11,350 | 17,200 |
| 120 | 4,400 | 7,400 | 12,400 | - |
| 140 | 4,800 | 7,950 | 13,250 | - |
| ¹Height of dominant and codominant trees of average d.b.h. | | | | |

: Fletcher, Rick
Sent: Tuesday, January 27, 2004 9:40 AM
To: Jim Just
Cc: Bennett, Max
Subject: RE: ponderosa pine soils ratings

Jim:

There are no published yield tables for Valley ponderosa like there are for Douglas-fir and other species. One logical approach would be to use the volume tables for ponderosa in SW Oregon. Max Bennett, our agent in Medford has some experience with Valley ponderosa and ponderosa in SW Oregon, so he may be able to help with this. I have included him in this email. Let's see what he might suggest.

Rick

From: Jim Just [mailto:goal1@pacifier.com]
Sent: Mon 1/26/2004 3:51 PM
To: Fletcher, Rick
Subject: ponderosa pine soils ratings

Rick,

How would you convert a site index for ponderosa pine into a cf/ac/yr rating? i.e. for Philomath soils, what cf/ac/yr rating could be expected from a site index of 104?

Thanks for your help.

Jim Just, Executive Director
Goal One Coalition
39625 Almen Drive
Lebanon, OR 97355
phone/fax: 541.258.6074

Championing the role of citizens in decisions affecting the livability of their communities and the sustainability of the natural environment

1/29/2004

Exhibit Divider



Marc E. Setchko
CONSULTING FORESTER

FEB 03 2004

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February 3, 2004

Lane County Planning Commission

RE: Lane County File #PA 02-5838, Ogle; Response to Goal One Coalition Letters dated January 26, 2004

Members of the Planning Commission:

In conjunction with my testimony, which I presented on Tuesday night January 20, 2004, I have enclosed the following written reponse to Goal One letters written by Jim Just. I have addressed each issue as presented in the letters, most of which I also addressed with my testimony. I am answering these questions as a qualified, Society of American Foresters Certified Professional Forester (#2953), with 27 years of experience including 17 years as a consultant, with Bachelor of Science (Cal Poly, SLO) and Master of Forestry (Oregon State) Degrees.

Following are reponses to questions raised in Letter I from Goal One:

Section 1a, Page 2: Timber species other than Douglas-fir not considered. Merchantable hardwood species mentioned included black cottonwood, Oregon ash, Oregon white oak, red alder, bigleaf maple and hybrid poplar. All of these species, except for Oregon white oak and maple, require large amounts of water to grow; which is why they are found primarily in wetland areas and along streams. There is not enough moisture on this parcel to support these trees. Oregon white oak and bigleaf maple are worth very little from a commercial standpoint, particularly the small scrub oak, which is worth almost nothing. Therefore these two species were not considered for the income test.

Merchantable conifer species mentioned included ponderosa pine, grand fir, western red cedar, western hemlock and KMX. Red cedar and hemlock will not grow on this site, due to moisture constraints; the remaining species are worth considerably less money than Douglas-fir. Therefore, they werer not considered for the income test.

Section 1b, Page 2: My report failed to establish that information provided pertaining to Douglas-fir productivity for soils not rated by the NRCS provides data equivalent to NRCS data using methodology approved by the Department of Forestry.

The productivity figures used for soils not rated by the NRCS came from the "Single Phase Interpretation Sheets" (green sheets) published by the Soil Conservation Service and from an Office of State Forester Memorandum. NRCS and SCS are one and the same; NRCS simply being the "new" name for the "old" SCS, which would mean the data from either one is derived from the same methodology. The Office of the State Forester is a part of the Department of Forestry, therefore anything approved by the Office of the State Forester is, by default, approved by the Department of Forestry.

Section 1b, Page 4: It is stated that Goal One could not obtain a copy of the "Office of State Forester Memorandum, February 8, 1990, General File 7-1-1" could not be found. It must exist; Lane County has used it to support forestland data for years before being superseded by the 1997 report. I used it in good faith for productivity ratings not presented in the 1997 Lane County Soil Ratings for Forestry and Agriculture.

#18-500





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Section 1c, Page 4: It is stated that I did not address TL 303 and 304 together; Lane County guidelines for marginal lands applications state that all of the parcels must be considered together as a whole.

Section 1d, Page 5: Goal One states that my report shows a portion of the parcel to be capable of producing 11.96 af/ac/yr. of merchantable timber. This is not stated or shown anywhere in my report.

Section 1d, Page 6: Goal One states that my report fails to address the timber productivity of soils not rated for the production of Douglas-fir, and the productivity for merchantable species other than Douglas-fir. It further states that these soils could support merchantable hardwoods and other conifers. I have addressed every soil on the parcel and assigned a productivity rating to every soil. Nowhere have I denied that a particular soil will not support other tree species; I have used Douglas-fir because it is worth considerably more money than any other species which could be grown.

Section 1d, Page 6: Goal One states that I do not give the acreage of individual soil types within the proposed marginal land area. See Page Two of my productivity analysis; acreages are stated to the hundredth of an acre.

Section 1e, Page 6: Goal One states that I assume zero forest productivity for soils other than Ritner or Mc Duff. See Page 2 of my report; every soil on the parcel has been assigned a productivity number. Goal One further states that it is possible to fill in missing data with other available data for non-NRCS rated soils for Douglas-fir. I have done this in my report for non-NRCS rated soils; which Goal One argues on Page 2 of their letter should not be done (see above Section 1b, Page 2).

Section 1e, Page 7: Goal One states that it is possible to fill in missing data with available data giving productivity for non-NRCS rated soils for Douglas-fir, and with available data assessing productivity for Ponderosa pine. This statement follows their own statement that I should not do this because it would be erroneous to do so (see above). Goal One further states that available information does not readily convert site indexes for Ponderosa pine to cf/ac/yr equivalents. Following these statements Goal One then uses a study done on basically one tree farm of valley ponderosa pine, to come up with ponderosa pine site indexes. The tables I have used in my report were developed over many years, using many sites, thousands of trees and huge data bases to come up with statistically viable figures. Only then are these figures published in tables which can be used as supporting data. The table used by Goal One has not been published (see Appendix 4, Goal One letter), which usually means there is not enough data to substantiate the figures used. Goal One then takes these numbers and calculates cf/ac/yr growth figures using their own conversion factors; with no supporting data or published tables. Goal One then takes these numbers to create a table showing that this site is capable of producing greater than 85 cf/ac/yr.





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Section 2b, Page 8: Goal One provides extensive data to prove that "it cannot be disputed that the proposed marginal land was managed as a forest operation during the 1978-82 period". I have not disputed that fact, in my report or testimony at the board meeting. Goal One also states that Department of Forestry records indicate past timber harvesting activities. This has not been denied; Breeden Bros. logged in 1992, Derek Jaros removed nothing in 1997, in fact Jaros has never owned the property. However, the volume figures shown cannot be used as fact; I have submitted dozens of timber harvesting permits over the years and the volume figures on the application can be any number you wish it to be. The actual timber harvested is confidential information. Therefore, these numbers cannot be used for any productivity measurements for a given soil.

Section 2i, Page 8: Goal One states that I have "merely asserted" that the proposed marginal lands were not, during the 1978-82 period, capable of producing \$10,000 in income per year over the growth cycle. Goal One further states that this figure should be calculated "over the growth cycle", based on potential capability of the lands from a forest operation standpoint. On this point I am not clear what Goal One is saying, as my entire report is written around these very points.

Section 2i, Page 9: Goal One states I must use current timber values. The Lane County Planning Commission has determined that these are the years to be used; therefore, I have used them. The \$10,000/year limitation also takes these years into account; a current yearly limitation would be considerably higher in today's dollars.

Section 2ii, Page 9: Goal One states that my report fails to establish that it has adequately considered timber productivity for soils not rated Douglas-fir production. This question has already been discussed and answered more than once (see above).

Section 2iv, Page 10 and Section 2i, Page 9: Goal One states that I have improperly used a 60-year growth cycle rather than the standard 50-year cycle. To address this point I have rewritten my report using a 50-year growth cycle. In conjunction with this point Goal One has also shown calculations using more current timber prices (see Page 9, Letter 1), which show the average annual income to be greater than \$10,000. However, these calculations use the volume figures from my 60-year growth cycle projections; which Goal One states is improper to do. Using Goal One's own numbers and plugging them into a 50-year growth cycle yields the following results.

| DF | MBF | \$/MBF 1992 value | | \$/MBF 2003 value | |
|---------|--------|-------------------|-----------|-------------------|-----------|
| 2S | 444.34 | \$451 | \$200,397 | \$432 | \$191,955 |
| 3S | 555.43 | \$368 | \$204,398 | \$388 | \$215,507 |
| 4S | 111.08 | \$300 | \$ 33,324 | \$336 | \$ 37,323 |
| TOTAL | | | \$438,119 | | \$444,323 |
| AVERAGE | | | \$ 8,762 | | \$ 8,896 |

Section 2iii, Page 9: Goal One states I have failed to consider the productivity of timber species other than Douglas-fir. This has already been discussed and answered more than once (see above). The second portion of these statement asserts that other species could produce more total growth for the same period of time. I do not dispute this possibility; however, it would take substantially more growth to make up for the large price difference between Douglas-fir and another merchantable species.





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Section 2iv, Page 10: Goal One contends I have "conflated" the site class of the entire 113-acre tract under consideration. They further state that the 113-acre tract includes many "site classes" which are excellent for the production of Douglas-fir. I have not denied this; I am merely making a statement regarding the tract as a whole, which is the method I am supposed to follow for the analysis as presented.

Section 2iv, Page 11: After stating repeatedly that only a 50-year cycle is appropriate for this analysis, Goal One then proposes a 7-8 year, 15 and 20 year cycle to support their argument. No response to this is needed.

Section 2iv, Page 11: Goal One states I have not used reasonable management practices to evaluate the income production, and further states that different site specific species be planted throughout the parcel. I would agree with both of these statements. However, my report is not about management practices, it is an analysis of the maximum potential productivity possible on the parcel. Following reasonable management practices would undoubtedly result in multiple species being planted; however, every other species used would result in a lower annual dollar amount over the growth cycle.

Section 2v, Page 11: Goal One states I have "adjusted" the site tables to arrive at lower site class figures. The Lane County Soil Ratings for Forestry and Agriculture use the McArdle 100-year site class index numbers, as stated on Page 6 of the ratings. All current growth projection tables use Kings 50-year site index numbers. Therefore to get accurate volume figures from a 50-year growth table the 100-year site index number must be converted to a 50-year site index number. I have included the table, which I myself did not create, in my report (see Exhibit 8).

Conclusion, Page 12: Points addressed in Goal One's conclusions: 60-year rotation -- I have resubmitted a 50-year growth cycle analysis. 1983 log prices -- These are the figures the Lane County Planning Commission has deemed appropriate. Soils not rated by the NRCS or accepted by the Department of Forestry -- I have used SCS data; which is the same as NRCS data because the NRCS used to be the SCS, this is strictly a name change. I have used Department of Forestry data which Lane County deemed appropriate in the past. I used this data in good faith, assuming the Memorandum cited existed. I did not erroneously "correct" two capability ratings; I used tables accepted by the forestry profession for years.

Responses to Letter II from Goal One:

Page 1: Goal One states that the 1997 Lane County Board of Commissioners directive on Marginal Lands has adopted a 50-year growth cycle to calculate gross annual income. Goal One then states that this directive erroneously states that "the USDA NRCS has adopted the 50-year cycle for rating soil productivity. True or not, I am not at all sure how this has anything to do with my analysis; I am simply following county guidelines.





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Goal One states that the above statement conflates (combines) a 50-year site index with a 50-year growth cycle. This statement is too confusing to follow and as such cannot be appropriately answered. Goal One further states that a 50-year site index and 50-year growth cycle are not the same; a site index is simply a measurement of average growth at 50 years and that a growth cycle is simply a choice of when to harvest. All of these statements are correct and no one has ever argued any of these points. They also state that a site index and growth cycle have nothing to do with each other. They do have a lot to do with each other; the volume (productivity) at the end of a particular growth cycle is entirely dependent on the site index of the particular site in question. You cannot determine the volume at the end of a growth cycle without knowing the Site Index first.

Page 2: Goal One states I have failed to consider productivity for soils other than Douglas-fir; I have addressed this question several times, both on paper and in my presentation before the planning commission. Goal One states I have failed to calculate the productivity of each tax lot separately; Lane County requires they be calculated as one parcel.

Goal One states that I assume zero productivity for all soils other than Ritner or McDuff. Read page 2 of my analysis.

Goal One states available information does not readily convert site indexes for Ponderosa pine to cf/ac/yr equivalents. Goal One then proceeds to do their own conversions with no supporting data. This information is presented after Goal One has stated that I erroneously converted the site index data in my analysis, even though I have included the tables that they were derived from.

Goal One's final conclusion(s). In Letter I Goal One unequivocally states that because I have selected a 60-year growth cycle my report has not assumed "reasonable management practices", therefore my average income calculations are not reasonable or reliable. In Letter II Goal One unequivocally states that because I have selected a 50-year growth cycle my report has not assumed "reasonable management practices", therefore my average income calculations are not reasonable or reliable. In this case I am not sure how to respond.

I hope this letter answers all the points brought to light by Goal One.

Sincerely,

Marc E. Setchko

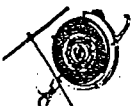


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FEB 10 2004

February 10, 2004

HAND DELIVERED

Lane County Planning Commission
% Jerry Kendall
Lane County Land Management Division
Courthouse Public Service Building
125 E. 8th Avenue
Eugene, OR 97401

Re: Applicants' Final Rebuttal Statement
Application for Marginal Land Plan Amendment/Zone Change
Ogle-Childs, Applicants
PA 02-5838

Commissioners:

Mr. Setchko has prepared an extensive response to the opponents' testimony, dated February 3, 2004. In particular, he responds to the written testimony provided by the Goal 1 Coalition prepared by Mr. Just. Please review it closely. Mr. Just and other opponents are not knowledgeable about forest practices or uses. Mr. Setchko's report and response make this obvious.

Specifically, Mr. Just makes repeated allegations about Mr. Setchko's report that are not true. These include:

- **A 50-year growth cycle was not used**—Mr. Setchko did and points out where that is in his report
- **Other merchantable species were not considered**—they were addressed and Mr. Setchko said they would not produce as much income as Douglas Fir
- **Unrated soils (for Douglas Fir) were not assigned productivity factors**—they were and Mr. Setchko again refers to where this is reflected in his report.

- Acreages for specific soil types were not provided—in fact, they were to the hundredth of an acre
- Tax Lots 303 and 304 were not addressed together—they were in the report as was the area previously zoned Marginal Lands in 1992.

1997 Board of Commissioners' Interpretation of Marginal Lands Applications

Mr. Just summarily dismisses the Board of Commissioners' 1997 Supplemental Interpretation of the Marginal Lands statute and the County's previous explanations of how it is to be applied. A copy of that document is enclosed. It is a binding policy statement at the local level. Its purpose was to provide guidance and direction to applicants, staff, the public, and to the Board and Planning Commission regarding some of the more ambiguous details in the statute. I know this because I was part of the committee that helped draft the interpretation and interact with the Board prior to its adoption.

Of particular importance to this application is "ISSUE 4" of the interpretation which states:

"ISSUE 4: What price data should be used to calculate gross annual income for forest land"

Board Direction:

The legislative intent of the "management and income test" of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a "significant contribution" to commercial forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. Using the volumes calculated in step (1), and 1983 prices, calculate the average gross income over the growth cycle."

This is why Mr. Setchko used 1983 log prices. He had no choice because this is what the County has directed him to do.

The Board's rationale for using 1983 prices was because any other interpretation would be meaningless as inflation increases. The only way to address this would be to adjust the \$10,000 figure or freeze the value of the timber to a particular time. It was the Board's belief that since the statute was based on a specific time period, i.e. 1978-1983,

to the extent possible, all other variables in the statute should be based on the same time frame. The \$10,000 figure could not be changed but the price of logs could be pegged at 1983 values. This was logical, practical and consistent with the available legislative history.

Other Opponents' Arguments

Most, if not all of the other arguments made by the opponents to the applications are irrelevant because they do not address applicable Marginal Land criteria. For example Ms. Hildreth's assertion that the subject property could be used for future livestock production does not address any of the criteria for Marginal Lands. Likewise, the argument by Dr. Chappell and Ms. Bartusiak that zoning for this site was frozen by the previous zone change in 1992 does not address any applicable criteria.

While the issue of water supply is an issue under the County's plan amendment criteria, the applicants submitted a comprehensive aquifer analysis prepared by EGR & Associates. That analysis concludes that the aquifer well provides sufficient water for the additional residences (maximum of 7) that would be addressed if these applications were approved. The opponents provide no evidence that contradicts this analysis and conclusion. In addition, Mr. Mattick of the Water Resources Department agrees with the conclusion.

Weight of Evidence

Given the aquifer analysis and timber production report, the Board's interpretation provides interesting and relevant direction. Based on the Ericsson case (DLCD vs. Lane County 23 Or LUBA 33 (1992))¹, the Board specifically recognized that "on-site evaluation by a qualified expert is weightier evidence than published data." Mr. Setchko has 27 years of forest management experience, including 17 years as a private consultant, and a Master's Degree in Forestry. He has walked the property extensively. In contrast, Mr. Just's experience and credentials are not apparent from either of his reports. Enclosed is a copy of the Ericsson case, which confirms the Boards' reliance upon and deference to the qualified experts who conduct on-site analysis for Marginal Land applications.

Conclusion

The application before you clearly demonstrates that the subject property qualifies as a Marginal Land. It is no surprise because much of the land in the South Hills is similar to the subject property and has been designated Marginal Land. There is simply not a lot of good soil in this area and therefore it has not been managed for farm or forest purposes. This is a historic fact that has been confirmed on other nearby properties.

The Board's interpretation recognizes this fact in its overview of the "Marginal Land Concept":

¹ I represented the landowner, Ericsson, before Lane County and on appeal to LUBA.

“ISSUE 1: What is the Marginal Land Concept?”

Board’s Direction:

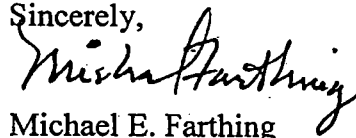
The Board recognized that marginal land is intended to be a sub-set of resource land, i.e., there are “prime” resource lands and “marginal” resource lands. The marginal lands are to be available for occupancy and use as smaller tracts than are required in the better resource lands. The criteria in the law define which lands may be designated as marginal. Evidence for this position is found in the legislative history and the fact that marginal lands are recognized in both Statewide Goal 3 – Agricultural Lands and Goal 4 – Forest Lands.”

Marginal lands are resource lands. However, because they have marginal resource capability, they can be placed in smaller tracts and occupied as home sites. The subject property qualifies for this designation.

I believe the criteria for designating Marginal Land are the most objective in the Lane Code for plan amendments. They are based on actual use, resource capability, and locational factors. These applications satisfy those criteria and are supported by comprehensive and detailed reports prepared by qualified experts that address the application criteria.

We respectfully request the Commission to apply the evidence to the criteria and recommend to the Board that the plan amendment and zone change be approved.

Sincerely,



Michael E. Farthing

cc: Brad Ogle
Derek Jaros
Marc Setchko

2 We agree with petitioners that under the relevant ALUO provisions, excluding the turnaround portion of a cul-de-sac right of way from the 500 foot length limitation is unreasonable and incorrect. The language of the ALUO provides no basis for making such a distinction, and the city's decision to the contrary is erroneous. The city may amend the ALUO to achieve that result, but it may not do so by interpreting the relevant code language in a manner contrary to its plain and ordinary meaning. A cul-de-sac street is generally understood to continue to the end of whatever turnaround is provided; it is not generally understood to end at the point the right of way begins to widen to accommodate the turnaround.

The assignment of error is sustained.

The city's decision is reversed.

DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT and
OREGON DEPARTMENT OF FORESTRY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

ROBERT ERICSSON,
Intervenor-Respondent.

LUBA No. 91-204

Appeal from Lane County.

Jane Ard, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

Stephen L. Vorhes, Eugene, filed a response brief and argued on behalf of respondent.

Michael E. Farthing, Eugene, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Gleaves, Swearingen, Larsen & Potter.

KELLINGTON; Referee; HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 03/12/92

1. Administrative Law - Interpretation of Law - Generally.
Marginal Lands.

The language in ORS 197.247(1)(a) that "[t]he proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983 * * *" applies to forest as well as farm operations.

2. Marginal Lands.

ORS 197.247(1)(a) requires a two part inquiry to determine whether a forest parcel may be designated as "marginal" land. First, a county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. Second, a county must determine whether the forest operation in question is "capable of producing an average of \$10,000 in annual gross income."

3. Marginal Lands.

Under ORS 197.247(1)(a), in determining whether a forest operation is capable of producing an average of \$10,000 in annual gross income over the growth cycle, what occurred on a particular parcel during the 1978-1982 time period is not the sole determinant of the "capability" of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five year period.

4. Marginal Lands.

The requirement of ORS 197.247(1)(a) that land be "capable" of producing the specified annual income "over the growth cycle" requires an evaluation of the income potential of the property, assuming the use of reasonable forest management practices over the growth cycle.

5. Marginal Lands.

Under ORS 197.247(1)(a), the classification of the soils on a particular parcel is not dispositive of such parcel's capability to produce income over the growth cycle.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal Ordinance PA 1007 amending the county's comprehensive plan designation for the subject parcel from Forest Land to Marginal Land and rezoning the parcel from Impacted Forest Lands to Marginal Land.

MOTION TO INTERVENE

Robert Ericsson, the applicant below, moves to intervene on the side of respondent in this appeal proceeding. Petitioners do not object to the motion, and it is allowed.

FACTS

The subject property is 90 acres in size. Intervenor-respondent applied to redesignate the subject land from Forest Land to Marginal Land, and to change the zoning for the subject parcel from Impacted Forest Lands to Marginal Land.

The planning commission recommended approval of the application. The board of commissioners approved the planning commission's recommendation, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

"The county misconstrued the applicable law by limiting the time period for evaluating production capability and shifting the focus from the overall timber production potential to past management of the forest operation."

SECOND ASSIGNMENT OF ERROR

"The county misinterpreted the term 'capable of producing' by basing the forest operation income test on how the subject parcel is currently managed."

ORS 197.247(1)(a) provides that a county may designate land as marginal land if:

"The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income[.]" (Emphasis supplied.)

A. Interpretation of ORS 197.247(1)(a)

Petitioners contend the county erroneously read the first part of ORS 197.247(1)(a), together with the portion emphasized above, to determine whether the subject land was managed *during 1978 through 1982* as a part of a forest operation "capable of producing" the specified \$10,000 annual gross income. Petitioners argue that for forest operations, the above emphasized language in ORS 197.247(1)(a) should be read alone. According to petitioners, the county must determine whether *over the growth cycle*, the subject land is capable of producing the identified income, without reference to the management of the land during the time period specified in the first part of ORS 197.247(1)(a).

1 We reject petitioners' contention that the time frame stated in ORS 197.247(1)(a) applies only to farm operations, and not to forest operations. ORS 197.247(1)(a) only makes grammatical sense if it is read as follows:

"The proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of [(1)] a farm operation that produced \$20,000 or more in annual gross income or [(2)] a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income[.]"

2,3 Consequently, ORS 197.247(1)(a) requires a two part inquiry to determine whether a forest parcel may be designated as "marginal" land. First, the county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. This requirement of ORS 197.247(1)(a) simply provides a period of time during which the management of the parcel as a part of a forest operation was required.¹ However, here, the parties do not dispute that the subject land was managed as part of a forest operation during 1978 through 1982.

Second, ORS 197.247(1)(a) requires the county to determine whether the forest operation in question is capable of producing an average of \$10,000 in annual gross income over the growth cycle. What occurred on the subject parcel during the 1978-1982 time period is not the sole determinant of the "capability" of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five year period. The issue in dispute in this appeal is whether the forest operation on the subject parcel is "capable of producing" the requisite income level over the growth cycle of the trees.

4 The parties disagree about what is meant by the ORS 197.247(1)(a) phrase "capable of producing." In this context, the choice of the word "capable" requires the application of an objective test in determining a parcel's potential productivity. In other words, that a particular forest operator may use poor management techniques, and thereby cannot produce the requisite income from the parcel over the growth cycle, would not establish that the parcel was not "capable" of producing the requisite income level over the growth cycle. The statutory requirement that the land be "capable" of producing the specified annual income "over the growth cycle" requires an evaluation of the income potential of the property assuming the utilization of reasonable forest management practices over the growth cycle.

¹ If the parcel were not managed as part of a forest operation during three of the five years from 1978 through 1982, then there would be no further inquiry under ORS 197.247(1)(a). In that circumstance, the land could be designated as marginal land if it satisfies at least one of the three standards provided in ORS 197.247(1)(b)(A)-(C).

B. Application of ORS 197.247(1)(a)

Petitioners argue the challenged decision improperly redesignates and rezones the subject land as "marginal land" because the county failed to rely on the capability of the soils on the property to determine whether the parcel is "capable of producing" the required annual income. Petitioners argue the county improperly based its determination of the income that the forest operation is capable of producing on how the property is currently managed. Petitioners argue the county must conclude the subject property is capable of producing the requisite income because of the ratings of the soils on the subject parcel for the production of forest products.

The county disagrees that its decision is based on how the property is currently managed. The county states it " * * * did not agree with petitioners' assertion that soil rating data is the only basis for determining forest income capability under ORS 197.247(1)(a)." Respondent's Brief 6.

5 While the classification of the soils on the subject parcel is relevant in determining the parcel's capability to produce the requisite income over the growth cycle, we do not agree with petitioners that the soils are dispositive of the capability of the parcel to produce trees and, therefore, of whether the parcel can generate the specified income over the growth cycle. The issue is whether the county determined the capability of the subject property to produce an average annual gross income of \$10,000, over the growth cycle, using reasonable management practices.

The challenged decision states:

"ORS 197.247(1)(a) should be interpreted to require an evaluation of the actual timber growth potential for the property in question during the years 1978 to 1983." Record 6.

While this finding is somewhat unclear, we believe it is clear enough, in view of the evidence cited in the decision, to establish that the county analyzed the capability of the subject land to produce the requisite income over the growth cycle, assuming the use of reasonable management practices. Specifically, the decision states:

- "1. The applicant's forester * * * has been a professional forester since 1968. He has a degree in Forest and Timber Management from the University of Montana and a

Master's Degree in Business Administration * * * from the University of Oregon. He has been a professional forester in Lane County since 1975.

- "2. [The applicant's expert] conducted an on-site evaluation to determine the volume of timber located on the Subject Property prior to its partial harvesting in 1988-89. After determining that volume he calculated, using current timber values, the amount of revenue that could be generated on a yearly average over the growth cycle of the trees. This amount was \$3,000 per year.
- "3. After analyzing the average income that could be expected based on the actual stocking of the Subject Property, [applicant's expert] analyzed the property's timber volume potential if it were fully stocked. Assuming the entire parcel * * * was fully stocked, [applicant's expert] concluded that the yearly average income over the growth cycle (45 years) would be approximately \$5,400 to \$6,300. His conclusion was based upon his observation of actual growth rates, soil conditions, exposure, soil depth and past forest management.
- "4. [Applicant's expert] analyzed another parcel in the area that contained soils similar to the Subject Property which has a well stocked stand of 60-year old timber. From this analysis, he applied his findings to the Subject Property to determine its productivity over a 90-year growth cycle. He concluded that the volume of timber would only produce an average of \$7,000 to \$7,500 annual gross income.
- "5. [The applicant's expert] did not question or dispute the Oregon Department of Forestry's timber growth rate estimates for the various soil types on the Subject Property. He concluded, however, that those growth rates were not being achieved for the timber that was actually growing on the Subject Property, nor would it be achieved, even if the property were fully stocked. [Applicant's expert] stated he did not know the reason for the lower growth rates on the subject property but speculated it could be a combination of factors, including, but not limited to, soil compaction, exposure poor drainage, soil depths, and over grazing.
- "6. [Applicant's expert] affirmed, based on his on-site analysis, the fact that the Subject Property was not managed as a forest operation capable of producing \$10,000 annual gross income between 1978 and 1983.

" * * * * " Record 5.

We conclude the challenged decision correctly applies ORS 197.247(1)(a), and determines that the property is not capable of producing, if reasonably managed, an average annual gross income of \$10,000 over the growth cycle of the trees.

The first and second assignments of error are denied.

The county's decision is affirmed.

March 1997

Supplement to Marginal Lands Information Sheet

**BOARD OF COUNTY COMMISSIONERS DIRECTION REGARDING THE
INTERPRETATION AND ADMINISTRATION OF MARGINAL LANDS
APPLICATIONS**

On February 26, 1997, the Lane County Board of Commissioners reviewed the state Marginal Lands law and developed responses to seven issues in the law needing clarification for purposes of administration by Lane County. Those issues are identified below, followed by the direction provided by the Board. Any application for the Marginal Land designation within the Lane County Rural Comprehensive Plan's jurisdiction must be in compliance with the Board's directions. Refer to the Marginal Lands Information Sheet, or to Oregon Revised Statutes 197.247 (1991 laws), for an explanation of the law itself.

ISSUE 1: What is the Marginal Lands concept?**Board's Direction:**

The Board recognized that marginal land is intended to be a sub-set of resource land, i.e., there are "prime" resource lands and "marginal" resource lands. The marginal lands are to be available for occupancy and use as smaller tracts than are required in the better resource lands. The criteria in the law define which lands may be designated as marginal. Evidence for this position is found in the legislative history and the fact that marginal lands are recognized in both Statewide Goal 3 - Agricultural Lands and Goal 4 - Forest Lands.

ISSUE 2: Definition of "Management".

When considering forest land, the entire growth cycle must be considered for evidence of management. This is because even the best managed forest operations may have nothing occurring on the land during the five-year window (1978 - 1982) stated in the marginal lands statute (ORS 197.247(1)(a)(1991 Edition). For farm operations, however, it is hard to conceive of an operating farm on which nothing occurred for five years.

Board's Direction :

No evidence of human activity on the land is required for forest land to be "managed". The conscious decision not to convert the land to another use is enough evidence of management to meet the statutory intent, provided there is a significant amount of merchantable or potentially merchantable trees on the property. Likewise, evidence of timber harvest since 1978 would suffice to show management even if there were no trees currently on the property. For farm land, no evidence of farm use during the 5-year statutory window would indicate that land was not managed for farm use.

ISSUE 3. Managed "as part of" a (farm or forest) operation during (1978-1982).

Does this phrase in ORS 197.247(1)(a)(1991) mean, for example, that if a large timber company owned and managed a 2000 acre tract during the five-year window, and then sold someone a 40 acre portion of non-forest land in 1985, that 40 acres would not be eligible for Marginal Lands designation?

Board's Direction :

The Board found that the law creates a general presumption that all contiguous land owned during 1978-82 was part of the owner's "operation". That presumption could be rebutted, however, by substantial evidence

that the parcel in question was not, in fact, a "contributing part" of the operation. The applicant would bear the burden of producing such evidence.

ISSUE 4: What price data should be used to calculate gross annual income for forest lands?

Board's Direction :

The legislative intent of the "management and income test" of the Marginal Lands Law was to identify those lands which were not, at the time the Marginal Lands law was enacted (1983), making a "significant contribution" to commercial forestry. Therefore, it is appropriate and statistically valid to use the following methodology:

1. Based on the best information available regarding soils, topography, etc., determine the optimal level of timber production for the tract assuming reasonable management.
2. Assume that the stand was, in 1983, fully mature and ready for harvest.
3. Using the volumes calculated in step (1), and 1983 prices, calculate the average gross annual income over the growth cycle.

ISSUE 5: What "growth cycle" should be used to calculate gross annual income?

Board's Direction :

The consensus of the Board was that a 50-year growth cycle should be adopted as the usual standard, with the option that another standard could be used if substantiated by compelling scientific evidence presented by the applicant. The Board's choice was based on evidence that the USDA Natural Resource Conservation Service has adopted the 50-year cycle for rating soil productivity, plus the administrative ease of having a standardized figure.

ISSUE 6: Weight of evidence.

One of the main holdings of the Ericsson case, which arose in Lane County, is that on-site evaluation by a qualified expert is weightier evidence than published data. Given this ruling, what is the appropriate role of the parcelization table in Lane Code 16.211(10)(b) and the legislative findings for Goal 4 of the Rural Comprehensive Plan as an income standard?

Board's Direction :

As a matter of administrative ease, and in the absence of other substantial evidence, the parcelization test could still be used. It is one method of identifying the acreage required of a given forest capability classification to achieve the \$10,000 income standard.

ISSUE 7: Ambiguities in the parcelization tests of ORS 197.247(1)(b)(A) & (B).

Is the parcelization test measuring the percent of an area (acreage) or the percent of the number of parcels a "parcel count"? If the test in ORS 197.247(1)(b)(A) is an area test, does the percentage requirement apply to the acreage or to the number of parcels that lie wholly or partly within the 1/4 mile of the subject tract?

Board's Direction :

Regard the tests in ORS 197.247(1)(b)(A) & (B) as "area" tests with the difference being that (A) specifies an area including the subject parcel and land within 1/4 mile and uses a 50% small lot test, whereas (B) increases the area to a minimum of 240 acres but raises the small lot test to 60%.

(Note: This is the position adopted by Lane County in the Jackson case. In that case, Lane County ruled that the area was limited to the 1/4-mile line, whereas DLCD argued that the area line should expand to include the entirety of any parcel partly located within the 1/4 mile boundary. DLCD threatened to appeal the Jackson case on that basis, but did not do so.)