W.9.C.

SUPPLEMENTAL MATERIAL

SUPPLEMENTAL MEMO

DATE OF MEMO: November 1, 2004

TO: Board of County Commissioners

FROM: Jerry Kendall/Land Management Division

RE: FIFTH READING AND DELIBERATION/Ordinance No. PA 1210/In the Matter of Amending the Rural Comprehensive Plan to Redesignate Land From "Agricultural" to "Marginal Land" and Rezoning That Land From "E-40/Exclusive Farm Use" to "Ml/Marginal Land", and Adopting Savings and Severability Clauses (File PA 02-5838; Ogle). (NBA & PM 6/23/04, 7/14/04, 8/25/04 & 9/22/04)

Scheduled board date for fifth reading: November 3, 2004

Procedural Issue: At the fourth reading, the Board left the record open in the following manner, in order to resolve procedural objections:

- Until October 8 for submittal of new written evidence, arguments or testimony in response to new evidence submitted during the previous reopened record period (August 25 through September 15, 2004).
- Until October 22 for submittal of final written argument rebuttal by applicant (argument only/no new evidence).

Two documents were submitted during the above period, and are included as attachments #1 and #2.

In addition, a third document was received from Mr. Just on October 29, alleging that new evidence was submitted along with the final rebuttal of October 21.

The purpose of this memo is to submit the three documents to the Board in order to provide some advance time for their reading. Staff, who is finishing a two week vacation which ends on November 2, will be prepared to discuss these documents and assist the Board with the deliberation on November 3rd.

Please contact me at x4057 if you have any questions or comments.

Attachments

Dates indicate when the material was received.

1. October 7, 2004, from J. Just—6pp.
2. October 21, 2004, Applicant's final rebuttal—6pp.
3. October 29, 2004, from J. Just—2pp.

GOAL ONE COALITION

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October 7, 2004

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, Oregon 97401

RE: PA 02-5838, Ogle marginal lands application: objection to applicant's submittal of September 8, 2004

Chair Green and Commissioners:

This letter is submitted to the Board on behalf of James Just, the Goal One Coalition, and LandWatch Lane County, and is specifically addresses issues raised by materials and evidence submitted by the applicant's representatives in a packet dated September 8, 2004.

1. **OAR 660 Division 6 (Goal 4, Forest Lands) is applicable to this application.**

OAR 660-006-0003(1) provides:

> "OAR Chapter 660, Division 006 applies to all forest lands as defined by Goal 4."

Mr. Farthing at p. 6 of his letter dated September 8, 2004 argues that OAR 660 Division 6 does not apply to this application because the subject property is designated and zoned EFU; that the subject property was not acknowledged by Lane County as forest lands on the date Goal 4 was amended; and that therefore the subject property is not "forest land" as defined by Goal 4. Mr. Farthing is not correct.

ORS Chapters 197 and 215 refer to lands in farmland and forestland zones as "resource lands." OAR 660-006-0000(3) acknowledges that lands may often be designated as either agricultural or forest land. ORS 215.203 authorizes counties to designate areas as exclusive farm use zones. ORS 215.213 identifies uses allowed outright in EFU zones in marginal lands counties. ORS 215.213(1)(c) allows "[t]he propagation or harvesting of a forest product." Thus "lands which are suitable for commercial forest uses" may be included in an EFU zone.

The Goal 4 definition of "forest lands" provides, in relevant part:

> Where . . . a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or

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> nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

This application would amend the Plan to redesignate the subject property from Agricultural to Marginal Land. For purposes of this application, "forest land" includes "lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

Unless it can be established that the subject property is not comprised of "lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources," the subject property is protected by Goal 4 as well as agricultural land protected by Goal 3. Mr. Farthing does not argue that the land does not meet this portion of the Goal 4 definition of forest land, but argues only that the subject property is not designated Forest Land. The mere fact that the subject property is designated Agricultural is not sufficient to establish that the subject property is not forest land protected by Goal 4. OAR Chapter 660 Division 6 applies to this application.

Goal 4 provides, in relevant part:

> "Local governments authorized by ORS 215.316 may inventory, designate and zone forest lands as marginal land, and may adopt a zone which contains provisions for those uses and land divisions authorized by law."

The manner in which local governments may inventory, designate and zone forest lands as marginal land is governed by relevant provisions of OAR 660 Division 6, and specifically by OAR 660-006-0010, Inventory; and OAR 660-006-0005(2). The inventory must include a mapping of forest class sites. Where NRCS data are not available or shown to be inaccurate, an alternative method providing equivalent data and approved by the Department of Forestry may be used.

"Equivalent data" requires that soil mapping be related to the NRCS classification system. *See Thomas v. Wasco County,* 30 Or LUBA 302 (1996) (in context of OAR 660-33-030(6), more detailed soils data shall be related to NRCS land capability classification system). "Equivalent data" also requires that productivity be expressed in cf/ac/yr. *Carlson v. Benton County,* 37 Or LUBA 897, 910 (2000). The ODF-approved methodology referred to by the applicant's representatives requires, in the absence of on-site measurements for each different soil type and aspect of the property, detailed information on the soil types in the form of a higher intensity soil survey provided by a qualified soil scientist. ODF identifies OAR 603-80-0040(3) as containing the qualifications and procedures for conducting such a survey.

It is not asserted that Mr. Setchko is a qualified soil scientist, as required by ODF-accepted methodology. No higher intensity soil survey has been submitted to the record. Nevertheless, Mr. Setchko has reclassified 13.092% of TL 303 and 34.061% of TL 304 as "Grassland with exposed rock." This is not a soil type related to the NRCS classification system. Mr. Sectchko has assigned the "Grassland with exposed rock" soil unit a forest productivity of

zero. Mr. Setchko in his letter of September 8 concedes that he has not done this by measuring site trees, as is appropriate for a consulting forester, because in the grassland areas "no trees exist to bore." Mr. Setchko does not claim to have made a series of transects of the subject properties, and has not provided a boring log. He has not described the results of any on-site investigation, or described the slope, horizon, depth, color or texture of the soils at any identified bore site. Mr. Setchko has not mapped his results, nor explained how he arrived at such precise acreage figures for the "Grassland with exposed rock" soil unit. Mr. Setchko has not explained how the evidence provided by any higher intensity soil survey leads to the conclusion that forest productivity for the "Grassland with exposed rock" unit is 0 cf/ac/yr.

2. Aerial photos do not establish that no trees, regardless of species, will grow in certain areas of the subject property.

In the September 8, 2004 packet aerial photos of the subject properties dated 1936 and 1947 are provided. Mr. Farthing asserts that these photos "dramatically corroborate" the conclusion that no tress (regardless of species) will grow on certain areas of the subject properties. This conclusion is unfounded.

To the contrary, examination of the photos reveals extensive forest cover on substantial areas of the subject properties. Correlation between forest cover and underlying soil types is not readily apparent. In particular, it has not even been asserted, much less established, that the unmapped "Grassland with exposed rock" unit correlates with the areas lacking forest cover.

Even if correlation between underlying soil types and forest cover were to be established, it does not follow that lack of forest cover indicates that forest productivity is zero. The photos indicate that the area supported substantial farm and other activity in 1936. Forested areas could have been cleared prior to 1936 for pasture or other farm use that would not necessarily be evident from an aerial photo. Lack of forest cover in 1936 does establishes neither that those areas were never forested nor that they are incapable of sustaining forest tree species.

3. Electrical power line easements do not affect the capability of the land.

Mr. Farthing in his letter of September 8, 2004 argues that "at least 8% or more of the Subject Property is restricted by these [EWEB and BPA] utility easements and facilities." Mr. Setchko in his material dated September 8, 2004 states that 3.055 acres, or 7.7%, of TL 303; and 2.508 acres, or 7.3%, of TL 304, are within the powerline easements. Mr. Setchko assigns these areas a forest productivity of 0 cf/ac/yr. in his calculations of the forest productivity of the subject properties.

The existence of a utility easement does not affect the capability of the land. The potential productivity of the land within the easements has not been affected in any way, except perhaps where the towers themselves sit. ORS 215.275 and OAR 660-033-0130(16) allow utility facilities such as powerlines in EFU zones; OAR 660-006-0025(q) allows such uses in forest zones. Utililizing farm or forest land for allowed uses other than farm or forest uses does not mean that the land is no longer *capable* of farm or forest production.

4. "Reasonable management practices" would not dictate the use of a 50-year growth cycle in all circumstances.

Mr. Setchko at p. 8 his letter of September 8, 2004 states that he has used a 50 year growth cycle in his calculations "because Lane County has determined that this is the cycle which will be used." LUBA has held that determination of productivity must assume reasonable management practices. Lane County interpretations of state law do not govern and are not due any deference.

Mr. Setchko's original report stated: "[a] sixty year rotation (growth cycle to final harvest) was used, this time span being a reasonable rotation on this site class[.]" In a later report dated February 3, 2004 Mr. Setchko recalculated site productivity using a 50 year growth cycle. Mr.m Setchko's own calculations show that productivity is 8.7% greater using a 60 year growth cycle rather than a 50 year growth cycle.

Mr. Setchko has stated that growth cycles must be related to individual sites. Goal One has further pointed out that growth cycles should be related to species, as growth rates for different species may vary. Evidence provided by the applicant's own expert has established that, for Douglas-fir on the subject properties, using a 60 year rather than a 50 year growth cycle would maximize productivity and income.

5. The subject properties are productive for other forest tree species.

Mr. Setchko at p. 8 of his letter of September 8, 2004 states that "incense cedar and ponderosa pine as well as Douglas-fir were harvested from the property." While conceding that "incense cedar did grow and does currently grow on the property," Mr. Setchko asserts that it grows "at a considerably slower growth rate than Douglas-fir and well below the 85 cf/ac/yr standard accepted by Lane County."

There is no evidence whatsoever in the record to support Mr. Setchko's conclusion. Mr. Setchko does not refer to site indexes for incense cedar for the soils on the subject properties, nor does he provide measurements taken from the site.

It is the applicants' burden to establish that the subject properties are not capable of producing 85 cf/ac/yr of incense cedar. The applicants have not carried that burden.

6. Merchantable species and reasonable management practices

Mr. Farthing and Mr. Setchko consistently confuse the concepts of "merchantable species" and "reasonable management practices" with maximizing income. They assert that, in the Willamette Valley, no reasonable person would plant any forest tree species other than Douglas-fir simply because no other species is so valuable or so readily salable. See Farthing letter of September 8, 2004, pp. 2-3, 4-5; Setchko letter of September 8, 2004, p. 9.

The applicable standard for marginal lands is 85 cf/acyr. In determining whether a property is capable of producing 85 cf/ac/yr or merchantable timber, one must assume reasonable management practices in attempting to achieve that standard. The relevant objective to which

reasonable management practices must be put is not to maximize income, but rather to produce 85 cf/ac/yr of merchantable timer.

If the legislature had wanted to limit consideration of merchantable timber to Douglas-fir, it could easily have done so. Lane County cannot by interpretation read such a limitation into the statute.

CONCLUSION

The applicants' representatives have made a number of legal and other errors in calculating the productivity of the proposed marginal lands. As a consequence, they have not carried their burden to establish that the requirements of ORS 197.247 have been met.

In conducting the inventory and calculating the productivity of the proposed marginal lands, the requirements of OAR 660 Division 6 must be complied with. More detailed data provided does not meet the applicable standards. Therefore calculations based on that data do not establish compliance with ORS 197.247.

Applicants consultant ahs improperly excluded lands identified as "Grasslands with rock outcrops" and lands within powerline easements from productivity calculations. Therefore those calculations do not establish compliance with ORS 197.247.

Productivity calculations are based on a 50 year growth cycle, whereas expert testimony provided by the applicants own consultant establishes that a 60 year growth cycle would be more reasonable. Therefore those calculations do not establish compliance with ORS 197.247.

Mr. Setchko has conceded that the subject property is productive for incense cedar but has, without providing any data or explaining why, concluded that productivity for incense cedar is below 85 cf/ac/yr. Therefore the productivity calculations do not establish compliance with ORS 197.247.

Applicants representatives have argued that it would not be reasonable to consider species other than Douglas-fir. The legislature has not restricted "merchantable timber" to Douglas-fir. Lane County cannot do so by interpretation of statute. Applicants' representatives argue that, if you cannot grow Douglas-fir, reasonable forest practices dictate that you grow nothing at all. The Goal One Coalition argues the law requires that, if you can't grow Douglas-fir, that you try to grow a species more appropriate to the site.

Applicants representatives have argued that species are not merchantable because they are not as valuable as Douglas-fir. "Reasonable forest practices" must be applied towards meeting the applicable standard which, in this case, is producing 85 cf/ac/yr of merchantable timber. Reasonable forest practices means selecting species most appropriate for the site.

For the above reasons, applicants have failed to meet their burden that the requirements of ORS 197.247 have been met. The applications must be denied.

Respectfully submitted,

/s/ Jim Just

Jim Just
as an individual and as Executive Director, Goal One Coalition

Michael E. Farthing
Attorney at Law

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October 21, 2004

HAND DELIVERED

Lane County Board of Commissioners
c/o Jerry Kendall
Land Management Division
Lane County Courthouse/PSB
125 East 8th Avenue
Eugene, OR 97401

Re: Applicant's Final Rebuttal
Plan Amendment/Zone Change Applications
Agriculture (E-40) to Marginal Lands (ML)
Ogle-Child (PA 02-5838)

Chair Green and Commissioners:

This is the final rebuttal statement of the applicants, Brad Ogle and Mark Childs for the above-referenced Marginal Lands applications. It has been a long, arduous process that began in 2002 which hopefully will conclude on November 3.

As with any land use application, the Applicant has the burden of demonstrating, with substantial evidence, that all of the applicable criteria have been addressed and satisfied. As the Applicants' attorney, I believe they have met this burden with evidence, facts, experts' opinions and legal analysis that is persuasive and complete. I am confident that a final decision approving these applications will be upheld on appeal to LUBA just as the Board decision in Ericcson was affirmed by LUBA. In a word, the Applicant's evidence is overwhelming in demonstrating that the property is not good resource land and qualifies as "Marginal Land".

This is not the time or the place to review that evidence in detail. However, I urge the Commissioners to review the record if you have any questions about a particular issue or criterion. In particular, the reports and analyses prepared by the Applicants' forester, Marc Setchko, address the issues regarding the property's suitability for forest production that have been raised by Goal One and its spokesperson, Jim Just. Also, the draft findings and supplemental findings that I previously submitted address each specific criterion in Lane Code and ORS 197.247, the marginal lands statute. A copy of that statue is attached as Exhibit A.

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On the attached copy of the statute, I have specifically identified the criteria that we have addressed and underlined those portions that relate to this site's timber growing capability. Goal One and Mr. Just have done an excellent job of challenging our evidence and analysis of the timber growing capability of the subject property. However, as both Mr. Seutchko and I have repeatedly stated, most, if not all of Goal One's objections are technical arguments that focus on the proper interpretation of the applicable criteria and administrative rules. Goal One, however, has not offered any substantive evidence that addresses the core issue for this application which is whether the Subject Property is actually capable of producing 85 cubic feet of "merchantable timber" per acre per year.

This property is not a good forest site and Mr. Setchko provides numerous reasons why. In contrast, Goal One offers arguments and publications that never address this core issue. For example, Goal One does not provide an accurate break-down by soil type that addresses the capability of the Subject Property to grow Douglas Fir, Ponderosa Pine or any of the other species that Goal One claims could be grown on the site. Goal One did nothing more than make groundless assertions about the site's forest capabilities that are often based on faulty assumptions and misuse of published soil information.

The other problem with Goal One's arguments and objections is that they ignore Lane County's 25-year history of applying and administering the Marginal Lands statute. Specifically, Goal One has ignored LUBA's holding in the Ericcson case and the 1997 Board Interpretation which give evidentiary strong weight to an on-site analysis by a qualified forester This failure weakens and brings into question the validity, strengths and relevance of Goal One's arguments.

Finally, and perhaps most importantly, is the fact that relatively large areas of the Subject Property simply will not grow trees of any kind. Mr. Setchko identified these areas in a current aerial photo that was attached to his September 8 submittal, copy of which is enclosed. Also enclosed ia a copy of a 1936 serial photo that was submitted by Mr. Setchko. On both of these photos, the same areas remain bare of all vegetation. These parts of the site have not changed in nearly 70 years. These are the same areas that Mr. Setchko says will not now or in the future grow trees. Goal One ignores this graphic and persuasive evidence.

THE SUBJECT PROPERTY IS MARGINAL LAND.

Sincerely,

Michael E. Farthing

cc: All Commissioners
Brad Ogle / Mark Childs
Marc Setchko

MARGINAL LANDS

197.247 Amendment of goals; marginal lands designation; effect on applicability of goals. (1) In accordance with ORS 197.240 and 197.245, the commission shall amend the goals to authorize counties to designate land as marginal land if the land meets the following criteria and the criteria set out in subsections (2) to (4) of this section:

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

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

(A) At least 50 percent of the proposed marginal land plus the lots or parcels at least partially located within one-quarter mile of the perimeter of the proposed marginal land consists of lots or parcels 20 acres or less in size on July 1, 1983;

(B) The proposed marginal land is located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983; or

(C) The proposed marginal land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification System in use by the United States Department of Agriculture Soil Conservation Service on October 15, 1983, and is not capable of producing fifty cubic feet of merchantable timber per acre per year in those counties east of the summit of the Cascade Range and eighty-five cubic feet of merchantable timber per acre per year in those counties west of the summit of the Cascade Range, as that term is defined in ORS 477.001 (21).

(2) For the purposes of subparagraphs (A) and (B) of paragraph (b) of subsection (1) of this section:

(a) Lots and parcels located within an urban growth boundary adopted by a city shall not be included in the calculation; and

(b) Only one lot or parcel exists if:

(A) A lot or parcel included in the area defined in subparagraph (A) of paragraph (b) of subsection (1) of this section is adjacent to one or more such lots or parcels;

(B) On July 1, 1983, greater than possessory interests are held in those adjacent lots or parcels by the same person, parents, children, sisters, brothers or spouses, separately or in tenancy in common; and

(C) The interests are held by relatives described in subparagraph (B) of this paragraph, one relative held the interest in the adjacent lots or parcels before transfer to another relative.

(3) For the purposes of paragraph (b) of subsection (2) of this section:

(a) Lots or parcels are not "adjacent" if they are separated by a public road; and

(b) "Lot" and "parcel" have the meanings given those terms in ORS 92.010.

(4) For the purposes of subparagraph (B) of paragraph (b) of subsection (1) of this section, lots and parcels located within an area for which an exception has been adopted by the county shall not be included in the calculation.

(5) A county may use statistical information compiled by the Oregon State University Extension Service or other objective criteria to calculate income for the purposes of paragraph (a) of subsection (1) of this section.

(6) Notwithstanding the fact that only a certain amount of land is proposed to be designated as marginal for the purposes of establishing the test area under subparagraph (A) of paragraph (b) of subsection (1) of this section, any lot or parcel that is within the test area and meets the income test set out in paragraph (a) of subsection (1) of this section may be designated as marginal land.

(7) The amended goals shall permit counties to authorize the uses on and divisions of marginal land set out in ORS 215.317 and 215.327.

(8) The provisions of this section shall not affect the applicability of any goal, except the goals on agricultural and forest lands, to a land use decision.

(9) Any amendments to local government plans and regulations resulting from amendments to goals required by subsection (1) of this section shall become effective only after approval by the commission under ORS 197.251 or 197.610 to 197.855. [1983 c.826 §2]

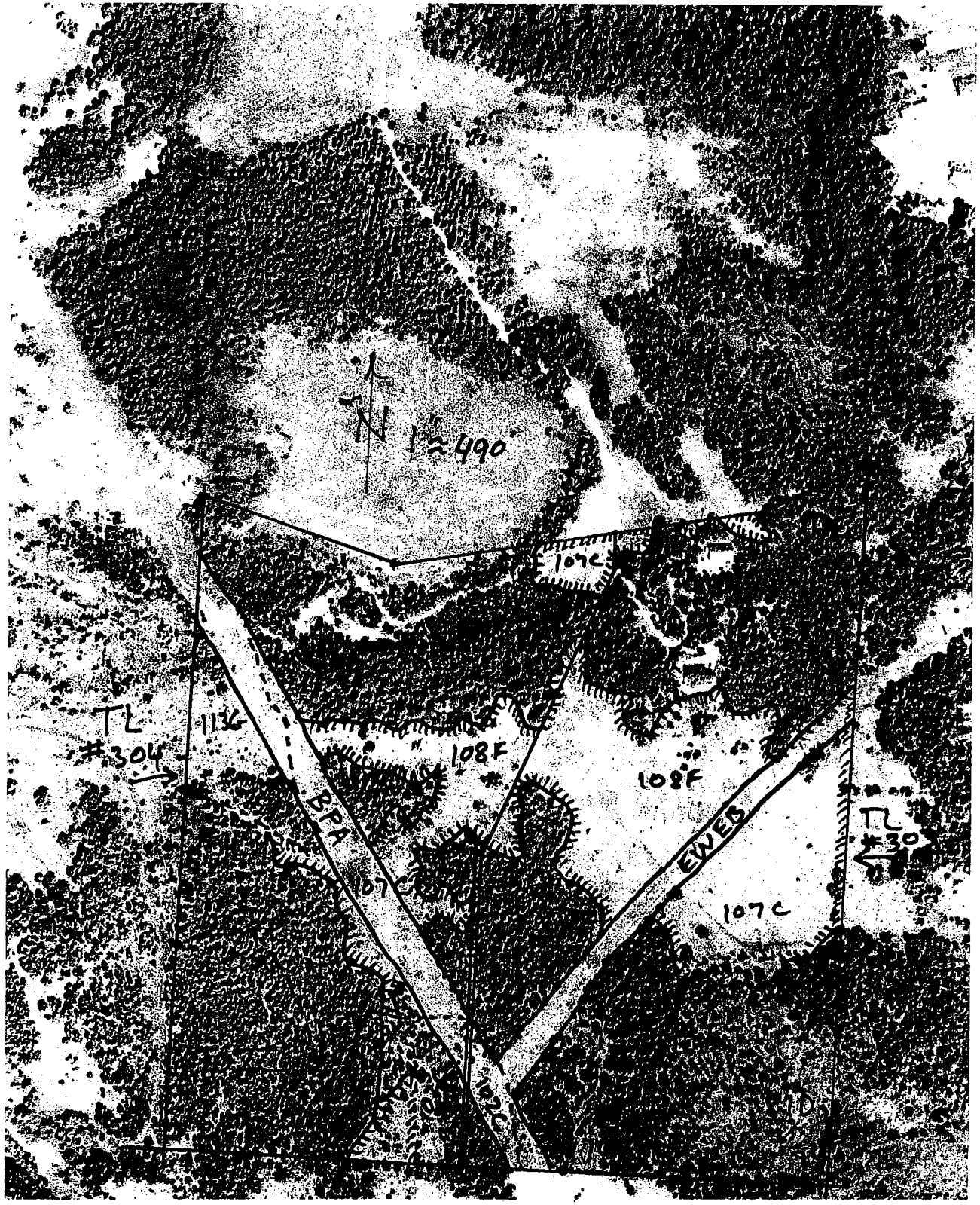
197.250 Compliance with goals required. Except as otherwise provided in ORS 197.245, all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the commission. [1973 c.80 §32; 1977 c.664 §19; 1981 c.748 §29a; 1983 c.827 §56a]

197.251 Compliance acknowledgment; commission review; rules; limited acknowledgment; compliance schedule. (1) Upon the request of a local government, the commission shall by order grant, deny or

Ex A

EXHIBIT 1-1

OGLE PARCEL



ONLY AREAS WITHIN THE 107C & 108F SOIL TYPES HAVE BEEN DEDUCTED

THE POWERLINE BOUNDARIES ARE CLEARLY DEFINED.

1936

1936

GOAL ONE COALITION

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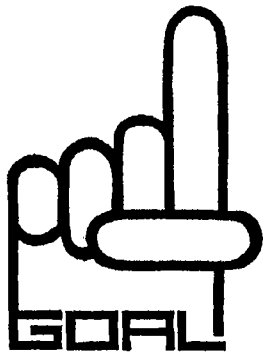

October 29, 2004

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, Oregon 97401

RE: PA 02-5838, Ogle marginal lands application: objection to applicant's submittal of October 21, 2004

Dear Commissioners:

The purpose of this letter is to place an objection in the record to procedures that have allowed for the submittal of evidence into the record without offering the opportunity for the Goal One Coalition and other parties to respond to issues raised by that evidence.

A memorandum dated September 22, 2004 from Mr. Jerry Kendall notes that the record in this matter was reopened until October 8, 2004 for submittal of new written evidence, arguments and testimony; and "until October 22 for submittal of final written argument rebuttal by applicant (argument only/no new evidence)."

The "final rebuttal" submitted by Mr. Farthing on October 21 contains new evidence in the form of four exhibits. Parties are entitled to an opportunity to present and rebut evidence and to respond to issues raised. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).

ORS 197.763(6) provides, in relevant part:

> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
>
> "* * *
>
> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be

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> considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

Thus ORS 197.763 allows the submission of additional written evidence, arguments or testimony during an open record period. ORS 197.763 further prohibits an applicant's final rebuttal from including new evidence.

The Coalition objects to the new evidence submitted by the applicant's representative in his final rebuttal, and requests that it not be considered part of the record. In the alternative, the Coalition requests opportunity to respond to that new evidence.

Respectfully submitted,

/s/ Jim Just

Jim Just
as an individual and as Executive Director, Goal One Coalition