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SUPPLEMENTAL MEMORANDUM
SUPPLEMENTAL MATERIAL

Memorandum Date: August 18, 2006
Ordinance Date: August 23, 2006 (Third Reading and Deliberations)

TO: Board of County Commissioners
DEPARTMENT: Public Works Department – Land Management Division
PRESENTED BY: Bill Sage, Associate Planner

AGENDA ITEM TITLE: ORDINANCE NO. PA 1236 / IN THE MATTER OF ADOPTING A CONFORMITY DETERMINATION AMENDMENT PURSUANT TO RCP GENERAL PLAN POLICIES – GOAL TWO POLICY 27a. vii. AND GOAL FOUR POLICY 15, ADOPTING THE PLAN DESIGNATION OF FOREST (F) AND THE ZONING DESIGNATION OF IMPACTED FOREST LAND (F2) FOR 37.5 ACRES LOCATED IN SECTION 32, TOWNSHIP 20, RANGE 2 WEST, WILLAMETTE MERIDIAN, AND IDENTIFIED AS A PORTION OF TAX LOT 1700 OF LANE COUNTY ASSESSOR MAP 21-02-06, AND ADOPTING SAVINGS AND SEVERABILITY CLAUSES (PA 06-5476 SYMBIOTIC LLC, USACE)

I. MOTION

I move Ordinance No. PA 1236 Fourth Reading and Deliberations on August 30, 2006.

II. AGENDA ITEM SUMMARY

The Board of Commissioners heard testimony on Ordinance No. PA 1236 in a public hearing on August 2, 2006. One interested party, John Steele, requested that the record be left open for submittal of written testimony. The Board granted the request and provided seven days (August 9, 2006) for Mr. Steele to submit his comments. The Board also granted the applicant an additional week (August 16, 2006) for submittal of final rebuttal.

Mr. Steele submitted written testimony on August 9, 2006, which is attached as Attachment "A".

Mr. Cornacchia, agent for the applicant, submitted final rebuttal and supplemental findings of fact on August 16, 2006. The applicant's submittals are attached as Attachment "B".

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

The rationale for the Board's decision to approve or deny the applicant's request for a designation of Impacted Forest Land (F2) are guided by Goal Four, Policy 15, which was adopted as a part of the Rural Comprehensive Plan - General Plan Policies in 1984. The specific circumstances of the subject land addressing the characteristics of Goal Four, Policy 15 b. and c. are included in Exhibit "C" Findings of Fact and Conclusions of Law to Ordinance No. PA 1236 which were distributed to the Board in the original Agenda Cover Memo.

The Board has adopted conformity determination decisions to apply Impacted Forest Land (F2) designations to subject properties on three occasions in the past two years:

Ordinance No. PA 1211 (Everett) adopted on March 30 2005
Ordinance No. PA 1212 (Kronberger) adopted on June 15, 2005; and
Ordinance No. PA 1225 (Walsh) adopted on January 18, 2006

Two of those decisions were appealed to the Land Use Board of Appeals and have been remanded to Lane County for an interpretation of the term "ownerships" as used throughout the language of Goal Four Policy 15 b. and c.

Mr. Steele's testimony raises the question again on how to interpret "ownerships" as it applies to the subject land (37.5 acres) specifically; to the entire Corps of Engineers holdings in the general vicinity which includes the Dorena Reservoir; or to the lands contiguous to the Corps lands and reservoir.

The applicant has proposed supplemental findings of fact and conclusions of law which address the term "ownerships". The salient recommended language is:

We find that "legal lots or parcels" or portions thereof are the functional equivalents of the term "ownerships" contained in the criteria of RCP Goal 4 Policy 15 and that finding constitutes an interpretation of the term "ownerships" as contained in that criteria.

For the purposes of this application, "ownership" would seem to mean the "land" subject to the request for amendment, in this instance being 37.5 acres.

B. Analysis

LMD and County Counsel staff have reviewed the testimony of Mr. Steele and applicant's recommendation for a response. This review is not complete due to staff schedules and the short period of time between the submittal on August 16th

and the scheduled deliberations on August 23rd. Additional research will be necessary before staff can make a recommendation to the Board on whether or not to embrace the proposed interpretation of "ownerships" as that term is used in Goal Four, Policy 15. There are several considerations that need to be thought out in more depth and detail.

C. Alternatives/Options

1. Adopt Ordinance No. PA 1236 with the original Exhibit "C" Findings of Fact and Conclusions of Law, without an express interpretation of "ownerships".
2. Adopt Ordinance No. PA 1236 with the original Exhibit "C" Findings of Fact and Conclusions of Law and Attachment "C" Supplemental Findings of Fact and Conclusion of Law (which include the applicant's proposed interpretation of "ownership".)
3. Deny Ordinance No. PA 1236.
4. Reschedule deliberations to August 30, 2006 or September 13, 2006, and direct staff to provide additional analysis on the proposed interpretation of "ownerships" as used in Goal Four Policy 15.

IV. RECOMMENDATION

Staff recommends that the Board postpone deliberations on Ordinance No. PA 1236 and approve a motion to schedule a fourth reading and deliberations for August 30th or September 13, 2006. This will provide staff at least an additional week to complete a more thorough review and analysis of the implications of the proposed interpretation.

V. ATTACHMENTS

- A. Testimony of John Steele, 34882 Spillway Road, Cottage Grove, OR 97424, dated August 9th, 2006, 4 pages.
- B. Applicant's rebuttal: Steve Cornacchia (Hershner Hunter) dated August 16th, 2006, 4 pages, with Supplemental Findings of Fact and Conclusions of Law, 3 pages.

Lane County Board of Commissioners
125 E. 8th Avenue
Eugene, OR 97401-2953

August 9, 2006

RE: Ordinance No. PA 1236

Chair Dwyer and Commissioners:

I thank the Board for leaving the record open to offer me the opportunity to prepare and present testimony.

The subject 970.71-acre property is identified as 21-02-06 TL 1700. TL 1700 includes Dorena Reservoir. TL 1700 apparently has no comprehensive plan designation and is unzoned. The request is to designate a 37.5-acre portion of TL 1700 "Forest" and zone it F-2, Impacted Forest Lands. The subject 37.5 acres include the Dorena Dam and spillway and the land located north of the Dorena Dam and spillway and Row River, south of Row River Road and east of Exception Area #453-R1.

It is not clear why this application is being processed as a "conformity determination" rather than a normal zone change. The fees that the county charges for a "conformity determination" are much less than for a regular zone change - \$1,330 instead of \$3,090. The fee for a zone change is an additional \$3,090. So the total fee for a "normal" plan amendment and zone change would be \$6,180. For this application, the taxpayers are picking up the bulk of the county's costs rather than the applicant. Is this fair?

If failure to plan and zone a portion of the subject property was an oversight, why is the entirety of the subject property not now being assigned plan and zoning designations?

Why is the applicant requesting F2 zoning rather than F1? All of the existing uses are uses - Dorena Reservoir, Dorena Dam and related infrastructure, and parks and recreation areas - allowed in the F1 zone. The only difference if the F2 zone were to be approved is that dwellings are permitted in the F2 zone but not in the F1 zone. Why is it important to the applicant that a dwelling be allowed? F1 zoning for the subject property would be uncontroversial and unopposed.

The main issue before the Board is whether F-1 or F-2 zoning is appropriate. An important threshold issue is the area which must be considered for zoning. You need to look at the entirety of the ownership, not just the 37.5-acre portion. The criteria under Plan Goal 4 Policy 16 refer to "ownerships," and require an inquiry based on an examination of the characteristics of the subject ownership and surrounding ownerships. The required analysis hasn't been done. There's recent case law on this point: *Brown v. Lane County*, ___ Or LUBA ___ (LUBA No. 2005-104, 5/05/2006) and *Just v. Lane County*, 50 Or LUBA 399 (2005). LUBA in both cases held that the county's analysis must be based on "ownerships." That hasn't been done in this case, as all that has been looked at is the 37.5-acre portion of the larger parcel. Neither the subject ownership nor the surrounding ownerships have been properly considered.

Plan Goal 4 Policy 15 sets forth criteria to be applied in deciding whether to apply F1 or F2 zoning. The characteristics of the subject ownership(s) and surrounding ownerships have to be examined and a determination made whether the characteristics of land to be rezoned correspond more closely to F1 or F2. The Board is required to explain in its findings its reasons for concluding that the land more closely corresponds to F1 or F2 characteristics as described in Policy 15(b) and 15(c), respectively.

In the analysis below the characteristics as set forth in Policy 15 will be compared and discussed.

Characteristic 1:

“Predominantly ownerships not developed by residences or nonforest uses.”

or

“Predominantly ownerships developed by residences or nonforest uses.”

The threshold question that must be addressed under this characteristic is: what is the ownership? Only a 37.5-acre area of a larger 970.71-acre parcel under the ownership of the U.S. Army Corps of Engineers is the subject of the plan and zoning map amendments. It is not noted whether any portion of the subject acreage or the larger parcel are forested.

It's not clear that Dorena Reservoir can be considered a “nonforest use.” A natural lake or stream would not be considered a nonforest use. Why would a man-made lake be considered or treated differently than a naturally occurring body of water? A body of water might more reasonably be considered to be neither a forest nor a nonforest use.

The other uses mentioned by the applicant – parks and recreation facilities including Schwarz Park campground and recreation area and Baker Bay Park – are allowed uses in the F1 zone. The extent of these uses in relation to the totality of the acreage of the ownership is not addressed.

Before this characteristic can be adequately addressed, it is necessary to identify the entirety of the ownership, describe whether and how it has been developed, and weigh whether the ownership most closely resembles F1 or F2 lands. There are no dwellings or other such structures on the 37.5 acres that are the subject of the proposed amendments. While it is asserted that a single-family residence exists on the subject property, that dwelling is at Baker Bay Park. The applicant has not explained what the purpose of the dwelling is or how it came about. It appears to be a “caretaker” dwelling or other lawfully established dwelling in conjunction with the marina use.

Characteristic 2:

“Predominantly contiguous ownerships of 80 acres or larger in size.”

or

“Predominantly ownerships 80 acres or less in size.”

The subject ownership – TL 1700 – is a single 970.71-acre parcel. The ownership is considerably larger than 80 acres. The applicant has improperly limited the inquiry to a sub-area of the ownership rather than the entirety of the ownership.

Characteristic 3:

“Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm uses.”

or

“Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.”

The applicant has improperly limited the inquiry to the lands contiguous to the sub-area proposed for the plan and zoning map amendments rather than contiguous to the “ownership.” As the extent of the subject property has not been properly identified, the ownerships contiguous to the subject ownership have of necessity not been adequately identified or analyzed. The entirety of the subject property is in fact contiguous to a great deal of other lands utilized for commercial forest uses.

The analysis prepared by the applicant considers only three rural residential properties at the western end of the subject property. The applicant correctly notes that properties to the north of Row River Road are not “contiguous” to the subject property. The three rural residential properties at the western boundary share only a short boundary with the subject property, which is far from supporting a conclusion that the subject property is “generally contiguous” to an exception area.

The applicant’s description of contiguous properties leaves out TL 400, which actually touches the 37.5-acre sub-parcel. Tax lot 400 is listed on the map but not addressed in the text on page 6. Tax lot 202 is probably 12.14 acres but is drawn incorrectly on the map on appendix C. Tax lot 201, a new and current development, no longer has a single family dwelling on it. If there are these errors and omissions in the applicant’s submittal, what additional errors or changes might be revealed upon closer examination?

Characteristic 4:

“Accessed by arterial roads or roads intended primarily for forest management. Primarily under commercial forest management.”

or

“Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences.”

As the entirety of the subject ownership has not been adequately identified or described, it is not possible to determine how the entirety of the ownership is accessed. The applicant has addressed access only to the most westerly portion of the ownership, the 37.5-acre sub-area. It appears that the primary access is Row River Road. The functional classification of Row River Road has not been identified.

There is no evidence in the record to support a finding that Spillway Road is intended primarily to serve rural residences. As the applicant suggests, Spillway Road and Shoreview Drive provide access to and serve the Dorena Reservoir parks and recreation areas. It has not been established that they “primarily” serve rural residential development in the area. The number of residences in the area has not been established, nor has the proportion of traffic resulting from that rural residential development been quantified.

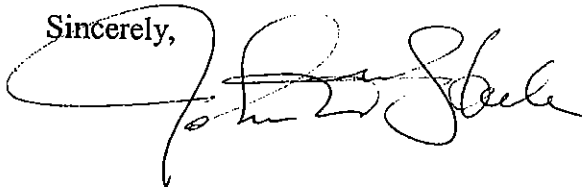
Similarly, it has not been established that the level of public facilities and services provided to the subject property are intended primarily for direct services to rural residences. Rather, the level of public facilities and services are intended primarily for the Dorena Dam operation and the public parks and recreation facilities.

Conclusion

The applicant has not explained why the entirety of the Corps property is not being assigned plan and zoning designations. The reasons for requesting F2 zoning rather than F1 zoning has not been explained. The analysis has improperly focused on a 37.5-acre sub-area rather than the subject ownership and surrounding ownerships. As the subject ownership and contiguous ownerships have not been adequately identified or described, the analysis is of necessity inadequate and cannot be supported by substantial evidence in the record. The evidence that is in the record does not support a conclusion that the characteristics of the subject property more closely resemble those of F2 lands rather than F1 lands.

I request written notice of any decision in this matter. I also request a copy of any decision and findings.

Sincerely,



John Steele
34882 Spillway Rd.
Cottage Grove, OR 97424

08-16-06P12:07 RCVD

HERSHNER HUNTER
LO**Attachment B**STEVE CORNACCHIA
scornacchia@hershnerhunter.com

August 16, 2006

Lane County Board of Commissioners
c/o Bill Sage
Lane County Land Management Division
125 E. 8th Avenue
Eugene, OR 97401Re: Ordinance No. PA 1236 (Symbiotic LLC)
Our File No.: 31476.00001

Dear Bill:

We represent Symbiotic LLC, the applicant in the above-referenced matter. This letter provides the Lane County Board of Commissioners with our response to issues raised by John Steele in his letter to the Board, dated August 9, 2006. I have attached draft Supplemental Findings of Fact regarding the issues raised by Mr. Steele for the Board's consideration and inclusion in the record of this matter.

Mr. Steele's arguments are all related to the term "ownerships" contained in Policy 15 of Goal 4 of the Lane County Rural Comprehensive Plan. Policy 15 provides the criteria for deciding whether forest land shall be designated and zoned as Non-Impacted Forest Lands or Impacted Forest Land. The applicant has requested that approximately 37.5 acres of a 970-acre parcel be zoned Impacted Forest Land (F-2) to allow the applicant's subsequent use of that 37.5-acre portion of the 970-acre parcel owned by the U.S. Army Corps of Engineers (hereinafter referred to as "Corps"). That request emanates from an apparent oversight by Lane County in the 1984 enactment of Ordinance No. 884 which left the entire property unzoned.

The applicant has applied the Policy 15 criteria to the 37.5-acre parcel that is the subject of the application.

Mr. Steele argues that the applicant and county staff have not properly considered the entire 970-acre parcel owned by the Corps and all ownerships contiguous to that 970-acre parcel in the Policy 15 analysis. Mr. Steele relies upon two LUBA decisions, *Brown v. Lane County* (LUBA No. 2005-104, 5/05/2006) and *Just v. Lane County*, 50 Or LUBA 399 (2005), as

support for his arguments. Both of these LUBA decisions remanded Lane County decisions that involved the Policy 15 analysis. The threshold question for remand in each of the decision is: "What is Lane County's interpretation of the term "ownerships" as contained in the Policy 15 criteria?"

In *Just v. Lane County* LUBA held:

"because the county's decision never expressly recognizes the ambiguity that is presented by the use of the undefined term 'ownerships' in RCP Goal 4, Policy 15(b) and (c), we believe remand for the county to adopt the needed interpretation is the appropriate course."***

Both decisions are instructive that Lane County must interpret the term "ownerships" in conjunction with its approval of an application to designate and zone land either Impacted Forest Land or Non-Impacted Forest Land. LUBA has not decided or determined how "ownerships" must or should be interpreted. LUBA has left that responsibility to Lane County.

This application provides the Board with an opportunity to interpret the term "ownerships" and to clear up any ambiguity related to its use in the Policy 15 analysis. The application requests that a portion of an "ownership", which is also a portion of a legal lot or parcel, constitute the subject property and that the portion be zoned Impacted Forest Land. While the entire 970-acre Corps-owned property was left un-zoned in 1984, the applicant will only be using the 37.5-acre parcel that constitutes the subject property and, accordingly, only requires that portion of the larger parcel to be zoned to allow its use by the applicant. It is our understanding that the remainder of the parcel and several other un-zoned parcels in the area will be zoned by Lane County during its Periodic Review process.

Lane County should interpret "ownerships," for the purposes of RCP Goal 4, Policy 15, such that "legal lots" and portions of "legal lots" are functional equivalents. Such an interpretation is consistent with the purpose and intent of Policy 15. Sub-paragraph a. of Policy 15 states that a decision to apply one of the zones (or both in a split zone fashion) shall be based upon:

"a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone."

The characteristics of the land, not the ownership of it, control the analysis. Policy 15 was crafted as a means of distinguishing large-scale industrial forest land from small-scale non-

industrial forest land in the present and for the foreseeable future. The policy was intended to provide an analysis of the size and use of the subject property and of the land in the immediate vicinity. Size and use of land constitute the four sets of characteristics of each type of forest land required by Policy 15 to be analyzed and compared. The listed characteristics do not include any reference to the determination of type of ownership or whether contiguous properties owned by the same person or entity constitute one or more ownerships.

The only reasonable interpretation of the term "ownerships" is that "legal lots" and portions of "legal lots" are functional equivalents of the term "ownerships." A legal lot is a unit of land formed pursuant to local land division laws at the time of creation, or one created by deed, court decree or similar means. The significance of legal lots relating to land planning policy is that, once created, legal lots never disappear until legally divided at which time new legal lots are created. Accordingly, multiple legal lots under one ownership today could become separately-owned lots or parcels in the future. Therefore, for the analysis of how a given geographic area will function over time (as in this case in relation to industrial forest operations), legal lots under common ownership are the functional equivalent of separately owned legal lots or parcels.

The suggested interpretation of "ownerships" in the context of the subject application is consistent with your January 5, 2005, amendment of the text of RCP General Plan Policies, Goal Two Policy 27.a.ii., wherein the Board deleted the following language of that text:

"ii. Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Non-Impacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 Policies would have dictated the F-2 Zone."

The Board replaced the deleted text language with the following:

"Inappropriate Non-Impacted Forest Land (F-1, RCP) zoning designation, where criteria of RCP Forest Land Policy 15 indicate that Impacted Forest Land (F-2, RCP) zoning designation is more suitable."

The text amendment effectively removed any historical analysis of ownerships or parcels or lots or maps in 1984 when lands were identified by County staff for designation as either Impacted or Non-impacted Forest Lands. The purpose of the text amendment was to place the RCP Goal Two and Goal 4 Policy analysis for such designations in a contemporary and

Lane County Board of Commissioners
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future context. Land is to be analyzed based upon current and future characteristics of the land over time rather than on the configuration of particular ownerships as identified in 1984 mapping.

The applicant has performed the Policy 15 analysis consistent with the suggested interpretation. The subject property, and the lots/parcels in its vicinity have been analyzed under the Policy 15 criteria and the most reasonable and logical conclusion thereafter is that the subject property should be zoned Impacted Forest Lands.

Best regards,



STEVE CORNACCHIA

PSC:ss
Enclosure

ORDINANCE NO. PA 1236
06-5476
35 (3 PAGES)

Attachment C

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

for

**A CONFORMITY DETERMINATION AMENDMENT
PURSUANT TO RCP GENERAL PLAN POLICIES – GOAL TWO, POLICY 27. a. vii.**

**ADOPTING THE PLAN DESIGNATION OF FOREST (F)
AND THE ZONING DESIGNATION OF IMPACTED FOREST LAND (F-2)
FOR 37.5 ACRES LOCATED IN SECTION 32, TOWNSHIP 20, RANGE 2 WEST,
WILLAMETTE MERIDIAN, AND IDENTIFIED AS A PORTION OF TAX LOT 1700 OF
LANE COUNTY ASSESSOR MAP 21-02-06**

and

ADOPTING SAVINGS AND SEVERABILITY CLAUSES

APPLICATION NO. PA 06-5476

ORDINANCE NO. PA 1236

- Applicant:** Symbiotics, LLC
- Owner :** U.S. Army Corp of Engineers
- Applicant's Agent:** Erik Steimle
Ecosystems Research Institute
- Applicant's Attorney:** Paul Vaughan
Hershner Hunter, LLP

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

In support of our adoption and enactment of Ordinance No. PA 1236, we make the following supplemental findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING APPLYING THE RURAL COMPREHENSIVE PLAN DESIGNATION AND ZONING OF IMPACTED FOREST LAND (F-2, RCP) TO THE SUBJECT PROPERTY:

We find that “legal lots or parcels” or portions thereof are the functional equivalents of the term “ownerships” contained in the criteria of RCP Goal 4 Policy 15 and that finding constitutes an interpretation of the term “ownerships” as contained in that criteria.

Such an interpretation is consistent with the purpose and intent of Policy 15. Sub-paragraph a. of Policy 15 states that a decision to apply one of the zones (or both in a split zone fashion) shall be based upon:

“a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone.” (Emphasis added)

The characteristics of the land, not the ownership of it, control the analysis. Policy 15 was crafted as a means of distinguishing large-scale industrial forest land from small-scale non-industrial forest land in the present and for the foreseeable future. The policy was intended to provide an analysis of the size and use of the subject property and of the land in the immediate vicinity. Size and use of land constitute the four sets of characteristics of each type of forest land required by Policy 15 to be analyzed and compared. The listed characteristics do not include any reference to the determination of type of ownership or whether contiguous properties owned by the same person or entity constitute one or more ownerships.

Our interpretation of “ownerships” in the context of the subject application is consistent with our January 5, 2005, amendment of the text of RCP General Plan Policies, Goal Two Policy 27.a.ii., wherein we deleted the following language of that text:

“ii. Failure to zone a property Impacted Forest Land (F-2, RCP), where maps used by staff to designate the property Non-Impacted Forest Land (F-1, RCP) zone did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 Policies would have dictated the F-2 Zone.”

We replaced the deleted text language with the following:

“Inappropriate Non-Impacted Forest Land (F-1, RCP) zoning designation, where criteria of RCP Forest Land Policy 15 indicate

that Impacted Forest Land (F-2, RCP) zoning designation is more suitable.”

The text amendment effectively removed any historical analysis of ownerships or parcels or lots or maps in 1984 when lands were identified by County staff for designation as either Impacted or Non-impacted Forest Lands. The purpose of the text amendment was to place the RCP Goal Two and Goal 4 Policy analysis for such designations in a contemporary and future context. Land is to be analyzed based upon current and future characteristics of the land over time rather than on the configuration of particular ownerships as identified in 1984 mapping.

The only reasonable interpretation of the term “ownerships” is that “legal lots” and portions of “legal lots” are functional equivalents of the term “ownerships.” A legal lot is a unit of land formed pursuant to local land division laws at the time of creation, or one created by deed, court decree or similar means. The significance of legal lots relating to land planning policy is that, once created, legal lots never disappear until legally divided at which time new legal lots are created. Accordingly, multiple legal lots under one ownership today could become separately-owned lots or parcels in the future. Therefore, for the analysis of how a given geographic area will function over time (as in this case in relation to industrial forest operations), legal lots under common ownership are the functional equivalent of separately owned legal lots or parcels and the functional equivalent of the term “ownerships.”