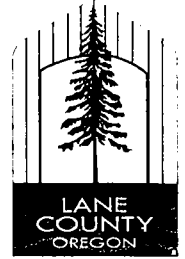


W. 10. C.

**AGENDA COVER MEMO**



**DATE:** August 11, 2006 (Date of Memo)  
August 30, 2006 (Date of First Reading)  
September 13, 2006 (Date of Second Reading/Public Hearing)

**TO:** LANE COUNTY BOARD OF COMMISSIONERS

LAND MANAGEMENT DIVISION  
[http://www.LaneCounty.org/PW\\_LMD/](http://www.LaneCounty.org/PW_LMD/)

**FROM:** Public Works Department/Land Management Division

**PRESENTED BY:** Jerry Kendall, <sup>JK</sup> Lane County Land Management Division

**AGENDA ITEM TITLE:** ORDINANCE NO. PA 1237 -- 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 05-5985, Ogle)

**I. MOTION**

1. AUGUST 11, 2006: I MOVE APPROVAL OF THE FIRST READING OF ORDINANCE NO. PA 1237 AND SETTING THE SECOND READING AND PUBLIC HEARING FOR SEPTEMBER 13, 2006, AT 1:30 P.M. IN HARRIS HALL.

2. SEPTEMBER 13, 2006: ALTERNATIVE MOTIONS AFTER THE PUBLIC HEARING:

A. I MOVE TO APPROVE ORDINANCE NO. PA 1237.

**OR**

B. I MOVE TO TENTATIVELY APPROVE ORDINANCE NO. PA 1237 SUBJECT TO REVISED FINDINGS.

**OR**

C. I MOVE TO TENTATIVELY DENY THE APPLICATION IN FILE PA 05-5985 AND DIRECT STAFF TO PREPARE AN ORDER WITH APPROPRIATE FINDINGS FOR FINAL ACTION.

**II. ISSUE OR PROBLEM**

The Lane County Planning Commission has recommended denial for a privately-initiated minor amendment to the RCP, and companion rezoning request. This Ordinance sets the matter before the Board for adoption or denial.

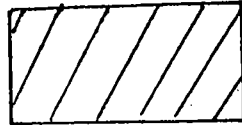
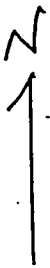
**III. DISCUSSION**

**A. Background**

In July, 2005, application was made to redesignate portions of two parcels of land totaling 73 acres, and located adjacent to the Urban Growth Boundary of Eugene and northwest of Lorane Highway, from Agricultural Land to Marginal Land and rezone

# COMPOSITE MAP

## EXHIBIT B ZONING MAPS

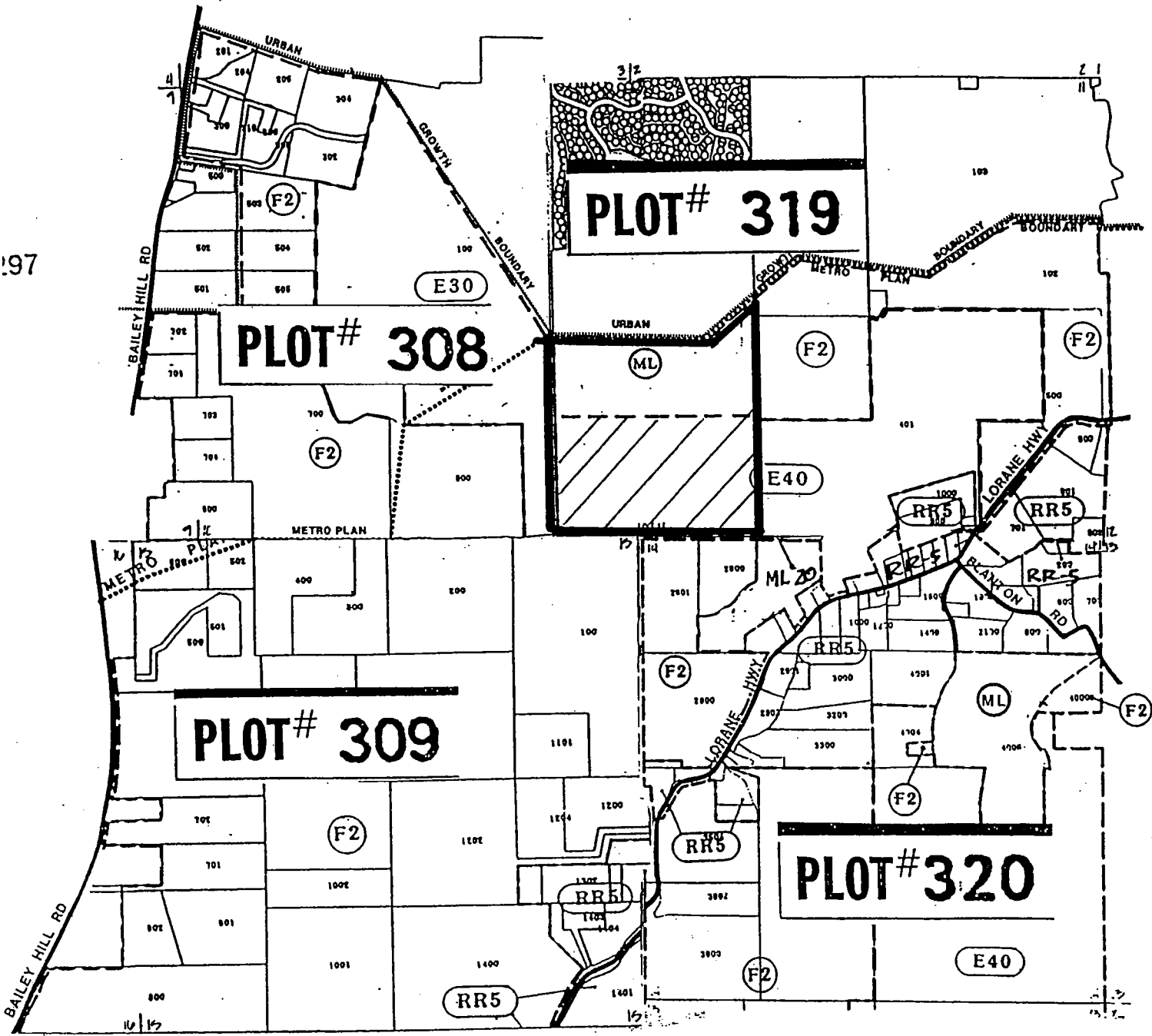


⇒ SUBJECT  
PROPERTY



197

33



it from E-40/Exclusive Farm Use to Marginal Land. The Lane County Planning Commission recommended denial of the request, following public hearings on February 7, 21, and deliberated on April 4, 2006.

The subject property is somewhat unusual in its configuration and components. Refer to the map on the preceding page. The property consists of two tax lots owned by two different parties. Tax lot 304, on the west, is owned by the Childs family, while tax lot 303 on the east is owned by the Ogle family. The two tax lots total 113+ acres. Both are separate parcels, having undergone a county partition process in 1994. For the purposes of this application, a tax lot can be considered synonymous with the term "parcel". Past practice has allowed two contiguous owners to apply for a Plan amendment/rezone under one application.

The northern 40 acres of the two tax lots is already zoned Marginal Land (ML). This occurred in 1992, prior to the aforementioned partition. Thus staff has referred to the entire 113 acres (composed of the two tax lots) as a "tract", while the "proposed marginal land" (identified as "subject property" on the map), as such term appears in marginal land law, ORS 197.247(1)(b)(C), refers to the portions of each parcel which has not yet been rezoned to ML. This distinction becomes important in the analysis of the request. The "proposed marginal land" totals approximately 71 acres, with 39.6 acres from tax lot 304, and 34.1 acres from tax lot 303.

Approval of this request will allow subdivision of the 113 acre tract into 20 acre parcels, a five parcel outcome. If however, the applicant incorporates findings into the subsequent subdivision application, documenting that adjacent farm or forest zoned lands *qualify* as Marginal Land, the tract can be divided into ten acre parcels, with a theoretical outcome of an eleven parcel outcome. However, because the submitted aquifer study is valid only for a total of nine dwellings, nine parcels is the maximum number of parcels that potentially can occur. **The applicant intends to pursue the nine parcel outcome.** Because of the water limitation, the Site Review suffix has been added to the Ordinance title, with the limitation of nine lots incorporated within the text of the Ordinance.

The subdivision application is a separate process to be evaluated at the Planning Director level, and is not part of the proposal currently before the Board.

## **B. Analysis**

The application is being made pursuant to Lane Code 16.400, which governs amendments to the Rural Comprehensive Plan, LC 16.252, which governs rezoning actions, and the provisions of 1991 ORS 197.247 (Marginal Lands). That statute no longer exists but its provisions are still available to marginal land counties (of which Lane County is one) for designation of Marginal Lands. They require evaluating history of use (e.g., income produced) and an analysis of either resource production capabilities of the subject property or an evaluation of the parcelization pattern surrounding the property. The applicant has selected the "resource production capability" option.

### **1. Income Tests**

ORS 197.247(1)(a) reads as follows:

**The proposed marginal land was not managed, during three of the five calendar years proceeding 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.**

Farm income standard

Per the direction given in the March 1997 Board document, the applicant has provided an affidavit (Applicant's exhibit "D" within the original submittal. See Attch. #2) from a party who owned the property during the five years preceding 1983, attesting that the proposed marginal land (i.e., the subject property), was not part of a farm operation that produced \$20,000 or more annual gross farm income. Staff accepts this "farm income" portion of the statute test, as it meets the Board directive.

Forest income standard

The forest income test requires that during the same time period, the proposed marginal land was not managed, by itself or in conjunction with other land, as a forest operation, which could generate over \$10,000, gross annual income from timber revenue.

The "proposed marginal land" is tax lots 303 and 304, minus the 40 acres already zoned ML. Unlike for the farm income; the forest income standard is not so easily addressed. The Board offers two options for documenting that the forest test has been met. Refer to the Board direction paper of March 1997.

The first method, not selected by the applicant, is described on the last page of the Board direction paper (under "Soils test"). Instead, the Applicant chose to employ a forester to provide a more specific analysis based on field observations and tree borings. In exhibit "J" (within Attach. #2), the forester, Setchko, concludes that the 113-acre tract was capable of grossing \$5,173 annual, below the \$10,000 limit. See Applicant's Exhibit J, pages 6-8. Staff concurs with Mr. Setchko's conclusion.

In his report, Mr. Setchko also describes why tree species other than Doug fir and Ponderosa pine are not used in the income calculations. The primary reason is that Doug fir brings the best return on the money invested. Ponderosa pine productivity ratings were utilized on the *Philomath* soils, on which they outgrow Doug fir.

Mr. Setchko's notes on the other species include:

- Red cedar: slow growing, site has moisture constraints.
- Incense cedar: slow growing, does not grow in pure stands, volume per acre is low.
- Hemlock: site has moisture constraints, poor soils, not as valuable as Doug fir.
- Grand fir: prefers lowlands and stream valleys with high water tables, not to be found on this site.
- KMX: not a merchantable species (poor market).
- Oak: very slow growth rate, worth less than Doug fir.
- Maple: has large canopies resulting in low volume per acre.
- Hybrid poplar: site is unsuitable due to shallow soils, harsh south/southwest aspect of the site results in harsh growing conditions, needs deep alluvial soils and water.

The income standard appears to have been met.

2. Productivity Test

The applicable portion of ORS 197.247(1)(b)(C) reads as follows:

**(b)(C) The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification**

**system used by the U.S. Department of Agriculture Soil Conservation Service, and is not capable of producing 85 cubic feet of merchantable timber per acre per year.**

Unlike the income tests, this provision requires an examination of the “proposed Marginal Land” only, meaning the 73.74 acre portion of the 113+ acre tract. The applicant concludes (p.10 of Ex. J, within Attach. #2) that the productivity is 69.3 cu. ft./ac./year.

It is noted that two power line easements (BPA and EWEB, see Applicant’s Ex. G & H) cross the property. Staff notes that Mr. Setchko provided two tables of productivity calculations. The first (p.10 of Ex. J) includes the land within the easements; the second (p.11) gives those 9.13 acres of land a zero productivity rating. Both tables meet the test.

It is noted that ORS 197.247(1)(b)(C) contains the phrase “merchantable timber”. When a word, such as merchantable, is not defined in the Lane Code, the code directs us to *Webster’s Third New International Dictionary*, (1981, excerpt attached to this report), which defines the word in part as:

*Merchantable: of commercial quality: acceptable to buyers: salable.*

Mr. Setchko discusses the merchantability issue throughout his report, concluding (for reasons already noted above) that species other than Doug fir and Ponderosa pine are not desirable from a marketing standpoint.

The “productivity test” appears to have been met.

In addition to ORS 197.247, any plan amendment must address state and local laws, including state goals.

Regarding Goal 5, water resources, it is noted that the subject property is within a water quality/quantity limited area (Spencer Creek watershed) per LM. 13.010. As required by LC 16.004(4) and LC 13.050(13), the applicant has provided an aquifer study performed by EGR & Associates. The study concludes domestic water availability for up to nine domestic wells. While the Watermaster’s Office expressed discontent at how the report was written, it concluded that the ground water system would not be taxed by the proposal. As stated previously, if this proposal is approved, a limitation of nine maximum parcels out of the 113+ acre tract would be incorporated into the Board ordinance.

The remainder of the submittal and exhibits satisfactorily address compliance with the code aspects such as: fulfilling the purpose of the ML zone as found in LC 16.214(1); the Plan Amendment requirements of LC 16.400; and the rezone requirements of LC 16.252. Staff agrees with the statements as presented.

#### Lane County Planning Commission Action

The issues were presented to the LCPC for its evaluation in public hearings on February 7, 21, and April 4, 2006. The Commission recommended denial of the application by a vote of 5-3. Commission reasoning is set forth in the Minutes of the meetings, attached to this packet.

The applicant is expected to be on hand at the Board hearing to present the proposal and respond to questions. It is expected that the forest income text will be further

contested. The Board is encouraged to take advantage of the presence of the Applicant's forester (Mr. Setchko), as well as that of the opposition, by addressing any unresolved questions they may have to those parties.

Opposition to the request was largely voiced through the Goal One Coalition. See Attachment #5 for those comments. Additional comments in opposition are found in the supplementary materials presented to the Planning Commission, Attachment #6.

Should additional written materials or testimony be produced concerning this item, it will be delivered to the Board in a supplement or delivered at the hearing.

**C. Alternatives/Options**

1. Adopt the Ordinance as presented.
2. Do not adopt the Ordinance and deny the application.

**D. Recommendation**

Staff recommends alternative 1 above.

**E. Timing**

The Ordinance does not contain an emergency clause.

**IV. IMPLEMENTATION/FOLLOW-UP**

Notice of action will be provided to DLCD and the applicant.

**ATTACHMENTS**

1. Ordinance PA 1237 with Exhibits "A" through "C".
2. LCPC Staff Report dated January 31, 2006. [Applicant's statements are now part of Exhibit "C".]
3. LCPC Minutes of February 7\*, 21, & April 4\*
4. Additional materials, from Applicant (M. Farthing), February 17, 2006.—51pp.
5. Goal One Submittal, February 3, 2006.—55pp.
6. Supplemental materials presented to LCPC, March 28, 2006.—147pp.

\* Draft. Not yet approved by the Planning Commission

**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON**

**ORDINANCE NO. PA 1237 ) 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/SR" ("MARGINAL LAND WITH  
 ) SITE REVIEW"), AND ADOPTING SAVINGS AND  
 ) SEVERABILITY CLAUSES (file PA 05-5985; Ogle)**

**WHEREAS**, the Board of County Commissioners of Lane County, through enactment of Ordinance PA 884, has adopted Land Use Designations and Zoning for lands within the planning jurisdiction of the Lane County Rural Comprehensive Plan; and

**WHEREAS**, Lane Code 16.400 sets forth procedures for amendment of the Rural Comprehensive Plan, and Lane Code 16.252 sets forth procedures for rezoning lands within the jurisdiction of the Rural Comprehensive Plan; and

**WHEREAS**, in July 2005, application no. PA 05-5985 was made for a minor amendment to redesignate portions of tax lots 303 and 304 of map 18-04-11, from "Agriculture Land" to "Marginal Land" and concurrently rezone the property from "E-40/Exclusive Farm Use " to "ML/Marginal Land"; and

**WHEREAS**, the Lane County Planning Commission reviewed the proposal in public hearings of February 7 and 21, 2006, deliberated on April 4, 2006, and forwarded the matter to the Board with a recommendation for denial; and

**WHEREAS**, evidence exists within the record indicating that the proposal meets the requirements of Lane Code Chapter 16, and the requirements of applicable state and local law; and

**WHEREAS**, the Board of County Commissioners has conducted a public hearing and is now ready to take action;

**NOW, THEREFORE**, the Board of County Commissioners of Lane County Ordains as follows:

Section 1. The Lane County Rural Comprehensive Plan is amended by the redesignation the portions tax lots 303 and 304 of map 18-04-11, which are not already plan designated as Marginal Land, from "Agricultural Land" to "Marginal Land," such territory depicted on Plan Plot 319 and further identified as Exhibit "A" attached and incorporated herein.

Section 2. Portions of tax lots 303 and 304 of map 18-04-11, which are not already zoned as Marginal Land, are rezoned from "E-40/Exclusive Farm Use" (Lane Code 16.212) to "ML/SR" "Marginal Land with Site Review" (Lane Code 16.214 & 16.257), such territory depicted on Rural Zoning Plot 319 and further identified as Exhibit "B" attached and incorporated herein. The exclusive purpose of the Site Review suffix is to limit any subsequent division of the subject property and the northern 40 acres (the 113-acre tract) to a maximum of nine lots or parcels, as so represented and limited by the Applicant's aquifer study.

**FURTHER**, although not a part of this Ordinance, the Board of County Commissioners adopts Findings as set forth in Exhibit "C" attached, in support of this action.

The prior designation and zone repealed by this Ordinance remain in full force and effect to authorize prosecution of persons in violation thereof prior to the effective date of this Ordinance.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not effect the validity to the remaining portions hereof.

**ENACTED** this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Chair, Lane County Board of County Commissioners

\_\_\_\_\_  
Recording Secretary for this Meeting of the Board

APPROVED AS TO FORM

Date 8-22-2006 Lane County

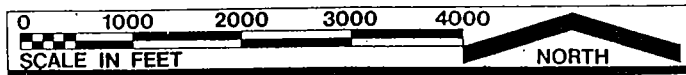
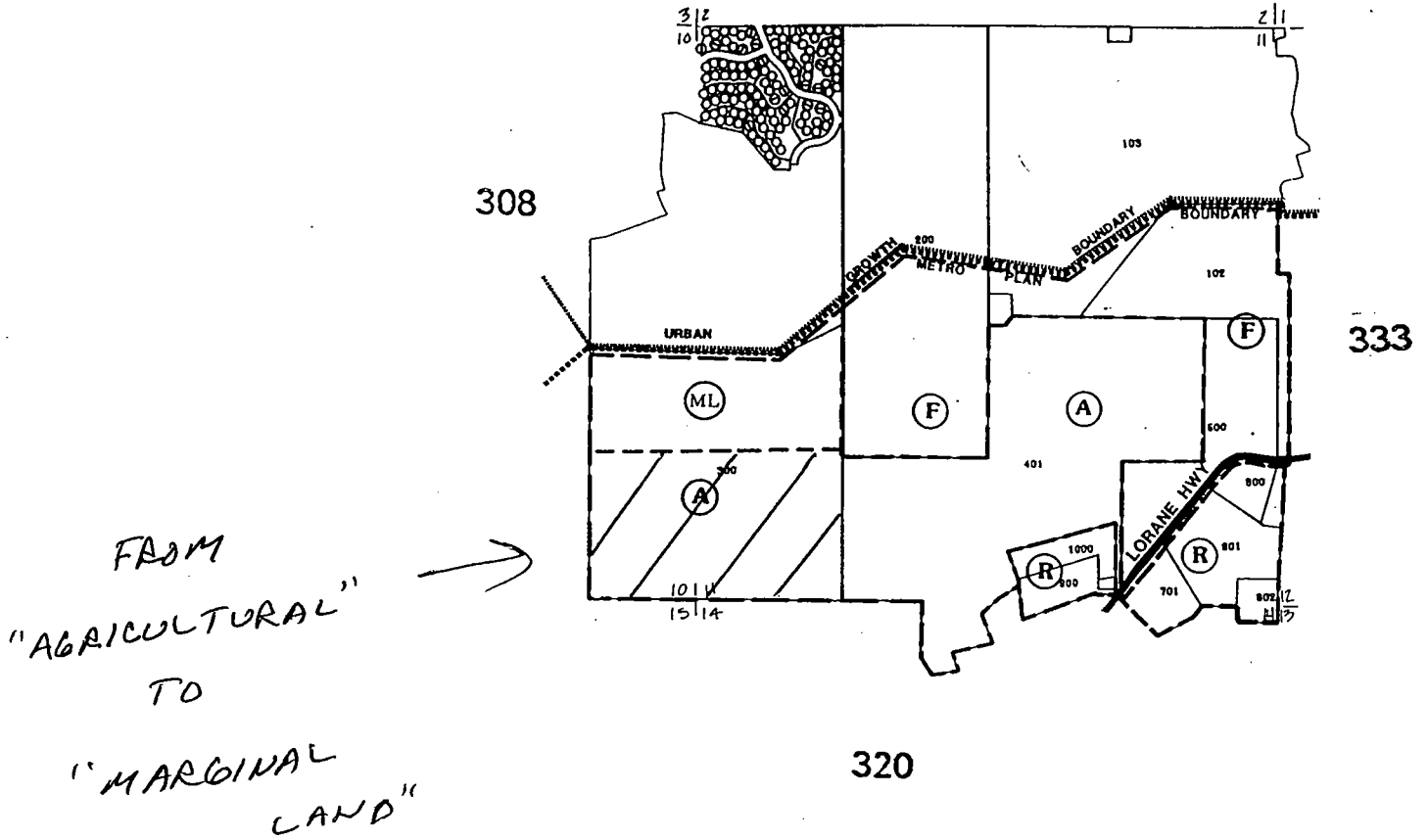



\_\_\_\_\_  
OFFICE OF LEGAL COUNSEL



Ordin. No. PA 1237

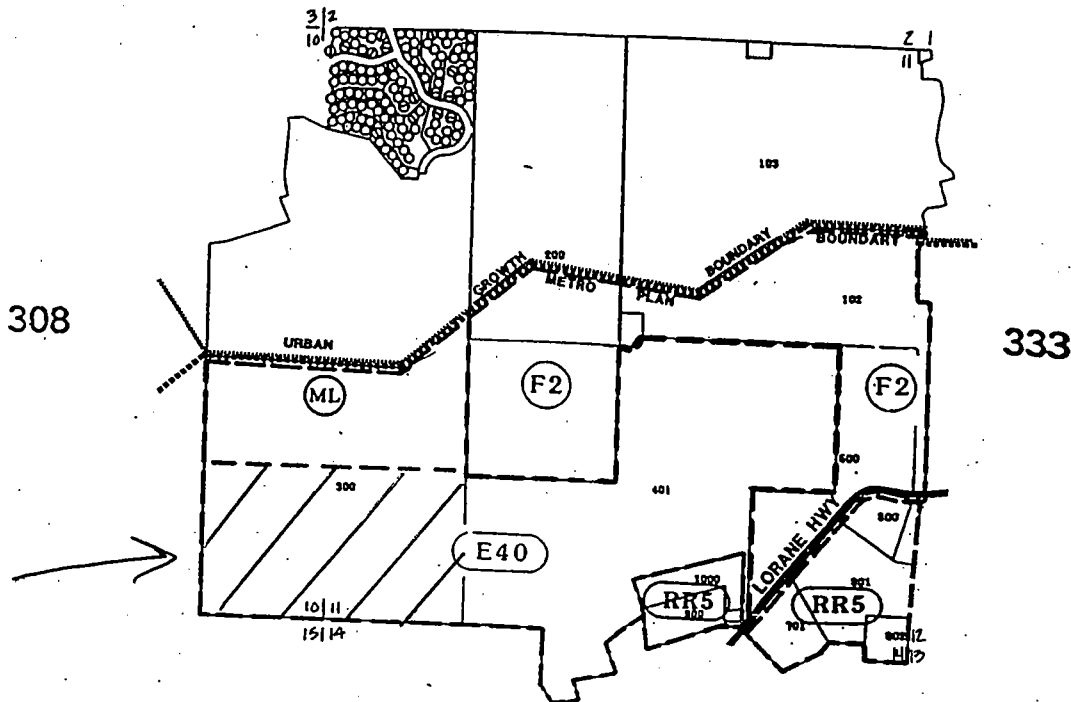
Exhibit "A"



	<b>OFFICIAL PLAN MAP</b>		<b>PLOT # 319</b>
	Township Range Section <b>18 04 11</b>		
ORIGINAL ORD. #	PA 884	DATE	2/29/1984
REVISION #	1	ORD. #	PA1021
		DATE	7/3/92

Ordin. No. PA 1237

Exhibit "B"



FROM  
E-40/RCP  
TO  
ML/RCP  
with Site Review

# FLOODPLAIN

320

The zones on this map are changed as follows:  
 From: RG, RA To: RR2  
 From: CR, C1, C2, & C3 To: RC Rural Commercial  
 From: M1, M2, & M3 To: R1 Rural Industrial  
 From: PF To: RPF Rural Public Facility  
 From: PR To: RPR Rural Park & Recreation



The RR zones on this map are changed as follows:  
 FROM: RR LC 16.231 TO: RR LC 16.290  
 The RR zone parcel size remains the same.

the county



**OFFICIAL ZONING MAP**

**PLOT# 319**

Township Range Section  
 18 04 11

ORIGINAL ORD. # PA 884 DATE 2/29/1984 FILE # \_\_\_\_\_  
 REVISION # 1 ORD. # PA1021 DATE 7/3/92 FILE # \_\_\_\_\_

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF A MINOR  
PLAN AMENDMENT AND ZONE CHANGE**

From: AGRICULTURE and E40, EXCLUSIVE FARM USE ZONE  
To: MARGINAL LANDS and ML, MARGINAL LANDS ZONE  
File No.: PA 05-5985  
Co-Applicants: BRAD and JULIE OGLE – MARK and CINDI CHILDS

The following findings of fact and conclusions of law support an affirmative decision by the Board to approve the proposed plan amendment and concurrent zone change for the "Subject Property" as described below.

- I. SUMMARY OF PROPOSAL
- II. GENERAL FINDINGS REGARDING THE SUBJECT PROPERTY
- III. LANE CODE 16.400 PLAN AMENDMENT CRITERIA
- IV. FINDINGS AND CONCLUSIONS RELATING TO STATEWIDE PLANNING GOALS
- V. FINDINGS AND CONCLUSIONS RELATING TO LANE CODE 16.252 ZONE CHANGE CRITERIA<sup>1</sup>

**I. SUMMARY OF PROPOSAL**

These combined applications propose to change the Lane County Rural Comprehensive Plan ("RCP") designation from Agriculture to Marginal Lands and the Zoning Designation from E40, Exclusive Farm Use, to ML, Marginal Lands, for approximately 74 acres located on the southwest edge of the Eugene Urban Growth Boundary (UGB).

---

<sup>1</sup> These headings and the subheadings will be in bold lettering. Within these headings, the substantive criteria from Lane Code and Statewide Planning Goals are italicized.

## II. GENERAL FINDINGS REGARDING THE SUBJECT PROPERTY

### A. Location, Land Use Designation, Site Description and Other Characteristics

#### **Location:**

The property subject to this application (“Subject Property”) is identified as portions of Tax Lots 303 and 304 on Assessor’s Map No. 18-04-11. See attached Exhibit “A”.

The Subject Property is located just south of the Metro Urban Growth Boundary in southwest Eugene. It is accessed off the southern end of Timberline Drive. See Exhibit “A”. The Subject Property is part of a larger tract (“the original tract”) that contained approximately 114 acres. The northern 40 acres was designated and zoned Marginal Lands in 1992 (PA 0221-92).

#### **Surrounding Zoning and Zoning History:**

The Subject Property is located within Lane County Zoning Plot #319. The original tract was designated for agricultural use and zoned E-40, Exclusive Farm Use, when the Lane County Rural Comprehensive Plan was first adopted in 1984. The northerly 40 acres of the original tract was changed from E-40 to ML in 1992 in a similar plan amendment and zone change application process (PA 0221-92). The staff report in that planning action indicated that the entire tract qualified as marginal lands. The land has never been planted in crops and limited grazing has occurred on the property in decades past. The original tract’s previous owner had owned the tract since 1962. They signed an affidavit stating that during their entire ownership (including the 1-1-78 through 1-1-83 Marginal Lands test period), they did not exceed the marginal lands gross income amounts that would disqualify the property from Marginal Lands consideration.

The city limits of Eugene forms the northern boundary of the original tract and is subject to urban development by the current owners as additions to Somerset Hills. The property immediately to the east and a portion of the land to the south is zoned F-2 Impacted Forest Land. The F-2 lots to the south have residences quite close to the Subject Property’s boundary and take access from the Lorane Highway. A portion of the southern boundary also abuts a parcel that is zoned Marginal Land. To the west is a parcel zoned E40 that is vacant. There are a variety of rural residential lots along the Bailey Hill and Lorane Highway corridors just to the south and west of the subject parcel. The predominant character of the land is rural in nature with residences impacting most of the designated resource properties. See Exhibit “B”, attached and incorporated herein by this reference.

The proposed zone change to Marginal Lands would closely match the

character of the surrounding parcels that are also rural/resource in nature. The proposed zone change and the subsequent residences would not interfere with or hinder adjacent uses or cause change in the nature of the surrounding area. The proposed zone change would closely match the intent of the Marginal Lands designation and would provide for an orderly transition and buffer from the urban uses to the north and the mixed rural and resource designations to the south, east and west. There are no commercial farm or forest operations being conducted on any of the properties that are adjacent to or in the immediate area surrounding the Subject Property.

**Site Description:**

The Subject Property was part of a larger tract (“the original tract”) that was 113.74 acres in size and located on the south face of the ridge line at the southwesterly edge of Eugene’s Urban Growth Boundary. Site topography consists almost entirely of south facing slopes of generally moderate 10-30% grades. The flora consists predominantly of seasonal grasses, Poison Oak, Black Oak, White Oak, Incense Cedar, Ponderosa Pine, and Douglas Fir. The soils, as discussed below, are very poor with most not attaining recognized agricultural and forestry classes or indexes necessary to conduct those activities.

**Improvements:**

Both lots within the original tract have residences constructed within the past five years. The residences are located on the northerly portion of each lot on land presently zoned ML. They are served by graveled drives that enter the property from the north by easement from the terminus of Timberline Drive. EWEB provides electrical service and Qwest provides phone service in the area of the access drive. Individual wells and septic systems are provided for each lot. The Bonneville Power Administration and EWEB have power line corridors that traverse the middle and southerly portion of the Subject Property . The power line easements and their associated gated access roads encumber approximately 10 acres of the site. The access drive to the two residences connects to the easement corridor roadways.

**Soils:**

The Soil Survey for Lane County Oregon (9/87) prepared by the Soil Conservation Service (SCS), map # 90, provides information on the soil types on the property and in the surrounding area. A detailed L-COG soil map is also included with the original application which identifies the location of the various soil types.

The Subject Property is composed entirely of class VI and class VII soils that are not rated for, and are unsuitable for farming practices. In addition, most of the property (79.3% - 58.5 of 73.7 acres) has no conifer site index rating and the soils are not considered capable of sustaining commercial forestry stands. A

breakdown of the soil types for the tract based on the L-COG soil data is as follows:

Soil Type	Agric. Site Class	Forestry Class	Cubic Ft. Per Ac/Yr	Acres
81D McDuff Clay Loam	Vie	112	158	5.6
102C Panther Silty Clay	VIw	----	----	14.7
107C Philomath Silty Clay	Vie	----	----	31.2
108F Philomath Cobbly Silty Clay	Vle	----	----	12.6
113E Ritner Cob. Silty Cl. Loam	VI s	107	149	6.9
113G Ritner Cob. Silty Cl. Loam	VII s	107	149	2.7
			Total	73.7

**Wetlands:**

The National Wetlands Inventory Map indicates no jurisdictional wetlands on the site. However, a small, unnamed seasonal stream does run for approximately 7-9 months over a small area in the southerly portion of the tract.

**Wildlife:**

The Lane County Wildlife Inventory Map indicates that the Subject Property is located in a Major Big Game Range. The allowed 10 and 20-acre minimum parcel sizes in the ML zone would provide adequate protection for wildlife in this area adjacent to the city limits. This is consistent with land use policy and similar decisions involving similar land use applications.

**Hazards:**

The Subject Property is not located within a flood way or flood plain according to FEMA records. No other natural hazards exist on the parcel.

**Other Resources:**

No historic, archaeological, scenic, or other resource features have been identified on the parcel nor is it part of any Lane County inventory of such resources.

**B. Services:**

The Subject Property is fully serviced with rural services as specified in RCP Goal 11: Public Facilities and Services, Policy 6.j.

Fire:	Bailey-Spencer Rural Fire Protection District
Police:	Lane County Sheriff
Schools:	4-J School District
Sewer:	on-site individual septic
Water:	on-site individual well
Access:	Private access by easement via Timberline Road
Electricity:	EWEB
Telephone:	Qwest Communications
Solid Waste:	Glenwood Solid Waste Transfer Site

### III. LANE CODE 16.400 PLAN AMENDMENT CRITERIA

#### A. Planning Commission Review and Recommendation:

Pursuant to procedures set forth in Lane Code 16.400(6)(a) to (d), the Lane County Planning Commission voted (5-3) to not recommend to the Board of Commissioners that they grant final approval of the combined plan amendment and zone change applications as described in and supported by these findings. The majority of the Planning Commission did not adopt any findings to support their decision nor did they refer to any evidence in the record that was in conflict with or contradicted the testimony of the Applicants' forester (Marc Setchko) or soil expert (Stephen Caruana).

#### B. Plan Amendment Criteria at LC 16.400(6)(h)(iii):

*(iii) The Board may amend or supplement the Rural Comprehensive Plan upon making the following findings:*

*(aa) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.*

This criterion establishes the parameters for identifying all the criteria that must be addressed with substantial evidence by a successful applicant for a marginal lands plan amendment and zone change. A minor amendment is one that amends only the Plan Diagram. A major amendment is any other plan amendment. The change sought by this request is a minor amendment.

This proposal would amend the RCP designation for the Subject Property from Agriculture to Marginal Lands. This application provides substantial evidence that addresses the applicable requirements of Lane Code, RCP policies, and the Statewide Planning Goals. Specific findings are set forth below.

***(bb) For Major and Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is:  
(i-i) necessary to correct an identified error in the application of the Plan; OR***

The Subject Property was designated Agriculture and zoned E40 as part of the RCP adoption process in 1984. The Agriculture designation and zoning were applied pursuant to County policy which determined that lands that might qualify as marginal lands should be addressed subsequently on a case-by-case basis pursuant to policies in the RCP and the statutory criteria in ORS 197.247. As the evidence indicates, the Subject Property is clearly not agricultural land by any definition and therefor the current plan designation is an error.

***(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment;  
OR***

Not applicable.

***(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; OR***

Not applicable.

***(iv-iv) necessary to provide for the implementation of adopted Plan policy or elements; OR***

ORS 197.247 authorizes counties to designate land as marginal lands. Lane County has acted to utilize this authority through the adoption of RCP Goal 3, Policy 14 and Goal 4, Policy 3. Those policies require an applicant for a marginal lands designation and zoning to address and satisfy the requirements of ORS 197.247 (1991 ed.) and applicable County policies and requirements. The co-applicants are implementing policies in the RCP which allow qualified resource lands to be designated as Marginal Lands rather than Agriculture or Forest.

In order to aid applicants, the staff and general public in addressing the marginal lands criteria, the Board of Commissioners, in 1997, adopted an interpretation of and supplement to the County's marginal lands information sheet ("the Board Interpretation"), copy of which is attached as Exhibit "C". The Board Interpretation clarifies how the marginal lands statute and criteria are to be applied in specific situations by addressing seven issues and providing policy direction for each. As discussed later in these findings, the Board Interpretation has particular relevance to this application in the context of evaluating the site's ability to grow timber.



ORS 197.247(1991 ed.) identifies the following standards:

- (1)(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*
- (1)(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 of 20 acres or less in size on July 1, 1983; or*
  - (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 class 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 or 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)*

The Applicants have addressed subsections (1)(a) and (1)(b)(C) in this application for designating the Subject Property as suitable for Marginal Lands. The following findings address each of these criteria:

**ORS 197.247(1)(a):**

**Farming Operation:**

An affidavit from the owner of the Subject Property during the five years preceding January 1, 1983, conclusively establishes that it was not part of a farm operation that produced \$20,000 or more in annual gross income at any time during the statutory time period (1978-1983). Based on uncontroverted evidence in the record, it is reasonable to conclude that the Subject Property has never been actively farmed.

## **Forest Operation:**

The Applicants' forester, Marc Setchko, presented an analysis of the timber growing potential of the Subject Property which established that it could not be managed as a forest operation capable of producing an average, over the growth cycle, of \$10,000 in annual gross income. This conclusion was based on a detailed analysis of the existing soils and on-site growing conditions, their ability to grow timber (Douglas fir) and conversion of that growth potential into dollars based upon log prices in 1983. This methodology is dictated by the Board Interpretation. (See Exhibit "C", Direction for Issue 4). The analysis also used a fifty year growth cycle as directed by the Board Interpretation. (See Exhibit "C", Direction for Issue 5). The Applicants' forester is a highly qualified professional forester with both industry credentials and 27 years of field experience.

We find Mr. Setchko's written analysis of the income potential for the Subject Property to be very persuasive for a number of reasons. First, Mr. Setchko's projection for income is, as a practical matter, virtually impossible to attain because it assumes a fully stocked stand of a single species. This is not realistic for this site because of the large areas of grassland and exposed rock which are not capable of growing stands of timber. Further, there is at least 9-10 acres of the site that is directly under major power lines (BPA and EWEB) which, due to provisions of the recorded easements, are not allowed to grow trees of any type. Therefore, we recognize that Mr. Setchko's estimate of \$5,173 per year as the projected income for this site over a 50-year growth cycle is, as Mr. Setchko concludes, "...extremely difficult, if not impossible, to reach."

The analysis of income potential prepared by Mr. Setchko ("the Setchko Report") was challenged by several opponents but one in particular, i.e. Goal One Coalition. That challenge contested the "income test" set forth in ORS 197.247(1)(a) (\$10,000 average annual gross income for a forest operation). Goal One made several allegations. Each will be addressed separately.

### **(1) The Setchko Report failed to use average prices for Douglas Fir over the period of 1978-1983.**

The Setchko Report was based on 1983 prices as specifically directed by the Board Interpretation (See Exhibit "C", Direction to Issue 4). The rationale for the Board's directive, based on clear legislative intent, was that marginal lands would be identified as those lands that were not making a significant contribution to commercial forestry in 1983 when the marginal lands statute was enacted. We believe it is reasonable to assume the Legislature was aware of the price of logs in 1983 when the Marginal Lands statute was enacted and the \$10,000 average annual income minimum was established. Goal One has not provided any evidence or rationale which demonstrates or suggests that this assumption is unreasonable.

**(2) The Setchko Report failed to consider timber productivity for soils not rated for Douglas fir.**

In fact, the Setchko Reports did assign a forest site index to those soils that did not have a site index rating in the Soil Survey of Lane County through use of information generated by Lane County and the State Forester's office. The Setchko Reports' calculation of site index ratings for the previously unrated soils is consistent with LCDC regulations for providing such ratings. See OAR 660-006-0005(2). As explained later, however, we do not believe LCDC regulations regarding the inventory of forest land in comprehensive plans is directly applicable to the criteria in ORS 197.247 (1991 ed.) for determining marginal land status.

**(3) The Setchko Report fails to assign a separate productivity rating for the Philomath and Hazelclair soil types on components of the Dixonville-Philomath-Hazelclair ("DPH") soil complex.**

The initial Setchko Report used productivity figures for the DPH soil complex that were obtained from the Soil Survey of Lane County and assigned a productivity factor of 54 cubic feet per acre per year ("cu.ft/ac/yr"). Goal One claimed this was in error because the individual forest productivity factors for each soil component of the soil complex was not determined and used in the calculation of the forest productivity for these soils. This argument was made in a previous marginal lands case that was appealed to the Land Use Board of Appeals (*Just v. Lane County*, LUBA No. 2005-029, decided June 8, 2005). In that case (also known as the "Carver Case"), LUBA held that the 1987 Soil Survey for Lane County provided a single forest productivity rating for the DPH soil complex and that Lane County did not err in relying on that single rating. The Setchko Report uses the same data for this application and we find that it is acceptable and reasonable.

In addition, we note that Mr. Setchko, in a supplemental response to Goal One's criticisms, utilized the individual growth figures provided by Goal One for the DPH soil complex and calculated an annual income of \$8,894 per year which is still well below the \$10,000 minimum set forth in ORS 197.247(1)(a). Goal One's calculations of income potential are not accurate because they misapplied published soil information. Further, Goal One does not recognize or acknowledge actual on-site growing conditions which significantly restrict the Subject Property's ability to grow timber.

**(4) The Setchko Reports use a 50 year growth cycle to calculate average income.**

The Setchko Report is based on a 50-year growth cycle which is consistent with the 1997 Board Interpretation. Goal One argues that a 60-year growth cycle should be used because it believes this would produce a higher annual income figure for the forest operation. Goal One does not provide any reason why a 60-year cycle would be more reasonable than a 50-year cycle. We note that LUBA, in the Carver case, approved the Board's direction for using a 50-year growth cycle and we find there is no reason to require a different growth cycle.

**(5) The Setchko Report uses log lengths and grades that are inconsistent and understate the income potential.**

Goal One argues that Mr. Setchko's utilization of 32 foot log lengths and grades for his analysis of the Subject Property's timber income potential is inconsistent, unwarranted and understate the income that could potentially be derived from the site. Mr. Setchko responded to these allegations in a supplement to his original report, dated March 1, 2006 ("Setchko Supplement" of "the Supplemental Report").

The Setchko Supplement completely refutes Goal One's allegations. Cutting long logs maximizes income that is produced from a stand of timber. The price paid for shorter length lots is significantly lower. The industry standard is to cut logs 32 feet and longer.

The Supplemental Report also explains Mr. Setchko's analysis of the likely grades of logs that would be harvested from the Subject Property. It is based on the relatively poor soil on the site, the 50-year rotation cycle and Mr. Setchko's personal experience in cruising and harvesting similar sites. In fact, we agree with Mr. Setchko's opinion that his estimation of the likely log grades for the Subject Property may be overly optimistic and would contribute to an inflated income estimate.

After careful examination of Goal One's assertions and the response in the Supplemental Report, we are persuaded that Mr. Setchko's opinions, analysis and conclusions are those of a reasonable, prudent and knowledgeable forester. We find them to be realistic, credible and grounded in fact. In contrast, the allegations and assertions of Goal One have no basis or foundation in commercial forest practices or standards in Western Oregon. At best, they raise issues about Mr. Setchko's methodology which provide him a forum to give greater detail and explanation for his estimate of the average annual income that the Subject Property could produce from a well-managed forest operation.

**Conclusion for ORS 197.247(1)(a):** Based on the Setchko Report and the Supplemental Report, we find there is substantial evidence in the record to support the conclusion that the Subject Property was not nor could it have been part of a forest operation (for any of the five years preceding January 1, 1983) that was capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.

**ORS 197.247(2)(b)(C):**

This criterion has two parts: (1) the proposed marginal land is composed predominantly of soils in capability classes V through VIII and (2) is not capable of producing 85 cubic feet of merchantable timber per acre per year. The Subject Property satisfies both of these criteria.

L-COG soils information indicates that Subject Property is composed entirely of Class VI and VII soils. The first part of the test is easily satisfied by the presence of only Class VI and VII soils within the Subject Property.

The initial Setchko Report determined the average timber growth potential of the Subject Property to be 62.146 cu.ft/ac/yr which is less than the minimum of 85 cu.ft/ac/yr set forth in ORS 197(1)(b)(C). This estimate was based on the forest site index for each soil type within the Subject Property and the site's specific growing conditions. Mr. Setchko determined that Ponderosa Pine would likely grow better than Douglas Fir within the Philomath soils (107C and 108F) and, based on borings of existing trees on site, he calculated an estimated growth rate for Ponderosa Pine.

For this criterion, he only reviewed the property that was subject to this application because that is the land proposed for marginal land designation and zoning. Based on his on-site inspection of the Subject Property, his review of historical aerial photos of the site, conversations with a soil expert who also conducted an on-site analysis of the site, and his personal experience in attempting to grow timber under virtually identical conditions, Mr. Setchko concluded that over 24 acres of the site could not sustain timber growth of any kind. He found these areas to be characterized by south-facing aspect, steep slopes, thin soil underlain with rock and an inability to retain moisture. Mr. Caruana, the Applicants' soil expert, observed and documented the same conditions. We find this evidence to be substantive, compelling and persuasive. Further, there is nothing in the present record that refutes or contradicts this site-specific evidence.

While Goal One cites to published studies and other generalized soil data, neither Goal One or any other opponent to this application has offered any evidence that explains how or why the "grassy areas with exposed rock", which Mr. Setchko found to have zero productivity as forest land, could be used to grow timber. They have historically never grown trees and Mr. Setchko found that this condition is not going to change in the future. We agree with his conclusion.

This initial determination of timber productivity was challenged by Goal One on several grounds. Each of those allegations was addressed in a Supplemental Report prepared by Mr. Setchko and the staff as follows:

**(1) The Setchko Report establishes a new soil type.**

Goal One argued that Mr. Setchko created a new soil type in identifying an area as “grassland with exposed rock” and assigning a zero (0) forest productivity value to it. Goal One further argued that Mr. Setchko is not a soil scientist and that OAR 660-06-0010 (LCDC’s Goal 4 administrative rule describing how counties are to inventory forest lands) which requires an “equivalent method” for determining the forest suitability of a particular property when the forest capability is not known.

We find that OAR 660-06-0010 does not apply directly to this application for Marginal Lands designation and zoning. It is a direction to counties for the preparation of rural comprehensive plans and inventorying forest land within those plans. There is nothing in ORS 197.247 or LCDC’s rules (OAR 660) that requires or even suggests that OAR 660-06-0010 applies to this application.

Further, we do not believe Mr. Setchko has created a new soil type. Rather, we believe Mr. Setchko has analyzed the Subject Property for its potential forest capability based on his education and experience as a consulting forester, his on-site inspection of the site’s actual growing conditions and his personal experience in attempting to grow Douglas Fir and Ponderosa Pine in similar conditions. The growing conditions for the soil types in these areas in the Lane County Soil Survey is generalized and imprecise. The timber growing potential for a particular property or area can be much better described and calculated by the methodology employed by a qualified expert like Mr. Setchko. We find Mr. Setchko’s analysis of timber productivity to be supported by the Oregon Department of Forestry’s publication, entitled “LAND USE PLANNING NOTES,” No. 3x April 1998. Goal One offers no credible evidence to rebut Mr. Setchko’s conclusions about the particular timber-growing conditions that exist on the Subject Property.

**(2) The Setchko Report failed to use growth ratings for soils that are rated by the National Resources Conservation Service (NRCS).<sup>2</sup>**

As discussed previously, the Setchko Report does assign cf/ac/yr

---

<sup>2</sup> The NRCS was formerly known as the Soil Conservation Service (SCS).

ratings to all the soils on the Subject Property. In areas where on-site timber growth was consistent with the soil ratings, Mr. Setchko used those productivity figures. However, he did not do so in the areas that did not sustain or support any timber growth. We find this to be reasonable and a much more accurate representation of the timber potential for these areas. We further find this is how a reasonable and prudent forester would evaluate this site. This allegation by Goal One is groundless.

**(3) The Setchko Report's calculation of productivity is inadequate and inconsistent with the soil report prepared by Stephen Caruana on behalf of the Applicants.**

Goal One argues that a report prepared by Stephen Caruana on behalf of the Applicant and which describes and analyzes the soil types on portions of the Subject Property is inconsistent with Mr. Setchko's analysis and calculation of the forest productivity capability of the Subject Property. We disagree for several reasons.

First, Mr. Caruana's report is limited to an evaluation of soils on the portion of the Subject Property which contained the mapped Philomath soils and included the bare grassy areas. Based on field samples, Mr. Caruana concluded that soils did not deviate from the published range of characteristics for those soils. In doing so, Mr. Caruana confirmed the general unproductivity of the Philomath series for timber production.

Contrary to Goal One's assertions, we do not find anything in Mr. Caruana's report that contradicts Mr. Setchko's conclusion that a significant area of the site has no timber productivity value, i.e. zero cubic foot per acre per year rating, for the production of either Douglas Fir or Ponderosa Pine. In fact, Mr. Caruana's report identified the characteristics of these areas which contribute to their zero productivity rating as being steep slope, shallow soils, low moisture content, south aspect and generally detrimental conditions to the establishment of merchantable timber. We find his report to be supportive of and consistent with the conclusions of Mr. Setchko.

In contrast, we find Goal One's description of Mr. Caruana's report to be selective and edited. Further, we find that Goal One places far too much reliance on published soil data which is general in nature and is subject to further refinement and analysis based on field surveys of the Subject Property by qualified experts like Mr. Setchko and Mr. Caruana. Overall, Goal One does not provide any evidence of actual on-site growing conditions for the Subject Property which refutes the evidence and analysis presented by Mr. Setchko and Mr. Caruana.

## **Supplemental Findings Regarding Forest Resource Potential of Subject Property**

The following findings of fact and conclusions of law supplement the previous findings concerning the forest resource capabilities of the Subject Property. Those findings and conclusions provide further support for approval of the proposed plan amendment and concurrent zone change for the Subject Property. They address issues that were raised before the Planning Commission by opponents to the applications and specifically address the 85 cubic foot per acre per year criterion in ORS 197.247(1)(b)(C)

1. Most of the soils on the Subject Property do not have a forest site index classification for Douglas Fir.
2. There are no site index tables for Valley Ponderosa Pine or any other tree species for the Subject Property, other than Douglas Fir.
3. There are electrical utility corridors and grassy areas with exposed rock that significantly limit the Subject Property's ability to grow trees. The utility easements comprise approximately 13% of the Subject Property and effectively prohibits the growth of trees and other vegetation within the easement areas. Aerial photos dating back nearly 80 years conclusively establish the location within the Subject Property of areas that have never grown trees. These areas have been identified and mapped by Mr. Setchko and comprise nearly a quarter of the Subject Property.
4. Douglas Fir is, by far, the most profitable and productive, in terms of value and growth, tree species that can be grown on this site.
5. There is presently no commercial market for Ponderosa Pine, KMX or hybrid poplar in Lane County or in the Willamette Valley. Because the site is dry, south-facing and contains shallow, dry soils, the site's capability to grow Ponderosa Pine is further limited. It is not reasonable or prudent for the owner of land in the Willamette Valley, which is otherwise suitable to grow Ponderosa Pine to invest the time and resources to plant and cultivate that species with the expectation receiving any commercially-positive return on that investment.
6. The Subject Property has been physically examined and analyzed by a professional consulting forester (Marc Setchko) who has concluded that:
  - a. It was not part of a forest operation capable of producing \$10,000 of annual income during the growth cycle, and
  - b. It is not capable of producing 85 cf/ac/yr of merchantable timber



over the growth cycle. There is no substantive evidence in the record that contradicts these conclusions.

7. The methodology used by Mr. Setchko is consistent with State law, relevant court decisions, the Board's 1997 Interpretation and the Department of Forestry's published and approved methodologies and is very persuasive. It should be given evidentiary weight as suggested by LUBA in the Ericsson case and confirmed in our 1997 Interpretation.
8. The evidence and testimony submitted by Goal One, while interesting and informative, did not substantively address the relevant marginal lands criteria nor did it provide evidence that directly contradicted the findings and conclusions of the Applicant's forester, Mr. Setchko or those of Mr. Caruana.

**Based on the above findings, the Board concludes:**

- A. The Subject Property is Marginal Land as described and defined in ORS 197.247, which means it is resource land that has limited capacity to grow merchantable forest products or agricultural crops.
- B. The soils on the Subject Property are predominantly of poor resource quality and potential. The site's capacity to be used for farm and forest uses is further limited by powerline corridors that intersect on the site and the existence of large areas of thin or no topsoil which are underlain by rock. We conclude that these areas cannot maintain tree growth of any kind.
- C. The term "merchantable" in ORS 197.247 means "salable" and is the same as "marketability". At present, there is no active market for any tree species, other Douglas Fir, that is capable of being grown on this site. There is no tree species that can be grown on the Subject Property which is capable of producing 85 cubic feet of growth per acre per year.

**Conclusion: The Subject Property qualifies under ORS 197.247(1) as marginal land because:**

- (a) it 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;
- (b) it was not managed as a part of a forest operation during that same

time period which was capable of producing an average, over the growth cycle, of \$10,000 in annual gross income,

- (c) it is composed predominantly of soils in agricultural capability classes V through VIII, and
- (d) it is not capable of producing 85 cubic feet of merchantable timber per acre per year.

There is substantial evidence, in the record primarily the Setchko Reports, to support each of these conclusions. The opponents, Goal One in particular, have not submitted any evidence, documentation or expert testimony that refutes or contradicts these findings with regard to the resource capabilities of the Subject Property as measured by the statutory standards and criteria in ORS 197.247 (1991 ed.).

For the reasons set forth above, the Board finds that the policies in the RCP, specifically RCP Goal 3, Policy 14 and RCP Goal 4, Policy 3, authorize and allow certain qualified resource lands to be designated and zoned marginal lands. Approval of these applications implements these policies which have been acknowledged by the Land Conservation and Development Commission to be in conformity with Statewide Planning Goals and ORS 197.247 (1991 ed.).

*(v-v) otherwise deemed by the Board, for reasons briefly set forth in its decision, to be desirable, appropriate or proper.*

For the reasons set forth in the previous section, the Board finds that approval of these applications for plan amendment and zone change to Marginal Lands is desirable, appropriate and proper.

*(cc) For Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component does not conflict with adopted Policies of the Rural Comprehensive Plan, and if possible, achieves policy support.*

There are no policies in the adopted and acknowledged RCP that conflict with this request for plan amendment. As discussed in the previous section, there are policies in the RCP that specifically support and encourage approval of marginal lands applications for qualified property. The Subject Property addresses and satisfies the marginal lands criteria that are set forth in ORS 197.247 (1991 ed.).

Approval of this plan amendment is also consistent with the Board's Interpretation of the Marginal Lands statute and its application to individual requests for plan amendment. In this case, price information for 1983 was used and

productivity was based on a 50-year growth cycle. We believe both of these assumptions are consistent with the Legislative intent and reasonable and prudent commercial forestry practices. Further, the application is supported by detailed and thorough analysis and testimony provided by a qualified and experienced forester which is complemented and supported by the report of a qualified soils expert. All of this was done in conformance with direction provided by the Board's Interpretation.

***(dd) For Minor Amendments as defined in LC 16.400(8)(a) below, the Plan amendment or component is compatible with the existing structure of the Rural Comprehensive Plan, and is consistent with the unamended portions or elements of the Plan.***

As discussed in previous sections, this plan amendment application is consistent with and satisfies the criteria that are referenced and adopted by specific policies in the RCP. Those policies are RCP Goal 3, Agricultural Lands, Policy 14 and RCP Goal 4, forest Lands, Policy 3 which specifically allow certain, qualified resource lands to be designated and zoned marginal lands. Approval of this amendment request is consistent with the RCP policies for farm (Goal 3) and forest (Goal 4) lands.

The Board Interpretation recognizes this consistency. It states under "Issue 1" :

"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 that are intended for occupancy with limited rural residential development.

Based on the evidence in the record which addresses and satisfies the criteria in ORS 197.247 and the above-referenced RCP resource policies, the Board concludes that approval of this plan amendment is compatible with the existing structure of the acknowledged RCP and is consistent with the unamended portions and elements of the RCP. Most importantly is the fact that when these criteria are applied to this particular property, it is obvious to us that this property has marginal resource value. We find it is the kind of land that can accommodate a limited level of rural development and might even be more productively used as resource land if on-site managers are in place. What is clear is that this property and the area in which it is

located is neither commercial form of forest land because of the soils and other factors that significantly limit the area's resource potential.

**C. Lane Code 16.400(8)**

*Additional Amendment Provisions. In addition to the general procedures set forth in LC 16.400(6) above, the following provisions shall apply to any amendment of Rural Comprehensive Plan components.*

*(a) Amendments to the Rural Comprehensive Plan shall be classified according to the following criteria:*

*(I) Minor Amendment. An amendment limited to the Plan Diagram only and, if requiring an exception to Statewide Planning Goals, justifies the exception solely on the basis that the resource land is already built upon or is irrevocably committed to other uses not allowed by an applicable goal.*

This application for plan amendment only affects the Plan Diagram for the RCP. No text change to the RCP is proposed. No exception to Statewide Goals is required because the marginal lands designation is a sub-set of resource land and specifically allowed by Goal 3 and Goal 4 policies in the RCP. This plan amendment is limited to the Plan Diagram and, therefore, is a minor amendment.

*(c) Minor amendment proposals initiated by an applicant shall provide adequate documentation to allow complete evaluation of the proposal to determine if the findings required by LC 16.400(6)(h)(iii) above can be affirmatively made. Unless waived in writing by the Planning Director, the applicant shall supply documentation concerning the following:*

*(I) A complete description of the proposal and its relationship to the Plan.*

A complete description of the proposed plan amendment is provided previously in these findings (See Section II). As discussed earlier, the proposed plan amendment is consistent with and specifically allowed by policies in the RCP. The plan amendment will change the RCP Plan designation from Agriculture to Marginal Lands.

*(ii) An analysis responding to each of the required findings of LC 16.400(6)(h)(ii) above.*

The previous findings address LC 16.400(6)(h)(ii) in detail.

***(iii) An assessment of the probable impacts of implementing the proposed amendment, including the following:***

***(aa) Evaluation of land use and ownership patterns of the area of the amendment.***

The Subject Property is located one mile east of Bailey Hill Road between Lorane Highway and the city of Eugene. It is directly adjacent to the Eugene Urban Growth Boundary with legal access from Timberline Road from Eugene. For a description of the surrounding area and zoning history, see Section II, A.

***(bb) Availability of public and/or private facilities and services to the area of the amendment, including transportation, water supply and sewage disposal;***

Neighbors expressed concern about the impact to the existing groundwater supplies that would be caused by the addition of residences and wells into the area. The Applicants hired EGR & Associates to prepare an aquifer analysis and assess whether additional residences and wells would adversely impact neighboring wells on the Subject Property or properties. Aquifer pumping and recovery tests were performed and well logs from neighboring properties were examined as part of EGR's study which was to analyze and measure the impact from as many as seven additional homesites on the Subject Property. EGR's Study concluded:

“Per Lane County Code 13.050, we conclude that the underlying aquifer will yield an adequate residential water supply for the additional proposed dwellings without adversely affecting wells on adjacent properties or the underlying aquifer. Due to the additional demands of the aquifer caused by the sporadic domestic use of P-1 during the test, the results concluded in this report are conservative.

Based on the aquifer test results, mathematical modeling and review of published information, the aquifer beneath the subject property can accommodate nine domestic use wells at normal or peak usage. Not every well drilled in the area will have the same production.”

Based on this study prepared by qualified, licensed professionals, and the absence of any substantive evidence that contradicts or conflicts with the

findings and conclusions of EGR's Study, the Board finds and concludes that there is adequate groundwater to accommodate seven additional homesites on the Subject Property.

As described previously, the Subject Property is served by all of the services required by RCP Goal 11, Policy 6j. These include schools, on-site sewage disposal and water supply, electrical service, telephone service, rural fire and police protection, and access to a solid waste disposal facility.

***(cc) Impact of the amendment on proximate natural resources, resource lands or resource sites, including a Statewide Planning Goal 5 "ESEE" conflict analysis where applicable;***

No sensitive wildlife habitat areas or any other Goal 5 resources have been inventoried or identified on the Subject Property. Therefore, a Goal 5 ESEE analysis is not required. Residential densities that will be allowed by Marginal Lands zoning for the Subject Property will not exceed any limits recommended by the Oregon Department of Fish and Wildlife (ODFW) as directed by RCP Goal 5, Flora and Fauna, Policy 11. The County and ODFW have implemented Policy 11 through application of County land use regulations, siting requirements and other elements of the County's rural resource zoning program.

***(dd) Natural hazards affecting or affected by the proposal:***

No natural hazards have been identified or inventoried on the Subject Property.

***(ee) For a proposed amendment to a nonresidential, nonagricultural or nonforest designation, an assessment of employment gain or loss, tax revenue impacts and public service/facility costs, as compared to equivalent factors for the existing uses to be replaced by the proposal;***

This criterion is not applicable because Marginal Lands is a resource zone designation in the RCP. The ML zone is also residential in that single-family residences are an outright, permitted use in the zone.

***(ff) For a proposed amendment to a nonresidential, nonagricultural or nonforest designation, an inventory of reasonable alternative sites now appropriately designated by the Rural Comprehensive Plan, within the jurisdictional area of the Plan and located in the general vicinity of the proposed amendment;***

The preceding response is also appropriate for this criterion.

#### **IV. FINDINGS AND CONCLUSIONS RELATING TO STATEWIDE PLANNING GOALS**

The Oregon Land Conservation and Development Commission Goals and Guidelines are incorporated herein by reference. The following applicable statewide goal statements have been summarized.

##### ***Goal 1 - Citizen Involvement:***

Goal 1 requires that citizens and affected public agencies be provided an opportunity to comment on the proposed amendment and zone change. Public notification in the form of mailed public notice has been sent by Lane County to affected agencies, including the Department of Land Conservation and Development and owners of record of nearby property

##### ***Goal 2 - Land Use Planning:***

Goal 2 establishes a land use planning process and policy framework as a basis for all land use decisions, and requires development of an adequate factual base to support these decisions. A minor change is one that does not have significant effects beyond the immediate area of change, and is based on special studies or information. The justification for the specific change must be established by substantial evidence in support of the conclusion that the applicable criteria have been met.

Lane County has adopted a comprehensive land use plan amendment process with specific standards that must be addressed to justify a minor change. Substantial compliance with the plan amendment criteria in LC 16.400 constitutes compliance with the applicable provisions. In addition, this plan amendment must address and satisfy the criteria set forth in ORS 197.247(1991 ed.). These applications are supported by substantial evidence upon which the Board can conclude that the applicable criteria have been met.

##### ***Goal 3 - Agricultural Lands:***

Goal 3 strives to preserve and maintain agricultural lands. The Subject Property is not agricultural land as defined by Goal 3. It is composed of soils that are entirely Class VI and VII and unsuitable for farming practices. RCP Goal 3, Policy 14 recognizes that some agriculturally-designated land can and should be re-designated and zoned as Marginal Lands

##### ***Goal 4 - Forest Lands:***

Goal 4 requires the preservation and conservation of forest land for forest uses. The Subject Property is not suitable for growing and sustaining commercial Douglas Fir stands

of timber. No other species would be as valuable and merchantable as Douglas Fir. Zoning the property for Marginal Lands maintains the property in a resource zone and capable of being used for limited resource uses.

***Goal 5 - Open Spaces, Scenic and Historic Areas and Natural Resources:***

Goal 5 requires the conservation of open space and protection of natural and scenic resources that include cultural, historic, scenic and wilderness area characteristics. The goal, as amended by OAR 660-23-000, contains policies and procedures for a variety of resources that are listed below. This administrative rule requires evaluation of these resources. OAR 660-23-10 and -20 includes definitions, standards and specific rules applicable to each Goal 5 resource.

There are no Goal 5 resources currently inventoried on the Subject Property as part of the RCP, except for its inclusion in the "Major Big Game Range" habitat area. The density allowed by the Marginal Lands zoning (10 and 20 acre minimum lot sizes) would provide adequate protection for wildlife and is consistent with other decisions involving similar land use applications. ODFW has no objection to the plan amendment.

***Goal 6 - Air, Water and Land Resource Quality:***

Goal 6 is intended to maintain and improve the quality of the air, water and land resources of the State. As it pertains to site-specific development, it requires that adequate protection measures be taken to assure the retention of air, water and land quality. Generally this means that development will be subject to the air and groundwater regulations promulgated by the State Department of Environmental Quality as administered by the Lane County Environmental Health Department and the Lane Regional Air Pollution Authority. The aquifer study prepared by EGR & Associates demonstrates that groundwater supplies are adequate to serve the intended residential uses.

***Goal 7 - Areas Subject to Natural Disasters or Hazards:***

Goal 7 is intended to protect life and property from natural hazards. There are no identified or inventoried potential hazards.

***Goal 8 - Recreational Needs:***

No scenic or recreational resources have been identified or inventoried on the site and this Goal has limited applicability.

***Goal 9 - Economy of the State:***

Goal 9's purpose is to diversify and improve Oregon's economy. This goal is primarily applicable to commercial and industrial development. Approval of this application will allow the Subject Property to be developed with 3 to 7 additional homesites. This Goal has limited applicability to this plan change.

***Goal 10 - Housing:***



Goal 10 is intended to provide for the housing needs of Oregon's citizens. This plan amendment and zone change request would facilitate the construction of housing on the site while at the same time maintaining its potential use as limited resource land.

***Goal 11 - Public Facilities and Services:***

The purpose of Goal 11 is to provide for the planning and development of public facilities and services in a timely, orderly and efficient manner in order to support rural and urban development.

The Subject Property has access to the full range of public services specified for Communities in RCP Goal 11: Public Facilities and Services, Policy 6. j. See Section III. B. No additional public facilities and services are available or will be required beyond the present level.

***Goal 12 - Transportation:***

Goal 12 is intended to provide and encourage a safe, convenient and economical transportation system. This goal does not address specific land use actions, such as this proposal, but is implemented at the comprehensive planning stage on an area-wide basis.

The Goal 12 administrative rules identify an additional aspect that must be addressed if an amendment to an acknowledged comprehensive plan "significantly affects" a transportation facility. OAR 660-012-0060. Approval of this plan amendment would not have a significant effect on any transportation facility because the number of trips generated by development of homesites on 3 to 7 lots can easily be accommodated on Timberline Drive which is the public street that provides access to the Subject Property. Goal 12 and Goal 12 rules have been addressed.

The Board of Commissioners concludes from this evidence that the proposed amendment will not significantly affect a transportation facility and that no further Goal 12 consideration is required.

***Goal 13 - Energy Conservation:***

This goal requires that land uses maximize conservation of all forms of energy based on sound economic principles. It is implemented by local plans and regulations that control location, orientation and density of development to minimize net energy consumption. Any development on the Subject Property will be subject to those rules.

***Goal 14 - Urbanization:***

The purpose of Goal 14 is to provide for the orderly and efficient transition from rural to urban land use. Approval of the plan amendment and zone change will not change the rural resource status of the Subject Property.

***Goals 15-19 - (Willamette Greenway and Coastal Resources):***

Goals 15 -19 are not applicable to this plan amendment and zone change request because they are geographically oriented to specific areas not located on or near the site.

**V. FINDINGS AND CONCLUSIONS RELATING TO LANE CODE 16.252 ZONE CHANGE CRITERIA**

**Lane Code 16.252 provides:**

*(2) Criteria. Zonings, rezonings and changes in the requirements of this Chapter shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest. In addition, zonings and rezonings shall be consistent with the specific purposes of the zone classification proposed, applicable Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged for compliance with the Statewide Planning Goals by the Land Conservation and Development Commission. Any zoning or rezoning may be effected by Ordinance or Order of the Board of County Commissioners, the Planning Commission or the Hearings Official in accordance with the procedures in this section.*

*Consistency with the General Purpose of LC Chapter 16 and not contrary to the Public Interest.*

This zone change application is consistent with the general purposes of LC Chapter 16 as set forth in LC 16.003 in that:

- 1) It is in conformity with various development rules discussed above and the property will be developed commensurate with the character and physical limitations of the land and will thus promote the health, safety and general welfare of the built environment;
- 2) It will provide home construction opportunities that will aid the economy;
- 3) It will conserve farm and forest lands by locating residential opportunities within a resource zone that allows limited residential development.
- 4) It will aid the provision of affordable housing that allows reasonable selection of a place to live;
- 5) By its location along the edge of the Metro UGB, it will provide for the orderly and efficient transition from rural to urban lands use and the efficient provision of public facilities and services;

- 6) By the use of a common driveway, and by eliminating the opportunity for traffic-intensive commercial land uses, it will encourage the safety of the transportation system;
- 7) By virtue of regulations discussed above, it will protect the quality of the land, air and water of the county and will protect life and property in areas subject to flooding;

Also, because it is consistent with the policies of the RCP and Statewide Planning Goals, it is not contrary to the public interest. See sections III and IV above.

*Consistency with the Purposes of the Marginal Lands Zoning District:*

This application is consistent with the general purposes of LC 16.214 in that:

- 1) It provides an alternative to more restrictive farm and forest zoning.
- 2) It will allow any of the uses permitted in the Marginal Lands zoning district and thereby provide opportunities for persons to live in a rural environment and to conduct intensive or part-time farm or forest operations.
- 3) It is being applied to property in accordance with Lane Code Chapter 16 criteria and procedures, RCP plan policies and criteria in ORS 197.247(1991 ed).

*Consistency with the Rural Comprehensive Plan:*

See Section III above.

*Consistency with Statewide Planning Goals for Unacknowledged Portions of Lane County:*

Because there are no unacknowledged portions of Lane County, this criterion is not applicable.

**CONCLUSION:**

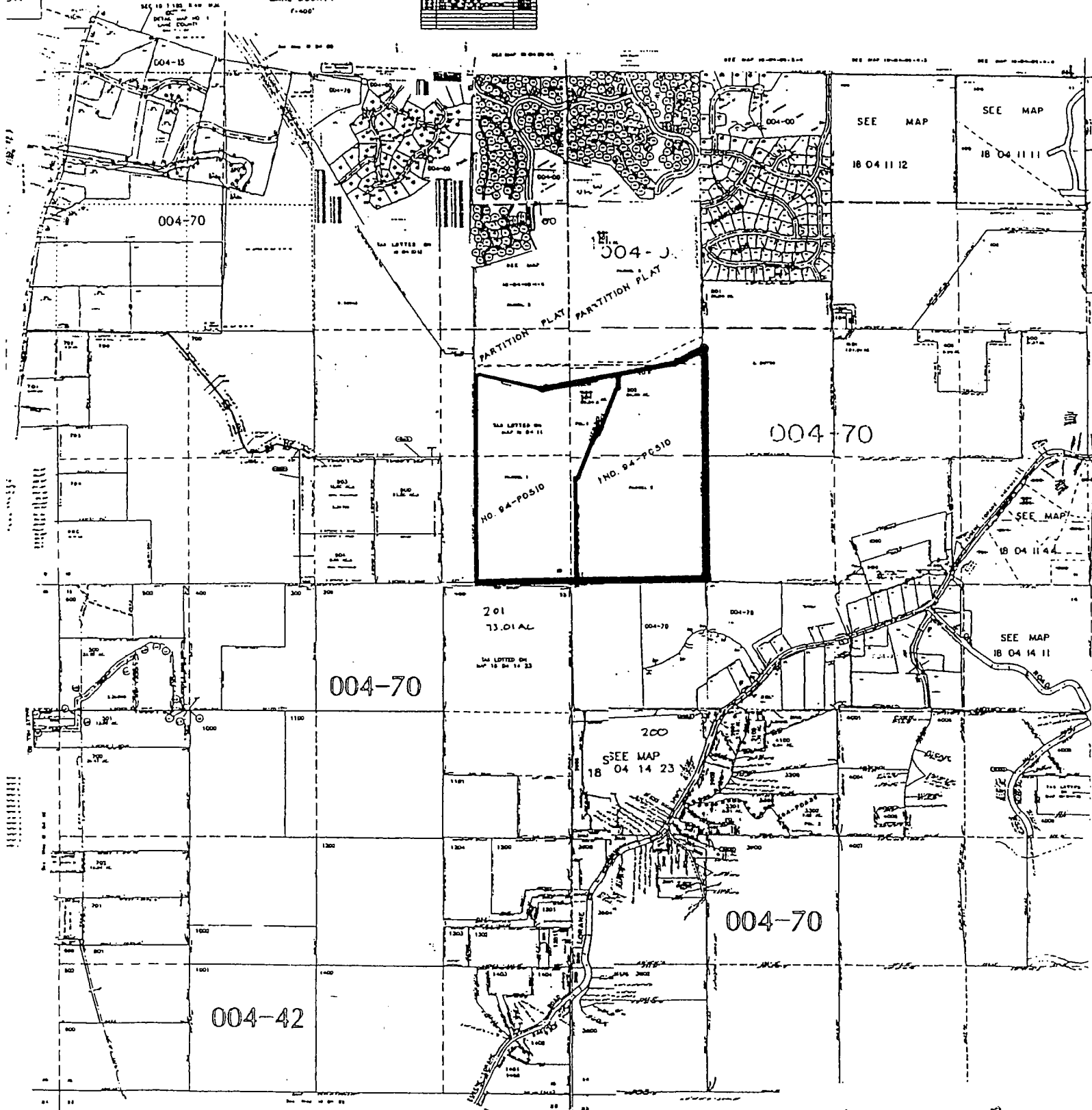
Based on the substantial evidence presented above, the Board of Commissioners finds and concludes that the subject applications for plan amendment and zone change meet and satisfy all of the relevant criteria and hereby are granted approval.

A & T MAP

ENT ON

Section 10 T.18 S. R.4 W.W.M  
LANE COUNTY  
1:400'

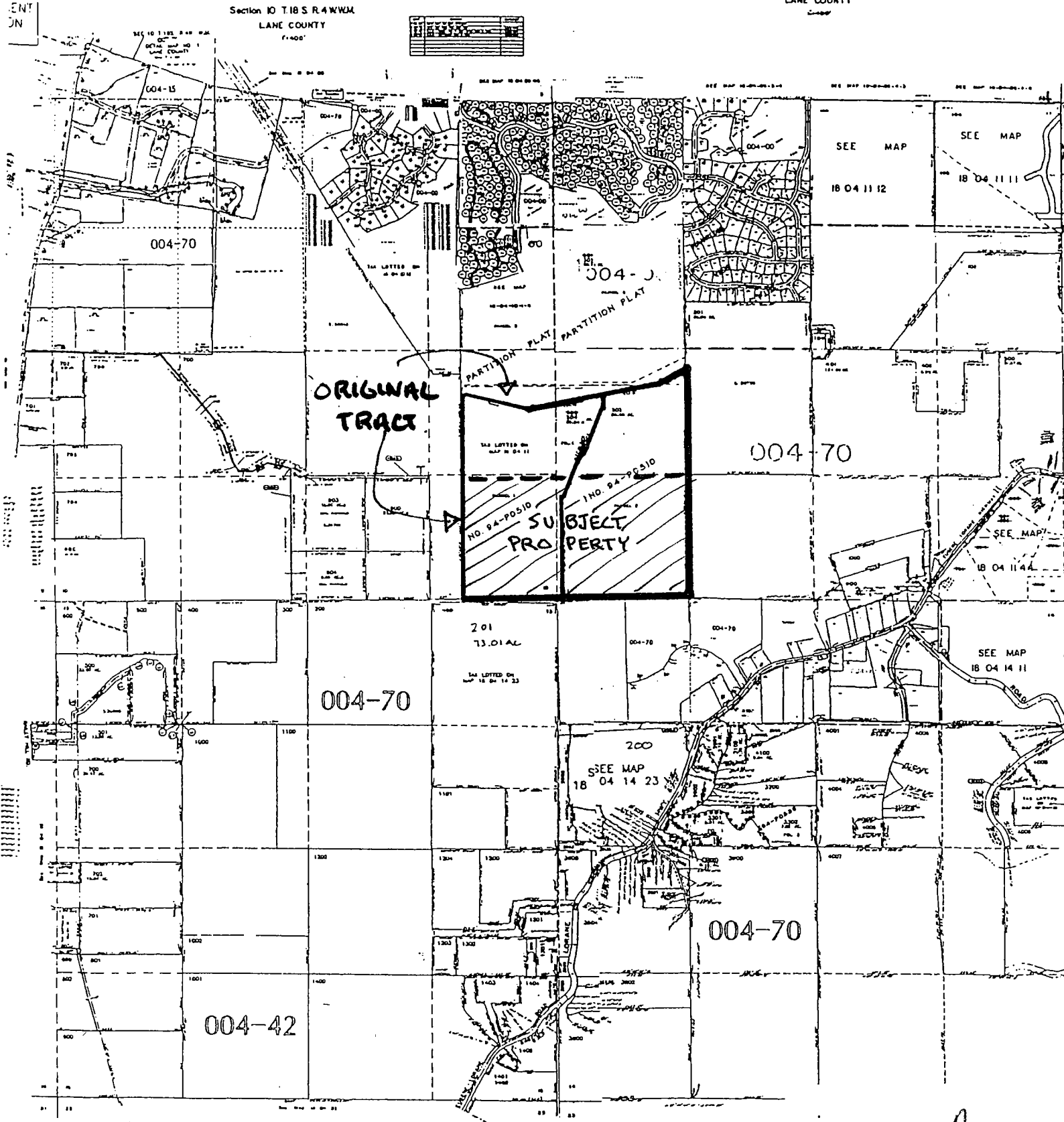
LANE COUNTY  
1:400'

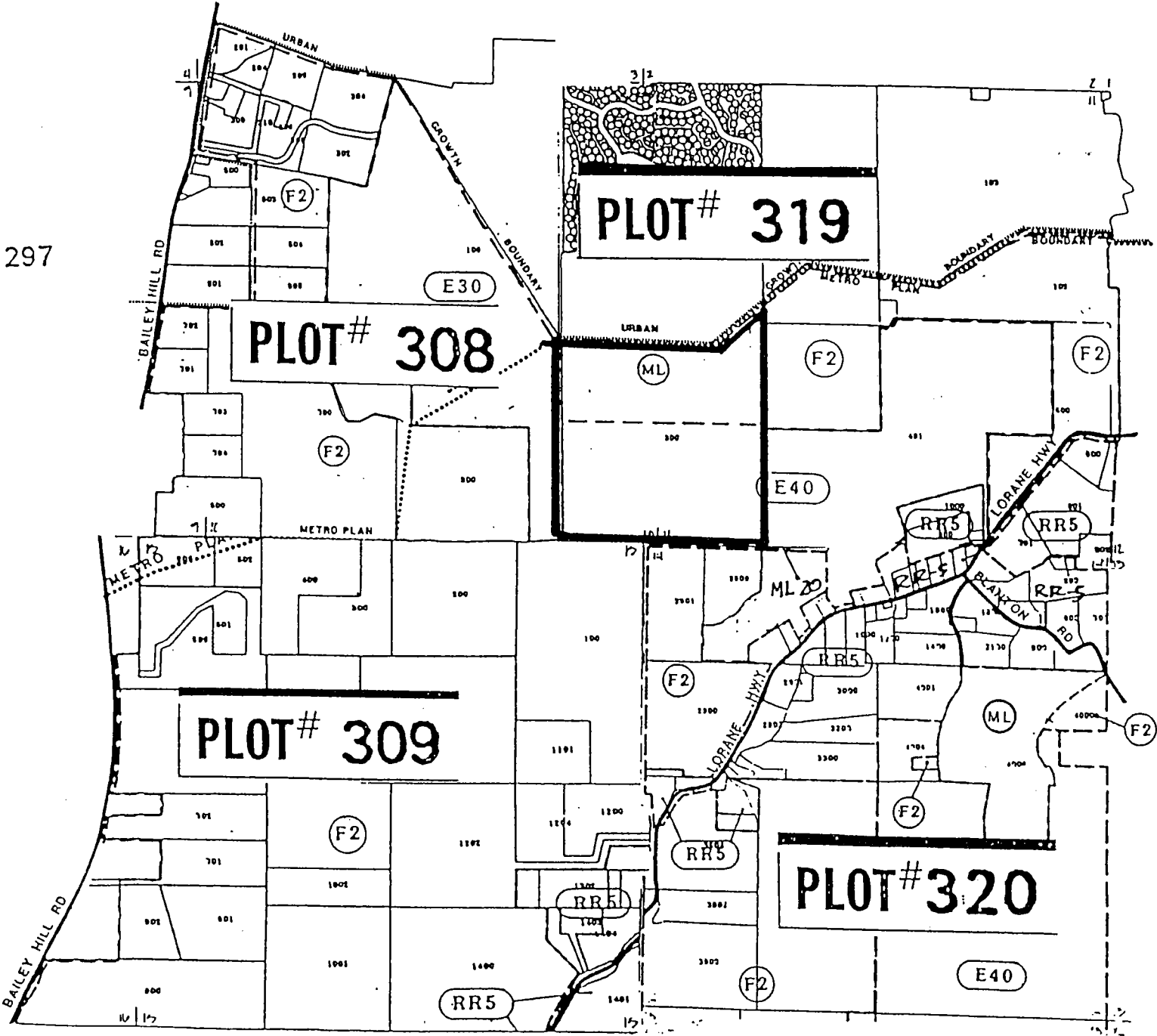
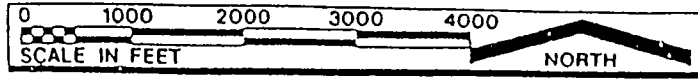



A & T MAP

Section 10 T18S R4WWM  
LANE COUNTY  
1/4-60'

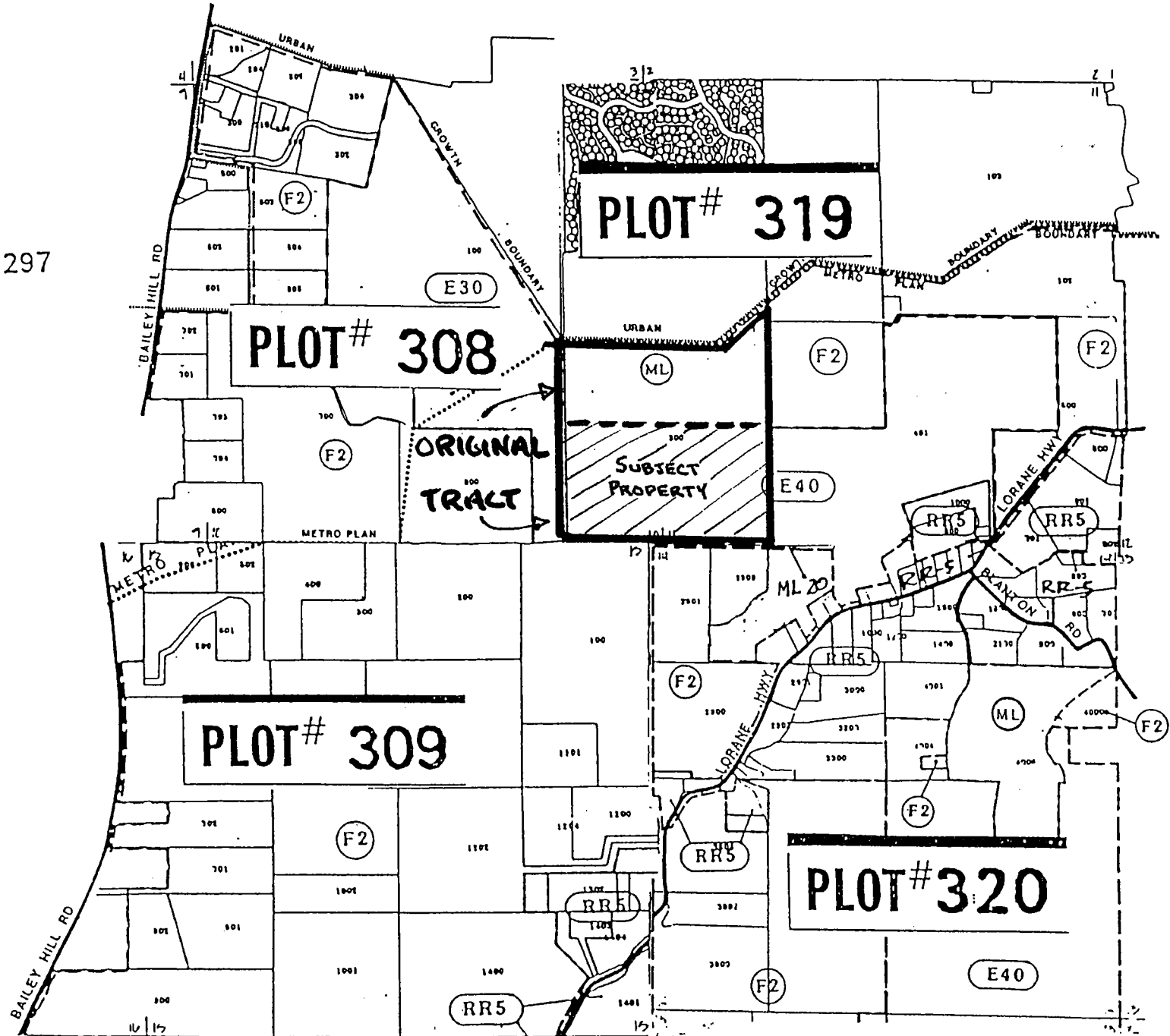
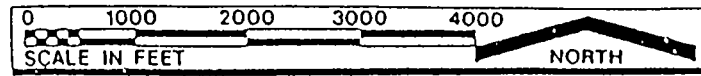
LANE COUNTY  
1/4-60'





297

33

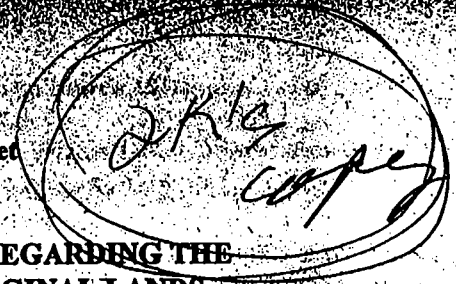


297

30

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

*E. J. King*



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.)

# LANE COUNTY PLANNING COMMISSION

## Staff Report



**Hearing Date: February 7, 2006**

**File PA 05-5985**

LAND MANAGEMENT DIVISION

**Report Date: January 31, 2006**

[http://www.LaneCounty.org/PW\\_LMD/](http://www.LaneCounty.org/PW_LMD/)

### I. PROPOSAL

#### A. Owners/Applicants:

Brad & Julie Ogle (tl 303)  
3103 Timberline Dr.  
Eugene, Or. 97405

Mark & Cindy Childs (tl 304)  
3101 Timberline Dr.  
Eugene, Or. 97405

#### Agent:

Michael Farthing  
767 Willamette St., Suite 203  
Eugene, Or. 97401

#### B. Proposal

Plan Amendment to redesignate 73.74 acres of a 113.74-acre tract of land from "Agricultural Land" to "Marginal Land," and rezone from E-40/Exclusive Farm Use to ML/Marginal Land, pursuant to Lane Code 16.400 and 16.252. If approved, the rezoning would allow the applicants to apply for land divisions of the tract into a mix of ten and twenty-acre parcels, with a dwelling on each. Maximum buildout would be limited, by the aquifer study, to nine total dwellings and parcels. Land division approvals are not part of the proposal before the Planning Commission.

### II. RECOMMENDATION

This proposal appears to meet applicable approval criteria and guidelines. Staff recommends:

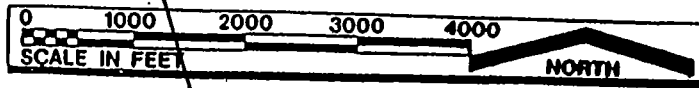
- 1.) Approval of the Plan Amendment from Agricultural land to Marginal Land, and
- 2.) Approval of the Zone change from E-40 to ML, with a limitation to be incorporated into the Board Ordinance of a nine parcel limit.

### III. SITE AND PLANNING PROFILE

#### A. Location

Map 18-04-11, tax lots 303 & 304

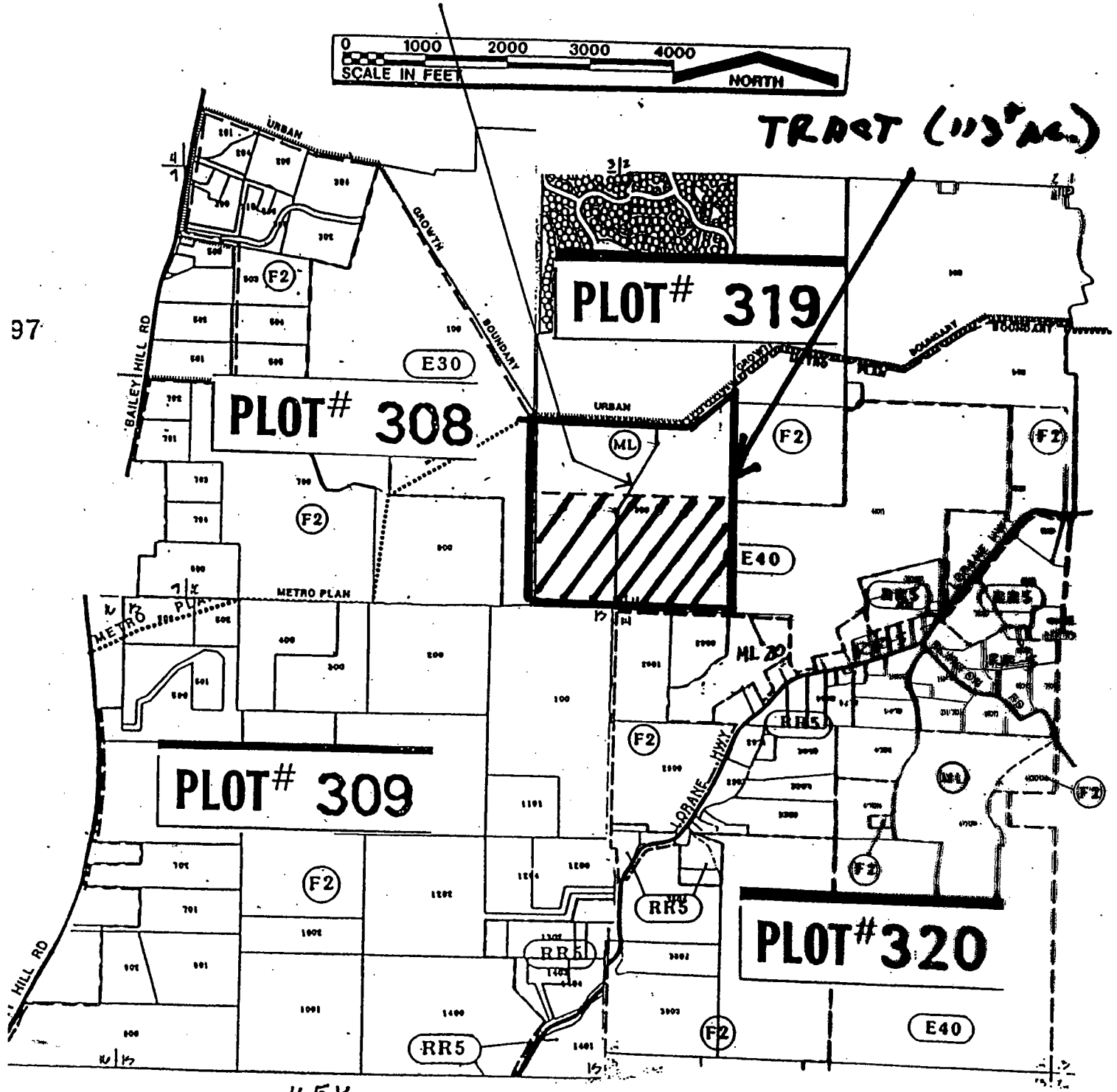
APPROXIMATE  
PARCEL BOUNDARY BETWEEN TAX LOT 303+304.



TRACT (113<sup>+</sup> AC.)

97

33



KEY



← "SUBJECT PROPERTY" (73<sup>+</sup> AC.)

**B. Zoning**

E-40/Exclusive Farm Use. Plot 319

**C. Proposal Summary**

The property, which is subject to this Plan Amendment/Rezone application, consists of 73.7 acres within a 113.7 acre tract of land. The tract is composed of two parcels, which are under separate ownership. Tax lot 304 is parcel #1 of Plat No. 94-P0510, while tax lot 303 is parcel #2 of the same plat. Therefore, within the context of this report, the terms “tax lot” and “parcel” is interchangeable. Refer to the map on the preceding page for the location. In addition, the submittal contains many illustrative exhibits. The submittal was previously mailed to the Planning Commissioners on January 9<sup>th</sup>.

In 1992, via PA 0221-92, the northernmost 40 acres of the tract were successfully changed from E-40 to ML. The present application seeks to rezone the remainder of the tract to ML. This change would allow for a subsequent division of the tract into a mix of 10 or 20-acre parcels, with a dwelling on each. The provided aquifer study concludes sufficient water availability for a maximum of nine dwellings, including the two existing dwellings. This limitation of nine total parcels will be incorporated into the Board ordinance, if approval is granted.

The current application is nearly identical to an earlier one, PA 02-5838, submitted in August, 2002. That application was contested, and later withdrawn by the Applicant after the Board of Commissioners took tentative action to deny the request in December, 2004.

**D. Subject Property & Surrounding Area**

(See map, prior page). The subject tract is found adjacent and south of Eugene’s Urban Growth Boundary, approximately 1/2 mile northwesterly from the intersection of Lorane Highway and Blanton Road. Access is via private easement, linking the tract to Timberline Drive to the north. The tract is at a crest in a ridge, with the majority of the land having a southern exposure. One dwelling is found on each of the two parcels, and is located within the ML zoned portion of the tract.

Aside from the UGB adjacent on the north, the tract is bordered by farm or forest zoned lands, with some ML zoning found adjacent to the southeast.

**E. Services**

Fire: Bailey-Spencer RFPD

Police: County, State

Sewer and Water: On-site

School District: Eugene 4-J

Power: EWEB

Access: Via private easement to Timberline Dr.

## **F. Referral Comments Received**

As of the date of this report, only County Transportation Planners have responded, citing no objection to the request. They note that the subsequent subdivision would be served by a private easement to Timberline Drive. Timberline Drive is within the city and under its jurisdiction.

The present aquifer study is the same as that which accompanied the earlier application. At that time the document was reviewed by the State Watermaster's Office, which concluded that "...the development should not over tax the ground water system." That January 2004 email response is attached to this report.

## **IV. CRITERIA AND ANALYSES**

- A. Marginal Land proposals are primarily governed by the 1991 version of ORS 197.247, attached to this report. In addition, in March 1997, the Lane County Board of Commissioners gave direction to staff on how to interpret and administer ML applications. That four page document is also provided as an attachment.

The agent has recited and addressed the applicable standards, including ORS 197.247, the March 1997 Board document, goals, and Lane Code requirements. Refer to the applicant's submittal for those recitals.

Essentially, qualification for a ML designation is a two-fold test. Any proposal for a ML designation must first comply with the "income test" requirement found in ORS 197.247(1)(a), recited below. It basically requires the applicant to document that the proposed ML land is less than "commercial-grade" stature for farm or forest use during a 5-year period preceding 1983. This examination must include any lands which might have been a part of such farm or forest operation at that time. Since the parcels were not yet created, the entire tract (113 ac.) must be examined.

The second part of the test contains three options, two of which are "parcelization" tests, which have not been selected by the applicant (these are described in the attached ORS 197.247(1)(b)(A) and (B)). Instead, the applicant has chosen the option under ORS 197.247(1)(b)(C), recited below. Commonly known as the "productivity test", the applicant is required to demonstrate that the farm soil capability is predominantly class V-VIII (on a I-VIII scale), and that per acre, the proposed land cannot produce, on average, more than 85 cubic feet of merchantable timber annually.

### **1. Income Tests**

ORS 197.247(1)(a) reads as follows:

**The proposed marginal land was not managed, during three of the five calendar years proceeding 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.**

Farm income standard

Per the direction given in the March 1997 Board document, the applicant has provided an affidavit (Applicant's exhibit "D") from a party who owned the property during the five years preceding 1983, attesting that the proposed marginal land (i.e., the subject property), was not part of a farm operation that produced \$20,000 or more annual gross farm income. Staff accepts this "farm income" portion of the statute test, as it meets the Board directive.

Forest income standard

The forest income test requires that during the same time period, the proposed marginal land was not managed, by itself or in conjunction with other land, as a forest operation, which could generate over \$10,000, gross annual income from timber revenue.

The "proposed marginal land" is tax lots 303 and 304, minus the 40 acres already zoned ML. Unlike for the farm income; the forest income standard is not so easily addressed. The Board offers two options for documenting that the forest test has been met. Refer to the Board direction paper of March 1997.

The first method, not selected by the applicant, is described on the last page of the Board direction paper (under "Soils test"). Instead, the Applicant chose to employ a forester to provide a more specific analysis based on field observations and tree borings. In exhibit "J", the forester, Setchko, concludes that the 113-acre tract was capable of grossing \$5,173 annual, below the \$10,000 limit. See Applicant's Exhibit J, pages 6-8. Staff concurs with Mr. Setchko's conclusion.

In his report, Mr. Setchko also describes why tree species other than Doug fir and Ponderosa pine are not used in the income calculations. The primary reason is that Doug fir brings the best return on the money invested. Ponderosa pine productivity ratings were utilized on the *Philomath* soils, on which they outgrow Doug fir.

Mr. Setchko's notes on the other species include:

- Red cedar: slow growing, site has moisture constraints.
- Incense cedar: slow growing, does not grow in pure stands, volume per acre is low.
- Hemlock: site has moisture constraints, poor soils, not as valuable as Doug fir.
- Grand fir: prefers lowlands and stream valleys with high water tables, not to be found on this site.
- KMX: not a merchantable species (poor market).
- Oak: very slow growth rate, worth less than Doug fir.
- Maple: has large canopies resulting in low volume per acre.
- Hybrid poplar: site is unsuitable due to shallow soils, harsh south/southwest aspect of the site results in harsh growing conditions, needs deep alluvial soils and water.

The income standard appears to have been met.

2. Productivity Test

The applicable portion of ORS 197.247(1)(b)(C) reads as follows:

**(b)(C) The proposed Marginal Land is composed predominantly of soils in capability classes V through VIII in the Agricultural Capability Classification system used by the U.S. Department of Agriculture Soil Conservation Service, and is not capable of producing 85 cubic feet of merchantable timber per acre per year.**

Unlike the income tests, this provision requires an examination of the “proposed Marginal Land” only, meaning the 73.74 acre portion of the 113+ acre tract. The applicant concludes (p.10 of Ex. J) that the productivity is 69.3 cu. ft./ac./year.

It is noted that two power line easements (BPA and EWEB, see Applicant’s Ex. G & H) cross the property. Jim Just of the *Goal One Coalition* had emailed testimony in opposition to this application on 1-24-06. The testimony is labeled “incomplete draft of testimony”, and from voicemail communication with Mr. Just, staff has been informed that the testimony would be further developed and presented at the hearing. As such, and because some of the documents referenced in the email were not attached, no comments on that testimony is offered at this time, with the following exception. Mr. Just noted a recent LUBA case, *Wetherell v. Douglas County* (LUBA No. 2005-075, 9-30-05, at slip op 17), where LUBA indicated (in dicta) that land under such easements should not be excluded from productivity calculations. Staff notes that Mr. Setchko provided two tables of productivity calculations. The first (p.10 of Ex. J) includes the land within the easements; the second (p.11) gives those 9.13 acres of land a zero productivity rating. While both tables meet the test, staff is disregarding the second table in deference to the LUBA case. Mr. Just’s draft testimony is attached to this report. Staff may offer responses when the final draft is provided.

It is noted that ORS 197.247(1)(b)(C) contains the phrase “merchantable timber”. When a word, such as merchantable, is not defined in the Lane Code, the code directs us to *Webster’s Third New International Dictionary*, (1981, excerpt attached to this report), which defines the word in part as:

*Merchantable: of commercial quality: acceptable to buyers: salable.*

Mr. Setchko discusses the merchantability issue throughout his report, concluding (for reasons already noted above) that species other than Doug fir and Ponderosa pine are not desirable from a marketing standpoint.

The “productivity test” appears to have been met.

In addition to ORS 197.247, any plan amendment must address state and local laws, including state goals.

Regarding Goal 5, water resources, it is noted that the subject property is within a water quality/quantity limited area (Spencer Creek watershed) per LM. 13.010. As required by LC 16.004(4) and LC 13.050(13), the applicant has provided an aquifer study performed by EGR & Associates. The study concludes domestic water availability for up to nine domestic wells. While the Watermaster's Office expressed discontent at how the report was written, it concluded that the ground water system would not be taxed by the proposal. As stated previously, if this proposal is approved, a limitation of nine maximum parcels out of the 113+ acre tract would be incorporated into the Board ordinance.

The remainder of the submittal and exhibits satisfactorily address compliance with the code aspects such as: fulfilling the purpose of the ML zone as found in LC 16.214(1); the Plan Amendment requirements of LC 16.400; and the rezone requirements of LC 16.252. Staff agrees with the statements as presented.

#### **IV. CONCLUSIONS**

##### **A. Summary Comments**

The proposal appears to meet state and local regulations. Approval of the request is recommended.

##### **B. Attachments to this Staff Report (in addition to the map on the 2<sup>nd</sup> p.)**

1. ORS 197.247 (1991 version)-1p.
2. March 1997 Supplement to ML Information Sheet—4pp.
3. Draft testimony from the Goal One Coalition—7pp.
4. Excerpt from Webster's dictionary for "merchantable"-1pp.
5. Watermaster's response to aquifer study—1p.
6. Applicant's statement with exhibits (previously mailed to the LCPC on 1-9-06).

##### **C. Materials to be part of the Record**

1. This staff report and attachments.
2. File PA 02-5838 and PA 0221-92



**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 para-

graph, 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