

IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

**FILED**

A. ~~ORDINANCE NO. PA 954~~ )

AUG 4 1988

) IN THE MATTER OF REPEALING ORDINANCE  
) NO. PA 944, AMENDING THE RURAL  
) COMPREHENSIVE PLAN DESIGNATION AND  
) ZONING FOR TAX LOT 3802, MAP  
) 18-04-13 (FILE #PA 3192-85;  
) TIMBERLANE-ROBBINS)

County Clerk  
For Lane County, Oregon

BY

*[Signature]*

WHEREAS, the Lane County Board of Commissioners adopted Ordinance No. PA 944, amending the Lane County Rural Comprehensive Plan land use designations and zoning for certain lands within the jurisdiction of the Lane County Rural Comprehensive Plan; and

WHEREAS, Daniel M. Holland appealed the adoption of Ordinance No. PA 944 to the Oregon Land Use Board of Appeals; and

WHEREAS, the Oregon Land Use Board of Appeals remanded the appeal to Lane County by a Final Opinion and Order of Remand entered on April 13, 1988, a copy of which is attached as Exhibit "A" and incorporated herein.

NOW, THEREFORE, THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON, ORDAINS AS FOLLOWS:

1. Ordinance No. PA 944, amending the Rural Comprehensive Plan designation and zoning for tax lot 3802, Map 18-04-13, as enacted by the Board of County Commissioners on November 4, 1987, is hereby repealed.

2. The Rural Comprehensive Plan designation and zoning in effect prior to enactment of Ordinance No. PA 944 shall be revived and shall continue and remain in full force and effect on the effective date of this Ordinance, and thereafter until amended.

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 affect the validity of the remaining portions hereof.

Enacted this 3 day of August, 1988.

*[Signature]*  
Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 08-24-88 lane county  
*[Signature]*  
OFFICE OF LEGAL COUNSEL

*[Signature]*  
Recording Secretary for this Meeting of the Board

1 - IN THE MATTER OF REPEALING ORDINANCE NO. PA 944, AMENDING THE RURAL COMPREHENSIVE PLAN DESIGNATION AND ZONING FOR TAX LOT 3802, MAP 18-04-13 (FILE #PA 3192-85; TIMBERLANE-ROBBINS).

LAND USE BOARD OF APPEALS

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

APR 13 3 46 PM '88

1 DANIEL M. HOLLAND, )  
 2 )  
 3 )  
 4 )  
 5 )  
 6 )  
 7 )  
 8 )  
 9 )  
 10 )  
 11 )

          Petitioner, )  
 vs. )  
 LANE COUNTY, )  
 Respondent, )  
 and )  
 TIMBERLANE LUMBER CO., an )  
 Oregon corporation, )  
 Participant- )  
 Respondent. )

LUBA No. 87-106  
FINAL OPINION  
AND ORDER

12 Appeal from Lane County.

13 Joseph J. Leahy, Springfield, filed the petition for review  
14 and argued on behalf of petitioner. With him on the brief was  
Harms, Harold, Leahy & Pace.

15 Bill Kloos, Eugene, filed a response brief and argued on  
16 behalf of Participant-Respondent Timberlane Lumber Company.  
With him on the brief was Johnson & Kloos.

17 No appearance by Lane County.

18 SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee;  
19 participated in the decision.

20 REMANDED 04/13/88

21 You are entitled to judicial review of this Order.  
22 Judicial review is governed by the provisions of ORS 197.850.  
23  
24  
25  
26

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals Lane County Ordinance No. PA 944  
4 amending the Lane County Rural Comprehensive Plan (plan)  
5 designation for a 62 acre parcel from Forest to Nonresource and  
6 rezoning the parcel from Impacted Forest Land (F-2) to Rural  
7 Residential - 5 Acre Minimum (RR-5) and Rural Residential - 10  
8 Acre Minimum (RR-10).

9 FACTS

10 Participant-respondent Timberlane Lumber Co. (respondent)  
11 applied for a plan map amendment from Forest to Nonresource and  
12 a zone change from F-2 to RR-5 for the subject 62 acre parcel.  
13 The parcel contains, near its western end, one dwelling  
14 approved by the county as a forest-related residence.

15 The urban growth boundary and city limits of the City of  
16 Eugene are contiguous with the eastern property line of the  
17 subject 62 acre parcel. Land adjoining the parcel to the east  
18 is zoned for urban residential use. There is one 9 acre parcel  
19 zoned RR-5 adjoining the subject parcel to the north. The  
20 remaining land adjoining the subject parcel to the north, west  
21 and south is comprised of large (34-80 acre) parcels zoned F-2  
22 or Exclusive Farm Use (E40).

23 On November 4, 1987, the Lane County Board of Commissioners  
24 adopted Ordinance No. PA 944, which provides that "upon  
25 satisfying all of the Conditions of Approval" imposed by the  
26 board of commissioners, the plan designation for the 62 acre

1 parcel is amended from Forest to Nonresource and the zoning  
2 designation is changed from F-2 to RR-5 for the eastern 15  
3 acres of the parcel and to RR-10 for the western 47 acres of  
4 the parcel.

5 FIRST ASSIGNMENT OF ERROR

6 "Respondent County erred in finding that the subject  
7 property is not forest land as defined by Goal 4, and  
8 therefore need not be retained for the production of  
9 wood fiber and other forest uses."

9 A. Interpretation of Applicable Standard

10 Petitioner argues the county's decision violates Statewide  
11 Planning Goal 4 (Forest Lands) because the county did not  
12 properly determine that the subject parcel is not "suitable for  
13 commercial forest uses." Petitioner contends the county  
14 improperly applied its plan definition of "commercial forest  
15 land" in making this determination by interpreting it to  
16 encompass only potential for production of Douglas fir.  
17 According to petitioner, land is "commercial forest land," as  
18 defined in the plan, if it has the capability or potential to  
19 produce 50 or more cubic feet per acre per year of any  
20 industrial wood fiber, not just Douglas fir.

21 Respondent counters with alternative arguments. First,  
22 respondent argues the county may interpret its plan definition  
23 of "commercial forest land" as encompassing only production of  
24 Douglas fir, because the plan "was acknowledged [by LCDC] using  
25 only Douglas fir as the indicator species." Respondent's Brief  
26 at 9. Second, respondent argues that the county did not

1 interpret and apply its plan definition as concerning only  
2 suitability for Douglas fir, as the county's findings make no  
3 mention of Douglas fir.

4 The Goal 4 definition of "forest lands" includes:

5 "(1) lands composed of existing and potential forest  
6 lands which are suitable for commercial forest uses;"

7 The county's decision concludes that the subject property is  
8 not suitable for commercial forest use "because the majority of  
9 the soils do not qualify as Commercial Forest Land."  
10 Record 16.<sup>1</sup>

11 The county adopted the following definition of "commercial  
12 forest land" as part of its "Working Paper: Forest Lands;  
13 March, 1982" (Forest Lands Paper) and "Addendum to Working  
14 Paper: Forest Lands; November, 1983" (Forest Lands Addendum)  
15 documents:<sup>2</sup>

16 "'Commercial' forest land [is] land capable of  
17 producing crops of industrial wood in excess of 50  
cubic feet per acre of annual growth."

18 Ordinance No. PA 889, Ex. C. The Forest Lands Paper, at p. 10,  
19 contains an inventory of "Acres of Commercial Forest Land by  
20 Cubic Foot Site Class, Forest Type and Ownership." This table  
21 recognizes the following commercial forest types -- "Douglas  
22 fir," "hemlock/cedar/spruce," "other conifers" and  
23 "deciduous." Respondent cites no language in the plan or  
24 implementing ordinances which supports its contention that  
25 Douglas fir is the sole indicator species for determining  
26 whether land is "commercial forest land." We therefore

1 conclude that the county's definition of "commercial forest  
2 land" cannot be interpreted as encompassing only Douglas fir  
3 production.

4 However, we agree with respondent that there is no basis in  
5 the county's decision for concluding that it did interpret its  
6 "commercial forest land" definition as applying only to Douglas  
7 fir production. As respondent has pointed out, there is no  
8 reference to Douglas fir production in the county's findings  
9 addressing this criterion. See Record 12-13, 16. We therefore  
10 conclude that the county properly interpreted its "commercial  
11 forest land" definition as including production of any  
12 industrial tree species.<sup>3</sup>

13 This subassignment of error is denied.

14 B. Substantial Evidence

15 Petitioner argues the county's decision that the property  
16 is not suitable for commercial forest uses is not supported by  
17 substantial evidence in the record. Petitioner argues the data  
18 demonstrating that the soil types found on the property lack  
19 suitability for timber production is not substantial evidence  
20 in light of other evidence in the record regarding current and  
21 past tree stocking and growth on the site and the owner's 1985  
22 county-approved forest management plan. Petitioner also  
23 contends the record does not contain substantial evidence that  
24 the majority of the property is not suitable for production of  
25 50 or more cubic feet per acre per year of industrial wood  
26 other than Douglas fir.

1 Substantial evidence is evidence which a reasonable mind  
2 could accept as adequate to support a conclusion. Braidwood v.  
3 City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den  
4 (1976). See also, Christian Retreat Center v. Comm. for Wash.  
5 Co., 28 Or App 673, 679, 560 P2d 1100, rev den (1977). When we  
6 review the evidentiary support for a local government decision,  
7 we must determine whether, in light of all the evidence in the  
8 record, the decision is reasonable. Younger v. City of  
9 Portland, \_\_\_ Or \_\_\_, \_\_\_ P2d \_\_\_ (March 29, 1988).

10 To the extent petitioner makes a general argument that data  
11 on soil capability cannot constitute substantial evidence to  
12 support the county's productivity determination in light of  
13 contrary evidence in the record based on observations of  
14 current tree stocking and growth on the site, we must  
15 disagree. We cannot, as a matter of law, say that evidence of  
16 a commercial level of wood production based on current tree  
17 growth and stocking inherently so detracts from the weight of  
18 contrary credible evidence based on soil capabilities as to  
19 render the soil data not substantial.<sup>4</sup> See Universal Camera  
20 Corp. v. Labor Bd., 340 US 474, 488, 71 S Ct 456, 95 L Ed 456  
21 (1951); Sane Orderly Development v. Douglas County Bd of  
22 Comm'rs, 2 Or LUBA 196, 206 (1981).

23 Petitioner also argues that the evidence in the record in  
24 this case does not support the county's determination that the  
25 subject property is not suitable for commercial forest  
26 production of species other than Douglas fir.<sup>5</sup> We must

1 therefore determine whether the county's conclusion that the  
2 "majority of the soils do not qualify as Commercial Forest  
3 Land" is supported by substantial evidence that the majority of  
4 the property is not suitable for production of 50 or more cubic  
5 feet per acre per year of industrial wood other than Douglas  
6 fir.

7 The county bases its decision on two mappings of the soils  
8 on the subject property, a general survey by the U.S. Soil  
9 Conservation Service (SCS survey) and a detailed 1981 soil  
10 survey by consulting soil scientist Steve Wert (Wert survey).  
11 The soil types identified by the two surveys are different.  
12 The county's findings state that "under either survey the  
13 majority of the soil [sic] on the property do not qualify as  
14 Commercial Forest Lands." Record 12. Therefore, we will  
15 consider whether there is substantial evidence in the record to  
16 support the county's decision, based on either survey.

17 1. SCS Survey

18 The SCS survey shows that the soils on the subject property  
19 are 55% Witzel very cobbly loam and 45% Dixonville-Philomath-  
20 Hazelair complex. Record 10. With regard to the Witzel soil,  
21 the county's findings state:

22 "Although Witzel is rated at Cubic Foot Site Class 4,  
23 it is not suited to commercial wood production because  
24 special limitations restrict sustained productivity.  
25 Witzel is noted as a marginal forest soil because  
'droughtiness and shallow rooting cause rapid decline  
after 30 years.' Lane County Soils, Farmland/Woodland  
(S.C.S. 1982) at 50." Record 12.

26 \* \* \* \* \*

1 "Under the proposed Soil Potential Rating System, both  
2 the Witzel as well as the Dixonville-Philomath-  
3 Hazelair complex are rated as 'Low' Woodland Grade in  
order to reflect these special limitations on  
sustained productivity." Record 13.

4 A Cubic Foot Site Class 4 rating equates to a potential  
5 annual yield of 85-119 cubic feet per acre.<sup>6</sup> Forest Lands  
6 Paper, App. II. Thus, the findings state that Witzel soil is  
7 rated as having a productivity which meets the county's  
8 commercial forest land definition, but nevertheless is not  
9 suitable for commercial forest use because "special limitations  
10 restrict sustained productivity."<sup>7</sup> Record 12.

11 The only evidence in the record on the capabilities of  
12 Witzel soil to which our attention has been directed is Steve  
13 Wert's 1985 addendum (Wert addendum) to his 1981 survey. Wert  
14 concludes that Witzel soil "just barely qualifies as a forest  
15 site" under the county's commercial forest land definition.  
16 Record 191. This evidence supports only a conclusion that  
17 Witzel soil does meet the county definition of commercial  
18 forest land.

19 The county's conclusion that Witzel soil is not suited to  
20 commercial forest production is not supported by substantial  
21 evidence in the record. Because the SCS survey finds Witzel  
22 soil comprises 55% of the subject property, this means that the  
23 county's decision that a majority of the soils on the property,  
24 as mapped by the SCS survey, do not qualify as commercial  
25 forest land is also not supported by substantial evidence in  
26 the record.<sup>8</sup>

1           2.   Wert Survey

2           The Wert survey, as adopted in the county's findings,  
3 identifies 18 different soils on the subject property and gives  
4 the acreage and percent of total area for each.<sup>9</sup> Record  
5 10-11. The county's conclusion that the majority of these  
6 soils do not qualify as "commercial forest land" is based on  
7 the following findings:<sup>10</sup>

8           According to the detailed soil survey, Steve Wert  
9 found little, if any, Witzel on the property. 69  
10 percent of the soils were classified as unsuited for  
11 wood production, 16.6 percent were classified as  
12 marginally suited, and only 14.4 percent were  
13 classified as suited for wood production. Marginal  
14 woodland is defined by Mr. Wert as soils capable of  
15 supporting a stand of timber but where the costs of  
16 establishing such a stand preclude profitable  
17 returns." Record 13.

18           The county's conclusion that a majority of the soils do not  
19 meet its commercial forest land definition is dependent on its  
20 determination that 69 percent of the soils are unsuited for  
21 wood production.<sup>11</sup> Petitioner challenges the county's  
22 determination of unsuitability with regard to three soil types  
23 -- (1) Dixonville-Dupee complex, 30-40% slopes (12.1% of total  
24 acreage); (2) Dupee, 20-30% slopes (0.3% of total); and (3)  
25 Dupee-Hazelair complex, 20-35% slopes (24.2% of total). The  
26 challenged soil types total 36.6% of the total acreage. Thus,  
without the challenged soil types, the county would only be  
able to conclude that 34.2% of the soils are unsuitable.

          The 1981 Wert study concludes only that these soils are not  
suited for commercial management of Douglas fir.<sup>12</sup> The 1981

1 Wert study states that Dixonville soil will support Douglas fir  
2 and Hazelair soil will not support Douglas fir, but makes no  
3 mention of other commercial species. Record 178. The study  
4 also states that Dupee soil will "barely" support Douglas fir,  
5 but is "better suited to Ponderosa Pine." id. Thus, the 1981  
6 Wert survey does not contain evidence that the challenged soil  
7 types are not suitable for commercial production of wood other  
8 than Douglas fir.<sup>13</sup>

9 The 1985 Wert addendum contains the following evidence  
10 concerning Dupee soils:

11 "Someone might argue that Dupee should be considered a  
12 forest site. In some areas of Lane County the Dupee  
13 soil will grow Ponderosa Pine. On the subject parcel  
14 Dupee has a seasonal water table at 14" which is  
15 closer to the surface than most Dupees. In my opinion  
16 the cost of clearing the site, controlling vegetation,  
17 and the planting costs do not warrant trying to  
18 reforest Dupee." Record 190.

19 These statements do not support a conclusion that Dupee soil is  
20 not capable of producing more than 50 cubic feet per acre per  
21 year of Ponderosa Pine or other non-Douglas fir commercial  
22 species.

23 Respondent also relies on evidence in the record concerning  
24 the SCS's productivity ratings for the three challenged soil  
25 types. Respondent's June, 1987 "Soils Summary" chart for the  
26 subject property, based on the 1981 Wert soil mapping, listed  
the three challenged soil types as cubic foot site class 4  
(which satisfies the county's commercial forest land  
definition). Record 361-362. The chart notes that cubic foot

1 demonstrate that the challenged soil types do not meet the  
2 county's productivity standard for commercial forest land. One  
3 is that it does not establish that the SCS standard for  
4 "producing commercial trees" is the equivalent of the county's  
5 50 or more cubic feet per acre per year.<sup>14</sup> Thus, soils  
6 capable of producing 50 or more cubic feet per acre per year of  
7 industrial wood might not be shown as having woodland  
8 suitability on SCS OR-SOILS-1 sheets. The other problem is  
9 that the Dupee and Hazelair mapping units for which there are  
10 OR-SOILS-1 sheets in the record do not exactly correspond to  
11 the three challenged mapping units.<sup>15</sup>

12 Furthermore, even if we could assume that a soil rated by  
13 the SCS as having no woodland suitability does not meet the  
14 county's commercial forest lands definition, there is  
15 conflicting evidence in the record as to whether the SCS rates  
16 the three challenged soils as having no woodland suitability.  
17 As previously stated, the OR-SOILS-1 sheets are inconclusive.  
18 Respondent's attorney testified that an SCS forester told him  
19 that Dupee and Hazelair soils are not considered woodland  
20 soils. Record 194. The professional forester testifying on  
21 behalf of petitioner stated that current SCS data verifies that  
22 the challenged soil types are cubic foot site class 4. Record  
23 54. The county's own findings, quoting an SCS soil scientist,  
24 state that Hazelair soil is "Site Class IV" (which can  
25 correspond to a cubic foot site class of 2-5, depending on the  
26 species for which the site class is measured). Record 13.

1 Based on the evidence in the whole record, as described  
2 above, we find that there is not substantial evidence in the  
3 record to support a determination that the three challenged  
4 soil mapping units are incapable of producing 50 or more cubic  
5 feet per acre per year of industrial wood other than Douglas  
6 fir. Therefore, the county's decision that the subject  
7 property is not suitable for commercial forest use because a  
8 majority of soils on the subject property, as mapped by the  
9 Wert survey, do not qualify as "commercial forest land" is not  
10 supported by substantial evidence in the whole record.

11 The first assignment of error is sustained, in part.

12 SECOND ASSIGNMENT OF ERROR

13 "Respondent County erred in failing to comply with  
14 Goal 14."

15 A. Conversion of Rural Land to Quasi-Urban Land

16 Petitioner argues that the county decision converts "rural  
17 land" to "quasi-urban land" in violation of Statewide Planning  
18 Goal 14 (Urbanization). Petitioner argues that, after  
19 acknowledgment of the county's plan and land use regulations,  
20 land can only be "rural" if it is designated as resource land  
21 or an exception to a resource goal is adopted.<sup>16</sup> Therefore,  
22 petitioner contends the county's decision converted the subject  
23 property to "quasi-urban land." According to petitioner, the  
24 county's decision creating quasi-urban land outside an urban  
25 growth boundary (UGB) required an exception to Goal 14.

26 The Statewide Planning Goals define "rural land" as follows:

1 "Rural lands are those which are outside the urban  
2 growth boundary and are:

3 "(a) Non-urban agricultural, forest or open space  
4 lands or,

5 "(b) Other lands suitable for sparse settlement, small  
6 farms or acreage homesites with no or hardly any  
7 public services, and which are not suitable,  
8 necessary or intended for urban use."

9 Under this definition, land outside a UGB is "rural land"  
10 if it meets either part (a) or (b) of the definition.  
11 Petitioner argues that, as a matter of law, land outside a UGB  
12 cannot be "rural land" unless it is designated as resource land  
13 or is the subject of an exception to a resource goal. This  
14 argument appears to be based on the following discussion by the  
15 Supreme Court, in 1000 Friends of Oregon v. LCDC (Curry Co.),  
16 301 Or 447, 500, 724 P2d 268 (1986), of the nature of "rural  
17 land" and "quasi-urban land:"

18 " \* \* \* 'Rural land' is of the two types described by  
19 parts (a) and (b) of the definition. The 'something  
20 in between' 'rural land' and 'urban land' is obviously  
21 'urbanizable land,' that land within the UGB which has  
22 not yet been converted to 'urban uses.' The  
23 'something in between' rural resource lands (part (a)  
24 of definition) and 'urbanizable land' is 'part (b)'  
25 rural land, that land excepted from resource uses but  
26 not included within a UGB. The 'something in between'  
27 'part (b)' rural land and 'urbanizable land' is the  
28 same thing that LCDC calls 'quasi-urban' land."<sup>17</sup>

29 Petitioner focuses on the court's description of "part (b)"  
30 rural land as "that land excepted from resource uses but not  
31 included within a UGB" (emphasis added). Petitioner believes  
32 the consequence of the quoted statement is that the subject  
33 property cannot be "part (b)" rural land since no exception

1 from a resource goal was adopted; and, therefore, the county's  
2 decision necessarily must have converted the property to  
3 "quasi-urban" land.

4 We believe petitioner reads too much into the court's  
5 above-quoted description of "part (b)" rural land. The court's  
6 discussion in 1000 Friends of Oregon v. LCDC (Curry Co.)  
7 applied to a portion of some 4,000 acres of land for which the  
8 county had adopted exceptions to Goals 3 and/or 4. 1000  
9 Friends contended that an exception to Goal 14 was required as  
10 well. Id. at 462. In that case, the court was not concerned  
11 with "non-resource" land (land which meets neither Goal 3's  
12 definition of "agricultural land" nor Goal 4's definition of  
13 "forest land").

14 "Non-resource" land may be designated and zoned for  
15 non-agricultural and non-forest uses without an exception to  
16 Goals 3 or 4. "Non-resource" land outside a UGB is "part (b)"  
17 rural land if it is not designated or zoned to allow "urban" or  
18 "quasi-urban" uses. In this case, the county found that its  
19 decision would not allow "urban uses" on the subject property,  
20 stating that the approved residential density and level of  
21 services would be rural in character. Record 24-25.  
22 Petitioner has not challenged these findings or explained why  
23 the uses allowed by the county's decision, under its RR-10 and  
24 RR-5 zoning districts, should be considered "urban" in nature.

25 We cannot say, as a matter of law, the county's decision  
26 converted the subject property to "quasi-urban" land. This

1 subassignment of error is denied.

2 B. Impact on Urban Growth Boundary

3 Petitioner also argues that the Goal 14 prohibition against  
4 urbanization of rural land required the county to consider the  
5 impact of its decision on the adjacent UGB and the utilization  
6 of land within it, citing 1000 Friends of Oregon v. Clackamas  
7 County, 3 Or LUBA 316, 327 (1981).

8 Respondent argues that 1000 Friends of Oregon v. Clackamas  
9 County is inapplicable to this decision because of differences  
10 in the scale of the redesignations involved (1000 versus 6  
11 potential additional dwellings), the minimum size of the lots,  
12 the services available and the conditions imposed. In the  
13 alternative, respondent argues that the county's findings and  
14 conditions meet the requirement of 1000 Friends of Oregon v.  
15 Clackamas County.

16 In 1000 Friends of Oregon v. Clackamas County, supra, we  
17 held that Goal 14 required a county to consider the impact of  
18 its action on a nearby UGB when it designated and zoned large  
19 areas of rural land for one-, two- and five-acre residential  
20 development. We reached a similar conclusion in Metropolitan  
21 Serv. Dist. v. Clackamas Cty., 2 Or LUBA 300, 307 (1981)  
22 (2.5-acre lot subdivisions 0.5 to 1.5 miles from a UGB). We  
23 believe the requirement to address the impact of proposed  
24 development on the UGB also applies in this case, where the  
25 county has approved five- and ten-acre residential zoning, but  
26 with a requirement for development by cluster subdivision,<sup>18</sup>

1 immediately adjacent to a UGB.

2 The county's findings state that a distinction between lots  
3 on the subject property and lots within the UGB will be  
4 retained, based on (1) minimum lot size; (2) maximum  
5 residential density; (3) level of services available; and (4)  
6 conditions imposed on development.<sup>19</sup> Record 25. However,  
7 the findings do not explain how this distinction between lots  
8 affects the impact of the allowed development on the UGB.  
9 Similarly, the other portions of the decision to which we are  
10 directed by respondent do not discuss the impacts of the  
11 development potentially allowed by this decision on the  
12 adjacent UGB.

13 This subassignment of error is sustained.

14 The second assignment of error is sustained, in part.

15 THIRD ASSIGNMENT OF ERROR

16 "Respondent County erred in failing to comply with  
17 Lane Code Section 16.004(4), which mandates: 'All  
18 requirements to affirmatively demonstrate adequacy of  
19 long term water supply must be met' 'prior to the  
20 zoning or rezoning of land.'"

19 Lane Code (LC) 16.004(4) provides as follows:

20 "Prior to the zoning or rezoning of land under this  
21 Chapter, which will result in the potential for  
22 additional parcelization, subdivision or water demands  
23 \* \* \* all requirements to affirmatively demonstrate  
24 adequacy of long-term water supply must be met as  
25 described in LC 13.050(13)(a)-(d)."

24 Petitioner argues that the county violated LC 16.004(4) by  
25 adopting an ordinance approving the rezoning of the subject  
26 property to RR-10 and RR-5 without a demonstration of the

1 long-term adequacy of the water supply. According to  
2 petitioner, LC 16.252(8)<sup>20</sup> does not authorize the county to  
3 condition the effectiveness of an approved zone change on a  
4 subsequent demonstration of the adequacy of long term water  
5 supply. Petitioner asserts that under the terms of the  
6 county's decision there will be no process or appeal provided  
7 by which petitioner will be able to challenge the county's  
8 eventual determination on the adequacy of the water supply for  
9 the approved residential development of the subject property.

10 Respondent replies that the county's decision does not  
11 violate LC 16.004(4) because the challenged ordinance provides  
12 that the rezoning will not occur until the requirement of LC  
13 16.004(4) is satisfied. Record 4, 6. Respondent does not  
14 identify the procedures required of the county in determining  
15 compliance with this condition of approval, but argues that,  
16 because of the presumption of administrative regularity  
17 applying to local government actions, it must be assumed that  
18 the county will follow applicable procedures.

19 The county's ordinance states that "upon satisfying all of  
20 the Conditions of Approval \* \* \* the Board of Commissioners  
21 Ordains" that the plan and zone maps are amended with regard to  
22 the subject property.<sup>21</sup> Record 4. The third of the attached  
23 "Conditions of Approval" provides:

24 "The applicant shall affirmatively demonstrate the  
25 adequacy of long-term water supply on the property  
26 pursuant to the requirements of Lane Code 13.050(13)  
(a)-(d) within 90 days of this decision. Rezoning to  
Rural Residential is expressly conditioned on

1 compliance with the specific requirements of Lane Code  
2 13.050(13)(c)(i), including water quality and aquifer  
tests." Record 6.

3 Thus, under the terms of the challenged ordinance, the  
4 rezoning will not actually occur until compliance with LC  
5 13.050(13) has been demonstrated.<sup>22</sup> The decision, therefore,  
6 does not violate LC 16.004(4).

7 However, the county cannot defer consideration of  
8 compliance with this mandatory zone change approval criterion  
9 to a later stage in its approval process unless its regulations  
10 or decision require the full opportunity for public involvement  
11 provided in this initial zone change proceeding. See Spalding  
12 v. Josephine County, 14 Or LUBA 143, 147 (1985); see also  
13 Storey v. City of Stayton, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
14 86-057/058; December 30, 1986), Meyer v. City of Portland, 67  
15 Or App 274, 280, 678 P2d 741, rev den 297 Or 82 (1984).

16 The challenged ordinance does not specify the procedures to  
17 be followed by the county in determining compliance with this  
18 condition of approval. Furthermore, we are cited to nothing in  
19 the county code which establishes procedures for determining  
20 compliance with conditions which must be satisfied in order for  
21 a rezoning to take effect. In such circumstances, we will not  
22 assume that the county is required to follow its basic zone  
23 change procedures in determining compliance with this mandatory  
24 condition of approval. There is no indication that the  
25 county's procedures for determining compliance with this  
26 condition, whatever they will be, will provide petitioner with

1 the opportunity to participate in the county's determination in  
2 the same manner provided for in the original zone change  
3 proceeding.

4 The third assignment of error is sustained.

5 FOURTH ASSIGNMENT OF ERROR

6 "Respondent County's failure to comply with the  
7 requirements of an affirmative demonstration of a long  
8 term water supply prior to the zoning or rezoning  
9 violates Goal 1."

10 Fairly read, petitioner argues the county's decision denies  
11 his right under Statewide Planning Goal 1 (Citizen Involvement)  
12 to citizen involvement in the plan and code amendment process.  
13 According to petitioner, the county's decision denies this  
14 right by approving the subject plan amendment and rezoning  
15 without making the required determination that there is an  
16 adequate long-term water supply.

17 Respondent argues that petitioner participated fully in the  
18 plan and zone change process which lead to the adoption of the  
19 challenged ordinance. Respondent also argues that the LC  
20 13.050(13) requirements for proof of adequacy of long term  
21 water supply are requirements for any land division.  
22 Therefore, through the land division process, petitioner will  
23 have an opportunity to participate fully in a determination of  
24 adequacy of the water supply prior to any further development  
25 of the subject property.

26 Goal 1 requires local governments to adopt a citizen  
involvement program which "insures the opportunity for citizens

1 to be involved in all phases of the planning process," and sets  
2 out requirements for such programs. After acknowledgment of a  
3 local government's plan and land use regulations, a decision to  
4 amend the plan or regulations, other than an amendment to the  
5 citizen involvement program itself, complies with Goal 1 if it  
6 complies with the acknowledged citizen involvement program.  
7 Petitioner has not shown that the acknowledged program was not  
8 followed by the county, or that it was not applicable to the  
9 subject proceeding before the county. Petitioner, therefore,  
10 has not shown a violation of Goal 1.<sup>23</sup>

11 The fourth assignment of error is denied.

12 FIFTH ASSIGNMENT OF ERROR

13 "Respondent County's failure to comply with the  
14 requirements of an affirmative demonstration of a long  
15 term water supply prior to the zoning or rezoning  
16 violates Goal 5."

17 Petitioner argues that the subject property overlies a  
18 Statewide Planning Goal 5 (Open Spaces, Scenic and Historic  
19 Areas, and Natural Resources) resource, a "quantity limited  
20 aquifer." Petitioner asserts that the county has "an  
21 obligation to follow the Goal 5 inventory-analysis-program  
22 development pattern," and should have applied Goal 5 when  
23 making its decision. Petitioner also contends the county  
24 failed to comply with a plan policy that designations and zones  
25 be "commensurate with groundwater aquifer capacities."

26 Respondent replies that petitioner does not identify how  
the county's application of Goal 5 was inadequate. Respondent

1 agrees that the county designated the area a quantity limited  
2 aquifer. Respondent contends the county enacted LC 13.050(13)  
3 to ensure that additional rural parcelization would not be  
4 allowed unless an adequate water supply was demonstrated.  
5 According to respondent, acting consistently with the code  
6 mechanism is all that Goal 5 requires.

7 The county's findings recognize the subject property  
8 overlies a quantity limited aquifer, but state Goal 5 will be  
9 met if the condition imposed requiring a demonstration of  
10 compliance with LC 13.050(13) is satisfied. Record 17.

11 The county's "Working Paper: Water Resources; January,  
12 1982" (Water Resources Paper) contains the acknowledged plan's  
13 inventory of water resources, identification of conflicting  
14 uses and determination of economic, social, environmental and  
15 energy (ESEE) consequences, as required by Goal 5 and OAR  
16 660-16-000 and 660-16-005. The Water Resources Paper, at  
17 10-12, identifies quantity limited aquifers as an inventoried  
18 groundwater resource, identifies "development" (i.e., any use  
19 of these aquifers) as a conflicting use, and analyzes the ESEE  
20 consequences of "development."

21 Under "conflict resolution," the Water Resources Paper  
22 concludes:

23 "For a quantity limited aquifer otherwise acceptable  
24 development should be allowed if an adequate showing  
25 is made that water will be available for a foreseeable  
26 period in the future, and that the additional  
withdrawal will not negatively impact surrounding  
water users. Lane Code 13.080(2) allows consideration  
of available water for land divisions and partitions

1 but only requires a showing that water will be  
 2 available at the time of construction, not for any  
 3 time in the future. This does not allow consideration  
 4 of cumulative impacts on existing users of the  
 5 aquifer. The subdivision ordinance should be  
 6 strengthened in this regard. \* \* \* " id. at 12-13.

7 Plan Water Resources policies 3-5, LC 16.004(4) and LC  
 8 13.050(13) carry out the recommendations of the above-quoted  
 9 section of the Water Resources paper, and apparently were  
 10 adopted at least in part as the "program to achieve the Goal"  
 11 required by Goal 5 and OAR 660-16-010. As such, they represent  
 12 a "3C," "limit conflicting uses," choice. OAR 660-16-010(3).

13 The county's acknowledged conflict and consequence analysis  
 14 for quantity limited aquifers covers any type of development  
 15 allowable under the plan and code. The county was not required  
 16 by Goal 5 to determine the specific consequences of the  
 17 proposed changes to the subject property's plan and zone  
 18 designations on the underlying aquifer. Under the county's  
 19 acknowledged Goal 5 "program," any type of development  
 20 otherwise allowable under the plan and code is acceptable if it  
 21 complies with applicable implementing measures for quantity  
 22 limited aquifers, such as LC 16.004(4) and 13.050(13).  
 23 However, in this case the county's decision improperly deferred  
 24 a determination of compliance with these implementing measures,  
 25 and consequently failed to comply with Goal 5 as well.<sup>24</sup>

26 The fifth assignment of error is sustained.

The county's decision is remanded.

FOOTNOTES

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The county's decision assumes that the county's definition of "commercial forest land" is the equivalent of the "suitable for commercial forest uses" portion of Goal 4's "forest lands" definition, and that property is not suitable for commercial forest uses if a majority of it does not meet the county's definition of "commercial forest land." Record 16. The parties have not questioned these assumptions. Therefore, for the purposes of evaluating petitioner's assignment of error, we will assume, as have the parties, that a decision that a majority of the subject property is not "commercial forest land" as defined by the county is sufficient to establish that the subject property does not meet the first part of Goal 4's definition of "forest lands." But see 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 512, 724 P2d 268 (1986) (post-acknowledgment plan amendments apply statewide goals directly).

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Ordinance No. PA 883 provides that these documents are to be "recognized as supportive technical information used in the preparation of this [Lane County Rural Comprehensive] Plan \* \* \*."

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Of course, one consequence of this interpretation and conclusion is that the county's decision must be supported by substantial evidence that the subject property is not capable of the required level of production of any industrial tree species (see subassignment B below).

4

We note that, in this case, petitioner has not challenged the qualifications or expertise of the soil scientists on whose data the county relied. Petitioner's argument seems to be based on the premise that one type of evidence is inherently more valid than the other.

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Petitioner does not argue that the evidence in the record does not support a conclusion that the majority of the property is not suitable for commercial production of Douglas fir.

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2 Land with a Cubic Foot Site Class of 1-5 meets the county's  
3 "commercial forest land" definition of having a productivity of  
4 50 or more cubic feet per acre per year. See Forest Lands  
5 Paper, App. II.

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7 The other findings concerning Witzel soil, quoted in the  
8 text above, state in addition that Witzel is a "marginal forest  
9 soil" and is rated as "'Low' Woodland Grade." Record 12, 13.  
10 There is no explanation in the decision as to the relationship  
11 between a soil being "marginal forest soil" or "Low Woodland  
12 Grade" and its ability to meet the county commercial forest  
13 land productivity standard or the Goal 4 suitability for  
14 commercial forest use standard. Furthermore, we are cited no  
15 evidence in the record which explains the relationship or  
16 supports these findings. The document referenced in support of  
17 the "marginal forest soil" finding, "Lane County Soils,  
18 Farmland/Woodland (S.C.S. 1982)," is not part of the record in  
19 this appeal. Thus, these findings do not support the county's  
20 conclusion that Witzel soil does not qualify as commercial  
21 forest land.

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23 We need not determine whether the county's decision is  
24 supported by evidence that the Dixonville-Philomath-Hazelair  
25 soil complex does not qualify as commercial forest land,  
26 because that soil type occupies only 45% of the subject  
27 property. However, we note that the findings state that,  
28 although the SCS rates Dixonville and Hazelair soils as "Site  
29 Class IV," this complex has been recognized by the SCS as a  
30 "non-resource soil," apparently because of a "30 year  
31 root-rot-blowdown problem" and the interspersed areas of  
32 Philomath soil which are "not suited to growing timber other  
33 than scattered white oak." Record 12-13.

34 There is no explanation of the relationship between being  
35 recognized by the SCS as a "non-resource soil" and meeting the  
36 county's commercial forest land definition. Site Class IV  
37 equates to a cubic foot site class of 4-5 or 2-3 (both of which  
38 meet the county's commercial forest land definition), depending  
39 on the commercial species for which the site index is  
40 measured. See Forest Lands Paper, App. II, p. II-1 and II-2.  
41 The statements by SCS staff quoted by the county in its  
42 findings to explain why the SCS considers this complex a  
43 non-resource soil are not in the county's record.

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2 We note that the soils listed in the county's findings  
3 actually total only 56.0 acres, and the percentages listed add  
4 up to only 90.3%. This appears to be due to the omission in  
5 the findings of one soil type identified in the Wert survey,  
6 Rockland-Soil A, 35 to 70% slope, of which Wert found 6.0  
7 acres, 9.7% of the total. Record 176.

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Petitioner does not challenge the adequacy of these findings.

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The county's finding that 16.6% of the soils are "marginal woodland" does not support a conclusion that these soils are not "commercial forest land," as defined by the county. The explanation in the findings of the term "marginal woodland" does not indicate that such land is not capable of producing 50 or more cubic feet of industrial wood per acre per year.

12

The following conclusions stated in the 1981 Wert study demonstrate that its conclusions were directed only at soil suitability for commercial production of Douglas fir:

"In my opinion, the bulk of the parcel is not suited for commercial management of Douglas-Fir. According to the soil survey, 69% of the parcel has soils that are not suited to Douglas-Fir. \* \* \* " Record 177.

"Douglas-Fir could be managed on nine acres or 14.4% of the parcel. The mapping units that will support Douglas-Fir without a great deal of effort are:" Record 180.

"There is an additional 16.6% or 10.2 acres that could be used for Douglas-Fir. However, the cost of putting it into production would be very high. \* \* \* " Record 181.

"About 69% of the parcel is not a Douglas-Fir site. The soils either are too shallow or too poorly drained to support Douglas-Fir. There is 14.4% of the parcel that could be used for production of Douglas-Fir. Another 16.6% once supported a low productive stand of Douglas-Fir and Ponderosa Pine. \* \* \* " Record 182.

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2 The relevant statements in the 1981 Wert study are as  
follows:

3 "The Dixonville-Dupee mapping unit is made up of about  
4 60% Dixonville soils and 40% Dupee soils. The  
5 Dixonville is a moderately deep (20-40") well drained  
6 clay soil. It will support Douglas-Fir. The Dupee is  
7 a deep, somewhat poorly drained soil. Douglas-Fir  
8 will grow on this soil, but barely. Dupee has a  
9 seasonal wet table that comes within fourteen inches  
of the surface. Douglas-Fir roots will not tolerate  
wetness for extended periods of time. Dupee is better  
suited to Ponderosa Pine. This mapping unit has these  
two soils intermingled. If it were managed for tree  
production, Ponderosa Pine would be the best suited.

\* \* \* \* \*

10 "Hazelair soil is a poorly drained soil with a dense  
11 clay layer. It is not a Douglas-Fir site because of  
12 the poor drainage." Record 178.

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14 It is quite possible that a soil which meets the county's  
15 commercial forest land definition might not reach the SCS  
16 threshold for identifying woodland suitability. The 1985 Wert  
addendum states that an SCS site index of 80 corresponds to  
production of 58 cubic feet per acre per year, and notes that  
"this is the lowest their table will go." Record 191.

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18 Dupee and Hazelair soils have both "silt loam" and "silty  
19 clay loam" mapping units. Record 185, 188. The OR-SOILS-1  
20 sheets in the record are for "Dupee Silt Loam, 3 to 20 percent  
21 slopes" and "Hazelair Silty Clay Loam, 7 to 20 percent  
22 slopes." Record 200, 202. The challenged mapping units are  
23 identified by Wert as Dixonville-Dupee complex, 30-40% slopes;  
Dupee, 20-30% slopes; and Dupee-Hazelair complex, 20-35%  
slopes. Thus, in view of the discrepancies in slope and lack  
of identification of the challenged Dupee and Hazelair mapping  
units by Wert as "silt loam" or "silty clay loam," we have no  
way of determining whether the OR-SOILS-1 sheets in the record  
are valid for the challenged mapping units.

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26 We are not sure whether petitioner does not recognize the

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1 possibility of there being rural non-resource land after  
2 acknowledgment, or does not recognize the existence of such  
3 land at all.

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4 The Supreme Court goes on to point out that "quasi-urban"  
5 is the term LCDC and this Board use to describe "development of  
6 urban-like intensity located outside incorporated cities and  
7 UGBs." Id. The court held that any decision which allows  
8 "urban" (or "quasi-urban") uses of "rural land" outside a UGB  
9 "converts" that land and requires an exception to Goal 14. Id.  
10 at 502.

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9 A condition of approval requires that all residential  
10 development on the subject property be pursuant to the cluster  
11 subdivision standards of Lane Code (LC) 16.260(4). Under LC  
12 16.260(4), there is no minimum lot size for residential  
13 development, so long as the number of lots does not exceed the  
14 density allowed, as determined by dividing the gross acreage by  
15 the minimum lot size of the zoning district.

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14 Petitioner has not questioned the existence of such a  
15 distinction between lots on the subject property and lots  
16 within the UGB. However, we note the requirement for  
17 clustering, while presumably not affecting retention of a  
18 distinction in density, would eliminate a distinction based on  
19 lot size.

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18 LC 16.252(8) provides:

19 "Conditional Approval. The approving authority may  
20 impose reasonable conditions if the application [for  
21 rezoning] is approved to be completed within one year."

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22 The county may have logical difficulties in approving any  
23 subsequent development actions under the terms of this  
24 ordinance, as the plan and zone changes will not take effect  
25 until all conditions have been met. It would seem that some of  
26 the conditions (e.g., that code requirements regarding site and  
area stability be satisfied during actual construction) cannot  
be satisfied unless permits dependent on the plan and zone  
changes can be issued.

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2 Section 18(4) of the Charter for Lane County, Oregon  
3 (charter) provides that an ordinance enacted by the board of  
4 commissioners other than for the purpose of meeting an  
5 emergency "shall take effect on the 30th day after being  
6 enacted." At oral argument, petitioner maintained this charter  
7 provision made the zone change for the subject property take  
8 effect 30 days after the November 4, 1987 adoption of the  
9 challenged ordinance, before compliance with LC 16.050(13) was  
10 demonstrated. We agree with respondent that, while the  
11 ordinance took effect on December 4, as provided by the  
12 charter, the effect of that ordinance is to enact a plan/zone  
13 change when the conditions subsequent have been fulfilled.

8 We have held that an ordinance becomes final, for the  
9 purpose of our review, on the date it is enacted, rather than  
10 the date it takes effect. Hazen Investments, Inc. v. Lane  
11 County, 2 Or LUBA 151 (1981). However, we note that the  
12 parties have not questioned whether there has in fact been a  
13 "final decision" on this plan/zone change.

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13 Statewide Planning Goal 2 (Land Use Planning) includes the  
14 following requirement:

14 "Opportunities shall be provided for review and  
15 comment by citizens and affected governmental units  
16 during preparation, review and revision of plans and  
17 implementation ordinances."

17 Arguably, the county's deferral of consideration of a mandatory  
18 zone change criterion without providing for the opportunity for  
19 public involvement when consideration of that criterion occurs  
20 is a violation of this Goal 2 requirement. However, petitioner  
21 has not alleged a violation of Goal 2.

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21 Although petitioner's assignment of error alleges only a  
22 violation of Goal 5, petitioner argues that the county's  
23 decision violates plan Water Resources Policy 5 as well. This  
24 policy requires that plan designations and zones "shall be  
25 commensurate with groundwater aquifer capacities." LC  
26 13.050(13)(c)(i) requires an applicant to "affirmatively  
demonstrate \* \* \* that the proposed [zoning] is capable of  
sustaining the development anticipated with sufficient potable  
water." Thus, compliance with this code provision would ensure  
that Water Resources Policy 5 is met.

1 The county's decision states that this policy is satisfied  
2 because compliance with LC 13.050(13) "is required as a  
3 condition of development." Record 17. However, when the  
4 county improperly deferred its determination of compliance with  
5 this code provision, it failed to comply with Water Resources  
6 Policy 5 as well. As this plan policy is part of the county's  
7 Goal 5 "program" for water resources, failure to comply with it  
8 is also a basis for finding violation of Goal 5.  
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CERTIFICATE OF MAILING

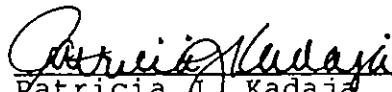
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 87-106, on April 13, 1988, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 13th day of April, 1988.

  
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