



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

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www.lcd.state.or.us

AMENDED NOTICE OF ADOPTED AMENDMENT

September 11, 2007



TO: Subscribers to Notice of Adopted Plan
or Land Use Regulation Amendments

FROM: Mara Ulloa, Plan Amendment Program Specialist

SUBJECT: Lane County Plan Amendment
DLCD File Number 019-07 R

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. A copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures*

DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: September 21, 2007

This amendment was submitted to DLCD for review 45 days prior to adoption. Pursuant to ORS 197.830 (2)(b) only persons who participated in the local government proceedings leading to adoption of the amendment are eligible to appeal this decision to the Land Use Board of Appeals (LUBA).

If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

***NOTE: THE APPEAL DEADLINE IS BASED UPON THE DATE THE DECISION WAS MAILED BY LOCAL GOVERNMENT. A DECISION MAY HAVE BEEN MAILED TO YOU ON A DIFFERENT DATE THAN IT WAS MAILED TO DLCD. AS A RESULT YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.**

Cc: Doug White, DLCD Community Services Specialist
Ron Eber, DLCD Farm/Forest Specialist
Jerry Kendall, Lane County

<paa> ya/

FORM 2

DLCD NOTICE OF ADOPTION

This form must be mailed to DLCD within 5 working days after the final decision per ORS 197.610, OAR Chapter 660 - Division 18

(See reverse side for submittal requirements)

DEPT OF

SEP 04 2007

LAND CONSERVATION AND DEVELOPMENT

Jurisdiction: LANE COUNTY Local File No.: PA 04-6092 (If no number, use none)

Date of Adoption: 8-29-07 Date Mailed: 8-29-07 (Must be filled in) (Date mailed or sent to DLCD)

Date the Notice of Proposed Amendment was mailed to DLCD: 3-22-06

- Comprehensive Plan Text Amendment
Comprehensive Plan Map Amendment
Land Use Regulation Amendment
Zoning Map Amendment
New Land Use Regulation
Other: ADDRESSES LUBA REMAND (Please Specify Type of Action)

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached."

ADOPTING SUPPLEMENTAL FINDINGS TO ADDRESS LUBA REMAND (LUBA No 2006-138) FOR A PLAN AMENDMENT + ZONE CHANGE FROM "E-40/EXCLUSIVE FARM USE" AND "AGRICULTURAL LAND" TO MARGINAL LAND.

Describe how the adopted amendment differs from the proposed amendment. If it is the same, write "Same." If you did not give notice for the proposed amendment, write "N/A."

PROPOSAL TITLE DID NOT CHANGE

Plan Map Changed from: AGRICULTURAL to MARGINAL LAND

Zone Map Changed from: E-40/RCP to ML/RCP

Location: 185-04W-24 #300 Acres Involved: 316 ac.

Specify Density: Previous: 40 AC. New: 10-20 AC.

Applicable Statewide Planning Goals: 2, 3, 4, 5

Was an Exception Adopted? Yes: No: [check]

DLCD File No.: 019-04R(14041)

Did the Department of Land Conservation and Development receive a notice of Proposed Amendment **FORTY FIVE (45) days prior to the first evidentiary hearing.** Yes: No:

If no, do the Statewide Planning Goals apply. Yes: No:

If no, did The Emergency Circumstances Require immediate adoption. Yes: No:

Affected State or Federal Agencies, Local Governments or Special Districts: _____

LANE COUNTY, DLCD

Local Contact: JERRY KENDALL Area Code + Phone Number: 541-682-4057

Address: PSB/LMO 125 E. 8th AVE.

City: EUGENE Zip Code+4: 97401 + 2926

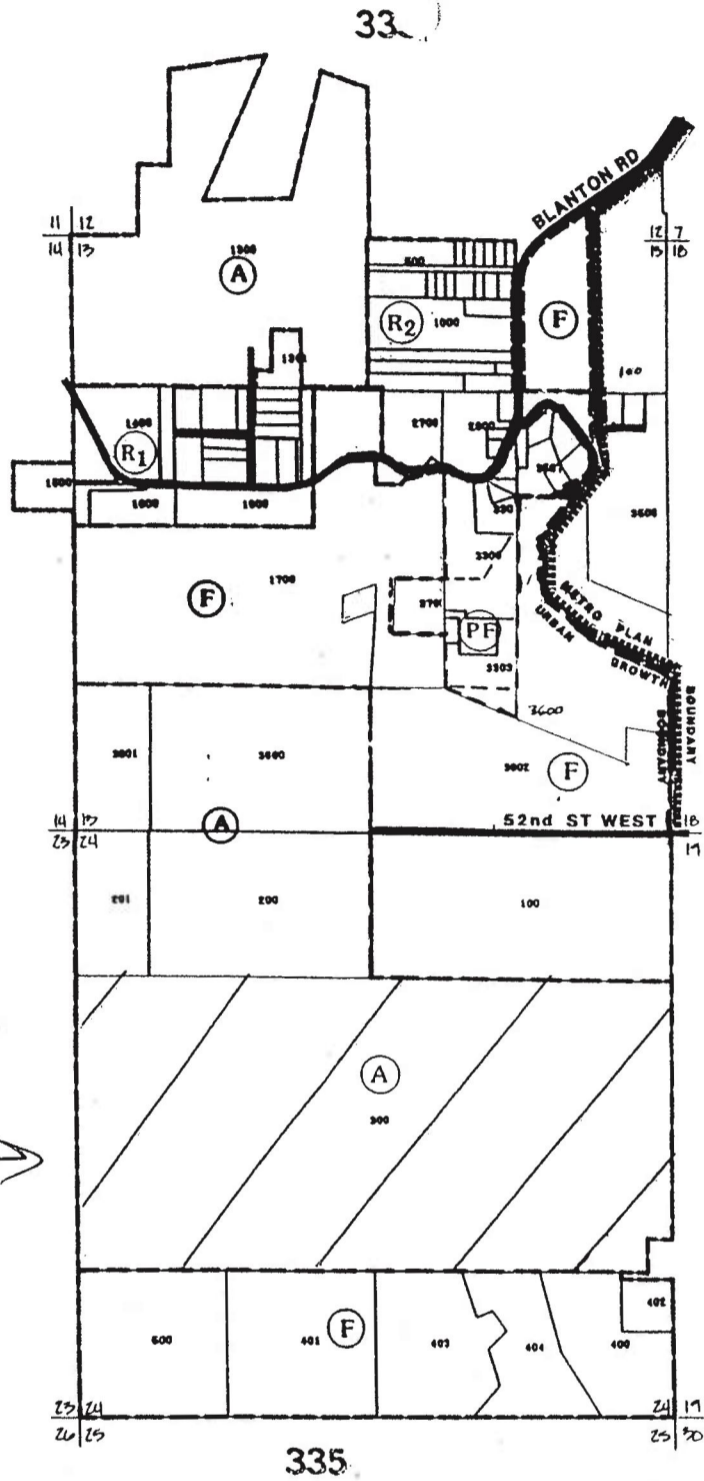
EMAIL: JERRY.KENDALL@CO-LANE.OR.US

ADOPTION SUBMITTAL REQUIREMENTS

This form **must be mailed** to DLCD **within 5 working days after the final decision**
per ORS 197.610, OAR Chapter 660 - Division 18.


1. Send this Form and TWO (2) Copies of the Adopted Amendment to:
**ATTENTION: PLAN AMENDMENT SPECIALIST
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
635 CAPITOL STREET NE, SUITE 150
SALEM, OREGON 97301-2540**
2. Submit **TWO (2) copies** the adopted material, if copies are bounded please submit **TWO (2) complete copies** of documents and maps.
3. Please Note: Adopted materials must be sent to DLCD not later than **FIVE (5) working days** following the date of the final decision on the amendment.
4. Submittal of of this Notice of Adoption must include the text of the amendment plus adopted findings and supplementary information.
5. The deadline to appeal will be extended if you submit this notice of adoption within five working days of the final decision. Appeals to LUBA may be filed within **TWENTY-ONE (21) days** of the date, the "Notice of Adoption" is sent to DLCD.
6. In addition to sending the "Notice of Adoption" to DLCD, you must notify persons who participated in the local hearing and requested notice of the final decision.
7. **Need More Copies?** You can copy this form on to 8-1/2x11 green paper only ; or call the DLCD Office at (503) 373-0050; or Fax your request to:(503) 378-5518; or Email your request to Larry.French@state.or.us - ATTENTION: PLAN AMENDMENT SPECIALIST.

Ordin. No. PA 1231
Exhibit "A"



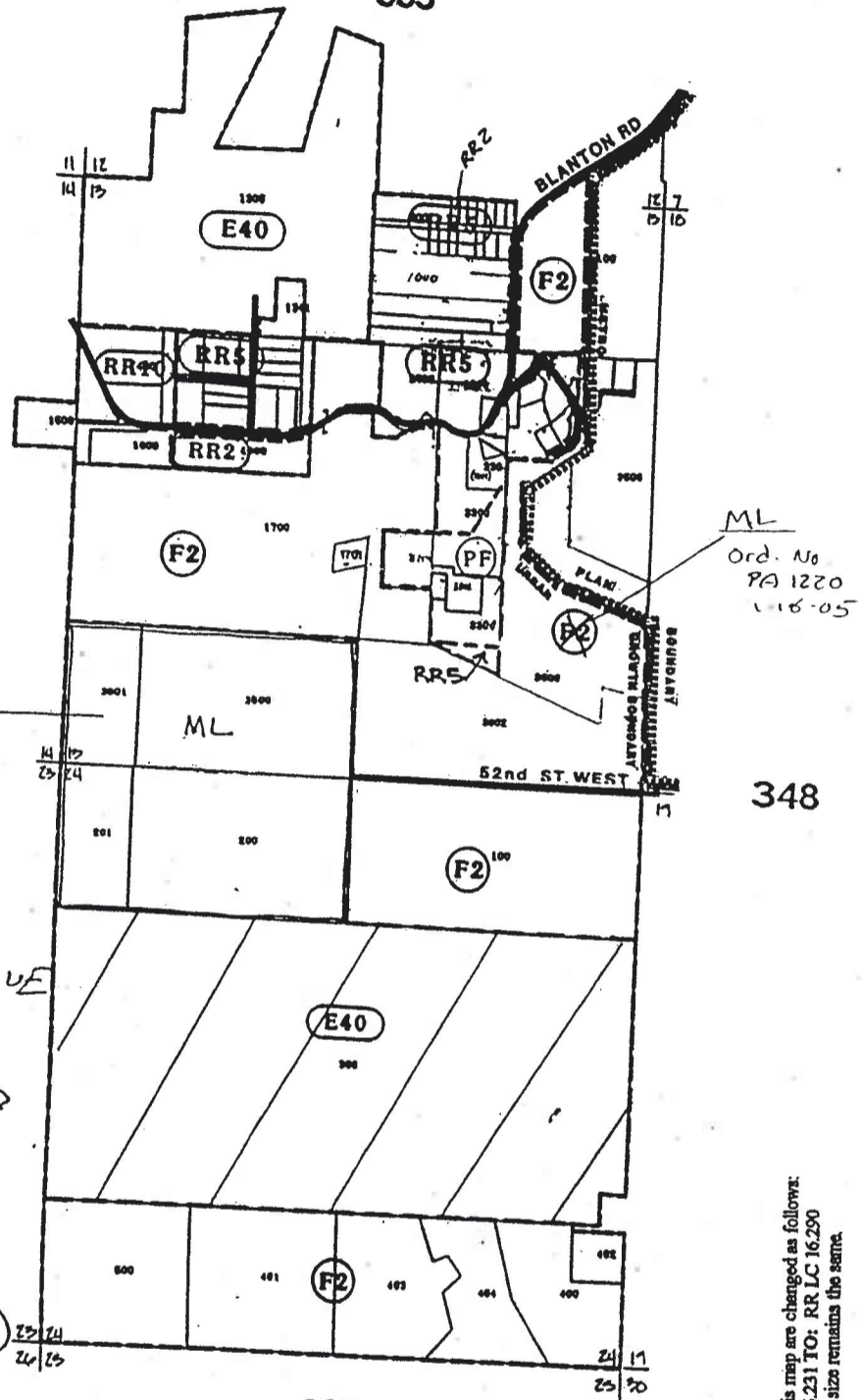
FROM
"AGRICULTURAL"
LAND
TO
"MARGINAL
LAND"

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 lane county	OFFICIAL PLAN MAP		PLOT# 334
	Township Range Section 18 04 13 / 18 04 24		()
ORIGINAL ORD. # <u>PA 884</u> DATE <u>2/29/1984</u> FILE # _____			
REVISION # <u>2</u> ORD. # <u>PA1038</u> DATE <u>6/18/93</u> FILE # <u>PA2781-91</u>			

Ordin. No. PA 1231

Exhibit "B"

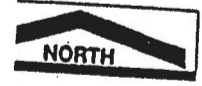


FROM "E-40/EXCLUSIVE FARM USE"
TO
"ML/SR" ("MARGINAL LAND WITH SITE REVIEW")

PA 1113
PA0220-98
6/12/98 320

ML
Ord. No.
PA 1220
1-16-05

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.

one county

OFFICIAL ZONING MAP

PLOT# 334

Township Range Section
 18 04 13 / 18 04 24

ORIGINAL ORD. # PA 884 DATE 2/29/1984 FILE #
 REVISION # 3 ORD. # PA1038

PASSED

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF
LANE COUNTY, OREGON

ORDER No. 07- 8-29-19) IN THE MATTER OF ADOPTING SUPPLEMENTAL
) FINDINGS TO ORDINANCE No. PA 1231, AMENDING
) THE RURAL COMPREHENSIVE PLAN TO REDESIG-
) NATE LAND FROM "AGRICULTURAL" TO
) "MARGINAL LAND" AND REZONING OF THAT
) LAND FROM "E-40/EXCLUSIVE FARM USE"
) TO "ML/SR" ("MARGINAL LAND WITH SITE RE-
) VIEW"), AND ADOPTING SAVINGS
) AND SEVERABILITY CLAUSES (file PA 04-6092;
) Dahlen).

WHEREAS, on July 12, 2006, by means of Ordinance No. PA 1231 the Board of County Commissioners amended the Lane County Rural Comprehensive Plan (RCP) by the re-designation of 316 acres of land identified as Map 18-04-24, tax lot 300 from "Agricultural" land to "Marginal Land" and from "E-40/Exclusive Farm Use" to "ML/SR/Marginal Lands with Site Review"; and

WHEREAS, that action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on February 15, 2007, LUBA issued its decision upholding the county action on all but one of the issues raised by the petitioners, but remanding the action based on that one issue as described in the LUBA decision attached as Exhibit "A" and incorporated herein; and

WHEREAS, in response to the LUBA remand, supplemental findings and analysis based on new evidence in the record, which is attached hereto as Exhibit "B" and incorporated herein, has been prepared containing additional information regarding the "farm income standard" of ORS 197.247(1)(a) (1991 version); and

WHEREAS, the Board of County Commissioners has reviewed the record and is now ready to take action based upon the evidence and testimony in the record.

NOW THEREFORE, IT IS HEREBY ORDERED that the findings previously adopted in support of Ordinance No. PA 1231 are further supplemented as described in Exhibit "B" attached and incorporated here by this reference to establish that the evidence in the record confirms the changes to the Lane County Rural Comprehensive Plan adopted by that ordinance conforms with the "farm income standard" of ORS 197.247(1)(a) (1991 version).

ADOPTED this 29th day of August, 2007.

APPROVED AS TO FORM
Date 8-21-2007, Lane County
Stephen H. Hahn
OFFICE OF LEGAL COUNSEL

Faye Stout
Chair, Lane County Board of Commissioners

Order No. 07- In the matter of adopting supplemental findings to ordinance No. PA 1231, amending the Rural Comprehensive Plan to redesignate land from "Agricultural" to "Marginal Land" and rezoning of that land from "E-40/Exclusive Farm Use" to "ML/SR" ("Marginal Land with Site Review"), and adopting savings and severability clauses (file PA 04-6092, Dahlen).

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

LUISE WALKER and
LANDWATCH LANE COUNTY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

KAREN DAHLEN,
Intervenor-Respondent.

LUBA No. 2006-138

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

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

P. Steven Cornacchia, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hershner Hunter, LLP.

RYAN, Board Member; HOLSTUN, Board Member, participated in the decision.

BASSHAM, Board Chair did not participate in the decision.

REMANDED 02/15/2007

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision amending the comprehensive plan designation for a 316-
4 acre parcel of land.

5 **MOTION TO INTERVENE**

6 Karen Dahlen (intervenor), the applicant below, filed a motion to intervene on behalf
7 of respondent. There is no opposition to the motion, and it granted.

8 **FACTS**

9 In September, 2004 intervenor applied to redesignate the subject property from
10 "Agricultural" to "Marginal Land" and to rezone the property from "E-40/Exclusive Farm
11 Use" to "ML/SR (Marginal Land with Site Review)." The subject property is located south
12 of the Eugene-Springfield urban growth boundary. To the east of the subject property is a
13 67.16-acre parcel of land owned by intervenor and zoned "Marginal Lands." Other lands
14 surrounding the subject property are variously zoned "Impacted Forest" and "Marginal
15 Lands."

16 The planning commission held a hearing on the application and forwarded the
17 application to the board of commissioners, with a recommendation for denial.¹ The board of
18 commissioners held hearings on the application and voted to approve the application,
19 adopting Ordinance No. PA-1231 on July 12, 2006. This appeal followed.

20 **ASSIGNMENT OF ERROR**

21 **A. Introduction**

22 Lane County is a "marginal lands" county, and therefore may designate certain lands
23 as marginal lands, under *former* ORS 197.247. OAR 660-033-0020(8)(j). *Former*
24 ORS 197.247 (1991) allowed a county to designate as "marginal lands" lands that met a

¹ Lane County Development Code Section 16.400 prescribes a procedure for comprehensive plan amendments in which the board of commissioners requests a recommendation from the planning commission.

1 series of tests, only one of which, the “income” test, is at issue in the appeal. The “income”
2 test at ORS 197.247(1)(a) requires a finding that the proposed marginal land was not
3 managed, during three of the five calendar years preceding January 1, 1983, as part of (1) a
4 farm operation producing \$20,000 or more in annual gross income, or (2) a forest operation
5 capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.
6 ORS 197.247(1) (1991) provided, in relevant part:

7 “In accordance with ORS 197.240 and 197.245, the commission shall amend
8 the goals to authorize counties to designate land as marginal land if the land
9 meets the following criteria and the criteria set out in subsections (2) to (4) of
10 this section:

11 “(a) The proposed marginal land was not managed during three of
12 the five calendar years preceding January 1, 1983, as part of a
13 farm operation that produced \$20,000 or more in annual gross
14 income or a forest operation capable of producing an average,
15 over the growth cycle, of \$10,000 in annual gross income;
16 * * *”

17 The county concluded that the subject property met the “income” test. Petitioners
18 contend that the county erred by relying on various interpretations of language in ORS
19 197.247(1)(a) that contradict the language of the statute regarding the “income” test.
20 Petitioners challenge the various errors in multiple sub-assignments of error, and we address
21 each below.

22 **B. First Sub-assignment of Error**

23 **1. Farm Operation**

24 In their first sub-assignment of error, petitioners argue that the county erred by
25 limiting its analysis of farm operations under the income test in ORS 197.247(1)(a) to
26 operations occurring on the subject property, property adjacent to or contiguous with the
27 subject property, and property in the vicinity of the subject property.² The county and

² In response to petitioners’ challenge below, the county adopted the following findings:

1 intervenor (together, respondents) answer that (1) the county's interpretation of that
2 provision of the statute as allowing the relevant inquiry to be limited to farm operations that
3 were occurring only on nearby properties was reasonable, and (2) the evidence in the record
4 shows that the subject property was not being managed as part of a farm operation.

5 The subject property was leased by the previous owners during the relevant period of
6 inquiry set forth in the statute to C & M Livestock Company (C & M), which grazed
7 approximately 25 head of cattle on the property. Record 664, 714. During the proceedings
8 below, one of the previous owners of the property, Arthur Moshofsky (Moshofsky)
9 submitted an affidavit in which he explained that he allowed C & M to graze cattle on the
10 property "in order to create an activity and human presence on the property in [the owners']
11 absence."³ Record 663. The existence of the lease to C & M led the county planning staff to
12 inquire as to whether more "nearby lands were leased" by C & M. Record 433. An

"Mr. Minty has testified that C & M Livestock Company owned no property contiguous to, adjacent to or nearby the subject property. Mr. Moshofsky testified that he requested that the cattle be grazed on the property to create a presence on the property in his absence and that the consideration for the grazing was primarily in the form of the presence and maintenance of fencing and never in an amount exceeding \$1000 in a particular year. It is found that Mr. Moshofsky, the owner of the property during the five-year period preceding January 1, 1983, did not manage the property for or as a farm operation beyond the intermittent grazing of a limited number of cattle and that that farm operation did not produce \$20,000 or more in annual gross income. Therefore, it is found that the intermittent grazing of a limited number of cattle on the subject property should be reasonably considered as not contributing significantly to the agricultural economy of the area or state and that the subject property was not managed as part of a farm operation that produced more than \$20,000 in annual income during the subject period." Record 33.

³ Moshofsky's affidavit regarding the lease of the subject property to C & M stated in relevant part:

"* * * During the [relevant inquiry period] I allowed a third party to graze a limited number of cattle on the subject property. The number of cattle was limited and never exceeded 25 head. My purpose in allowing the grazing was to create an activity and human presence on the property in our absence. The consideration received for allowing the grazing was the activity and presence and annual fence repair. In the years that I accepted a nominal payment for the grazing, the payment and other stated consideration never exceeded \$1,000 in annual value. At no time during the aforementioned time period was the subject property managed as part of a farm operation capable of producing \$20,000 in annual income." Record 663.

1 “Agenda Cover Memo” dated March 20, 2006 described the planning staff’s concerns and
2 actions as follows:

3 “For both [planning staff and petitioners], [the existence of the lease] raised
4 the question as to whether or not the C & M Livestock Company utilized
5 other, *nearby lands* as part of their farm operation. While 25 head of cattle
6 raised yearly would not exceed the \$20,000 gross income limit of ORS
7 197.247(1)(a), it did represent a substantial portion of that total. Staff was
8 interested in knowing if more *nearby lands* were leased.

9 “* * * The applicant took the position that the [m]arginal [l]ands statute does
10 not require a reporting of the C & M holdings ‘wherever located on the
11 planet.’ Staff, however, was not requesting such a widespread accounting, but
12 rather a report on the activities of C & M *in the area*. The statute does not
13 give guidance in determining the factors that allow one to conclude when
14 farm use conducted by the same party on *non-contiguous properties* does or
15 does not constitute being ‘part of a farm operation.’ * * *.” Record 433-434.
16 (Emphases added.)

17 In response to the staff’s inquiries, a partner in C & M submitted an affidavit, which stated in
18 relevant part:

19 “At no time during the applicable period, and at no time thereafter, did C & M
20 Livestock Company own or manage property *adjacent to or contiguous with*
21 [the subject property] or *in the vicinity of that property*.” Record 664.
22 (Emphases added.)

23 Petitioners argue that the use of the subject property by C & M for grazing means that it was
24 a part of the C & M “farm operation” as that phrase is used in the statute, such that the
25 relevant inquiry is whether the entire C & M farm operation produced more than \$20,000 in
26 gross income during the relevant years specified in the statute. Petitioners point out,
27 correctly, that the record does not include any evidence regarding whether the entire C & M
28 farm operation produced more than \$20,000 in annual income during the period in question.

29 Respondents argue that the county’s interpretation of the statute is reasonable in light
30 of ORS 197.247(5), which authorized counties to use objective criteria to calculate income
31 for purposes of the “income” test.⁴ Respondents argue that the Lane County Board of

⁴ ORS 197.247(5) (1991) provided:

1 Commissioners' 1997 Supplement to Marginal Lands Information Sheet (1997 Supplement),
2 adopted by the county commission in March, 1997, contains such objective criteria. The
3 1997 Supplement created a general presumption that all contiguous land owned during the
4 relevant period of inquiry was part of a "farm operation." Record 1142-43.

5 Whatever weight the 1997 Supplement is entitled to under ORS 197.247(5), we do
6 not understand how, in creating a presumption that common ownership of contiguous
7 properties means the parcels are part of a farm operation, the 1997 Supplement can
8 reasonably be read to *limit* the relevant geographic inquiry to only contiguous lands. In fact,
9 the county's inquiry in the present case appears to have extended beyond merely contiguous
10 lands to lands "in the vicinity" of the subject property.

11 The issue of the scope of the relevant inquiry regarding what constitutes a "farm
12 operation" for purposes of the statute is one of first impression. Although the issue was not
13 disputed in *Just v. Lane County*, 49 Or LUBA 456 (2005), we noted:

14 "* * * ORS 197.247(1)(a) can be read to apply the gross income threshold test
15 to the farm and forest operation itself, *not limited to the subject property*. In
16 other words, the pertinent question under ORS 197.247(1)(a) may not be
17 whether the *subject property* can produce \$10,000 in average annual income
18 * * * but whether the forest operation that the property is or was part of can
19 produce \$10,000 in average annual income. * * *" *Just*, 49 Or LUBA at 462
20 n 4 (emphasis in original).

21 In interpreting the meaning of a statute, we examine the text of the statute itself to
22 give effect to the intent of the enacting body. *PGE v. Bureau of Labor and Industries*, 317
23 Or 606, 859 P2d 1143 (1993). ORS 197.247(1)(a) contains no express limits on the
24 geographic scope of a "farm operation;" the term is not limited by any other word or words,
25 such as "in the vicinity," "contiguous to," "adjacent to," or "nearby." We do not understand
26 respondents to dispute that the subject property was managed as part of the C & M cattle

"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." (Emphasis added).

1 operation, although apparently a very small part of that cattle operation. We also do not
2 understand respondents to contend that the C & M cattle operation is not a farm operation.
3 Assuming the subject property was managed as part of C & M's cattle operation, the
4 question then becomes whether the C & M cattle operation produced \$20,000 or more in
5 annual gross income during the relevant time period. The location of the individual
6 properties that make up C & M's cattle operation is irrelevant in determining whether that
7 cattle operation produced \$20,000 or more in annual gross income during the relevant time
8 period.⁵

9 The evidence in the record indicates that the property was leased to C & M, and C &
10 M grazed approximately 25 head of cattle on the property during the period in question.
11 County planning staff noted that grazing 25 head of cattle would produce income that could
12 represent a substantial portion of the "income" test total of \$20,000, and questioned the
13 applicant regarding C & M's operations "in the area" of the subject property. C & M's
14 response to the inquiry was similarly limited to lands "*adjacent to or contiguous with* [the
15 subject property] *or in the vicinity of that property.*" The county misconstrued the language
16 of ORS 197.247(1)(a) when it limited the inquiry to C & M's farm operations that were close
17 in geographic scope to the subject property.

18 2. Forest Operation

19 Petitioners also challenge the county's interpretation of the term "forest operation,"
20 arguing that the county erred in limiting its inquiry to whether the *subject property* was
21 capable of meeting the income test for forest operations. Petitioners argue that the county
22 should have considered other timber lands and timber business interests owned by the prior

⁵ We do not mean to foreclose the possibility that C & M might operate separate cattle operations, for example a cattle operation in Lane County and separate cattle operations in Argentina or Deschutes County. However, the testimony that C & M does not own or manage property adjacent to or contiguous *with* the subject property or in the vicinity of that property is not sufficient to establish that the subject property was not managed as part of C & M's cattle operation.

1 owners or related companies during the relevant time period in determining whether the
2 forest operations income test was met.

3 During the relevant inquiry period, January 1, 1978 through January 1, 1983, the
4 property contained timber, and the prior owners of the subject property also owned timber-
5 related businesses and timber lands. Record 730-738. In 1990, 900,000 board feet of timber
6 on the subject property and adjacent property owned by the same owner was sold and
7 harvested. Record 33. Petitioners argue that the presence of timber on the property during
8 the relevant period of inquiry, the 1990 timber harvest, and the concurrent ownerships of the
9 subject property and the interests in timber-related companies and timber lands are evidence
10 that the property was being managed as part of the owners' larger forest operations.
11 Therefore, petitioners argue, the relevant inquiry was whether the owners' larger forest
12 operations were capable of meeting the "income" test.

13 We agree with petitioners that the relevant inquiry is whether the property was
14 managed as part of a "forest operation," and the inquiry is not limited in geographic scope to
15 only the subject property. The relevant question is whether the subject property was
16 managed as part of a larger forest operation, regardless of location of the properties that
17 make up that larger forest operation. However, while it is a close call, we agree with
18 respondents that the evidence in the record supports the county's conclusion that the subject
19 property was not being managed as part of the larger Moshofsky forest operations.
20 Moshofsky testified that the timber was sold on the open market to third parties and not
21 harvested by or used in any of his timber business operations. Record 33, 102, 255. The
22 timber harvest that occurred in 1990 was not performed by one of the Moshofsky owned
23 enterprises. Record 433, 832. Testimony from Moshofsky indicates that the subject property
24 was not being managed as part of their forest operations, but was held with the original intent
25 to build a golf course. Record 255. There is no evidence in the record indicating that the
26 property was jointly managed with other properties in terms of planting or thinning of trees

1 on the property. Evidence in the record generally supports the conclusion that the 1990
2 harvest was inconsistent with Moshfosky's typical management procedures for his forest
3 operations, supporting the county's conclusion that the property was not part of his other
4 forest operations.

5 The first sub-assignment of error is sustained, in part.

6 **C. Second Sub-assignment of Error**

7 In their second subassignment of error, petitioners argue that intervenor's expert's use
8 of 1983 log prices to calculate the gross annual income of forest operations during the
9 relevant inquiry period was error. Petitioners argue that the statute requires examination of
10 actual prices for timber in all of the years 1978 through 1982, and that if any three of those
11 five numbers is at least \$10,000, then the land is not marginal land. Respondents respond
12 that the county's use of 1983 log prices to demonstrate that the forest operation on the
13 subject property was incapable of producing "an average, over the growth cycle, of \$10,000
14 in annual gross income" was a proper interpretation of the statute and was authorized by
15 ORS 197.247(5) and the 1997 Supplement. *See n 4.*

16 We approved of the use of 1983 log prices as dictated by the 1997 Supplement in
17 *Just*, and we upheld the county's use of the 1983 prices to calculate the gross income that the
18 property was capable of producing. *Just*, 49 Or LUBA at 463-64. Petitioners have not put
19 forward any arguments that lead us to reconsider that part of our decision in *Just*.

20 The second sub-assignment of error is denied.

21 **D. Third Sub-assignment of Error**

22 Petitioners also challenge the applicant's expert's use of a 50-year growth cycle in
23 calculating the production capability of the subject property, arguing that the use of a 50-year
24 growth cycle is not allowed by ORS 197.247(1)(a). Petitioners argue that the statute implies
25 that an "income optimal growth cycle" should be used, and argue that the applicant should

1 have used a growth cycle related to the Culmination of Mean Annual Increment (CMAI).⁶
2 Record 155.

3 Respondents argue, and we agree, that the 1997 Supplement's direction to use a 50-
4 year growth cycle is an objective criterion that is allowed under ORS 197.247(5) and its use
5 by the applicant's expert was reasonable. The 1997 Supplement adopted a 50-year growth
6 cycle as the general standard, based on evidence that the United States Department of
7 Agriculture Natural Resource Conservation Service (NRCS) had adopted the 50-year cycle
8 for rating soil productivity. Record 1143. The applicant's forester testified that the majority
9 of trees growing in the Willamette Valley have passed the CMAI by the age of 45 years.
10 Record 192. Petitioners have not explained why the applicant's use of a 50-year growth
11 cycle as directed by the 1997 Supplement is unreasonable.

12 The third sub-assignment of error is denied.

13 **E. Fourth Sub-assignment of Error**

14 In their fourth sub-assignment of error, petitioners challenge 1) the applicant's use of
15 actual stocking rates for the subject property during the relevant inquiry period and 2) the
16 assumption of reasonable management practices in calculating production capability.
17 Respondents answer that the expert's use of actual stocking rates for the property and his
18 assumption of reasonable management practices, as directed by the 1997 Supplement, was
19 proper and supported by substantial evidence in the record.

20 In *DLCD v. Lane County (Ericsson)*, 23 Or LUBA 33, 36 (1992), we noted that actual
21 production is not necessarily conclusive evidence of potential production without additional
22 information regarding the operation. However, the unrebutted evidence in the record
23 indicates that for the subject property, actual production was reflective of potential
24 production capability for the subject property. The county relied on the testimony of the

⁶ Petitioners do not explain how the use of a CMAI measurement would differ significantly from the 50-year growth cycle.

1 applicant's expert, who based his calculation of productivity for the relevant inquiry period
2 on actual stocking rates. He calculated the actual stocking rates based on the actual volume
3 of timber removed from the subject property when it was harvested in 1990, and a timber
4 cruise of the remaining portions of the subject property containing merchantable Douglas Fir
5 stands.

6 The expert also assumed reasonable management practices, based on the direction in
7 the 1997 Supplement. In addition, he concluded that based on soil and topographic factors
8 that made the establishment of fully stocked stands of Douglas Fir or Ponderosa Pine
9 difficult, the actual stocking rate of the subject property would not change significantly with
10 additional management. It was reasonable for the county to rely on this evidence in
11 concluding that the property was not capable of meeting the "forest operation" income test.

12 The fourth sub-assignment of error is denied.

13 The county's decision is remanded.

**Remand Response and Supplemental Findings
Supporting Ordinance No. PA-1231 Amending
Lane County Rural Comprehensive Plan.**

In support of our adoption and enactment of Ordinance No. PA-1231, we make the following findings of fact and conclusions of law.

Introduction

On July 12, 2006, the Board of County Commissioners adopted Ordinance No. PA-1231 that amended the Lane County Rural Comprehensive Plan diagram to re-designate that certain property described as Tax Lot 300 of Lane County Assessor's Map No. 18-04-24 from Agriculture to Marginal Land and amended the Lane County zoning map from Exclusive Farm Use (EFU 40) to Marginal Lands (ML/RCP). That action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on February 15, 2007, LUBA issued its decision upholding the county action on all of the issues raised by the petitioners except one, but remanded the action based on that one issue.¹ That issue relates to the adequacy of Lane County's findings with respect to the former ORS 197.247(1)(a) requirement that Lane County find that the proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983, as part of a farm operation producing \$20,000 or more in annual gross income. The LUBA decision was not appealed to the Court of Appeals.

In reviewing the LUBA decision and upon the request of the applicant, Lane County Planning Department staff and Lane County Legal Counsel determined the necessity of a remand evidentiary hearing limited in scope to correcting the deficiency that was the basis for LUBA's remand. The following additional findings and analysis of the evidence presented during the remand evidentiary hearing provide further support for our adoption of Ordinance No. PA-1231.

Findings and analysis

Former ORS 197.247 allows land in "Marginal Land Counties" to be designated as "Marginal Land" if several criteria are satisfied. One of those, ORS 197.247(1)(a), is that 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. We found that the applicant had demonstrated that the subject property 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. The LUBA decision addressed that provision of ORS 197.247(1)(a) and concluded our decision misconstrued the language of ORS 197.247(1)(a) when it limited the inquiry to the cattle operation of C&M Livestock Company (hereinafter referred to as "C&M") that was close in geographic scope to the subject property. It also noted that the record of Lane County's decision did not include any evidence

¹ *Walker v. Lane County*, LUBA No. 2006-138

regarding whether the entire C&M cattle operation produced more than \$20,000 in annual income during the period in question. LUBA stated that the relevant and appropriate inquiry is “whether the C&M cattle operation produced \$20,000 or more in annual gross income during the relevant time period.”²

The following supplemental findings and supporting evidence in the record establish that the subject property 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.

We find that evidence in the record demonstrates that no farm use, other than the limited cattle operation of C&M, occurred on the subject property during the applicable five year period. Consequently we find that, other than the limited cattle operation of C&M that occurred on the subject property, the subject property was not managed, during three of five calendar years preceding January 1, 1983, as part of a farm operation that produced \$20,000 or more in annual gross income.

On August 29, 2007, we conducted a remand evidentiary hearing that was limited in scope to correcting the deficiency that was the basis for LUBA’s remand—whether the C&M cattle operation, as a whole, produced \$20,000 or more in annual gross income during three of the five calendar years proceeding January 1, 1983. We find, based upon the evidence produced at the remand evidentiary hearing, that it did not.

At the August 29, 2007, remand evidentiary hearing, the applicant produced an affidavit executed by Mark Minty that provided substantial evidence that the C&M cattle operation, including those cows grazed on the subject property, did not gross more than \$20,000 annually during three of the five calendar years preceding January 1, 1983. That affidavit is incorporated herein by this reference and a copy of it is attached to these supplemental findings. Mr. Minty testified that he was a partner with his father, now deceased, of C&M during the relevant time period. Mr. Minty also testified that C&M no longer exists as a business entity.

In his affidavit Mr. Minty testified that during the relevant time period C&M maintained a cattle herd of approximately 100 head annually, of which 25 or less were intermittently grazed on the subject property. Mr. Minty further testified that the cattle operation produced, on average, approximately 40 calves per year and that those calves were sold at auction or on the open market each year. Mr. Minty testified that C&M only sold calves from its herd and that he believes that C&M received less than \$300 per calf at sale during the relevant period. Based on that sales price ceiling, Mr. Minty calculated that C&M grossed no more than \$12,000 annually from the sale of calves during the relevant period. Mr. Minty also noted that the \$12,000 annual figure is in gross and does not take into account the annual cost of maintaining the herd and producing that income.

Mr. Minty’s affidavit also contains a reference to the Oregon State University (OSU) Department of Agriculture and Resource Economics cattle price list contained in the September 23, 2004, Agricultural Capacity Review of Paul E. Day, Agricultural Consultant that was

² Walker at pages 6 and 7

provided in PA 04-6308 (Ordinance No. PA 1235-Dennis) before us and incorporated herein by this reference. With the caveat that he did not believe that C&M ever received a sales price for calves approaching the OSU price list, Mr. Minty calculated gross income from the sale of 40 calves based on that price list. That calculation demonstrated that even using apparently inflated sale prices C&M could not have grossed over \$20,000 income from its cattle operation in four of the five calendar years.

We find Mr. Minty's testimony persuasive on the question of whether the C&M cattle operation produced \$20,000 or more in annual gross income during the relevant time period. Therefore, we find that the subject property 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. Based upon evidence in the record we find that the applicant has demonstrated that the requirements of former ORS 197.247 are fulfilled and that the subject application for marginal land designation of the subject property should be approved. Accordingly, we approve the application.

AFFIDAVIT

STATE OF OREGON)
)ss.
County of Lane)

Before me this day personally appeared Mark Minty, who, first being duly sworn, deposes and says:

1. I was a partner, with my father, of C&M Livestock Company during the subject period from January 1, 1978 through January 1, 1983. C&M Livestock Company no longer exists and I do not have financial records of the company dating back to the subject period.

2. During the subject period, C&M Livestock Company grazed a limited number of cattle on property owned by Art Moshofsky in the manner, in the amount and for the purposes as stated by Mr. Moshofsky in his affidavit, dated March 15, 2005. The statements in his affidavit relating to our grazing of cattle on his property are true and accurate.

3. During the subject period C&M Livestock Company maintained a cattle herd of approximately 100 head annually. During the subject period C&M Livestock Company produced, on average, approximately 40 calves annually from its herd and sold those 40 calves at auction or on the open market each year. C&M Livestock Company annually only sold calves from its herd.

4. I have reviewed the Oregon State University Department of Agricultural and Resource Economics cattle price list contained in the September 23, 2004, Agricultural Capacity Review of Paul E. Day, Agricultural Consultant. I believe that those cattle prices are substantially higher than what C&M Livestock was able to achieve from its sale of calves during the subject period. I believe that C&M Livestock received less than \$300 per calf during the subject period. I confirm that C&M Livestock received no more in sales price, per calf, as reported by the Department in Mr. Day's report during the subject period. Those sale prices, as reported by the Department, were \$368.76 per cow in 1978, \$551.17 per cow in 1979, \$444.07 per cow in 1980, \$451.60 per cow in 1981, and \$467.80 per cow in 1982.

5. Based upon the Department's average sale prices for the subject period and an annual sale of no more than 40 calves, I calculate that C&M Livestock Company grossed no more than the following sums from the sale of its calves from the cattle operation:

- a. 1978: Approximately \$14,750.40
- b. 1979: Approximately \$22,046.80
- c. 1980: Approximately \$17,762.80
- d. 1981: Approximately \$18,064.00
- e. 1982: Approximately \$18,712.00

6. Based upon my estimation that C&M Livestock Company received no more than \$300 per calf in sales price during the subject period, I calculate that C&M Livestock Company,

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at a maximum, more reasonably grossed no more than the following sums from the sale of its calves from the cattle operation:

- a. 1978: Approximately \$12,000
- b. 1979: Approximately \$12,000
- c. 1980: Approximately \$12,000
- d. 1981: Approximately \$12,000
- e. 1982: Approximately \$12,000

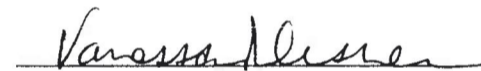
7. The aforementioned amounts in paragraphs 5. and 6. are gross income amounts and do not take into account the annual cost of maintaining the herd and producing that income.

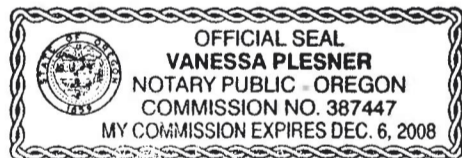
8. It is my belief and recollection that C&M Livestock Company did not receive more than \$20,000 in annual income from its cattle operation in any of the years of the subject period.


Mark Minty

Personally appeared the above-named Mark Minty, being duly sworn, who signed this affidavit in my presence as his voluntary act and deed.

Before me this 18th day of April, 2007.


Notary Public for Oregon
My commission expires: 12/4/08



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TABLE 4. THEORETICAL MAXIMUM INCOME FROM CATTLELane County, Oregon 1978 – 1982 Inclusive
Sutton Property

Year	No. Of Cows ¹	\$ Total Sales	\$ Sales Per Cow ¹	Au Per Year ²	\$ Projected Annual Income
1978	14,500	5,347,000	368.76	32.889	12,128
1979	14,500	7,992,000	551.17	32.889	18,127
1980	15,000	6,661,000	444.07	32.889	14,605
1981	15,000	6,774,000	451.60	32.889	14,853
1982	15,000	7,017,000	467.80	32.889	15,385

1 Source: Oregon State University, Dept. Agricultural and Resource Economics, Oregon Agricultural Information Network (OAIN).

2 Animal units per year for the parcel. Source: Table 2. Soils Inventory, page 4.

TABLE 5. PRACTICAL MAXIMUM INCOME FROM CATTLELane County, Oregon 1978 – 1982 Inclusive
Sutton Property

Year	No. Of Cows ¹	\$ Total Sales	\$ Sales Per Cow ¹	Au Per Year ²	\$ Projected Annual Income
1978	14,500	5,347,000	368.76	18.155	6695
1979	14,500	7,992,000	551.17	18.155	10,006
1980	15,000	6,661,000	444.07	18.155	8062
1981	15,000	6,774,000	451.60	18.155	8199
1982	15,000	7,017,000	467.80	18.155	8493

1 Source: Oregon State University, Dept. Agricultural and Resource Economics, Oregon Agricultural Information Network (OAIN).

2 Adjusted animal units per year for the parcel. Source: Table 2. Soils Inventory, page 4 as modified according to discussion on page 12.

Mailing Date: 9/4/2007

DEPT OF

SEP 05 2007

LAND CONSERVATION
AND DEVELOPMENT



LAND MANAGEMENT DIVISION

http://www.LaneCounty.org/PW_LMD/

To: Interested Parties *JK*
From: Jerry Kendall/Associate Planner (541-682-4057)
Re: PA 04-6092: Plan Amendment & Zone Change (Dahlen)

On August 29, 2007, via Order No. 07-8-29-19, (excerpt enclosed), the Board of Commissioners approved a Plan Amendment and Zone change for the subject parcel. If you wish a full copy, it is also available on the county's website, at www.lanecounty.org (Departments/Board of Commissioners/Orders/2007.... find item).

Any appeal of this decision must be filed in a timely manner with the Land Use Board of Appeals (LUBA) in Salem. Refer to OAR 661, Division 10, for "Rules of Procedure for Appeals".

For more information on the appeal process, contact LUBA at:

LUBA
550 Capitol St., NE, Suite 235
Salem, Or. 97301-2552

Phone: 503-373-1265

Luba's website is <http://luba.state.or.us/>

PASSED

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF
LANE COUNTY, OREGON

ORDER No. 07- 8-29-19) IN THE MATTER OF ADOPTING SUPPLEMENTAL
) FINDINGS TO ORDINANCE No. PA 1231, AMENDING
) THE RURAL COMPREHENSIVE PLAN TO REDESIG-
) NATE LAND FROM "AGRICULTURAL" TO
) "MARGINAL LAND" AND REZONING OF THAT
) LAND FROM "E-40/EXCLUSIVE FARM USE"
) TO "ML/SR" ("MARGINAL LAND WITH SITE RE-
) VIEW"), AND ADOPTING SAVINGS
) AND SEVERABILITY CLAUSES (file PA 04-6092;
) Dahlen).

WHEREAS, on July 12, 2006, by means of Ordinance No. PA 1231 the Board of County Commissioners amended the Lane County *Rural Comprehensive Plan* (RCP) by the redesignation of 316 acres of land identified as Map 18-04-24, tax lot 300 from "Agricultural" land to "Marginal Land" and from "E-40/Exclusive Farm Use" to "ML/SR/Marginal Lands with Site Review"; and

WHEREAS, that action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on February 15, 2007, LUBA issued its decision upholding the county action on all but one of the issues raised by the petitioners, but remanding the action based on that one issue as described in the LUBA decision attached as Exhibit "A" and incorporated herein; and

WHEREAS, in response to the LUBA remand, supplemental findings and analysis based on new evidence in the record, which is attached hereto as Exhibit "B" and incorporated herein, has been prepared containing additional information regarding the "farm income standard" of ORS 197.247(1)(a) (1991 version); and

WHEREAS, the Board of County Commissioners has reviewed the record and is now ready to take action based upon the evidence and testimony in the record.

NOW THEREFORE, IT IS HEREBY ORDERED that the findings previously adopted in support of Ordinance No. PA 1231 are further supplemented as described in Exhibit "B" attached and incorporated here by this reference to establish that the evidence in the record confirms the changes to the Lane County *Rural Comprehensive Plan* adopted by that ordinance conforms with the "farm income standard" of ORS 197.247(1)(a) (1991 version).

ADOPTED this 29th day of August, 2007.

APPROVED AS TO FORM

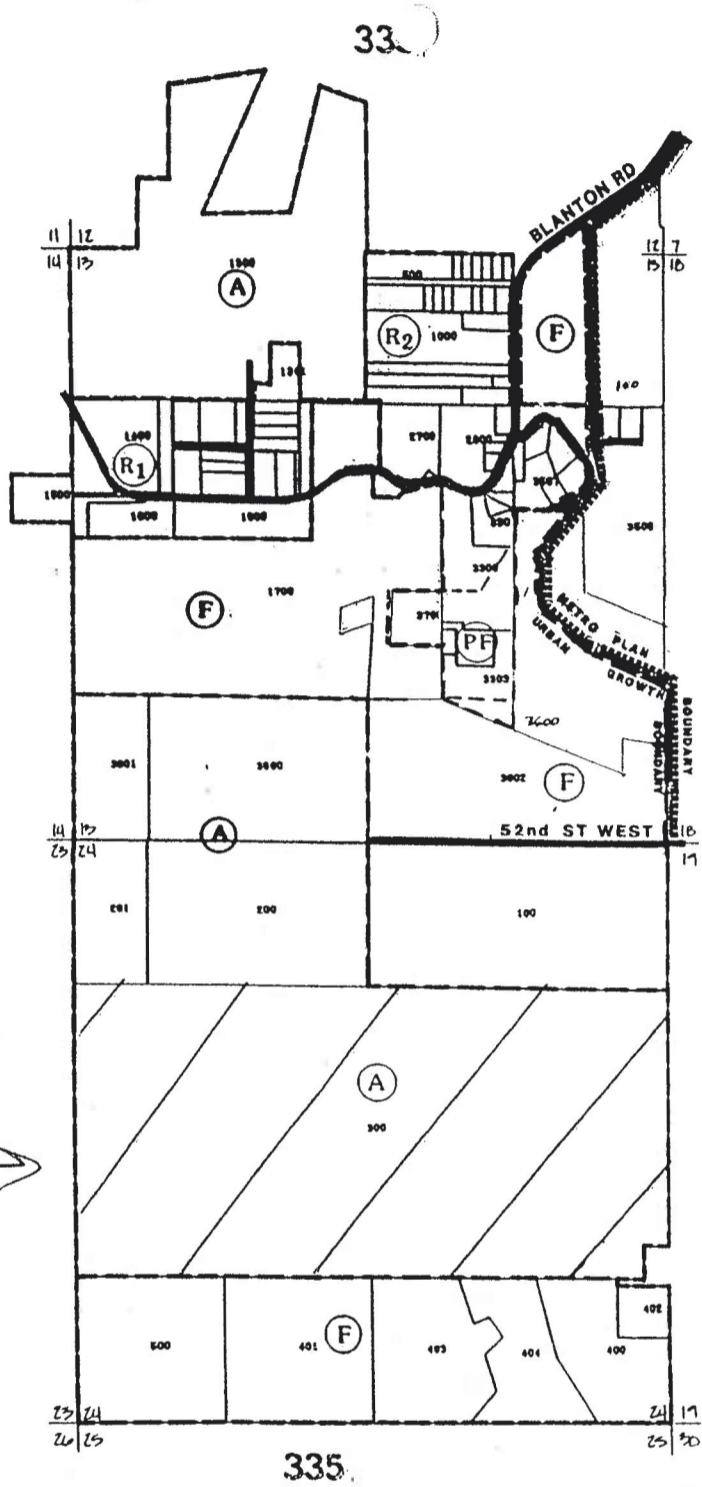
Date 8-21-2007, Lane County
Stephen H. Hahn
OFFICE OF LEGAL COUNSEL

Faye Stent
Chair, Lane County Board of Commissioners

Order No. 07- In the matter of adopting supplemental findings to ordinance No. PA 1231, amending the Rural Comprehensive Plan to redesignate land from "Agricultural" to "Marginal Land" and rezoning of that land from "E-40/Exclusive Farm Use" to "ML/SR" ("Marginal Land with Site Review"), and adopting savings and severability clauses (file PA 04-6092, Dahlen).


Ordin. No. PA 1231

Exhibit "A"

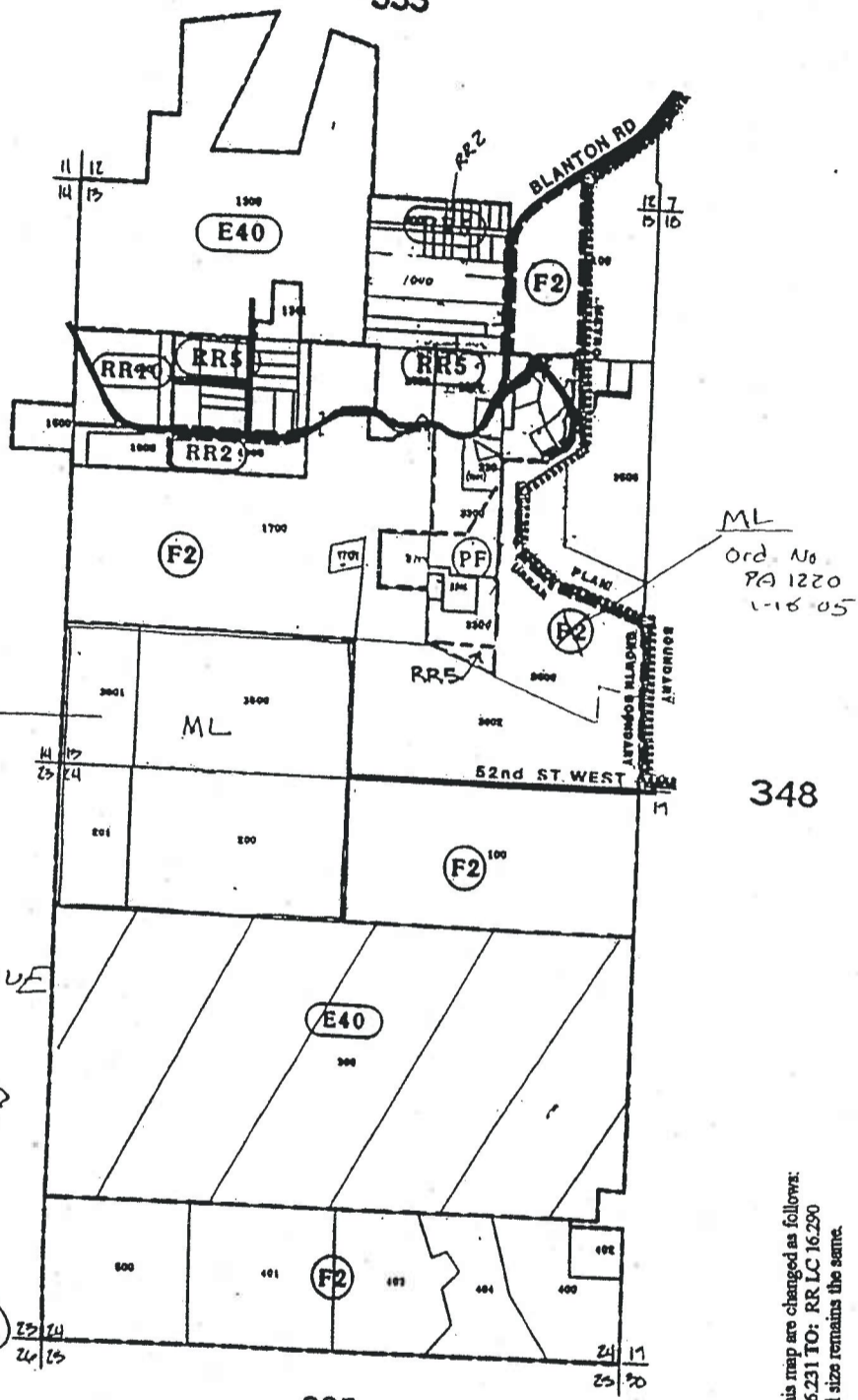


FROM
"AGRICULTURAL"
LAND
TO
"MARGINAL
LAND"

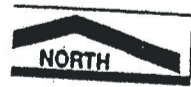
15

	OFFICIAL PLAN MAP		PLOT # 334
	Township Range Section 18 04 13 / 18 04 24		
ORIGINAL ORD. # _____ PA 884 _____ DATE 2/29/1984 FILE # _____			
REVISION # <u>2</u> ORD. # _____ PA1038 _____ DATE 6/18/93 FILE # PA2781-91			

Ordin. No. PA 1231
Exhibit "B"



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.

16

ane county



OFFICIAL ZONING MAP

PLOT # 334

Township Range Section

18 04 13

18 04 24

ORIGINAL ORD. # PA 884

DATE 2/29/1984 FILE #

REVISION # 3 ORD. # PA1038