

## LANE COUNTY LAND USE TASK FORCE REPORT

### 1/27/10 GOAL ONE COALITION PROPOSAL REGARDING MARGINAL LANDS

The author of this proposal is Jim Just of Goal One Coalition, a Lane County Land Use Task Force (LCLUTF) member. The original 1/27/10 proposal was modified by the author on 7/1/10 prior to consideration by the LCLUTF, and again during the 7/7/10 meeting in response to concerns raised by LCLUTF member Steve Cornacchia, with no objections from the other members. This report covers only the 7/7/10 modified version. However, a copy of the original proposal was previously submitted to the Board, and the Chair will submit a supplemental report covering the original proposal, upon request of the Board. The proposal is divided into three parts in this report, since each was discussed and voted on separately.

#### **RCP Goal 2, Policy 28**

Goal of Proposal: Adopt revised marginal lands policy directives into the RCP

Consensus on Goal? Yes

Consensus on Proposal? No

Consensus on Alternate Proposal? No

Potential Measure 49 claims? Yet to be determined

Measure 56 notice required? Yet to be determined

Discussion:

This item was considered at the July 7, July 12 and July 19, 2010 LCLUTF meetings. Currently, the Marginal Lands statute is interpreted by the March 1997 Board directive entitled "Supplement to Marginal Lands Information Sheet." However, there have been intervening judicial decisions that supersede portions of the 1997 information sheet. The goal is adopt revised policy directives regarding Marginal Lands into the rural comprehensive plan and there was consensus among LCLUTF members that this should be done. However, there was disagreement about what the specific policy directives should be. The following discussion focuses on those points of disagreement.

The 7/7/10 modified version of Goal One's Policy 28 proposal is attached as Exhibit A. There is also attached an alternate Policy 28 proposal prepared by staff, attached as Exhibit B. There are two differences between these proposals:

#### **60-year rotation vs. 50-year rotation**

Lane County has historically used a 50-year growth cycle assumption when computing the average annual income for Marginal Lands purposes. It was generally agreed on the LCLUTF that in many cases, switching to a 60-year growth cycle would increase the average annual income, and that sometimes, this increase in income would be enough to push the forest operation over the \$10,000 per year limit and disqualify the subject property from Marginal Lands designation.

Evidence in favor of retaining the 50-year rotation included a) oral and written testimony to the LCLUTF from professional forester Marc Setchko, b) reference to Oregon Court

of Appeals and LUBA decisions which rejected challenges to Lane County's use of a 50-year growth cycle, and c) a letter from the Oregon Department of Forestry to Mr. Just, dated May 23, 2008, which stated, among other things, that "a growth cycle of 50 years is a logical choice for Lane County." This evidence focused on establishing that the 50-year cycle is reasonable from a timber management point of view, and has also passed legal muster.

An additional supporting argument for the 50-year rotation is that it has taken years of court actions to reach resolution on what is acceptable data for 50-year rotations. Income calculations can now be made in an objective manner using just the mapped soil types and these approved data sources; however all approved sources use 50-year rotations. The LCLUTF was told by Mr. Setchko that in order to use 60-year rotations, unapproved data sources must be used, and in some cases more complex methods must be used, such as tree boring. He said that use of these methods opens the forester up to challenge that the methodology was not sound, the sampling was biased, not enough trees existed to permit accurate determinations, etc. The expressed concern was that switching to a 60-year rotation would disrupt many years of established case law and probably cause applicants and opponents to resume fighting over matters that have already been settled for 50-year rotations.

Evidence in favor of the 60-year rotation included an analysis by Mr. Just comparing the annual income potential of a particular site using both the 50- and 60-year rotations. The analysis showed that, when assuming the U.S. bond rate as the opportunity cost, higher average annual income was realized with the 60-year rotation. Also, the previously mentioned Oregon Department of Forestry letter stated that "[i]n Oregon, the range of harvest ages is broadly similar for both industrial and nonindustrial ownerships, 40 to 65 years depending on site and regime." This was pointed out as evidence that 60 years falls within the normal management range. One LCLUTF member also mentioned that Mr. Setchko told the group that marginal sites are managed for longer rotations and that rotations in the past were longer.

To summarize the arguments in favor of the 60-year rotation: a) 60 years is within today's typical 40-65 year rotation range, b) poorer sites require longer rotations to recover planting, release and harvest costs so selection of the longer end of today's 40-65 year range is appropriate, c) the slower growth on marginal sites means that 60 years can often produce higher average annual income than 50 years, and d) during the marginal lands test years of 1978-1982 rotations were longer than they are now, again pointing to the appropriateness of selecting on the high end of today's 40-65 year rotation range.

To summarize the arguments in favor of the 50-year rotation: a) 50 years is in the middle of today's typical 40-65 year rotation range, b) the Department of Forestry has endorsed a 50-year rotation for Lane County, c) LUBA and the Court of Appeals have rejected challenges to the 50-year rotation, d) approved data sources for calculating annual income under 50-year rotations are readily available and have a lengthy case law history informing their use, e) switching to 60-year rotations would likely cause renewed confusion and legal wrangling over matters that are already settled for 50-year rotations.

## Inclusion of additional material taken from the Board's 1997 Information Sheet

The alternate proposal prepared by staff includes this additional explanatory statement, taken from the Board's March 1997 "Supplement to Marginal Lands Information Sheet":

*Marginal Lands are a subset of resource lands and are to be available for occupancy and use as tracts smaller in area than that required for other resource lands.*

The alternate proposal also includes an additional directive, which is also taken from the 1997 Information Sheet:

- (a) *To determine if a tract was making a "significant contribution" to commercial forestry at the time of the enactment of ORS 197.247 (1991 ed.), the following methodology can be used:*
  - (i) *Use the best information available regarding soils, topography, etc., to determine the optimal level of timber production for the tract.*
  - (ii) *Assume that the tract was reasonably managed.*
  - (iii) *Assume that in 1983 the stand was fully mature and ready for harvest.*

The additional provisions represent a continuation of the status quo, and were included by staff in the alternate proposal to ensure that all relevant provisions from the 1997 Information Sheet were transferred to the new Policy 28. Mr. Just indicated that he might object to inclusion of these provisions, but did not say why. There was no discussion about the implications of not including these provisions.

The task force members indicated their level of consensus<sup>1</sup> on the Goal One proposal as follows:

Mr. Emmons: 1

Ms. Driscoll: 3

Ms. Nelson, Mr. Kloos, Mr. Evans, Mr. Cornacchia, Mr. Reeder, Mr. Sisson, Mr.

Lanfear: 6

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<sup>1</sup> Consensus Ratings:

- 1 Whole-heartedly agree
- 2 It's a good idea and the person could support the idea of bringing resources toward the motion
- 3 The person was supportive but not likely to want to put resources towards the motion
- 4 The person has reservations but would stand aside
- 5 The person had serious concerns, but could live with the motion
- 6 The person could not participate in the decision and would actively work to block it.

The task force members indicated their level of consensus on the alternate proposal as follows:

Ms. Nelson, Mr. Kloos, Mr. Evans, Mr. Cornacchia, Mr. Reeder, Mr. Sisson, Mr. Lanfear: 1  
Ms. Driscoll: 4  
Mr. Emmons: 6

### **RCP Goal 3, Policy 14 & RCP Goal 4, Policy 3(a) and (b) only**

Goal of Proposal: Add compliance with new Policy 28 as a Marginal Lands criterion

Consensus on Goal? Yes

Consensus on Proposal? Yes

Potential Measure 49 claims? Yet to be determined

Measure 56 notice required? Yet to be determined

Discussion:

This item was considered at the July 7 and July 12, 2010 LCLUTF meetings. The goal is to incorporate the new Goal 2, Policy 28 as a criterion for marginal lands designation. This is a housekeeping item. Proposed changes are shown below:

*RCP Goal 3: Agricultural Land Policy 14*

*14. Land may be designated as marginal land if it complies with the following criteria:*

*a. The requirements of ORS 197.247, and*

***b. Lane County General Plan Policies, Goal 2: Land Use Planning, Policy 28, and***

***c. Lane County General Plan Policies, Goal 5: Flora and Fauna, policies numbered 11 and 12.***

*RCP Goal 4: Forest Lands Policy 3*

*~~3. Forest lands that satisfy the requirements of ORS 197.247 may designate as Marginal Lands and such designations shall also made in accordance with other Plan policies. Uses and land divisions allowed on Marginal Lands shall be those allowed by ORS 197.247.~~*

***Land may be designated as marginal land if it complies with the following criteria:***

***a. The requirements of ORS 197.247,***

***b. Lane County General Plan Policies, Goal 2: Land Use Planning, Policy 28.***

The task force members were unanimous in their support for this amendment.

### **RCP Goal 4, Policy 3(c)**

Goal of Proposal: Add big-game range assessment to marginal lands criteria

Consensus on Goal? No

Consensus on Proposal? No

Potential Measure 49 claims? Yet to be determined

Measure 56 notice required? Yet to be determined

Discussion:

This item was considered at the July 7 and July 12, 2010 LCLUTF meetings. The proposal is to add the following additional marginal lands approval criterion to the previously discussed RCP Goal 4 Forest Lands Policy 3:

**c. Lane County General Plan Policies, Goal 5: Flora and Fauna, policies 11 and 12.**

Adding this provision would require forest-designated properties to comply with Big Game Range Habitat density requirements in order to qualify as Marginal Lands. This is already a requirement for agriculture-designated lands (see RCP Goal 3: Agricultural Land Policy 14 above). Staff told the LCLUTF that the reason the Big Game provisions have historically applied only to farmlands is that the reservoir of unbuildable F-1 forest land has been considered adequate to ensure habitat preservation in forested areas.

This provision is only triggered if the subject property is in an area inventoried in the RCP as Major or Peripheral Big Game Range Habitat. Oregon Department of Fish and Wildlife recommend overall residential densities for Peripheral Big Game Range at one dwelling per 40 acres and for Major Big Game Range one dwelling per 80 acres for protection of big game habitat. Any density above the recommendations is considered to conflict with Goal 5 and would be allowed only after resolution in accordance with OAR 660 Division 16.

The task force members indicated their level of consensus as follows:

Mr. Just, Mr. Emmons: 1

Ms. Nelson, Ms. Driscoll: 2

Mr. Kloos, Mr. Evans, Mr. Cornacchia, Mr. Reeder, Mr. Sisson, Mr. Lanfear: 6

Submitted this \_\_\_th day of July, 2010, by:

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Mia Nelson, Chair

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Michael Reeder, Vice Chair

Attachments:      Exhibit A: Modified proposal prepared by Goal One  
                         Exhibit B: Alternate proposal prepared by staff

# EXHIBIT A

## Goal 1 Coalition: Proposed Goal 2, Policy 28

28. Marginal Lands. Lane County shall designate and zone as Marginal Lands property meeting the requirements of ORS 197.247 (1991 ed.). Uses and land divisions allowed on Marginal Lands shall be those allowed by ORS 197.247 (1991 ed.). In establishing compliance with ORS 197.247 (1991 ed.), the following directives shall be applied:
- a. No evidence of human activity on the land is required for forest land to be “managed” for purposes of ORS 197.247(1)(a) (1991 ed.). The conscious decision not to convert the land to another use is enough evidence of management to meet the statutory intent, provided there is a significant amount of merchantable or potentially merchantable trees of the property. Likewise, evidence of timber harvest since 1978 would suffice to show management even if there were no trees currently on the property. For farm land, no evidence of farm use during the 5-year statutory window would indicate that land was not managed for farm use.
  - b. All lands owned or managed by an individual or other entity as part of a farm or forest operation during the period 1978 through 1982 shall be considered in addressing the “income” tests established by ORS 197.247(1)(a) (1991 ed.).
  - c. For the purposes of ORS 197.247(1)(a) (1991 ed.), the calculation of potential forest operation income shall be based on the five calendar years preceding 1983.
  - d. To calculate average annual income over the growth cycle, a growth cycle of 60 years shall be assumed.
  - e. In addressing the timber productivity test, the potential productivity of the proposed Marginal Land property shall be consistent with OAR 660-006-0010, as applicable.

# EXHIBIT B

## REVISED – RCP Goal 2, Policy 28

28. Marginal Lands. Marginal Lands are a subset of resource lands and are to be available for occupancy and use as tracts smaller in area than that required for other resource lands. Lane County shall designate and zone as Marginal Lands land meeting the requirements of ORS 197.247 (1991 ed.). Uses and land divisions allowed on Marginal Lands shall be those allowed by ORS 197.247 (1991 ed.). In establishing compliance with ORS 197.247 (1991 ed.), the following directives shall be applied:

- (b) No evidence of human activity on the land is required for forest land to be “managed” for purposes of ORS 197.247(1)(a) (1991 ed.). The conscious decision not to convert the land to another use is enough evidence of management to meet the statutory intent, provided there is a significant amount of merchantable or potentially merchantable trees of the property. Likewise, evidence of timber harvest since 1978 would suffice to show management even if there were no trees currently on the property. For farm land, no evidence of farm use during the 5-year statutory window would indicate that land was not managed for farm use.
- (c) All lands owned or managed by an individual or other entity as part of a farm or forest operation during the period 1978 through 1982 shall be considered in addressing the “income” tests established by ORS 197.247(1)(a) (1991 ed.).
- (d) To determine if a tract was making a “significant contribution” to commercial forestry at the time of the enactment of ORS 197.247 (1991 ed.), the following methodology can be used:
  - (i) Use the best information available regarding soils, topography, etc., to determine the optimal level of timber production for the tract.
  - (ii) Assume that the tract was reasonably managed.
  - (iii) Assume that in 1983 the stand was fully mature and ready for harvest.
- (e) For the purposes of ORS 197.247(1)(a) (1991 ed.), the calculation of potential forest operation income shall be based on the five calendar years preceding 1983.
- (f) To calculate average annual income over the growth cycle, a growth cycle of 50 years shall be assumed.
- (g) In addressing the timber productivity test, the potential productivity of the proposed Marginal Land property shall be consistent with OAR 660-006-0010, as applicable.