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"Preserving Forest Lands for Forest Uses"— Land Use Policies for Oregon Forest Lands

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Forest lands are central to the identity and economy of Oregon.[1] Though both public and private forest lands contribute to the health

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and stability of Oregon, this Article focuses on public and private forest lands not owned by the federal government for which Oregon has forest management responsibilities, land use jurisdiction, and established land use policies. These policies evolved from a generalized combination of forest management and land use laws intended to protect forest lands for forest use, and from conversion to nonforest development, to a system where land use and forest management laws are split between land use and forest agencies with precise regulations designed to preserve and sustain private forest lands necessary for the future of Oregon.

However, Oregon forest land use policy has been in place for more than forty years and remains controversial. The principal landmark of this policy was the passage in 1973[2] of a statewide land use program, by which a state agency, the Land Conservation and Development Commission (LCDC), adopted various land use policies—the "statewide planning goals" or simply the "goals"[3]—and their implementing administrative rules to be applied and enforced by local governments through land use plans and zoning rules.[4] These goals and rules protect the forest land base from nonforest development and parcelization that threatens the continued use of these lands for forest production. While these policies have been fairly effective in preventing the conversion of forest lands to nonforest uses, they are not always well received by forest landowners.

I
OREGON FORESTRY: PAST AND PRESENT

A. Scope and Organization

Following this introduction, the authors discuss the evolution of Oregon planning and regulatory efforts to establish a coherent forest land use policy. The first efforts coincide with the development of planning law in Oregon, i.e., by requiring planning and zoning of all private lands in the state and then by the development of a state

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1 *See The Oregon Story: History of Logging in Oregon*, OR. PUB. BROADCASTING (Jan. 18, 2007), http://www.opb.org/programs/oregonstory/logging/timeline.html (overview of some historical facts regarding logging in Oregon).

2 Act of May 29, 1973, ch. 80, 1973 Or. Laws 127 (codified as amended at OR. REV. STAT. §§ 215.055, 215.510, 215.515, 215.535, 453.345 (1975)).

3 *Id.* § 11(1), 1973 Or. Laws at 130.

4 OR. REV. STAT. § 197.040(1)(c) (2009).

agency to formulate and implement state policy through local plans and land use regulations. One element of this evolving policy relates to forest lands through the adoption of a broadly worded policy in Statewide Planning Goal 4: Forest Lands. Initial efforts by state agencies and the courts to interpret that goal in a variety of situations resulted in policy and regulatory chaos, leading to various efforts to rewrite, clarify, and provide detail for that policy through rulemaking. The authors trace the evolution of forest policy over a forty-year period. The authors then provide a description of current forest policy as it relates to the principal planning issues that have arisen at the local level over the years, namely, defining "forest lands," dealing with minimum lot sizes and land divisions, and determining the nature of "forest uses" and nonforest uses permitted on forest lands. The authors then discuss the resolution of two major controversies that arose independent of local planning issues: whether state law should preempt local regulations of forest practices on forest lands, and whether, and at which level, government should pay for loss of property value due to land use regulations. The authors then conclude with some final comments, conclusions, and recommendations about the Oregon land use program regarding forest lands, evaluating its effectiveness in meeting multiple—and sometimes conflicting—state policy objectives. The political and policy struggles of forest land protection examined in this Article, and their resolution as of 2011, include the following:

Why is forest land protected, given the changing markets for raw or finished forest products? The answer appears to be based on the combined goals of preserving forest lands for commercial timber use and for the recreational and natural resources found there.

Why do forests need protection? The answer most often given is that forest lands need protection against nonforest uses, especially dwellings unrelated to forest use (because of the conflicts with human activity, especially fire) and from land divisions that create smaller parcels and lessen the viability of small ownerships for forestry. But there is also concern about how much timber will be cut and its consequent impacts on recreation and other natural resources.

What are the tools used? Minimum lot sizes to assure economic viability of forest tracts and limitation of nonforest uses, especially dwellings, are the most frequent responses. Forest practices are also used to improve forest health and management.

Who should regulate forests outside federal control? In Oregon, the struggle has resulted in a dual system of regulation. The Land

Conservation and Development Commission (LCDC) and local governments are responsible for protecting the land base by designating forest lands and administering land use regulations, while the Oregon Department of Forestry has exclusive authority and responsibility for forest management and forest practices.

Who bears the cost of forest regulations that reduce the value of property? Generally, these costs are borne by the landowner. Forest interests have, however, successfully bargained for property tax breaks, which are then borne by other taxpayers,[5] and limitations on forest practice regulations.

Is the Oregon Land Use Program for forestry successful in preserving forest lands for forest use? As detailed in the conclusion of this paper, according to the data and studies to date, that program appears to be successful in protecting the forest land base.

B. The Timber Industry in Oregon

Forestry is a major economic component of Oregon's economy. However, the amount of timber harvested in Oregon is subject to great fluctuation. For example, Asian demand for Northwest logs is highly variable.[6] Nevertheless, Oregon's timber provides a major component of the nation's wood products market. Oregon's public and private forests now cover more than 28 million of the state's 61.8 million-acre land base, or about 45% of the state's total landmass.[7] Of these lands, 8.2 million acres of private lands—more than 29%—are zoned exclusively for forest use, with another 2.2 million acres zoned

5 *See, e.g.*, HENRY R. RICHMOND & TIMOTHY G. HOUCHEN, AM. LAND INST., OREGON'S PUBLIC INVESTMENT IN CONSERVATION, PROSPERITY AND FAIRNESS: REDUCED TAXATION OF FARM LAND AND FOREST LAND 1974–2004 (2007). *See also* LEGISLATIVE REVENUE OFFICE, OR. STATE LEGISLATURE, REPORT 7-00, REVENUES FROM TIMBER IN OREGON (2000); Dep't of Revenue, *Property Taxes: Timber Taxes*, OREGON.GOV, http://www.oregon.gov/DOR/TIMBER/index.shtml (last visited Mar. 29, 2011) (setting out the Oregon timber taxation regime in some detail).

6 *See generally* KRISTA M. GEBERT, CHARLES E. KEEGAN, III, SUE WILLITS & AL CHASE, FOREST SERV., U.S. DEP'T OF AGRIC., PNW-GTR-532, UTILIZATION OF OREGON'S TIMBER HARVEST AND ASSOCIATED DIRECT ECONOMIC EFFECTS, 1998 (2002), *available at* http://www.fs.fed.us/pnw/pubs/pnw_gtr532.pdf.

7 *See* SALLY CAMPBELL, PAUL DUNHAM & DAVID AZUMA, FOREST SERV., U.S. DEP'T OF AGRIC., PNW-RB-242, TIMBER RESOURCE STATISTICS FOR OREGON (2004), *available at* http://www.fs.fed.us/pnw/pubs/pnw_rb242.pdf; *Oregon's Forest Heritage*, OR. FOREST RESOURCES INST., http://www.oregonforests.org/factbook/heritage(4-5).htm (last visited Mar. 29, 2011). "Forest land" means at least ten percent of the land is covered with live trees or formerly had such cover, and not currently developed for nonforest use. CAMPBELL, DUNHAM & AZUMA, *supra*, at 11.

for mixed farm and forest uses.[8] The loss of forest land to human use (dwellings, shopping centers, roads, industry, and power lines) has been about 2.5 million acres.[9] Due in part to changing laws and priorities, timber harvests on federal lands—which comprise about 53% of all the land in Oregon[10]—dropped 96% between 1989 and 2001, and timber harvests have not recovered since then.[11] Despite harvests below historical levels on federal land, more harvesting has occurred on state and private lands. Oregon remains the leader in lumber production in the United States.[12]

As detailed in Part II.B below, since 1974 LCDC has established state land use policy (in addition to policies provided by the state legislature) through the adoption, implementation, and enforcement of statewide planning goals. Statewide Planning Goal 4 addressing forest lands has required the retention of forest lands for forest uses.[13] Under those policies provided by statute and the goals, counties may designate forest lands and regulate land divisions and nonforest practices, but are preempted from regulating forest practices on forest lands.[14]

8 Dep't of Land Conservation & Dev., *Forest Land Protection Program*, OREGON.GOV, http://www.oregon.gov/LCD/forlandprot.shtml (last updated Apr. 13, 2009).

9 *See* OR. DEP'T OF FORESTRY, OREGON FOREST LEGACY PROGRAM ASSESSMENT OF NEED 14 (2001), *available at* http://www.oregon.gov/ODF/privateforests/docs/legacy/FinalAON.pdf.

10 William G. Robbins, *Oregon's Public Lands*, OR. HIST. PROJECT (2002), http://www.ohs.org/the-oregon-history-project/narratives/this-land-oregon/people-politics-environment-1945/oregons-public-lands.cfm. Another three percent of the state is under state or local control. *Id.*

11 *25–Year Harvest History*, OR. FOREST RESOURCES INST., http://www.oregonforests.org/factbook/Harvest_History(24).html (last visited Mar. 29, 2011).

12 Oregon still remains the leader in lumber and plywood production in the United States. *See* Or. Dep't of Forestry, *Data Information and Reporting for Indicator B.d.*, OREGON.GOV, http://www.oregon.gov/ODF/indicators/indicatorBd.shtml (last updated Nov. 30, 2010).

13 OR. ADMIN. R. 660-015-0000(4) (2011) (implementing Oregon Department of Land Conservation and Development Goal 4 through a detailed administrative rule, i.e., OR. ADMIN. R. 660-006-0000 to -0060 (2011)). The Land Conservation and Development Commission (LCDC), a division of the Department of Land Conservation and Development (DLCD), "adopted planning standards, called 'goals,' as well as administrative rules setting forth goal requirements in some detail. . . . Over its lifetime, the LCDC promulgated nineteen statewide planning goals. These goals establish binding land-use policies that attempt to strike a balance between development and conservation. The goals fall broadly into five categories: 1) the planning process, 2) citizen involvement, 3) conservation of natural resources, 4) economic development, such as housing and transportation, and 5) management of Oregon's coastal resources." Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 134–135 (2006) (footnotes omitted).

14 *See* OR. REV. STAT. § 527.722 (2009).

The decline of the industry over the past thirty years in part due to reduced harvests (mostly on federal lands) to protect nontimber resources has changed the economic perspective of some forest land owners from one of conservation of a profitable resource use to one in which the value of the land for nonforest uses—specifically, rural homesites—is more economically desirable.[15] While these landowners may find the loss of preferential assessment on that portion of timber lands on which a dwelling is placed acceptable (as the remainder of the land keeps its forest assessment), they may also object to land use laws that limit further land divisions and development, which provide them an economically desirable alternative to forest use.

II
FOREST LAND USE POLICIES

Oregon now maintains its forest lands base through a land use program including specific statutory provisions, a forest policy set out in the forest lands goal, and implementing administrative rules, all of which have evolved over time from a generalized policy to preserve forest lands for forest uses to one with more specific requirements. LCDC, as well as the Oregon Land Use Board of Appeals (LUBA),[16]

15 Declining federal harvests are not the only culprit and may even make timber on private forest lands more valuable. Other factors include the pressure for conversion of forest lands to rural residential uses and tax changes to empower Real Estate Investment Trusts and Timberland Investment Management Organizations to be preferred vehicles for investors seeking tax avoidance or reduction. *See* FOREST SERV., U.S. DEP'T OF AGRIC., PNW-GTR-765, OREGON'S FOREST RESOURCES, 2001–2005: FIVE-YEAR FOREST INVENTORY AND ANALYSIS REPORT (2008).

16 The Land Use Board of Appeals (LUBA) is a state agency charged with review of most local, and some state agency, "land use decisions," a very broad term set out in OR. REV. STAT. § 197.015(10) (2009), on an "on the record" basis by an administrative tribunal (in lieu of trial court review) with direct review by the Oregon Court of Appeals. *See* OR. REV. STAT. §§ 197.805–.850 (2009); Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979–1999*, 36 WILLAMETTE L. REV. 441 (2000). From its temporary establishment in 1979 under Act of July 25, 1979, ch. 772, 1979 Or. Laws 1018 (codified as amended at OR. REV. STAT. §§ 34.020, 34.030, 34.040, 34.050, 34.070, 181.350, 197.015, 197.090, 197.252, 197.265, 197.395, 198.785, 199.461, 215.416, 330.123, 330.557, 341.573, 459.155, 476.835, 479.195 (1979)), until it became a permanent agency in 1983 under Act of Aug. 9, 1983, ch. 827, 1983 Or. Laws 1607 (codified as amended at OR. REV. STAT. §§ 34.020, 92.044, 92.046, 92.105, 197.015, 197.090, 197.175, 197.180, 197.250, 197.251, 197.254, 197.255, 197.265, 197.320, 197.350, 197.395, 197.540, 197.610, 197.615, 197.620, 197.625, 197.640, 197.650, 203.113, 215.213, 215.416, 215.422, 227.175, 227.180, 268.390, 459.049, 527.726, 541.626 (1983)), LUBA's decisions on matters relating to the Statewide Planning Goals were themselves subject to review by LCDC. *See* Land Use Bd. of Appeals, *About Us*, OREGON.GOV, http://www.oregon.gov/LUBA/about

and appellate courts, have continually interpreted these policies, which has led to constant change and the need for adjustments over time.[17] Statewide Planning Goal 4: Forest Lands requires that: forest lands be conserved for forest uses, that such lands shall be retained for the production of wood fiber and other forest uses, that lands suitable for forest uses be inventoried and designated as forest lands, and that existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan. The Goal is set out in full in Appendix 1 in its original and present versions and is the core element of this program and the point of departure for most policy issues. The Goal now requires that forest lands be identified, designated, and zoned principally for forest uses, and requires review of certain nonforest uses according to certain statutory and administrative rule provisions. LCDC's administrative rules[18] and certain statutory provisions[19] set out the types of dwellings and other nonforest uses allowed in forest zones. These cumulative requirements are complex and incorporate the statutory minimum lot sizes, land uses, and standards for nonforest land divisions.[20]

To understand the current requirements adequately, one must look to the evolution of the law relating to these land use measures. Some of that history is presented below; however, space limitations prevent a complete exposition of all the battles fought over forest land use policy. In the main, local governments desired flexibility and discretion in forest policy. Land use and conservation groups, such as 1000 Friends of Oregon, desired clear policies strictly applied with protection for nontimber resources such as habitat, scenic values, and watersheds. State forestry officials and the timber industry desired to protect the forest land base, but also wanted to assure that the Oregon

_us.shtml (last updated July 31, 2007). After the 1983 legislation, LUBA's decisions on all issues were final, subject only to review by the appellate courts. OR. REV. STAT. § 197.850(3) (2009). Thus goal interpretation and implementation in individual cases could be subject to review by one of two agencies, with resolution of differences between them occurring only if the matter were taken to the appellate courts (which occurred only occasionally). Alternatively, LCDC could respond by amending the Statewide Planning Goals or their implementing rules. *See* Dep't of Land Conservation & Dev., *Land Conservation and Development Comm.*, OREGON.GOV, http://www.oregon.gov/LCD/lcdc .shtml (last updated Feb. 25, 2011). This disconnect caused a great deal of confusion in the administration and implementation of state forestry policy.

17 Memorandum from Lloyd Chapman on Approval Standards and Other Nonforest Uses on Lands Zoned Forest Use (Mar. 20, 2006) (on file with the authors).

18 *See* OR. ADMIN. R. 660-006-0000 to -0060 (2011).

19 OR. REV. STAT. §§ 215.700–.755 (2009).

20 *See id.* §§ 215.700–.780.

Department of Forestry, rather than counties, would regulate forest management. Landowners were split over whether dwellings and other development should be limited on forest lands. These actions are reflected in the various LCDC decisions and cases before administrative agencies and the courts discussed below. Given this background, frequent policy standoffs occurred.

A. Before Statewide Land Use Planning

No specific statewide regulation of uses on forest lands was in place in Oregon until 1975, when Goal 4 took effect. However, there was widespread concern over the loss of Oregon's forest lands in the early 1970s. Approximately 1.25 million acres of forest land was lost from Oregon's forest land base between 1952 and 1977.[21] This forest land was converted to housing, roadways, power line rights-of-way, water impoundments, and other uses.[22] LCDC sought to protect the forest land base needed for the forest industry and the state economy.

B. Early General Land Use Legislation—Senate Bills 10 and 100

In 1969, the Oregon legislature enacted Senate Bill 10 (S.B. 10), which required every city and county in the state to have a comprehensive plan that met certain broad statewide standards.[23] However, the legislation was neither implemented nor enforced.[24] An underlying problem was the lack of financial support to cities or counties to prepare comprehensive plans.[25] Uncontrolled development in conjunction with an unprecedented growth of population in the early 1970s propelled further legislative efforts.[26]

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21 J.E. Schroeder, *Timber Needs Projected*, OR. LANDS (Dep't Land Conservation & Dev., Salem, Or.), May 1979, at 5.

22 *Id.*

23 Act of June 3, 1969, ch. 324, § 3, 1969 Or. Laws 578, 578–79 (codified at OR. REV. STAT. § 215.515 (1969)) (commonly referred to as S.B. 10).

24 *See generally* ROBERT K. LOGAN, LAWRENCE R. LUCAS & ERNEST M. ANKRIM, THE OREGON LAND USE STORY 4–5 (1974); Edward Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961–2009*, 18 SAN JOANQUIN AGRIC. L. REV. 1, 9 (2008–2009).

25 CHARLES E. LITTLE, THE NEW OREGON TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON 10 (The Conservation Found. 1974).

26 Michael J. Rupp, Rural Plan Specialist, Or. Dep't of Land Conservation and Dev., Conserving Oregon's Forest lands Through Land Use Planning, American Planning Association Small Town and Rural Planning Symposium IV: The Status of Rural America (Apr. 6, 1986).

The uncontrolled growth incensed the politically active farming community as well as Oregon's governor, Tom McCall, resulting in Senate Bill 100 (S.B. 100), which superseded S.B. 10 in 1973. S.B. 100 created LCDC,[27] the appointed body overseeing the Oregon land use program, as well as the Department of Land Conservation and Development (DLCD), which acts as staff to LCDC (or "the Commission").[28] S.B. 100 required cities and counties to prepare and adopt comprehensive plans, zoning, subdivision, and other ordinances to implement their comprehensive plans.[29] All comprehensive plans and any zoning, subdivision, and other ordinances and regulations adopted by cities and counties were required to be in conformity with the statewide planning goals authorized by that legislation.[30] The first major task for LCDC was to adopt the statewide planning goals to govern the development of local comprehensive land use plans.[31] On December 27, 1974, LCDC adopted the first fourteen statewide planning goals,[32] including Goal 4, which established the conservation of forest lands as a principal land use policy objective of Oregon.

S.B. 100 was subsequently amended in 1977 to provide LCDC with specific administrative procedures for a new statutory process, called acknowledgment, to require LCDC review of local

27 Act of May 29, 1973, ch. 80, § 4, 1973 Or. Laws 127, 129 (codified as amended at OR. REV. STAT. §§ 215.055, 215.510, 215.515, 215.535, 453.345 (1975)) (commonly referred to as S.B. 100). Section 5 of that legislation created LCDC. *Id.* § 5, 1973 Or. Laws at 129. For summaries of the genesis of the Oregon land use system, see LITTLE, *supra* note 25; Carl Abbott & Deborah Howe, *The Politics of Land-Use Law in Oregon: Senate Bill 100, Twenty Years After*, 94 OR. HIST. Q. 4 (1993); Hector Macpherson & Norma Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 WILLAMETTE L.J. 414 (1974).

28 Act of May 29, 1973, ch. 80, § 4, 1973 Or. Laws 127, 129 (codified as amended at OR. REV. STAT. §§ 215.055, 215.510, 215.515, 215.535, 453.345 (1975)).

29 *Id.* § 18, 1973 Or. Laws at 132. Forest landowners were split over the merits of this legislation—some not desiring state interference with forestry at all while others saw land use regulations as a means of reducing conflicts with forest practices. Kami A. Teramura, An Oral History of the Visions and Intentions Behind Oregon's Land Conservation and Development Act: Senate Bill 100, 110–11 (Aug. 1, 1997) (unpublished Master's thesis, University of Oregon) (on file with University of Oregon Libraries).

30 Act of May 29, 1973, ch. 80, § 32, 1973 Or. Laws 127, 137 (codified as amended at OR. REV. STAT. §§ 215.055, 215.510, 215.515, 215.535, 453.345 (1975)).

31 *Id.* § 11(1), 1973 Or. Laws at 130.

32 Order Adopting Statewide Goals and Guidelines, LCDC Order No. 1, (Dec. 27, 1974) [hereinafter LCDC Order No. 1], *available at* http://www.oregon.gov/LCD/docs/history/original_goals_012575.pdf. The original version of Goal 4 is set forth in Appendix 1, *infra*.

comprehensive plans and land use regulations for consistency with these planning goals.[33] As a matter of practice, a local plan would gain approval only after the Commission had reviewed an administrative report prepared by the DLCD, heard testimony, and determined that the plan complied with all relevant statewide goals and guidelines.[34] Although S.B. 100 anticipated that local plans and regulations were to be in compliance with the goals within a year of their adoption, or by 1976, progress toward that objective was considerably slower, as goal requirements expanded over time and new issues arose, some local governments resisted the new state requirements, local staff and funds were limited, and those local plans and regulations submitted almost always required further work.[35] As a result, plans of all counties and cities of Oregon were acknowledged by 1986,[36] though a number of limited specific issues for certain areas were not resolved for years, or even decades, later.

C. Statewide Planning Goal 4: Drafting and Adoption

Forest land issues were not prominent in the process of adopting S.B. 100 nor were such lands listed as a resource to be conserved in the earlier S.B. 10 adopted in 1969. The 1973 legislation included a provision to "give consideration to" eleven specific land use issues in formulating the goals; however, forest land was not one of them.[37] Goal 4 came into existence after a series of different drafts were considered. From the beginning, development of the forest lands goal

33 Act of July 22, 1977, ch. 664, 1977 Or. Laws 598 (codified at OR. REV. STAT. § 197.251 (2009)) (implemented by OR. ADMIN. R. 660-003-0005 to -0050 (2011) to provide for acknowledgment). The definition of acknowledgment in OR. ADMIN. R. 660-003-0005 (2011) was initially adopted in 1978 by LCDC's rulemaking process, which became effective June 2, 1978. Acknowledgment is an important process for a local government: (1) not only do the goals drop out as review criteria for land use decisions, and (2) those things that LCDC "missed" in acknowledgment cannot be revisited until periodic review. *See* Byrd v. Stringer, 295 Or. 311, 316–17, 666 P.2d 1332, 1336 (1983); Urquhart v. Lane Council of Gov'ts, 80 Or. App. 176, 180, 721 P.2d 870, 872–73 (1986). *See also infra* text accompanying notes 51, 53, 55 (describing the acknowledgment process).

34 GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 23 (1992).

35 JOHN M. DEGROVE, LAND, GROWTH AND POLITICS 276–78 (1984).

36 County Acknowledgment Dates for Goal 4 (Jan. 14, 1993) (on file with the authors).

37 Act of May 29, 1973, ch. 80, § 34(2), 1973 Or. Laws 127, 137 (now codified as amended at OR. REV. STAT. § 197.230(1)(c) (2009)). It may well be that forest landowners were more comfortable dealing with local governments rather than the State of Oregon on land use matters.

language focused on three main issues: 1) the definition of forest lands to be protected, 2) the primacy of timber production on such lands, and 3) the nonforest uses allowed on such lands.[38]

This portion of the Article undertakes a historical review of the background to Goal 4. In addition, the section relates the lengthy acknowledgment process that followed to interpret that goal along with initial development of interpretive rules, and culminates with subsequent significant amendments to Goal 4 and accompanying rules between 1990 and 1994.

LCDC was authorized by statute to adopt "goals"—that is, binding land use standards—to direct local comprehensive planning and land use regulations to implement state land use policies locally.[39] Several rounds of extensive public workshops were held in order to give citizens the opportunity to influence the development of goals for land use in Oregon.[40] The information gathered from these workshops was subsequently used to prepare draft statewide planning goals. From those workshops, the Commission perceived the need to orient what would become Goal 4 more towards conservation of the forest lands base and decided the overall aim of this goal would be the preservation of forest lands to the greatest possible extent.[41]

On October 24, 1974, LCDC adopted a document titled "Public Hearings Draft" of the statewide land use goals, guidelines, and critical areas.[42] The forest lands goal was worded to "conserve forest lands for forest use purposes" and distinguished between policies applicable to private and public forest lands, and other forest lands. Under this draft, private commercial forest land was to be retained primarily for the production of wood fiber, but other forest and

38 Lloyd Chapman, Protecting Forest Lands in Oregon: The Early Years—1973–1984, at 1 (Mar. 10, 2011) (unpublished manuscript) (on file with authors).

39 *See generally* OR. REV. STAT. §§ 197.015(8), .175, .225–.250 (2009).

40 LAND CONSERVATION & DEV. COMM'N, "PEOPLE AND THE LAND" PUBLIC WORKSHOPS, CITIZENS WORKBOOK (1974).

41 The original draft Goal concerning forests and forest lands focused on "important forest land" as "land capable of profitable production of wood products, considering the size of the forest unit and surrounding land uses." *Id.* at 4. However, public review raised four issues that commentators felt should be addressed: (1) increasing demand for wood products, (2) increasing demand for other uses of forest lands (and resulting loss of good forest lands), (3) forest resources not being replaced on the best lands nor at the rate to meet future demand, and (4) lack of coordination among cutting and marketing policies. *Id. See* LCDC Order No. 1, *supra* note 32 (showing the original version of the first fourteen statewide planning goals).

42 OR. LAND CONSERVATION & DEV. COMM'N, "PUBLIC HEARINGS" ON DRAFT STATEWIDE LAND USE GOALS, GUIDELINES AND CRITICAL AREAS 4 (1974).

nonforest uses could be permitted. Public commercial forest lands were to be retained for the production of wood fiber and other forest uses.[43] Other noncommercial forest lands would be used in a manner consistent with the primary objective of protecting soil and water resources, wildlife and fisheries habitat, scenic corridors, and recreational and wilderness uses.[44]

A revised draft of the proposed statewide land use goals and guidelines was circulated in November 1974 (the "November draft") and included what was then called Goal 11: Forest Lands,[45] which dealt with the conservation of forest lands, and made no distinction between public forest lands, private commercial forest lands, and other forest land.[46]

43 Public forest lands were defined as forest lands in federal, state, and local government ownership, and commercial forest land was defined as land capable of growing 100 board feet per acre per year. The draft Goal 11 (later renumbered Goal 4) also provided for forest uses: "(1) commercial forest land in the production of trees for forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) the recreational and wilderness values of forests which are compatible with these other uses; and (7) the use of forest land to determine demarcation for growth boundary limits." LAND CONSERVATION & DEV. COMM'N, "PEOPLE AND THE LAND" PUBLIC WORKSHOPS, CITIZENS WORKBOOK 4 (1974).

44 Other forest land was defined as "land other than commercial forest land which is: (1) presently supporting forest tree species; (2) has historically supported forest tree species; (3) is needed for watershed protection, wildlife and fisheries habitat, recreation wilderness, erosion control and maintenance of clean air and water; (4) has conditions of climate, soil and topography that are suitable only for tree growth irrespective of use; or (5) will provide, in agricultural and urban areas, in addition to the above urban buffers, windbreaks, wildlife, and fisheries habitat, livestock habitat, scenic corridors and recreational uses." *Id.* The early draft version of what was then numbered Goal 11 also contained a series of guidelines. However, guidelines were not legally binding, but advisory, being "suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals." OR. REV. STAT. § 197.015(9) (2009) (defining "guidelines").

45 LAND CONSERVATION & DEV. COMM'N, REVISED DRAFT OF STATEWIDE LAND USE GOALS, GUIDELINES, AND THE COLUMBIA RIVER GORGE AS A CRITICAL AREA (1974). There was a final public hearing on this draft on December 13, 1974, in Salem, Oregon.

46 *Id.* The revised draft Goal on November 30, 1974, included a single definition of forest lands, which are "(1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; (2) other forested lands needed for watershed protection, wildlife and fisheries habitat and recreation; (3) lands where extreme conditions of climate, soil and topography require the maintenance of vegetative cover irrespective of use; (4) other forested lands in urban and agricultural areas which provide urban buffers, wind breaks, wildlife and fisheries habitat, livestock habitat, scenic corridors, and recreational use." LCDC Order No. 1, *supra* note 32, at 15. The Goal also

The final version of this goal—renumbered to Goal 4: Forest Lands, and adopted by LCDC on December 27, 1974—included most of the language from the November draft. The overall goal was simplified: "To conserve forest lands for forest uses." A new paragraph strengthening protection of forest land was added: "Forest land shall be retained for the production of wood fiber and other forest uses. Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan."[47]

The Goal also directed how forest lands would be inventoried and designated: "In the process of designating forest lands, comprehensive plans shall include the determination and mapping of forest site classes according to the United States Forest Service manual 'Field Instructions for Integrated Forest Survey and Timber Management Inventories—Oregon, Washington and California, 1974.'"[48]

The definitions of "forest land" and "forest uses" were left largely unchanged from the November draft.[49] However, the Goal did not deal with dwellings or other nonforest uses, a policy conundrum that would haunt the land use program for the next twenty years.

D. From "Ad Hocery" to Rules—The Evolution of Forest Policy

This subsection deals with the incremental evolution of forest land use policy in Oregon following the adoption of Goal 4, including revisions to that goal, adoption and amendment of interpretive administrative rules, and legislative intervention. The history demonstrates an evolution from a broadly worded conservation policy to one utilizing objective standards. The policy's development can be divided into three periods: first, from the adoption of the goal to the adoption of the first administrative rules (1974–82); second, the evolution of the administrative rules as LCDC changed policy

defined forest uses, which were approximately the same as the previous draft of the goal, i.e., "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." *Id.*

47 *See infra* Appendix 1.

48 *Id.*

49 *Id.*

direction (1982–93); and third, the resolution of many policy issues by legislative intervention (1993–present).

1. Early LCDC Forest Policy (1974–1982)

Once the statewide goals were adopted in 1974, LCDC moved to establish a process for evaluating existing local plans and regulations in order to determine how much time and public funds would be needed for local plans and regulations to be revised in order to comply with the new goals.[50] The Commission returned to the question of what the goals required when local governments began submitting their plans and implementing land use regulations for acknowledgment or certification that they complied with the goals.[51] LCDC provided more than $25 million in direct grants to local governments to develop and update their comprehensive plans and implementing ordinances.[52]

Based on the plan evaluation process and revisions to S.B. 100 in 1977, the Commission adopted a rule formalizing the "acknowledgment" process in June 1978.[53] The rule required that local governments provide notice to interested parties and an opportunity to comment on, or more formally, to "support" or "object to" an acknowledgment request.[54] The legislation also provided for the Commission to "continue" an acknowledgment request for a period of time to allow a jurisdiction to do additional work in order to comply with specific goal requirements identified by LCDC requirements.[55]

Policy evolved slowly through the review of local plans for goal compliance. Acknowledgment decisions were the primary and most frequent source for policy precedents from 1974 to 1982. However

50 *See, e.g.*, OR. LAND CONSERVATION & DEV. COMM'N, OREGON LAND USE HANDBOOK (1975) (containing the first policies and procedures for the development of comprehensive plans and implementing regulations to comply with the statewide goals ready for acknowledgment).

51 *See supra* notes 33, 37 and accompanying text.

52 Grant amount information provided by DLCD. The 1981 and 1983 Oregon legislatures extended the scope of S.B. 100 and the responsibilities of LCDC to include the review of amendments to completed plans and ordinances to ensure continued compliance with the Statewide Planning Goals. *See* OR. REV. STAT. §§ 197.610–.625 (2009) (post-acknowledgment amendments); OR. REV. STAT. §§ 197.628–.644 (2009) (periodic review).

53 *See supra* note 33.

54 OR. ADMIN. R. 660-003-0020, -0025 (2009).

55 *See supra* note 33.

policy could also be established by goal interpretations from sources other than LCDC, including the courts. The changing interpretations of various goals, including Goal 4, in individual cases based on the broadly worded goals and the absence of binding interpretive administrative rules led many to complain that LCDC was moving the goal posts and requiring compliance with newer interpretations of the goals.[56]

From 1978 through 1982, before administrative rules were adopted, DLCD and LCDC struggled to set out how counties were to plan and zone so as to "conserve forest land for forest uses."[57] There was a continuum of views on permissible uses of forest land—from a view that only forest uses listed in the goal should be allowed, to the view that a range of uses similar to those allowed in Exclusive Farm Use (EFU) zones[58] were appropriate. Others took the position that the range of uses should be more abbreviated.[59] As acknowledgment reviews and court cases brought forward new factual situations in which policy was established or changed from prior precedent, the Commission was forced to reconcile these different values and make decisions about uses allowed on forest land. In addition, the forest industry was politically strong and there were three unsuccessful initiative measures to eviscerate or terminate the state's land use program in 1976, 1978, and 1982, making LCDC cautious in program administration.[60]

56 As individual county acknowledgment reports were reviewed and acted upon by LCDC, they tended to set precedents for the requests that followed. These early county reviews were often contentious as the stakeholders sought to push LCDC in their particular direction along the continuum. County commissioners, industry groups (such as Associated Oregon Industries), and local government groups (such as the Association of Oregon Counties) constantly advocated for stronger local control and flexibility in land use and forest land policy. The Oregon Department of Forestry generally sought to reduce impacts on commercial forestry while other state agencies sought to protect other forest uses on forest land. Environmental groups, and especially 1000 Friends of Oregon, represented environmental values and typically argued for a stronger state role in the planning process. The Oregon Business Planning Council hired a forest planner to participate in the early acknowledgment reviews and small timber owners were also vocal in presenting their views. In all, a wide and diverse group of stakeholders, organizations, and landowners participated in the process.

57 *See infra* Appendix 1.

58 *See* OR. REV. STAT. § 215.213 (1977); OR. REV. STAT. § 215.283 (1983).

59 *See* Chapman, *supra* note 17.

60 *See* Dep't of Land Conservation and Dev., *History of Oregon's Land Use Planning*, OREGON.GOV, http://www.oregon.gov/LCD/history.shtml (last updated Aug. 20, 2010).

In this same period, LCDC also heard appeals of goal-related land use decisions made by local governments in formulating or applying their comprehensive plans or land use regulations. In 1979 the Legislature established the Oregon Land Use Board of Appeals (LUBA) to deal with most land use appeals from local governments, in lieu of direct review by LCDC or state trial courts, but subject to appellate court review. The enabling legislation allowed the Commission to review and edit those portions of LUBA decisions dealing with goal issues. This editing authority was removed from LCDC in 1983,[61] but in the meantime LCDC continued to review and edit LUBA decisions related to goal requirements until all cases under review prior to the passage of legislation were decided.[62] LCDC edited a number of such decisions on Goal 4 related matters, which are discussed below. Thus, in addition to appellate court cases, there were several avenues by which Goal 4 could be interpreted: by acknowledgment, LUBA, and appellate court challenges to local government interpretations of the goal before acknowledgment. At the same time, there were multiple opportunities for conflicting interpretations of the goals within LCDC.

Because there were many sources of inconsistent interpretations, LCDC took steps to define goal requirements more precisely and provide better direction to local governments by adopting policy papers and other publications to explain its interpretation of certain goals. DLCD also created "internal plan review worksheets" in 1978–79 for each goal, with a checklist of goal requirements to provide staff consistency in the evaluation of local plans and regulations.[63] The Commission also established an internal plan review team made up of the supervisor, six plan review staff, and a regional field representative in order to define more clearly the requirements of each of the goals.

Responding to multiple questions on the interpretation of Goal 4, LCDC circulated two documents on the subject in 1979, one titled "Common Questions on the Forest Lands Goal" (the Common Questions paper) and another called "Forest Lands Goal Policy" (the

61 The power to edit LUBA decisions was given to LCDC by the Act of July 25, 1979, ch. 772, § 6, 1979 Or. Laws 1018, 1020–21 (repealed 1983). It was removed by the Act of Aug. 9, 1983, ch. 827, § 59, 1983 Or. Laws 1607, 1633 (repealing OR. REV. STAT. §§ 197.605, 197.630, 197.635 (1983)).

62 Act of July 1, 1983, ch. 230, 1983 Or. Laws 253 (amending Act of July 25, 1979, ch. 772, § 28, 1979 Or. Laws 1018, 1025).

63 LCDC Goal 4 Worksheet (1979) (on file with the authors).

Forest Lands Policy paper).[64] Like the Common Questions paper, the Forest Lands Policy paper provided advice on interpretation and application of that goal in a question-answer form, but the Forest Lands Policy paper was more formal in nature. Although these documents provided helpful advice on interpreting Goal 4, they were not binding. Members of LCDC could not agree among themselves about how to interpret Goal 4 on limitations and prohibitions of nonforest uses and dwellings. Lacking the Commission's direction, DLCD staff used its interpretive discretion and recommended refinements of forest policy as plan reviews proceeded and LUBA cases arose, but there was no adopted policy as to what nonforest uses would be allowed on forest lands nor under what circumstances forest dwellings would be permitted.

These adopted policy papers addressed some of the policy issues that had been raised up to that time[65] and interpreted Goal 4 to require local governments to do the following:

1. Inventory their forest land consistent with the goal definitions of forest land and forest uses;
2. Designate inventoried forest land as forest land on the comprehensive plan map and adopt policies adequate to conserve forest land for forest uses;
3. Apply implementing measures (zoning, subdivision and land partitioning, and development ordinances) to designated forest land adequate to conserve/retain/protect forest land for forest uses; and

64 Memorandum from W.J. Kvarsten, Dir., Dep't of Land Conservation and Dev. on Common Question on the Forest Lands Goal to Interested Persons (Mar. 15, 1979) [hereinafter Common Questions]; Memorandum from Dick Gervais, Anne Squier & Randy Smith, Comm'n Subcomm., Land Conservation and Dev. Comm'n on Item 4.6: Forest Land Goal Policy to Land Conservation and Dev. Comm'n (July 3, 1979) [hereinafter Forest Lands Goal Policy].

65 *See* Common Questions, *supra* note 64 (interpreting the goal "to require a mapping of forest lands *by cubic foot site class*" (emphasis in the original)). *See also* OR. REV. STAT. § 526.320 (2009). After public review of the Common Questions, a Commission subcommittee was established to review remaining unresolved issues. *See* Forest Lands Goal Policy, *supra* note 64. In July 1979, the Commission adopted a policy that required mapping of forest lands by cubic foot site class, effective in July 1980, as well as interim measures. *See id.* (providing the minutes for the July 11–13, 1979, LCDC meeting). The mapping issue was a good example of the lack of clarity in stating forest policy. It should also be noted that Goal 4 does not require an inventory of forest lands, defined by the Goal, but rather lands suitable for forest uses. The definitions of "forest lands" and "forest uses" are not wholly aligned, and the definition of "forest uses" does not indicate whether any nonforest uses or dwellings are permitted. This lack of clarity led to litigation and the need for further rulemaking.

4. Take a Goal 2 "Exception" for any inventoried forest land that was not zoned for forest uses.[66]

Although LCDC had determined the basic requirements of the goal, the necessary details were still yet to be identified.

a. Inventory and Designation Issues

The primary issues over the requirement to inventory "lands suitable for forest uses" included both the extent of such lands, and also the detail required for the inventory.[67] The Common Questions paper included a lengthy discussion titled "Field Instructions for Integrated Forest Survey and Timber Management Inventories" listed in Goal 4, and explained that a mapping by cubic foot site class was the appropriate inventory tool.[68]

Before these informal policy publications were circulated, Wallowa County came before LCDC for acknowledgment in 1978,[69] the first county to be reviewed under Goal 4.[70] A brief staff report

66 Forest Lands Goal Policy, *supra* note 64. "A goal exception is necessary where an applicable goal would otherwise prohibit a local government's proposed action. An exception is essentially a variance that allows state land use goal requirements to be waived where, for some compelling reason, it is 'not possible to apply the appropriate goal to specific properties or situations.'" 1000 Friends of Or. v. Wasco Cnty. Court, 299 Or. 344, 352, 703 P.2d 207, 215–16 (1985).

67 If the inventory were tied solely to forest classifications, it would be relatively easy to administer; however, if additional forest lands not within the soil classifications listed are otherwise necessary for forest production in the same way that similarly situated agricultural lands are included for preservation, even if they do not meet those soil classifications that would automatically require inclusion, the discussion becomes more complicated. *See* Sullivan & Eber, *supra* note 24, at 55–56. Moreover, soils mapping deals with larger geographic areas, there may be disputes over the soils on particular tracts and experts are often used. Wetherell v. Douglas Cnty., 342 Or. 666, 160 P.3d 614 (2007).

68 *See* Common Questions, *supra* note 64, at 2 (discussing the "Field Instructions for Integrated Forest Survey and Timber Management Inventories" under the section entitled "How are Forest Lands Inventoried?").

69 Wallowa County Acknowledgment Denial Order (1978) (on file with authors). As the order shows, Wallowa County's request was denied because of a policy prohibiting additional wilderness in the county, which the commission deemed inadequately coordinated with state and federal agencies.

70 Actually, Gilliam County was the first county reviewed for acknowledgment in 1976. Lloyd Chapman, Protecting Forest Lands in Oregon: The Early Years—1973–1984, at 16 n.11 (Mar. 10, 2011) (unpublished manuscript on file with authors). Gilliam County is one of only two of Oregon's thirty-six counties that do not have any forest lands, and Goal 4 was not considered in the county's acknowledgment review. *Id.*; Wallowa County Acknowledgment Denial Order, *supra* note 69. This County is located in the northeast corner of Oregon and is the home of the Wallowa Mountains and the Eagle Cap Wilderness Area. WALLOWA COUNTY, OREGON, http://www.co.wallowa.or.us/ (last visited Mar. 30, 2011). The late 1970s were a time of great concern over the dwindling

identified problems with the county's inventory of forest land, but noted that "[a]ll lands suitable for forest use have been generally inventoried and designated as Timber/Grazing."[71] At the time of the review, no forest site class mapping was available, so the report recommended that the county include a productivity map with the next plan update.[72] LCDC established a policy of inventorying forest lands through this acknowledgment review.[73] LCDC applied the inventory policy fairly consistently to later acknowledgment submissions and the adoption of the policy papers adopted by July of 1979.[74] However, in the absence of binding rules interpreting Goal 4,

timber industry and conflict between those who supported the industry and those who advocated for wilderness. *U.S. Forest Service History*, FOREST HIST. SOC'Y, http://www.forest history.org/ASPNET/publications/region/8/history/summary.aspx (last updated Nov. 24, 2008). Since under OR. REV. STAT. § 197.180(1) state agencies were expected to follow the local plan (although the plan was not binding on federal agencies), the Oregon Fish and Wildlife agency protested the county's policy and was upheld by the commission. Wallowa County Acknowledgment Denial Order, *supra* note 69. The original version of Goal 4 also required counties to designate inventoried forest land as "forest land" on the plan map and adopt policies to meet the goal's requirement to conserve forest land for forest uses. *See infra* Appendix 1. For the most part, these plan policies did not arise as an acknowledgment issue.

71 Wallowa County Acknowledgment Denial Order, *supra* note 69, at 11.

72 *See* Wallowa County Acknowledgment Order 9–11 (1978) (on file with authors). The adopted Goal included language to require use of the *United States Forest Service Field Manual* in the inventory process. *See infra* Appendix 1. However, the manual cited in the goal describes an inventory process based on specific points on a three-mile square grid system that was designed to monitor changes in land use over time. It was thus not a completely useful tool in developing a property-specific inventory map of forest land. Soils mapping of forest land was completed much more slowly than that of farmland and often failed to address woodland suitability. And the timber industry had not settled on the best way to inventory the quality of forest land. Polk County Acknowledgment Report 24 (1979) (on file with authors).

73 Later LCDC actions confirmed the necessity of inventorying forest lands. *See, e.g.*, Polk County Denial Order 21–24 (1979) (on file with authors); Crook County Acknowledgment Order 11–13 (1979) (on file with authors); Yamhill County Continuance Order 16–20 (1979) (on file with authors).

74 One year later in February 1979, LCDC reviewed Polk County's acknowledgment request. The county provided an adequate productivity mapping based on Department of Revenue information, but the Department used the opportunity to elaborate on the inventory requirement of Goal 4. Polk County Acknowledgment Report, *supra* note 72, at 24. The report found: "In assessing the adequacy of forest lands inventories, DLCD uses a standard of equivalency with the Goal requirement. While use of soils information suggested by the Department of Forestry appears most complete, Department of Revenue information and local mapping can also be adequate to meet the Goal's inventory requirements." *Id.* By late 1979 most counties were able to provide cubic foot site class mapping of forest lands. Counties that had already submitted their acknowledgment request were allowed to substitute other productivity mapping and provide cubic foot site class mapping at the next plan update.

Commission policy evolved, as counties submitted their plans for acknowledgment.

The Polk County acknowledgment request was submitted in 1979 while the policy guidance papers mentioned above were being formulated. The request raised the issue of appropriate designation of forest land. LCDC denied acknowledgement on Goal 4 because Polk County, having inventoried 260,000 acres of forest lands, only designated 217,000 as forest land on its comprehensive plan map and failed to give an explanation about the remaining lands.[75]

The 1981 Lane County acknowledgment request provided the next test for the goal inventory requirements. The County submitted a cubic foot site class productivity map, but it failed to demonstrate that all lands suitable for forest uses were included and failed to show that the appropriate forest designation had been applied to identified forest lands. LCDC found that "[t]he inventory does not distinguish between cubic foot site class 4 and 5 lands, less productive forest lands and nonforest lands. The inventory does not assure that all forested land (land with trees on it) is inventoried forest land."[76] Incrementally, inventory and designation requirements were fleshed out through detailed review and Commission discussion of individual plans and regulations.

Another controversial issue in the early years of the program was whether to recognize a category of rural land that was neither suitable for farm use, nor forest use, which a county might lawfully designate in its plan for a use other than resource land preservation. Through the first two years of acknowledgment reviews, no county asserted that they had any exclusively rural land—i.e., land that was neither agricultural land nor forest land. All land except that within urban growth boundaries and "built and committed exception areas" was classed as either farm, forest, or mixed farm/forest. Given the broad definitions of farm and forest land and the requirement to inventory lands "suitable for forest uses," LCDC staff believed that there was little or no "nonresource" land in the state.[77]

75 Polk County Acknowledgment Report, *supra* note 72.

76 Lane County Compliance Acknowledgment Denial Order 42 (1981) (on file with authors).

77 *See* Sullivan & Eber, *supra* note 24, at 21–25 (discussing the nonresource lands issue).

The 1981 Lane County acknowledgment review squarely raised the nonresource issue to LCDC.[78] The county's complex plan included an overall plan along with thirteen subregional plans. Only two of the subregional plans, Mohawk Valley and Spencer Creek, were adopted after newer forest land inventory information was available. LCDC found that Lane County failed to comply with several goals, including Goal 4, because the county's inventory failed to clearly define and separate forest land and possible nonresource land.[79]

The inventory issue was further refined in a 1982 LUBA case preceding the adoption of administrative rules, *Osborne v. Lane County*,[80] involving the county's approval of a seventy-seven-lot subdivision on land the county deemed to be nonresource land. Lane County made findings using the four part definition of "forest lands," (which were required under the Goal to be protected) rather than the broader "lands suitable for forest uses" which was the requirement of the inventory requirements of Goal 4 and determined the area was not "forest land" as defined by the goal.[81] In finding for Lane County, LUBA said:

> We do not view the fact that trees may be growing on the property in various places, as the record seems to indicate, to mean the land is "forested" within the meaning of Goal 4. . . . [T]he photograph clearly shows the property subject to the appeal is equally divided between brown open space and green tree cover of some kind. . . .
>
> Further, even if we were to interpret the land as being "forested," the county has made sufficient findings supported with substantial evidence to show that the land is nonetheless not required to be kept in its present condition to protect [other forest uses]. . . .
>
> We believe that the county has adequately shown that this property is not subject to Goal 4.[82]

This LUBA decision interpreted the goals so that at least three categories of rural land plan designations were possible: farm and forest lands and nonresource lands, where previously it had been understood there were only two such categories, in the absence of an exception. Following this decision and at least in part because of it, a

78 Lane County Acknowledgment Order, *supra* note 76, at 34–43.

79 *Id.* at 43.

80 Osborne v. Lane Cnty., 5 Or. LUBA 172 (1982).

81 *Id.* at 182–86.

82 *Id.* at 186.

number of counties—including Lane[83] and Josephine[84]—submitted acknowledgment requests that included some nonresource land.

b. Uses, Dwellings, and Minimum Lot Sizes

Designating resource lands outside urban growth boundaries by soil types was relatively precise, as was the case for identification of "agricultural lands" under Goal 3.[85] How to meet the requirement of Goal 4 that forest lands be preserved for forest uses through the choices of what nonforest uses, particularly dwellings, would be permitted and what minimum lot size would meet the goal was less ascertainable. By this time, the acknowledgment process proved to be a lengthy endeavor, with objections and revisions to plans and regulations to meet increasingly strict standards. When LCDC overlooked planning or regulatory flaws, citizen watchdog groups were present to challenge those LCDC decisions in the appellate courts. The fact that law was made from two sources, LCDC and the appellate courts, often caused confusion in determining the status of LCDC interpretation. Local governments complained that LCDC was too detailed in its reviews, while landowners often complained that land use laws were too restrictive. These perceptions played out in the political field in the directions given to LCDC and the responses made by watchdogs. Ultimately, LCDC would determine that the difficulties over its administration of Goal 4 militated toward providing greater clarity in the adoption of binding administrative rules.

The definition of "forest uses" did not include any reference to nonforest uses or dwellings. In the absence of any statutory direction on the matter, LCDC initially viewed the uses and standards in the statutory Exclusive Farm Use (EFU) zoning as an appropriate analog for the conservation of forest land. This position retained discretion for the Commission and gave flexibility for local governments.[86]

83 *See* Lane County Acknowledgment Order, *supra* note 76, at 34–43.

84 Josephine County Acknowledgment Order 52–53 (1982) (on file with authors). *See also* Clatsop County Acknowledgment Order (Corrected) 7–10 (1984) (on file with authors); Douglas County Continuance Order 9–15 (1983) (on file with authors).

85 Sullivan & Eber, *supra* note 24, at 19–21 (setting out the agricultural lands identification process).

86 In Common Questions, *supra* note 64, at 5, LCDC gave the following advice regarding protection of forest lands by prohibiting or limiting nonforest uses (Question 9): "An Exclusive Farm Use (EFU) Zone (pursuant to ORS ch. 215) is also adequate to protect forest lands if it provides for the forest uses permitted by the law. The statutory definition of 'farm use' includes small woodlots (less than 20 acres) and the growing of

Following publication of the Common Questions paper and the Forest Lands Policy paper, there was a continuing lack of consensus within the Commission as to whether local plans and regulations were adequate to meet the Goal 4 requirement to conserve forest land for forest uses. This development led to a case-by-case evolution of the implementation requirements of Goal 4. Case-by-case review occurred through acknowledgment decisions, LUBA cases that LCDC edited until 1983 when LUBA became an independent review authority over local government land use decisions, and appellate court decisions.

Among other things, the Common Questions paper included a response to the question: "How are designated forest lands protected for forest uses?" This paper suggested three ways of achieving such protection: "(1) [*l*]*imiting* nonforest uses on forest lands; (2) [a]ssuring that nonforest uses are *compatible* with forest uses; and (3) [p]roviding a buffer area between forest and nonforest uses."[87] The paper then provided examples of ways to limit nonforest uses and of compatibility standards and stated that EFU zoning was generally adequate to protect forest lands.[88] The "Policy on the Forest Lands Goal" adopted by the Commission in July 1979 confirmed the use of the Common Questions paper where it did not conflict with other Commission policy.[89] The elastic terms "limiting" and "compatible,"

'cultured Christmas trees' (ORS 215.203). Permitted nonfarm uses include the propagation or harvesting of forest products, public and private parks, private hunting and fishing preserves, campgrounds and a portable or temporary facility for the primary processing of forest products compatible with farm use (ORS 215.213)." This approach of conflating nonfarm and nonforest uses, and finding many nonfarm uses allowable outright or conditionally, continued through the first administrative rules that dealt with allowable nonforest uses in 1990 and was the subject of much discussion in *1000 Friends of Oregon v. Land Conservation and Development Commission, Lane County*, 305 Or. 384, 752 P.2d 271 (1998), discussed *infra* note 89.

87 Common Questions, *supra* note 64, at 4 (emphasis added).

88 *Id.* at 5.

89 For example, the paper stated: "Forest lands are retained for forest uses by allowing one or more forest uses and limiting nonforest uses (such as residential use). Where nonforest uses are allowed (outright or conditionally) on forest land, the jurisdiction must demonstrate in the plan that the forest lands will be retained and protected for existing and potential forest uses, despite the nonforest uses allowed. . . . If it cannot be demonstrated that forest lands will be protected and retained despite provision of some nonforest use, then that use cannot be permitted unless an exception is justified and taken." Forest Lands Goal Policy, *supra* note 64, at 2, 10. The position that nonforest uses, particularly those uses allowed in an EFU zone, could be allowed in forest zones if, e.g., it is shown that no lands will be removed from forest uses that would materially alter the stability of the overall land use pattern of the area would later be struck down in *1000 Friends of Oregon*

and the inconsistency of policy formulation and application, such as allowing dwellings on ten acres of forest land in Multnomah County,[90] would cause much trouble for LCDC.

Early acknowledgment reviews, such as those for Wallowa and Crook Counties, found zoning similar to EFU zoning to be in compliance with Goal 4.[91] Crook County's EFU-4 zone was acknowledged with a forty-acre minimum lot size, allowing residential and recreational dwellings as conditional uses and assurance that such uses are compatible with forest uses.[92] Also, in November 1979 LCDC approved the Yamhill County plan and regulations, including the application of three different forest designations to inventoried forest land.[93] In addition, during the Multnomah County acknowledgment review of January 1980 the Commission accepted a "Multiple Use Forest" designation, allowing more nonforest uses over the objections of the Oregon Department of Forestry.[94] In that review, LCDC also decided that dwellings "in conjunction with a primary use were allowed on parcels over 10 acres if a forest management plan for 75 percent of the parcel was provided, no new public services were needed, and the residential siting

v. Land Conservation and Development Commission, Lane County, 305 Or. 384, 752 P.2d 271 (1988), as inconsistent with Goal 4.

90 Multnomah County Continuance Order 22–27 (1980) (on file with authors).

91 The Commission had difficulty determining forest land policy for uses allowed and prohibited uses permitted by Goal 4, as well as dwellings on forest land. Attempts early in the acknowledgment process to clarify policy could not be agreed on by the Commission. *See infra* Part II.D.1. Periodic review requirements, so as to update the plans every five years, gave reason to believe that it led to more uniform application of standards over time. Moreover, LUBA and Court of Appeals cases seemed to change and adjust the requirements regularly. *See id.* The statewide goals for agricultural land and forest land were treated somewhat similarly. However, Goal 3 Agricultural Land has always relied on statutory EFU language and zoning as the primary tool for protecting designated agricultural land. *See* Sullivan & Eber, *supra* note 24, at 15–16. No such tool was available for forest land zoning. As acknowledgment decisions addressed new issues, the Commission dealt with how these interpretations would be applied to other counties.

92 Crook County Acknowledgment Order, *supra* note 73.

93 Yamhill County Continuance Order, *supra* note 73, at 16–20. LCDC did not approve one of the forest zones, the AF-20, with a twenty acre minimum lot size which was applied to commercial forest lands, and to sensitive deer winter range habitats because the zone allowed dwellings right on twenty acres, permitted subdivisions, and did not apply "compatibility standards" to assure that forest lands would be preserved for forest uses.

94 Multnomah County Continuance Order, *supra* note 90, at 22–27. In these proceedings, the Oregon Department of Forestry (ODF) objected to acknowledgment, *inter alia*, because it believed the County regulation of forest uses had been preempted by the state legislation described in Part IV *infra*. LCDC stated its review was for consistency with the Goals and avoided the question. *Id.* at 26, 31–33.

standards were met."[95] As shown in these reviews, LCDC seemed to be content to establish policies on nonresource uses and dwellings, as well as minimum lot sizes, for forest lands using similar standards to those applied to farmlands and seemed less focused on forest lands protection.[96]

c. Conflicting Interpretations of State Forest Policy

While LCDC dealt with the acknowledgment of plans and land use regulations, LUBA and Court of Appeals cases also interpreted these standards, though the first cases emanating from LUBA beginning in 1980 were edited by LCDC on goal issues.

In *1000 Friends of Oregon v. Marion County,*[97] LUBA found that the minimum lot size in that county's forest zones was insufficient. LUBA also held that the county ordinance rezoning rural forest lands to a classification that might satisfy preferential forest assessment violated Goal 4 in that, first, it failed to ensure that existing forest lands will be preserved, and second, it would allow nonforest dwellings in areas required to be preserved for forest use.[98]

Additionally, in 1979, LCDC heard a direct appeal from the decision of the Clackamas County Board of Commissioners to enact a forest zone allowing nonforest uses without the review standards suggested in the policy paper.[99] LCDC remanded the matter to the County for the addition of standards for nonforest uses; for limitation of those nonforest uses to lands not suitable for forest use; and for standards that those nonforest uses would not interfere with forest practices nor materially alter the stability of the overall land use pattern of the area.[100]

95 *Id.* at 25–27. The county's standards are "conditions" applied to a permitted use, as opposed to the approval standards used by Crook County. The use is permitted, but it must be sited at a particular location on the property according to the standards in the code. Multnomah County Continuance Order, *supra* note 90, at 22–27. However, provisions allowing dwellings on forest lands, without showing a need for the dwelling, were similar to those struck down by the Oregon Supreme Court for inconsistency with the Goal in *1000 Friends of Oregon v. Land Conservation and Development Commission, Lane County*, 305 Or. 384, 752 P.2d 271 (1988).

96 The Multnomah County Continuance Order, *supra* note 90, exemplifies this problem.

97 1000 Friends of Or. v. Marion Cnty., 1 Or. LUBA 33 (1980).

98 *Id.* at 39.

99 Forest Lands Goal Policy, *supra* note 64.

100 1000 Friends of Or. v. Clackamas Cnty., 3 LCDC 113, 122–23 (1979). These scattered views of Goal 4 in the Policy Paper are appropriately criticized by John Shurts, but would be themes used with greater or lesser emphasis in subsequent LCDC acknowledgments and cases. *See* John Shurts, *Goal 4 and Nonforest Uses on Forest Land*,

Then, in *1000 Friends of Oregon v. Douglas County*, LUBA decided that land at issue fell within the definition of Goal 4 for forest lands, rather than agricultural lands under Goal 3, and that forty-acre lots designated for small woodlots that allegedly would encourage and permit highly intense forest management activities did not achieve that result and thus violated the goal.[101] Later in *McCrystal v. Polk County*, a case arising before acknowledgment, LUBA found a violation of Goal 4 because timber existed on the land where a partition was proposed, but the County never considered Goal 4 in reviewing that proposal.[102] Since timber was present on the land, the local government had a duty to address Goal 4 and to show that the proposal would comply with Goal 4.[103]

Both the Court of Appeals and LUBA addressed dwellings on forest lands. In *Publishers Paper Co. v. Benton County,*[104] the Court of Appeals held that the County improperly characterized an application as one for a forest-related dwelling, but such error was rendered harmless by a concurrent finding that the application also met criteria for a nonforest use dwelling; that the evidence supported the finding that the dwelling would be compatible with existing forest uses; and finally that LUBA (and LCDC, using its editing power) properly reviewed the County's decision under the principle that there exist circumstances in which forest lands could be retained and protected, despite nonforest use conditionally allowed after being found "compatible" with forest uses.[105]

19 ENVTL. L. 59, 65–66 (1988). Shurts also comments in a similar vein on *Shadybrook Environmental Protection Association v. Washington County*, 4 Or. LUBA 236 (1981). *Id.* at 66–68, 71.

101 1000 Friends of Or. v. Douglas Cnty., 1 Or. LUBA 42, 48–49 (1980).

102 McCrystal v. Polk Cnty., 1 Or. LUBA 145, 150 (1980).

103 *Id.*

104 Publishers Paper Co. v. Benton Cnty., 6 Or. LUBA 182 (1982), *aff'd*, 63 Or. App. 632, 665 P.2d 357 (1983). *See also* Shurts, *supra* note 100, at 68–70, 73 (observing the twists and turns of LCDC forest policy in the early 1980s).

105 This case was decided before the adoption of administrative rules, and illustrates the division in LCDC over the extent to which dwellings may be permitted on forest lands. In *Allen v. Umatilla County*, 8 Or. LUBA 89 (1983), LUBA determined that in order to allow for certain nonforest uses in forest zoned lands, the county must apply compatibility standards like those set out in *Publishers Paper Co. v. Benton County*, 6 Or. LUBA 182 (1982), *aff'd*, 63 Or. App. 632, 665 P.2d 357 (1983), so that, where forestry is the predominant use, additional protective measures must be taken to protect forest lands. LCDC took advantage of its power at the time to amend LUBA decisions on Goal issues to interpret Goal 4 in this way. Once again, Shurts notes the inconsistency of policy application between *Allen* and *Publishers Paper.* Shurts, *supra* note 100, at 71–72.

Lamb v. Lane County[106] was a significant LUBA case that arose both before adoption of the 1982 rules and before LCDC lost its editing authority over LUBA orders on goal issues. The final order in that case held that Goal 4 prohibits forest land uses not enumerated in Goal 4 unless the use is an essential part of one of the permitted, enumerated uses in the goal. LCDC determined that a proposal for an unenumerated use was, in effect, not for a use expressly authorized by the goal.[107] LUBA held that, even if the County intended to condition such approval of an unenumerated use, those conditions could only be used to measure whether the proposal was for an accessory use, not whether it met the Goal 4 criteria in the first instance.[108] LCDC used its then-existing power to amend the original LUBA decision in this case to interpret Goal 4 to require that any dwellings permitted on forest lands be "necessary and accessory" to forest uses. The *Lamb* case was applied until new rules were adopted in 1990 reflecting the language of that case.[109]

In retrospect, it may be understandable that these earlier decisions regarding forest land inventories, protection measures, and nonforest uses are inconsistent and incomplete. As a commission, LCDC failed to agree about the nature and extent of nonforest uses and dwellings to be allowed on forest lands and failed to adopt binding interpretations of Goal 4 in the form of rules. As with LUBA appeals, acknowledgment was an objection-based process that depended on the vigilance and resourcefulness of objectors and the attitude of a Commission that sought to increase the number of acknowledged plans. Similarly, the case law was based on the ability and

106 Lamb v. Lane Cnty., 7 Or. LUBA 137 (1983).

107 Specifically, as revised by LCDC, the LUBA decision states, in material part: "Our review of the county's ordinance leads us to conclude that the uses allowed, even under conditions and limitations, violate Goal 4. We understand petitioner to argue that Goal 4 prohibits uses not enumerated in Goal 4 unless the use is an essential part of one of the permitted, enumerated uses. In other words, unenumerated uses which are necessary and accessory to an enumerated forest use are permitted because they are, in effect, part of uses expressly authorized by Goal 4. For example, roads are not enumerated in Goal 4 as being an authorized use in lands zoned for forest uses. However, a logging road is a necessary accessory of commercial forestry production and would be permitted under petitioner's interpretation. We agree with that interpretation. Restrictions and conditions placed on unenumerated nonaccessory uses, such as buffering, are irrelevant because they fail to assure that forest lands are retained for the enumerated forest uses under this standard. Relevant conditions or restrictions would measure whether a use is, in fact, accessory." *Id.* at 143.

108 *Id.*

109 OR. ADMIN. R. 660-06-025 (1990) (amended 1992).

intelligence of objectors who sought to convince LUBA, LCDC, and the appellate courts of their positions. Decisions from LUBA and the appellate courts, like acknowledgment decisions themselves, dealt with an immediate case, leaving open the possibility that such decisions could be distinguished at a later time. In an effort to exercise more control over forest policy, LCDC resolved to state that policy in one place and to reconcile or reject previous actions through the adoption of rules.

2. Formulating, Adopting, and Applying Rules (1982–2003)

In 1982 and 1983, LCDC undertook an exhaustive attempt to establish and clarify a comprehensive policy for forest lands through the adoption of administrative rules, but was unable to come to an agreement on the portions of the rule dealing with dwellings and uses allowed outright or conditionally on forest lands. The policy issues were not fully resolved until the 1990 amendment of Goal 4 and adoption of its implementing administrative rules, discussed below.[110]

a. The 1982 Rules

After LCDC had lost its power to edit further LUBA decisions,[111] the case law that emanated from challenges to and under Goal 4 came to be decided primarily by LUBA and then by the appellate courts. LCDC could set policy through its acknowledgment process; however, LUBA and the appellate courts looked primarily to their own precedents in interpreting the goals. This combination of circumstances allowed specific policy issues, particularly with regard to forest lands, to be amenable to resolution by administrative rule. Unsatisfied with the use of nonbinding policy papers in lieu of rules, the 1981 Oregon legislature required LCDC to establish policies as binding interpretive administrative rules.[112] These rules were to serve

110 *See infra* Part II.D.2.d; Dep't of Land Conservation & Dev., *History of Oregon's Land Use Planning*, OREGON.GOV, http://www.oregon.gov/LCD/history.shtml (last updated Aug. 20, 2010).

111 *See* Act of July 1, 1983, ch. 230, 1983 Or. Laws 253; Act of Aug. 9, 1983, ch. 827, § 59, 1983 Or. Laws 1607, 1633; Act of July 25, 1979, ch. 772, § 6, 1979 Or. Laws 1018, 1020–21.

112 Act of Aug. 24, 1981, ch. 748, § 22, 1981 Or. Laws 976, 986–87 (codified in OR. REV. STAT. § 197.040 (1981)). Specifically, the legislature commanded: "Any state-wide land use policies adopted by the commission before the effective date of this 1981 Act shall be adopted by goal or rule within one year after the effective date of this 1981 Act." *Id.* The Oregon Court of Appeals also determined that LCDC could not use policy papers

the purpose of explaining and directing exactly how Goal 4 should be applied, and they became the basis for forest land policy in Oregon.

The 1982 administrative rules were divided into six sections: (1) purpose, (2) definitions, (3) inventory, (4) plan designation outside an urban growth boundary, (5) plan designation within an urban growth boundary, and (6) regulation of forest and nonforest uses.[113] However, in the adoption of these administrative rules, LCDC was unable to gain a majority vote on one portion of the rules that specified allowed dwellings and forest and nonforest uses and the conditions for approving those uses on forest lands.[114] The policy issues were not fully resolved until the 1990 amendment of Goal 4 and adoption of its implementing administrative rules, discussed below.[115] These rules had the same purpose and the same definitions of "forest land" and "forest use" as the 1974 version of Goal 4.[116]

Notwithstanding the lack of direction regarding uses on forest lands, the 1982 rules set out the procedures to be followed for Goal 4 compliance: first, an inventory of lands suitable for forest uses, including a determination and mapping of the productivity of these lands for commercial use;[117] second, a designation of inventoried lands on the comprehensive plan map as forest lands follows;[118] and finally, the requirement that forest uses be retained on designated

to set policy instead of the formal rulemaking process. Marion Cnty. v. Fed'n for Sound Planning, 64 Or. App. 226, 234–235, 668 P.2d 406, 410–11 (1983).

113 OR. ADMIN. R. 660-06-000 (1982) (amended 1990). As noted in Part IV, *infra*, forest operations are regulated by the Forest Practices Act, OR. REV. STAT. §§ 527.620–.990 (2009). *See also* OR. ADMIN. R. 660-06-030 (1982) (renumbered to 660-06-060 in 1990).

114 Dwellings in particular were a contentious issue, as their impacts were incremental with respect to fire hazards, loss of forest lands, and similar land use conflicts for forest land owners. *See, e.g.*, OR. ADMIN. R. 660-06-0027, -0035 (2011).

115 *See infra* Part II.D.2.d.

116 OR. ADMIN. R. 660-015-000(4) (1974). This original version and the current version of Goal 4 are set forth in Appendix 1.

117 *Id.* 660-06-000(1)(a). The inventory required by Goal 4 and the administrative rules must include "land forested in commercial and noncommercial species and nonforested land suitable for forest uses, unless the nonforested land is inventoried as Goal 3 agricultural land or is planned for nonresource uses and an exception to Goal 4 is justified and taken." OR. ADMIN. R. 660-06-010 (1982) (amended 1990). Where agricultural and forest land are intermingled, the land may be designated "Agricultural/Forest Lands." *Id.* 660-006-0015(1) (amended 1990). *See also id.* 660-006-0015(3) (amended 1990); Shurts, *supra* note 98 (criticizing of regulations for not specifying nonforest uses allowed on forest land without a goal exception).

118 OR. ADMIN. R. 660-06-000(1)(b) (1982) (amended 1990).

forest lands.[119] When lands suitable for forest uses are not designated so as to protect forest uses, then an exception to Goal 4 is required.[120] LCDC amended its administrative rules several times following their initial adoption in 1982, based on decisions from LUBA and the appellate courts.

b. Acknowledgment Decisions and Case Law Under the 1982 Rules

LCDC applied its new administrative rules, notwithstanding the indecision over allowed uses, but also took a more aggressive stance to clarify the uses permitted under Goal 4 in its acknowledgment reviews. LCDC had been dissatisfied with interpretations given by LUBA and the appellate courts on Goal 4,[121] and realized that these diverse results were the product of a broadly worded goal, a lack of interpretive administrative rules for much of the time it engaged in acknowledgment review, and the diversity of its own statements on state land use policy towards forest lands. In 1983, LCDC attempted to clarify and explain its policy on nonforest uses and land divisions in its first significant acknowledgment review following adoption of the 1982 rules, that of the Coos County Plan and regulations.[122] In that final order, LCDC provided a detailed discussion of both issues, particularly as to what nonforest uses may be established without

119 *Id.* 660-006-0000(1)(c) (amended 1990). If the land is situated outside urban growth boundaries, the inventory must include "a mapping of forest lands by cubic foot site class of the dominant commercial species . . . ." *Id.* 660-06-010 (amended 1990).

120 *Id.* 660-06-000(1)(c) (amended 1990). *See also* OR. ADMIN. R. 660-004-0000 (2011). With regard to plan designation within an urban growth boundary, retention of commercial forest uses is not the primary goal, rather the requirement of Goal 4 to retain forest land for forest uses is generally achieved through compliance with other Goals. *See* OR. ADMIN. R. 660-06-020 (1982) (amended 1990).

121 *See, e.g.*, Grden v. Umatilla Cnty., 10 Or. LUBA 37 (1984); Publishers Paper Co. v. Benton Cnty., 6 Or. LUBA 182 (1982), *aff'd*, 63 Or. App. 632, 665 P.2d 357 (1983). John Shurts notes LUBA's plea to be reviewed on Goal 4 issues by LCDC in its *Grden* opinion, which urges LCDC to resolve the inconsistency between *Allen v. Umatilla County* and *Publishers Paper Co. v. Benton County*, discussed *supra* note 105, but notes that LCDC declined the invitation and deleted the language from the final order in that case. Shurts, *supra* note 100, at 74–75.

122 Final Order on Coos County Acknowledgment Request 85–114 (1983) [hereinafter Coos County Order]. In general, LCDC required the County to justify its minimum lot sizes, strengthen its review standards on dwellings (to make them at least "necessary and accessory" to forest use) and nonforest uses to assure compatibility with forest land uses. This review evidences a more coherent development of forest land policy by LCDC. While the acknowledgment report, *id.* at 86, mentions the 1982 rules as a criterion for the review, the only discussion of the rules is at *id.* at 106, over a section not adopted. Instead, the review relies on other sources for its application of forest policy. This is not surprising, as the 1982 rules avoided the contentious issues of nonforest uses and dwellings.

taking a Goal 4 exception.[123] The Coos County decision demonstrates that, even after adoption of the 1982 rules, LCDC still looked to other sources for application of forest policy, particularly because of internal LCDC agreement over nonforest uses and dwellings.

The status of forest policy was still vulnerable because LCDC's acknowledgment decisions were binding in the case before it unless appealed, and its interpretations of Goal 4 did not always find their way into LUBA and appellate court decisions, giving further impetus to revisions to the goal and the adoption of further interpretative administrative rules. Thus, while the initial round of acknowledgments was nearing completion (and would largely be complete by 1986),[124] significant areas of state land use forest policy were not coherent.[125]

There were LUBA and court cases as well that that took a harder look at nonforest uses in forest zones, notwithstanding the lack of direction on nonforest uses in the rules. In *Jensen v. Clatsop County*,[126] LUBA decided that an exception from Goal 4 is required for nonfarm and nonforest uses on forest lands. While farm uses were allowed in forest zones under the 1982 rules,[127] mining and processing aggregate were statutorily listed as nonfarm uses.[128] If not connected with forest uses, they could not be approved on forest land without an exception to Goal 4.[129] And in *Department of Land*

123 This issue would also be resolved by the Oregon Supreme Court in 1000 Friends of Oregon v. Land Conservation and Dev. Comm'n, Lane Cnty, 305 Or. 384, 752 P.2d 271 (1988). Shurts also notes the attempt in the Coos County Order, *supra* note 122, to formulate policy without first adopting rules and the lack of consistency with previous case law and subsequent decisions. Shurts, *supra* note 100, at 73–74.

124 County Acknowledgment Dates for Goal 4, *supra* note 36.

125 While this review was being undertaken, the 1987 forest fire season was one of the worst in Oregon history, so that there was additional reason for considering revisions to forest land use policies. *See infra* note 146 and accompanying text.

126 Jensen v. Clatsop Cnty., 14 Or. LUBA 776 (1986).

127 OR. ADMIN. R. 660-06-015(1), (3) (1982) (amended 1990).

128 OR. REV. STAT. §§ 215.213, .283 (1983) provide for statutorily permitted nonfarm uses in Exclusive Farm Zones. That means those uses are allowable (either outright or following a discretionary process) by local governments. There is no corresponding legislation for forest zones. One of the difficult issues for LCDC in administering forest policy was whether to have those same uses as allowable in a forest zone. In 1000 Friends of Oregon v. Land Conservation and Dev. Comm'n, Lane Cnty, 305 Or. 384, 752 P.2d 271 (1988), the Oregon Supreme Court determined that this could not be done without an amendment to the Goals.

129 In this context, an exception is a limited process available to designate land for rural development outside UGBs. To do this, the exception must set forth the reasons why Goals 3 and 4 should not apply and the proposed use should be allowed, including the

Conservation and Development v. Columbia County,[130] LUBA also addressed nonforest uses on forest lands and determined that an exception to Statewide Planning Goal 4 based on irrevocable commitment to nonresource use is not adequate where the exception does not include findings explaining why forest uses other than commercial timber production are impracticable.[131] However, the lack of direction on nonforest uses in the adopted rules made these decisions more difficult for LUBA, the appellate courts, and LCDC itself.

By 1986, all plans and implementing regulations from the thirty-six counties of Oregon were acknowledged, save for a few small contested areas.[132] However, county plans and implementing measures greatly differed. After local plans and land use regulations were acknowledged by LCDC, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions.[133] However, the legislature has required that local land use regulations must remain current with any goal, statute, or rule changes since acknowledgment.[134] This legislative direction proved to be more important to policy development regarding forest lands because it did not directly require LCDC action but could require local governments to take certain directions, even if not set out in their plans and regulations.

In 1987, LUBA decided *Champion International v. Douglas County*,[135] regarding "necessary" forest dwellings. Douglas County had concluded in drafting its forestry zone prior to acknowledgment that certain nonforest uses were compatible with forest uses, which could be allowed conditionally on forest lands. LUBA held the county must consider whether the zone itself, not the applicant's proposed use, is consistent with the plan and that the County's implementing zone was incompatible with the Timberland Policies in the county

amount of land needed and, in natural resource areas, why the use requires a location on resource land. *See* Sullivan & Eber, *supra* note 24, at 46. *See also* OR. ADMIN. R. 660-004-0020, -0022 (2011); VinCEP v. Yamhill Cnty., 215 Or. App. 414, 426, 171 P.3d 368, 374 (2007).

130 Dep't of Land Conservation & Dev. v. Columbia Cnty., 15 Or. LUBA 302 (1987).

131 *Id.* at 304–05.

132 County Acknowledgment Dates for Goal 4, *supra* note 36.

133 Byrd v. Stringer, 295 Or. 311, 666 P.2d 1332 (1983).

134 OR. REV. STAT. § 197.646(1), (4) (2009); Kenagy v. Benton Cnty., 115 Or. App. 131, 134, 838 P.2d 1076, 1077–78 (1992).

135 Champion Int'l v. Douglas Cnty., 16 Or. LUBA 132 (1987).

plan because the county development code allowed a variety of single-family dwelling types that did not comply with Goal 4.

Substantial improvements in forest lands policymaking occurred after 1982, when the first administrative rules were adopted. The inventory and designation of forest lands had been institutionalized and binding policies for many aspects of forest policy came into place. Responding to court decisions, LCDC adopted goal or rule amendments seen as inconsistent with its policies. However, the failure to come to grips with nonforest uses and dwellings had resulted in a decision invalidating an acknowledgment and requiring LCDC to make hard policy choices.

c. The Lane County Decision—The Supreme Court Interprets Goal 4

In October 1988 the Oregon Supreme Court decided *1000 Friends of Oregon v. Land Conservation and Development Commission (Lane County)*, which found LCDC's acknowledgment contravened Goal 4 in several ways with respect to the types of nonforest uses and dwellings permitted on forest lands.[136] The case presented the very issues that LCDC failed to resolve after 1982, when it adopted administrative rules. First, the court found that LCDC failed to show that allowing dwellings on parcels of ten acres or more of forest land under a "necessary and accessory" test preserved forest land for forest uses.[137] Second, LCDC failed to show that it properly authorized nonfarm uses allowed under Goal 3 to be consistent with Goal 4, by adopting an administrative rule[138] permitting interchangeable farm and forest designations:

> LCDC seeks to merge Goal 4 into Goal 3, at least in areas of mixed farm and forest use. To justify this reinterpretation of the goals, LCDC first argues that the legislature did not explicitly direct the establishment of a forest goal. Later LCDC argues that "[b]ecause the legislature has adopted no exclusive forest use zone for forested lands, LCDC must determine which uses are permissible under Goal 4." Ignoring the fact that LCDC has set forth permissible forest uses in Goal 4, LCDC concludes that "[i]t is an appropriately circumscribed interpretation of what Goal 4 requires" for LCDC to permit a legislatively specified farm use on

136 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Lane Cnty., 305 Or. 384, 752 P.2d 271 (1988).

137 *Id.* at 272–80.

138 OR. ADMIN. R. 660-06-015(1) (1982) (amended 1990) ("In areas of intermingled agricultural and forest lands, an 'Agricultural/Forest Lands' designation may also be appropriate.").

> forest land. LCDC rejects the "surgical precision" of the Court of Appeals, because it claims that limiting "ORS 215.213(2) uses to land currently in farm use has no basis in ORS chapter 197." In sum, LCDC argues that it views Goal 4 forest uses and Goal 3 agricultural uses as interchangeable.
>
> This abolition of any distinction between Goal 4 and Goal 3 goes too far. When it created separate goals for agricultural use and for forest use, LCDC recognized that these uses had distinct characteristics. To suggest that land "may appropriately be converted from farm to forest use or vice versa depending on economic conditions and other factors," as LCDC now does in its petition to this court, blurs the distinction between Goal 4 and Goal 3. Nothing in the goals themselves, nor in the language of any statute, suggests that the goal can be thus reinterpreted.
>
> . . . .
>
> If land is designated as Goal 4 land, all non-excepted uses must meet the requirements of Goal 4. Where there are mixed uses so closely or rationally connected that it is impractical to divide the land into exclusive Goal 3 or Goal 4 zones, the parties do not contest LCDC's decision that a mixed designation can be given to the zone as a whole. However, within such a mixed use zone, and within an exclusive zone of either type, individual parcels cannot meet one goal merely by having a use corresponding to another goal. To be a forest use on forest land, the use must be compatible with and conducive to the retention and protection of forest land, and must be supported by findings in the record. LCDC acknowledged Lane County's plan despite the fact that it allowed farm uses on forest lands without a showing of compatibility with forest uses. In so doing, LCDC violated the requirements of Goal 4.[139]

The court also concluded that a standard requiring that nonforest dwellings be "necessary and accessory" to forest use was not sufficiently precise to show that that those dwellings "conserve forest lands for forest uses." [140] Finally, the Court said that the County was preempted from regulating forest practices to meet Goal 5 by statute.[141] This case cut through the muddle of inconsistencies, interpretations, and conflicting forest land policies about nonforest uses and dwellings and ultimately required LCDC to restate forest land policy by revising both Goal 4 and its implementing rules.

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139 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Lane Cnty., 305 Or. 384, 400–02, 752 P.2d 271, 281–82 (1988) (first and second alterations in original).

140 *Id. See also* 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Curry Cnty., 301 Or. 447, 724 P.2d 268 (1986) (interpreting the urban and rural separation of uses; the protection of resource lands from urban sprawl was a significant factor in the decision).

141 OR. REV. STAT. § 527.722 (2009). *See infra* Part IV. Shurts contends that, in clarifying the interpretation of Goal 4, the Oregon Supreme Court created additional ambiguities to be settled by rulemaking. Shurts, *supra* note 100, at 76–78.

d. The 1990 Goal and Rule Amendments

Several converging events led to the wholesale revision of Goal 4 in 1990. First, in an attempt to bring closure to a long-festering set of issues regarding lesser resource or "secondary" lands, including minimum lot size, uses required, and protection for primary resource lands, the Department began hearings in 1988 on proposals to allow small-scale farm and forest operations through amendments to Goals 3 and 4 and their implementing rules.[142] Other significant reasons also propelled the Commission to amend Goal 4 and its implementing rules. As noted above, the Oregon Supreme Court in *1000 Friends of Oregon v. Land Conservation and Development Commission (Lane County)* had interpreted Goal 4 contrary to the Commission acknowledgement orders.[143] Second, in 1987 the Oregon legislature had passed House Bill 3396 (H.B. 3396),[144] which was designed to preempt the authority of counties to regulate forest practices. Third, the commercial forest land base continued to shrink and the state's timber supply diminished.[145] Finally, forest fire seasons had been extremely costly, thus affecting the state's economy.[146] The combination of these factors led LCDC to amend both Goal 4 and its interpretive administrative rules.

142 The goal amendment process is set out in OR. REV. STAT. § 197.235 (2009). The expected outcome was that some designated farm and forest lands would be redesignated for large lots not necessarily oriented towards commercial farm and forest use. After holding twenty public hearings, LCDC reviewed a record of hundreds of pages of written testimony and twelve drafts of the proposed goal and rule amendments. Copies of draft rules and correspondence were sent to over 13,000 interested parties and contained in the *Summary of Testimony and Discussion of Amendments to Goal 4 and OAR 660, Division 6*, prepared by DLCD staff and presented to the Commission in March, 1990, when the new rules were under consideration. *See also* Certificate and Order for Filing Administrative Rules with the Secretary of State, Land Conservation and Dev. Comm'n (Mar. 1, 1990), *available at* http://www.oregon.gov/LCD/docs/history/div6circaMar90.pdf (amending OR. ADMIN. R. 660-06-027(1)(a)).

143 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Lane Cnty., 305 Or. 384, 418, 752 P.2d 271, 291 (1988). LCDC made specific reference to the *Lane County* decision in its statement of need for the 1990 rules. *See* Certificate and Order for Filing Administrative Rules with the Secretary of State, Land Conservation & Dev. Comm'n (Mar. 1, 1990), *available at* http://www.oregon.gov/LCD/docs/history/div6circaMar90 .pdf.

144 *See infra* Part IV.C.

145 *See* OR. DEP'T OF FORESTRY, FIRST APPROXIMATION REPORT FOR SUSTAINABLE FOREST MANAGEMENT IN OREGON (2000), *available at* http://www.oregon.gov/ODF /STATE_FORESTS/FRP/docs/FAR.doc.

146 Dep't of Forestry, *A Short History of Wildland/Urban Interface Fires in Oregon*, OREGON.GOV, http://www.oregon.gov/ODF/FIRE/SB360/wui_history.shtml (last updated Nov. 27, 2007).

After hearings and internal debate, Goal 4 Amendments were finally adopted on January 25, 1990, and became effective on February 5, 1990.[147] The gist of the goal remained the same—i.e., to "conserve forest lands;" however, the wording of the goal became more elaborate. Under the amendments, the way to achieve the described objective was:

> by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water and fish and wildlife resources and to provide for recreational opportunities and agriculture.[148]

Under the revised Goal 4, forest lands specifically included an emphasis on "lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."[149]

Whereas previous LCDC policy had allowed a measure of local discretion as to the nature and circumstances under which dwellings and nonforest uses may be allowed in forest areas, Goal 4 now allowed uses subject only to regulations and uses that could be regulated by LCDC.[150] LCDC could regulate:

> (1) [U]ses related to and in support of forest operations, (2) uses to conserve soil, water and air quality, and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment, (3) locationally dependent use, (4) forest management dwellings that are necessary for, and

147 *See* Dep't of Land Conservation and Dev., *DLCD Measure 49: History of Statutes, Goals & Rules*, OREGON.GOV, http://www.oregon.gov/LCD/MEASURE49/history_statutes_goals_rules.shtml (last updated Feb. 5, 2008) (providing all versions of Goal 4 and administrative rules, including the 1990 versions). The rules were amended twice in 1990. *Id.*

148 Dep't of Land Conservation & Dev., *Goal 4 Forest Lands*, OREGON.GOV (Feb. 5, 1990), *available at* http://www.oregon.gov/LCD/docs/history/goal4circa020590.pdf (the 1990 version of the Goal). Much of this language is remarkably similar to that of the policy section of the Oregon Forest Practices Act set forth in OR. REV. STAT. § 527.630 (2009).

149 Dep't of Land Conservation & Dev., *Goal 4 Forest Lands*, OREGON.GOV (Feb. 5, 1990), *available at* http://www.oregon.gov/LCD/docs/history/goal4circa020590.pdf (the 1990 version of the Goal). Goal 4 allowed uses subject only to regulations by and uses that could be regulated by LCDC. See *infra* Appendix 1 for the current version of Goal 4.

150 *See* OR. REV. STAT. § 527.722 (2009).

> accessory to forest operations; and (5) other dwellings under prescribed conditions.[151]

The Goal 4 revisions placed increased emphasis on forest land use with a focus on commercial forest uses through comprehensive plans and zoning regulations. However, zoning applied to forest lands contained provisions that limit uses that may have an adverse effect on a range of forest land values.[152] Finally, the 1990 version of Goal 4 continued to provide for the inventorying, designating, and zoning of "marginal" forest land.[153]

At the same time as the Goal 4 amendments, LCDC also amended the existing administrative rules and adopted additional rules regarding the conservation of forest lands. These new rules[154] included provisions regarding the uses and dwellings allowed in forest zones consistent with the newly amended Goal 4.[155] On March 9, 1990, LCDC amended the new rule regarding forest management dwellings to further clarify allowance when such dwelling is necessary for forest management.[156]

The 1990 administrative rules were much more comprehensive than the 1982 rules. Consensus was achieved on the previously contested issue of permitted forest and nonforest uses and

151 *See infra* Appendix 1 (the current version of Goal 4).

152 *See infra* Part IV (analyzing this balance in OR. REV. STAT. §§ 527.260–.992 (2009)). Similar to the present OR. ADMIN. R. 660-06-025(6) (2011), *former* OR. ADMIN. R. 660-06-027(11) (1990) made specific reference to Goal 5 as one of these "values."

153 *See* Dep't of Land Conservation & Dev., *Goal 4 Forest Lands*, OREGON.GOV, (Feb. 5, 1990), *available at* http://www.oregon.gov/LCD/docs/history/goal4circa020590.pdf (the 1990 version of the Goal). "Marginal Lands" was a term for an experiment that lasted from 1983 to 1993 to allow counties to adopt regulations that would protect "better" resource lands more strictly than elsewhere, but would allow limited resource uses (including dwellings) on lands of lesser soils capability. Only Lane and Washington Counties used the program and, on its termination, no other county could enter the program. *See* OR. REV. STAT. §§ 215.316–.317 (2009); Sullivan & Eber, *supra* note 24, at 21–25.

154 OR. ADMIN. R. 660-06-001 to -060 (1990) (amended 1992). As noted, there were two 1990 amendments, one adopted on February 5, 1990, see OR. ADMIN. R. 660-06-001 to -060 (1990), *available at* http://www.oregon.gov/LCD/docs/history/div6circaFeb90.pdf, along with the amended Goal 4 and another dealing with "forest management dwellings" on March 9, 1990, see Certificate and Order for Filing Administrative Rules with the Secretary of State, Land Conservation & Dev. Comm'n (Mar. 1, 1990), *available at* http://www.oregon.gov/LCD/docs/history/div6circaMar90.pdf. The new goal and rule provisions became immediately applicable to a variety of land use decisions as set forth in its Order of Adoption filed with the Secretary of State.

155 OR. ADMIN. R. 660-06-027 (1990) (amended 1992).

156 *Id.* 660-06-027(1)(a) (amended 1992).

dwellings.[157] The administrative rules permitted four different categories of uses: (1) forest uses as set forth in Goal 4, subject to the standards in the goal and rules,[158] (2) uses pursuant to the Forest Practices Act,[159] (3) uses that the rules allowed outright on forest lands,[160] and (4) uses that were subject to the new conditional use-type review standards.[161] The 1990 rules also provided for new land division requirements in forest zones[162] and various provisions related to dwellings, such as forest management dwellings in forest zones,[163] dwellings not related to forest management,[164] siting standards for dwellings and structures in forest zones,[165] and fire siting standards for dwellings and structures.[166] Finally, the 1990 rules made provision for mixed agriculture/forest zones,[167] fire safety design for roads,[168] and the circumstances under which land may be zoned for farm, forest or mixed farm/forest use, including allowable uses in each zone.[169]

e. The 1992 Goal and Rule Amendments

Despite the 1990 amendments to Goal 4 and its administrative rules, there remained concern that the goals were giving insufficient protection to productive farm and forest lands. The 1991 legislative session of the Oregon Legislature directed LCDC to conduct an independent analysis of Oregon's productive farm and forest land to determine what actions or conditions may diminish the quality and quantity of those lands.[170] The resulting three-volume study of

157 *Id.* 660-06-025 (amended 1992) (dealing with "Uses Authorized in Forest Zones").

158 *Id.* 660-06-025(1) (amended 1992) (listing five general uses).

159 *See* OR. REV. STAT. §§ 527.260–.992 (2009); OR. ADMIN. R. 660-06-025(2) (1990) (amended 1992) (listing four uses).

160 OR. ADMIN. R. 660-06-025(3) (1990) (amended 1992) (listing sixteen uses allowed by right).

161 *Id.* 660-06-025(4) (amended 1992) (providing for twenty-three conditional uses, where the standards for granting or denying of those uses are found in *id.* 660-06-025(5)).

162 *Id.* 660-06-026 (amended 1992).

163 *Id.* 660-06-027 (amended 1992).

164 *Id.* 660-06-028 (amended 1992).

165 *Id.* 660-06-029 (amended 1994).

166 *Id.* 660-06-035 (amended 1994).

167 *See id.* 660-06-055 (amended 1992) (for uses authorized in such zones). *See also id.* 660-06-057 (amended 1992) (Rezoning Land to an Agriculture/Forest Zone).

168 *Id.* 660-06-040.

169 *Id.* 660-06-057 (amended 1992); Oregon Forest Practices Act, OR. REV. STAT. §§ 527.620–.990 (2009) (regulating forest operations on forest lands).

170 *See* OR.'S DEP'T OF LAND CONSERVATION & DEV., SECONDARY LANDS BACKGROUNDER 3 (1999); Act of July 20, 1989, ch. 710, § 3, 1989 Or. Laws 1110, 1110.

Oregon's farm and forest lands, of recent development patterns on those lands, and of conflicts between development and resource management, *Farm and Forest Land Research Project* (the "Project Report"), completed in the spring of 1991,[171] concluded that these protections were inadequate.[172] Relative to forest lands, the Project Report found that a large number of dwellings on forest lands did not lead to better forest management.[173] Where there were no dwellings on existing forest lands the report concluded that one dwelling per 160 acres was a better approach[174] and that forest operations of more than eighty acres in size were more likely to be managed for timber production.[175]

Fueled by the Project Report, the 1991 Oregon Legislature spent much effort in attempting to forge a "secondary lands" compromise—i.e., lands of lesser resource value on which dwellings might be permitted under certain conditions in return for enhanced protections for better, or "primary" resource lands.[176] Nevertheless, a secondary lands bill did not come to fruition.

The debate, however, had the value of acquainting legislators with the issues associated with "secondary" lands: identification criteria for primary and secondary lands, permissible uses, and appropriate density. Following adjournment of the 1991 session, LCDC returned to the issue of "secondary" or "small scale" resource lands and adopted amendments to Goals 3 and 4 and their implementing rules in

171 *See* Sullivan & Eber, *supra* note 24, at 35 n.239 (listing the individual reports). DEP'T OF LAND CONSERVATION & DEV., ANALYSIS AND RECOMMENDATIONS OF THE RESULTS AND CONCLUSIONS OF THE FARM AND FOREST LAND RESEARCH PROJECT (May 1991) [hereinafter PROJECT REPORT], (concluding that the 1990 rules enhanced such protection but that further measures should be taken) (on file with authors).

172 *See* Letter from Craig Greenleaf, Acting Dir., Dep't of Land Conservation and Dev., to John Kitzhaber, President of the Senate, and Larry Campbell, Speaker of the House (June 7, 1991) (submitting the Farm and Forest Research Project) (on file with authors).

173 *See* PROJECT REPORT, *supra* note 171.

174 *Id.*

175 *Id.* The minimum lot size discussion had already begun with the report to LCDC by its staff in March 1990. *See* Summary of Testimony and Discussion of Amendments to Goal 4 and OAR 660, Division 6, *supra* note 142, at 29–34 (concluding that an eighty-acre lot size would not require further explanation, although smaller minimums would require justification).

176 *See* Memorandum from Craig Greenleaf, Deputy Director, Dep't of Land Conservation & Dev. on Comparison of Secondary Land Bills to Land Conservation and Dev. Comm'n (Apr. 12, 1991) (on file with authors); Shurts, *supra* note 100, at 83–86 (discussing earlier efforts towards a secondary lands policy). The Shurts article anticipated those rules would be adopted in 1988; however, they did not come about until 1992.

order to allow counties to identify,[177] designate,[178] provide uses for,[179] and divide[180] such lands to be used more intensely for resource purposes. At least, this was the theory.

These amendments were controversial and short lived. Some landowners and local governments believed that an insufficient amount of land had been designated as secondary and that there was insufficient flexibility to make such designations. Meanwhile, conservation and land use watchdog groups felt exactly the opposite.[181]

f. H.B. 3661—The Legislature Leads and LCDC Follows (1993–2011)

At the beginning of the 1993 legislative session, there was dissatisfaction with the 1990 and 1992 rules in legislative halls. Furthermore, landowners, counties, and developers sought to make more lands available for rural development, while at the same time some farm interests, forest industry representatives, and conservationists urged the legislature to preserve resource lands through, *inter alia*, statutory minimum lot sizes.[182] LCDC had now begun to read Goal 4 even more closely, recognizing that loose standards for nonforest uses in forest zones and loose administration of those standards did not protect forest lands.[183] The time was ripe for the legislature to settle these competing policy claims.

In 1993, the legislature adopted H.B. 3661, which included major revisions to state farm and forest land policy, and effectively repealed the 1992 rules for "Small Scale Resource Lands."[184] Further, the

177 OR. ADMIN. R. 660-33-040 (1993) (amended 1994).

178 *Id.* 660-33-050 (amended 1994).

179 *Id.* 660-33-060 (amended 1994). *See id.* 660-33-120 (amended 1994) (containing a table of the uses that might be allowed on such lands).

180 *Id.* 660-33-070 (repealed 1994).

181 Proponents of secondary lands contended that agricultural and forest lands of lesser quality should be free of some development restrictions and engaged in a great deal of legislative activity in the 1980s and 1990s to this end. Sullivan & Eber, *supra* note 24, at 24–30.

182 *Id.* at 50–51.

183 *See supra* notes 122, 175.

184 OR. REV. STAT. § 215.304 (2009) (dealing with the 1992 Goal and rule amendments, which were effectively repealed pursuant to the provisions of that legislation). Other portions of H.B. 3661, now codified as OR. REV. STAT. §§ 215.705–.780 (2009), deal with lot-of-record dwellings, dwellings on farm and forest lands, and required minimum lot sizes.

legislature required LCDC to amend related statewide planning goals and administrative rules by March 1, 1994, to reflect new forest land use policy.[185] The legislation directed LCDC to repeal the secondary lands goals and rules it adopted in 1992 and substituted a "lot-of-record" approach to provide an avenue for landowners who owned parcels of less productive agriculture and forest lands and might have had the expectation that they could have transferred parcels created before the advent of more stringent land use regulations.[186] The lot-of-record provision allows one dwelling on a qualifying pre-existing parcel unless the property is highly productive forest or farmland.[187] In addition, H.B. 3661 also:

- Established new criteria for nonfarm dwellings to allow them only on non-productive resource lands;[188]
- Set new standards for dwellings on forest land;[189]
- Set minimum lot sizes of eighty acres for most farm and forest land;[190]
- Prohibited LCDC from adopting or implementing any rules for small-scale farm and forest lands;[191]
- Limited the use of marginal land provisions to those counties that already applied them (Lane and Washington);[192] and
- Strengthened the "right-to-farm and forest" laws.[193]

In response to the legislation, LCDC adopted amendments to Goal 4 on February 18, 1994, that became effective on March 1, 1994.[194] LCDC also adopted amendments to its administrative rules, as

185 *See id.* § 215.304; OR. ADMIN. R. 660-06-000 to -070 (1994), *available at* http://www.oregon.gov/LCD/docs/history/div6circaMay94.pdf (adopted pursuant to OR. REV. STAT. § 215.304).

186 OR. REV. STAT. § 215.304 (2009).

187 *See infra* Part III.C.1.

188 OR. REV. STAT. § 215.284 (2009).

189 *Id.* §§ 215.740–.755.

190 *Id.* § 215.780(1).

191 Act of Sept. 8, 1993, ch. 792, 1993 Or. Laws 2438 (codified as amended at OR. REV. STAT. §§ 30.930, 30.935, 30.940, 92.044, 92.046, 93.040, 197.010, 197.030, 197.040, 197.045, 197.065, 197.175, 197.625, 215.010, 215.130, 215.213, 215.236, 215.263, 215.283, 215.296, 215.317, 215.327, 308.372, 451.555 (1993)).

192 OR. REV. STAT. § 215.316 (2009).

193 *Id.* §§ 30.390–.947.

194 *Id.* §§ 215.705–.780; Dep't of Land Conservation & Dev., *Oregon's Statewide Planning Goals & Guidelines Goal 4: Forest Lands*, OREGON.GOV (Mar. 1, 1994), http://www.oregon.gov/LCD/docs/history/goal4circa030194.pdf (the 1994 Goal 4 amendments).

required by the legislation, to bring its rules regarding the conservation of forest lands in compliance with H.B. 3661, including the standards for dwellings and land divisions in forest zones.[195]

Based on these goal and rule amendments, the purpose of forest land use policy, as provided in Goal 4, is to:

> [C]onserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.[196]

The improvements wrought by the 1993 legislation and 1994 rules were profound—large statutory minimum lot sizes, abandonment of "small-scale resource" policies, and provision for landowner relief through a lot-of-record and template dwelling allowance, all discussed below. Reactions to the more stringent portions of these efforts, particularly the statutory minimum lot sizes, were a likely factor in initiative efforts to require "just compensation" for these restrictions, yet they remain in place. While Goal 4 has remained unchanged since March 1, 1994, the current Goal 4 administrative rules have been modified incrementally over time since their initial adoption in 1982—primarily to respond to new legislation—setting out land use requirements for forest lands under Goal 4, and are described below.[197]

III
GOAL 4 ADMINISTRATIVE RULES: CURRENT OREGON FOREST LAND USE POLICIES

This Part presents current Oregon land use policy affecting forest lands and uses thereon from the current 2010 version of Goal 4, as well as state statutes and administrative rules. Goal 4 provides the broad policy framework with respect to all aspects of forest land use policy: inventory and designation, permitted forest uses, dwellings, land divisions and minimum lot sizes. However, certain statutes and the applicable administrative rules provide specific details,

195 *See* OR. REV. STAT. §§ 215.284, .740–.755, .780(1) (2009).

196 Dep't of Land Conservation & Dev., *Oregon's Statewide Planning Goals & Guidelines Goal 4: Forest Lands*, OREGON.GOV (Mar. 1, 1994), http://www.oregon.gov/LCD/docs/history/goal4circa030194.pdf.

197 OR. ADMIN. R. 660-006-0025(1) (2011). *See also supra* and *infra* Parts II.D.2, III.

particularly with respect to nonforest uses, dwellings and minimum lot sizes. Section A below discusses requirements for forest land inventories, the obligations for plan designation of those lands, and the enactment by local governments of sufficient regulatory protections for such lands. Section B then deals with land divisions and minimum parcel size requirements on forest lands, while Parts C and D discuss dwellings and other nonforest uses permitted on forest lands respectively.

A. Inventory and Designation

Goal 4 requires that local governments follow a three-stage process in planning and regulating forest lands. First, each county must inventory its existing and potential forest lands.[198] For land outside urban growth boundaries, this inventory must include a mapping of average annual wood production capability by cubic foot per acre.[199] In preparing this inventory, the county must include appropriate information identifying forested areas based on aerial photographs, visual surveys and vegetative cover mapping, as well as mapping of the forest productivity of the land. Second, forest lands must be so designated on the comprehensive plan map to direct how those lands will be used.[200] Intermingled agricultural and forest lands present a choice for local governments to use either classification or provide a third classification to include both; but forest lands must either be placed in a forest zone or in a farm-forest zone classification. In "mixed" farm forest designations, dwellings are permitted under

198 OR. ADMIN. R. 660-006-0010 (2011). Acknowledged local plans and regulations need not undertake the inventory process again, unless specifically required by law. *See, e.g.*, OR. REV. STAT. § 197.628 (2009).

199 *See* Anderson v. Coos Cnty., 60 Or. LUBA 247 (2009); Just v. Linn Cnty., 60 Or. LUBA 74 (2009). Prior to comprehensive plan and zone map amendments changing land use designations from forest to nonforest designations, the county must consider the wood fiber productivity of the subject property in cubic feet per acre per year (cf/ac/year). That cf/ac/year data must be from one of the sources authorized by OR. ADMIN. R. 660-006-0010(2) (2011). If that data is not available or is shown to be inaccurate, equivalent data may be used, as authorized by the rule and approved by the Oregon Department of Forestry. OR. ADMIN. R. 660-006-0010(3) (2011).

200 OR. ADMIN. R. 660-006-0015 (2011). There were many battles over whether sufficient lands were designated as forest lands, both in acknowledgments and on appeals from acknowledgments. *See e.g.*, Dep't of Land Conservation & Dev. Committee Action on Polk County (1979) (on file with authors); Memorandum from W.J. Kvarsten, Dir., Dep't of Land Conservation & Dev. on *Item 8.4: Polk County Status Report* to Land Conservation & Dev. Comm'n (Oct. 22, 1980) (on file with authors); Dep't of Land Conservation & Dev. Committee Action on Yamhill County (1979) (on file with authors).

either farm or forest standards, depending on whether the land is in farm or forest use.[201] Finally, forest uses must be protected on forest lands through adequate implementing regulatory measures.[202] This is achieved primarily through the zoning ordinance, which allows one or more forest-related uses and limits nonforest uses, such as residential uses unrelated to forestry.[203]

B. Uses Authorized in Forest Zones

Goal 4 provides:

> Forest operations, practices and auxiliary uses shall be allowed on forest lands subject only to such regulation of uses as are found in ORS 527.722.
>
> Uses which may be allowed subject to standards set forth in this goal and administrative rule are: (1) uses related to and in support of forest operations; (2) uses to conserve soil, water and air quality, and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment; (3) locationally dependent uses; (4) dwellings authorized by law.[204]

To carry out the goal, implementing administrative rules provide for two broad categories of uses on forest lands: forestry uses which are allowed outright and other uses which are subject to review standards set out in the regulations themselves.[205] The review standards include:

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201 OR. ADMIN. R. 660-006-0050(2) (2011); *id.* 660-033-0130(3)(e).

202 *Id.* 660-006-0015.

203 OR. REV. STAT. § 197.175 (2009). The Goal 4 administrative rules list the nonforest uses other than dwellings that are authorized in forest zones. *See* OR. ADMIN. R. 660-006-0025(2)–(4) (2011). However, counties may regulate more restrictively than required by rule. *See* Cent. Or. Landwatch v. Deschutes Cnty., 52 Or. LUBA 582, 596 (2006); Westfair Assocs. P'ship v. Lane Cnty., 25 Or. LUBA 729 (1993).

204 Dep't of Land Conservation & Dev., *Oregon's Statewide Planning Goals & Guidelines Goal 4: Forest Lands*, OREGON.GOV (Mar. 1, 1994), http://www.oregon.gov/LCD/docs/history/goal4circa030194.pdf.

205 The uses listed in Appendix 2 are similarly divided into those allowed outright, as they are forest or forest-related uses, and those conditionally allowed, so long as certain review standards are met. OR. ADMIN. R. 660-006-0025(3)–(4) (2011). Nonforest uses allowed include some forestry-related uses, such as primary processing of forest products, repair and storage of logging equipment, and log scaling and weighing stations. Nonforest uses allowed conditionally include fire stations, utility facilities, firearms-training facilities, reservoirs, and the like. The review standards are found at OR. ADMIN. R. 660-006-0025(5) (2011). A separate rule provides for the expansion of pre-existing youth camps. *See id.* 660-006-0031.

> (a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;
>
> (b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
>
> (c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner that recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized . . . .[206]

C. Dwellings on Forest Land

Forest dwellings are currently regulated by statute and rule. State statutes allow for three types of dwellings in forest zones: lot of record, large tract, and template dwellings on forest land.[207] The state regulations governing forest land are intended to limit the circumstances under which dwellings may be approved to those that will not interfere with forestry operations.[208] These dwellings are not necessarily related to forest uses, but are allowable because the approval standards are designed to limit their extent and possible interference with surrounding forest uses. One type of nonresource dwelling, lot-of-record dwellings, are authorized on tracts of land acquired by the current owner or family member before January 1, 1985, when most plans and regulations were acknowledged.[209] In

206 *Id.* 660-006-0025(5)(a)–(c). *See infra* Appendix 2. These standards are modeled on OR. REV. STAT. § 215.296(1) (2009) for certain nonfarm uses permitted conditionally in exclusive farm use zones.

207 *See* OR. REV. STAT. §§ 215.700–.755 (2009). As detailed below, there are three main types of dwellings allowed under OR. REV. STAT. §§ 215.700–.755 (2009): (1) lot-of-record dwellings, OR. REV. STAT. § 215.705 (2009); OR. ADMIN. R. 660-006-0027(1)(a)–(d),(4) (2011); (2) large tract dwellings, OR. REV. STAT. § 215.740 (2009); OR. ADMIN. R. 660-006-0027(1)(e), (4) (2011); and (3) template dwellings, OR. REV. STAT. § 215.750 (2009); OR. ADMIN. R. 660-006-0027(1)(f)–(h), (2)–(4), (7) (2011). Other types of dwellings may also be allowed including the alteration, restoration, or replacement of an existing dwelling, OR. REV. STAT. § 215.755(1) (2009); OR. ADMIN. R. 660-006-025(3)(p) (2011), hardship dwellings, OR. REV. STAT. § 215.755(2) (2009), and caretaker residences, OR. REV. STAT. § 215.755(3) (2009). The law related to these last three categories of dwellings has its origins and case law under land use regulations for farm use zones, but are dealt with briefly here.

208 Christopher Gilmore, Caroline MacLaren & Douglas M. DuPriest, *Goals 3–5: The Resource Goals*, *in* 1 LAND USE 10-1, 10-83 (Edward J. Sullivan, Robert E. Stacey, Jr. & Kathryn S. Beaumont eds., Oregon State Bar Legal Publications 2010).

209 *Id.* at 10-84 to -85.

addition to large tract dwellings, Measure 37[210]—passed in 2004 and revised by Measure 49 in 2007[211]—added another class of nonresource-related dwellings to provide additional opportunities for landowners who acquired the property before laws limiting the property's development were enacted.[212] Template dwellings based on a pattern of parcelization and existing dwellings in an area are a third type of permitted nonresource dwelling.

1. Lot-of-Record Dwellings

Lot-of-record dwellings—i.e., dwellings on certain previously vacant parcels lawfully created on or before January 1, 1985—are permitted under the same standards for lot-of-record dwellings on farmland.[213] The fact that such dwellings are permitted demonstrates a

210 OR. REV. STAT. § 197.352 (2005) (renumbered to OR. REV. STAT. § 195.305 in 2007).

211 Act of June 15, 2007, ch. 424, 2007 Or. Laws 1138 (codified at OR. REV. STAT. §§ 195.300–.336 (2009)).

212 *Id. See* Edward J. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon*, 46 WILLAMETTE L. REV. 577 (2010) (discussing these measures).

213 These standards include: (1) the lot or parcel on which the dwelling will be sited was lawfully created and was acquired and owned continuously by the present owner prior to January 1, 1985, or through devise or intestate succession from a person who acquired the lot or parcel prior to January 1, 1985, (2) the tract on which the dwelling will be sited does not include a dwelling, (3) the proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law, (4) the lot or parcel on which the dwelling will be sited, if zoned for forest use, is described in OR. REV. STAT. §§ 215.720, 215.740 or 215.750, (5) when the lot or parcel on which the dwelling will be sited lies within an area designated in an acknowledged comprehensive plan as habitat of big game, the siting of the dwelling is consistent with the limitations on density upon which the acknowledged comprehensive plan and land use regulations intended to protect the habitat are based, (6) if the lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another lot or parcel that was part of that tract and (7) when the lot or parcel on which the dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed. *See* OR. ADMIN. R. 660-006-0027 (2011); OR. REV. STAT. § 215.702 (2009). Since 1993, state policy on lot-of-record dwellings in forest zones is provided for under OR. REV. STAT. § 215.700 (2009). The aim of legislation concerning resource land dwelling policy is twofold: first, it aims to provide owners of certain less productive land an opportunity to build a dwelling on their land, and, second, the legislation limits the future division of land and the siting of dwellings upon the state's more productive resource land. *See id.* § 215.700. These requirements are set forth in OR. REV. STAT. §§ 215.705–.755 (2009) and the relevant portions of the implementing administrative rules and obviates a more detailed discussion of previous case law involving land divisions in forest zones. State law provides a floor, but a county may be more but not less restrictive in approving forest dwellings. *See* Reeves v. Yamhill Cnty, 53 Or. LUBA 4 (2006); Yontz

recognition that lots created before this time were likely buildable before the extensive goals requirements were incorporated into local plans and acknowledged by LCDC. The date also coincides with the time when most plans were acknowledged. However, lot-of-record dwellings are prohibited on highly productive forest soils.[214] The dwelling must be located within 1500 feet of a paved or a rock-surfaced public road.[215] Contiguous parcels in common ownership must be consolidated.[216] Nevertheless, these dwellings may still be denied in some circumstances.[217]

2. Large Tract Dwellings

"Large tract dwellings" are provided for by statute, allowing a landowner with sufficient acreage to receive approval for a dwelling on undeveloped forest land.[218] State regulations governing large tract

v. Multnomah Cnty., 34 Or. LUBA 367 (1998) (template dwellings); Dilworth v. Clackamas Cnty., 30 Or. LUBA 279 (1996).

214 OR. REV. STAT. § 215.720 (2009); OR. ADMIN. R. 660-006-0027(1)(c) (2011). In western Oregon, defined in OR. REV. STAT. § 321.257 (2009), a dwelling may not be located on soils "capable of producing 5,000 cubic feet per year of commercial tree species . . . ." OR. REV. STAT. § 215.720(1)(a) (2009). In eastern Oregon, defined in OR. REV. STAT. § 321.805 (2009), a dwelling may not be located on soils "capable of producing 4,000 cubic feet per year of commercial tree species . . . ." *Id.* § 215.720(1)(b).

215 This is a requirement under both OR. REV. STAT. § 215.720(1)(a) and (b) (2009). A Forest Service Road may be adequate if it is paved to a minimum width of 18 feet, a lane is provided in each direction and there is a maintenance agreement in place. OR. REV. STAT. § 215.720(1) (2009). The administrative rules require use of a public road as defined in OR. REV. STAT. § 368.001 (2009). OR. ADMIN. R. 660-006-0027(1)(c)(A) (2011).

216 *See* OR. REV. STAT. §§ 215.705(1)(g), .780(2)(b)(C)(ii) (2009); OR. ADMIN. R. 660-006-0026(2)(b)(C)(ii), -0027(1)(d)(B) (2011).

217 The denial may occur if the dwelling would exceed the facilities and service capabilities of the area, materially alter the stability of the overall land use pattern in the area, or create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations. OR. REV. STAT. § 215.705(5)(a)–(c) (2009). Additional criteria for forest land dwellings under OR. REV. STAT. § 215.705 (2009) exist under relevant statutes concerning stocking requirements.

218 *See* OR. REV. STAT. § 215.740 (2009); OR. ADMIN. R. 660-006-0027(1)(e) (2011). If a non-contiguous parcel is used to meet the size requirements it is not eligible for a dwelling, nor can it be used to qualify another parcel for a dwelling. The remaining non-contiguous tracts for such a large tract forest dwelling must be placed under a restrictive covenant precluding all future rights to construct a dwelling or from using the tracts to qualify for another large tract forest dwelling. *See infra* note 223 and accompanying text. "'Tract' means one or more contiguous lots or parcels under the same ownership." OR. REV. STAT. § 215.010(2) (2009). Thus, a "tract" may be a single area or multiple areas of land. These provisions assure that only one dwelling will be constructed on qualifying land. *See* OR. ADMIN. R. 660-006-0027(1)(e)(A)–(B), (6)(a)–(e) (2011). *See* Or. Shores

forest dwellings impose a minimum level of regulation, but local governments may regulate more strictly.[219] In Eastern Oregon, a large tract forest dwelling is permitted on 240 acres of contiguous property or 320 acres of property that is not contiguous but is under the same ownership within the same county or an adjacent county.[220] In western Oregon, a large tract forest dwelling may be located on 160 acres of contiguous property or 200 acres of property that is not contiguous but is under the same ownership within the same county or an adjacent county.[221] Noncontiguous parcels that are used to justify a large tract dwelling must be placed under restrictive covenants that preclude future dwellings.[222]

3. Template Dwellings

The criteria for approving a forest template dwelling are provided for both in statute and the administrative rules. They are structured according to a formula to permit additional dwellings depending on the quality of the soils, existing parcelization, and residential development.[223] Generally, the greater the forest land productivity, the greater the number of parcels and existing residential dwellings must be to justify approval of an additional dwelling under this heading. The review standards tie the ability to gain approval for a template dwelling to the number of parcels and dwellings that lawfully existed within the template area on January 1, 1993.[224] Local governments are

Conservation Coal. v. Coos Cnty., 50 Or. LUBA 444, 467 (2005) (case remanded on grounds unrelated to the covenant) (discussing the impact of a covenant in place on forest land to a development proposal).

219 Reeves v. Yamhill Cnty., 53 Or. LUBA 4 (2006).

220 OR. REV. STAT. § 215.740(1)(a), (3)(a) (2009); OR. ADMIN. R. 660-006-0027(1)(e)(A) (2011).

221 OR. REV. STAT. § 215.740(1)(b) (2009); OR. ADMIN. R. 660-006-0027(1)(e)(B) (2011). *See also* Cent. Or. Landwatch v. Deschutes Cnty., 53 Or. LUBA 290 (2007) (analyzing the substantial evidence necessary prior to local approval of a large tract forest dwelling).

222 *See* OR. REV. STAT. § 215.740(3)(b)–(c) (2009); OR. ADMIN. R. 660-006-0027(4)(c), (6)(a)–(e) (2011). DLCD was required to prepare a form of deed restriction under OR. REV. STAT. § 215.740(3)(c) (2009).

223 OR. REV. STAT. § 215.750 (2009). *See* OR. ADMIN. R. 660-006-0027(1)(f) (2011). *See also* Friends of Yamhill Cnty. v. Yamhill Cnty., 229 Or. App. 188, 211 P.3d 297 (2009) (analyzing the prerequisite that a parcel be lawfully created before allowing a template dwelling).

224 OR. REV. STAT. § 215.750(6)(a)(A) (2009). There are a number of peculiar requirements for template dwellings. *See infra* note 227 (statutory standards). For example, a rectangular tract that is one mile long and one-fourth mile wide may be used in certain cases for tracts that abut a road or perennial stream. OR. REV. STAT. § 215.750(5),

not required to allow forest template dwelling permits[225] but, if granted, the permits are valid for four years and may be extended for two additional years.[226] The dwelling must otherwise comply with the acknowledged plan and land use regulations.[227]

(6) (2009); OR. ADMIN. R. 660-006-0027(2), (3) (2011). A local government is not obligated by OR. REV. STAT. § 215.750(1) to allow the establishment of template dwellings. If a local government chooses to allow nonforest dwellings, it is not obligated to allow nonforest dwellings under the alternative template test specified at OR. REV. STAT. § 215.750(5). Yontz v. Multnomah Cnty., 34 Or. LUBA 367 (1998). Moreover, parcels in the template that fall within an urban growth boundary do not count towards meeting the template test. OR. REV. STAT. § 215.750(3) (2009). Finally, for purposes of establishing a forest template dwelling, the existing lots are not subject to the date of creation that otherwise applies to a lot-of-record. Parsons v. Clackamas Cnty., 32 Or. LUBA 147 (1996).

225 *Yontz*, 34 Or. LUBA 367. There are different standards for template dwellings in eastern and western Oregon. *Compare* OR. REV. STAT. § 215.750(1), (2) (2009), *and* OR. ADMIN. R. 660-006-0027(1)(f), (g) (2011) (addressing Western Oregon), *with* OR. REV. STAT. § 215.750(1), (2) (2009), *and* OR. ADMIN. R. 660-006-0027(1)(f), (g) (2011) (addressing Eastern Oregon). The term "lot" under these provisions refers to a lawfully created lot. *See* Reeves v. Yamhill Cnty., 53 Or. LUBA 4 (2006). In a follow-up case to *Reeves*, LUBA determined respondent may only count lawfully created lots and parcels in determining whether a template dwelling may be permitted. Friends of Yamhill Cnty. v. Yamhill Cnty., 58 Or. LUBA 315 (2009). The term "wood fiber" refers to all tree species, rather than only to Douglas Firs. *See* Carlson v. Benton Cnty., 154 Or. App. 62, 961 P.2d 248 (1998). In Oregon, "lots" are created by subdivision plat approval, while "parcels" are created by partition, by deed, or by land sales contracts. OR. REV. STAT. § 92.010(3), (4), (6) (2009). "In eastern Oregon, [defined by OR. REV. STAT. § 215.750(2) (2009),] a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is . . . : [(1) c]apable of producing 0 to 20 cubic feet per acre per year of wood fiber if . . . [a]ll or part of at least three other lots or parcels that existed on January 1, 1993, are within a . . . square centered on the center of the subject tract . . . and [a]t least three dwellings existed on January 1, 1993, on the other lots or parcels; [(2) c]apable of producing 21 to 50 cubic feet per acre per year of wood fiber if . . . [a]ll or part of at least seven other lots or parcels that existed on January 1, 1993, are within a 160-acre, square centered on the center of the subject tract and . . . [a]t least three dwellings existed on January 1, 1993, on the other lots or parcels; or [(3) c]apable of producing more than 50 cubic feet per acre per year of wood fiber if . . . [a]ll or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract . . . and [a]t least three dwellings existed on January 1, 1993, on the other lots or parcels." *See* OR. REV. STAT. § 215.750(2), (3) (2009); OR. ADMIN. R. 660-006-0027(1) (2011).

226 OR. ADMIN. R. 660-033-0140(5) (2011).

227 *See* OR. REV. STAT. § 215.705(1)(c), (5)(c) (2009) (lots of record); *id.* § 215.750(4)(a) (template dwellings). *See also* Greenhalgh v. Columbia Cnty., 54 Or. LUBA 626, 639–645 (2007) (requiring that the application for dwellings comply with the comprehensive plan policy that the use be "necessary and accessory" to commercial forest management).

4. Other Forest Land Dwellings

Three additional types of dwellings permitted on forest land are based on similar types of dwellings permitted in EFU zones.[228] These are temporary hardship dwellings,[229] replacement dwellings,[230] and caretaker dwellings. Also, a caretaker residence may be permitted for public parks and public fish hatcheries.[231]

D. Land Divisions and Minimum Parcel Sizes on Forest Land

Oregon statutes require most designated forest land to have a minimum lot or parcel size of eighty acres.[232] This norm was set to provide parcels of sufficient size to allow for a forest economy.[233] A county[234] may propose, and LCDC may approve, a minimum lot or parcel size less than eighty acres; however, that proposed minimum must meet particular policy requirements[235] and "conserve values found on forest lands."[236]

The Goal 4 administrative rule provides that new land divisions less than eighty acres may be approved only for certain specified

228 *See* OR. ADMIN. R. 660-033-0120, tbl. 1 (2011).

229 OR. REV. STAT. § 215.755(2) (2009). A temporary hardship dwelling must be removed within three months of the end of the hardship.

230 OR. REV. STAT. § 215.755(1) provides for alteration, restoration, or replacement of an existing dwelling under certain statutorily defined circumstances.

231 *Id.* § 215.755(3).

232 *Id.* § 215.780(1) ("Except as provided in subsection (2) of this section, the following minimum lot or parcel sizes apply to all counties: . . . (c) For land designated forest land, at least 80 acres.").

233 *See supra* and *infra* notes 232–39 and accompanying text (discussing resource lot size policy).

234 Most primary forest zones in Oregon have minimum parcel size requirements of eighty acres. Nevertheless, three counties (Lane, Polk, and Wasco) have their forty-acre minimum parcel sizes grandfathered because they had been acknowledged by LCDC just prior to the passage of H.B. 3661. OR. REV. STAT. § 215.780(5) (2009).

235 *Id.* § 527.630. These requirements include the encouragement of economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the conservation of other values found on forest lands set out in Goal 4.

236 OR. ADMIN. R. 660-006-0025(5) (2011); OR. REV. STAT. § 215.780(2)(a) (2009). *See also* OR. ADMIN. R. 660-006-0026(1)(a)(C), -0029, -0031(9), -0055(1) (2011). Unfortunately, the only further guidance as to the nature of "conserving values found on forest lands" is the following oblique reference in OR. ADMIN. R. 660-006-0025(6) (2011): "Nothing in this rule relieves governing bodies from complying with other requirement contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g., Goal 5) that exist on forest lands." The difficulty is that LCDC has conveyed to local governments a sense of preemption of their land use regulatory activities on forest lands, so that there are no Goal 5 resources regulated on those lands.

uses.[237] The divisions, which may not be approved until the uses have been approved, must create parcels that are the minimum size necessary for a given use.[238] Approval of forest land divisions with a dwelling requires meeting an additional condition: providing evidence that additional dwellings on the remainder of the parcel will be restricted.[239]

IV
PREEMPTION OF MOST LOCAL LAND USE REGULATIONS OF FOREST PRACTICES

In addition to the Goal 4 requirement to conserve forest land for forest uses, Goal 5 directs local governments to protect a number of natural resources such as riparian vegetation, wildlife, watersheds, and scenic waterways that may be located on, among other places, forest land. These planning requirements were of concern to the forest industry because of possible reductions in the amount of timber that could be cut on their lands.[240] The forest industry preferred for

237 OR. ADMIN. R. 660-006-0026(2)(a) (2011). "For the uses listed in OAR 660-006-0025(3)(m) through (o) and (4)(a) through (o) provided that such uses have been approved pursuant to OAR 660-006-0025(5) and the parcel created from the division is the minimum size necessary for the use . . . ." *Id.* Such uses include, but are not limited to, gas exploration, destination resorts, solid waste facilities, logging equipment storage, private parks, and campgrounds. *See id.* 660-006-0025. The source to lower minimum lot sizes for certain nonforest uses in forest zones under OR. ADMIN. R. 660-006-0027(2)(a) (2011) is not at all clear, as OR. REV. STAT. § 215.780(2) (2009) does not specifically allow smaller lot sizes for such uses. Nevertheless, these lot sizes have been part of LCDC's rules since 1994. *See* OR. ADMIN. R. 660-06-000 to -070 (1994), *available at* http://www.oregon.gov/LCD/docs/history/div6circaMay94.pdf.

238 OR. ADMIN. R. 660-006-0026(2) (2011). Although the rule does not specifically so provide, the remaining parcel created by the land division must also meet the minimum lot size standards set forth in OR. ADMIN. R. 660-006-0026 (2011). *See, e.g.*, Yamhill Cnty. v. Ludwick, 294 Or. 778, 663 P.2d 398 (1983) (arising before the statutory direction).

239 *See* OR. ADMIN. R. 660-006-0026(3)(a) (2011), which carries out OR. REV. STAT. § 215.780(2)(e)(E), (6)(a) (2009). Moreover, the rules require that a statement must be recorded that "the landowner will not in the future complain about accepted farming or forest practices on nearby lands devoted to farm or forest use." OR. ADMIN. R. 660-006-0026(6) (2011).

240 Additionally, federal laws with a conservationist import similar to Goal 5 came into existence that affected the amount of timber cut on public and private forest land. In 1973, Congress passed the Endangered Species Act (ESA) to protect at-risk species of plants and animals, and in 1976 passed the National Forest Management Act to outline harvest practices to preserve biological diversity and meet multiple-use objectives for federal forest lands. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); National Forest Management Act, 16 U.S.C. §§ 1600–1687 (2006). Further, between 1978 and 1984, citizen efforts lobbying Congress to designate more wilderness under the 1964 Wilderness Act reached a fever pitch in Oregon. *See generally* KEVIN R. MARSH,

planting, growing, and harvesting of trees to be regulated solely by the State Board of Forestry and the Oregon Department of Forestry under the Forest Practices Act (FPA).[241] As is the case with the statewide planning goals, much of the detail of the FPA is contained in its implementing administrative rules.[242] It suffices to say that, before the passage of H.B. 3396 in 1987, the industry was wary of another set of regulations in which local governments might authorize local land use restrictions based on broadly worded statewide planning goals. Below we will describe Goal 5, discuss program conflicts with Goal 4, and explain how the Oregon legislature resolved those conflicts.

DRAWING LINES IN THE FOREST: CREATING WILDERNESS AREAS IN THE PACIFIC NORTHWEST (2007); DENNIS M. ROTH, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS (1995); DENNIS M. ROTH, FOREST SERV., U.S. DEP'T OF AGRIC., FS-391, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964–1980 (1984); DENNIS M. ROTH, FOREST SERV., U.S. DEP'T OF AGRIC., FS-410, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1980–1984 (1988). In 1978, the Endangered American Wilderness Act was approved, adding the French Pete area to the Three Sisters Wilderness in the Willamette National Forest and designating the Wenaha Tuccanon Wilderness Area in the Umatilla National Forest. Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 40 (1978). In 1984, Congress approved the Oregon Wilderness Act, which designated almost 1 million acres of new wilderness. Oregon Wilderness Act of 1984, Pub. L. No. 98-328, 98 Stat. 272 (1984). These bills were passed over the strong and historic opposition of the timber industry and increased the industry's anxiety over additional local limitations on timber practices because the citizen participation requirements of the Oregon planning program would permit this citizen support to be focused on their private forest lands. By 1991, the ESA created the circumstances that resulted in an injunction on timber harvesting on federal lands. In *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991), a federal court held that the ESA required the federal Fish and Wildlife Service to designate critical habitat for the owl. Subsequent listing of the northern spotted owl, as well as other animals such as the marbled murrelet and various salmon and steelhead, as threatened species on forest lands in Oregon resulted in removal of large tracts of forest land from the timber base and increased harvest restrictions. *See* JASON P. BRANDT ET AL., FOREST SERV., U.S. DEP'T OF AGRIC., PNW-GTR-681, OREGON'S FOREST PRODUCTS INDUSTRY AND TIMBER HARVEST, 2003 (2006), *available at* http://www.fs.fed.us/pnw/pubs/pnw_gtr681.pdf. Another major factor in Oregon forest land management was the attempt of the Clinton Administration in 1994 to reconcile increased harvesting on forest lands and environmental protection in the Northwest Forest Plan. *See Northwest Forest Plan (NWFP) Overview*, REG'L ECOSYSTEM OFFICE, http://www.reo.gov/general/aboutNWFP.htm (last updated Nov. 28, 2006) (describing the plan). Despite those efforts, the allowable timber cut on federal lands in Oregon has fallen precipitously. The impacts of these federal laws, regulations, and practices on the Oregon land use program are beyond the scope of this Article.

241 OR. REV. STAT. §§ 527.610–.992 (2009).

242 *See* OR. ADMIN. R. 629-600-0100 to -680-430 (2011).

A. Goal 5

The 1974 version of Goal 5 provided that a local government must determine whether to protect certain resources if the resources are deemed "significant."[243] Because that goal proved to be expensive to meet and difficult to implement as a practical matter, it was revised in 1996.[244] Similarly, the original administrative rules implementing Goal 5 adopted in 1981[245] were significantly revised, along with the goal, in 1996.[246] The Goal 5 process requires that in addressing certain resources, local government must first inventory the location, quality, and the quantity of these resources.[247] Second, those governments must identify potential uses in each area containing Goal 5 resources that conflict with the preservation of such resources.[248] Third, the local government must assess the economic, social, environmental, and energy (ESEE) consequences of allowing or

243 *See* LCDC Order No. 1, *supra* note 32, at 17–20 (providing the original version of Goal 5).

244 To meet criticism of the vast discretion available to local governments under Goal 5 and OR. ADMIN. R. 660-16-000 (1981), LCDC both revised Goal 5 and adopted a new set of administrative rules in OR. ADMIN. R. 660-023-0000 to -0250 (1996) to provide more specific policy direction. *See* Certificate and Order for Filing Permanent Administrative Rules with the Secretary of State, Land Conservation & Dev. Comm'n (Aug. 30, 1996) (adopting OR. ADMIN. R. 660-023-0000 to -0250).

245 Certificate and Order for Filing Administrative Rules with the Secretary of State, Land Conservation & Dev. Comm'n (May 8, 1981) (adopting OR. ADMIN. R. 660-16-000).

246 Certificate and Order for Filing Permanent Administrative Rules with the Secretary of State, Land Conservation & Dev. Comm'n (Aug. 30, 1996) (adopting OR. ADMIN. R. 660-023-0000 to -0250). LCDC was well aware of the concerns of the forest landowners and studied the matter extensively in advance of the 1987 rules. *See* Memorandum from James F. Ross, Dir., Dep't of Land Conservation & Dev. on *Commission Worksession on Goal 5* to Interested Parties (Apr. 18, 1986) (on file with the authors) (noting the difficulty in reconciling Goal 5 and the Forest Practices Act, the wide variation in local application of Goal 5, and its effectiveness).

247 *See* Certificate and Order for Filing Permanent Administrative Rules with the Secretary of State, Land Conservation and Dev. Comm'n (Aug. 30, 1996) (adopting OR. ADMIN. R. 660-023-0000 to -0250); OR. ADMIN. R. 660-016-0000(2) (2011).

248 *See* Certificate and Order for Filing Permanent Administrative Rules with the Secretary of State, Land Conservation and Dev. Comm'n (Aug. 30, 1996) (adopting OR. ADMIN. R. 660-023-0000 to -0250); OR. ADMIN. R. 660-016-0000(2) (2011). *See also* Dep't of Land Conservation & Dev., *Oregon's Statewide Planning Goals & Guidelines Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces*, OREGON.GOV, http://www.oregon.gov/LCD/docs/goals/goal5.pdf (last updated Nov. 24, 2010) ("Criteria should be developed and utilized to determine what uses are consistent with open space values and to evaluate the effect of converting open space lands to inconsistent uses. The maintenance and development of open space in urban areas should be encouraged."); OR. ADMIN. R. 660-016-0005 (2011) (identifying conflicting uses).

prohibiting any conflicting uses.[249] Once the conflicts are identified, the local government—based on the ESEE assessment—must develop a program to achieve the goal in one of three ways: (1) If the local government concludes that the resource should be fully protected, it may prohibit conflicting uses, notwithstanding the possible impacts on those uses;[250] (2) if, on the other hand, the local government concludes that conflicting uses are more important than the Goal 5 resources in the area, those conflicting uses may be fully allowed;[251] and (3) if the local government concludes that both the resource and the conflicting use are sufficiently important so that neither should be sacrificed entirely, it may allow the conflicting use but limit it so that the resource is protected to some extent.[252]

These steps involved much discretion and have resulted in controversy surrounding both the local government's and LCDC's application of Goal 5, as demonstrated by appellate review.[253] As many Goal 5 resources may be found on forest lands, there was a distinct possibility that local governments might limit commercial forestry on forest lands in an effort to preserve these resources. Furthermore, because there were also increasing limits on timber production on federal lands, the forest industry sought protection from the legislature.

B. Program Conflicts Between Goals 4 and 5 and the 1979 Preemption

As counties submitted their plans for acknowledgement, the Oregon Business Planning Council and some industrial forest land owners became concerned that, given the conflict between protecting forest lands for harvesting and protecting some non-timber Goal 5 resources, counties would use local regulation to limit forest operations.[254]

249 OR. ADMIN. R. 660-016-0005(3) (2011).

250 *Id.* 660-016-0010(1).

251 *Id.* 660-016-0010(2).

252 *Id.* 660-016-0010(3).

253 LCDC was not unaware of the concerns of the industry, which led to the 1996 revision of Goal 5 and adoption of new administrative rules to make the rule clearer and to narrow the kinds and qualities of natural resources to be protected. *See supra* notes 246–47 and accompanying text.

254 Common Questions, *supra* note 64 (doing nothing to dispel this fear).

At the behest of the timber industry, the Oregon Legislature in 1979 passed H.B. 3008,[255] providing for the supremacy of the Forest Practices Act (FPA) [256] and prohibiting local governments from "regulating the conduct on forest lands of forest operations" governed by the FPA or its implementing rules.[257] However, the legislation allowed local governments to continue designating forested lands to be conserved in accordance with the goals and to zone forested lands for nonforest uses. Thus, forest practices could be regulated by local land use regulations if the "primary" use of those lands was for "other than the commercial growing and harvesting of forest tree species."[258] In addition, cities were permitted to regulate forest operations so long as those regulations were equal to, or more stringent than, those under the FPA.[259] In July 1979, LCDC included this language as part of the Forest Lands Goal Policy in its informal interpretation of Goal 4.[260] The policy appeared to endorse local land use regulation of forest lands, but did not specify just how far that regulation would extend.

255 Act of July 16, 1979, ch. 400, § 4, 1979 Or. Laws 490, 490 (codified as amended at OR. REV. STAT. § 527.722 (2009)) (known as H.B. 3008).

256 OR. REV. STAT. §§ 527.610–.992 (2009). *See supra* notes 246–47 and accompanying text.

257 Act of July 16, 1979, ch. 400, § 2(1), 1979 Or. Laws 490, 490. Current administrative rules are now found in OR. ADMIN. R. 629-600-0100 to -680-430 (2011).

258 Act of July 16, 1979, ch. 400, § 4, 1979 Or. Laws 490, 490. Legislative history during the 1979 legislative session supports the position that the legislature intended to limit county restrictions of forest practices only to lands zoned exclusively for the commercial harvesting of trees. The legislature specifically discussed the term "primary use" as used in H.B. 3008 and agreed that the determinations of primary and secondary uses would be made by the counties using whatever zoning techniques seemed appropriate. Audio tape: Senate Committee on Agriculture and Natural Resources (June 20, 1979) (Oregon State Archives Office). In effect, however, the practice has been to allow the Forest Practices Act preemption to be applied to any land designated as forest land. Because DLCD never required, and no county specifically designated "commercial forest land" separate from "non-commercial forest land," the preemption statute always applied to all designated forest land. A local government could use another designation, such as "public park" or "natural area" for some forested lands, but commercial forest operations would not be an outright permitted use in an implementing measure applied to that area. In light of the more specific 1987 preemption, these controversies are moot.

259 Act of July 16, 1979, ch. 400, § 2(2), 1979 Or. Laws 490, 490.

260 *See supra* note 261. Two Oregon Attorney General Opinions construed the 1979 legislation to preempt regulation of forest practices on forest lands where forestry was one of several primary uses, but allowed the designation of forest lands for primary uses other than commercial forestry, in which the local government could regulate such activities. *See* 40 Or. Op. Att'y Gen. 446 (1980); 40 Or. Op. Att'y Gen. 500 (1980). For the timber industry, this was an unacceptable outcome and led to further preemptive legislation in 1987.

C. Applying the 1979 Preemption and Enacting a New Preemption

The 1979 statutory preemption by the Forest Practices Act of county land use regulations under Goal 5 led many to believe that the goal had been eroded, particularly when an obligation to conserve a particular resource under Goal 5 conflicted with the commercial harvesting of timber.[261] On the other hand, even with the enactment of the 1979 preemption, the forest industry complained that valuable forest lands might be "locked up" because of Goal 5 and voiced concerns that any ordinance or comprehensive plan that regulated timber harvesting on lands designated for timber use was preempted under the FPA.[262] LCDC began to acknowledge plans where Goal 5 compliance was considered, notwithstanding the preemption provisions in H.B. 3008,[263] and plans where the local government relied on the FPA for protection of Goal 5 resources. Goal 5 review by LCDC, notwithstanding the preemption, was challenged and initially upheld by the Oregon Court of Appeals.[264]

At the same time, LCDC was beginning to implement legislation requiring coordination in land use activities among state agencies and local governments regarding all goals, including Goal 5.[265] In 1985, LCDC had begun its review of the Oregon Department of Forestry State Agency Coordination Program, to determine if that department's programs affecting land use (i.e., policies and rules) complied with the statewide planning goals and were compatible with

261 Terence L. Thatcher & Nancy E. Duhnkrack, *Goal Five: The Orphan Child of Oregon Land Use Planning*, 14 ENVTL. L. 713, 741 (1984).

262 *Id.* at 722–23.

263 *See supra* note 90 (discussing Multnomah County acknowledgment request).

264 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Tillamook Cnty., 76 Or. App. 33, 708 P.2d 370 (1985), *on reconsideration*, 77 Or. App. 599, 714 P.2d 279 (1986). In that case and related cases involving Union, Washington, Columbia, Linn, Lane, Umatilla, and Coos counties, the Court of Appeals held that counties could adopt regulations to protect Goal 5 resources occurring on forest land even if the regulations minimally impacted forest operations. The Court of Appeals said that a county could not rely on the state forest practices program to meet its land use planning obligations under Goal 5. This presented the prospect of thirty-six different sets of forest practice regulations, rather than a unified state system.

265 OR. REV. STAT. § 197.180 (2009) (requiring state agencies generally to "carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use: (a) In compliance with the goals, rules implementing the goals and rules implementing this section; and (b) In a manner compatible with acknowledged comprehensive plans and land use regulations.").

acknowledged comprehensive plans and land use regulations.[266] The most contentious issue was whether the FPA and its rules conformed to Goal 5. The conservation community urged LCDC to require that the Board of Forestry amend the FPA implementing rules to be consistent with the resource protections of Goal 5, while the timber industry urged LCDC to find it in compliance with the goal. Certain legislative leaders strongly urged LCDC to make the requirements of Goal 5 applicable to state agencies and to develop "clear and objective standards" for their application, particularly regarding Goal 5 and the FPA.[267] When it became apparent that these provisions may not have complied with Goal 5, the review was suspended.[268]

The Court of Appeals decision and the state agency coordination review led the timber industry back to the Legislature to strengthen their preemption and gain an additional exemption for the FPA from state agency coordination requirements.[269] Because of the legislative stalemate, the Governor convened a work group to deal with state and local roles in regulating forest practices.[270] Governor Goldschmidt supported preemption by the FPA from local government plans and regulations arising under Goal 5 through local comprehensive plans and regulations. However, in order to gain support from the legislature and the conservation community, the Governor proposed amending the FPA to incorporate protection of Goal 5 resources, to be overseen by a reconstituted State Board of Forestry, with membership

266 *Id.* This state agency coordination review was underway during the 1985 legislative session with forest landowners generally urging certification of the Oregon Department of Forestry program as compatible with the Goals, including Goal 5, and environmental and land use watchdog groups arguing otherwise. *See* Oregon Department of Forestry Program of Coordination memorandum (on file with authors).

267 Letter from John Kitzhaber, M.D., Senate President, Bill Bradbury, Chair, Joint Legislative Comm. on Land Use, and legislators Joyce Cohen, Mike McCracken, Tom Throop, and Wayne Fawbush, to Stafford Hansell, Chair, Land Conservation & Dev. Comm. (May 9, 1986) (on file with authors).

268 Memorandum from James F. Ross, Dir., Dep't of Land Conservation & Dev. on Preliminary Draft Report: Department of Forestry State Agency Coordination Program to Interested Parties (May 6, 1986) (on file with authors). This report was met with a response by certain legislative leaders demanding greater rigor in the state agency coordination process. Letter from Senate President John Kitzhaber, M.D., and other senators, to Stafford Hansell, Chair, Land Conservation & Dev. Comm'n (May 9, 1986) (on file with authors).

269 *See id.*

270 Memorandum from Gail L. Achterman, Assistant to the Governor for Natural Res. on H.B. 3396 Relating to Forestry Land Use Practices to Members of the Or. House of Representatives (June 18, 1987) [hereinafter Achterman Memorandum to Legislators] (on file with authors).

less dominated by the forest industry.[271] In the meantime, the Oregon Supreme Court reversed the Court of Appeals and affirmed the LCDC orders acknowledging the county plans relying on the Forest Practices Act to comply with Goal 5.[272] Although the Supreme Court decision essentially resolved the question of preemption, it did not address the other key issues identified by the Governor's working group, such as state agency coordination, challenges to forest practices, the need for legislation to deal with the manner of preemption, composition of the Board of Forestry, or the relationship between LCDC and the Department of Forestry on forest policy issues.[273]

H.B. 3396, enacted in 1987, expressly exempted the FPA from the statewide goals, interpretive rules, and any coordination obligation otherwise imposed by state law, thereby resolving the ambiguity of the 1979 legislation.[274] The goals otherwise apply to any other Department of Forestry program and to forest lands not protected by the Act. In turn, LCDC was required to amend its goals and rules so as not to allow local governments to regulate forest operations except as allowed under the FPA. In addition, the FPA applies to forest operations inside any urban growth boundary except in areas where a local government has adopted land use regulations for forest practices, in which case the local government must take on all FPA

271 Memorandum from Gail Achterman, Assistant to the Governor for Natural Res. on Forest Practices Act and State Agency Coordination to Governor Neil Goldschmidt (Apr. 27, 1987) (on file with authors).

272 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, Tillamook Cnty., 303 Or. 430, 737 P.2d 607 (1987). The Court concluded that "[t]he statutes involved in this case follow a logical preemption pattern. ORS 527.722 prohibits counties from adopting any rules or regulations regulating commercial forest operations governed by the FPA. The only exceptions to this rule arise when an area is zoned for a primary use other than commercial forest operations. ORS 527.726(1)(c). The Court of Appeals' interpretation allows the exception to swallow the rule. We do not believe that this was the legislature's intent in enacting ORS 527.726(1)(c)." *Id.* at 441, 737 P.2d at 613. The result was that counties may zone land to make forest operations insignificant or incidental, but if forest operations are permitted, counties cannot regulate them. Counties may fulfill their planning responsibilities by deferring to state administration of the Forest Practices Act.

273 Achterman Memorandum to Legislators, s*upra* note 270.

274 OR. REV. STAT. § 197.277 (2009). *See also* Achterman Memorandum to Legislators, *supra* note 270. The preemptive intent of this legislation is also apparent from STAFF OF H. ENERGY & ENV'T COMM., 64TH OR. LEG. ASSEMB., 1987 REG. SESS., STAFF MEASURE ANALYSIS (OR. 1987) and Memorandum from Senator Bill Bradbury, Chairman, Senate Agric. & Natural Res. Comm. on Senate Amendments to H.B. 3396 to Representative Ron Cease, Chairman, and Members of the House Energy & Env't Comm. (June 24, 1987) (on file with authors).

responsibilities.[275] This significant legislation established the current policy structure for protection of forest lands in Oregon. Under this structure, the land use program protects the forest land base and the Department of Forestry oversees the actual management of the forests and the non-timber resources located on forest lands. Finally, the FPA provides for appeals to the State Forester rather than LUBA[276] and sets the Board of Forestry membership and procedures.[277]

Nevertheless, as discussed below, private timber companies in particular have continued to chafe at state and local land use regulations that affect their use of land, and provide significant support for efforts to require these governments either to pay for the "lost value" of their land or to waive most regulations.

V
THE "PAY OR WAIVE" CONTROVERSIES

In the first decade of the 21st century, Oregon became heavily engaged in a debate as to whether government should be required to pay landowners for the economic impact of regulations imposed. Oregon voters approved three measures in that decade with varying implications for planning. Measure 7, passed in 2000, was a state constitutional amendment requiring the state and local governments to

275 *See* OR. REV. STAT. § 527.722(5)–(8) (2009) ("These local regulations shall: (a) [p]rotect soil, air, water, fish and wildlife resources; (b) [b]e acknowledged as in compliance with land use planning goals; (c) [b]e developed through a public process; (d) [b]e developed for the specific purpose of regulating forest practices; and (e) [b]e developed in coordination with the State Forestry Department and with notice to the Department of Land Conservation and Development. (6) [In order t]o coordinate with local governments in the protection of soil, air, water, fish and wildlife resources, the State Forester shall provide local governments with a copy of the notice or written plan for a forest operation within any urban growth boundary. Local governments may review and comment on an individual forest operation and inform the landowner or operator of all other regulations that apply but that do not pertain to activities regulated under the Oregon Forest Practices Act. (7) The existence or adoption by local governments of a comprehensive plan policy or land use regulation regulating forest practices . . . relieve[s] the State Forester of responsibility to administer the Oregon Forest Practices Act within the affected area. (8) [Finally, t]he Director of the Department of Land Conservation and Development shall provide the State Forester copies of notices submitted pursuant to [OR. REV. STAT. § 197.615 (2009)], whenever such notices concern the adoption, amendment or repeal of a comprehensive land use regulation allowing, prohibiting or regulating forest practices."). The State Board of Forestry has included environmental standards in its forest practice rules. *See* OR. ADMIN. R. 629-605-0100 to -635-0310 (2011).

276 OR. REV. STAT. § 527.700 (2009). *See also* Achterman Memorandum to Legislators, *supra* note 270 (regarding sections 4 and 13 of the proposed legislation).

277 *See* OR. REV. STAT. §§ 526.009, .016 (2009). *See also* Achterman Memorandum to Legislators, *supra* note 270 (regarding sections 6 to 8 of the proposed legislation).

pay for most land use regulations,[278] but was found to have been presented to the voters improperly and was thus invalidated.[279] Measure 37, passed in 2004, was a "regulatory taking" initiative that required payment for loss of value through land use regulations or the waiver of those regulations.[280] This measure passed with the support of the forest industry,[281] and was upheld by the courts.[282] After considerable public discussion and debate,[283] the Oregon legislature offered an alternative program that reduced potential claims and awards significantly, but provided a means by which the owner could sell the lands for certain residential development.[284] Oregon voters approved this referral measure in 2006.[285] The campaign in opposition to Measure 49 also received some financial support from the timber

278 *Measure 7*, OR. SEC'Y OF STATE ELECTIONS DIV., http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htm (last visited Mar. 29, 2011) ("If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed; the property owner shall be paid just compensation equal to the reduction in the fair market value of the property."). *See also* Carl Abbott, Sy Adler & Deborah Howe, *A Quiet Counterrevolution in Land Use Regulation: The Origins and Impact of Oregon's Measure 7*, 14 HOUSING POL'Y DEBATE 383 (2003).

279 League of Or. Cities, v. State, 334 Or. 645, 56 P.3d 892 (2002).

280 *Measure 37*, OR. SEC'Y OF STATE ELECTIONS DIV., http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Mar. 29, 2011).

281 Measure 37 received support from Oregonians in Action (OIA), a public interest group, which consists of several interrelated front groups, political actions committees, and nonprofit organizations. Frank Nims, a timber and farmland owner in Sherwood, was a public face for a principal backer of the measure, OIA. Dale Riddle, of Eugene's Seneca Jones Sawmill, was also a leading proponent. *See Measure 37: Arguments in Favor,* OR. SEC'Y OF STATE ELECTIONS DIV., http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html (last visited Mar. 29, 2011) (showing that timber companies contributed significantly to the Measure 37 campaign as well); Michael Milstein, *Oregon Forest Owners See Fairer Future in Measure 37*, ENVTL. NEWS NETWORK (Dec. 22, 2004, 12:00 AM), http://www.enn.com/top_stories/article/9981. *See also* Sullivan & Bragar, *supra* note 212.

282 MacPherson v. Dep't of Admin. Servs., 340 Or. 117, 130 P.3d 308 (2006).

283 *See* Sullivan & Bragar, *supra* note 212.

284 *Id. See also Measure 49: Text of Measure*, OR. SEC'Y OF STATE ELECTIONS DIV., http://www.sos.state.or.us/elections/nov62007/guide/m49_text.html (last visited Mar. 29, 2011).

285 *See November 6, 2007, Special Election Abstract of Votes*, OR. SEC'Y OF STATE ELECTIONS DIV., http://www.sos.state.or.us/elections/nov62007/abstract/results.pdf (last visited Mar. 29, 2011).

industry, though not to the extent that the industry supported Measure 37.[286]

The 2009 Legislature broadened the scope of awards of compensation authorized by Measure 49 with respect to forest lands by approving Senate Bill 691,[287] which resulted in three statutory modifications. First, it expanded the types of forest land regulations that could be the basis for a claim for compensation.[288] Second, it permitted a new method of appraisal. The reduction in fair market value may now be demonstrated by appraisals showing "the value of the land and harvestable timber, with and without application of the land use regulation, conducted in accordance with generally accepted forest industry practices for determining the value of timberland."[289] Third, it allowed future owners to file a claim, and not only current owners, as is otherwise provided in Measure 49.[290]

As with the preemptive provisions of the Forest Practices Act in 1979, the real impacts on forest policy may not be the actual claims and litigation over the scope of the legislation, but rather the "dog that did not bark," i.e., those rules and regulations not enacted or applied for fear of claims or litigation.[291] In any event, the role of the timber industry in the passage of these measures has given it considerable leverage in dealing with future state laws and regulations that may affect the industry.

286 *See* Press Release, Democracy Reform Group, Measure Campaigns Raise Nearly $20 per Vote Cast: Fundraising Underdogs Lose in Latest Round of Ballot Measures (Nov. 14, 2007) (on file with authors).

287 *See* S.B. 691, 75th Or. Leg. Assemb., 2009 Reg. Sess. (Or. 2009), *available at* http://www.leg.state.or.us/09reg/measpdf/sb0600.dir/sb0691.en.pdf. This legislation amended several provisions of Measure 49 to the benefit of the forest industry in what appeared to be a deal for that industry to refrain from collectively opposing the Measure. Sullivan & Bragar, *supra* note 212.

288 *See* OR. REV. STAT. § 195.300(14)(e)(C) (2009) (adding to the list of compensable claims any law enacted or rule adopted "solely for the purpose of regulating a forest practice").

289 *See id.* § 195.310(4) (allowing forest land claimants a different method of appraisal to show loss).

290 *See id.* § 195.310(8) (allowing an individual besides the landowner to file a compensation claim, if it involves a forestry regulation; a right not given to other landowners); Sullivan & Bragar, *supra* note 212.

291 Sullivan, *supra* note 13, at 156.

VI
FINAL OBSERVATIONS, RECOMMENDATIONS, AND CONCLUSIONS

By taking an inclusive view of forest lands through soils and productivity mapping, requiring stringent local regulations to be applied by local governments, and limiting the use of forest lands for nonresource uses, the Oregon land use system has largely fulfilled the aspiration that "[f]orest lands shall be preserved for forest use."[292] Additionally, elected officials are sensitive to the needs of the forest industry, given the importance of forestry to the Oregon economy. Some of those needs are met through substantial property tax benefits given to private forest land owners, including preferential assessment, deferral of tax liability, and an assessment scheme that reflects fluctuations in the value of forest lands, which are paid by other taxpayers.[293]

However, there are practical issues in dealing with the planning and land use regulation of resource lands in Oregon. State policy prefers to designate unincorporated areas suitable for agriculture and forestry into one of these land use designations (or sometimes a mixed use version of them), and then to combine tax benefits with restrictions on nonresource uses of these lands and provision for limited nonresource uses. The model has worked reasonably well with farmlands in Oregon;[294] however, use of the agricultural lands protection analogy is less helpful to protect forest lands for several reasons.

First, the timber economy in Oregon is subject to both market and non-market pressures. The market price of wood, like the price of agricultural products, varies greatly in domestic and foreign markets over time.[295] In addition, the impact of NEPA and the Endangered Species and Wilderness Acts on the availability of timber from public lands has been profound, thus increasing the pressure on private lands.[296] And unlike the situation of the farmer, forest land owners cannot switch easily from one tree species to another.

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292 *See, e.g.*, LCDC Order No. 1, *supra* note 32 (reflecting this aspiration in the original text of Goal 4). *See also infra* Appendix 1.

293 *See* RICHMOND & HOUCHEN, *supra* note 5.

294 *See* Sullivan & Eber, *supra* note 24, at 52–55.

295 *See* Dep't of Forestry, *Log Price Information*, OREGON.GOV, http://oregon.gov/odf/state_forests/timber_sales/logpage.shtml (last updated Jan. 6, 2011).

296 Daowei Zhang, *Markets, Policy Incentives and Development of Forest Plantation Resources in the United States of America*, *in* WHAT DOES IT TAKE? THE ROLE OF

Second, despite the number of small woodlands owners in Oregon,[297] private timberlands tend to be held in large tract ownerships,[298] and large timber companies tend to be socially and politically organized while the farm community is more diverse and not aggregated into large corporations.[299] As a result of that frequent corporate structure and organization, the tax preferences granted to the timber industry have been more than matched by regulatory concessions, such as preemption of local land use regulation of forest practices and legislative sympathy to claims of loss of value, particularly by those who owned smaller parcels before the current regime came into being.[300] However, the industrial forest landowners have not rejected the efforts of the state to take a broad-brush approach to forest land protection. Some of them have even endorsed restrictions on land divisions and limitations on nonforest use of designated timberlands. Prior to the controversies over payment or waiver, state statutes, Goal 4, its implementing administrative rules, and the case law interpreting them tended toward more restrictive regulations of nonforest use of timberlands. Today, those statutes, rules, and interpretations remain strict, with some limited relief under Measure 49. For some time, these increasingly stringent regulations did not provoke objections from significant industrial forest landowners, notwithstanding significant objections to other federal rules, such as those implementing the Endangered Species Act.[301] The resolution of the "pay or waive" controversy might cause these landowners to support future initiatives along the same lines. However, the financial support of the timber industry of similar measures is an important factor in the success of those efforts. These

INCENTIVES IN FOREST PLANTATION DEVELOPMENT IN ASIA AND THE PACIFIC 237, 250 (2004), *available at* ftp://ftp.fao.org/docrep/fao/007/ae535e/ae535e02.pdf.

297 "Almost 60 percent of forest land in Oregon is in federal ownership, while 20 percent is in industrial ownership, and 15 percent is held by small private landowners. The rest is in state, tribal, or other public ownership. The land held by small woodlot owners is in more than 150,000 ownerships. As federal lands have become less available for timber harvesting in recent decades, the harvest of timber from private ownerships has increased significantly." Dep't of Land Conservation & Dev., *Forest Land Protection Program*, OREGON.GOV, http://www.oregon.gov/LCD/forlandprot.shtml (last updated Apr. 13, 2009).

298 *Id.*

299 *See, e.g.*, Sullivan & Bragar, *supra* note 212.

300 OR. REV. STAT. §§ 195.300–.336 (2009) (amended 2010).

301 Boise Cascade Corp. v. Bd. of Forestry, 325 Or. 203, 205, 935 P.2d 422, 423 (1997) (finding the Board of Forestry had authority to determine whether a taking has occurred under an administrative rule it has promulgated).

are daunting impediments to a coordinated statewide planning program.

Third, there are limited measurement opportunities by which the success of the Oregon land use program towards forestry may be gauged. LCDC is required by law to report biennially the number of new and replacement dwellings on forest lands and divisions of such lands, and requires each local government to cooperate in gathering this data.[302] Since 1997, approximately 450 dwellings on forest lands (one-fifth of them being replacements of existing dwellings) were approved in the entire state.[303] Considering that all nonfederal lands in the state are subject to plans and regulations, and that data is kept on a statewide basis, the Oregon program is relatively successful in its objectives of preserving forest lands for forest uses.[304] Nevertheless, Oregon is currently experimenting with other methods of resource lands preservation, including transferable development rights as a means of directing development away from forest lands.[305]

While the Oregon land use program was undergoing an examination of its effectiveness, a report was commissioned to conduct an academic literature search to evaluate certain goals, including Goal 4.[306] From an examination of land use patterns following the adoption of the Oregon land use program, the study concludes:

> Based on the studies reviewed below, it is possible to address the primary research question—whether the land use law has reduced the conversion of forest land to developed uses. Empirical analysis of rates and patterns of forest land development before and after

302 OR. REV. STAT. § 197.065 (2009).

303 DEP'T OF LAND CONSERVATION & DEV., APPROVED 2006–07 FOREST REPORT: JANUARY 1, 2006 THROUGH DECEMBER 31, 2007, at 6 (2008), *available at* http://www.oregon.gov/LCD/docs/rural/forest2006-07.pdf. *See infra* Appendix 3. Moreover, the report shows that, from 2004, when LCDC was required to keep data, there were, on average, 48 forest and 37 nonforest land divisions in the entire state (Table G), and from 1993–94 to 2007, there was an average of 101 nonforest uses allowed each year (Table J). *Id.* This is the most recent data available.

304 Dep't of Land Conservation & Dev., *Urban & Rural Issues*, OREGON.GOV, http://www.lcd.state.or.us/LCD/urbanrural.shtml#Farm_and_Forest_Reports (last updated Feb. 1, 2011) (showing reports on the number of dwellings, land divisions, and nonresource uses allowed in Oregon).

305 Oregon has authorized the use of transferable development credits in circumstances set forth in OR. REV. STAT. §§ 94.531–.538 (2009) and a bolder pilot program to be administered by LCDC under OR. REV. STAT. § 197.430 (2009).

306 *See* Jeff Kline & Jim Duncan, *Goal 4 Forest Lands*, *in* DRAFT FINAL REPORT: THE OREGON LAND USE PROGRAM: AN ASSESSMENT OF SELECTED GOALS 56 (2008).

> implementation of the land use law suggest that the land use planning system has redirected residential and other development to locations within urban growth boundaries and other designated growth areas. Land use planning has reduced the amount of forest land conversion that otherwise would have taken place without implementation of the land use law. Additional analysis suggests that the continuation of the land use planning program into the future will yield further prevention of development on forest lands.[307]

A third study, prepared jointly by the Oregon Department of Forestry and the United States Forest Service,[308] concluded:

- Ninety-eight percent of all non-Federal land that was [zoned for] forest, agricultural, and range land uses in Oregon in 1974 remained in these uses in 2005. . . .
- Average annual rates of conversion of private land [zoned for] forest, agriculture, and range uses to low-density residential and urban uses declined for Oregon, western Oregon, and eastern Oregon from the 1974–1984 period through the 2000–2005 period. Annualized rates of change in the conversion of private forest, farm, and range land to low-density residential or urban uses declined dramatically from the 1974–1984 period to the 1984–

307 *Id.* at 59 (citations omitted). *See also id.* at 72–73 ("Despite the significant interest in Oregon's land use planning program since its inception and the rather large body of literature that has been written about it, little empirical analysis actually exists that has attempted to evaluate the forest land conservation effects of forest and agricultural zoning in Oregon. Although a [great] number of studies claim to do so, many of those studies are more descriptive in nature and focus on examining trends in land use since land use planning was implemented. Although such descriptive analyses do provide a story of shifting land use trends after planning, the failure of most studies to control for the numerous socioeconomic and topographic factors that influence land use change and development confound our ability to draw strong conclusions regarding the likely influence of zoning in effecting rates and patterns of change."). Perhaps however the more recent study by Clay Harris Veka, Impact of Dwellings on Land Use in Farm and Forest Zones: The Case of Hood River County, Oregon, 1994–2005 (2008) (unpublished professional project submitted in partial fulfillment of the requirements for the degree of Master of Urban Planning, University of Washington) (on file with Built Environments Library, University of Washington) might qualify as a valid model for how to study forest lands, notwithstanding the Kline and Duncan suggestions to the contrary and the fact that the case study considered only farm land. Despite some concerns that there is no study or analysis to evaluate whether the land use system could do a better job protecting the non-timber values found primarily on forest land and there are several arguments to suggest that it would not.

308 U.S. FOREST SERV. & OR. DEP'T OF FORESTRY, FORESTS, FARMS & PEOPLE: LAND USE CHANGE ON NON-FEDERAL LAND IN OREGON 1974–2005 (2009), *available at* http://www.oregon.gov/ODF/RESOURCE_PLANNING/docs/Low_Res_Forest_farms_8_9_09.pdf. *See also* The Hillsboro Argus, *Forestry Report Chronicles Land-Use Changes in Oregon*, OREGONLIVE.COM (Mar. 15, 2011, 8:30 AM), http://www.oregonlive.com/argus/index.ssf/2011/03/forestry_report_chronicles_lan.html.

> 1994 period. From 1994 to 2005, rates of development remained relatively low in spite of rapidly increasing population.
>
> • How fast forest, agricultural, and range land shifted to low-density residential or urban land uses was related to their distance to more developed areas. . . .
>
> • Land zoned for forest, range, and agricultural uses has remained in these uses. Of non-Federal acreage designated as non-developable zones in county comprehensive land use plans, nearly all of it has remained in forest, range, and agricultural uses in the years following completion of these plans in the mid-1980s. Development of land in these resource uses to low-density residential or urban uses occurred where land was zoned for development.
>
> • A slowdown in the conversion of private forest, agriculture, and range land to more developed uses in the 1984–1994 period coincided with the implementation of comprehensive land use plans. Land in low-density residential land use shifted to urban land use at a high rate in the 2000–2005 period. These results support a key finding that Oregon's land use program has encouraged intensified development in areas already urbanizing, while limiting the development of more rural forest, range, and agriculture land.
>
> . . . .
>
> • A large majority, 87 percent, of private land in Oregon zoned for forest use, is still largely free of the effects that population or development may have on forest management. However, the rate at which private land zoned for forest use shifted from lower to higher population densities accelerated in the 2000–2005 period.[309]

Oregon's land use planning program has identified and extended significant protections to the state's forest land base. Information from the Oregon Forest Institute shows that Oregon is converting forest land to other uses at a much slower rate than virtually every other state. Oregon has retained ninety-two percent of the forest cover it had in 1850.[310] This significant figure is due in large part to the statewide land use program. In recent years, a variety of forces have

309 *Id.* at 4. The report concludes that the rate of conversion of forest land to low-density and urban uses between 2000 and 2005 averaged 6000 acres per year, though there was more development in wildland forests and set benchmarks to review such future conversions, so that the report would be updated in 2010 and every five years thereafter. *Id.* at 49.

310 *See* OR. FOREST RES. INST., THE FUTURE OF OREGON'S WORKING FORESTS: CHOICES, CONSEQUENCES, AND WHAT'S AT STAKE FOR OREGON 1 (2008), *available at* http://www.oregonforestresources.org/assets/uploads/Working_Web.pdf.

caused timber harvests to drop dramatically even as land remains undeveloped, while other values such as habitat, water quality, carbon sequestration, and recreation have gained increasing importance for those lands. However, as nonmarket values diminish, private industrial timber ownerships have been transferred to real estate arms or companies, raising a concern about growing development pressure on forest land that could adversely impact both future timber management and other forest values.

Recommendations to improve the state's program should address five issues in particular, namely: inventory and designation, nonforest uses, forest dwellings, minimum lot sizes, and preemption.

A. Inventory and Designation

Identifying precisely which forest lands are to be conserved under Goal 4 has been a perennial issue subject to much litigation. Unlike Goal 3, which defines agricultural lands based primarily on soil capability, the definition of forest land under Goal 4 is somewhat general in nature. The definition should have a minimum of lands that are deemed forest land, preferably based on soil categories. Additional lands outside urban growth boundaries should then be considered if they are suitable for forest use or for the protection of other forest resources.[311]

B. Nonforest Uses

The nonforest uses permitted under Goal 4 remain similar to the long list of nonfarm uses permitted under Goal 3 in EFU zones. As with Goal 3, there has not been any comprehensive review of these permitted uses to determine whether any individual or cumulative loss of forest land or any impact on adjacent forest operations has occurred. Such a study should be done using the information submitted annually to LCDC by Oregon counties and field checked using available GIS information.[312]

311 In January of 2011, LCDC amended OR. ADMIN. R. 660-006-0005, -0010 (2011), to provide that data from the United States Forest Service Natural Resource Data Service is the default authority for determining commercial forest land classification, but adding other sources in the event that such data is unavailable or is shown to be inaccurate. Additionally, OR. ADMIN. R. 660-006-0005 (2011) was amended to cross-reference OR. REV. STAT. §§ 215.700–.799 (2009), to demonstrate the policies in these statutes as additional purposes for these rules. While an element of discretion is still present, the new rules do provide additional certainty.

312 *See* Veka, *supra* note 310 (providing a model for this approach).

C. Forest Dwellings

The dwellings permitted in forest zones under ORS § 215.705 to § 215.755 are subject to standards intended to keep dwellings from intruding into active forest areas or interfering with any forest operations. A comprehensive review of the dwellings approved should be undertaken to determine whether the standards are achieving their intended purpose.[313] Such a review is especially important for the large-tract[314] and template dwellings,[315] where there is anecdotal evidence of problems.

D. Minimum Lot Sizes

There has been no review of the adequacy of the statutorily required minimum lot sizes in forest areas since the passage of H.B. 3661 in 1993. This should be done to ensure that the size of new parcels is appropriate for commercial forestry and not more attractive for residential purposes.

E. Preemption

H.B. 3396 also reconstituted the Oregon Board of Forestry and delegated to that Board the responsibility to protect various important non-timber resources. Since that time, there has been no comprehensive evaluation of the expected reforms established by this legislation. In response to the claim that preemption would exacerbate the domination of the forest industry in managing forest practices, the legislature reestablished the Board with more diversity, so that it was not dominated by the timber industry and included persons with expertise in "all aspects of forest management."[316] Further, this new Board was to adopt new rules to conduct certain inventories of important nontimber resources and to ensure the protection of these

313 The Veka methodology, *supra* note 310, or that used in Project Report, *supra* note 172, appear to be an appropriate measurements of impact.

314 *See supra* Part III.C.2. There is a concern that nonforest landowners will buy large parcels of forest land for private game reserves, rather than the practice of commercial forestry.

315 *See supra* Part III.C.3. There is concern that standards applicable to template dwellings permit some construction in areas with nearby dwellings or areas that are not clearly parcelized. To ensure that these dwellings are only approved in areas with an existing pattern of small parcels and dwellings, one possible solution would be to require the dwellings used to qualify the parcel for development be within the template area or within a certain distance from the proposed dwelling.

316 Achterman Memorandum to Legislators, *supra* note 270.

critical resources.[317] These rules need a continuing and comprehensive review to ensure that they can achieve the goals of the legislation.

The Oregon land use program appears to have achieved an understanding with the timber industry and owners of forest lands so that forest lands are restricted to provide for forest uses, nonforest uses are limited or prohibited, a property tax regime is provided that supports and encourages that industry, and forestry regulations are undertaken through a state agency, rather than through the state land use program.[318] Not all forest landowners are in agreement with this approach. While this balance occasionally creates controversy and upsets forest landowners, conservationists, local governments, and the public, it works and is predictable. Given the economic challenges to the forest industry, such predictability is important.

317 *Id.*; OR. REV. STAT. § 197.277 (2009).

318 The statutory exclusion of most local land use regulation of forest practices and reliance on the Forest Practices Act leaves the responsibility for sustainable land management practices to the Oregon Board of Forestry (BOF), which develops such policies for state (but not federal) and private forest lands. The adequacy of such policies is beyond the scope of this Article. Nevertheless, the BOF is beset with a number of problems in developing and administering its own land use policies: (1) BOF funding is largely dependent on the amount of timber cut, which is largely in steep decline in recent years, and cannot look to the state general fund to replace these revenues; (2) the "pay or waive" provisions of Measure 49 and subsequent legislation will likely be asserted against new BOF rules dealing with environmental protection, such as endangered species and water quality; (3) the influence on that Board by the forest industry, which is likely to have less sympathy to land use regulations and conservation efforts, is great. The preemption alternative must be weighed against whether local land use control of forest lands would have been a better outcome. It is far from clear whether local governments, especially county governments, would be less sympathetic to the industry and more supportive of conservation regulations since local tax revenues come in part from receipts of the local timber harvest.

APPENDIX 1

ORIGINAL VERSION OF GOAL 4

4—FOREST LANDS
GOAL:

To conserve forest lands for forest uses.

Forest land shall be retained for the production of wood fiber and other forest uses. Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan.

In the process of designating forest lands, comprehensive plans shall include the determination and mapping of forest site classes according to the United States Forest Service manual "Field Instructions for Integrated Forest Survey and Timber Management Inventories—Oregon, Washington and California, 1974."

FOREST LANDS—are (1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; (2) other forested lands needed for watershed protection, wildlife and fisheries habitat and recreation; (3) lands where extreme conditions of climate, soil and topography require the maintenance of vegetative cover irrespective of use; (4) other forested lands in urban and agricultural areas which provide urban buffers, wind breaks, wildlife and fisheries habitat, livestock habitat, scenic corridors, and recreational use.

FOREST USES—are (1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3)watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.

CURRENT VERSION OF GOAL 4

OAR 660-015-0000(4)

GOAL 4: FOREST LANDS
To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and

harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources.

USES

Forest operations, practices and auxiliary uses shall be allowed on forest lands subject only to such regulation of uses as are found in ORS 527.722.

Uses which may be allowed subject to standards set forth in this goal and administrative rule are: (1) uses related to and in support of forest operations; (2) uses to conserve soil, water and air quality, and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment; (3) locationally dependent uses; (4) dwellings authorized by law.

IMPLEMENTATION

Comprehensive plans and zoning provide certainty to assure that forest lands will be available now and in the future for the growing and harvesting of trees. Local governments shall inventory, designate and zone forest lands. Local governments shall adopt zones which contain provisions to address the uses allowed by the goal and administrative rule and apply those zones to designated forest lands.

Zoning applied to forest land shall contain provisions which limit, to the extent permitted by ORS 527.722, uses which can have significant adverse effects on forest land, operations or practices. Such zones shall contain numeric standards for land divisions and standards for the review and siting of land uses. Such land divisions and siting standards shall be consistent with the applicable statutes, goal and administrative rule. If a county proposes a minimum lot or parcel size less than 80 acres, the minimum shall meet the requirements of ORS 527.630 and conserve values found on forest lands. Siting standards shall be designed to make allowed uses compatible with forest operations, agriculture and to conserve values found on forest lands.

Local governments authorized by ORS 215.316 may inventory, designate and zone forest lands as marginal land, and may adopt a zone which contains provisions for those uses and land divisions authorized by law.

GUIDELINES

A. PLANNING

1. Forest lands should be inventoried so as to provide for the preservation of such lands for forest uses.

2. Plans providing for the preservation of forest lands for forest uses should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

B. IMPLEMENTATION

1. Before forest land is changed to another use, the productive capacity of the land in each use should be considered and evaluated.

2. Developments that are allowable under the forest lands classification should be limited to those activities for forest production and protection and other land management uses that are compatible with forest production. Forest lands should be available for recreation and other uses that do not hinder growth.

3. Forestation or reforestation should be encouraged on land suitable for such purposes, including marginal agricultural land not needed for farm use.

4. Road standards should be limited to the minimum width necessary for management and safety.

5. Highways through forest lands should be designed to minimize impact on such lands.

6. Rights-of-way should be designed so as not to preclude forest growth whenever possible.

7. Maximum utilization of utility rights-of-way should be required before permitting new ones.

8. Comprehensive plans should consider other land uses that are adjacent to forest lands so that conflicts with forest harvest and management are avoided.

APPENDIX 2

Or. Admin. R. 660-006-0025: Uses Authorized in Forest Zones

(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are:

(a) Uses related to and in support of forest operations;
(b) Uses to conserve soil, air and water quality and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment;
(c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc.;
(d) Dwellings authorized by ORS 215.705 to 215.755; and
(e) Other dwellings under prescribed conditions.

(2) The following uses pursuant to the Forest Practices Act (ORS Chapter 527) and Goal 4 shall be allowed in forest zones:
(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash;
(b) Temporary on-site structures which are auxiliary to and used during the term of a particular forest operation;
(c) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities; and
(d) For the purposes of section (2) of this rule "auxiliary" means a use or alteration of a structure or land that provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded.
(3) The following uses may be allowed outright on forest lands:

(a) Uses to conserve soil, air and water quality and to provide for wildlife and fisheries resources;

(b) Farm use as defined in ORS 215.203;

(c) Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;

(d) Temporary portable facility for the primary processing of forest products;

(e) Exploration for mineral and aggregate resources as defined in ORS Chapter 517;

(f) Private hunting and fishing operations without any lodging accommodations;

(g) Towers and fire stations for forest fire protection;

(h) Widening of roads within existing rights-of-way in conformance with the transportation element of acknowledged comprehensive plans and public road and highway projects as described in ORS 215.213(1) and 215.283(1);

(i) Water intake facilities, canals and distribution lines for farm irrigation and ponds;

(j) Caretaker residences for public parks and public fish hatcheries;

(k) Uninhabitable structures accessory to fish and wildlife enhancement;

(l) Temporary forest labor camps;

(m) Exploration for and production of geothermal, gas, oil, and other associated hydrocarbons, including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the well head;

(n) Destination resorts reviewed and approved pursuant to ORS 197.435 to 197.467 and Goal 8;

(o) Disposal site for solid waste that has been ordered established by the Oregon Environmental Quality Commission under ORS 459.049, together with the equipment, facilities or buildings necessary for its operation;

(p) Alteration, restoration or replacement of a lawfully established dwelling that:

(A) Has intact exterior walls and roof structures;

(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

(C) Has interior wiring for interior lights;

(D) Has a heating system; and
(E) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling; and
(q) An outdoor mass gathering as defined in ORS 433.735 or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period is not a "land use decision" as defined in ORS 197.015(10) or subject to review under this division.
(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:
(a) Permanent facility for the primary processing of forest products;
(b) Permanent logging equipment repair and storage;
(c) Log scaling and weigh stations;
(d) Disposal site for solid waste approved by the governing body of a city or county or both and for which the Oregon Department of Environmental Quality has granted a permit under ORS 459.245, together with equipment, facilities or buildings necessary for its operation;
(e)(A) Private parks and campgrounds. Campgrounds in private parks shall only be those allowed by this subsection. Except on a lot or parcel contiguous to a lake or reservoir, campgrounds shall not be allowed within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes and is established on a site or is contiguous to lands with a park or other outdoor natural amenity that is accessible for recreational use by the occupants of the campground. A campground shall be designed and integrated into the rural agricultural and forest environment in a manner that protects the natural amenities of the site and provides buffers of existing native trees and vegetation or other natural features between campsites. Campsites may be occupied by a tent, travel trailer or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations. Overnight temporary use in the same campground by a camper or camper's vehicle shall not exceed a total of 30 days during any consecutive 6 month period.

(B) Campsites may be occupied by a tent, travel trailer, yurt or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites except that electrical service may be provided to yurts allowed for by paragraph (4)(e)(C) of this rule.

(C) Subject to the approval of the county governing body or its designee, a private campground may provide yurts for overnight camping. No more than one-third or a maximum of 10 campsites, whichever is smaller, may include a yurt. The yurt shall be located on the ground or on a wood floor with no permanent foundation. Upon request of a county governing body, the Commission may provide by rule for an increase in the number of yurts allowed on all or a portion of the campgrounds in a county if the Commission determines that the increase will comply with the standards described in ORS 215.296(1). As used in this rule, "yurt" means a round, domed shelter of cloth or canvas on a collapsible frame with no plumbing, sewage disposal hook-up or internal cooking appliance.

(f) Public parks including only those uses specified under OAR 660-034-0035 or 660-034-0040, whichever is applicable;

(g) Mining and processing of oil, gas, or other subsurface resources, as defined in ORS chapter 520, and not otherwise permitted under subsection (3)(m) of this rule (e.g., compressors, separators and storage serving multiple wells), and mining and processing of aggregate and mineral resources as defined in ORS chapter 517;

(h) Television, microwave and radio communication facilities and transmission towers;

(i) Fire stations for rural fire protection;

(j) Utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR chapter 660, division 4;

(k) Aids to navigation and aviation;

(l) Water intake facilities, related treatment facilities, pumping stations, and distribution lines;

(m) Reservoirs and water impoundments;

(n) Firearms training facility;

(o) Cemeteries;

(p) Private seasonal accommodations for fee hunting operations may be allowed subject to section (5) of this rule, OAR 660-006-0029, and 660-006-0035 and the following requirements:

(A) Accommodations are limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code;

(B) Only minor incidental and accessory retail sales are permitted;

(C) Accommodations are occupied temporarily for the purpose of hunting during game bird and big game hunting seasons authorized by the Oregon Fish and Wildlife Commission; and

(D) A governing body may impose other appropriate conditions.

(q) New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width;

(r) Temporary asphalt and concrete batch plants as accessory uses to specific highway projects;

(s) Home occupations as defined in ORS 215.448;

(t) A manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative as defined in ORS 215.213 and 215.283. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the manufactured dwelling will use a public sanitary sewer system, such condition will not be required. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. A temporary residence approved under this subsection is not eligible for replacement under subsection (3)(p) of this rule. Governing bodies every two years shall review the permit authorizing such mobile homes. When the hardships end, governing bodies or their designate shall require the removal of such mobile homes. Oregon Department of Environmental Quality review and removal requirements also apply to such mobile homes. As used in this section, "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons;

(u) Expansion of existing airports;

(v) Public road and highway projects as described in ORS 215.213(2)(p) through (r) and (10) and 215.283(2)(q) through (s) and (3);

(w) Private accommodations for fishing occupied on a temporary basis may be allowed subject to section (5) of this rule, OAR 600-060-0029 and 660-006-0035 and the following requirements:

(A) Accommodations limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code;

(B) Only minor incidental and accessory retail sales are permitted;

(C) Accommodations occupied temporarily for the purpose of fishing during fishing seasons authorized by the Oregon Fish and Wildlife Commission;

(D) Accommodations must be located within one-quarter mile of fish bearing Class I waters; and

(E) A governing body may impose other appropriate conditions.

(x) Forest management research and experimentation facilities as described by ORS 526.215 or where accessory to forest operations; and

(y) An outdoor mass gathering subject to review by a county planning commission under the provisions of ORS 433.763. These gatherings are those of more than 3,000 persons that continue or can reasonably be expected to continue for more than 120 hours within any three-month period and any part of which is held in open spaces.

(5) A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:

(a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;

(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and

(c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner that recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (m), (s), (t) and (w) of this rule.

(6) Nothing in this rule relieves governing bodies from complying with other requirement contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g., Goal 5) which exist on forest lands.

APPENDIX 3

DWELLING APPROVALS ON FOREST LAND **2009 Table S**
TOTALS BY YEAR

	New Permanent Dwellings (Excludes Replacement and Hardship)										
County	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
Baker	1	5	2						3	1	
Benton	2	5	2	4	3	1	2	3	1	5	3
Clackamas	50	41	50	16	30	51	30	35	34	19	15
Clatsop	6	5	6	5	4	7	4	4	9	1	7
Columbia	33	35	32	40	16	12	24	25	16	17	13
Coos	10	14	17	15	23	31	19	14	33	15	4
Crook					1	1	1				
Curry	2	5	14	9	13	40	18	7	6	8	7
Deschutes	9	13	6	3	1	2	3	5	6	3	3
Douglas	2	6	10	5	7	4	15	39	23	15	11
Gilliam						1					
Grant	6	6	10	4	8		4	1	5	2	1
Harney											
Hood River	7	7	8	4	2	1	1	2	3	5	4
Jackson	78	45	57	42	52	52	40	32	24	22	16
Jefferson										2	
Josephine	13	12	28	14	18	22	29	8	18	8	3
Klamath	14	9	20	9	15	15	16	10	9	8	5
Lake											
Lane	45	48	67	39	40	24	38	33	17	49	33
Lincoln	12	7	15	12	8	11	14	11	11	9	3
Linn	12	7	8	5	11	14	10	11	23	11	3
Malheur											
Marion	5	6	8	2	7	5	3	5	3		
Morrow	4	3	1	1	1	1		4	6		2
Multnomah	4	2	1	8	1		5	3	1	4	3
Polk	2	22	20	12	13	15	16	20	28	13	12
Sherman											
Tillamook	2	3	5	1	3	4	3	2	5	3	2
Umatilla			2	1	1		2	1	6	1	
Union	5	4	3	2	9	7	3	6	2	5	2
Wallowa	2	5	3	3	1	4	2	5	1	3	2
Wasco			1						1		
Washington	10	4	6	8	8	23	13	19	12	2	7
Wheeler			1								
Yamhill	3	22	4	2	7	13	16	18	12	12	17
Totals	**339**	**341**	**407**	**266**	**303**	**361**	**331**	**323**	**318**	**243**	**178**