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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
COLUMBIA COUNTY,)
)
Respondent.)

LUBA No. 92-073

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Larry Knudsen, Salem, filed the petition for review and argued on half of petitioner. With him on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

John K. Knight, St. Helens, filed the response brief and argued on behalf of respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED IN PART;
REMANDED IN PART 09/10/92

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance amending the Columbia
4 County Zoning Ordinance (CCZO) to allow the creation of lots
5 or parcels smaller than those allowed by the lot size
6 standards of the county's agriculture, forest and rural
7 residential zoning districts.

8 **FACTS**

9 In 1985, the Columbia County Comprehensive Plan (plan)
10 and CCZO were acknowledged by the Land Conservation and
11 Development Commission (LCDC) pursuant to ORS 197.251. In
12 early 1992, LCDC initiated an enforcement proceeding against
13 respondent Columbia County (county) pursuant to ORS 197.324.
14 This enforcement proceeding was initiated in response to
15 concerns by petitioner Department of Land Conservation and
16 Development (DLCD) regarding an alleged pattern and practice
17 of using CCZO Major Variance provisions to circumvent the
18 minimum lot sizes required by the county's acknowledged
19 agriculture, forest and rural residential zoning districts.
20 Record 12, 18.

21 In response to the LCDC enforcement proceedings, the
22 county adopted the challenged Ordinance No. 92-4, amending
23 CCZO 1504 (Variances). Prior to this amendment, CCZO 1504
24 consisted of an introductory paragraph and three subsections
25 establishing different types of variances (major, solar
26 access and minor). Ordinance No. 92-4 amends the

1 introductory paragraph of CCZO 1504 to include a statement
2 that "Major Variances from the lot size requirements of the
3 Primary Agriculture (PA-38), Forest Agriculture (FA-19),
4 Primary Forest (PF-76) and Rural Residential (RR-5) Zones
5 are not permitted under [the CCZO]." Record 17. Petitioner
6 does not contest this portion of Ordinance No. 92-4.

7 Ordinance No. 92-4 also adds a new subsection 4 to
8 CCZO 1504, creating a fourth type of variance. CCZO 1504.4
9 (Two or More Existing Dwellings on a Parcel) provides, as
10 relevant:

11 "[N]otwithstanding the lot size provisions of the
12 PA-38, FA-19, PF-76 and RR-5 zones, the Director
13 may approve the partitioning of a lawfully created
14 lot or parcel in these zones, upon which two or
15 more lawfully established permanent dwellings
16 exist, into a number of parcels equal to the
17 number of dwellings on the lot or parcel, upon
18 findings by the Director that:

19 "A. Each new parcel has a pre-existing habitable
20 dwelling, * * * none of which were previously
21 approved as resource-related [dwellings] or
22 as temporary dwellings * * *.

23 " * * * * *

24 "B. The creation of the separate parcels will
25 have no adverse impact on farm or forest
26 practices in the area or on the parcels.

27 "C. The configuration of the parcels will permit
28 the establishment of a new septic system on
29 each parcel * * *.

30 "D. The proposed division of the land is
31 appropriate for the continuation of the
32 existing commercial farm or forest enterprise
33 on the parcels, and any non-resource parcels
34 are no larger than necessary.

1 "E. All the new parcels meet all other
2 requirements (access, frontage, setback, lot
3 width and depth, etc.) of [the] zone, except
4 for the lot size as permitted by this
5 [sub]section." Record 16.

6 Petitioner challenges CCZO 1504.4 as it applies to the
7 county's PA-38, FA-19 and PF-76 zones. Petitioner does not
8 challenge CCZO 1504.4 as it applies to the county's RR-5
9 zone.

10 **PRELIMINARY ISSUE**

11 The county contends issues concerning the consistency
12 of CCZO 1504.4 with the county's plan and the Statewide
13 Planning Goals (goals) were not raised during the
14 proceedings below and, therefore, under ORS 197.830(10) and
15 197.835(2), cannot be raised in this appeal. The county
16 argues that ORS 197.830(10) and 197.835(2) apply to this
17 Board's review of all land use decisions. The county
18 further argues the requirement that issues be raised during
19 the local proceedings could not be abrogated in this case by
20 any county failure to follow the procedures required by
21 ORS 197.763, because the procedural requirements of
22 ORS 197.763 apply only to "quasi-judicial land use
23 hearings." The county argues the challenged decision and
24 the proceedings below were clearly legislative in nature.

25 ORS 197.763 provides, in relevant part:

26 "The following procedures shall govern the conduct
27 of quasi-judicial land use hearings conducted
28 before a local governing body, planning
29 commission, hearings body or hearings officer on
30 application for a land use decision * * *:

1 "(1) An issue which may be the basis for an appeal
2 to [LUBA] shall be raised not later than the
3 close of the record at or following the final
4 evidentiary hearing on the proposal before
5 the local government. * * *

6 "* * * * *" (Emphasis added.)

7 ORS 197.830(10) provides in relevant part:

8 "A petition for review of the land use decision
9 * * * shall be filed with [LUBA]. Issues shall be
10 limited to those raised by any participant before
11 the local hearings body as provided in
12 ORS 197.763. A petitioner may raise new issues to
13 [LUBA] if:

14 "(a) The local government failed to follow the
15 requirements of ORS 197.763; or

16 "* * * * *" (Emphasis added.)

17 Additionally, ORS 197.835(2) provides:

18 "Issues [raised before LUBA] shall be limited to
19 those raised by any participant before the local
20 hearings body, as provided by ORS 197.763. A
21 petitioner may raise new issues to [LUBA] if:

22 "(a) The local government failed to follow the
23 requirements of ORS 197.763; or

24 "* * * * *" (Emphasis added.)

25 The above quoted statutory provisions were enacted in
26 1989. Or Laws 1989, ch 761. We have described them as
27 representing a "quid pro quo," whereby local governments
28 must give broader and more detailed notice of quasi-judicial
29 land use hearings and make staff reports available in
30 advance of such hearings, in exchange for participants being
31 required to raise an issue during the local proceedings in

1 order to be able to raise that issue before this Board.¹
2 1000 Friends of Oregon v. Benton County, 20 Or LUBA 7, 10
3 (1990).

4 The requirements of ORS 197.763, both with regard to
5 procedures for local proceedings and raising issues in such
6 proceedings, apply only to local government quasi-judicial
7 land use proceedings, not to local government legislative
8 land use proceedings. Parmenter v. Wallowa County, 21
9 Or LUBA 490, 492 (1991). Therefore, ORS 197.763(1) imposes
10 no limitation on the issues which may be raised before this
11 Board in an appeal of a local government legislative land
12 use decision. Both ORS 197.830(10) and 197.835(2) provide
13 that issues raised before LUBA shall be limited to those
14 raised below "as provided in ORS 197.763." Consequently,
15 these provisions also do not limit the issues which may be
16 raised before this Board in an appeal of a local government
17 legislative land use decision.

18 The challenged decision is clearly legislative in
19 nature. Accordingly, we may review the issues raised by
20 petitioner in this appeal, regardless of whether those
21 issues were raised in the county proceedings.

¹With certain exceptions not relevant here, prior to the enactment of Oregon Laws 1989, chapter 761, there was no requirement that issues have been raised in the local proceedings below in order to be reviewed by this Board. See 1000 Friends of Oregon v. Lane County, 102 Or App 68, 70 n 1, 793 P2d 885 (1990); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 369-70 (1986).

1 **FIRST ASSIGNMENT OF ERROR**

2 "The county adopted a new land use regulation that
3 fails to comply with its comprehensive plan
4 provisions relating to agricultural lands and
5 Statewide Planning Goal 3 [Agricultural Lands]."

6 Petitioner contends CCZO 1504.4 violates Goal 3 and the
7 exclusive farm use (EFU) statute. Petitioner points out
8 that Goal 3 requires counties to preserve agricultural lands
9 by zoning them for exclusive farm use pursuant to ORS
10 ch 215. There is no dispute that the county's PA-38 zone is
11 acknowledged by LCDC, and has been applied to agricultural
12 land, as an EFU zone. Petitioner argues that CCZO 1504.4
13 regulates land zoned PA-38 less stringently than is required
14 by the EFU statute.

15 Petitioner argues the state's agricultural land use
16 policy, as stated in ORS 215.243(2), favors the preservation
17 of agricultural land in large blocks. According to
18 petitioner, although this policy does not bar all partitions
19 for nonfarm dwellings, "it is part of comprehensive
20 regulatory requirements intended to substantially limit
21 partitions [for] nonfarm dwellings by the imposition of
22 rigorous requirements." Petition for Review 5. Petitioner
23 argues the statutory requirements for partitioning EFU zoned
24 land to create a nonfarm parcel for a nonfarm dwelling are

1 found in ORS 215.236, 215.263(4) and 215.283(3).²

2 Petitioner first contends CCZO 1504.4 improperly allows
3 approval of a division of land for a dwelling not provided
4 in conjunction with farm use (nonfarm dwelling) without
5 requiring that the nonfarm dwelling be situated on
6 "generally unsuitable land for the production of farm crops
7 and livestock," as required by ORS 215.263(4) and
8 215.283(3)(d).³ Petitioner argues that ORS 215.283(3)

²Petitioner also notes OAR 660-05-040(1) provides that "[d]wellings on nonfarm parcels are allowed only if they meet the conditions set forth in [ORS] 215.283(3) and 215.236 and 215.263(4) for nonfarm residences."

³ORS 215.263(4) provides:

"The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under [ORS 215.283(3)]."

ORS 215.283(3) provides in relevant part:

"[Nonfarm dwellings] may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use upon a finding that each such proposed dwelling:

"* * * * *

"(d) Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract
* * *

"* * * * *"

We refer to ORS 215.283(3)(d) as the "generally unsuitable standard." We note that petitioner does not contend that CCZO 1504.4 fails to require compliance with the nonfarm dwelling approval standards found in ORS 215.283(3)(a)-(c).

1 governs the "establishment" of a legally recognized nonfarm
2 dwelling use, not just the construction of a new structure
3 for that purpose. Billington v. Polk County, 13 Or LUBA
4 125, 130 (1985). According to petitioner, regardless of
5 whether a dwelling already exists on the subject property,
6 ORS 215.263(4) requires that the "establishment" of a
7 nonfarm dwelling be approved pursuant to ORS 215.283(3)
8 prior to the approval of a partition to create a new parcel
9 for such a dwelling.

10 Second, petitioner contends CCZO 1504.4 improperly
11 allows approval of a division of land for a nonfarm dwelling
12 without requiring that the property on which the nonfarm
13 dwelling is located has been disqualified from special farm
14 value assessment, and any additional tax imposed has been
15 paid, as required by ORS 215.236(2).⁴ See Letter of Advice
16 dated December 24, 1987 to Representative Tony Van Vliet
17 (OP-6144); Record 28. Petitioner argues that until
18 ORS 215.236(2) is satisfied, the county cannot approve the
19 establishment of a nonfarm dwelling under ORS 215.283(3).

⁴ORS 215.236(2) provides:

"The governing body or its designate shall not grant final approval of an application made under [ORS] 215.283(3) for the establishment of a [nonfarm] dwelling on a lot or parcel in an exclusive farm use zone that is, or has been, receiving special assessment without evidence that the lot or parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 * * * and any additional tax imposed as the result of disqualification has been paid."

1 Petitioner also argues that until the establishment of a
2 nonfarm dwelling is approved under ORS 215.283(3), the
3 county cannot approve a partition of EFU zoned land for that
4 nonfarm dwelling.

5 The county maintains that CCZO 1504.4 applies only to
6 lots or parcels which have two or more "lawfully
7 established" "pre-existing habitable dwelling[s]" which
8 (1) were "established before July 25, 1985," the date the
9 county's plan and regulations were acknowledged by LCDC, and
10 (2) were not "previously approved as resource-related or as
11 temporary dwellings under [CCZO 1505]." The county argues
12 this effectively restricts the applicability of CCZO 1504.4
13 to lots or parcels which contain two or more dwellings that
14 are preexisting lawful nonfarm residential uses. According
15 to the county, both ORS 215.130(5) and 215.215(2) allow the
16 continuation of such preexisting nonfarm residential uses.⁵

17 The county further argues that ORS 215.283(3) does not
18 apply to preexisting dwellings in an EFU zone, rather only

⁵ORS 215.130(5) provides in relevant part:

"The lawful use of any building, structure or land at the time
of enactment or amendment of any zoning ordinance or regulation
may be continued. * * *"

ORS 215.215(2) provides:

"Consistent with ORS 215.243, the county governing body may
zone for the appropriate nonfarm use one or more lots or
parcels in the interior of an exclusive farm use zone if the
lots or parcels were physically developed for the nonfarm use
prior to the establishment of the exclusive farm use zone."

1 to approval of new nonfarm dwellings.⁶ In support of this
2 interpretation, the county points out the introductory
3 paragraph of ORS 215.283(3) refers to the findings required
4 for "each such proposed [nonfarm] dwelling." The county
5 also argues that whereas ORS 215.283(3) applies to
6 establishment of a new nonfarm residential use, CCZO 1504.4
7 does not allow the creation of new uses, but rather only the
8 creation of new parcels. The county maintains that land
9 divisions are not "uses" governed by ORS 215.283. The
10 county further argues that if ORS 215.283(3) only applies to
11 approval of new nonfarm dwellings, then it follows that
12 ORS 215.236 also applies only to approval of new nonfarm
13 dwellings.

14 Finally, the county contends ORS 215.263(4) does not
15 apply to land divisions for preexisting nonfarm dwellings.
16 The county points out that although ORS 215.263 contains
17 provisions regulating land divisions for farm uses and for
18 nonfarm uses allowed under ORS 215.283(2) and (3), it says

⁶The county recognizes that 1000 Friends of Oregon v. LCDC, 72 Or App 443, 696 P2d 550, rev den 299 Or 584 (1985) and Billington v. Polk County, supra, implicitly conclude that ORS 215.283(3) applies to preexisting dwellings. However, the county argues those decisions are not dispositive because the applicability of ORS 215.283(3) to preexisting dwellings was not questioned in those cases. Rather, according to the county, these decisions address only whether particular county standards for land divisions for preexisting dwellings satisfy the requirements of ORS 215.283(3). The county is correct that the main issue addressed in both 1000 Friends and Billington was whether particular local code standards were equivalent to the requirements of ORS 215.283(3). However, both decisions are clearly premised on an interpretation of ORS 215.283(3) as applying to approvals of partitions for existing dwellings and, therefore, are relevant to this case.

1 nothing about land divisions for nonfarm uses allowed under
2 ORS 215.283(1), except that ORS 215.263(7) specifically
3 prohibits land divisions for farm help dwellings approved
4 under ORS 215.283(1)(e). According to the county, this lack
5 of any reference to the other nonfarm uses allowed under
6 ORS 215.283(1) (such as churches, schools and utility
7 facilities) indicates that ORS 215.263 does not regulate
8 land divisions for all uses that may be permitted in an EFU
9 zone. The county contends preexisting nonfarm dwellings are
10 similarly overlooked by ORS 215.263(4). According to the
11 county, ORS 215.263(4), like ORS 215.283(3) and 215.236,
12 applies only to approval of a land division for a new
13 nonfarm dwelling and, therefore, is not in conflict with
14 CCZO 1504.4.

15 We do not agree with the county that CCZO 1504.4 is
16 limited to the creation of parcels only for nonconforming
17 nonfarm dwellings. CCZO 1504.4.A simply requires that a
18 preexisting dwelling not have been "previously approved" as
19 a "resource-related" dwelling. Presumably, a farm dwelling
20 in existence prior to the time EFU zoning was first applied
21 would fit this description. Such a farm dwelling would be a
22 permitted use after the application of EFU zoning, not a
23 nonconforming use.

24 However, even if the applicability of CCZO 1504.4 is
25 limited to the creation of parcels for nonconforming nonfarm
26 dwellings, we see nothing in ORS 215.130 or 215.215 that

1 authorizes the creation of new parcels for such
2 nonconforming uses. ORS 215.130(5) simply provides that
3 such uses may be continued. ORS 215.215(2) provides that a
4 lot or parcel in an EFU zone, which is physically developed
5 for a nonconforming nonfarm use, may be zoned for that
6 nonfarm use, but does not authorize the creation of a new
7 lot or parcel for the nonfarm use.

8 The only provision of the EFU statute that specifically
9 refers to the creation of a new lot or parcel in an EFU zone
10 for a nonfarm dwelling is ORS 215.263(4). ORS 215.263(4)
11 provides that such a land division may be approved "only if
12 the dwelling has been approved under [ORS] 215.283(3)
13 * * *." ORS 215.283(3) states that nonfarm dwellings may be
14 "established" in an EFU zone based on findings that the
15 standards of ORS 215.283(3)(a) through (d) are met. We
16 agree with petitioner that in this context, "established"
17 refers to the legal establishment of a nonfarm residential
18 use, not merely to the construction of a nonfarm dwelling.
19 This is consistent with the Court of Appeals' and this
20 Board's interpretation and application of ORS 215.283(3) in
21 1000 Friends of Oregon v. LCDC, supra, and Billington v.
22 Polk County, supra. Thus, there is nothing illogical or
23 inconsistent about allowing creation of a new parcel for a
24 preexisting nonfarm dwelling only if that dwelling has been

1 approved under ORS 215.283(3).⁷ We find nothing in the
2 wording or context of ORS 215.263(4) to indicate it does not
3 apply to the creation of a new parcel for an existing
4 nonfarm dwelling.⁸

5 Further, there can be no doubt that under
6 ORS 215.236(2), final approval of an application to
7 establish a nonfarm dwelling under ORS 215.283(3), on a lot
8 or parcel that has received special assessment at value for
9 farm use, cannot be granted until the parcel has been
10 disqualified from special assessment and any additional tax
11 paid. In addition, ORS 215.263(9) specifically provides
12 that a land division for a nonfarm dwelling under
13 ORS 215.263(4) cannot be approved "unless any additional tax
14 imposed for the change in use has been paid." Therefore, we
15 also agree with petitioner that ORS 215.236 must be complied

⁷We note that if such a preexisting nonfarm dwelling was previously a nonconforming use, an approval under ORS 215.283(3) would also have the effect of making the dwelling a conforming use and rendering the restrictions imposed on nonconforming uses by ORS 215.130(5)-(9) inapplicable.

⁸We note that ORS 215.263(8) specifically allows a county to approve a division of land in an EFU zone to create a parcel "with an existing dwelling" to be used as a residential home under ORS 215.283(2)(n) or for historic property under ORS 215.283(1)(o). However, the specific reference to existing dwellings in ORS 215.263(8) is a consequence of the fact that ORS 215.283(1)(o) and (2)(n) themselves authorize only use of existing dwellings. On the other hand, ORS 215.263(4) allows the creation of parcels for nonfarm dwellings approved under ORS 215.283(3). ORS 215.283(3) applies to both new and existing dwellings. Therefore, the absence of a reference to existing dwellings in ORS 215.263(4) does not imply that ORS 215.263(4) does not apply to the creation of a new parcel for an existing nonfarm dwelling.

1 with before a land division for a nonfarm dwelling in an EFU
2 zone may be approved, regardless of whether the dwelling
3 already exists.

4 We conclude CCZO 1504.4 improperly allows the creation
5 of new parcels for nonfarm dwellings in the PA-38 zone
6 without requiring that such dwellings satisfy the generally
7 unsuitable" standard of ORS 215.283(3)(d) or the
8 disqualification from special assessment and additional tax
9 payment requirements of ORS 215.236.

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 "The county adopted a new land use regulation that
13 fails to comply with its comprehensive plan
14 provisions relating to forest lands and Statewide
15 Planning Goal 4 [Forest Lands]."

16 Petitioner contends CCZO 1504.4 is inconsistent with
17 several provisions of OAR 660, Division 6 (Goal 4 Rule).⁹
18 Petitioner argues that under OAR 660-06-003(1)(d), the
19 provisions of the Goal 4 rule are applicable to any land use
20 regulation amendment.

21 We agree with petitioner that under
22 OAR 660-06-003(1)(d), (2)(d), (3) and the "Applicability
23 Matrix" of OAR 660-06-003(5), it appears that the Goal 4

⁹Petitioner also argues in the alternative that if the Goal 4 rule does not apply to the challenged decision, CCZO 1504.4 also fails to comply with certain county comprehensive plan provisions. Because we agree with petitioner that the Goal 4 rule applies, we do not address petitioner's alternative argument.

1 rule applies to virtually all land use regulation
2 amendments.¹⁰ The challenged decision amends the CCZO and,
3 therefore, must comply with the Goal 4 rule. We address
4 separately below the application of the Goal 4 rule to
5 CCZO 1504.4 with regard to the PF-76 and AF-19 zones.

6 **A. PF-76 Zone**

7 There is no dispute that the PF-76 zone is a "forest
8 zone," as that term is used in the Goal 4 rule. Petitioner
9 contends CCZO 1504.4 does not comply with OAR 660-06-026
10 (New Land Division Requirements in Forest Zones).

11 The county concedes CCZO 1504.4 does not comply with
12 the standards for new land divisions in OAR 660-06-026(1),
13 (2) and (3), but argues the new regulation does comply with
14 the alternative standards of OAR 660-06-026(4).

15 OAR 660-06-026(4) provides:

16 "Notwithstanding sections (1) and (2) of this
17 rule, the minimum land division standards may be
18 waived to allow a division of forest land
19 involving a dwelling existing prior to the date of
20 adoption of this rule provided:

21 "(a) The new parcel containing the dwelling is no
22 larger than 5 acres; and

23 "(b) The remaining forest parcel, not containing
24 the dwelling, meets the minimum land division

¹⁰The sole exception seems to be where a land use regulation amendment is adopted following the termination of periodic review under ORS 197.628 to 197.646, and the local comprehensive plan contains specific provisions which provide the basis for the amendment. OAR 660-06-003(3) and (5) n 4; ORS 197.835(5)(b). However, the county does not contend this is the situation here, and we do not understand that it is.

1 standards of the zone; or

2 "(c) The remaining forest parcel, not containing
3 the dwelling, is consolidated with another
4 parcel which together meet the minimum land
5 division standards of the zone."¹¹

6 We agree with petitioner that OAR 660-06-026(4) applies
7 where a land division involves a preexisting dwelling,
8 regardless of whether there is also a second dwelling on the
9 parent parcel. OAR 660-04-026(4) requires that (1) the new
10 parcel containing the preexisting dwelling be no larger than
11 five acres, and (2) the remaining forest parcel, by itself
12 or after combination with another parcel, meets the minimum
13 land division standards of the zone for forest parcels.

14 CCZO 1504.4 does not satisfy these requirements.
15 First, it requires only that a new nonresource parcel be "no
16 larger than necessary." CCZO 1504.4.D. It does not limit
17 the size of any such parcels to five acres. Second, it
18 requires that any remaining resource parcel be "appropriate
19 for the continuation of the existing commercial farm or
20 forestry enterprise on the parcels." Id. This is not the
21 same as the minimum land division standard for forest
22 parcels in the PF-76 zone found in CCZO 506.1.

23 This subassignment of error is sustained.

¹¹We agree with petitioner that except as provided by OAR 660-06-026(4), which allows creation of a new nonforest parcel for an existing dwelling in certain circumstances, a nonforest dwelling may only be approved in a forest zone if the parcel on which the dwelling would be located was lawfully created prior to adoption of the Goal 4 rule. OAR 660-06-028(5).

1 **B. FA-19 Zone**

2 There is no dispute that the FA-19 zone is an
3 "agriculture/forest zone," as that term is used in the
4 Goal 4 rule. Petitioner contends CCZO 1504.4 does not
5 comply with OAR 660-06-055 (New Land Division Requirements
6 in Agriculture/Forest Zones).

7 OAR 660-06-055(1) provides:

8 "New land divisions may be allowed for certain
9 nonfarm or certain other uses pursuant to
10 ORS 215.263(3) and (4) and OAR 660-06-026(3)."

11 The only one of the above cited provisions that would allow
12 the approval of a land division to create a new nonresource
13 parcel for an existing dwelling is ORS 215.263(4). We
14 determined under the first assignment of error that
15 CCZO 1504.4 does not comply with ORS 215.263(4).

16 In addition, OAR 660-06-055(4) allows divisions of
17 forest land in agriculture/forest zones to create new
18 parcels for existing dwellings in certain circumstances. It
19 is worded identically to OAR 660-06-026(4). We determined
20 under the preceding subassignment of error that CCZO 1504.4
21 does not comply with OAR 660-06-026(4).

22 This subassignment of error is sustained.

23 The second assignment of error is sustained.

24 **CONCLUSION**

25 The challenged ordinance includes the following
26 severability clause:

27 "If any portion of this ordinance * * * is for any

1 reason held invalid by any court of competent
2 jurisdiction, such portion shall be deemed a
3 separate, distinct, and independent portion and
4 such holdings shall not affect the validity of the
5 remaining portion thereof." Record 14.

6 The county requests that we affirm the portion of the
7 challenged ordinance amending the introductory paragraph of
8 CCZO 1504 to prohibit major variances from the lot size
9 requirements of the PA-38, PF-76, FA-19 and RR-5 zones, as
10 that portion of the ordinance was not challenged by
11 petitioner. The county also requests that we affirm the
12 portion of the ordinance adopting CCZO 1504.4, as it applies
13 to the RR-5 zone, as that portion of the ordinance was not
14 challenged by petitioner.

15 We agree with the county that these portions of the
16 challenged ordinance were not contested by petitioner in its
17 assignments of error and are capable of being applied
18 independently of the portions of the ordinance challenged by
19 petitioner.¹²

20 The county's decision is affirmed with regard to the
21 amendment to the introductory paragraph of CCZO 1504 and the
22 adoption of CCZO 1504.4, as applicable to land in the RR-5
23 zone. The county's decision is remanded with regard to the
24 adoption of CCZO 1504.4, as applicable to land in the PA-38,

¹²With regard to CCZO 1504.4, we note that simply deleting the references to the PA-38, FA-19 and PF-76 zones in the first sentence leaves a complete provision regulating the creation of new parcels for existing dwellings in the RR-5 zone only.

1 PF-76 and FA-19 zones.