1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 DEPARTMENT OF LAND CONSERVATION)
5 AND DEVELOPMENT,)
6)
7 Petitioner,)
8)
9 vs.)
10) LUBA No. 97-014
11 CURRY COUNTY,)
12) FINAL OPINION
13 Respondent,) AND ORDER
14)
15 and)
16)
17 WAYNE GREEN,)
18)
19 Intervenor-Respondent.)
20
21
22 Appeal from Curry County.
23
24 Richard M. Whitman, Assistant Attorney General,
25 Salem, filed the petition for review and argued on behalf
26 of petitioner. With him on the brief were Hardy Myers,
27 Attorney General, David Schuman, Deputy Attorney General,
28 and Virginia L. Linder, Solicitor General.
29
30 No appearance by respondent.
31
32 Kenneth D. Helm, Portland, filed the response brief
33 and argued on behalf of intervenor-respondent. With him
34 on the brief was O'Donnell Ramis Crew Corrigan &
35 Bachrach.
36
37 HANNA, Administrative Law Judge; LIVINGSTON,
38 Administrative Law Judge, participated in the decision.
39
40 REMANDED 12/15/97
41
42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the board of
4 commissioners (county board) redesignating and rezoning
5 10 acres of a 24-acre parcel from Timber to Rural
6 Residential 5 (RR-5).

7 **MOTION TO INTERVENE**

8 Wayne Green (intervenor), the applicant below, moves
9 to intervene on the side of the county. There is no
10 opposition to the motion, and it is allowed.

11 **MOTION TO DISMISS**

12 Intervenor moves to dismiss petitioner's appeal on
13 the ground that petitioner failed to file a notice of
14 intent to appeal within 21 days of the date the
15 challenged decision became final, as required by ORS
16 197.830(8).[1] The county issued the challenged decision
17 December 31, 1996, but did not send notice of its
18 decision to interested parties until January 3, 1997.
19 Petitioner filed its notice of intent to appeal within 21

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[1]ORS 197.830(8) provides, in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 [post-acknowledgment procedures] shall be filed not later than 21 days after the decision sought be reviewed is mailed to parties entitled to notice under ORS 197.615."

1 days of the date the county mailed its decision, but 24
2 days after the decision became final.

Intervenor argues that the Court of Appeals' recent decision in Wicks-Snodgrass v. City of Reedsport, 148 Or App 217, 939 P2d 625, rev den 326 Or 59 (1997) (petition for reconsideration pending), requires dismissal under these circumstances. Wicks-Snodgrass reversed a long-standing interpretation of the first sentence of ORS 197.830(8) that allowed a petitioner to file its notice of intent to appeal within 21 days of the date the challenged land use decision was mailed, notwithstanding the actual language in the subsection's first sentence, which requires filing within 21 days of the date the decision becomes final.

Petitioner responds that Wicks-Snodgrass is inapposite, because the challenged decision was an amendment to the county's comprehensive plan (plan), processed according to post-acknowledgment procedures, and thus is governed by the second sentence of ORS 197.830(8), which expressly permits filing the appeal within 21 days of the date the decision is mailed. Intervenor argues that the county followed the post-acknowledgment procedure in some respects, but not in others, and therefore the challenged decision was not "processed pursuant" to the post-acknowledgment procedures. We disagree. The evident purpose of the second sentence of ORS 197.830(8), providing an extended appeal deadline when a local government amends its plan or land use regulations, is frustrated if the county can

1 simply force a shorter appeal period on participants by
2 neglecting to follow the notice and other requirements of
3 the post-acknowledgment process. We find that
4 petitioner's notice of intent to appeal was timely filed
5 under the second sentence of ORS 197.830(8).

6 Intervenor's motion to dismiss is denied.

7 **FACTS**

8 Intervenor owns a 24-acre parcel located
9 approximately two miles from Highway 101 near Gold Beach.
10 The 24-acre parcel is both designated in the plan and
11 zoned Timber,[2] and is forested with a mixed stand of
12 conifers, deciduous trees and underbrush. The minimum
13 parcel size for the zone is 80 acres. The immediate area
14 surrounding the 24-acre parcel consists of a 477-acre
15 parcel of commercial timber to the north and east, large
16 commercial forest holdings to the south and southwest,
17 several RR-5 parcels to the south, and, to the west, a
18 number of two to eight acre residential parcels zoned RR-
19 5, located in an exception area. The 24-acre parcel was
20 substantially logged in the 1950s and selectively logged
21 at various periods thereafter. A single manufactured
22 dwelling has existed in the western portion of the parcel
23 since the 1970s.

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[2]The record contains some references to the property as zoned Forestry/Grazing, but the challenged decision refers to the applicable zoning as Timber. The parties do not argue that the distinction is material.

1 In September of 1995, intervenor applied for (1) a
2 plan amendment redesignating the 24-acre parcel as Rural
3 Residential, (2) a zone change from Timber to RR-5, and
4 (3) an irrevocably committed exception to Statewide
5 Planning Goals 3 and 4. The county board approved the
6 application, but intervenor withdrew it when petitioner
7 appealed the approval to this Board.
8 In September of 1996, intervenor filed a new
9 application to amend the plan and rezone to RR-5 only the
10 westerly 10 acres of the 24-acre parcel. Intervenor did
11 not seek an exception to Goals 3 and 4, or a division of
12 the parcel. Rather, intervenor based his application on
13 his claim that the westerly 10-acre portion of the parcel
14 does not meet the standards for resource land under Curry
15 County Zoning Ordinance (CCZO) 9.031 and thus should be
16 redesignated as non-resource land.
17 After hearings, the county board approved the
18 application with the two "conditions" that intervenor's
19 existing dwelling be recognized as a non-conforming use,
20 and that one new dwelling be permitted in the northwest
21 portion of the parcel. In the challenged decision, the
22 county board interpreted CCZO 9.031 to allow the county
23 to segment parcels for the purpose of determining whether
24 redesignating resource land as non-resource land complied
25 with Statewide Planning Goals 3 and 4 (Goals 3 and 4).
26 The decision analyzed only the 10-acre portion of the 24-
27 acre parcel and concluded that this portion did not meet

1 the respective Goal 3 or Goal 4 definitions of
2 agricultural and forest land. After applying other local
3 criteria, the county board approved the application.
4 This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner argues that the county board erred in
7 interpreting CCZO 9.031 to permit it to evaluate only the
8 10-acre portion for compliance with relevant criteria in
9 the Goal 3 or 4 definitions, in isolation from the
10 remainder of the 24-acre parcel or surrounding lands.

11 **A. Waiver**

12 Intervenor contends, first, that petitioner failed
13 to raise this issue below with sufficient specificity to
14 allow the county board to respond. Petitioner responds
15 that it specifically challenged the county board's sub-
16 parcel analysis and its application of Goal 3 and Goal 4
17 standards in a letter dated November 22, 1996:

18 "Both the county plan and the statewide goals
19 require that the <u>parcel</u> be evaluated in its
20 entirety. It is not appropriate to isolate a
21 portion of the property when considering its
22 productivity.

23 "The key criterion under CCZO 9.031 requires
24 that the applicant demonstrate the parcel is not
25 defined as agricultural or forest land under
26 statewide planning goals 3 and 4. * * *" Record
27 159 (emphasis in original).

28 Notwithstanding, intervenor contends that petitioner
29 failed to adequately apprise the county board that the

1 Goal 4 definition requires the county to analyze whether
2 the parcel is suitable for commercial forestry, whether
3 the parcel is necessary to permit forest operations or
4 practices on adjacent or nearby forest lands, and whether
5 the parcel is necessary to maintain soil, air, water and
6 fish and wildlife resources.[3]

7 This contention lacks merit. ORS 197.763 does not
8 require, as intervenor appears to urge, that petitioner
9 or another participant raise all <u>arguments</u> related to an
10 issue raised below, in order to advance those arguments
11 on appeal. Petitioner informed the county that it must
12 apply the Goal 4 definition. The county board responded,
13 as reflected in the decision's extensive analysis of the
14 specific Goal 4 language. Record 15-17. We conclude
15 that petitioner adequately raised the issue of whether
16 the county board's sub-parcel analysis complied with the
17 Goal 4 definition.

18 As a separate contention, intervenor argues that
19 petitioner affirmatively waived the issue of Goal 3
20 compliance when it wrote the county that:

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[3]Goal 4 defines forest lands as

> "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."

> "The most recent NRCS soil survey for Curry County indicates that the 24-acre subject parcel is predominantly comprised of soils in the Millicoma-Whaleshead-Reedsport complex. Although these soils are not suitable for farm use * * * soils in this series are capable of producing 173 cubic feet per acre, per year of wood fiber * * *." Record 159 (emphasis added).

Intervenor concludes from the emphasized language that petitioner was informing the county that Goal 3 does not apply because the parcel is not agricultural land. We disagree. Intervenor's interpretation contradicts statements in the same letter which assert that Goal 3 applies to this parcel, and ignores the fact that "agricultural land" need not possess farm soils, under the Goal 3 definition. An act of affirmative waiver must be clearer than that alleged here. Cf. DLCD v. Curry County, 28 Or LUBA 205, 211 (1994), aff'd 132 Or App 393 (1995) (River's End Ranch) (DLCD's statement that the relevant Goal 5 inquiry is limited to certain aspects of the aggregate operation is an affirmative waiver of Goal 5 issues unrelated to the operation). Petitioner did not affirmatively waive the issue of Goal 3 compliance.

Finally, intervenor argues that petitioner has waived the issue that the only method by which the county could change its designation of the subject parcel is through a Goal 2 exception. Petitioner's brief does offer an opinion to that effect, but does not assign as

error the county board's failure to undertake an exception. Thus we do not address it.

We conclude that petitioner adequately raised the issue of whether the county board misapplied Goals 3 and 4 in its analysis.

B. Application of Goals 3 and 4

According to petitioner, the challenged decision is an amendment to the county's acknowledged plan and land use regulations, and as such, must comply with Goals 3 and 4. Intervenor responds that Goals 3 and 4 do not apply, and if they do, the county board correctly applied them through CCZO 9.031, an acknowledged provision of the zoning ordinance which describes the criteria for determining when certain resource lands should be redesignated nonresource lands. CCZO 9.031 provides in relevant part that:

> "The [county board] shall determine that requests for comprehensive plan amendments prove that land planned and zoned for resource use is not resource land and meets the following standards:
>
> "1. The subject property does not meet the definition of Agricultural Land under Statewide Planning Goal 3 and/or Forest Land under Statewide Planning Goal 4;
>
> "* * * * *"

Intervenor cites Foland v. Jackson County, 311 Or 167, 807 P2d 801 (1991), for the proposition that the challenged decision need not comply with the goals because it is made pursuant to an ordinance acknowledged

1 under the plan, i.e. CCZO 9.031, and thus need only
2 comply with the plan. Intervenor argues that
3 petitioner's insistence that the goals apply is an
4 impermissible collateral attack on an acknowledged land
5 use regulation.

6 Intervenor's reliance on Foland is misplaced. In
7 Foland, the county labeled its decision a plan amendment,
8 but the court determined that the decision in substance
9 implemented an acknowledged plan provision, and thus the
10 decision need not comply with the goals. 311 Or at 180.
11 In the present case, the decision is a plan amendment
12 both in substance and form. Petitioner does not seek to
13 review CCZO 9.031 against the goals, but rather to review
14 the plan amendment against the goals. An amendment to an
15 acknowledged plan is not acknowledged at the time it is
16 adopted, and thus is reviewable for compliance with

the goals. ORS 197.835(6). In any case, CCZO 9.031(1) itself requires that the plan amendment comply with Goals 3 and 4.

We conclude that Goals 3 and 4 apply to the proposed plan amendment, both independently and as required by CCZO 9.031(1). The real issue in this case is exactly what compliance with Goals 3 and 4 means.

C. Compatibility of Sub-Parcel Analysis with Goals 3 and 4

The fundamental objection petitioner makes to the challenged decision is its focus on only 10 acres of the 24-acre parcel in applying the Goal 3 and 4 definitions. The decision adopts this scale of analysis by interpreting the phrase "subject property" as used in CCZO 9.031(1) to mean only the portion to be segmented from the parcel. The decision defends this interpretation by noting that:

> "The authorizing ordinances for Section 9.031 * * * state that the purpose of this section is to provide standards which allow an applicant to show that land designated by the county's comprehensive plan as resource land is not resource land. The operative language of Section 9.031(1) requires that the "subject property" be shown to be nonresource land. The provision does not require that the entire ownership or parcel be found to be nonresource land. The [county board] finds that the terms "subject property" and "parcel" and "ownership" are distinct terms. If the county had desired to apply the requirements of Section 9.031 only to full ownerships or parcels, then the resulting language would have reflected that intent. Thus, Section 9.031 properly applies to

1 the property which is the subject of the
2 individual application." Record 14.[4]

3 **1. Deference to the County's Interpretation**

4 The county board did not determine whether its
5 interpretation is consistent with Goals 3 and 4. Instead
6 it appears to presume, and intervenor asserts on appeal,
7 that its interpretation of the term "subject property" in
8 CCZO 9.031(1) is entitled to deference under Clark v.
9 Jackson County, 313 Or 508, 836 P2d 710 (1992), and its
10 progeny. If so, it is mistaken. We need not affirm a
11 local government's interpretation of its land use
12 regulations if the interpretation is contrary to a
13 statute, land use goal or rule that the regulation
14 implements. ORS 197.829(1)(d); DLCD v. Crook County, 26
15 Or LUBA 478, 488 (1994). The decision in this case
16 "implements" Goals 3 and 4. See Leathers v. Marion
17 County, 144 Or App 123, 129-30, 925 P2d 148 (1996). In
18 the context of the case before us, the county may not
19 interpret its ordinances in a manner that is inconsistent
20 with, or provides a lesser level of resource protection

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[4]The decision goes on to reject petitioner's view that the goals require a "full-parcel" analysis because petitioner had had an opportunity to comment and appeal CCZO 9.031(1), including the phrase "subject property," when that ordinance was adopted and acknowledged in a post-acknowledgment procedure. Record 14. Petitioner correctly notes that the county's "sub-parcel" interpretation was first made in this proceeding, and that petitioner could hardly acknowledge an interpretation that was first advanced years after the date of acknowledgment.

1 than, the law it implements. Testa v. Clackamas County,
2 26 Or LUBA 357, 366 (1994). Nor may the county, through
3 its own definitions, eliminate a goal requirement. DLCD
4 v. Coos County, ___ Or LUBA ___ (LUBA No. 96-121,
5 February 21, 1997), slip op 13 (Ridle).

6-7 **2. Compatibility of Sub-Parcel Analysis with Goal 4**

8 The Goal 4 definition of "forest lands" requires
9 analysis of (1) whether the land is suitable for
10 commercial forest uses; (2) whether the land is necessary
11 to permit forest operations or practices on adjacent or
12 nearby forest lands; and 3) whether the forested land is
13 necessary to maintain soil, air, water and fish and
14 wildlife resources.[5] See Ridle, slip op at 9-12. An
15 affirmative answer to any one of those criteria renders
16 the land "forest land" under Goal 4.

17 Using its "sub-parcel" analysis, the decision
18 determines that the 10 acres in question do not meet
19 these three criteria. Record 15. For example, the
20 decision considers only the soils and character of the
21 10-acre site in deciding unsuitability for commercial

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[5]Goal 4 defines forest lands as

> "* * * [t]hose 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."

1 forestry, without considering whether the entire 24-acre
2 parcel is unsuitable.

3 **a. Suitable for Commercial Forestry**

4 Petitioner asserts that

5 "Goal 4 requires an analysis of the suitability
6 of both the property in question <u>and</u> its
7 suitability when considered along with adjacent
8 or nearby lands. * * * The entire 24-acre
9 parcel, along with adjacent or nearby lands must
10 be evaluated in terms of their suitability for
11 commercial forest use." Petition for Review 8-9
12 (emphasis in original).

13 At this juncture, we need not and do not decide whether
14 petitioner is correct that the county must consider the
15 commercial suitability of the land under consideration <u>in</u>
16 <u>conjunction</u> with adjacent or nearby lands. We need
17 address only petitioner's less expansive assertion that
18 Goal 4 and applicable case law require the county board
19 to consider the <u>entire parcel</u> in deciding whether the
20 subject property is suitable for commercial forestry.
21 Several cases have addressed the "sub-parcel" scale of
22 analysis problem presented here, in the context of both
23 Goal 3 and Goal 4.

24 Under Goal 3 and relevant EFU statutes, it is clear
25 that when a local government considers converting
26 agricultural land to nonresource use it must consider the
27 agricultural suitability of the entire parcel, not just
28 the sub-parcel for which the nonresource use is sought.
29 <u>See</u> <u>Smith v. Clackamas County</u>, 313 Or 519, 527-28, 836

1 P2d 716 (1992); Lemmon v. Clemens, 57 Or App 583, 588,
2 646 P2d 633, rev den 293 Or 634 (1982).[6] This doctrine
3 is generally premised on interpretation of "suitability"
4 language adopted into local ordinances from statutory or
5 rule requirements, read in context with a state land use
6 policy at ORS 215.263 to preserve large blocks of
7 agricultural land. See, e.g., Smith, 313 Or at 527-28.
8 Petitioner argues that the "full-parcel" doctrine
9 also applies to the Goal 4 context, because the
10 "suitability" language and concept is almost identical in
11 both cases, and because both Goal 3 and Goal 4 have as
12 their bedrock policy the conservation of resource lands.
13 Petitioner cites Grden v. Umatilla County, 10 Or LUBA 37
14 (1984), for the proposition that Goal 4 implements that
15 policy by requiring a "full-parcel" analysis to prevent
16 loss of forest lands through parcelization.[7]

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[6]Smith holds that when determining whether property is "generally unsuitable" for purposes of approving a nonfarm dwelling, the property considered must be the entire parcel. This holding was legislatively overruled in certain counties by HB 3661, 1993 Or Laws ch. 792 § 14 (codified at ORS 215.284(2) and (3)). Under the relevant portion of the current statutory scheme, applications for a nonfarm dwelling in counties outside the Willamette Valley, such as Curry County, need only demonstrate that the "portion of a lot or parcel" is generally unsuitable for agriculture. ORS 215.284(2)(b), (3)(b). The legislative "fix" of Smith is inapplicable to the present case, which does not involve an application for a nonfarm dwelling under ORS 215.284. However, the legislative exception for nonfarm dwellings in certain counties tends to prove the general rule that Goal 3 and the EFU statutes require, in other contexts, a full-parcel analysis of agricultural suitability.

[7]Petitioner also cites DLCD v. Coos County, 113 Or App 621, 833 P2d 1318 (1992) (Lone Rock II), for the same proposition. While Lone Rock II seems to draw an analogy between the policies inherent in Goal 3 and

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Goal 4, it does not involve a direct interpretation of Goal 4 or an ordinance based on Goal 4. At issue in Lone Rock II was a county ordinance that permitted nonforest dwellings on land that is "generally unsuitable" for forest uses. The "generally unsuitable" language did not implement Goal 4, or any rule or statute, but apparently was borrowed from the nonfarm dwelling context. DLCD v. Coos County, 23 Or LUBA at 17, n 4 (Lone Rock I). The county interpreted its ordinance to allow it to examine the suitability of a portion rather than the entire parcel. The Court of Appeals agreed with LUBA that the "suitability" standard in this context requires the same full-parcel analysis derived from the Goal 3 context, because "[p]arcelization is as inconsistent with the preservation and proper use of forest land as it is with commercial agriculture." 113 Or App at 625. Lone Rock II does not address Goal 4 other than to quote with approval a passage from our decision in Grden that does address Goal 4. Thus, it is unclear whether Lone Rock II considers the ultimate source of the "full-parcel" analysis it reads into the local suitability language to be Goal 3 or Goal 4.

Shortly after the Court of Appeals issued Lone Rock II, the Supreme Court decided Clark, 313 Or 508. Clark held that we erred in interpreting a county "suitability" requirement with respect to mining operations to require the same full-parcel analysis imposed by the nonfarm statutes and Goal 3. 313 Or at 515. Clark also held that we must defer to local interpretations of local ordinances unless they are contrary to the text, purpose or context of the ordinance. In response, the Court of Appeals withdrew Lone Rock II and remanded it to us for reconsideration under Clark. DLCD v. Coos County, 115 Or App 145, 838 P2d 1080 (1992) (Lone Rock III). On remand, we found that Clark controlled, and that because the suitability language in the ordinance did not derive from any statutory or other legal requirement, it was error to import the "full-parcel" analysis from the Goal 3 context into the local ordinance against the county's contrary interpretation. Accordingly, we deferred to that local interpretation. 24 Or LUBA at 353-54. We did not consider in Lone Rock IV the Court of Appeals' allusion to Goal 4 in Lone Rock II or whether Goal 4 embodies values that dictate a full-parcel analysis. It is not clear how or if our consideration of that allusion would have changed the analysis at that time, since Clark had not yet been legislatively modified to direct us not to defer to local interpretations of ordinances implementing goals, rules or statutes. ORS 197.829(1)(d).

In short, Lone Rock II, read in light of its subsequent history, does not state anything authoritative about whether the Goal 4 suitability standard requires a full-parcel analysis. The local suitability language at issue in Lone Rock I-IV did not implement Goal 4 or standards in Goal 4, and it is unclear what role Goal 4 played, if any, in Lone Rock II's analysis. Further, Lone Rock II was subsequently withdrawn, on other grounds, and our analysis on remand did not consider Goal 4 at all. Accordingly, for purposes of the present case, we decline to give Lone Rock II any weight in our analysis.

1 Grden involved a proposal to lease five acres of a
2 389-acre parcel zoned F-5 Forest (five-acre minimum), and
3 build a nonforest structure on .9 acres of that five-acre
4 portion. The five acres as a whole was suitable for
5 timber production, but the .9-acre building site was not.
6 The applicable Goal 4 standards for nonforest uses
7 required analysis of the "suitability" of the land for
8 forest production.[8] We found, first, that the five-acre
9 portion as a whole was "forest land" under Goal 4. Id.
10 at 41. We then held that the Goal 4 suitability analysis
11 must apply to the entire five acres, rather than the .9-
12 acre building site. Id. at 43. The opinion goes on to
13 state:

14 "The Board's interpretation of the suitability
15 standard in this case is governed by an
16 understanding that the overall purpose of Goal 4
17 is the retention of forest land for forest uses.
18 * * * Acceptance of the narrow reading proposed
19 by participants-respondents, while attractive in
20 the present case, could easily result in the
21 gradual diminution of valuable resource lands.
22 Myriad non-forest uses could be expected to
23 spring up on small, unproductive building sites
24 located on larger parcels containing valuable
25 timber land. In time, these uses could well
26 make a much larger presence known, to the
27 detriment of the values reflected in Goal 4.
28 The Board notes, in support of its
29 interpretation, that in analogous cases arising
30 under Goal 3 (Agricultural Lands) the Court of
31 Appeals has read the law so as to maximize the

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[8]At the time Grden was decided Goal 4 defined forest lands in relevant part as "lands composed of existing and potential forest lands which are suitable for commercial forest uses * * *." Former Goal 4 (1983 Version).

retention and continuation of existing resource uses." Id.

In short, we recognized early in the evolution of Goal 4 that it embodies a policy of conserving forest lands that requires, in assessing whether lands are "forest lands" under the suitability standard, that the scope of analysis extend minimally to units of forest lands consistent with conservation of forest resources. We see nothing in the subsequent history or current version of Goal 4 that detracts from that policy.

While intervenor does not agree that Goal 4 imposes such a requirement, he cites Grden for the proposition that the appropriate scale of analysis is not the parcel under single ownership (in Grden, 389 acres), but the lands subject to proposed nonresource use (in Grden, the five acres subject to the challenged permit under applicable F-5 zoning). We agree that Grden demonstrates the appropriate scale of analysis in that case, but not for intervenor's reasons. Our reading of Grden is that five acres was the proper scale of analysis because it was the minimal unit of forest lands consistent with conservation of forest resources. That is, five acres corresponded with the county's prior determination that a five-acre minimum parcel size was sufficient to comply with the Goal 4 requirement to conserve forest resources. That determination is reflected in the minimum parcel size required by the base forest zoning.

1 In sum, Goal 4 requires that, in determining whether
2 land is "forest land" under the Goal 4 suitability
3 standard, the local government's minimum scale of
4 analysis must at least equal the applicable base forest
5 zone minimum parcel size. If the subject property is
6 less than the minimum parcel size, all of the subject
7 property must be considered. In the present case, the
8 24-acre parcel is less than the county's 80-acre minimum
9 parcel size. CCZO 3.044(1). It follows that the county
10 board erred in evaluating only the 10-acre portion for
11 commercial suitability.
12 This subassignment of error is sustained.
13 **b. Nearby and Adjacent Lands**
14 Petitioner next argues that the county board failed
15 to adequately evaluate under Goal 4 whether the 24-acre
16 parcel is necessary to permit forestry operations or
17 practices on adjacent or nearby forest lands. The only
18 evidence the decision cites on this point is a letter
19 from the manager of the timber company

1 that owns the 477-acre timber parcel to the north and
2 east of the subject property. The letter states that:

3 "We regularly purchase property to supplement
4 our timberland base. However, due to the size
5 and location of your property, it is not the
6 type we seek to purchase. We also do not lease
7 land for timber management purposes. We have no
8 interest in either purchasing or leasing your
9 property." Record 161.

10 The decision notes that the letter led it to conclude
11 that "the company does not view the subject property as
12 necessary for maintaining other timber related purposes,"
13 and, on that evidence, finds that the subject property
14 was not necessary to permit forest operations on adjacent
15 or nearby forest lands. Record 16.

16 Petitioner argues that this finding misconstrues the
17 law because it focuses solely on one adjacent timber
18 property. Other than the strip of developed residential
19 lots to the west, and several residential parcels to the
20 south, the record shows that the immediate area of the
21 subject property is comprised overwhelmingly of
22 commercial timber holdings. Record 119-23.[9] Goal 4
23 requires that the county evaluate nearby lands, as well
24 as adjacent lands, to determine whether the subject
25 property is necessary to maintain forestry in the
26 vicinity. Ridle, slip op at 13. The challenged decision

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[9]Intervenor aptly describes the adjacent area of developed residences as an "island of development" in what is apparently a sea of timber land. See Record 118-24.

1 contains no discussion of the extensive nearby timber
2 lands.[10]

3 This subassignment of error is sustained.

4 **c. Lands that Maintain Soil, Air, Water,**
5 **Fish and Wildlife Resources**

6 The decision's findings on the Goal 4 requirement
7 that the subject property not be "other forested lands
8 that maintain soil, air, water and fish and wildlife
9 resources" consists simply of a statement that:

10 "No evidence was submitted suggesting that the
11 subject property is necessary to allow forest
12 operations or maintain soil, air, water and fish
13 and wildlife resources on adjacent or nearby
14 properties." Record 16.

15 Petitioner argues that the decision fails to make
16 specific findings, supported by substantial evidence,
17 about any of the enumerated resources on the subject
18 property; further, that the decision impermissibly shifts
19 the burden of proof to other parties, when the applicant
20 bears the burden of proof that all applicable standards
21 are met. ODOT v. City of Newport, 23 Or LUBA 408, 417
22 (1992).[11]

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[10]Moreover, we question whether the letter from a forest industry landowner declining to lease or purchase the subject property is sufficient to establish that the subject property is not necessary to permit forest operations on the landowner's property. The letter is not directed at that issue, but rather at whether the subject property is a suitable addition to the landowner's timberland base.

[11]CCZO 9.031 also requires that:

1 Intervenor responds that the decision assesses those
2 natural resources, or similar ones, under CCZO 9.031(2),
3 which requires the applicant to prove that the subject
4 property does not contain "any natural resources defined
5 in Statewide Planning Goal 5 which are identified in the
6 Comprehensive Plan." We disagree. Goal 5 natural
7 resources do not duplicate the enumerated Goal 4 natural
8 resources, nor does analysis of Goal 5 resources in any
9 way duplicate the required Goal 4 analysis of whether
10 designation of the subject property for forest use
11 maintains soil, air, water and fish and wildlife
12 resources. The county must make appropriate findings,
13 based on substantial evidence in the record, not on an
14 absence of evidence on a point on which the applicant
15 bears the burden of proof.

16 This subassignment of error is sustained.

17 **3. Compatibility of Sub-parcel Analysis with**
18 **Goal 3**

19 The decision determines that the 10-acre portion of
20 the subject parcel did not possess the requisite soils,
21 nor the suitability for grazing, required to constitute
22 "agricultural land" under the Goal 3 definition. Record
23 17. Petitioner argues that Goal 3 and its rules require

"The [county] shall determine that requests for comprehensive plan amendments prove that land planned and zoned for resource use is not resource land * * *".

1 consideration of the entire 24-acre parcel.[12] River's End
2 Ranch, 28 Or LUBA at 208.
3 In River's End Ranch, the applicant sought to
4 redesignate and rezone from Forest/Grazing to Rural
5 Residential 233 acres of a 272-acre parcel. The
6 applicant also owned adjacent farm lands. Like the
7 county board in this case, the county in River's End
8 Ranch adopted a sub-ownership analysis. We held in
9 relevant part that whether the subject property is
10 agricultural land as defined in Goal 3 and OAR 660-33-
11 020(1)(a)(B) and (C) "depends upon an analysis of an
12 applicant's entire ownership." 28 Or LUBA at 209.

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[12]Goal 3 defines agricultural land in relevant part as:

> "[L]ands which are suitable for farm use taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands shall be included as agricultural land in any event."

In turn, OAR 660-33-020(1)(a) defines agricultural land in relevant part as:

> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
>
> "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

We conclude in this case, as we did in River's End Ranch, that Goal 3 requires the county to evaluate the soils and suitability for grazing and other agricultural uses of the 24-acre parcel under the applicant's ownership to determine whether the parcel is agricultural land under Goal 3. The county must also evaluate whether the 24-acre parcel is necessary to permit farm practices on adjacent or nearby agricultural lands. OAR 660-33-020(1)(a)(C).

This subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues in the alternative that, even if a sub-parcel analysis is consistent with Goals 3 and 4, a sub-parcel interpretation of "subject property" as used in CCZO 9.031 is inconsistent with the express language, purpose and policies underlying the county's land use ordinance and plan. ORS 197.829(1)(a)-(c).

We concluded in the first assignment of error that a sub-parcel interpretation of "subject property," as used in CCZO 9.031(1), is contrary to Goals 3 and 4. Our resolution of the first assignment of error makes it unnecessary to address the second assignment of error.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner assigns error to the decision's approval
3 of a nonconforming use determination and approval of a
4 second dwelling on the subject property. The county
5 board approved intervenor's application for plan
6 amendment and zone change, and imposed as "conditions" of
7 that approval intervenor's right to use one dwelling as a
8 nonconforming use, and intervenor's right to place one
9 additional dwelling in the northwest corner of the 10
10 acres under consideration. Record 25-26.

11 Petitioner argues these approvals must be remanded
12 because neither the notice of the hearing, the notice to
13 petitioner, nor the hearing itself contained any mention
14 that intervenor was seeking a nonconforming use or
15 additional dwellings, the decision contained no findings
16 required to establish a nonconforming use or additional
17 dwelling, and, in any case, the applicable ordinances do
18 not permit approval of nonconforming uses and additional
19 dwellings in this context.

20 Intervenor responds, first, that petitioner knew
21 about the existing manufactured dwelling and chose not to
22 raise that issue before the county, thus waiving the
23 nonconforming use issue. We disagree. Where the hearing
24 notice does not fairly apprise interested persons of the
25 matter to be decided, or where the final decision is
26 substantially different from the notice given,
27 petitioners may raise pertinent issues for the first time

1 before this Board. See Collier v. Marion County, 29 Or
2 LUBA 462, 472 (1995)

3 Intervenor next contends that he did not request
4 approval of the nonconforming use, and, indeed, does not
5 need approval, because he is automatically entitled to
6 nonconforming use status under ORS 213.130(5).
7 Intervenor is incorrect. CCZO 2.060(1) grants authority
8 for the county planning commission to approve or deny
9 applications for determination of the existence of a
10 nonconforming use. Intervenor is required to gain the
11 county's recognition of his nonconforming use.

12 Finally, intervenor argues that the decision does
13 not actually approve the nonconforming use and additional
14 dwelling, it merely conditions the plan and zone change
15 to clarify that intervenor could not build other
16 dwellings on the 24-acre parcel. We disagree. The
17 decision purports to authorize the nonconforming use and
18 placement of an additional dwelling in a particular
19 portion of the property, without notice or findings to
20 support those approvals.

21 The third assignment of error is sustained.

22 **FOURTH ASSIGNMENT OF ERROR**

23 Petitioner argues that the county board's decision
24 to convert 10 acres of a parcel zoned Timber to RR-5 is
25 contrary to CCZO 4.030, which generally prohibits any
26 lot, yard or open space dedicated by the zoning ordinance

1 for one use from being employed for another use.
2 However, petitioner does not establish that any
3 participant raised below the applicability of CCZO 4.030,
4 or that it could not have been raised below. ORS
5 197.835(3), (4)(b). We agree with intervenor that this
6 issue was waived. ORS 197.835(3).

7 The fourth assignment of error is denied.

8 The county's decision is remanded.

9