

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

3
4 JOHN RYAN NEIL
5 and CHELSEA STRAUTMAN NEIL,
6 *Petitioners,*

7
8 vs.

9
10 COLUMBIA COUNTY,
11 *Respondent,*

12
13 and

14
15 DAVID AUSTIN WILSON, JR.,
16 REVOCABLE LIVING TRUST,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2016-043

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Columbia County.

25
26 John Ryan Neil and Chelsea Strautman Neil, Warren, represented
27 themselves. Chelsea Strautman Neil filed the petition for review and argued on
28 her own behalf.

29
30 No appearance by Columbia County.

31
32 William L. Rasmussen and Steven G. Liday, Portland, filed the response
33 brief. With them on the brief was Miller Nash Graham & Dunn LLP. Steven G.
34 Liday argued on behalf of intervenor-respondent.

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36 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board
37 Member, participated in the decision.

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AFFIRMED

11/01/2016

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

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners’ decision approving a partition and a minor variance to create three parcels falling below the minimum five-acre parcel size.

FACTS

The subject property is a vacant 14.29-acre parcel zoned Rural Residential 5-acre minimum (RR-5). The property is a remainder of a 58-acre parcel that the family of intervenor-respondent David Austin Wilson, Jr., (intervenor) acquired in 1981 and have since been partitioning into rural residential parcels and developing. At one time the county’s code allowed rural residential lots as small as two acres in size. That code provision was repealed in 1988, but a number of smaller parcels were created before its repeal. Most of the parcels surrounding the subject property are less than five acres in size, and the average is 3.28 acres in size.

The northern third of the subject property is bisected by a high-voltage powerline easement. The parcel has frontage on Blaha Road, which terminates at the southwest corner of the property. The last 600 feet of Blaha Road is a one-lane paved driveway, not built to public road standards, which serves five other parcels, including that of petitioners. A northern corner of the property has access to a second road, Lindsey Lane, via an easement.

1 The county’s code allows a variance to reduce the minimum lot size by
2 less than 10 percent of the minimum lot size, as a “minor variance,” based on
3 findings that the property is subject to “unique” conditions and strict
4 compliance with the zoning code would create an “unnecessary hardship.”
5 Intervenor applied to the county for a minor variance to create three 4.75-acre
6 parcels, which would vary from the minimum five-acre size by five percent.
7 The proposed partition locates the boundary line between the northern and
8 middle parcels along the powerline easement.

9 As discussed below, an application for a minor variance is processed as
10 an administrative decision. The county planning director provided notice of
11 the application to surrounding property owners, including petitioners. At the
12 request of petitioners, the county planning director elevated review to the
13 planning commission. The planning commission held a hearing on the
14 application and, on February 1, 2016, approved the variance and partition.
15 Petitioners appealed the planning commission decision to the board of county
16 commissioners. The county commissioners held a hearing on the appeal and,
17 on March 30, 2016, issued a decision denying the appeal and approving the
18 partition and variance. This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 Columbia County Zoning Ordinance (CCZO) 1504 governs variances.
21 Under CCZO 1504, a Minor Variance includes a request for a variance of less

1 than 10 percent from a minimum lot or parcel size requirement. All other
2 variances to minimum parcel sizes must be treated as Major Variances.

3 In an introductory paragraph, CCZO 1504.1 provides that the planning
4 commission may approve a Major Variance “when unusual circumstances
5 cause undue hardship in the application of [code requirements]. The granting of
6 such a variance shall be in the public interest.”¹ The actual five criteria for a
7 Major Variance are set out at CCZO 1504.1A. *See* n 1.

¹ CCZO 1504.1 provides:

“Major Variances: The Planning Commission may permit and authorize a variance from the requirements of this ordinance when unusual circumstances cause undue hardship in the application of it. The granting of such a variance shall be in the public interest.

“A. A variance shall be made only when all the following conditions and facts exist:

- “1. The granting of the variance will not be detrimental to the public safety, health, or welfare, or injurious to other property;
- “2. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property;
- “3. Approval of the application will allow the property to be used only for purposes authorized by the Zoning Ordinance;
- “4. Strict compliance with the Zoning Ordinance would create an unnecessary hardship;

1 Minor Variances are governed by CCZO 1504.3.² Minor Variances are
2 reviewed and approved by the planning director, unless a party receiving notice

“5. The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor violate any other provision of the Zoning Ordinance.

“B. A variance so authorized shall become void after the expiration of 1 year if the next step in the development process has not been applied for.

“C. The Planning Commission may impose whatever reasonable requirements it feels will fulfill the intent of this ordinance.”

² CCZO 1504.3 provides:

“Minor Variances: The Director is authorized to grant variances of the setback, yard, height, lot or parcel coverage, lot or parcel size, width, or depth requirements of this ordinance in accordance with the following procedures and conditions:

“A. Application shall be made on forms provided by the Director;

“B. The filing fee for the variance shall be paid;

“C. The Director shall mail notices to all adjoining property owners within 250 feet and to the members of the CPAC of the area. The people receiving written notice have 10 working days in which to send comments concerning the proposed variance or to request a hearing before the Planning Commission;

“D. If the Director finds the proposed variance meets the criteria in Section 1504.1A and none of the notified parties request a hearing before the Planning Commission, the Director may approve the variance and shall send copies of the approval to anyone who responded to the notice. The

1 requests review by the planning commission, which happened in this case.
2 Under CCZO 1504.3D, a Minor Variance is governed by the same approval
3 criteria for Major Variances, at CCZO 1504.1A. *See* n 2. The planning
4 commission, and ultimately the board of county commissioners, applied the
5 criteria at CCZO 1504.1A to approve the requested variance.

6 In the first assignment of error, petitioners argue that the county erred in
7 failing to also apply as approval criteria the introductory paragraph at CCZO
8 1504.1, which states in relevant part that “[t]he Planning Commission may
9 permit and authorize a variance from the requirements of this ordinance when
10 unusual circumstances cause undue hardship in the application of it. The
11 granting of such a variance shall be in the public interest.” *See* n 1. Petitioners
12 argue that the county failed to consider whether there are “unusual
13 circumstances” that cause “undue hardship,” and whether the variance is in the
14 “public interest.”

Director may attach reasonable conditions to the approval of the variance. The Director shall send copies of the findings to all affected parties;

“E. If a person receiving notice for a variance requests a hearing before the Planning Commission, the director shall schedule the request at the next regularly scheduled Planning Commission meeting. Notice of this hearing will be provided in accordance with Section 1600.

“F. A variance so authorized shall become void after the expiration of 1 year if the next step in the development process has not been applied for.”

1 Intervenor responds that this issue was not raised below, and is therefore
2 waived. ORS 197.763(1).³ On the merits, intervenor argues that petitioners
3 misconstrue the relevant CCZO 1504 provisions. According to intervenor,
4 CCZO 1504.3D refers only to the criteria at CCZO 1504.1A, not to the larger
5 CCZO 1504.1 section that includes the introductory paragraph, which speaks in
6 any case only to major variances.

7 In the petition for review, petitioners argue that the issue of the
8 applicability of the CCZO 1504.1 introductory paragraph as approval criteria
9 for a minor variance was raised in the testimony below, citing to Record 172-
10 87 and 113-28 (both copies of the February 1, 2016 planning commission
11 minutes), and an unspecified portion of the DVD recording of the board of
12 county commissioners' hearing. We have reviewed those very broad record
13 cites to the best of our ability, and see nothing that comes close to arguing that
14 the introductory paragraph at CCZO 1504.1 applies as approval criteria.
15 Accordingly, we agree with intervenor that this issue is waived.

³ As relevant, ORS 197.835(3) limits LUBA's review to issues raised before the local hearings body as provided by ORS 197.763(1). ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 In any case, we agree with intervenor on the merits that petitioners
2 misconstrue CCZO 1504.1 and 1503.3. CCZO 1503.3D refers only to the
3 criteria at CCZO 1504.1A. If that reference was intended to also encompass the
4 introductory paragraph at CCZO 1504.1 as approval criteria, it presumably
5 would have so specified.

6 Petitioners also argue under this assignment of error that language in the
7 variance application form that the county requires applicants to submit includes
8 criteria that must be applied to approve a minor variance. Intervenor responds
9 that this issue was also not raised below, and is waived. In addition, intervenor
10 argues that language in an application form is not an approval criterion. We
11 agree with both responses. Petitioners do not identify any place in the record
12 where this issue was raised below and, in any event, petitioners have not
13 established that the county's application form establishes mandatory approval
14 criteria for a minor variance.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 As noted, CCZO 1504.1A(2) requires findings that the conditions upon
18 which the request for a variance is based are "unique to the property," and are
19 not applicable generally to other property. CCZO 1504.1A(4) requires a
20 finding that strict compliance with the CCZO "would create an unnecessary
21 hardship." Petitioners challenge the board of county commissioners'

1 interpretations of CCZO 1504.1A(2) and (4), and the adequacy of the findings
2 concluding that those criteria are met.

3 **A. CCZO 1504.1A(2): Unique Conditions**

4 The county commissioners' findings first reject petitioners' proffered
5 interpretation of CCZO 1504.1A(2), which argued that the conditions upon
6 which the request for a variance are based must stem solely from the physical
7 characteristics of the property, and that the property's surroundings cannot be
8 considered. The county commissioners concluded that nothing in CCZO
9 1504.1A(2) limits the conditions to the physical characteristics of the property,
10 or excludes consideration of the property's surroundings.⁴ The commissioners
11 then identified three conditions it found were unique to the property for which
12 the variance is sought and are not applicable generally to other property.⁵ The

⁴ The city's findings state in relevant part:

“The Board does not interpret this criterion in such a narrow fashion. There is no language in this criterion that limits the unique conditions to only physical characteristics of the property or prohibits consideration of the surrounding area as a unique condition. This is not an oversight nor is it implied by the other language used. Other sections of County code do expressly limit variances to criteria that can only be met by the physical characteristics of the land. For instance, Section 210 of the CCSPO [Columbia County Subdivision and Partition Ordinance] restricts allowable hardship findings to only ‘the particular physical surroundings, shape or topographical conditions of the specific property involved[.]’ * * *.” Record 12.

⁵ The county commissioners' primary findings under CCZO 1504.1A(2) state:

- 1 county also adopted alternative findings that focus exclusively on the physical
- 2 characteristics of the subject property.⁶

“* * * First, the Property is surrounded by a neighborhood of smaller properties that do not meet the current five-acre minimum for the RR-5 zone. There are 40 homes in the RR-5 zone on the two roads that will provide access to the Property (Blaha Road and Lindsay Lane). Of these 40 homes, 32 are smaller than five acres. The average size of these 32 homes is less than 2.5 acres. Second, as set forth in the Staff Report, the Property has been subject to widely varying zoning rules, which has resulted in parcels on three sides of the Property that are less than 5 acres. Third, the land is bisected by an easement for the Bonneville Power Administration’s transmission line. This easement is located at a natural boundary for one-third of the Property, pursuant to a three-parcel division.” Record 13.

⁶ The county commissioners’ alternative findings under CCZO 1504.1A(2) states:

“Alternatively, even if this criterion authorized variances only based on unique physical characteristics of the site, it would still be met. As explained in the Staff Reports, the owner of the subject site donated .72 acres of land to public right of way in previous years, but is now only .71 acres short of the amount needed to reach 15 acres (and thereby not need a variance). The history and specific size of this property is a unique condition upon which this variance is based. Furthermore, this site is served by a public road that is not improved to County standards and will need to be upgraded prior to or as a part of this development. This physical characteristic is unique to this property and not generally applicable to other property. In addition, the subject site will take access from both Blaha Road (via public frontage) and Lindsey Lane (via private easement). This unique dual access will enable [dispersal] of traffic impacts from the proposal in multiple directions making the site more suitable for one additional parcel.

1 Petitioners acknowledge that, pursuant to ORS 197.829(1), LUBA must
2 affirm the county commissioners’ code interpretations unless the interpretations
3 are inconsistent with the express language, purpose or policy underlying the
4 code provisions.⁷ However, petitioners argue that the county commissioners’
5 interpretation of CCZO 1504.1A(2) is inconsistent with language in the
6 variance application form, which asks the applicant to describe an unnecessary
7 hardship resulting from a physical characteristic of the land. We agree with

“The Board would also like to address the relationship of the BPA easement to this uniqueness requirement. * * * The existence of this easement * * * divides the property at a point where it makes the best use of the property to divide it into three parcels and where Parcel 1 will use Lindsay Lane for access. This easement condition, as well as the others offered by applicant in its submittals and oral argument (including surrounding average lot size, need for road improvements, and history of the parcel), are each independently sufficient unique conditions that meet this criterion. The Board finds that this criterion is satisfied.” Record 13.

⁷ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 intervenor that language in the county’s application form, which in any case
2 refers to a different approval criterion (unnecessary hardship), has no bearing
3 on the meaning of CCZO 1504.1A(2), and certainly does not demonstrate that
4 the county commissioners’ interpretation of the uniqueness variance standard is
5 reversible under ORS 197.829(1).

6 Petitioners next argue that the county erred in considering the small size
7 of surrounding lots, because many of those small lots were created at a time
8 when it was allowed under county law, but the developer failed to leave a
9 remainder parcel that was of sufficient size to create three five-acre parcels
10 after the zoning was changed to RR-5. We understand petitioners to argue that
11 the conditions that form the basis for the variance for purposes of CCZO
12 1504.1A(2) cannot be the fault of the applicant. However, that argument, again,
13 is apparently based on language in the variance application form, not on any
14 applicable CCZO provision. Petitioners’ arguments do not provide a basis for
15 reversal or remand.

16 Next, petitioners challenge the county’s conclusion, in its alternative
17 findings, that conditions “unique to the property” for purposes of CCZO
18 1504.1A(2) includes the fact that intervenor previously donated .72 acres of
19 land for right-of-way, and is now only .71 acres short of the 15 acres needed to
20 meet the minimum parcel size requirements for three parcels. *See* n 6.
21 Petitioners argue that intervenor dedicated the right-of-way as a condition to
22 obtain prior partitions of surrounding lands, and that such dedications are not

1 “physical characteristics” of the land over which intervenor had no control.
2 Again, petitioners’ arguments are based on language in the application form,
3 not any applicable CCZO 1504 variance language, and therefore provide no
4 basis for reversal or remand.

5 Finally, petitioners challenge the primary and alternative findings
6 regarding the BPA high-voltage powerline that runs through the property,
7 arguing that the powerline runs over other properties in the area, including
8 petitioners,’ and is therefore not a condition “unique to the property” that is not
9 generally applicable to other properties in the area. However, the findings
10 emphasize not only the existence of the powerline easement on the property,
11 but that its location on that property effectively divides one-third of the parent
12 parcel from the remainder. The county found that that condition is unique to
13 the property, and petitioners do not argue otherwise or otherwise establish that
14 the county erred on relying in part on the powerline easement as one of the
15 conditions that warrant a variance under CCZO 1504.1A(2).

16 **B. CCZO 1504.1A(4): Unnecessary Hardship**

17 CCZO 1504.1A(4) requires the applicant for a variance to demonstrate
18 that “[s]trict compliance with the Zoning Ordinance would create an
19 unnecessary hardship[.]” *See* n 1. The county commissioners first rejected
20 petitioners’ proffered interpretation of the term “unnecessary hardship,” under
21 which hardships must stem only from the physical characteristics of the land,
22 and cannot include the financial consequences of strict compliance. Instead,

1 the commissioners interpreted unnecessary hardship to include some hardship,
2 stemming from any source, which is unnecessary to satisfy the criterion being
3 varied.⁸ The findings then identify two circumstances that constitute
4 “unnecessary hardship”: (1) the financial burden of improving 600 feet of

⁸ The county commissioners’ findings regarding CCZO 1504.1A(4) state, as relevant:

“Appellant argues that for satisfaction of this criterion, the requisite hardship must be extraordinary, major, and must be related to the physical characteristics of the land. Appellant also argues that the hardship cannot be related to the financial consequences from strict compliance, nor can it relate to any circumstance outside the Property itself.

“The Board rejects this narrow interpretation of the phrase ‘unnecessary hardship.’ First, the Board concludes that the plain language of the text for this criterion does not support such an interpretation. Furthermore, the Board observes that more severe language is used in the standards for other types of variances. For example, a major variance of the zoning ordinance requires an applicant to also show that there exists ‘unusual circumstances’ and ‘undue hardship.’ Under the subdivision and partitioning code, a variance can only be granted if there is an ‘extraordinary’ and ‘particular’ hardship—and this extraordinary hardship must be related to the physical nature of the land. Because such language is not used for the hardship criterion for a minor variance, the Board rejects an interpretation that incorporates a similarly harsh standard. Rather, the Board holds that the term ‘unnecessary hardship’ is to be interpreted according to its plain English meaning. In other words, there must be some hardship from strict compliance and it must be unnecessary to satisfy this criterion. But the hardship is not restricted to solely the physical characteristics of the land. In addition, consideration of the financial consequences of the strict compliance is appropriate.” Record 14 (citations omitted).

1 Blaha Road to county standards, and (2) holding intervenor to a parcel size that
2 few parcels in the area meet.⁹

3 Petitioners challenge that county commissioners’ interpretation and
4 findings, arguing that as a matter of law it is not an “unnecessary hardship” for
5 intervenor to create only two rather than three parcels. If the inability to create
6 an additional parcel is a circumstance that alone constitutes a “hardship,”
7 petitioners argue, then application of any minimum lot size would create a
8 hardship. Further, petitioners dispute the county’s reliance on the condition
9 requiring improving 600 feet of road to county standards, arguing that any

⁹ The county commissioners’ findings continue:

“For this variance application, there are two primary consequences of strict compliance that qualify as hardships. First, the applicant would have to make substantial and costly road improvements for a partition resulting in only two parcels. The road improvements would benefit five existing home, whose owners were not required to bring the road to county standards because such a requirement is only triggered when a new parcel is created by a partition. These improvements would be to almost 600 linear feet of road. The Board finds that this cost is great in proportion to the benefit of the creation of two over-sized parcels, and that it constitutes a hardship. Second, the Board finds that restricting the applicant to the creation of two parcels that are oversized compared to the neighborhood is also a hardship. By not granting the variance, the Board would be holding the applicant to a standard that few in the surrounding area meet. The Board also finds that these hardships are unnecessary. The requested variance is a minor adjustment and will not impact the neighborhood in any meaningful way. Also, the three parcels created through the variance will be compatible with the surrounding area—and in fact, would still be larger than the majority of parcels in the neighborhood.” Record 14.

1 partition applicant must pay to bring public roads serving the property up to
2 county standards. Petitioners also note that the staff report indicated that the
3 applicant had the option of providing a surety bond in lieu of constructing the
4 road improvements. Finally, petitioners argue that the county cannot rely upon
5 the cost of the road improvements unless the county determines what those
6 costs will be.

7 Intervenor responds, and we agree, that petitioners have not established
8 that the county commissioners' interpretation of CCZO 1504.1A(4) is
9 inconsistent with the express language of that code provision. The text and
10 context that the county discusses support its interpretation, that CCZO
11 1504.1A(4) does not require "extraordinary" hardship limited to the physical
12 characteristics of the land, or exclude consideration of hardships from financial
13 or other sources. Under the county's interpretation of CCZO 1504.1A(4), the
14 inability to create an additional parcel to offset the disproportionate financial
15 cost of improving Blaha Road, and to closer match the existing parcel size
16 pattern in the surrounding area, could be viewed as hardships. While that
17 interpretation might not be consistent with traditional or common law notions
18 of the hardship variance standard, the county is not bound to interpret its local
19 variance standards in the same manner as traditional variance standards.
20 *deBardelaben v. Tillamook County*, 142 Or App 319, 325-26, 922 P2d 683
21 (1996).

1 Petitioners’ other challenges to the county’s findings regarding the road
2 construction also fail to provide a basis for reversal or remand. That the staff
3 report noted that the applicant could post a surety bond to ensure that the
4 required road construction occurs does not undermine the county’s finding that
5 the disproportionate financial cost of the road improvement is an unnecessary
6 hardship under CCZO 1504.1A(4). The applicant will ultimately bear the cost
7 of constructing the road.

8 Similarly, petitioners cite nothing in the CCZO or elsewhere that
9 requires a variance applicant or the county to provide estimates of the costs of
10 improving 600 feet of road to county standards, in order to rely on those costs
11 as one basis for a variance under CCZO 1504.1A(4). Petitioners do not dispute
12 that the cost of improving 600 feet of single-lane road to county standards,
13 including a 20-foot paved width, will be substantial.

14 Finally, petitioners challenge the county’s reliance on the existing
15 mismatch between RR-5 zoning and the smaller average parcel size pattern in
16 the surrounding area, arguing that allowing additional undersize parcels, even
17 if only .24 acres below the five-acre minimum and larger than the average,
18 would further erode the RR-5 zone. Intervenor responds, and we agree, that
19 petitioners’ argument is in essence an impermissible collateral attack on the
20 CCZO 1504 provisions that expressly allow a minor variance to minimum lot
21 sizes.

22 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 CCZO 1504.1A(5) requires a finding that “[t]he granting of the variance
3 will not adversely affect the realization of the Comprehensive Plan nor violate
4 any other provision of the Zoning Ordinance.” The county board’s findings
5 state that “[n]o opponent argued that the variance would violate this
6 criterion[,]” and adopted other findings concluding that the variance will not
7 adversely affect the realization of the comprehensive plan or violate any other
8 CCZO provision. Record 15, 29.¹⁰

9 Petitioners argue that issues were raised below that were based on
10 comprehensive plan provisions, but the county failed to address those issues in
11 its findings. Intervenor responds that no issues were raised below regarding
12 any specific comprehensive plan policies, or compliance with CCZO
13 1504.1A(5) generally.

14 We agree with intervenor. In the petition for review, petitioners cite to
15 testimony below from opponents expressing concerns that additional rural
16 residential development would degrade the rural quality of the neighborhood,

¹⁰ The county board adopted staff findings that “the proposed variance will complement the existing character and levels of development of this rural residential unincorporated area, be consistent with the existing rural facilities and services in the area, and will not require any facility and/or service improvements at the expense of the public. Nonetheless, a condition of approval for the minor partition should state that all future site development will be reviewed by the County Planner for consistency with the applicable goals and Policies of the Comprehensive Plan that are implemented through the County’s Zoning Ordinance. * * *” Record 29.

1 cause traffic that would create safety issues for children playing, etc. Petition
2 for Review 32. Petitioners argue that the cited testimony is based on language
3 in the comprehensive plan; however, the cited testimony did not identify any
4 comprehensive plan provisions. Without some citation to applicable
5 comprehensive plan provisions, the general concerns regarding the quality of
6 the RR-5 zone raised below were not sufficient to raise issues of compliance
7 with CCZO 1504.1A(5).

8 In the petition for review, petitioners cite to language in the Columbia
9 County Comprehensive Plan, Part VII, Rural Residential, which describes rural
10 residential areas with an average density of one unit per five acres or less as
11 common in the county. Petitioners argue that two seven-acre parcels would be
12 more consistent with the plan provisions governing rural residential areas than
13 three 4.76-acre parcels. However, petitioners have not demonstrated that the
14 comprehensive plan provisions cited in the petition for review were raised
15 below at all, much less with the specificity required by ORS 197.763(1). The
16 issue raised in the third assignment of error is waived.

17 The third assignment of error is denied.

18 The county's decision is affirmed.