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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

JIM BELKNAP,
Intervenor-Respondent.

LUBA No. 2019-024

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

H. Andrew Clark, Assistant County Counsel, Eugene, filed a response brief and argued on behalf of respondent.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REMANDED 08/15/2019

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals Ordinance No. 18-08, which amends several provisions of the county's zoning code.

MOTION TO INTERVENE

Jim Belknap moves to intervene on the side of the respondent. No party opposes the motion, and it is granted.

REPLY BRIEF

On June 5, 2019, petitioner filed a reply brief. OAR 661-010-0039.

FACTS

This appeal challenges amendments to the Lane County Code (LC) adopted by the board of county commissioners in Ordinance No. 18-08. In 2015, the board of county commissioners directed the county's Land Management Division (LMD) to scope revision of LC Chapters 13, 14, and 16, prioritize needed updates, and develop a strategy for addressing those updates as part of its 2015-2016 Long Range Planning Work Program. Record 1896.

The county's multi-year effort to comprehensively overhaul and modernize the county's land use regulations was designated the Code Modernization Project (CMP). *Id.* In 2018, the first phase of the CMP implemented by the board amended LC Chapter 14, the county's Application Review and Appeal Procedures code chapter. *Id.* We remanded the decision

amending LC Chapter 14 in *Landwatch Lane County v. Lane County*, __ Or LUBA __ (LUBA No 2018-093, Jan 31, 2019).

This appeal presents six assignments of error related to the amendments to LC Chapter 16 that were adopted by Ordinance No. 18-08. Because LC Chapter 16 implements Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), we review the county's interpretation of state law to determine whether the county correctly construed the applicable law, with no deference to the county's interpretation of state law. ORS 197.835(9)(a)(D). *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992).

BACKGROUND

Statewide Planning Goal 3 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." OAR 660-015-0000(3). Statewide Planning Goal 4 (Forest Lands) is "[t]o conserve forest lands by maintaining the forest land base and to protect the state's forest economy * * *." OAR 660-015-0000(4).

Uses allowed on lands designated exclusive farm use or forest are generally set forth in ORS 215.213 and OAR 660-006-0025.[1] Pursuant to ORS 197.247, see n 1, and ORS 215.316, certain counties may designate qualifying

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[1] Oregon's marginal lands statute, at ORS 197.247, was first adopted in 1983, and was subsequently repealed in 1993. Or Laws 1983, ch 826, § 2; *repealed by* Or Laws 1993, ch 792, § 55. We refer to the version of ORS 197.247 that existed in 1991 throughout this opinion, unless otherwise noted.

land marginal and potentially allow more intense development on those lands than would otherwise be allowed. ORS 215.317(1) provides that allowed uses on marginal lands include:

> "(a) Intensive farm or forest operations, including but not limited to 'farm use' as defined in ORS 215.203.
>
> "(b) Part-time farms.
>
> "(c) Woodlots.
>
> "(d) One single-family dwelling on a lot or parcel created under ORS 215.327 (1) or (2).
>
> "(e) One single-family dwelling on a lot or parcel of any size if the lot or parcel was created before July 1, 1983, subject to subsection (2) of this section.
>
> "(f) The nonresidential uses authorized in exclusive farm use zones under ORS 215.213 (1) and (2).
>
> "(g) One manufactured dwelling or recreational vehicle in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident."

Petitioner's first, fourth, and fifth assignments of error challenge the consistency with state law of certain uses on resource land that are allowed pursuant to amendments to LC Chapter 16, and we begin there.

FIRST ASSIGNMENT OF ERROR

Ordinance No. 18-08 amended LC 16.210(3)(d) (NonImpacted Forest Lands (F1)), 16.211(3)(d) (Impacted Forest Lands (F2)), 16.212(4)(g) (Exclusive Farm Use (EFU)), and 16.214(3)(e) (Marginal Lands (ML)) to allow a category

of uses that the county calls "in-home commercial activities." Petitioner's first assignment of error asserts that in-home commercial activities are not allowed under state law and even if those activities could be allowed, they are subject to a discretionary review process that is not provided in the LC Chapter 16.210, 16.211, 16.212, and 16.214 amendments. Petition for Review 4, 7. We conclude that in-home commercial activities are not allowed in those resource zones as a use separate and apart from home occupations, and that the approval process set forth in the amended code is inconsistent with applicable state law.

A. In-home Commercial Activities

The code amendments authorize "in-home commercial activities" in resource zones. LC 16.210 (F-1), 16.211 (F-2), 16.212 (EFU), 16.214 (ML). Uses on resource lands must be consistent with state law and in reviewing the county's decision we determine whether the county improperly construed the law. ORS 197.835(9)(a)(D).

Petitioner argues that in-home commercial activities are not among the uses state law authorizes on resource lands. Petition for Review 5. We conclude that nothing in state law authorizes in-home commercial activities on farm, forest, and marginal lands as outright permitted uses.

First, in-home commercial activities are not included in the list of permitted or conditionally allowed uses in ORS 215.213, 215.317, or OAR 660-006-0025. The county argues, however, that in-home commercial activities are properly allowed because they are indistinguishable from the *related* residential

use and "would impose zero impacts to any of the resource uses on the property and are, therefore, consistent with the resource land Goals." Response Brief 4. We understand the county to treat these in-home commercial activities as permitted as accessory to residential uses.[2]

Residential uses are, in limited circumstances, allowed on farm, forest and marginal lands. Both the county and intervenor argue that the relatively minor in-home commercial activities authorized by the amendment are consistent with a model ordinance prepared by DLCD, and that the model ordinance should be given weight in our evaluation of the amendment's consistency with state law. As intervenor observes, ORS 197.639(3) authorizes DLCD to develop model ordinances "to assist local governments in the periodic review plan update process and in complying with new statutory requirements or new land use

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[2] County staff described the in-home commercial activity as an optional use

> "that may be allowed through a Type I procedure after finding certain clear and objective standards are met. While home occupations in the farm and forest zones require a conditional use permit per ORS 215.448, in-home commercial activities are indistinguishable from the residential use of a dwelling. A common example is an internet-based service operated out of [a] home office where no customers come to the property. Adding this provision allows for a simpler path for non-impactful home occupations. [Department of Land Conservation and Development (DLCD)] supports this option in the model code as a Type I procedure." Record 1901.

planning goal or rule requirements adopted by [the Land Conservation and Development Commission (LCDC)] outside the periodic review process." Intervenor's Response Brief 1-2. Intervenor also directs us to ORS 197.717(3) and (4) which provide:

> "(3) [LCDC] shall develop model ordinances to assist local governments in streamlining local permit procedures.
>
> "(4) [DLCD] and the Oregon Business Development Department shall establish a joint program to assist rural communities with economic and community development services. The assistance shall include, but not be limited to, grants, loans, model ordinances and technical assistance. The purposes of the assistance are to remove obstacles to economic and community development and to facilitate that development. The departments shall give priority to communities with high rates of unemployment."

As staff noted above, home occupations in the farm and forest zones require a conditional use approval. ORS 215.213(2); OAR 660-006-0025(4)(s). Home occupations are allowed on marginal land pursuant to ORS 215.317(1)(f)'s incorporation by reference of ORS 215.213(2).[3] ORS 215.296(1) requires that

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[3] ORS 215.213(2)(n) provides in part that "[i]n counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition), the following uses may be established in any area zoned for exclusive farm use subject to ORS 215.296:

"* * * * *

"(n) Home occupations as provided in ORS 215.448."

the local government determine whether applicants seeking authorization for a use on farm land pursuant to ORS 215.213(2) establish that the use will not:

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

On forest land, OAR 660-006-0025(5)(a) and (b) provide that a home occupation must establish that "[t]he proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands" and that "[t]he proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel[.]"

DLCD may be correct that the proposed in-home commercial activities have minimal-to-no impact on resource lands and this approach would streamline local permitting by avoiding the conditional use process required for home occupations. Nonetheless, the model ordinances must still comply with state law. In-home commercial activities are not listed in the statute or rule and consequently are not authorized by right in resource zones. The closest allowed use is a home occupation, and as we discuss below, a home occupation requires conditional use approval. The challenged amendments that allow in-home commercial activities as outright permitted uses are inconsistent with state law.

The first subassignment of error is sustained.

B. Type I Process

Below, petitioner challenged the county's amendment providing that in-home commercial activities be approved subject to a Type I process. LC 14.030(1)(a)(i) provides:

> "The Type I procedure involves the ministerial review of an application based on clear and objective standards and criteria. Uses or development evaluated through this process are those that are permitted outright in the applicable zone. In general, potential impacts of the proposed development have been already recognized through the adoption of County standards. The Type I procedure does not require interpretation or exercise of policy or legal judgement when evaluating development standards and criteria. A Type I determination is made by the Director without public notice or a hearing. A Type I determination may not be appealed at the County level except as otherwise provided in Lane Code."[4]

We agree with petitioner that even assuming that in-home commercial activities could be authorized as accessory to a home occupation use, a Type I process does not provide the review that is required by the statutes authorizing home occupations.

A county may elect to allow home occupations on farm, forest or marginal lands subject to compliance with ORS 215.448. ORS 215.213(2)(n); OAR 660-006-0025(4)(s); ORS 215.317(1)(f). ORS 215.448(1) provides that in "an exclusive farm use, forest zone or a mixed farm and forest zone that allows residential uses" the following standards apply to home occupations:

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[4] We address LC Chapter 14 in greater detail in our discussion of the third assignment of error.

"(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;

"(b) It shall employ on the site no more than five full-time or part-time persons;

"(c) It shall be operated substantially in:

"(A) The dwelling; or

"(B) Other buildings normally associated with uses permitted in the zone in which the property is located; and

"(d) It shall not unreasonably interfere with other uses permitted in the zone in which the property is located."

ORS 215.448(4) provides that the existence of a home occupation will not justify a zone change.

The county has incorporated ORS 215.448(1)(a)-(d) and (4) into its home occupation standards at LC 16.210(3)(c)(i), (ii), (iii), (iv) and (vi).[5] Similar

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[5] LC 16.210(3)(c) provides that a home occupation must:

"(i) Be operated by a resident or employee of a resident of the property on which the business is located;

"(ii) Employ on the site no more than five full-time or part-time persons at any given time;

"(iii) Be operated substantially in the dwelling or other buildings normally associated with uses permitted in the F-1 Zone;

"(iv) Not unreasonably interfere with other uses permitted in LC 16.210;

provisions are provided in LC 16.211(3)(f), 16.212(4)(f), and 16.214(3)(d). ORS 215.448(2) authorizes the governing body of the county to adopt additional, reasonable conditions for approval of a home occupation and the LC home occupation code may be characterized as adding additional, reasonable conditions to the local home occupation provision in the form of LC 16.210(3)(c)(v), requiring that the use also "[c]omply with sanitation and building requirements prior to start of Home Occupation[.]"

In general, the county's newly adopted in-home commercial activity approval standards incorporate the home occupation standards that mirror provisions in ORS 215.448(1) and (4). The in-home commercial activity standards exclude, however, the "not unreasonably interfere with other uses permitted in [the zone]" language required by ORS 215.448, and instead provide that the in-home commercial activity may not involve outside storage, onsite advertisement, onsite display or sale of stock in trade other than vehicle or trailer signage, not serve customers on site, be conducted within a dwelling and not occupy more than 25% of the dwelling or an attached garage. LC 16.210(3)(d).

Based on the language in the DLCD model code, it appears that the county endeavored to replace subjective language in the home occupation code and ORS

"(v) Comply with sanitation and building code requirements prior to start of Home Occupation; and

"(vi) Not be used as a justification for a zone change."

215.448(1)(d) concerning avoiding unreasonable interference with clear standards, to facilitate approval of in-home commercial activities through a Type I process. However, planning staff will be required to exercise legal judgment in applying standards, for example, to determine whether the use is operating substantially in other buildings normally associated with uses permitted in the F-1 zone. LC 16.210(3)(d)(i), 16.210(3)(c)(iii). Moreover, as we concluded above, state law does not recognize in-home commercial activities, and home occupations require a conditional use permit, through a Type II process. LC Tables 16.210-1, 16.212-1, 16.214-1.

In-home commercial activities may not be allowed through a Type I procedure.

The second subassignment of error is sustained.

The first assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the amendments authorize more expansive uses on marginal lands than are allowed by state law. Petition for Review 16. Specifically, petitioner argues that park and ride lots, a variety of telecommunication facilities, the utility component of utility/solid waste facilities and a provision regarding lot sizes are not allowed under state law and that the provisions concerning school facilities are inconsistent with state law. Petition for Review 17-18. The county responds by directing us to provisions of state law it believes authorize the identified uses, and concedes that remand is necessary

to correct one provision, as explained further below. We agree with the county that the majority of the challenged amendments are consistent with state law.

ORS 215.317(1)(f) provides that a county may allow on marginal lands "[t]he nonresidential uses authorized in exclusive farm use zones under ORS 215.213(1) and (2)." The county argues that the telecommunications facilities and utility facility portion of a solid waste facility may be allowed under the provision in ORS 215.213(1)(c) regulating utility facilities.[6] Response Brief 11. We agree with the county.

Petitioner next challenges LC 16.214(6)(c), which allows creation of a parcel of a size necessary to accommodate authorized nonresidential uses, which petitioner argues is inconsistent with ORS 215.317. We agree with the county

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[6] ORS 215.213(1)(c) authorizes:

> "Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:
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> "(A) ORS 215.275; or
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> "(B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 469.300."

that creation of such a parcel is allowed on marginal lands pursuant to ORS 215.327(3).[7]

Petitioner also challenges the inclusion of park and ride lots in the uses allowed on marginal lands. LC Table 16.214(5.12). As explained above, ORS 215.317 allows on marginal lands "[t]he nonresidential uses authorized in exclusive farm use zones under ORS 215.213(1) and (2)." The county does not direct us to a provision in ORS 215.213(1) or (2) authorizing the use but instead argues that park and ride lots are allowed by OAR 660-012-0065(1), (3)(i).[8] OAR

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[7] ORS 215.327 provides: "A county may allow the following divisions of marginal land:

> "(1) Divisions of land to create a parcel or lot containing 10 or more acres if the lot or parcel is not adjacent to land zoned for exclusive farm use or forest use or, if it is adjacent to such land, the land qualifies for designation as marginal land under ORS 197.247 (1991 Edition).
>
> "(2) Divisions of land to create a lot or parcel containing 20 or more acres if the lot or parcel is adjacent to land zoned for exclusive farm use and that land does not qualify for designation as marginal land under ORS 197.247 (1991 Edition).
>
> "(3) Divisions of land to create a parcel or lot necessary for those uses authorized by ORS 215.317(1)(f)."

[8] We observe that ORS 215.213(2)(r) conditionally allows:

> "Improvement of public road and highway related facilities such as maintenance yards, weigh stations and rest areas, where additional

660-012-0065 identifies transportation facilities, services, and improvements which may be permitted on rural lands consistent with Goals 3, 4, 11, and 14 without a goal exception and authorizes park and ride lots. As the county observes, "[p]etitioner makes no argument that the rule is inconsistent with the marginal lands statute." Response Brief 10. We agree with the county that petitioner has not developed an argument that these uses are inconsistent with state law, and accordingly, petitioner's argument provides no basis for reversal or remand.

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property or right of way is required but not resulting in the creation of new land parcels."

We also note that ORS 215.213(10)(b) provides:

> "Roads, highways and other transportation facilities and improvements not allowed under subsections (1) and (2) of this section may be established, subject to the approval of the governing body or its designee, in areas zoned for exclusive farm use subject to:
>
> "(a) Adoption of an exception to the goal related to agricultural lands and to any other applicable goal with which the facility or improvement does not comply; or
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> "(b) ORS 215.296 for those uses identified by rule of the [LCDC] as provided in section 3, chapter 529, Oregon Laws 1993."

Finally, petitioner argues that the provision in the amended code at LC 16.214(6)(vi) allowing schools outright is inconsistent with state law. We agree. ORS 215.213(2)(y) provides that a county may allow "[p]ublic or private schools for kindergarten through grade 12, including all buildings essential to the operation of a school, primarily for residents of the rural area in which the school is located." The county agrees that remand is required for it to add missing language from ORS 215.213(2)(y) qualifying that the school must be primarily for residents of the rural area in which the school is located.

Petitioner also argues that the amendment improperly allows schools as an outright use. As discussed earlier in this opinion, uses authorized pursuant to ORS 215.213(2) are conditional uses and are not allowed outright. Remand is also required to provide that school uses are conditional uses, consistent with ORS 215.213(2)(y).

The fifth assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

LC Table 16.212-1(9.1) allows accessory uses and structures within a given distance of an existing dwelling and LC 16.212(4)(cc) provides that "[i]f the proposed structure is located on the same site as the existing dwelling, the application is exempt from LC 16.212(15)(a)." Petitioner argues that the amendment improperly exempts these structures from LC 16.212(15)(a)'s requirement that steps be taken to minimize adverse impacts on farm and forest

uses. Petitioner also argues that amendments to provisions governing accessory uses are inconsistent with ORS 215.213(3)(b).[9] Petition for Review 13.

The county does not reply to the substance of petitioner's argument but rather argues there is nothing to challenge here because the amendments to the code provision were comparable to the "standards [in] the 2016 version of the

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[9] ORS 215.213(3)(b) provides that:

> "(3) In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition), a single-family residential dwelling not provided in conjunction with farm use may be established on a lot or parcel with soils predominantly in capability classes IV through VIII * * *. A proposed dwelling is subject to approval of the governing body or its designee in any area zoned for exclusive farm use upon written findings showing all of the following:
>
> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use.
>
> "(b) The dwelling 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, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land.
>
> "(c) Complies with such other conditions as the governing body or its designee considers necessary."

county code applicable to EFU land" and the amendments in Ordinance 18-08 are not "substantive." Response Brief 8. In its reply brief, petitioner does not develop any argument explaining why the revisions are substantive instead of technical and therefore ripe for challenge.

Instead, petitioner argues that the similarity to the prior ordinance is irrelevant because:

> "[t]he particular way in which the County amends its code is to entirely remove a section and replace that with another section. * * * The County has removed and then replaced entire sections. Under that particular amendment scheme, the County puts any provision within those entire sections at issue during the amendments." Reply Brief 4.

The form of the county's adoption of changes to its code does not alter the fact that the prior code included a 200-foot square same site standard. Without a developed response from petitioner explaining why the amendment is more than technical, petitioner's argument provides no basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

Similarly, we understand the code, prior to Ordinance 18-08, allowed accessory uses as Type I uses and absent a more developed argument will not revisit that issue here.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the county impermissibly expanded the definition of legal lot. LC 16.090(126)(b) provides that a legal lot includes a unit of land:

"(i) Created in compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or

"(ii) Created by deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations; or

"(iii) That received legal lot verification from the County and was noticed pursuant to [LC] 13.020."

The county concedes that the cross reference in LC 16.090(126)(b)(iii) to notice pursuant to LC 13.020 is erroneous, and should cite a different provision. LC 13.020 does not address notice and this part of the assignment of error is sustained.

Petitioner argues that the statutory language from ORS 92.017 should not be included in LC 16.090(126)(d). Petitioner argues that this provision "does not, in and of itself, operate to qualify a lot, parcel or unit of land as a lawfully established unit of land. Therefore, the County misconstrued applicable law." Petition for Review 20. We agree with the county that this is superfluous language and does not require a remand.

The sixth assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(a)(D)(ii) and (iii) provide that in the Willamette Valley, a single family residential dwelling not provided in conjunction with farm use, may be approved if the dwelling will not materially alter the stability of the overall land use pattern of the area. The rule requires the county to consider the cumulative impact of possible new nonfarm *and lot of record dwellings* in a study

area and in doing so, determine the number of nonfarm/*lot of record* dwellings that could be approved in the "study area."[10] Petitioner argues that LCC16.212(9)(a)(iv)(bb) and (cc) are inconsistent with OAR 660-033-

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[10] OAR 660-033-0130(4)(a)(D) provides, in relevant part:

> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsection (3)(a) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4), ORS 215.263(5), and ORS 215.284(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph; and
>
> (iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

0130(4)(a)(D)(ii) and (iii) because LC 16.212.(9)(a)(iv)(bb) and (cc) do not require the county to consider the cumulative impact of both existing and potential non-farm dwellings *and* existing and potential lot of record dwellings. Prior to 1993, Lane County opted to become a marginal lands county and in order to retain the ability to designate marginal lands, the county must refrain from establishing lot of record dwellings on lands zoned for exclusive farm use. ORS 215.316; *Lane County v. LCDC*, 325 Or 569, 575-76, 942 P2d 278 (1997) ("The 1994 Goal 3 and implementing regulations allow the marginal lands counties to continue to designate lands as marginal lands, unless they avail themselves of the 'lot of record' provisions of ORS 215.705 to 215.750.").[11] The county responds

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[11] ORS 215.705 to 215.730 governs lot of record dwellings. ORS 215.316 provides:

> "(1) Unless a county applies the provisions of ORS 215.705 to 215.730 to land zoned for exclusive farm use, a county that adopted marginal lands provisions under ORS 197.247 (1991 Edition), 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317, 215.327 and 215.337 (1991 Edition) may continue to apply those provisions. After January 1, 1993, no county may adopt marginal lands provisions.
>
> "(2) If a county that had adopted marginal lands provisions before January 1, 1993, subsequently sites a dwelling under ORS 215.705 to 215.750 on land zoned for exclusive farm use, the county shall not later apply marginal lands provisions, including those set forth in ORS 215.213, to lots or parcels other than those to which the county applied the marginal lands provisions before the county sited a dwelling under ORS 215.705 to 215.750."

that as a marginal lands county, it does not allow lot of record dwellings, and it is therefore not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot of record dwellings, because there are no existing or potential lot of record dwellings in the county. Response Brief 5. We agree with the county.

The study area is required to "include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas." OAR 660-033-0130(4)(a)(D)(i). If, in a specific application for a nonfarm dwelling, the study area would include land located outside of the county, then the rule may supersede the LC provision and require the county to consider existing and potential lot of record dwellings outside the county. However, we need not decide that issue here because it is a facial challenge to Ordinance 18-08.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the decision improperly relies upon provisions in an ordinance (Ordinance No.18-02) that LUBA remanded in *Landwatch Lane County v. Lane County*, __ Or LUBA __ (LUBA No 2018-093, Jan 31, 2019). The county responds that a severability clause in Ordinance No. 18-02 had the legal effect of allowing unchallenged aspects of the amended LC 14 to take effect,

even after we remanded that ordinance.[12] We conclude that no part of Ordinance No. 18-02 remains in effect.

ORS 197.835(1) concerns our scope of review and provides in part that LUBA "shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision." "When LUBA remands a land use decision, absent some authority to the contrary, the remanded decision becomes ineffective unless and until the local government takes action on remand to re-adopt the decision or otherwise render the decision or portions of it effective." *Hatley v. Umatilla County*, 66 Or LUBA 433, 439 (2012) ("[A]fter remand * * * the [ ] ordinances were no longer effective, and required some formal action to render them effective again after the county addressed the bases for LUBA's remand.").

Our rules require that the response brief generally contain the same content as the petitioner's brief, including a statement of the requested relief. OAR 661-010-0035(3)(a); OAR 661-010-0030(4)(b)(A). The county did not appear in

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[12] The county advises that the severability clause in both the ordinance amending LC Chapter 14 and the ordinance at issue here provide that:

> "If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion constitutes a separate, distinct and independent provision, and such holding does not affect the validity of the remaining portions hereof." Response Brief 6; Record 25.

Landwatch Lane County v. Lane County, __ Or LUBA __ (LUBA No 2018-093, Jan 31, 2019) and no one requested that LUBA sever any portion of Ordinance No. 18-02. Even if, however, we had been asked in the prior proceeding to limit the remand, we question our authority to do so. In *DLCD v. Columbia County*, 24 Or LUBA 32, 44-45, *aff'd*, 117 Or App 207, 843 P2d 996 (1992), the county requested that we affirm a portion of the challenged ordinance, and we agreed to sever sections that "were not contested by petitioner in its assignments of error and are capable of being applied independently of the portions of the ordinance challenged by petitioner." *Id.* (footnote omitted). The Court of Appeals questioned this disposition in *DLCD,* 117 Or App 207, and in *Welch v. City of Portland*, 28 Or LUBA 439, 451 n 12 (1994), we explained the following:

> "Intervenor requests that if we do not sustain assignments of error challenging the environmental review portion of the challenged decision, we affirm that portion of the decision so that part of the phased development may go forward. While we are sympathetic to intervenor's request, the court of appeals has strongly suggested that where an entire decision is appealed to this Board, and we sustain assignments of error, it is inappropriate for LUBA to affirm in part and remand in part. *DLCD v. Columbia County*, 117 Or App 207, 843 P2d 996 (1992). This would appear to apply regardless of whether portions of an appealed decision are not successfully challenged. Therefore, we decline to affirm in part and remand in part."

This is consistent with the resolutions in *Morsman v. City of Madras*, 45 Or LUBA 16, 21 n 6, *aff'd in part, rev'd in part on other grounds*, 191 Or App 149, 81 P3d 711 (2003) (request that remand on annexation challenge be limited

to specific property denied absent citation to legal authority giving LUBA the power to do so); *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 321 (2007) (LUBA declined petitioner's invitation to affirm in part and reverse in part in light of decisions questioning LUBA's authority to grant such relief.); *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150, 164-65 (2006) ("[T]he Court of Appeals has strongly suggested LUBA lacks authority to affirm an ordinance in part and reverse in part.").

The potential survival of any provisions of Ordinance No. 18-02 was not raised and was not expressly addressed in *Landwatch Lane County v. Lane County*, __ Or LUBA __ (LUBA No 2018-093, Jan 31, 2019), and we remanded the decision back to the county in January 2019. The county has not directed us to any authority supporting its position that its severability clause was self-executing or supersedes or modifies the authority granted to LUBA in ORS 197.835(1). Accordingly, we agree with petitioner's argument that the current decision impermissibly relies on portions of Ordinance No. 18-02. The provisions of the challenged ordinance, Ordinance No. 18-08, that refer to or rely on provisions of Ordinance No. 18–02 that we previously remanded are invalid.

The third assignment of error is sustained.

The county's decision is remanded.