

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of his request for
4 a reduction to the setback requirement for a single-family
5 home adjacent to a resource zone.

6 **FACTS**

7 Petitioner proposes to develop a single-family home on a
8 1.14-acre parcel in the county's rural-residential (RR) zone.
9 The northeast corner of the parcel borders unimproved land
10 zoned Woodland Resource (WR), and owned by the federal Bureau
11 of Land Management (BLM). The subject property is bordered to
12 the north and west by other RR-zone parcels, both of which
13 also border the BLM land, and both of which are developed with
14 single-family dwellings. Those dwellings have setbacks from
15 the BLM land of 100 and 150 feet, respectively.

16 Jackson County Land Development Ordinance (LDO)
17 280.060(1) establishes special setback requirements to provide
18 buffers between resource and non-resource lands.¹ LDO

¹LDO 280.060(1) explains the purpose of and establishes special setback requirements as follows:

"Purpose: To provide a buffer between resource lands and adjacent districts as a means to prevent conflicts between resource and nonresource uses, the following special setbacks are promulgated:

- A) Forest and Agricultural Lands Special Setback Requirements: In any nonresource zoning district, no primary or temporary residential building or structure shall be located within 200 feet of a Forest Resource (FR-160), Woodland Resource (WR), or Exclusive Farm Use (EFU) district boundary.

"* * * * *"

1 280.060(2)(C) establishes exceptions to those required
2 setbacks:

3 "The Department may approve exceptions to, or
4 reductions of, the special setback requirements set
5 forth in subsection 1 above and require any
6 necessary conditions if the applicant provides
7 substantial findings to document that any of the
8 following situations exist:

9 "i) Existing Development Affecting Resource:

10 Dwellings on the resource zoned parcel are near
11 the common lot line with the nonresource
12 parcel, and a reduction of the setback would
13 not affect the resource. Similarly, an
14 exception may be granted if existing dwellings
15 are within the prescribed setback on the
16 nonresource zoned parcels and the County
17 determines that a reduction of setback
18 consistent with dwellings on adjacent parcels
19 will not adversely affect resource lands and
20 uses.

21 "ii) Physical Features Affecting Resource:

22 "a) The required setback would prohibit the
23 placement of the dwelling on the parcel
24 due to topography, flood hazard, or would
25 adversely impact other physical or natural
26 areas.

27 "* * * * *

28 "c) Substantial findings by the applicant
29 document that a reduction of the special
30 setback will not now or in the future
31 adversely change or increase the cost of
32 accepted farm, forest or aggregate
33 extraction practices on adjacent resource
34 zoned land. If a reduction [in] setback
35 is justified development must maintain as
36 much setback from the resource as
37 practicable.

38 "* * * * *"

39 Petitioner applied to the county for an exception to the
40 setback requirements in order to reduce the required setback

1 from the BLM property to 142 feet. The county planning staff
2 administratively reviewed and approved the application. Upon
3 appeal by one of the neighboring property owners (the
4 appellant), a hearing was conducted by the county hearings
5 officer, who reversed the planning staff determination and
6 denied the request.

7 Petitioner appeals that decision.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner challenges first the hearings officer's
10 finding that petitioner did not provide substantial findings
11 that the requested reduction would not adversely affect the
12 adjacent resource lands and uses. The hearings officer's
13 finding states, in relevant part:

14 "Under LDO 280.060(2)(C)(i), it is not sufficient
15 for an applicant merely to show that other parcels
16 have dwellings located within the 200 foot setback
17 area. The ordinance is clear in requiring that,
18 before a reduction in the 200 foot setback can be
19 approved, the county must also find the reduction
20 will not adversely affect the resource parcel.
21 Accordingly, the remaining issue is whether
22 applicant has presented substantial findings to
23 document that the proposed setback of 142 feet will
24 not adversely affect the resource-zoned lands.

25 "In the application, [applicant] addressed this
26 standard with the following information and
27 arguments:

28 'The adjacent resource land is BLM land w/o
29 dwellings. There are existing homes on
30 adjacent lots that are as close or closer to
31 the BLM land. Any adverse impact on resource
32 land has already been made.' * * *

33 "Applicant presented no other evidence addressing
34 this standard. Although a letter from BLM was
35 submitted, it addressed only the location of the

1 common boundary between the subject property and the
2 BLM parcel.

3 "In the judgment of the Hearings Officer, applicant
4 has not presented 'substantial findings' that the
5 resource land will not be adversely affected by the
6 proposed setback reduction. * * *

7 "It is not difficult to imagine a situation in which
8 resource-zoned land might be adversely affected by
9 one dwelling located closer than 200 feet, but not
10 other dwellings located a similar distance away.
11 For example, if one dwelling were located close to a
12 logging road and the others not, the impact on the
13 resource land might well be different. The crucial
14 point is that the ordinance has made it the duty of
15 the applicant to show why the resource land will not
16 be adversely affected. Where, as here, the
17 applicant presents no evidence as to the resource
18 use of the land, its layout, and resource practices
19 which may be conducted upon it, the required
20 findings cannot be made." Record 16-17 (emphasis
21 in original).

22 Petitioner challenges the county's findings in several
23 respects. First petitioner cites to the letter in the record
24 submitted by BLM, wherein the does not identify any adverse
25 effect on the resource use of the property from the proposed
26 adjacent development. Petitioner argues that the absence of
27 any stated concern by BLM "by itself constitutes substantial
28 evidence that BLM was not concerned about any adverse impact
29 on its land." Petition for Review 16.

30 Next, petitioner cites to testimony at the public
31 hearing, where petitioner's agent discussed the attributes of
32 the property and surrounding properties, and introduced an
33 aerial photograph that illustrates the layout and attributes
34 of the subject property and the BLM land. He also cites to
35 testimony by petitioner's neighbor, the appellant whose

1 property is within 100 feet of the BLM land. Petitioner
2 quotes a dialogue between the hearings officer and the
3 appellant, wherein the hearings officer asked, "What kinds of
4 things does BLM do on its land in terms of forest practices
5 that you are able to observe?" The appellant responded, "I
6 have seen nothing. I only bought the property about a year
7 ago." Petition for Review 18.²

8 Petitioner further argues that the hearings officer's
9 hypothetical reference in his decision to potential adverse
10 impacts from a property adjoining a logging road is undermined
11 by the aerial photograph, which illustrates the subject and
12 BLM properties, and the testimony that the subject property is
13 unimproved and no uses have been witnessed on it.

14 Finally, petitioner complains that while the hearings
15 officer questioned petitioner's representative during the oral
16 argument, he asked no questions regarding the use of the BLM
17 property, or whether petitioner's use of the property would
18 create adverse impacts. Thus, petitioner argues, his agent
19 "was lulled into believing that he had fully covered the
20 criteria to the County's satisfaction." Petition for Review
21 17.

22 As the hearings officer recognized, petitioner bears the
23 burden to establish that the reduced setback will not create

²Petitioner did not append the relevant portions of the hearing transcript to his brief. Instead, the quoted passages from the hearing are taken from the petition for review. The county has not challenged the accuracy of petitioner's transcription, nor has it otherwise appeared in this appeal.

1 an adverse impact on the adjacent resource property. It is
2 not incumbent upon the hearings officer to elicit from
3 petitioner the necessary evidence to meet his burden. Thus,
4 to the extent petitioner argues he met his burden because the
5 hearings officer failed to inquire about adverse impacts, we
6 reject that notion. We also disagree that the letter from BLM
7 constitutes substantial evidence regarding the resource use of
8 the BLM property. The BLM letter does not discuss the merits
9 of petitioner's request, and does not evaluate any impacts of
10 this requested setback on the BLM land. That letter merely
11 acknowledges that petitioner's survey of the property
12 boundaries appears correct.

13 However, we also disagree with the hearings officer's
14 conclusion that petitioner presented "no evidence as to the
15 resource use of the land * * *." Record 17. The hearings
16 officer's finding states that it relies on the information
17 contained in the application, and given that the hypothetical
18 example of potential impacts does not relate to the facts
19 actually presented at the appeal hearing in this case, it may
20 be that the application itself contained no information
21 regarding the resource site. However, the finding that "no
22 evidence" was presented excludes evidence and testimony
23 presented at the hearing. The fact that any evidence was
24 presented, in the form of the aerial map and the testimony, is
25 sufficient to undermine the hearings officer's conclusion that

1 petitioner presented no evidence. See Canfield v. Yamhill
2 County, 142 Or App 12, 920 P2d 558 (1996).³

3 The first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioner challenges the hearings officer's conclusion
6 that petitioner failed to address compliance with LDO
7 280.060(2)(C)(ii)(a), which allows a reduced setback when

8 "[t]he required setback would prohibit the placement
9 of the dwelling on the parcel due to topography,
10 flood hazard, or would adversely impact other
11 physical or natural areas."

12 The hearings officer summarily concluded that petitioner did
13 not address this criterion. Record 17.

14 Petitioner alleges that his agent testified at length
15 during the public hearing regarding this criterion. He
16 explains that his agent testified regarding the topography and
17 other attributes of the property that preclude the dwelling
18 from being sited at or beyond the 200-foot setback, and
19 described why the proposed dwelling site was the only place on
20 the property where a dwelling could be sited. Petitioner also
21 cites a dialogue between the hearings officer and the
22 appellant, wherein the hearings officer asks:

³We cannot determine at this point whether petitioner's evidence constitutes substantial evidence that this criterion is satisfied. Because the hearings officer erred in finding as a factual matter that petitioner presented no evidence to support a finding of compliance, this case must be remanded for the hearings officer to evaluate this criterion against the evidence that was submitted.

1 "You do agree, I take it from your testimony, that
2 if a home is going to be placed on the subject
3 property, it's going to be a mobile home of about
4 this size, and it's pretty much got to be in the
5 location they've chosen." Petition for Review 23.

6 The appellant responded to this question by stating, "There's
7 no other place to put it." Id. Petitioner further explains
8 that the hearings officer asked his agent a similar question,
9 to which the agent also answered that the proposed location
10 was the only site on the property where a dwelling could be
11 located.⁴

12 In light of the evidence and testimony to which we have
13 been cited, we agree with petitioner that the hearings officer
14 erred in concluding that petitioner failed to address this
15 criterion.

16 The second assignment of error is sustained.

17 **THIRD ASSIGNMENT OF ERROR**

18 Finally, petitioner challenges the hearings officer's
19 conclusion that petitioner did not present substantial
20 evidence to establish compliance with LDO
21 280.060(2)(C)(ii)(c), which states:

⁴Although the hearings officer summarily concluded petitioner did not address this criterion, he also stated in his order:

"The central feature of the property is a high voltage electrical power line which enters on the south end of the property and extends easterly to the east property line * * *. The power company requires that a residence be set back at least twenty feet from the power line for safety reasons. The Hearings Officer finds that the size and shape of the property, the power line, and the power company's required safety setback, effectively limits the placement of any dwelling on the subject property to the location proposed by the applicant * * *." Record 13-14.

1 "Substantial findings by the applicant document that
2 a reduction of the special setback will not now or
3 in the future adversely change or increase the cost
4 of accepted farm, forest or aggregate extraction
5 practices on adjacent resource zoned land. If a
6 reduction [in] setback is justified development must
7 maintain as much setback from the resource as
8 practicable."

9 The hearings officer concluded:

10 "Without evidence even explaining what resource
11 practices, if any, are conducted on the BLM land, it
12 is impossible to determine whether locating a
13 dwelling as proposed would adversely affect or
14 increase their cost." Record 18.

15 Petitioner challenges this finding, arguing:

16 [T]hrough the aerial photograph * * *; through the
17 letter from BLM * * *; and the testimony of the
18 opponent neighbor * * *; as well as Petitioner's
19 application and his agent's testimony, nobody
20 identified or alluded to any possible future adverse
21 change or cost increase on the neighboring forest
22 practices on the BLM land resulting from
23 Petitioner's proposed dwelling being 142 feet from
24 the BLM boundary, rather than the required 200
25 feet." Petition for Review 24-25.

26 The hearings officer interpreted this criterion to
27 require an explanation regarding any resource practices on the
28 property. Petitioner does not challenge that interpretation.
29 Rather, petitioner relies exclusively on the lack of any
30 evidence of any potential impacts as a means to substantiate
31 his claim that there will be no adverse impact. Petitioner
32 has not cited to any evidence regarding the use, or lack of
33 use, of the BLM land, from which the hearings officer could
34 draw a conclusion regarding any possible impacts.

35 As stated above, petitioner bears the burden to establish
36 compliance with each criterion. Petitioner cannot rely on the

1 lack of countervailing evidence to sustain his burden. See,
2 e.g., Berg v. Linn County, 22 Or LUBA 507, 510-11 (1992).

3 The third assignment of error is denied.⁵

4 The county's decision is remanded.

⁵Typically, to support denial of a land use permit, a local government need only establish the existence of one adequate basis for denial. Horizon Construction, Inc. v. City of Newberg, 28 Or LUBA 632 (1995); Kangas v. City of Oregon City, 26 Or LUBA 177, 180 (1993); Rozenboom v. Clackamas County, 24 Or LUBA 433, 437 (1993); Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123 (1990). However, in this case, LDO 280.060(2)(C) specifically states that the applicant need document only one basis for an exception or reduction to the setback requirements. Thus, while we sustain one of the hearings officer's bases for denial, the case must be remanded to determine whether petitioner has sustained his burden to establish at least one basis for the requested setback reduction.