BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAL HERMANSON,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

TOM LININGER and MERLE WEINER,
Intervenor-Respondents.

LUBA No. 2007-189

FINAL OPINION
AND ORDER

Appeal from Lane County.

Hal Hermanson, Eugene, filed the petition for review and argued on his own behalf.

No appearance by Lane County.

Tom Lininger and Merle Weiner, Eugene, filed a joint response brief and argued on their own behalf.

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

AFFIRMED 04/03/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county rezoning a forest parcel.

FACTS

The subject property is an 80.6-acre parcel of which 80 acres is zoned F-1 (Non-Impacted Forest Land) and a 0.6-acre portion of the parcel is zoned RR-10 (Rural Residential – 10 acre minimum). The property is located southwest of the city of Eugene, in the Peaceful Valley neighborhood, a neighborhood comprised of residences and forest parcels. Intervenor Lininger owns an 80-acre parcel zoned F-2 that is located south of the subject property, and intervenors' children own an 81.2-acre parcel zoned F-1 that is east of the subject property.

In 2005, intervenors purchased the subject property and two other parcels from Rosboro Timber Company, and subsequently consolidated the three parcels and then partitioned the single consolidated parcel into the current three-parcel configuration. In October, 2006, intervenors applied to rezone the property from F-1 to F-2 (Impacted Forest Land), to facilitate qualifying the property for a single family dwelling, which is permitted in the F-2 zone. A hearing was held, and the hearings officer approved the application. Petitioner, owner of a neighboring parcel, appealed the decision to the board of county commissioners, and the BOC declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Lane Code (LC) 16.252(2) establishes the criteria for the proposed rezoning. LC 252(2) provides in relevant part:

> "Zonings, rezonings and changes in the requirements of this chapter shall be enacted to achieve the general purpose of this chapter and shall not be contrary to the public interest. In addition, zonings and rezonings shall be consistent with the specific purposes of the zone classification proposed, applicable Rural Comprehensive Plan elements and components, and Statewide Planning Goals for any portion of Lane County which has not been acknowledged for compliance with the Statewide Planning Goals by the Land Conservation and Development Commission. * * *"

LC 16.003(4) sets out the purposes of the Lane Code.[1] In his first assignment of error, petitioner argues that the county's findings regarding the application's consistency with the purposes set out in LC 16.003(4) are inadequate, specifically the LC purpose to conserve forest lands for the production of timber products. The hearings officer found that traditional methods of timber management that relied on aerial spraying of herbicides were impracticable on the parcel because of the proximity of multiple residences, but that the property's current owner would be able to continue using the land as forest land through employment of labor-intensive, non-chemical techniques of controlling vegetation. The hearings officer also found that the presence of a dwelling on the property may protect timber production on the property and adjacent forest land by decreasing incidents of trespass and upgrading existing logging roads for emergency access.[2]

Petitioner's argument in support of his first assignment of error is set forth below:

> "* * * The hearings officer's findings discuss the timber management practices occurring on the adjacent parcels but fails to explain how those facts support a finding that the proposed rezone serves to 'conserve forest lands for the production of timber products.' The hearings officer then asserts that the presence of a dwelling (which is the reason that the zone change is proposed

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[1] LC 16.003(4) provides in relevant part that one of the purposes of the LC Chapter 16 is to:

> "Conserve farm and forest lands for the production of crops, livestock and timber products."

[2] The hearings officer found:

> "The record is clear that traditional industrial methods of timber management of the remaining portions of the Partition 2006-P2019, such as the aerial spraying of herbicides, are impractical because of the proximity of residential use. The applicants have adopted a management strategy on Parcel #2 (as well as on the subject property and Parcel #3 for non-commercial forest management) that emphasizes non-chemical control of competing vegetation and have spent hundreds of hours implementing this strategy. This type of forest management involves labor-intensive techniques such as the use of mulch mats and manual removal of scotch broom and blackberries. The application of low-impact forestry methods also serves as a controlled laboratory experiment for the large-scale use of mulch mats.
>
> "The applicants have pointed to examples of trespass by hunters and others that could discourage work crews for safety reasons and that increase fire danger. It is expected that the presence of a dwelling would decrease the threat of trespass and increase access for emergency vehicles through the upgrade to existing logging roads." Record 33.

> in the first place) would decrease the threat of trespass and increase access for emergency vehicles through the upgrade of existing logging roads. The desire for an extra dwelling on a particular parcel is not a justification for a rezone from F-1 to F-2 zoning. The minimum parcel size in the F-1 zone, with some exceptions is 80 acres. Dwellings are not allowed in that zone. Minimum acreage in the F-2 zone is allowed as small as 17 acres. Dwellings are allowed. The hearings officer's findings fail to demonstrate how the proposed zone change conserves forest lands for timber products." Petition for Review 10-11 (citations omitted).

Although petitioner clearly disagrees with the hearings officer's reasoning, petitioner has not demonstrated that the findings are inadequate to explain why the hearings officer believes the proposed zone change is consistent with the purpose of LC Chapter 16 to conserve forest lands for production of timber products.

Petitioner also argues that the hearings officer erred in failing to determine whether the proposal complied with additional policies of the Rural Comprehensive Plan (RCP), including RCP Policies 1, 5, 7, 10, and 11. The hearings officer found that Policy 1 "* * * appears to be advisory in nature and not directly applicable to the rezoning at hand." Record 35.[3] Petitioner does not challenge that finding or otherwise explain why Policy 1 is a mandatory approval criterion that must be applied directly when rezoning land. Absent an explanation from petitioner as to why the hearings officer's finding regarding Policy 1 is incorrect, we conclude that the hearings officer is correct that Policy 1 is not a mandatory approval criterion.

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[3] RCP Goal 4, Policy 1 provides:

> "Conserve forest lands by maintaining the forest land base and protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.
>
> "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."

Intervenors respond that the additional policies cited by petitioner, Policies 5, 7, 10, and 11, do not apply at all to the proposed rezoning.[4] Those policies deal with residences on F-1 land, land divisions on F-1 lands, shortfalls in timber supplies, and consolidation of forest lands, none of which are implicated by the rezoning proposal. We agree with intervenors that the cited policies are not "applicable Rural Comprehensive Plan elements and components," and that the county did not err in not considering whether the proposed rezoning is consistent with those policies. LC 16.252(2).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner challenges the hearings officer's findings regarding the proposal's compliance with RCP Goal 4, Policy 15 (Policy 15).[5] Policy 15

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[4] The cited RCP policies provide as relevant:

> "5. Prohibit residences on Non-Impacted Forest Lands except for the maintenance, repair or replacement of existing residences.
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> "7. The minimum land division size for the Non-impacted Forest Lands (F-1/RCP) Zone shall be 80 acres pursuant to OAR 660-06-026(2)(a) except parcels smaller than 80 acres may be authorized for certain uses pursuant to OAR 660-06_026(3) and (4). Area requirements for Impacted Forest Land must be adequate to conserve forest land for impacted farm and forest uses and be consistent with the following criteria: * * *
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> "10. The effects of a projected shortfall in timber supplies within the near future are of considerable concern to Lane County. The County supports efforts by state and federal agencies in developing plans that will address this situation. The County intends to be an active, committed participant in such plan development.
>
> "11. Encourage the consolidation of forest land ownership in order to form larger more viable forest resource units."

[5] RCP Goal 4, Policy 15 provides:

> "Lands designated within the Rural [Plan] as forest land shall be zoned [F-1] or [F-2]. A decision to apply one of the above zones * * * shall be based upon:
>
> "a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and

requires the county to consider various characteristics of the property in order to determine whether F-1 or F-2 zoning is appropriate. The county's approach to zone changes such as the one at issue in the present appeal is apparently to determine how many of the characteristics specified in Policy 15(b) the property meets, how many characteristics specified in Policy 15(c) the property meets, and determine the appropriate zone according to which number is higher.

Petitioner's arguments are contained in the general discussion of the second assignment of error, as well as in subassignments of error under the second assignment of error. We address each argument in turn.

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c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

"b. Non-impacted Forest Land Zone [F-1] Characteristics:

"(1) Predominantly ownerships not developed by residences or non-forest uses.

"(2) Predominantly contiguous, ownerships of 80 acres or larger in size.

"(3) Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm uses.

"(4) Accessed by arterial roads or roads intended primarily for forest management.

"(5) Primarily under commercial forest management."

"c. Impacted Forest Land Zone [F-2] Characteristics:

"(1) Predominantly ownerships developed by residences or non-forest uses.

"(2) Predominantly ownerships 80 acres or less in size.

"(3) Ownerships generally contiguous to tracts containing less th[a]n 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

"(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences."

A. Ownerships

In the general discussion under the second assignment of error, and in the third assignment of error, which we discuss below, petitioner challenges the hearings officer's interpretation of the term "ownerships" that appears in Policies 15(b)(1) and (2) and (c)(1) and (2). Petition for Review 18-19. The hearings officer concluded that, as the term is used in Policies 15(b)(1) and (2) and (c)(1) and (2), "ownerships" means the lots or parcels being proposed for rezoning. The hearings officer based his conclusion on the county board of commissioners' interpretation of those provisions in Ordinance No. PA 1236.[6] Record 769-790. Petitioner argues:

> "In this case, the subject property was part of a 242-acre parcel until 2006, 160 of which was zoned F-1. It was owned by Rosboro Timber Company * * *. The applicants purchased the property and promptly partitioned the 242-acre property into three separate parcels. They then transferred ownerships of those parcels to separate individuals so that the confines of the policy's definition of 'ownerships' could be overcome. Because of the recent ownership and land use actions on the subject property, * * *, in this case, it makes sense to consider the entire 242-acre property when considering the characteristics set forth in policy 15. This is not a case in which it makes sense to define the term 'ownerships' to mean only the area proposed for rezoning. Accordingly, the hearings official's interpretation as such is unreasonable."[7] Petition for Review 18-19.

Petitioner does not directly challenge the hearings officer's interpretation of the term "ownerships," based on the BOC's interpretation in Ordinance No. PA 1236, but instead appears to argue that that interpretation should not be applied in the present case, due to the history of common ownership of the subject property and two adjoining parcels, because it

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[6] In response to our remand in *Just v. Lane County*, 50 Or LUBA 399, 409 (2005), the BOC adopted Ordinance PA No. 1236, which interprets the term "ownerships." Record 769. The BOC found:

> "We find that the term 'ownerships' contained in the criteria of * * * Policy 15 should be considered as including only the land being proposed for the rezoning (unless other qualifiers in a particular characteristic compels a different result) because of the introductory language in Policy 15 * * *." Record 782.

[7] As noted, the property was originally three separate parcels that were consolidated and reconfigured by intervenors after they purchased it. Record 345-51.

does not "make sense." However, petitioner does not explain how the term "ownerships" can mean one thing as applied to one circumstance and another thing as applied to a different circumstance. Absent a focused challenge to the hearings officer's interpretation or the underlying BOC interpretation, petitioner's arguments on this point do not provide a basis for reversal or remand.

Petitioner also challenges the hearings officer's findings under Policy 15(c)(3). Policy 15(c)(3) provides that F-2 zoning is appropriate for lands that are "generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken * * *." *See* n 5. The hearings officer found:

> "The subject property abuts 13 tracts, 11 of which are under 80 acres in size. These tracts are comprised of 18 parcels, 11 of which are zoned RR-10. Rural residential zoning is applied to exception areas (nonresource land) that are devoted to rural housing. In addition, there are between 50 and 60 parcels within 2,000 feet of the subject property. An 'eyeball' assessment of the official zoning map of this area indicates that the vast majority of these parcels are less than 80 acres in size. In addition, a large number of these parcels are zoned RR-10, including Peaceful Valley Estates, a residential subdivision located about 400 feet to the west. The subject property meets [Policy 15(c)(3)]." Record 39-40 (footnote omitted).

Petitioner asserts that the hearings officer considered only the 18 parcels that have common boundaries with the subject property, and that "[the hearings officer] should have looked further to the east * * * where the parcels are much larger." Petition for Review 20. However, the findings specifically note that there are between 50 and 60 parcels within 2,000 feet of the subject property, the vast majority of which are less than 80 acres in size.

The hearings officer appears to have interpreted "generally contiguous to" as meaning both lands contiguous to and within 2,000 feet of the subject property. Petitioner does not explain why that interpretation is unreasonable. Moreover, even if the hearings officer had included land further to the east of the subject property, it appears that lands to the east of the subject property are generally no larger than 80 acres in size, and that

parcelization occurs on lands to the east as well. Record 823. In applying Policy 15(c)(3), the hearings officer did not err by limiting his analysis to lands that are contiguous to or within an approximately one-third mile radius of the subject property.[8]

B. First Subassignment of Error

Petitioner's first subassignment of error is:

> "The hearings official's interpretation of Policy 15 is contrary to Statewide Planning Goal 4 and the [RCP]." Petition for Review 20.

Policy 15 has been acknowledged by the Department of Land Conservation and Development as complying with Goal 4. Although petitioner nominally challenges the hearings officer's *interpretation* of Policy 15, petitioner identifies no particular ambiguity in Policy 15 that the hearings officer "interpreted" contrary to Goal 4. The gist of this subassignment of error appears to be that allowing F-1 zoned land to be rezoned to F-2 as permitted by Policy 15 is inconsistent with Goal 4. To the extent petitioner argues that Policy 15 itself violates Goal 4 or that any such inconsistency can be challenged in this appeal, we reject that argument.

The remainder of petitioner's argument under this subassignment of error is insufficiently developed for our review and as such, provides no basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The first subassignment of error is denied.

C. Second and Fourth Subassignments of Error

In his second and fourth subassignments of error, petitioner challenges the hearings officer's findings under Policies 15(b)(2) and 15(c)(2), which require a determination as to whether the property is less than, equal to, or more than, 80 acres in size. The hearings officer found that, for purposes of determining whether the subject property is more than,

[8] Our resolution of petitioner's arguments regarding the terms "ownerships" and "generally contiguous" makes it unnecessary for us to address intervenors' argument that petitioner is precluded under ORS 197.763(1) from raising those issues for the first time on appeal to LUBA.

equal to, or less than 80 acres in size, the 0.6-acre portion of the subject property that is zoned RR-10 should be excluded from the analysis, because Policy 15 by its terms applies only to properties designated as forest lands by the RCP. Record 37. *See* n 5. In his second subassignment of error, petitioner argues that by excluding the 0.6-acre portion zoned RR-10, the hearings officer misinterpreted the term "ownerships" as used in Policies 15(b)(2) and 15(c)(2). In his fourth subassignment of error, petitioner argues that in determining the size of the subject property an adjacent 1.8-acre area that, petitioner alleges, was the subject of an illegal property line adjustment in the 1990s should be included. On the last point, intervenors respond that the record indicates that the previous owner completed the necessary paperwork to formalize the property line adjustment in 2005. Record 360-72.

The hearings officer's finding that the 0.6-acre RR-10 zoned portion of the property should not be included in the calculation of the size of the property is reasonable given that Policy 15 by its terms applies only to forest land. *See* n 5. Further, we agree with intervenors that the record refutes petitioner's claim that an adjacent 1.8-acre area should be included as part of the subject property. Record 360-72.

These subassignments of error are denied.

D. Third Subassignment of Error

In his third subassignment of error, petitioner challenges the hearings officer's findings regarding Policies 15(b)(4) and (c)(4). Policy 15(b)(4) asks whether the property is accessed by roads intended for forest management, and Policy 15(c)(4) asks whether the property is provided with services and facilities intended for rural residences. *See* n 5. The subject property has access to a public county road, Laughlin Road, across the 0.6-acre portion of the property that is zoned RR-10. As we understand it, petitioner is arguing that the hearings officer's determination that the 0.6-acre parcel zoned RR-10 should not be included when calculating the size of the property for purposes of Policies 15(b)(2) and 15(c)(2) should bind the hearings officer's analysis under Policies 15(b)(4) and (c)(4), so that

the hearings officer cannot consider that RR-zoned portion when evaluating whether the property has access to a public road.[9]

Policies 15(b)(4) and (c)(4) are concerned with different subject matter than Policies 15(b)(2) and (c)(2). *See* n 5. In his analysis of Policies 15(b)(4) and 15(c)(4), the hearings officer found that the subject property has access to Laughlin Road, and that the primary use of Laughlin Road is to provide access to residentially-zoned properties. Record 38, 40-41. Thus, the hearings officer found, the subject property does not meet Policy 15(b)(4) but does meet Policy 15(c)(4). Other than to assert that the hearings officer's findings under Policy 15(b)(2) and (c)(2) bind his analysis of criteria that relate to totally different subject matter than the subject matter of Policy 15(b)(2) and (c)(2), petitioner does not explain why the hearings officer's findings are inadequate. We agree with the hearings officer's analysis.[10]

This subassignment of error is denied.

E. Fifth Subassignment of Error

Petitioner's fifth subassignment of error concerns Policy 15(b)(3), which asks whether the property is contiguous to other commercial forest or commercial farm lands. We quote petitioner's fifth subassignment of error in its entirety:

> "**In considering * * * Policy 15(b)(3) it is only as a result of the applicant's attempt to take their property out of commercial forestry use that they qualify for this characteristic.**
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> "If the illegal lot line adjustment parcel that has a border on the property is counted along with the parcel to the South, then the overall perimeter is equal

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[9] Petitioner argues:

> "The County erred in allowing the subject parcel, a legal lot that is 80.6 acres (and split into its component zoned pieces for Lane RCP Policy 15(b)(2) and (c)(2)) to be reassembled for the purposes of the rezoning criteria [in] Lane RCP Goal 4, Policy 15(b)(4) and Policy 15(c)(4)." Petition for Review 25.

[10] Our resolution of these subassignments of error makes it unnecessary for us to address intervenors' argument that petitioner is precluded under ORS 197.763(1) from raising those issues for the first time on appeal to LUBA.

> to 55% in commercial forestry use. Therefore, the ruling on the illegal lot creation, as well as, a ruling on the deed restrictions the applicants filed with the county are absolutely crucial to determining the nature of each characteristic." (Bold in original). Petition for Review 30.

This subassignment of error appears to repeat arguments rejected above. To the extent it goes beyond those rejected arguments, we do not understand it. Undeveloped arguments do not provide a basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The fifth subassignment of error is denied.

F. Sixth Subassignment of Error

In his sixth subassignment of error, petitioner argues that the county erred in determining that the subject property does not meet the characteristics of Policy 15(b)(5). Policy 15(b)(5) asks whether the property is primarily under commercial forest management.[11] The hearings officer found:

> "The subject property has been logged in the recent past and its soils are suitable for the commercial management of trees. However, in past years many adjacent and nearby property owners have raised serious concerns about the proposed application of industrial forest management practices (i.e. aerial herbicide spraying) to the subject property. I believe both the applicants and their neighbors would agree that traditional commercial forest management is impractical on the subject property.
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> "The applicants have taken affirmative steps to manage the subject property for conservation and non-commercial forestry purposes. To this end, non-commercially-viable tree species have been planted and labor-intensive, herbicide-free methods of noxious vegetation control have been employed. In addition, the subject property is subject to a deed restriction that prohibits commercial forestry and the Lane County Department of Assessment and Taxation has agreed to remove the property from its special assessment program for forest land.
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> "The applicants have gone beyond the utterance of platitudes regarding their intent to remove the subject property from commercial forest management

[11] Although petitioner cites Policy 15(c)(4) in his subassignment of error, we understand his argument to challenge the county's findings regarding Policy 15(b)(5).

practices. I believe that these affirmative steps demonstrate that the subject property no longer can be considered as being primarily under commercial forest management." Record 38-39.

Petitioner challenges this finding, arguing that (1) intervenors' management plan for the subject property could be revoked or amended, and (2) the use of mulch mats will not be effective. Petition for Review 31-32. However, petitioner does not explain why it was error for the hearings officer to conclude that, based on the evidence in the record regarding the existing management of the subject property for non-commercial purposes, the property is not "primarily under commercial forest management." RCP Goal 4, Policy 15(b)(5).

This subassignment of error is denied.

G. Seventh Subassignment of Error

In his seventh subassignment of error, petitioner challenges the hearings officer's findings regarding Policy 15(c)(4), which asks whether the property is provided with services and facilities intended for rural residences. The hearings officer found that public facilities and services, including electricity and telephone, are reasonably available to the subject property because the property has direct access to Laughlin Road and those services are available to other rural residences in the area from Laughlin Road.[12] Petitioner argues that

[12] The hearings officer found in relevant part:

> "One opponent has argued that the term 'provided' should be interpreted to mean that the subject property actually has those facilities and services in place rather than merely having access to them. While not disputing that this criterion could have been written more clearly, I do not believe that it should be read so narrowly.
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> " * * * * *
>
> "A better interpretation is that 'provided' means reasonably accessible and I believe that this is consistent with the Board of Commissioners interpretation for RCP Goal Four Policy 15.c.(4). Electrical and telephone utilities, for instance, are normally made available via the local road system. Properties that have direct access to the local road system therefore have direct access to those services and thus those services can be considered to be provided to the property. As a corollary, if a property does not have access to the local road system then the fire district, for example, cannot provide emergency service and that service cannot be considered to be 'provided' to the property. In the present case, the subject property has direct access to Laughlin Road via tax lot 528, which is a part of the same legal lot that

the hearings officer's interpretation of Policy 15(c)(4) is erroneous because, he argues, that provision requires that all public facilities and services must be connected to or physically present on the subject property *at the time of application*, not merely present nearby and easily extended to the subject property.

The hearings officer interpreted "provided with" to include circumstances where the subject property has access to nearby public facilities and services. Although petitioner disagrees with that interpretation, petitioner has not demonstrated that the phrase "provided with" must be interpreted narrowly to include only circumstances where public services already exist on the subject property. We think the hearings officer correctly interpreted the term "provided with" as used in Policy 15(c)(4).

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner restates the arguments made under the second assignment of error regarding the hearings officer's interpretation of the phrase "ownerships" as used in Policies 15(b)(1) and (2) and (c)(1) and (2). We have already determined that petitioner's arguments do not provide a basis for reversal or remand.

The third assignment of error is denied.

The county's decision is affirmed.

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comprises the subject property. There is no practical or legal impediment to the provision of the full range of rural public facilities and services provided along Laughlin Road to the subject property.

"* * * * *

"The subject property, as well as the other properties in the area that have access to Laughlin Road, has access to a full range of services normally available to a rural residence, including police and fire coverage, school, electricity, telephone, and solid waste disposal. To a large degree, the public facilities and services available in the area and Laughlin Road are utilized by rural residences. For this reason, I believe that the subject property meets this characteristic of Impacted Forest Lands." Record 40-41.