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

LANDWATCH LANE COUNTY,
Petitioner,

and

1000 FRIENDS OF OREGON,
Intervenor-Petitioner,

vs.

LANE COUNTY,
Respondent,

and

NIMPKISH LLC,
Intervenor-Respondent.

LUBA No. 2020-030

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean Malone filed a petition for review and reply brief and argued on behalf of petitioner.

Andrew Mulkey filed a petition for review and reply brief and argued on behalf of intervenor-petitioner.

No appearance by Lane County.

Michael E. Farthing filed the response briefs and argued on behalf of intervenor-respondent.

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

REMANDED 01/21/2021

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 a hearings officer approving an application for a forest template dwelling.

MOTION TO INTERVENE

1000 Friends of Oregon (1000 Friends) moves to intervene on the side of petitioner. There is no opposition to the motion and it is allowed.

Nimpkish LLC (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

FACTS

Intervenor's property is approximately 10 acres in size and zoned Impacted Forest Land (F-2). The property includes slopes of over 40 percent in some areas. The property is included on the county's inventory of Major Big Game Range. Intervenor applied for a forest template dwelling, and the planning director approved the application. Petitioner appealed the planning director's decision to the hearings officer, who held a hearing on the appeal and issued a decision affirming the planning director's decision and approving the application. This appeal followed.

PETITIONER'S FIRST ASSIGNMENT OF ERROR/1000 FRIENDS' ASSIGNMENT OF ERROR

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) (Goal 5) is "[t]o protect natural resources and conserve scenic

and historic areas and open spaces." OAR 660-015-0000(5). In order to implement Goal 5, local governments are required to "adopt programs that will protect natural resources." *Id.* The county's program to protect natural resources was acknowledged by the Land Conservation and Development Commission (LCDC) to comply with Goal 5 in 1984. The county's Goal 5 program includes a map and inventory of big game habitat determined to be "significant or important" within the meaning of OAR 660-016-0000(5)(c) (Big Game Habitat Inventory). *Save TV Butte v. Lane County*, 77 Or LUBA 22, 40 (2018).[1] As noted, the subject property is included on the Big Game Habitat Inventory.[2]

The county's Goal 5 program also includes a Rural Comprehensive Plan (RCP) policy, the meaning and application of which is at the heart of the parties' dispute in this appeal. RCP Goal 5, Flora and Fauna Policy 11, provides:

> "Oregon Department of Fish and Wildlife [(ODFW)] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential

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[1] LCDC adopted Goal 5 in 1974. It adopted its first set of Goal 5 rules in 1981, which were codified at OAR chapter 660, division 16. In 1996, LCDC adopted a second set of Goal 5 rules, which are codified at OAR chapter 660, division 23. Because LCDC acknowledged the county's program to protect natural resources in 1984, the 1981 rules applied. *See Delta Property Co., LLC v. Lane County*, 271 Or App 612, 616-19, 617 n 1, 352 P3d 86 (2015).

[2] The Lane County Wildlife Inventory maps were developed based on Oregon Department of Fish and Wildlife (ODFW) big game range maps and identify the location, quality, and quantity of big game range, identify conflicts with big game range, and explain how those conflicts are to be mitigated. Record 541-42.

> units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with [ODFW] officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."

RCP Goal 5, Flora and Fauna Policy 11, was developed in part by relying on a March 1982 Flora and Fauna Working Paper. The county (and DLCD) relied on the Flora and Fauna Working Paper as a background document to the RCP.[3]

During the proceedings below, petitioner and intervenor-petitioner (together, petitioners) argued that RCP Goal 5, Flora and Fauna Policy 11, applied to the application and that, because the density of the subject property with a forest template dwelling would be one dwelling unit per 10 acres, which would exceed the ODFW recommendations on overall density for protection of Major Big Game Range, the application could not be approved absent "resolution

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[3] The RCP characterizes the Flora and Fauna Working Paper as "background information * * * to be used to help interpret and understand [the RCP]." RCP Part 1(C). The Flora and Fauna Working Paper explains in more detail that the ODFW residential density recommendations for Major Big Game Range were one dwelling unit per 80 acres:

> "The primary conflict to big game, as mentioned earlier is residential use at certain densities. ODFW has recommended overall densities for Peripheral Big Game Range at one dwelling unit per 40 [acres]; for Major Big Game Range at one dwelling unit per 80 acres. Therefore, to restate the conflict: overall residential density greater than one dwelling unit/40 acres in Peripheral Range and one dwelling unit/80 acres in Major Range conflicts with habitat for big game." Record 542.

in accordance with OAR 660-16-000." The hearings officer concluded that RCP Goal 5, Flora and Fauna Policy 11, did not apply to intervenor's application for a forest template dwelling because that provision only applies to applications for a land division or a zone change:

> "Ultimately, the acknowledged zoning ordinance did not apply the Big Game limitations except in certain circumstances, such as in the Exclusive Farm Use Zone. And in that case only properties lying within a Major Big Game area were affected. No specific siting regulations for forest template dwellings located within a peripheral big game range were adopted by the acknowledged Chapter 16 zoning code. That is, the Big Game Range density standards were integrated into the zoning classifications and minimum lot size recommendations within the [F-2] Zone. The density recommendations were not applicable to existing parcels but were to be considered only in rezoning and land division applications. Therefore, the approval of dwellings under a template dwelling test does not involve a determination of consistency with Big Game Range density standards." Record 10 (footnote omitted).

In reaching that conclusion, the hearings officer relied in part on a July 1984 Department of Land Conservation and Development (DLCD) staff report, prepared by DLCD when the county was seeking LCDC acknowledgement of its Goal 5 program.[4] According to the hearings officer, the DLCD staff report and

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[4] The hearings officer found:

> "The DLCD staff report of July 19, 1984 indicates a concern with the minimum lot sizes in the resource zones coupled with a lack of siting and clustering requirements. The minimum parcel size was the County's chosen method to comply with the ODFW recommended maximum densities. The recommended densities—

the Flora and Fauna Working Paper demonstrate that the county intended that the primary method for achieving the recommended ODFW density standards was the creation of zoning areas, the adoption of minimum parcel sizes to implement the density standards, and the adoption of siting and clustering standards for new dwellings in the F-2 zone. The hearings officer also relied on testimony from two former county planners that RCP Goal 5, Flora and Fauna Policy 11, was intended only to apply to land divisions and zone changes. Record 9-10.

Petitioner's first assignment of error and 1000 Friends' sole assignment of error challenge the hearings officer's interpretation of the density recommendations referenced in RCP Goal 5, Flora and Fauna Policy 11, as being

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> one dwelling per 40 acres in the peripheral big game range—depended entirely on the size of the area being studied. When considering an 80-acre study area, the recommendation would only allow two dwellings. However, the recommendation was intended to apply at a much higher level; which is why the County originally anticipated dividing the County into regions. Ultimately, the County, with the blessing of DLCD and ODFW, decided to rely on minimum parcel sizes to implement the ODFW recommendations. This view is borne out in DLCD's staff report which stated: '*Without siting clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable.)*' At this time, Lane County's proposal was to have a minimum lot size of 40 acres for the F-1 Zone, minimum lot size of 20 acres in the F-2 Zone, minimum lot size of 40 acres in the EFU Zone, and no clustering or siting standards for dwellings." Record 9 (emphasis in original).

inapplicable to intervenor's forest template dwelling application.[5] Petitioners argue that the hearings officer's conclusion that the density recommendations were "integrated into the zoning classifications and minimum lot size recommendations within the [F-2] Zone" has no support in the provisions of the F-2 zone. Petitioners argue that the hearings officer failed to give any effect to the second sentence of RCP Goal 5, Flora and Fauna Policy 11, which, according to petitioners, prohibits the county from allowing residential density above the ODFW-recommended limits without first conducting an Economic, Social, Environmental, and Energy (ESEE) analysis under the applicable Statewide Planning Goal 5 rule. Petitioners argue that the hearings officer's interpretation contravenes ORS 174.010's prohibition on "insert[ing] what has been omitted."[6]

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[5] OAR 660-006-0027(6)(a) provides, in relevant part, that "[a] proposed 'template' dwelling under this rule is allowed only if" "[i]t will comply with the requirements of an acknowledged comprehensive plan, acknowledged land use regulations, and other provisions of law." OAR 660-006-0025(6) provides that "[n]othing in this rule relieves governing bodies from complying with other requirements contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g., Goal 5) that exist on forest lands."

[6] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Intervenor responds that, based on the testimony of the former county planners and the legislative history in the record regarding LCDC's acknowledgement of the county's Goal 5 program, the hearings officer correctly concluded that RCP Goal 5, Flora and Fauna Policy 11, does not apply to a forest template dwelling application for property inventoried as Major Big Game Range. In intervenor's view, the county's program to protect Major Big Game Range relies on the F-2 zone's minimum parcel size of 80 acres for new land divisions and clustering standards in Lane Code (LC) 16.211, but the LC includes no density standards for dwellings on existing parcels.

We review the hearings officer's interpretation of the RCP and the LC to determine whether the hearings officer "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D). In construing the law, we will consider the text and context of the law at issue in order to determine the intent of the enacting body. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). For the reasons explained below, we agree with petitioners that RCP Goal 5, Flora and Fauna Policy 11, applies to intervenor's application for a forest template dwelling on property included on the county's Big Game Habitat Inventory of Major Big Game Range.

First, the hearings officer's conclusion that RCP Goal 5, Flora and Fauna Policy 11, applies only where an application is for a land division or a zone change has no support in the text that policy or in any of the LC provisions

governing the F-2 zone. The plain language of RCP Goal 5, Flora and Fauna Policy 11, does not refer to or limit its application to land divisions and zone changes. Context provided by the Flora and Fauna Working Paper does not refer to or limit the county's Goal 5 program to applications for land divisions and zone changes.[7] For those reasons, we agree with petitioners that the text and

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[7] The Flora and Fauna Working Paper explains:

> "The following paragraphs basically outline procedures to be used for implementation of the ODFW density recommendations in big game ranges. The premise is to work overall density figures into minimum lot size recommendations for regions of the County, rather than postponing the issue by referrals to ODFW for every land division application. The anticipated result is to base zoning by region on the overall residential densities or ODFW minimum parcel size recommendations, thereby creating no conflict with Goal 5.
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> "The County will be divided into regions convenient for planning purposes. These have not yet been determined but will probably result in 10-20 regions in the County.
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> "Within these regions, determinations will be made of acreages, number of existing residences, and additional number of residences allowable to still fall within the overall density level. Built upon and committed areas are subtracted out, as they are treated as Impacted Range. From the figure of remaining residences and acreage, a residential carrying capacity will be determined. This figure, or the ODFW figure of 40 or 80 acres, whichever is lesser, will be recommended in the region for residential density for big game purposes. This, along with other resource land requirements will be used to determine appropriate zoning in an area.

context of RCP Goal 5, Flora and Fauna Policy 11, does not support the hearings officer's interpretation. Rather, the hearings officer's interpretation "insert[s] what has been omitted," in contravention of ORS 174.010, and gives no effect to the second sentence of RCP Goal 5, Flora and Fauna Policy 11. Moreover, a decision approving an application to divide or rezone land generally does not authorize any development, let alone residential development, but rather is the precursor to an application for future residential development. Thus, it is difficult to see how the ODFW density standards would apply to either of those types of applications at all, let alone apply *solely* to those types of applications.[8] Finally,

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> "If this figure is ever exceeded, it constitutes a conflict with Big Game Range. ESEE consequences must be determined and analyzed at that time. Prior to dividing the County into regions and making the above determinations, it is impossible to determine if conflicts will exist in any regions. The expectation, based on examining trial areas, is that the recommendations of ODFW can be incorporated without creating a conflict.
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> "Special uses which may be allowed in resource zones have the potential of conflicting with Big Game Range. To preclude that conflict, criteria will be incorporated into the Special Use review considering the effect on big game. Recommendations will be requested from ODFW and considered as part of the review process." Record 542-43.

[8] An application to rezone property could trigger OAR 660-023-0250(3)(b), which provides that a local government is required to apply Goal 5 to an application for a post-acknowledgment plan or land use regulation amendment (PAPA) only if "[t]he PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site."

the testimony of the former county planners on which the hearings officer relied is not particularly persuasive, given that it also is not supported by the text of RCP Goal 5, Flora and Fauna Policy 11, or any provision of the LC.

As explained above, the hearings officer's view of the county's Goal 5 program is that the county intended to rely on (1) the creation of zoning areas, (2) the adoption of minimum parcel sizes to implement the density standards, and (3) the adoption of siting and clustering standards for new dwellings in the F-2 zone. The first sentence of RCP Goal 5, Flora and Fauna Policy 11, refers to the process that the county was supposed to follow, which included taking actions to identify "10-20 regions" and to "base zoning by region on the overall residential densities or ODFW minimum parcel size recommendations." *See* n 7. All parties agree that, during the 36 years since its Goal 5 program was acknowledged, the county has never taken the steps described in the first sentence and has never created any "regions" or "base[d] zoning by region on the overall residential densities or ODFW minimum parcel size recommendations."

1000 Friends argues that the county's failure to take the steps described in the first sentence of RCP Goal 5, Flora and Fauna Policy 11, means that Goal 5 applies directly to the county's permit decision. We disagree with that argument. RCP Goal 5, Flora and Fauna Policy 11, is acknowledged to comply with Goal 5 and Goal 5 does not apply directly to the county's decision. ORS 197.175(2)(d).

However, the county's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW

minimum parcel size recommendations does not mean that the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in RCP Goal 5, Flora and Fauna Policy 11, or that the density recommendations simply do not apply. Rather, the *second sentence* of RCP Goal 5, Flora and Fauna Policy 11, remains operative, and it provides that "[a]ny density above [the ODFW-recommended density] limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000."[9] The second sentence is not tethered to or derivative of the first sentence, which envisions the creation of zoning areas that the county has never completed. The second sentence does not mention or refer to zoning areas. To find that the second sentence simply has no effect absent the creation of zoning areas would be to allow the county to fail to perform an action that it assured LCDC it would perform in order to obtain acknowledgement of its Goal 5 program, and it would have the effect of eliminating the Goal 5 protections for Big Game Range that LCDC understood were in place when it acknowledged the program. Moreover, the county must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential

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[9] The hearings officer's decision never directly addresses the second sentence of RCP Goal 5, Flora and Fauna Policy 11.

development through density standards, in a manner that is not inconsistent with Goal 5. ORS 197.829(1)(d).

This view is supported by language in DLCD's final staff report leading to acknowledgement of the county's Goal 5 program. In its response to some objections to the county's proposed program, DLCD explained its understanding of why the county's program did not conflict with Goal 5:

> "Objectors are not correct that [RCP Goal 5, Flora and Fauna Policy 11,] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made. This would require a plan amendment and could only take place if justified based on the Goal 5 analysis*." Record 212-13 (emphasis added).

We understand DLCD to have concluded that the county's Goal 5 program protects habitat because it adopts residential densities in accordance with ODFW's recommendations and requires that, if "proposals are made" that exceed those densities, the county will conduct an ESEE analysis for that individual proposal. Contrary to the hearings officer's decision, RCP Goal 5, Flora and Fauna Policy 11, includes no language that limits its application to land divisions and zone changes. The hearings officer's decision is not consistent with ORS 174.010 because it inserts language into the policy.

Moreover, the hearings officer's interpretation that the county's Goal 5 program to protect Big Game Range is implemented by provisions of the LC, specifically the F-2 zone's minimum parcel size of 80 acres for new land

divisions and the clustering standards in LC 16.211(5), is not supported by anything in the text of the F-2 zone provisions. The siting and clustering standards in LC 16.211(5)(a) do not quantify a residential density standard. A requirement to site dwellings "[n]ear dwellings on other tracts" is not a density standard. LC 16.211(5)(a)(i). Nor do the rest of the F-2 zone provisions support the hearings officer's interpretation. The use table for the F-2 zone lists six types of allowed dwellings, five of which do not require any particular parcel size. The F-2 zone does not provide any residential density standard at all. As we explained in *Cattoche v. Lane County*, the county has not quantified a residential density standard in the F-2 zone but "instead use[s] the ODFW 40-acre standard [referenced in RCP Goal 5, Flora and Fauna Policy 11, and the Flora and Fauna Working Paper] for areas inventoried as Peripheral Big Game Range." 79 Or LUBA 466, 479 (2019). Similarly, here, we conclude that the county uses the one-dwelling-per-80-acres standard referenced in RCP Goal 5, Flora and Fauna Policy 11, and the Flora and Fauna Working Paper to determine the allowed residential density in areas inventoried as Major Big Game Range.

In conclusion, we agree with petitioners that the hearings officer's conclusion that RCP Goal 5, Flora and Fauna Policy 11, does not apply because the application does not involve a land division or a zone change improperly construes RCP Goal 5, Flora and Fauna Policy 11. There is no dispute that the density of the subject property with the proposed dwelling would exceed one dwelling unit per 80 acres. Accordingly, the proposed dwelling "shall be

considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000." RCP Goal 5, Flora and Fauna Policy 11.

Petitioner's first assignment of error and 1000 Friends' assignment of error are sustained.

PETITIONER'S SECOND ASSIGNMENT OF ERROR

As noted, the location of the proposed dwelling is in an area of the property that contains steep slopes.[10] RCP Goal 7, Policy 3 provides:

> "When extensive or drastic safeguards must be employed in conjunction with development proposals, the immediate and ultimate impact (including financial and economic considerations) of such safeguards on the environment and the public shall be considered."

In appealing the planning director's decision, petitioner argued that RCP Goal 7, Policy 3 (Policy 3) applied and that the planning director failed to apply it to the application. Record 608.

During the proceedings below, intervenor provided a geotechnical evaluation of the proposed dwelling site and the property (Level I report). The Level I report determined that the proposed driveway location did not present a

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[10] The decision states that the home site is "located at least 30 feet from a ravine ridge or slope greater than 40%" and that, "[w]est of the home site, there is a 17% downslope." Record 5-6.

significant landslide hazard, and recommended a more detailed geotechnical investigation of the proposed dwelling site prior to development.[11] Record 11.

The hearings officer found that the general location of the property within a very high-risk landslide area "is an indication that potential development problems may exist." Record 12. While the hearings officer expressed doubt that Policy 3 applied to the application, the decision applied Policy 3 and found:

> "In regard to Policy #3, the Level I [report] did not identify extensive or drastic safeguards that had to be employed in conjunction with [intervenor's] development proposal. However, the location of the development within a very high landslide hazard area is an indication that potential development problems may exist. Thus, [the Level I report] wisely recommends that this evaluation be a prelude to a more comprehensive evaluation (Level II) when the actual development is proposed through the building permit process.
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> "In a prior appeal of a template dwelling in the general area of the subject property, this Hearings Official addressed the implications of [*Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992),] in regard to LC 16.005(2). In its decision in the *Rhyne* case, LUBA noted that [the] local government had the option of deferring its determination of compliance [with] a standard to a subsequent proceeding. Lane County has a process where an applicant may be compelled to apply for a Type III Modification of Decision when a substantial change in an approved application is necessary. This review would be before the Hearings Official and would require notice to the Appellant.
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> "Thus, the building inspector will review the Level II * * * report provided by [intervenor's] engineer. Section 1803 of the Oregon

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[11] The decision states that slopes for the proposed driveway are between zero and 14 percent. Record 4.

> Structural Specialty code gives the Building Official the authority to require and review geotechnical information. If the Building Official finds problems that would require a restriction on mechanical grading and/or clearing, that issue would be reviewed by the Hearings Official. Condition of Approval #13 has been modified to reflect this change." Record 12 (footnotes omitted).[12]

In *Rhyne*, we explained a local government's options in evaluating the evidence submitted to it to support compliance with an approval criterion:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and

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[12] We note that the decision includes a purported quote of "LC 16.005(2)" that does not appear to be an accurate quote of that LC provision. Record 12. The language quoted by the hearings officer as LC 16.005(2) appears to be a quote of a provision of the Metro Plan, the regional plan for the cities of Eugene and Springfield and the county.

> hearing for second stage decisions in other circumstances." 23 Or LUBA at 447-48 (footnotes omitted) (citing *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988)).

In its second assignment of error, petitioner argues that the hearings officer erred in deferring a determination of whether Policy 3 was met to a later-stage proceeding that does not allow for notice and an opportunity for a hearing.[13] Intervenor responds that the hearings officer found that compliance with Policy 3 is feasible, as allowed by *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984), and that the later Level II report that is required by Condition 13 is therefore not entitled to public review and comment.[14]

The hearings officer's decision regarding Policy 3 is somewhat unclear, and the parties' dispute boils down to a dispute over whether the hearings officer's decision follows the first *Rhyne* option, as intervenor maintains, or the third *Rhyne* option, as petitioner maintains. Given the decision's explicit

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[13] Petitioner also cites RCP Goal 7, Policies 1 and 2, but does not develop any argument regarding why those policies apply or are not met.

[14] Condition 13 provides:

> "Excessive grading, excavation and clearing shall be avoided when detrimental to soil stability and erosion control. The character of soils for fills and the characteristics of the subject property made usable by means of fill shall be suitable for the intended purpose. Prior to building approval, [intervenor] shall submit a Level II * * * report to the County. If the building inspector finds problems that would require a restriction on mechanical grading and/or clearing, that issue shall be reviewed by the Hearings Official through a Type III Modification of Decision." Record 7.

reference to the third *Rhyne* option ("LUBA noted that [the] local government had the option of deferring its determination of compliance [with] a standard to a subsequent proceeding"), we understand the hearings officer to have determined that the evidence provided by the Level I report was insufficient to determine whether Policy 3 was met and to have deferred that determination to a later stage approval process through Condition 13. The problem with Condition 13 is that it places review and approval of the future Level II report solely in the discretion of the building inspector, and only if the building inspector concludes that there are "problems that would require a restriction on mechanical grading and/or clearing" would that issue be referred by the building inspector to the hearings officer for review. Such a closed circle of decision making that excludes public participation is inconsistent with *Rhyne*.

The second assignment of error is sustained.

PETITIONER'S THIRD ASSIGNMENT OF ERROR

Former ORS 215.750(4)(d) (2017), *renumbered as* ORS 215.750(5)(d) (2019), prohibits a template dwelling if the property is part of a tract that already contains a dwelling. ORS 215.010(2) defines "tract" as "one or more contiguous lots or parcels under the same ownership." The subject property is owned by intervenor, a limited liability company. The Goodmans own adjacent properties to the west and the east of the subject property, at least one of which contains a dwelling. Record 685-86. The Goodmans are the registered agents of and have a membership interest in intervenor.

The hearings officer concluded that the subject property is not part of a tract because the owner of the subject property is not the owner of the adjacent properties and that the fact that the Goodmans may control the owner of the subject property or own the limited liability company that owns the subject property is not relevant for purposes of applying the operative terms of the definition of "tract." Petitioner argues that the subject property is part of a tract that is effectively owned by the Goodmans and, therefore, the subject property is not allowed a dwelling. Petitioner argues that viewing the subject property and adjacent properties as under different ownership is "contrary to the underlying policy of the template dwelling statute's prohibition on allowing more than one dwelling on a tract." Petition for Review 30-31. Intervenor responds that the hearings officer correctly interpreted *former* ORS 215.750(4)(d) (2017) to conclude that the subject property is not under the same ownership as the adjacent properties.

Petitioner has not developed any argument that persuades us to conclude that the subject property and adjacent properties are "under the same ownership," within the meaning of ORS 215.010(2), where title to the properties is vested in different owners. Absent any developed argument regarding the meaning of the phrase "under the same ownership" in the context of *former* ORS 215.750(4)

(2017), petitioner's arguments in this assignment of error do not provide a basis for reversal or remand.[15]

The third assignment of error is denied.

The county's decision is remanded.

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[15] In *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2019-105, Jan 31, 2020), we rejected the petitioner's argument that two properties constituted a "tract" because they were "under the same ownership" within the meaning of ORS 215.010(2), where title to one property was held in the name of an individual person and title to an adjacent property was held in the name of the same person as "trustee" of a trust. *Id.* at ___ (slip op at 10-13).