BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT COSNER and CHERYL COSNER,
Petitioners,

and

RICHARD STEWART, TED REID,
TOM BUELL, JO LYNN BUELL,
BARBARA CLUTTER, KEN SCHIEWE,
IDA SCHIEWE, GREG TSIATSOS,
DORIS TSIATSOS, JIM HATLEY,
HERB MARCH and FRED REICHOW
Intervenors-Petitioners,

vs.

UMATILLA COUNTY,
Respondent,

and

CONFEDERARTED TRIBES OF THE
UMATILLA INDIAN RESERVATION,
Intervenor-Respondent.

LUBA Nos. 2011-070, 2011-071 and 2011-072

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Edward J. Sullivan, Portland, filed a joint petition for review and argued on behalf of petitioners and intervenors-petitioners Richard Stewart, Jo Lynn Buell, Tom Buell, Ken Schiewe, Ida Schiewe, and Jim Hatley. With him on the brief were Jennifer M. Bragar, Carrie A. Richter, Garvey Schubert Barer PC and Minnick Hayner.

James K. Hayner, Walla Walla, Washington, filed a joint petition for review on behalf of intervenor-petitioner Ted Reid. With him on the brief were Jennifer M. Brager, Edward J. Sullivan, Carrie A. Richter, Garvey Schubert Barer PC and Minnick Hayner.

Greg Tsiatsos and Doris Tsiatsos, Starkey, Fred Reichow, Barbara Clutter and Herb March, Milton-Freewater, represented themselves.

Douglas R. Olsen, County Counsel, Pendleton, filed a response brief and argued on behalf of respondent.

Joe Pitt, Pendleton, filed a response brief on behalf of intervenor-respondent.

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

REMANDED 01/12/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's adoption of three ordinances that amend the county's regulations regarding commercial wind power generation facilities (wind facilities).

MOTION TO INTERVENE

Confederated Tribes of Umatilla Indian Reservation moves to intervene on the side of respondent. No party objects to the motion, and it is granted.

MOTION TO TAKE EVIDENCE

Petitioners move to accept into LUBA's record a copy of a lease agreement petitioners have entered into with a wind facility developer, which petitioners contend may be necessary to establish injury to petitioners and constitutional standing under federal law.

OAR 661-010-0045(1) allows LUBA to consider extra-record evidence "in the case of disputed factual allegations in the parties' brief concerning * * * standing * * *." Petitioners alleged in their petition for review that they have entered into a lease agreement with a wind facility developer, and no party in this appeal has raised any dispute regarding that allegation, or challenged petitioners' standing. The motion to take evidence is denied.

FACTS

Commercial Wind power generation facilities (wind facilities) are allowed as conditional uses in the county's exclusive farm use zones pursuant to ORS 215.283(2)(g).[1] In 2003, the county adopted conditional use standards for wind facilities. The 2003

---

[1] ORS 215.283(2) provides in relevant part:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(g) Commercial utility facilities for the purpose of generating power for public use by sale."

conditional use standards required that such facilities be set back a minimum 3,250 feet from property zoned for residential use. In 2009, the county undertook a lengthy review of those regulations, in part to address complaints regarding noise from existing facilities. In 2011, after conducting a number of hearings before the planning commission and county commissioners, the county adopted three ordinances amending its conditional use standards.

In relevant part, Ordinance 2011-05 provides for a two-mile setback from any urban growth boundary, unless the city council of the affected city authorizes a lesser setback. Ordinance 2011-06 amends the conditional use standards to impose a two-mile setback from any "rural residence," unless the landowner records a written waiver for a lesser setback.[2] Finally, Ordinance 2011-07 adopts additional regulations protecting the Walla Walla watershed, and prohibits construction related to wind facilities, including access roads, on erodible soils or within two miles of streams or tributaries that contain federally listed species. Petitioners challenge these provisions as being unconstitutional or inconsistent with applicable statutes and statewide planning goals.

---

[2] Ordinance 2011-05 and 2011-06 amend the county Land Development Ordinance (LDO) 152.616(HHH)(6)(a) to provide, in relevant part:

> "Setbacks. The minimum setback [from a wind facility] shall be a distance of not less than the following.
>
> "(1) From a turbine tower to a city urban growth boundary (UGB) shall be two miles, unless a city council action authorizes a lesser setback. * * *
>
> "(2) From turbine tower to land zoned Unincorporated Community (UC) shall be 1 mile, unless the landowner of the land zoned UC authorizes by written waiver a lesser setback and the waiver is recorded with the county deed records.
>
> "(3) From a turbine tower to a rural residence shall be 2 miles, unless the landowner of the rural residence authorizes by written waiver of a lesser setback and the waiver is recorded with the county deed records. For purposes of this section, a 'rural residence' is defined as a legal, conforming dwelling existing on the parcel at the time an application is deemed complete. The measurement of the setback is from the centerline of the turbine tower to the centerpoint of the residence."

FIRST ASSIGNMENT OF ERROR

A. Introduction

Under the first assignment, petitioners advance both constitutional and sub-constitutional challenges to the setback waiver provisions of Ordinances 2011-05 and 2011-06. Typically we would address constitutional challenges only after first considering and rejecting all sub-constitutional challenges. For the reasons set out below, we reject petitioners' two sub-constitutional challenges, and therefore must address the constitutional challenges in any case. However, because the constitutional analysis best frames the issues, we turn first to the constitutional challenges.

B. Article I, Section 21 Delegation Clause

Petitioners contend that allowing city councils or private landowners to "waive" the two-mile setbacks imposed under Ordinances 2011-05 and 2011-06 unlawfully delegates legislative authority in violation of Article I, section 21 of the Oregon Constitution.

Article I, section 21 provides in relevant part that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *." The delegation clause has been construed to prohibit laws that delegate to another governmental entity the power to amend the enacting body's legislation. *Advocates for Effective Regulation v City of Eugene*, 160 Or App 292, 311, 981 P3d 368 (1999); *Barnes v. City of Hillsboro*, 61 Or LUBA 375, 392, *aff'd* 239 Or App 73, 243 P3d 139 (2010). The delegation clause has also been construed to prohibit laws that authorize private landowners to initiate judicial proceedings that result in de-annexation of land from a city, as an effective delegation of the power to amend the city charter. *Schmidt v. City of Cornelius*, 211 Or 505, 316 P2d 511 (1957).

Petitioners argue that Ordinances 2011-05 and 2011-06 violate the delegation clause, by authorizing a city council or a private landowner to waive the two-mile setback and to substitute a lesser setback determined solely at the discretion of the city council or

landowner, based on no standards at all. According to petitioners, the county has no choice but to accept any such lesser setback in approving a conditional use permit.

The county responds that no impermissible delegation will occur under Ordinances 2011-05 and 2011-06, because in adopting those ordinances the county has legislatively determined that either a two-mile setback or a lesser setback is in the public interest. Further, the county agues that under Ordinances 2011-05 and 2011-06 when a two-mile setback is waived to a lesser setback it will necessarily be the *county* that will waive the setback during the proceedings before the county on a permit application for a wind facility, not a city council or a private landowner.

We agree with petitioners that, as it presently framed, the waiver provisions of Ordinances 2011-05 and 2011-06 run afoul of the delegation clause of Article I, section 21. The delegation clause is intended to proscribe laws that leave "wholly to persons outside of the Legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be." *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 463, 49 P2d 1140 (1935). In *Barnes*, we held that a city decision applying an airport zone that authorized "air passenger and air freight services that are consistent with levels identified in most current, adopted Master Plan" for a public airport violates the delegation clause. We concluded that the city had "prospectively" delegated to the airport manager, the Port of Portland, the ability to *amend* the uses the city code allowed in the airport zone, by referencing the airport's "most current" Master Plan rather than the then-existing Master Plan (which did not provide for air passenger or freight services at all). We also concluded that the city had impermissibly delegated to another entity, the airport, the ability to determine what uses are allowed in the airport zone, by effectively granting the airport the sole discretion to determine whether passenger or freight services are allowed, and at what levels. *But see* the concurring opinion of Holstun, Board Chair, 61 Or LUBA at 401-02 (disagreeing that a city zone that allows passenger or freight service, but requires that the level of such

services must be consistent with an airport master plan that will be adopted by the Port of Portland, violates the delegation clause).

In the present case, even more clearly than in *Barnes*, the county has authorized another entity to determine whether there is a "law" at all and if so what its terms will be. The relevant "law" here is the setback from wind facilities, which under Ordinances 2011-05 and 2011-06 a city or landowner can unilaterally reduce to any distance less than two miles, theoretically to a distance of zero, or no setback. The city or landowner in that circumstance is in the uniquely situated position to determine whether there shall be a county setback at all, and if there is, the extent of that setback. We disagree with the county that no impermissible delegation occurs because the county has legislatively authorized a process for other entities to determine a lesser setback. We also disagree that it is the county, rather than the city or landowner, that will effectively waive the two-mile setback and determine the lesser setback. As we understand the challenged ordinances, once the city or landowner has recorded a waiver that embodies a lesser setback, the county has no choice but to impose that lesser setback in granting the conditional use permit.

The constitutional proscription on delegation is subject to several recognized exceptions, and it is possible that modest changes in the terms of Ordinance 2011-05 and 2011-06 could avoid any impermissible delegation. For example, the legislature can delegate, at least to another agency of government, "the power to determine the existence of facts or circumstances mentioned in the law upon which the law will become operative." *State v. Long*, 315 Or 95, 100, 843 P2d 420 (1992) (quoting *Sargent*, 252 Or 579, 580, 449 P2d 845 (1969). Thus, if the county ordinances delegated to the city council the ability to approve a lesser setback, based on facts or circumstances set out in the county ordinances, that would presumably pass constitutional muster. Other potential exceptions might apply. *See Schmidt*, 211 Or at 519-20 (the operation or "taking effect" of a law may by its own terms

be made to depend upon a contingency set out in the law, without violating the delegation clause).[3]

However, we do not see that the challenged provisions—which allow for a city council or a private landowner to waive the county's two-mile setback and substitute for it a lesser setback the extent (and practical existence) of which is determined solely at the uncabined discretion of the city or landowner—fit into any recognized exception. For the reasons set out above, we agree with petitioners that the waiver provisions of Ordinances 2011-05 and 2011-06 violate Article I, section 21 of the Oregon Constitution. This sub-assignment of error is sustained.

C. Due Process Clause

Petitioners also argue that granting wind facility neighbors the arbitrary and unreviewable power to determine the setbacks applicable to a wind facility violates the Due Process Clause of the United States Constitution, citing *Eubank v. City of Richmond*, 226 US 137, 33 S Ct 76, 57 L Ed 156 (1912), *State of Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 US 116, 49 S Ct 50, 73 L Ed 210 (1928) and *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 140 Or 600, 15 P2d 391 (1932), *Anderson v. Peden*, 284 Or 313, 329, 587 P2d 59 (1978).[4]

The county offers the same responses above, that the county has legislatively determined that waivers of the setback are in the public interest, and that it is the county rather than the city or landowners that effectively waive the setback, but those responses are equally unpersuasive.

---

[3] Of course, the county could avoid any delegation issue at all by simply providing for a code variance process for the county to determine a lesser setback, based on code variance standards of some kind. Whether such variance standards could permissibly include due consideration of whether neighboring cities or landowners have consented to the requested variance is less clear to us.

[4] The Fourteenth Amendment to the United States Constitution provides, in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law * * *."

The cases cited by petitioners provide some support for their position that the setback waiver provisions of Ordinances 2011-05 and 2011-06 are inconsistent with the federal Due Process Clause. In *Eubank*, the Court held that a code provision granting project neighbors the arbitrary power to determine the project's building setback from the street violated the Due Process Clause. In *Roberge*, the Court reversed the denial of a permit to construct a group home pursuant to a code provision requiring that the developer obtain the written consent of two-thirds of the property owners within 400 feet of the building. In *Baker*, the Oregon Supreme Court held unconstitutional a code requirement that the applicant for a parochial school in a residential zone obtain the signatures of 50 percent of neighboring property owners. In *Anderson*, the Oregon Supreme Court appeared to agree with a ruling of the circuit court that the county board of commissioners erred to the extent it denied a conditional use permit based on whether the majority of the neighboring property owners opposed it.

The cited cases possibly represent a flavor of Due Process jurisprudence no longer in vogue. They also all involve project *denials* based on code provisions that effectively gave project neighbors completely standardless vetoes over the project. The present case is somewhat different, in that the county's code establishes a two-mile setback, but allows project neighbors to *waive* that two-mile setback and substitute a lesser setback. However, we see no meaningful distinction based on that difference. As in the cited cases, the exercise of the neighbors' discretion under Ordinances 2011-05 and 2011-06 to waive or not to waive the setback is completely unfettered. If Ordinances 2011-05 and 2011-06, or the ordinances at issue in the above cases, prohibited the proposed development, but allowed that prohibition to be lifted if project neighbors so approved, we believe that the standardless exercise of that approval would be inconsistent with the Due Process Clause, even in circumstances where the project neighbors in fact granted approval, and the applicant benefited thereby. We conclude that the waiver provisions of Ordinances 2011-05 and 2011-06, by granting project

neighbors the arbitrary and standardless power to determine whether and to what extent there is a setback for wind facilities, violate the Due Process Clause. This sub-assignment of error is sustained.

D. Consistency of Waiver with Statutory Procedures

Petitioners contend that the waiver provisions of Ordinances 2011-05 and 2011-06 violate the statutory procedures for issuing permits at ORS 215.402 to 215.437 and for conducting quasi-judicial land use hearings at ORS 197.763. According to petitioners, Ordinances 2011-05 and 2011-06 do not require the waiver to be granted prior to the county's issuance of a decision approving a wind facility. We understand petitioners to argue that under Ordinances 2011-05 and 2011-06 the county could potentially issue a wind facility permit with a two-mile setback, but subsequent to that permit issuance the applicant and project neighbors could agree to a lesser setback outside any public hearing process, and recordation of that post-hoc agreement would then, without any further public process, supply the applicable setback. If so, petitioners argue, that procedure would violate ORS 197.736 and ORS 215.402 to 215.437, which generally require the county to approve permits after conducting a public hearing in which interested persons can participate regarding whether the proposal complies with applicable approval criteria, including required setbacks.

We understand the county to dispute that Ordinances 2011-05 and 2011-06 authorize wind facility permits to be modified after they are issued, by the subsequent unilateral actions of the applicant and project neighbors. The county argues that all dispositions regarding the setback, including waivers, will be made in the course of a public proceeding to approve or deny the wind facility permit, and that the final permit, when issued, will control subsequent development, unless further modified by the county following the appropriate public process for modifying a permit.

Petitioners cite nothing in Ordinances 2011-05 and 2011-06 that would authorize a post-hoc modification of a wind facility permit in the manner petitioners argue is possible.

The ordinances are silent regarding procedure, and do not purport to vary any of the county procedures that implement ORS 197.736 and ORS 215.402 to 215.437. Petitioners have not demonstrated that Ordinances 2011-05 and 2011-06 authorize procedures inconsistent with ORS 197.763 and ORS 215.402 to 215.437. This sub-assignment of error is denied.

E. Consistency of Waiver with Comprehensive Plan Goal 5 Policies

Petitioners argue that granting wind facility neighbors the arbitrary power to waive the two-mile setback and substitute a lesser setback is inconsistent with county comprehensive plan policies protecting natural resources pursuant to Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). As an example, petitioners argue that waiver of the two-mile setback could result in the location of wind facilities, or more wind facilities than would otherwise be permitted, in areas that are identified as big game habitat protected under various comprehensive plan policies, yet Ordinances 2011-05 and 2011-06 do not require wind facility neighbors to consider such plan policies in exercising their arbitrary discretion to grant or withhold a waiver of the two-mile setback.

Conditional uses such as wind facilities under the county's plan and code are either subject to review for consistency with comprehensive plan policies or they are not, depending on the relevant terms of the code and plan. We do not see how the waiver provisions of Ordinances 2011-05 and 2011-06 affect that calculus. If due to a setback waiver a wind facility will be sited in a location that under the county's code and plan requires analysis for consistency with comprehensive plan policies protecting Goal 5 resources, then the county would presumably conduct that analysis as part of the permit proceeding. If the proposed location is inconsistent with applicable Goal 5 policies, then the county would presumably deny the application for that reason notwithstanding any waiver of the setback. The same analysis will occur whether or not the county applies the default two-mile setback, or some lesser setback. Petitioners have not established any connection between the possibility of a

setback waiver and the applicability of comprehensive plan policies. This sub-assignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue, in three sub-assignments of error, that the county erred in failing to apply Goal 5 and the Goal 5 rule at OAR chapter 660, division 023 to the challenged ordinances. Because the second and third sub-assignments of error are closely related, we address them together.

A. The Ordinances Amend County Regulations Adopted to Protect Significant Goal 5 Resources

First, petitioners argue that the challenged ordinances include regulations designed to protect inventoried Goal 5 resources, such as cultural resources and wildlife habitat, from the impacts of wind facilities. Petitioners note that Ordinance 2011-07, in particular, is intended to provide additional protections to inventoried Goal 5 resources in the Walla Walla watershed.[5] Ordinance 2011-07 adopts a new regulation, codified at LDO 152.616(HHH)(11) that requires that a wind facility applicant demonstrate that the facility, including access roads, will not conflict with existing Goal 5 resources in the Walla Walla

---

[5] The findings supporting Ordinance 2011-07 state, in relevant part:

> "7. The acknowledged Umatilla County Comprehensive Plan and Technical Report contain inventories of Goal 5 resources and findings and policies that support appropriate standards for protection of resources in the Walla Walla Watershed.
>
> "8. Commercial wind energy development would conflict with inventoried Goal 5 resources within the Walla Walla Watershed Sensitive Resource Area.
>
> "9. The resources within the watershed are sensitive and traditional mitigation standards and techniques cannot guarantee the necessary protection of the resources.
>
> "* * * * *
>
> "11. Standards have been designed that are reasonable, appropriate, and would not preclude commercial wind energy development, but would protect inventoried resources * * *." Record 30.

sub-basin, imposes a two-mile setback from streams and tributaries that contain threatened or endangered species and prohibits any runoff or siltation into such streams, and further prohibits any wind facility or its components within a critical wildlife winter range.

According to petitioners, Ordinance 2011-07 effectively adopts or amends the county's program "to protect a significant Goal 5 resource" and therefore the county is obligated by OAR 660-023-00250(3) to apply Goal 5 and the Goal 5 rule.[6] Petitioners contend that the county failed to consider or apply Goal 5 or the Goal 5 rule at all, and in particular conducted no analysis of the economic, social, environmental and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use such as wind facilities, as required by OAR 660-023-0040.

The county does not dispute that Ordinance 2011-07 adds additional regulations intended to protect inventoried Goal 5 resources in the Walla Walla watershed, and thus triggers the application of Goal 5 and the Goal 5 rule pursuant to OAR 660-023-0250(3). However, the county argues that because Ordinance 2011-07 is a legislative decision, there is no general statutory, rule or goal-based requirement to adopt findings addressing Goal 5 or the Goal 5 rule. According to the county, the absence of specific findings addressing Goal 5 or the Goal 5 rule is not necessarily a basis for remand, as long as there is "accessible material in the record of the legislative act to show that applicable criteria were applied and

---

[6] OAR 660-023-0250(1) provides that "Local governments shall follow the procedures and requirements of this division" in the adoption or amendment of all post-acknowledgment plan amendments (PAPAs) "pertaining to Goal 5 resources. OAR 660-023-0250(3) provides, in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002). The county and intervenor-respondent argue that a staff summary of the applicable comprehensive plan Goal 5 policies at Record 389-95, combined with the brief findings attached to Ordinance 2011-07, the most pertinent of which are quoted at n 5, suffice to demonstrate that the applicable criteria in Goal 5 and the Goal 5 rule were applied and required considerations indeed considered.

Petitioners reply that LUBA has interpreted Goal 5 and the Goal 5 rule itself to require findings necessary to demonstrate compliance with the goal and rule. *League of Women Voters v. Klamath County*, 16 Or LUBA 909, 913-14 (1988); *Ramsey v. City of Portland*, 23 Or LUBA 291, 298, n 5 (1992).[7] We generally agree with petitioners that where a local government must apply Goal 5 and the Goal 5 rule pursuant to OAR 660-023-0250(3), some kind of explanatory findings will be necessary to demonstrate compliance with the goal and rule. Under OAR 660-023-0250(3), the Goal 5 rule applies where, as here, the county adopts amendments to its acknowledged program to protect inventoried Goal 5 resources vis-à-vis identified conflicting uses. We have held that in amending its acknowledged program to protect inventoried Goal 5 resources a local government is not necessarily obligated to undertake each of the many sequential steps in the Goal 5 process set out in OAR 660-023-0030 (inventory process), OAR 660-023-0040 (ESEE decision process) and OAR 660-023-0050 (program to achieve Goal 5). *Johnson v. Jefferson County*, 56 Or LUBA 25, 39-40, *aff'd* 221 Or App 190, 189 P3d 34 (2008); *NWDA v. City of Portland*, 50 Or LUBA 310, 338 (2005); *NWDA v. City of Portland*, 47 Or LUBA 533, 543 (2004), *rev'd on other grounds*, 198 Or App 286, 108 P3d 589 (2005); *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002). Which and how many of the substantive steps in

---

[7] Both *League of Women Voters* and *Ramsey* discussed the former Goal 5 rule at OAR chapter 660, division -016, rather than the new Goal 5 rule at OAR chapter 660, division 023 applicable to post-acknowledgment plan amendments adopted after 1996. However, we see no basis in either rule to conclude differently regarding amendments subject to the new Goal 5 rule.

the Goal 5 decision process must be revisited, if any, and to what extent, will depend on the nature of the amendments, the existing acknowledged program, the particular Goal 5 resource and the conflicting use at issue. We note that, at least where the nature of the amendment, etc., require that the local government revisit portions of its initial ESEE analysis, OAR 660-023-0040(1) expressly requires "findings" to demonstrate that the requirements of the rule are met.[8] Even in circumstances where portions of the initial ESEE analysis need not be revisited, in order for LUBA to perform its review function the record must include a reviewable explanation adopted by the governing body for why it believes the amended program is consistent with the goal and rule.

We have held that while the county need not reconsider the basic choices made in adopting its initial acknowledged ESEE analysis, the county must conduct enough of an analysis under OAR 660-023-0040 to support its decision to allow, limit, or prohibit the new conflicting uses with respect to significant resource sites, sufficient to demonstrate that its amended Goal 5 program continues to be adequate to achieve the Goal. *Johnson*, 56 Or LUBA at 40. That demonstration may be simple if the existing program is to fully protect the

---

[8] OAR 660-023-0040(1) provides, in relevant part:

> "Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:
>
> "(a) Identify conflicting uses;
>
> "(b) Determine the impact area;
>
> "(c) Analyze the ESEE consequences; and
>
> "(d) Develop a program to achieve Goal 5."

inventoried resource and prohibit all identified conflicting uses, and the local government is simply identifying a new conflicting use, similar to those previously identified, to add to the proscribed list. A more substantial demonstration may be needed if the program is to protect the resource in part and allow conflicting uses in part, subject to limitations, and the effect of the amendment is to adjust that previously determined balance to impose additional limitations. An even more substantial demonstration will be necessary if the adjustment effectively reduces the level of protection the program previously provided for inventoried Goal 5 resources.

In the present case, the county has chosen to amend its program to achieve Goal 5 with respect to inventoried resources in the Walla Walla watershed, by adopting additional measures to protect those resources from an identified conflicting use, commercial wind facilities. Because the county's code expressly allows wind facilities as a conditional use in resource zones, including those in the Walla Walla watershed, we understand the county's existing program with respect to inventoried resources and wind facilities is to limit, but not prohibit, conflicting uses such as wind facilities. Ordinance 2011-07 thus adjusts the balance the county initially struck in its initial ESEE analysis and its program to achieve the goal. We conclude that the county must undertake to perform at least some of the ESEE analysis set out in OAR 660-023-0040(2) through (5), and must adopt findings, based on that ESEE analysis, explaining its choice to impose additional limitations on conflicting uses.

The county did not conduct even a limited ESEE analysis and adopted no findings addressing OAR 660-023-0040, the Goal 5 rule or Goal 5. The findings quoted at n 5 do not address Goal 5 or the Goal 5 rule and are insufficient to provide a reviewable explanation of the county's choice to impose additional limitations on wind facilities. The staff summary at Record 389-95 discusses a number of general comprehensive plan policies that apply to the county's inventoried Goal 5 resources, and concludes that the additional limitations imposed on wind facilities under Ordinance 2011-07 are consistent with those policies. Some of the

analysis in that staff summary might be reframed and used as part of an ESEE analysis for purposes of OAR 660-023-0040, but we do not see that the summary constitutes or substitutes for an ESEE analysis. The summary does not address OAR 660-023-0040 or the economic, social, environmental and energy consequences of allowing, limiting or prohibiting wind facilities as conflicting uses, at least in those terms. In any case, the county commissioners did not adopt, or even reference, the staff summary as part of their findings supporting Ordinance 2011-07.

The first sub-assignment of error is sustained.

B. County Inventory of Goal 5 Wind Resources

Under Goal 5 and OAR 660-023-0190, local governments must evaluate, inventory and protect significant "energy sources" including "wind areas:"[9] The county's initial Goal 5 inventory and program, adopted in the early 1980s under the former Goal 5 rule, did not

---

[9] OAR 660-023-0190 provides, in relevant part:

"(1) For purposes of this rule,

"(a) 'Energy source' includes naturally occurring locations, accumulations, or deposits of one or more of the following resources used for the generation of energy: natural gas, surface water (i.e., dam sites), geothermal, solar, and wind areas. * * * .

"(b) 'Protect,' for energy sources, means to adopt plan and land use regulations for a significant energy source that limit new conflicting uses within the impact area of the site and authorize the present or future development or use of the energy source at the site.

"(2) In accordance with OAR 660-023-0250(5), local governments shall amend their acknowledged comprehensive plans to address energy sources using the standards and procedures in OAR 660-023-0030 through 660-023-0050. Where [federal agencies] regulate a local site or an energy facility that relies on a site specific energy source, that source shall be considered a significant energy source under OAR 660-023-0030. Alternatively, local governments may adopt a program to evaluate conflicts and develop a protection program on a case-by-case basis, i.e., upon application to develop an individual energy source * * *[.]"

identify or inventory any "wind areas" of the county as significant Goal 5 resources.[10] Instead, the county determined that there was not enough information available on wind, oil, gas and other energy sources to inventory any such sources, a determination known in Goal 5 parlance as a "1B" determination. The Land Conservation and Development Commission (LCDC) acknowledged the county's comprehensive plan in 1983 with the proviso that the county will amend the plan to include a policy indicating that the county will fulfill the Goal 5 requirements for wind, oil and gas energy "when adequate information becomes available." Petition for Review App B-71. However, the county has apparently never amended the plan to include a policy with respect to wind energy in general, or with respect to any particular wind area within the county.

Petitioners cite to testimony below that the cumulative effect of the two-mile setback imposed on wind facilities under Ordinances 2011-05 and 2011-06 is to prohibit wind facilities within a 65,000-acre area within the county. Petitioners contend that imposition of the two-mile setback is inconsistent with the county's obligations under Goal 5 and OAR 660-023-00190 to "protect" energy sources such as wind energy. According to petitioners, the county cannot impose limitations on an uninventoried "1-B" Goal 5 resource such as wind energy, without first completing the Goal 5 process, which will entail inventorying wind resource locations, quality and quantity, conducting an ESEE analysis to determine whether to allow, limit or prohibit uses that conflict with inventoried wind resources, and developing a program to achieve the goal with respect to wind energy resource sites.

The county responds that the last sentence of OAR 660-023-0190(2) expressly authorizes local governments to adopt a program to evaluate conflicts and develop a protection program on a case-by-case basis, upon application to develop an individual energy

---

[10] Goal 5 itself, and the old Goal 5 rule, at OAR 660, chapter 016, do not specifically mention wind energy, but do require local governments to determine the location, quality and quantity of a variety of resources including "energy sources." OAR 660-016-0000(2).

source. The county contends that detailed information on wind areas in the county is still not available, and it would be financially prohibitive for the county to develop such information on a county-wide basis. The county argues that such information that does exist is proprietary and generated and controlled by private wind facility developers. According to the county, it has effectively chosen to implement Goal 5 with respect to wind energy pursuant to the last sentence of OAR 660-023-0190(2), by allowing wind facility developers, if they choose, to apply to the county to add a particular wind resource site to the county's Goal 5 inventory, conduct an ESEE analysis to allow, limit or prohibit uses that conflict with that particular wind energy site, and develop a program to protect that site. Further, the county argues that under *Urquhart v. Lane Council of Governments*, 80 Or App 176, 180, 721 P3d 870 (1986), the county is not obligated, in the course of adopting post-acknowledgment plan amendments that do not affect an inventoried resource, to update its acknowledged Goal 5 inventory to include uninventoried resources. In *Urquhart*, the city rezoned property from open space to a development zone without considering whether the property should be added to the city's acknowledged inventory of Goal 5 open space resources. The court held that because the PAPA did not affect the city's open space inventory the only way to correct the arguable omission of the property from the inventory was through periodic review.

Petitioners reply that *Urquhart* is distinguishable, because unlike *Urquhart* in the present case LCDC's 1983 acknowledgement order specifically directs the county to adopt a policy to ensure the county addresses and inventories energy resources when information is available. Petitioners cite to testimony in the record that, contrary to the county's claims, adequate information regarding wind energy resources is available to update the county's Goal 5 inventory to include wind energy resources on a county-wide basis.[11] Therefore,

[11] Petitioners cite to Record 43, the minutes of the hearing before the county commissioners, apparently referring to the oral testimony of Nicole Hughes, a representative of a power company, that "data was available

petitioners argue, the county cannot adopt post-acknowledgment plan amendments that impose additional restrictions on wind facilities allowed as conditional uses under ORS 215.283(2)(g) unless it first completes the Goal 5 process with respect to wind energy.

We disagree with petitioners that *Urquhart* is distinguishable on the basis of the 1983 LCDC acknowledgment directive that the county adopt a policy indicating that the county will complete the Goal 5 process regarding energy resources when adequate information is available. Even assuming that adequate county-wide information on wind energy resources is currently available, something petitioners have not established, OAR 660-023-0190(2) expressly authorizes the county to proceed on a case-by-base basis to complete the Goal 5 process with respect to energy resources. Further, the LCDC acknowledgment order does not specifically require the county to undertake a county-wide inventory of its wind energy resources prior to, or in the course of, adopting regulations governing conditional use permit applications for wind energy facilities allowed in EFU zones under ORS 215.283(2)(g); it merely requires the county to adopt a policy indicating that the county will address energy resources when information becomes available.[12] Nothing in the LCDC order precludes the county from addressing energy resources on a case-by-case basis, consistent with OAR 660-023-0190(2).

Finally, we note that in *Johnson v. Jefferson County*, 221 Or App 156, 165, 189 P3d 30 (2008), the Court of Appeals reaffirmed its holding in *Urquhart*, commenting that OAR 660-023-0250 now codifies the operational holding of that case. OAR 660-023-0250(4) provides that:

---

already, as Mr. Brown had testified." It is not clear what "data" she refers to. Earlier in the hearing, a Ron Brown had testified regarding federal wind energy siting guidelines and studies of the impacts of wind facilities on wildlife species, commenting that "the scientific data was already there." Record 39. This seems to be reference to the studies on wildlife species. Nothing cited to us in the record supports petitioners' assertion that there is currently available to the county adequate information on the location, quality and quantity of wind resources in the county to allow completion of the Goal 5 process regarding wind energy on a county-wide basis.

[12] The parties do not advise us as to whether the county in fact adopted the plan policy required by LCDC.

> "Consideration of a PAPA regarding a specific resource site, or regarding a specific provision of a Goal 5 implementing measure, does not require a local government to revise acknowledged inventories or other implementing measures, for the resource site or for other Goal 5 sites, that are not affected by the PAPA, regardless of whether such inventories or provisions were acknowledged under this rule or under OAR 660, division 16."

It is clear under OAR 660-023-0250(4) that the county can amend its Goal 5 program to protect inventoried Goal 5 resources in the Walla Walla watershed, for example, without thereby triggering the obligation to revise its Goal 5 inventory or program for other inventoried Goal 5 resources or sites not affected by the amendment. OAR 660-023-0250(4) certainly does not suggest that in adopting amendments to the program to protect one set of inventoried Goal 5 resources the county thereby incurs the obligation to complete the county's Goal 5 process for different *non-inventoried* Goal 5 resources.

The second and third sub-assignments of error are denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioners argue that the county erred in adopting the challenged ordinances without an "adequate factual base" as required under Statewide Planning Goal 2 (land use planning). Petitioners repeat their arguments under the second assignment of error that the county cannot adopt additional limitations on wind facilities allowed under ORS 215.283(2)(g) until it completes the Goal 5 process with respect to wind facilities.

As far as we can tell, petitioners' arguments under this assignment of error add nothing to those advanced under the second assignment of error, and provide no additional basis for reversal or remand. The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners next argue that the two-mile setback from rural residences and urban growth boundaries lacks the adequate factual base required under Goal 2. According to

petitioners, there is no evidence or justification in the record to support a two-mile setback, as opposed to a lesser setback.

The county responds that the county chose to expand the existing 3,250-foot setback from residential zones to a two-mile setback from rural residences and urban growth boundaries, based on voluminous testimony regarding noise impacts up to two miles from wind facilities. Based on the testimony cited to us by the county, we agree with the county that the record provides an adequate factual base supporting the county's choice to impose a two-mile setback from wind facilities.

Petitioners also argue that there are no findings or other explanation in the record supporting imposition of the two-mile setback, sufficient to demonstrate that applicable criteria were applied and required considerations in fact considered. *Citizens Against Irresponsible Growth*, 179 Or App at 16 n 6. However, petitioners do not identify any applicable criteria the county failed to apply or required considerations that the county failed to consider in choosing to adopt the two-mile setback. The record is abundantly clear that the commissioners believed, based on the testimony before them, that the existing 3,250-foot setback was inadequate, and that a larger setback was necessary to protect residences from the noise impacts of wind facilities. As discussed more fully below, the county has authority to adopt additional approval standards for uses conditionally allowed under ORS 215.283(2), beyond those listed in the statute. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). Petitioners have not demonstrated that additional findings are necessary in the present case to explain the county's choice to impose a two-mile setback.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the county lacks authority to impose a two-mile setback to protect residences from the impacts of wind facilities, because the county can only impose additional approval standards or conditions on uses that are authorized in EFU zones under

ORS 215.283(2) based on the parameters established in ORS 215.296.[13] According to petitioners, under ORS 215.296(1) the county can impose only standards or conditions on ORS 215.283(2) uses that are intended to protect farm and forest practices, and cannot impose standards or conditions unrelated to protection of farm and forest practices.

However, the Court in *Brentmar* disagreed with a similar argument, citing to ORS 215.296(10), which provides:

> "Nothing in this section shall prevent a local governing body approving a use allowed under ORS 215.213 (2) or 215.283 (2) from establishing standards in addition to those set forth in subsection (1) of this section or from imposing conditions to insure conformance with such additional standards."

ORS 215.296(10) does not expressly limit additional county standards or conditions to those that protect farm and forest practices, and petitioners cite no basis in the statute or elsewhere to read such a limitation into the statute.

Petitioners also argue under this assignment of error that the waiver provisions of Ordinance 2011-05 and 2011-06 are inconsistent with ORS 215.296(2), which as noted above allow an applicant to demonstrate that compliance with the farm and forest protection standards at ORS 215.296(1) will be satisfied through the imposition of clear and objective conditions of approval. Petitioners contend that the waiver provisions are not clear and

---

[13] ORS 215.296 provides, in relevant part:

> "(1) A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds 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.
>
> "(2) An applicant for a use allowed under ORS 215.213 (2) or 215.283 (2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

objective. We have already held that the waiver provisions are unconstitutional, but for the following reasons we reject this subconstitutional challenge to the waiver provisions.

First, ORS 215.296(2) refers only to conditions of approval. The two mile setback and the waiver provisions are approval standards, not conditions of approval. Second, ORS 215.296(2) expressly refers to conditions that are imposed to demonstrate compliance with the farm and forest protection standards in ORS 215.296(1). ORS 215.296(2) does not refer to any county standards or conditions adopted or imposed pursuant to the authority granted in ORS 215.296(10), and we see no basis to read such a limitation into the statute. Petitioners have not demonstrated that the clear and objective condition requirement of ORS 215.296(2) governs supplemental county approval standards.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

ORS 197.175(2) and Goal 2 require the challenged ordinances to be consistent with the applicable comprehensive plan. Petitioners argue that the county erred in failing to address comprehensive plan policies that encourage energy production in the county.[14] According to the petitioners, the challenged ordinances impose limitations on wind energy that will eliminate the possibility of constructing new wind facilities across much of the county, and for that reason are inconsistent with the cited plan policies.

---

[14] The comprehensive plan policies cited by petitioners state:

Open Space Policy 42(a): "Encourage development of alternative sources of energy."

Open Space Policy 37: "The County shall ensure compatible interim uses provided through Development Ordinance standards, and where applicable consider agriculturally designated land as open space for appropriate and eventual resource or energy facilities use."

Energy Conservation Policy 1: "Encourage * * * the utilization of locally feasible renewable energy resources through use of tax and permit incentives."

Economy of the County, Policy 1: "Encourage diversification within existing and potential resource-based industries."

The county responds that the challenged ordinances are consistent with 20 or more comprehensive plan policies that address a variety of topics, including agriculture, open space, natural hazards, rural residential, etc. and that petitioners focus exclusively on five plan policies that mention energy resources. We understand the county to argue that the challenged ordinances are consistent with all applicable plan policies, including those cited by petitioners, because the ordinances allow wind facilities subject to reasonable restrictions intended to protect a wide range of policy objectives.

The county adopted no findings regarding any comprehensive plan policies, including the 20 policies the county cites or the five policies petitioners cite. Nor does the county cite us to any documents in the record suggesting that the county applied or considered any of these plan policies. The county may be correct that the restrictions on wind facilities imposed by the challenged ordinances are consistent with all applicable plan policies, viewed as a whole, when considered and balanced, to the extent there is tension between the plan's policy objectives. However, we are cited to no indication in the record that the county in fact ever considered whether the challenged ordinances are consistent with any of the cited plan policies. The record of the decision is insufficient to establish that "applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth*, 179 Or App at 16, n 6.

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

The challenged ordinances include special standards governing construction of access roads to wind facilities. Petitioners argue that these special road standards are different from existing county road standards that govern other ORS 215.283(2) uses, and that the adoption of different road standards for wind facilities creates an "inconsistency" with the comprehensive plan, in violation of the Goal 2 consistency requirement and ORS 197.175(2).

The county responds, and we agree, that petitioners have not demonstrated that adoption of different road standards for different ORS 215.283(2) uses creates an "inconsistency" with the comprehensive plan, for purposes of Goal 2 and ORS 197.175(2). Petitioners cite no authority requiring that all uses allowed in a zone must be subject to identical standards.

The seventh assignment of error is denied.

The challenged ordinances are remanded.