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I. PETITIONER'S STANDING

Petitioner Hatley participated in the land use proceedings below (2012 Rec 14, 121) and filed timely appeals of the challenged land use decisions.[1]

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought

This case is an appeal of Umatilla County's adoption of a series of enactments prohibiting or severely restricting wind energy development. Petitioner seeks reversal or remand of Umatilla County's decisions pursuant to OAR 660-010-0071 and ORS 197.835(6), (7)(a), (b), (8), (9)(a)(A), (C), (D), (E).

B. Summary of Arguments

Ordinance 2012-005 continues to violate Goal 5 by extending additional protection to inventoried Goal 5 riparian and fish habitat without applying Goal 5 and without the demonstration of consistency with the County's comprehensive plan and adequate factual base required by Goal 2.

The 2012 decisions continue to violate Goal 5 by failing to recognize the special status of wind energy under OAR 660-023-0190 and precludes the ability of wind energy facilities from the benefits of that special status.

If Order 2012-021 is before LUBA, the findings fail to demonstrate compliance with applicable comprehensive plan policies and are not supported by substantial evidence. Contrary to relevant provisions of the comprehensive plan, the ordinances do not operate to encourage or promote wind energy as an alternative source of energy or to promote the advantages the County

[1] There is no dispute that petitioner's appeal of Ordinance 2012-04 and 2012-5 is timely. There is a dispute about whether there was a need for an independent appeal of Order 2012-21 and if so whether the appeal of that order was timely. Petitioner maintains no appeal was required per the requirements of *Dyke v. Clatsop County*, 97 Or App 70, 775 P2d 331 (1989) and even if one was, the appeal was timely filed per ORS 197.830(3) and *Craig Realty v. City of Woodburn*, 37 Or LUBA 1041 (2000).

enjoys in the wind energy arena. The County's standards are not clear and objective and would not operate to give greater certainty to wind energy developers and in fact in some instances are less clear and objective than the standards they replace.

If only the 2012 ordinances are before LUBA, the County failed to make findings on compliance with relevant comprehensive plan policies and that analogous findings from Order 2012-021 fail to demonstrate compliance with the Comprehensive Plan.

The challenged decision is contrary to state law by imposing improper discretionary approval standards on transmission lines contrary to ORS 215.283(1).

The challenged 2011 Ordinances, as amended (Ordinances) are contrary to state law and are impermissibly vague.

The 2011 Ordinances, as amended (Ordinances), are pre-empted by state law because (1) the Ordinances ignore the special status given wind energy facilities subject to EFSC jurisdiction and preclude them from benefitting from that special status, (2) the Ordinances restrict rather than encourage wind energy, in contravention of state policy and in so doing, as the largest wind energy producing county in the state, significantly impairs the State's ability to achieve its renewable energy goals, and (3) the County imposes requirements that conflict with EFSC siting requirements and are beyond the authority delegated the County.

The County failed to coordinate with the Oregon Department of Energy (ODOE) in violation of Goals 2 and Goal 5 and failed to consider ORS 469.010 as required.

For these reasons, the County's decision must be reversed or remanded.

C. Summary of Material Facts: On June 24, 2011, the county adopted Ordinances 2011-05, 2011-06 and 2011-07, amending Umatilla County Development Code (UCDC) 152.616(HHH) to add new prohibitions and restrictions on wind energy facilities, hereinafter referred to as "2011 Ordinances," (unless otherwise specifically referenced). Rec. 14. App 16-31.

There was no severance clause in the 2011 Ordinances. UCDC 152.616(HHH) regulates development of Wind Power Generation Facilities[2] in the EFU zone.

On January 12, 2012, LUBA remanded the 2011 Ordinances. *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-070, 071, 072 (2012)). LUBA sustained the first assignment of error finding that provisions in Ordinances 2011-05 and 06 authorizing waiver of new 2 mile setback requirements from UGBs and rural residences with certain consents, constituted an unconstitutional delegation of legislative authority. *Cosner*, *supra*, slip op 5-9. LUBA sustained the second assignment of error deciding that the new protections for inventoried Goal 5 resources in the Walla Walla Basin failed to address the requirements of Goal 5. *Cosner*, *supra*, slip op 12-17. Finally, sustaining the sixth assignment of error, LUBA determined that the County failed to make findings of consistency with the County Comprehensive Plan. *Cosner*, *supra*, slip op 24-25.

On remand, the County held a single combined hearing. 2012 Rec 11[3]. On February 28, 2012, the county responded to LUBA's remand and adopted Ordinance 2012-04, 2012-05 and Order 2012-21, (hereinafter 2012 decisions, unless otherwise specifically referenced). Responding to LUBA's remand under the *Cosner* Sixth Assignment of Error, the County adopted new findings to address the deficiencies LUBA identified regarding consistency with the County's comprehensive plan in Order 2012-021. App 10-15. With regard to the First Assignment of Error, the County adopted Ordinance 2012-004, deleting any possibility of waiver of either 2-mile setback. 2012 Rec 4-6. (App 3-5). With regard to the Second Assignment of Error, the County adopted

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[2] The county code regulates wind energy facilities under the title of "Commercial Wind Energy Facilities" (UCO 152.616(HHH), but the county's restrictions apply to any "Wind Power Generation Facility". UCO 152.616(HHH)(1) and (6). The UCO defines "Commercial Wind Power Generation" as follows: "An activity carried out for monetary gain using one or more wind turbine generators operated as a single Wind Power Generation Facility that has a combined generating capacity greater than 1 MW." UCO 152.003. The county definition of "Wind Power Generation Facility" is "an energy facility that consists of one or more wind turbines or other such devices and their related or supporting facilities that produce electric power from wind and are: (a) Connected to a common switching station, or (b) Constructed, maintained, or operated as a contiguous group of devices." *Id.*

[3] References to the record on remand will be referred to as "Rec 2012." References to the record in the 2011 proceedings will simply be referred to simply as "Rec".

Ordinance 2012-005, deleting references to Goal 5 and to some inventoried Goal 5 resources. 2012 Rec. 7-10. (App 6-9).[4] None of these enactments referenced the 2011 Ordinances.

The County provided notice of its "decision" February 29, 2012. 2012 Rec. 2. (App 1). That notice stated: "A statutory 21-day appeal period commenced the day the *Ordinances* were signed by the Board of Commissioners, February 28, 2012. If you wish to appeal the county decision to the Land Use Board of Appeals (LUBA) you must file the appeal by March 20, 2012." (Emphasis supplied). 2012 Rec. 2. The county's notice did not state that Order 2012-21 was independent of the Ordinances and there is no dispute that Order 2012-12 is labeled as an "Order". No notice of adoption was provided to the Department of Land Conservation and Development. Affidavit of Bruce White, Exhibit to April 18, 2012 Response to Motion for Partial Dismissal.

Petitioner owns a 1,926-acre undeveloped property zoned EFU in the Walla Walla River Basin of Umatilla County. 2012 Rec.121. Petitioner's property is subject to a lease for wind energy from a wind energy developer and is located in one of four geographically distinct areas of the County that have a concentration of wind energy leases. 2012 Rec. 121, 139. App 43. The property consists of a complex of flat ridge tops surrounded by slopes that lead to various drainages in the Walla Walla River Basin. 2012 Rec. 121, 132 (topo map), 270 (road map), App 42. App 42a. According to the county's citation of "high potential areas" the sloped portions of the property are comprised of what are probably to be classified as "highly erodible soils." Rec 387. App 68. However, the ridge top benches themselves have appear to have no highly erodible soils. 2012 Rec. 68, 121. The property is drained by tributaries in the Walla Walla River Basin. 2012 Rec. compare, 132, 270. App. 42, 42a. There are 11 residential properties within 2 miles of Petitioner's property. 2012 Rec. 122, 132. App 42.

[4] In addition, the Board of County Commissioners adopted Order 2012-020 to refer to the Planning Commission the issue of potentially recommending exceptions to the 2-mile setbacks. 2012 Rec. 30. There was no final decision by the county regarding setbacks or exceptions thereto, and no purpose would have been served to appeal it and none was filed.

D. LUBA Jurisdiction: LUBA has jurisdiction over timely appeals of land use decisions. ORS 197.825(1). The challenged decisions Ordinances 2012-04 and 05 are timely, amend land use regulations of Umatilla County by readopting, as amended, the 2011 Ordinances and are therefore land use decisions. ORS 197.015(10). The decision challenged in Order 2012-21 are findings supporting the 2011 ordinances as amended in the 2012 Ordinances.

III. PRELIMINARY MATTERS

A. Enactments Before LUBA: LUBA determined by interim order that Order 2012-021, is not before it. LUBA decided that first, Order 2012-21 was an independent land use decision, independent from Ordinances 2012-04 and 2012-05 and must have been appealed separately and that, second, the precautionary appeal filed by Petitioners in this case was not timely filed. For the reasons set forth below, Petitioner respectfully requests that LUBA reconsider this determination and decide that Order 2012-21 is properly before LUBA for review.

1. No Separate Appeal of Order 2012-021 Was Necessary: Both the 2011 and the 2102 Ordinances amend a single provision in the county's code – UCDC 152.616(HHH). Following LUBA's remand in *Cosner*, the 2011 Ordinances amending UCDC 152.616(HHH) were no longer valid. As LUBA noted in its Order in LUBA No. 2012-030, the County needed to take some action to validate or make effective those ordinances including those LUBA did not remand. *Hatley v. Umatilla County*, LUBA No. 2012-030, Order on Motion to Dismiss, July 2, 2012, p. 6. The only method of making legislative changes to the County's zoning code recognized in the County's Home Rule Charter is through an *ordinance* that addresses the sections in question and that contains an ordaining clause. See, e.g., Umatilla Cty. Charter, Art. III, Sec. (7), Ordinances. Furthermore, ORS 215.503(2) requires that "all legislative acts relating to comprehensive plans, land use planning or zoning" be adopted by ordinance. ORS 215.503(2).

Since the 2011 Ordinances were invalidated by LUBA's remand and could only be readopted as amended by an ordinance, then the only candidate ordinances are Ordinances 2012-04

and 2012-05. The 2012 Ordinances are the only *legislative* enactments adopted by the County Board in response to the remand, and the only ordinances that could embody a decision by the Board of County Commissioners to readopt the 2011 Ordinances as amended (or not amended). There is no dispute that the 2012 ordinances are the culmination of the decision-making process following LUBA's remand of the 2011 ordinances. The changes made or not made in those ordinances reflected the County's judgment on what it needed to do legislatively to amend or to not amend UCDC 152.616(HHH) to effect the changes it desired in light of LUBA's *Cosner* decision. Order 2012-021 simply supports the decision embodied in the 2012 Ordinances that the County would make no changes other than those in the 2012 ordinances and explains why no legislative changes responsive to the *Cosner* sixth assignment of error appear in the 2012 enactments.[5]

The language of the findings in Order 2012-021 indicating they were made in support of the 2011 Ordinances is consistent with this explanation of events. The findings merely indicate that the County regarded the 2011 Ordinances to be adequate and explain why no additional *legislative* changes would be made by way of the 2012 Ordinances. The language of Order 2012-021 stops well short of making any pronouncements that the adopted findings themselves would have any legislative effect, even if an Order could do so.

Nothing in Order 2012-021 indicates that it has the effect of amending or not amending the County's zoning ordinance. There is no ordaining clause and there are no references to any particular sections of the code, as are required by Umatilla Code Section 10.17.[6] App. 128. App. 15-31. Accordingly, the only vehicles left to legislatively express the Board of Commissioners'

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[5] That the ordinances constitute the operative decision of the Board of Commissioners in response to the *Cosner* remand is confirmed by the language of the County's notice of its decision, dated February 29, 2012. By its express terms indicating that the appeal date is to run from the date of the *ordinances*, the notice indicates that it is the *ordinances* and the ordinances alone that effected the County's decisions on remand. 2012 Rec. 2.

[6] It is telling that a review of all amendments to the UCDC indicates that they have been effected by ordinance. App.32-40 (Umatilla County website list of amending ordinances). Order 2012-021 and its companion order 2012-020 are the only orders appearing in this list, going back to 1983. Reference to such outside-the-record materials is permissible in matters, such as here, where LUBA's jurisdiction is at issue. *Yost v. Deschutes County*, 37 Or LUBA 653 (1999).

decision to readopt the 2011 Ordinances as amended are the 2012-04 and 2012-05 ordinances.[7] App. 3-9. Accordingly, the findings in Order 2012-021 need not have been appealed separately.

2. If a Separate Appeal of Order 2012-021 Was Necessary, Petitioner's Separate Appeal of the Order was timely filed: If a separate appeal of Order 2012-021 was necessary, the Precautionary Appeal filed on April 18, 2012 was timely. In its Order in LUBA No. 2012-030, LUBA determined otherwise. However, LUBA overlooked its own precedent to the contrary in *Craig Realty v. City of Woodburn*, 37 Or LUBA 1041 (2000). That decision is directly on point with the facts in this case and unless disavowed by LUBA is the controlling authority on the issue of whether Petitioner's Precautionary NITA was timely.[8]

This case is in the same posture as the case in *Craig*, except that as of the time of Petitioner's Precautionary NITA, DLCD had never received any notice whatsoever of the County's adoption of the 2012 amendments or of Order 2012-021. See Affidavit of Bruce White, filed with Response to Partial Motion to Dismiss, April 18, 2012. Respectfully, LUBA's order failed to recognize that pursuant to the implementing administrative rule found at OAR 660-018-0040, the function of providing a copy of the decision to DLCD serves a notice function and that accordingly, it is incorrect to interpret ORS 197.830(9) in the manner LUBA did. The decision in *ODOT v. City*

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[7] In this context, this case falls squarely within the holding of *Dyke v. Clatsop Co., supra*. In *Dyke*, the Court held that where the subject of one enactment is a required component of a decision finalized in another decision, separate LUBA appeals of each component are unnecessary. In this case, the decision to not amend the 2011 ordinances further is reflected in the legislative enactments embodied in the 2012 ordinances. Order 2012-021 gives the reason behind the decision, as required by *Cosner*, but does not constitute the decision itself. As with all land use cases, findings in support of the decision need not be appealed independent from the decision; only at the briefing stage must findings be specified as items on appeal in assignments of error directed at specific findings.

[8] In *Craig*, the City of Woodburn provided written notice of its decision in a land use matter to DLCD and the other parties to the case, but in that initial mailing, the City failed to provide all elements of the notice required by ORS 197.615, specifically the Notice of Adoption form required to be filed with DLCD following a post-acknowledgment plan amendment (PAPA) pursuant to OAR 660-018-0040. The City provided the required notice to DLCD in a separate mailing two days later. DLCD and ODOT filed an appeal with LUBA within 21 days of the second mailing but more than 21 days after the first mailing. In reviewing the deadline for filing appeals to LUBA of PAPAs specified in the language of ORS 197.830(8), LUBA found that the time period for filing appeals to LUBA for all parties was tolled until DLCD was provided with the notice required by ORS 197.615 and its implementing regulations. Therefore, even though DLCD and ODOT both received written notice of the decision more than 21 days prior to filing their appeals to LUBA the fact that that the notice did not comply with the requirements of ORS 197.615(1) and its implementing regulations did not start the clock for filing appeals to LUBA.

of Oregon City, 153 Or App 705, 959 P2d 615 (1998), cited by LUBA does not consider the applicability of OAR 660-018-0040 and does not compel the reading given by LUBA in contravention of its own precedent. As far as we can tell, respectfully, there is no basis for LUBA to disavow its former ruling in *Craig* on this issue, and accordingly under that precedent, Petitioner requests LUBA reconsider its Order and decide that the independent appeal was timely filed.

B. Scope of Issues Before LUBA in this Appeal: In its preliminary order, LUBA questioned whether Petitioner would be precluded from raising certain issues on the merits under the "law of the case" doctrine announced in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) because those issues were issues that were either decided *or that could have been decided* in a prior appeal. The holding in *Beck* was limited to precluding a party that did not appeal further on an issue that was raised and resolved in a prior LUBA decision from raising that same issue in local proceedings upon remand from LUBA or on a subsequent appeal to LUBA following a remand. Consequently, *Beck* offers no support for limiting Petitioner to issues that might have been raised in an earlier appeal but were not.[9] *Morsman v. City of Madras*, 196 Or 67, 100 P3d 761 (2004). *Beck* does not preclude LUBA's consideration of the issues raised in this consolidated appeal. None of the issues raised in this brief were resolved by LUBA and so none is precluded.

C. Standard of Review: The grounds for remand or reversal are in ORS 197.835. Under ORS 197.835(6), LUBA must remand if the decision is not in compliance with the goals. (Assignment of Error (AOE) 1, 2.) Under ORS 197.835(7), LUBA must remand if the decision is not in compliance with the comprehensive plan or in the absence of an applicable plan policy is not in compliant with the Goals. (AOE 1, 3 and 4.) Under ORS 197.835(9)(a)(E), LUBA must reverse or remand if the County's decision is unconstitutional. The County's decision is preempted. (See AOE 7.) Under

[9] Perhaps LUBA reads this from footnote 6 in *Beck*, wherein the Court refused to entertain an issue that had not been argued by the appellants before LUBA in either the initial *Beck* appeal or the subsequent appeal following remand. However, that is an issue of whether the assignment of error at issue made before the appellate courts in *Beck* had been adequately preserved at some point in the LUBA proceedings below, including in the second LUBA appeal; it does not mean that *Beck* must be read to say that an unresolved issue cannot be raised in a subsequent appeal to LUBA.

ORS 197.835(9)(a)(C) and (D), LUBA must reverse or remand the County's decision if the County improperly misconstrued the law or made a decision not supported by substantial evidence. (AOE 5, 8.) The deferential standard of review under ORS 197.829 applies, if at all, only to limited aspects of AOE 1, 3 and 4.

IV. ASSIGNMENTS OF ERROR

First Assignment of Error

In adopting protections for resources within the Walla Walla River basin in Ordinance 2012-05 without applying the requirements of Goal 5 and its administrative rule, the County misconstrued the applicable law, made inadequate findings and made a decision not consistent with the comprehensive plan and not supported by an adequate factual base, in violation of Goal 2.

In their second assignment of error in *Cosner*, Petitioners argued that the amendments to UCDC 152.616(HHH)(11), in effect, amended the County's Goal 5 program by adding additional protections to already inventoried Goal 5 resources, thereby triggering a requirement under OAR 660-023-00250(3) to apply Goal 5 and the Goal 5 rule. Petitioners also argued that the 2011 Ordinances failed to address Comprehensive Plan policies that implement Goal 5. On appeal, LUBA sustained the Petitioner's second assignment of error, finding that in adopting the 2011 Ordinances, 2011-07 in particular, the County granted additional protection to inventoried Goal 5 resources without the required Goal 5 analysis and findings and did not provide a reviewable explanation of its decision to extend additional protection to Goal 5 resources by imposing limitations on Wind Energy Facilities. Accordingly, LUBA remanded the 2011 Ordinances for the required Goal 5 analysis and findings. On remand, the County sidestepped the Goal 5 issue by adopting Ordinance 2012-05 and deleting the explicit reference to Goal 5 resources and to Critical Winter Range. 2012 Rec 9, App 8. In Finding 4, the County explicitly stated its intent was to avoid the requirements of Goal 5 in adopting changes to UCZO 152.616(HHH)(11). 2012 Rec 8, App 7.

For the reasons set forth below, the County's attempt to cure the deficiencies identified by LUBA were insufficient and the ordinance must be remanded. In addition, the County's decision failed to satisfy Goal 2, which requires remand.

1. **The County failed to satisfy Goal 5 and to demonstrate consistency with its own comprehensive plan relating to riparian and fish habitat resources.**

A. The restrictions retained in Section 152.616(HHH), as amended by Ordinance 2012-05, grant additional protections to inventoried Goal 5 resources. UCDC 152.616(HHH)(11), as amended by Ordinance 2012-05, protects fish habitat. The express language of the provision indicates that the purposes of the provision are as follows: (1) to prevent impacts to "highly erodible soils", (2) to prevent impacts to "federally listed threatened and endangered species", (3) "to protect sensitive streams" and (4) to be consistent with the Clean Water Act. 2012 Rec 9, App 9. The provision then goes on to prohibit the location of any portion of a wind energy facility on soils identified as highly erodible; to require that such components be set back a minimum of two miles from streams and tributaries containing federally listed threatened and endangered species and to require a demonstration that the project will not generate runoff or siltation into such streams. 2012 Rec 9, App 8. Doing so without applying Goal 5 is error.

The text, context and legislative history[10] of this section shows that the reason the county prohibits and restricts wind energy development in vast areas of the Walla Walla River watershed is ultimately to protect fish resources and fish habitat. Rec. 34-36, 40-41, 41-42, 58, 389-390.[11] The context from the adoption of the County's existing Goal 5 program shows that fish habitat and water quality concerns are inextricably linked. See, footnote 11, infra. Thus, it can fairly be said

[10] Under *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), it is permissible for LUBA to look to legislative history in assessing the meaning of a legislative enactment, without the necessity of finding an enactment ambiguous.

[11] The connection between water quality and fish habitat is made throughout the Comprehensive plan and its supporting September 1984 Technical Report (referred to hereinafter as "Tech. Rep.". See, e.g., Tech. Rep., D-28, 29, 30, 65, 70, 72, 73, (App 114, 115, 116, 117, 122, 124,125, respectively). See, e.g., Policy 2(a) (reference to 208 Non-point source water quality Best Management Practices), Plan, 8-3 (App 86); Policy 10(c), (d) (maintenance of riparian vegetation), Plan, 8-6, 8-7 (App 89, 90); Policy 10(j) (observance of point and non-point source programs to protect water quality for fish resources), Plan, 8-7, (App 90).

that UCDC 152.616(HHH)(11), as amended, is aimed at protecting fish habitat and populations of fish residing in certain stream segments. These are new protections for inventoried Goal 5 resources because Goal 5 and the Plan identifies the resources being protected including riparian corridors, (water and riparian areas) and fish habitat. Goal 5, OAR 660-015-000(5). These resources do not lose their Goal 5 status because the county deletes the words "Goal 5" in legislation affording them greater protections and changing the balance with respect to them. Having been identified in the county's plan as significant Goal 5 resources, the county may not ignore their status. See *D.S. Parklane Development, Inc. v. Metro (Parklane II)*, 165 Or.App. 1, 22 (2000) (Goal 2 requires Metro to apply acknowledged planning documents, not drafts of other documents); *1000 Friends v. City of Dundee*, 203 Or App 207 (2005).

As noted, Goal 5 is implemented in Umatilla County through the County's Plan natural resource policies and implementing land use regulations. The Plan policies are found in Open Space and Natural Resource Chapter, found at Chapter 8 of the Comp. Plan. App. 84-95. The inventories and ESEE analysis of recognized Goal 5 resources are set forth in Chapter D of the Technical Report (hereinafter Tech. Rep.). App. 101-124. See, e.g., footnote 11, infra.

The Umatilla Plan lists as "important habitat" a vegetation corridor within 50 feet of the banks of all perennial and intermittent streams, including those streams within the Walla Walla River basin. Tech. Rep., D-28, App 114.[12] Those areas include some listed as particularly sensitive that enhance shoreline stability and water quality and as providing "excellent" fish and wildlife habitat. *Id.* A map shows such particularly sensitive areas as falling within the Walla Walla River basin, and coinciding with the north and south forks of the Walla Walla River, with Couse Creek and Pine Creek. Tech. Rep. D-24. App 112. The recommended Goal 5 program for riparian vegetation corridors includes a streamside setback of 100 feet. Tech Rep., D-30, App 116.

[12] This version of the technical report is the version posted on the County's website. As a document that is a resource document for the County's Comprehensive Plan, it is a document of which LUBA may take official notice.

Fish habitat is specifically listed as a separate Goal 5 resource in the Umatilla Comprehensive Plan. Tech. Rep., D-65, App 117. It is listed and defined in three aspects: "rivers and streams," "lakes, reservoirs and ponds," and "headwaters areas". Tech. Rep., D-65, D-69-D-70. App 117, 121, 122. As described in the Tech. Rep., "most rivers and streams in Umatilla County, including those with intermittent flows, are considered important to the fish resource by the State Fish and Wildlife Department." Tech. Rep., D-69. App 121. "Headwater areas" are noted as not being mapped, but are described as "those sensitive areas in stream drainage patterns that fish generally do not inhabit, but where man's activities can cause direct impact on downstream water quality and fish production. Steep topography and highly erosive soils typify headwater areas." Tech. Rep., D-65, D-70. App 117, 122. The plan contains a map depicting the location of anadromous fish habitat and a table (Table XIII) showing the distribution of fish species by stream segment, including the following stream segments lying within the Walla Walla River basin: the Walla Walla River, Pine Creek, Couse Creek; the Walla Walla River North Fork; the Walla Walla River South Fork.[13] Tech. Rep., D-71, D-66-68, App 123, 118-120.

This description of fish habitat in the Tech. Rep. is followed by an ESEE analysis in which conflicts are identified as "uses or developments that require occupation of water surface area, channelization, removal of shoreline vegetation, alteration of natural streambanks, or filling into or removal from natural waterways." Tech. Rep., D-72, App 124. There is no discussion about conflicts from development that is located up-gradient in the watershed as much as two miles away on "highly erodible soils." It is evident from the discussion on page D-73 of the Tech. Rep. that a "3C" decision is made to protect both the Goal 5 resource and to limit the conflicting uses and that the County would employ a strategy largely reliant on management plans of other agencies, such as the Oregon Forest Practices Act, state and federal fill and removal programs and existing elements

[13] The Walla Walla River main stem, its north and south forks and Couse Creek are all noted as containing summer steelhead, rainbow trout, dolly varden, whitefish. Pine Creek is noted as containing rainbow trout.

of the Umatilla County zoning ordinance.[14] Tech. Rep., D-73. App 124. The data in Section D of the Tech. Rep. is specifically referenced in the comprehensive plan as providing the data for the relevant portion of the Comprehensive Plan. Comprehensive Plan, p. 8-21, App 96.

Chapter 8 of the Comprehensive Plan includes text and policies regarding protection of Goal 5 resources. Riparian areas are Fish and Wildlife Areas and Habitat are described as a protected resource, including waters in Umatilla County that serve as "valuable harvesting, spawning, and rearing areas for migratory fish, resident trout and warm-water fish." Comprehensive Plan, 8-1, App. 84. Fish and fish habitat resources are addressed under Policies 2, 10 and 12 of the Plan. Plan, pp. 8-3 - 8-4, pp. 8-6 - 8-7, and p. 8-8, App 86, 87, 89-91.

By its terms, the prescriptions of UCDC 152.616(HHH)(11) apply only to an unidentified subset of fish habitat stream segments and their tributaries in which Federally listed threatened and endangered species are said to be found. UCDC 152.616(HHH)(11), Rec 9, App 8. From a map contained in the record, it appears that these stream segments are intended to include segments of the Walla Walla River, the North Fork Walla Walla River, the South Fork Walla Walla River and Couse Creek. Rec. 386. App 80. These stream segments coincide with stream segments already designated in the county plan for fish habitat protection under Goal 5. See, e.g., App 112, 117, 119-120. Consequently, although the Federally listed fish are not designated as threatened or endangered species under the County's Goal 5 inventory, the habitat this fish population occupies and the upstream areas that affect that habitat have already been designated for protection under the county's Goal 5 program. Accordingly, the restrictions included in UCDC 152.616(HHH)(11) constitute an amendment to the County's existing Goal 5 program that protects fish habitat in the subject portion of the Walla Walla River Basin.

[14] Given the clear manifestations of an ESEE analysis and ESEE determination regarding fish habitat on pages D- 72 and 73 of the Tech. Rep., any interpretation by the County to the contrary would be inconsistent with the express language of the Plan and would not provide a basis for deferential review under ORS 197.829 and Siporen v. City of Medford, supra.

B. The County failed to demonstrate that the restrictions retained in Section 152.616(HHH), as amended by Ordinance 2012-05, comply with the requirements of Goal 5 and the Comprehensive Plan: LUBA held that the 2011 Ordinances affected Goal 5 resources in a manner that extends additional protections to those Goal 5 resources and that accordingly, under OAR 660-023-00250(3) of the Goal 5 administrative rule, the County could not grant such additional protections to designated Goal 5 resources without addressing compliance with Goal 5, as set out in OAR 660-023-0040 et seq. *Cosner, supra.* LUBA found that demonstration of compliance with Goal 5 required the County to make findings applying the applicable portions of the rule, citing *League of Woman Voters v. Klamath County*, 16 Or LUBA 909, 913-14 (1988). Because the County completely ignored Goal 5 as it related to the protections granted Goal 5 resources in the Walla Walla basin, LUBA remanded the ordinances to the County to make findings and address compliance with Goal 5.

On remand, the County takes the same flawed pathway it took with the 2011 Ordinances. Like the 2011 Ordinances it amends, Ordinance 2012-05 extends additional protections to already inventoried Goal 5 resources.[15] Like the 2011 Ordinances, Ordinance 2012-05 is a PAPA because it affects a Goal 5 resource, requiring a demonstration of compliance with Goal 5. OAR 660-023-00250(3). On remand, the County explicitly addressed Goal 5 only to explain it intended to avoid having to apply Goal 5. Ordinance 2012-05, p. 2, 2012 Rec. 8. The county deleted explicit references to protection of Goal 5 resources and eliminated the protections extended to Critical Winter Range habitat. Ordinance 2012-05, p. 3, 2012 Rec. 9. App 8.

[15] For example, the County's determination in the Tech. Rep. is to resolve the conflicts with conflicting land uses (as wind energy is now treated in the Walla Walla Basin, as a "so-called" 3C decision (with reference to under former OAR 660-016-0010). The challenged decision simply flatly prohibits wind energy development within certain distances of inventoried resources without any factual analysis. Further, Plan Policy 10(j) looks to established point and non-point source pollution programs as a way of insuring that water quality is maintained and enhanced. Comprehensive Plan, p. 8-7.

As set forth above, the retained language of UCDC 152.616(HHH)(11) continues to increase the protection of inventoried Goal 5 resources and accordingly, at a minimum under the *Cosner* reasoning, requires the County to make additional findings why it believes Goal 5 is complied with. Neither the riparian nor the fish habitat Goal 5 analysis contained in the Tech. Rep. considered wind energy development or development that might be remotely (as much as 2 miles under the 2011 and 2012 ordinances) situated from those areas as a conflicting use. In accordance with the Goal 5 rule, the conflicts analysis must be followed by an ESEE analysis and decision. See OAR 660-023-0050. Purporting to avoid Goal 5 by simply removing references to Goal 5 is a form-over-substance ruse. As demonstrated above, removing references to Goal 5 does not prevent the challenged decisions from affecting a Goal 5 resource either directly or indirectly. *1000 Friends of Oregon v. Jackson Co.*, 79 Or.App. 93, 97, 718 P.2d 753, *rev. den.* 301 Or. 445, 723 P.2d 325 (1986), cited with approval in *Urquhart, supra*).

C. The requirements of Goal 5 apply to all aspects of the restrictions in Section 152.616(HHH)(11): It is clear from the text and context of UCDC 152.616(HHH)(11) that the "protection" of erodible soils referenced in UCDC 152.616(HHH)(11) is closely linked to protection of inventoried fish habitat, and that any strategy that involves restrictions on development of Wind Energy Facilities based upon the presence of such soils would need to be evaluated as part of the Goal 5 process for protection of riparian corridors and fish habitat. This is particularly so given the need under Goal 2 for a factual basis.

2. <u>The County's decision fails to satisfy the requirements of Goal 2 and ORS 197.175(2).</u>

Goal 2 requires that a local jurisdiction's land use decision be supported by an adequate factual base. This applies to legislative as well as quasi-judicial decisions and is the equivalent to the requirement for substantial evidence in the whole record. *1000 Friends of Oregon v. City of*

North Plains, 27 Or LUBA 372 (1994). In addition, Goal 2 requires that a local jurisdiction's land use regulations be consistent with its comprehensive plan.

In this case, the need to demonstrate compliance with Goal 5 provides the framework for the required factual base. See *OCAPA v. City of Mosier*, supra. Without addressing Goal 5's implementing rule identifying conflicting uses and undertaking an ESEE analysis, the County has not demonstrated an adequate factual basis for its decision to extend additional protections to certain riparian corridors and fish habitat.

With regard to consistency with the comprehensive plan, the County must demonstrate how a decision that in effect prohibits development of wind energy in the Walla Walla basin is consistent with the plan's protection of riparian corridors and fish habitat as a "limit conflicting use" decision under Goal 5 and why, for example, utilization of existing non-point source water quality programs, as contemplated in the plan in the Tech. Rep (D-73) and in Open Space Plan policies 10(j) and 34 (regarding road construction for forestry activity) are not adequate to address water quality concerns. App 90, 95. Furthermore, any broad scale determination to avoid building roads on "highly erodible soils" must be consistent with the analysis required under Policy 12, which would require the County to first define and identify "unstable areas" (Policy 12(b)) (App 91), to determine what are "appropriate setbacks" (based upon an adequate factual basis) (Policy 12(a) (App 91) and to then apply Forest Practices Act rules and fish habitat management policies established by state and federal agencies as guidelines in addressing development activities affecting erosion in these areas (Policy 12(d)) (App 91).

Second Assignment of Error

In adopting the 2011 ordinances, as amended, the County violated Goal 5 and its implementing rule in that the challenged decision forecloses the County from ever being able to apply Goal 5 to "significant energy resources".

In *Cosner*, LUBA explained that the County can comply with Goal 5 with respect to significant energy resources in one of two ways -- either by applying Goal 5 programatically or on a

"case by case" basis. OAR 660-023-190(3). In the 2011 Ordinances, the county purported to apply Goal 5 on a case-by case basis. *Cosner*, slip op., at 20. However, the challenged decision absolutely prevents the County from ultimately being able to apply Goal 5 to energy resources on a case-by-case basis, because wind energy facilities are deemed to be conflicting uses to other existing or prospective inventoried Goal 5 resources in all cases. App 7, 8.

Importantly in this regard, the challenged decisions ignore that there are specific rules for energy facilities that apply in the future and that supersede the "standard Goal 5 process". OAR 660-023-0020(1); OAR 660-023-190(1)-(3).[16] OAR 660-023-190(1)(a) as a matter of law unequivocally adds as a matter of law, energy resources *applied for or approved by EFSC* to the county's inventory of significant resources. The 2012 Decisions ignore that prospectively there may be ever be per se inventoried significant wind energy resources in the Walla Walla Watershed. App 43, 44 (Met towers since 2006). The challenged decision instead determines all wind energy resources in the Walla Walla Watershed are conflicting uses precluding any possibility of a "case-by-case" program to "evaluate conflicts and develop a protection program" for energy resources.[17]

The county makes it impossible to ever apply the special state law rule about protection of significant energy resources in OAR 660-023-190(1)(b) to prospective wind energy resources in the Walla Walla watershed.[18] The county ignores that the requirement to include significant energy resources on the county's plan will be immediate when they are applied for or approved by EFSC. OAR 660-023-030(5). It ignores that when significant resource sites are per se identified by operation of OAR 660-023-190(1), they are required to go through the Goal 5 process. OAR 660-

[16] OAR 660-023-020(1) makes clear the primacy of the "resource-specific" rules: "In case of conflict, the resource-specific rules set forth in OAR 660-023-0090 through 660-023-0230 shall supersede the standard provisions in OAR 660-023-0030 through 660-023-0050."

[17] Comparing App 42-44 showing where the wind is in the Walla Walla basin to the presumed areas where the county bans any wind energy facilities (App 68 78-80), it is evident there is precious little if any areas where wind energy facilities would be allowed.

[18] Adequacy of information about the resource is irrelevant when the resource is conclusively presumed to be on the county's inventory of significant sites, as here. *See* OAR 660-023-030(2) and (3) regarding collecting and adequacy of information to determine significance.

023-040(1). It ignores that this includes identification and analysis of those uses that conflict with energy resources. OAR 660-23-040(2). The county not only ignores, but forecloses the requirement to ever adopt a program to implement the results of the ESEE process respecting significant energy resources. OAR 660-023-0050(1).

Where, as here, the adopted county amendments have adverse secondary effects on wind energy resources that Goal 5 per se will add to the inventory of significant energy resources, those secondary effects are reviewable. *1000 Friends v. Jackson County supra.* The county is required to consider and address that significant adverse secondary effect on the county's continued compliance with Goal 5. *1000 Friends v. Jackson County, supra.*

Petitioner acknowledges that in *Cosner,* LUBA rejected an argument that the challenged County program of restrictions and prohibitions on wind energy facilities violates Goal 5. LUBA decided that because the county is free to evaluate energy facilities under Goal 5 on a case-by-case basis, the challenged program did not violate Goal 5. *Cosner*, supra, at 20. However, in *Cosner,* no party raised and LUBA did not resolve whether the challenged decisions preclude the county from ever employing a case-by-case Goal 5 analysis of the type contemplated in OAR 660-023-190.[19]

Third Assignment of Error

In readopting Ordinances 2011-05, 2011-06 and 2011-07, the Board of County Commissioners adopted land use regulations that were not in compliance with the comprehensive plan and that are not supported by an adequate factual basis.

[19] In addition, no party raised whether the county may preclude wind energy facilities from ever gaining "significant resource" status under OAR 660-023-190(1)(a) or preclude such resources from ever being protected as defined in OAR 660-023-190(1)(b) by deciding here – to protect other Goal 5 resources that wind energy facilities are per se conflicting uses. The County program allows "existing residences" (without definition), whether temporary or permanent to prevent transmission towers that are within 500 feet; it allows "rural residences" existing at the time an application is "deemed complete" to prevent wind towers within 2 miles; it allows lines on maps to protect every use inside and prevent wind energy resources to be development within 2 miles (UGB line on map) or 1 mile (unincorporated community); it allows a "Federally listed threatened or endangered" species sighted at any time in any stream or tributary in the Walla Walla basin to foreclose wind energy facilities including transmission, for 2 miles. Thus under OAR 660-023-250(3)(b), the challenged decisions "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list" and are reviewable. LUBA did not resolve this issue because it was not asked to.

Under Goal 2 and ORS 197.175(2)(d), the challenged ordinances must be consistent with the County's acknowledged Comprehensive Plan. *NWDA v. City of Portland*, 198 Or App 286, 291, 108 P3d 589 (2005). Legislative decisions, such as amendments to a jurisdiction's land use regulations, must be supported by an adequate factual base, which is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *Waste Not of Yamhill County v. Yamhill County*, __ Or LUBA __ (slip op., 2011-091, April 5, 2012), p. 14.

For the purposes of this assignment of error, Petitioner assumes that, pursuant to the alternative arguments it made in Section III A herein the findings adopted in Order 2012-021 are properly before LUBA for its consideration as part of this appeal.

The Comprehensive Plan policies to which the *Cosner* remand was addressed and which were addressed by the County on remand are as set forth in Cosner and in the County's Order 2012-021.[20] For the reasons set forth below, the County's findings do not demonstrate compliance with the County's comprehensive plan and are not supported by substantial evidence.

1. **The restrictions at issue:**
   - 2-mile setback from rural residences and urban growth boundaries (UCDC 152.616(HHH)(6)(A)(3), 2012 Rec 5, App 4;
   - 2-mile setback from a UGB (UCDC 152.616(HHH)(6)(A)(1), 2012 Rec 5, App 4;
   - 1-mile setback from land zoned Unincorporated Urban Community (UCDC 152.616(HHH)(6)(A)(2), 2012 Rec 5, App 4;

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[20] **Open Space Policy 42(a):** "Encourage development of alternative sources of energy." App 98.
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 uses." App 97.
Energy Conservation Policy 1: "Encourage rehabilitation/ weatherization of older structures and the utilization of locally feasible renewable energy resources through the use of tax and permit incentives." App 101.
Economy of the County, Policy 1: "Encourage diversification within existing and potential resource-based industries." App 99.
Economy of the County, Policy 7: "Cooperate with development oriented entities in promoting advantageous aspects of the area." App 77.

- 500-foot setback of transmission lines from rural residences (UCDC 152.616(HHH)(6)(A)(2), 2012 Rec 5, App 4;
- The indeterminate setback from cultural resources (UCDC 152.666(HHH)(6)(A)(5), Rec 21, App 20.
- The prohibition in the Walla Walla River Basin of Wind Energy Facilities, or any part thereof, on highly erodible soils (UCDC 152.616(HHH)(11)(A)), 2012 Rec 9, App 8; and
- The 2-mile setback in the Walla Walla River Basin of Wind Energy Facilities from stream segments and their tributaries bearing Federal endangered or threatened fish populations (UCDC 152.616(HHH)(11)(C) (UCDC 152.616(HHH)(11)(B) under the 2012 amendments), 2012 Rec 9, App 8.

2. The findings do not demonstrate that the 2011 Ordinances are consistent with the relevant comprehensive plan policies: The language of the policies cited above speak to "encouraging" development of alternative energy sources (in Open Space Policy 42(a) and Energy Conservation Policy 1 – 2012 Rec 335, App 12), "encouragement" of economic diversification in potential resource-based industries (Economy of the County, Policy 1 – 2012 Rec 337, App 14), and "cooperating" with development-oriented entities to promote advantageous aspects of the area (Economy, Policy 7 – 2012 Rec 337, App 14). The County's findings, found at Paragraphs 1-6 of the Order (2012 Rec. 333-337, App 10-14) do not supply a definition of what is meant in the cited Comprehensive Plan policies by "encouragement," "promoting" or "cooperate" in development of alternative energy sources. However, the plain meaning of these terms[21] clearly would indicate an

[21] *Portland General Electric v. BOLI*, 317 Or 606, 611, 859 P2d 1143 (1993). The common dictionary definition for the word "encourage" is "2: to spur on: STIMULATE, INCITE; 3: to give help or patronage to: FOSTER. *Webster's Third International Dictionary*, p. 747. The common dictionary definition of the term "promote" is "4 a : to contribute to the growth, enlargement or prosperity of." *Webster's, supra*, at 1815. The common dictionary definition of the word "cooperate" means "to act or work with another or others to a common end." *Webster's, supra,* p 501.

intent to provide a supportive regulatory climate that goes beyond merely allowing the theoretical possibility on paper for development activity but that would also include positive steps to favor (e.g., the "permit incentives" referenced in Energy Cons. Policy 1) development of alternative energy sources and new and diverse economic enterprises that can capitalize on the County's natural resources and those resources that are advantageous for development in the County.

The County's findings of compliance with these policies rest on the following general premises repeated in several of its findings: (1) that its code "allows" for wind energy development even though under state law it does not have to allow for such development and that by specifically providing for wind energy development within the County it in fact "supports" such development,[22] (2) by enacting clear and objective standards regarding wind energy development, the County has made the regulatory environment better and "more attainable" for such development by reducing regulatory uncertainty, which ends up "promoting" the development of wind energy sources;[23] and (3) that the regulations do not preclude wind energy development in the County.[24] In addition, the County's findings make the general statement that the 2011 Ordinances were made "for the explicit purpose of providing clear and objective standards, to support and encourage commercial wind energy development." Order 2012-021, paragraph 5. 2012 Rec. 334.

With regard to the first premise, merely *allowing* for wind energy development in the County's code does not in and of itself constitute "encouragement," "promotion" or "cooperation" as it relates to development/utilization of alternative energy sources, providing permit incentives, providing diversification in the economy or otherwise taking advantage of an energy source that is readily available in the County and in which the County has an advantage over other counties.

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[22] See Order 2012-021, Findings 2, 3 and 6 (Open Space Policy 42), (Economy Policy 1), 2012 Rec. 333, 334. 335.
[23] See Order 2012-021, Findings 4, 5 and 6 (Open Space Policy 42). 2012 Rec. 334, 335, 336

[24] See Order 20120-021, Finding 6, responsive to Open Space Policy 42 ("The standards do not preclude the siting of facilities in the county."), Energy Conservation Policy 16 ("The standards may limit development in highly sensitive areas, but do not preclude the siting of facilities in the county.")

With regard to the second premise, the fact that the County has purportedly adopted clear and objective standards for wind energy development does not in and of itself demonstrate "encouragement," "promotion" or "cooperation" on the County's part, absent a consideration of what effect those clear and objective regulations would have on such development in the County. For example, a clear and objective setback standard could prescribe such broad setbacks from resources or land uses that the overlapping setbacks from the protected resources or uses would leave no room for development. In this case, the language of the 2011 Ordinances, as amended, shows that the County adopted a stringent, 2-mile setback from rural residences (Rec 28, App 27, 2012 Rec 5, App 4) and in the Walla Walla River Basin a blanket proscription against wind energy development on highly erodible soils (2012 Rec 9, App 8, Rec 31, App 30) and within 2 miles of river segments and their tributaries that contain Federally listed threatened and endangered species. Rec 31, App 30. There is abundant testimony in the record from wind energy developers and lessors that the restrictions in the 2011 ordinances would make development of wind energy development in the County more difficult or impossible. Rec 42-43, 427, 693, 709, 756, 3574, 3575. 2012 Rec. 20. The findings do not address what impact these "clear and objective" standards would have on actual development or how attainable approvals may be in the face of the stringent standards, even in the face of evidence from wind energy developers that the standards were too stringent, other than to make conclusory and self-serving statements that the standards "would not preclude commercial wind energy development" Rec 30, App 29. While there is no absolute requirement that legislative enactments have findings, where, as here there is such a stark difference between the testimony of the landowners with leases and wind energy developers on the one hand and the County's action on the other hand, some explanation is needed to establish the basis for the County's determination. See, e.g., *Wood v. Crook County*, 36 Or App 143 (1999), *Norvell v. Portland Metropolitan Area Local Government Boundary Commission*, 43 Or App 849, 855, 604 P2d 896 (1979).

With regard to the third premise, there are no findings as to what the extent might be of the area the County presumes to be left for wind energy development nor whether any areas that might be left available under the County's stringent regulations would in fact be desirable for wind energy development. The record shows that not all areas of the County could be expected to be suitable for wind energy development. Rec. 777. In fact, the record shows that wind energy leases tend to be concentrated in relatively small portions of the County. 2012 Rec 139. The record does not reflect that the County conducted any meaningful tests of its own to determine how wind energy development might be impacted by the regulations in the 2011 Ordinances, so no findings can be made in that regard. Given the large setbacks proposed by the County from rural residences, the broad proscriptions against wind energy development in the Walla Walla River Basin, and that the Walla Walla River Basin constitutes one of the most desirable areas in County for wind energy development (based upon the concentration of wind energy leases), one would expect a finding addressing with some specificity the claims of wind energy supporters that the 2011 ordinances would adversely impact wind development in the County. The County made no such findings.

Furthermore, in light of testimony included in the record that the standards in the 2011 Ordinance exceed state licensing standards for such development[25], one would expect there to be findings that address why despite the County's more stringent standards, the standards contained in the County's 2011 Ordinances still operate to "encourage" development of such alternative sources of energy (per Open Space Policy No. 42), operate as "permit incentives" in accordance with Energy Conservation Policy 1, encourage diversification within existing and potential resource-based industries (in accordance with Economy Policy 1) and operate to cooperate with development-oriented entities to "promote" the advantages the County has with respect to wind energy development.

[25] See, e.g., Rec. 703, 709 (with respect to state setbacks for noise), 705 (with respect to EFSC standards), 706 (with respect to state and federal permits governing erosion control), 707 (with respect to ice throw), 708 (with respect to archaeological resources), 3567 (setbacks from transmission lines), 3577, 3580 .

There are no findings addressing, as a measure of "encouragement" a comparison in how the impacts of wind energy development are addressed versus impacts of similar development activities, despite the existence of testimony in the record on this point. See, e.g., 2012 Rec 128, 266 – 269 (with respect to the disparate treatment of access roads to Wind Energy Generation Facilities versus the County's own road system in the Walla Walla River basin).

This is not an issue of interpretation where the deferential standard of review under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) will save the County. An interpretation that equates broad-brush blanket proscriptions not narrowly tailored to the characteristics of individual sites is simply not a plausible interpretation or application of the terms "encourage," "promote" or "cooperate".

3. The County's findings are not supported by substantial evidence: Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). For the reasons set forth below, some of the key findings on which the County relies in order to demonstrate compliance with the cited policies of the Comprehensive Plan are not supported by substantial evidence.

There is simply no credible evidence to support the finding, found in Paragraph 5 of the findings, that the purpose behind the 2011 Ordinances was "to support and encourage" commercial wind energy development. 2012 Rec. 334. The supporters of the Ordinances were all opponents or critics of wind energy development, particularly in the Walla Walla River watershed. See, e.g., Rec. 34-36, 38-42, 47-48, 709-711[26]. The adopted regulations were seen by them as the next best alternative to a moratorium. See, e.g., Rec. 39, 40, 41. Wind energy developers and property owners with wind energy leases have been uniformly critical of the proposed restrictions. See e.g.,

[26] This includes the testimony of Intervenor Dave Price, who stated with reference to the 2-mile residential setbacks that "The County needs to do all it can to protect the affected land owners." Rec. 709.

Rec. 36-38, 42-44, 46, 48, 50. With regard to the 2-mile setback, the testimony of the chief proponent of the 2-mile setback from rural residences, Planning Commission Chair Clint Reeder, was that the 2-mile setback is needed to give rural residential neighbors of wind energy development proposals added leverage to address concerns about reductions in their property values and to allow for negotiations for possible compensation. 2012 Rec 42-43, Rec 52, 3555-3556, 3558. This purpose was acknowledged by Commissioner Hansell in comments made at the May 12, 2011 hearing. Rec 709.

There is no substantial evidence to support the County's finding that wind energy development will not be precluded by the 2011 amendments. A test of the effects of the two-mile setbacks in the record indicated the impacts of the two-mile setback would be preclusive. Rec. 3574, 3336-3337. This was the reason cited by Commissioner Hansell in voting to oppose the 2-mile setback in the 2011 Ordinances. Rec. 60. The record shows that wind energy leases for possible wind energy development are concentrated in but a few areas of the County. 2012 Rec. 139. This is likely a result of the necessity that wind energy must locate where conditions – i.e., wind and access to transmission lines – support such development. Rec. 777, 780. While the setbacks might theoretically be satisfied in some remote areas of the County, there is no evidence to show that those areas would be areas in which development of wind energy would be feasible.[27]

The Walla Walla River Basin is a case in point. The evidence shows that it contains a high concentration of wind energy leases, indicating that it is among the most desirable areas in the County for location of such resources. 2012 Rec. 139. The only evidence in the record as to the distribution of highly erodible soils in the Basin, on which wind energy development would be precluded, indicates that such soils are widely distributed throughout the basin.[28] Rec. 387. In

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[27] It is precisely because energy facilities are locationally dependent that energy facility sites are subject to protection under Goal 5. See Goal 5.

[28] As explained in Petitioner's Fourth Assignment of Error, no one knows exactly what constitutes highly erodible soils or exactly where it is located. See, e.g., Rec. 397 (staff inquiry of DOA re basis for soils data). Accordingly, the map referenced herein represents the County's best estimate.

those areas where such soils are not as prevalent, the properties would appear to fall within two miles of streams regarded as having Federal threatened or endangered species. Rec. 386.

There is evidence in the record and otherwise that directly refutes the findings that the 2011 Ordinances "support" or encourage wind energy development in Umatilla County. For example, a review of the UCDC shows that no other land development activities in the EFU zone that might result in building roads on "highly erodible soils" are subject to the kind of restrictions on road building as are found in the Walla Walla River Basin. See, e.g., UCDC 152.060, EFU Zone Conditional Uses.[29] A case in point is the County's own road system, maintained by the County, some of which roads are located adjacent to or "up gradient" of stream segments the 2011 ordinances seek to protect. That system includes gravel roads that are adjacent to and up-gradient from streams in the Walla Walla River Basin that are said to include Federally listed fish. 2012 Rec 128-129 (and exhibits cited therein indicating location and nature of roads). According to the County Public Works Director, these roads are maintained in accordance with ODOT's standard "best management practices." 2012 Rec 266, 267-269. There is no activity that disturbs soils as much as does farming, but there is no suggestion in the DOA's Walla Walla Agricultural Water Quality Management Plan to avoid activities on soils subject to erosion, even on Highly Erodible Land. 2012 Rec 210, 232-235 (regarding uplands management, including for roads).

Finally, there is no substantial evidence to show that the county's proscriptions are so clear and objective as to give the kind of clear guidance to developers as the County suggests there is. With regard to the lack of clarity for setbacks from rural residences, the prohibition on highly erodible soils, setbacks from archaeological resources, the 2-mile setback from streams and tributaries with Federal endangered and threatened fish, see the discussion in the Fifth AOE with regard to compliance with ORS 215.416(8)(a), by this reference incorporated herein. By

[29] The list of conditional uses is set out at App 83, and 83a-83b. Reference to the individual standards shows no reference to avoidance of "highly erodible soils". In fact, that zoning code contains no definition of erodible or highly erodible soils. UCDC 152..030, App 81a, 81b

comparison, prior to the 2011 amendments, the residential setback standard was even more clear and objective than what replaced it: 3,520 feet measured to the boundary of properties zoned or Plan-designated as residential without need to determine the legal status of nearby residences. In the deliberations of the Board of Commissioners on the date of adoption there is not a single reference to a desire to accommodate developers by creation of clear and objective standards. Rec. 56 – 60. It is clear from this that the "developer certainty" justification that appears in the County's findings is just an after-the-fact fig leaf, ginned up in response to LUBA's remand requiring that findings be made. For all these reasons, the County's findings regarding compliance with the policies in its comprehensive plan fails to demonstrate consistency with the comprehensive plan as required under ORS 197.835(7)(a) and are not supported by substantial evidence as required by Goal 2 and accordingly pursuant to ORS 197.835(7)(b)[30] and ORS 197.835(9)(C), the County's approval of the 2011 ordinances, as amended, must be remanded.

Fourth Assignment of Error

In the alternative to the Second Assignment of Error, the County's adoption of the 2012 Ordinances erred by making a decision that is inconsistent with the County's Comprehensive Plan in Violation of Goal 2 and ORS 197.175(2) because the 2012 Decisions do not address policies in the Plan regarding Wind Energy Development.

In the event LUBA determines that Order 2012-021 is not properly before it in this appeal and that the findings contained in that Order apply only to the 2011 Ordinances, nonetheless, the 2012 Ordinances suffer from the same deficiencies found in the sixth assignment of error in *Cosner* and requires remand. As noted in Section III.A. above the 2012-04 and 2012-05 decisions were adopted to correct deficiencies in the 2011 ordinances and accordingly, extend and make effective the same restrictive wind energy development regulations adopted in the 2011 Ordinances.

This assignment is subject to the same legal principles as set forth under the first assignment of error and are hereby adopted by reference as if fully stated herein. In addition, the same

[30] There is no comprehensive plan policy that addresses the Goal 2 requirement that land use regulation amendments be supported by an adequate factual base.

Comprehensive Plan policies as are stated in that assignment of error are at issue and are incorporated herein as if fully stated.

The removal of the exception to the setback in Ordinance 2012-04 and the restrictions on wind energy development in the Walla Walla River basin in 2012-05 are indisputably before this Board. There are no findings demonstrating compliance of Ordinance 2012-05 or 2012-04 with the Comprehensive Plan. The 2012 Ordinances must be remanded under LUBA's ruling on the sixth assignment of error in *Cosner*. To the extent the Findings set forth in Order 2012-021, are viewed as being separately applicable by reference to the 2012 then the arguments set forth in the third assignment of error are hereby incorporated by reference.

Fifth Assignment of Error

The challenged decisions impermissibly apply to restrict or prohibit any wind power generation facilities, making no distinction between "utility facilities necessary for a public service" (ORS 215.283(1)(c) or utility lines meeting the standards of ORS 215.283(1)(u) and "commercial utility facilities for the purpose of generating power for public use: (ORS 215.281(1)(c) and impermissibly prohibits "transmission lines" on "highly erodible soils."

The challenged decisions apply to "Wind Power Generation Facilit[ies]".[31] UCDC 152.616(HHH)(1), (5). Wind Power Generation Facilities are defined as energy facilities that produce electrical power from wind "and their related or supporting facilities". UCDC 152.003. App. 81. Umatilla County's EFU zone conditionally allows all "Wind Power Generation Facilities" including ORS 215.283(2)(g) "commercial utility facilities for the purpose of generating power for public use by sale" as a conditional use. UCDC 152.060(F), App 83. While "[u]tility facilities necessary for public service" (ORS 215.283(1)(c)) and "utility facility service lines" (ORS 215.283(1)(u), are listed as permitted outright uses in the EFU zone, the challenged ordinances

[31] While the title of the proscriptive county ordinance section (UCO 152.616(HHH) is "Commercial Wind Power Generation Facility" all of the substantive regulatory provisions apply to "Wind Power Generation Facility". It is well established that the substantive portions of a regulation prevails over its title. CITE.

make them conditional uses despite LUBA's recent decision explaining that transmission lines serving electrical generating plants, including transmission lines that serve a single wind power facility cannot be subjected to discretionary local standards. *WKN Chopin, LLC v. Umatilla County*, ___ Or LUBA ___ (LUBA No. 2012-016, July 11, 2012).

Under state law, subject to constitutional restrictions and preemption, local governments generally may subject the ORS 215.283(2) uses, including the ORS 215.283(2)(g) regarding energy generating plants, to discretionary land use approval standards. *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). On the other hand, EFU uses listed as ORS 215.283(1), including "utility facilities necessary for public service" and "utility facility service lines" (for convenience "transmission facility uses"), cannot be subjected to local discretionary standards and must be allowed in EFU zones . *WKN Chopin*, supra. Transmission facility uses are subject only to the land use state approval criteria expressed in ORS 215.275 and may not be subject to additional locally imposed approval criteria. *WKN Chopin*, supra.

The subject decisions impermissibly add restrictions to transmission facility uses well in excess of those allowed under ORS 215.283(1)(c) and ORS 215.275. Specifically, the challenged decisions impermissibly regulate and in some cases absolutely prohibit "transmission facilities" as "components" of a "Wind Power Generation Facility." In this regard, the challenged decisions apply global restrictions to "components" as well as specific restrictions to "turbine towers" (UCDC 152.616(HHH)(a)(6)(1)-(4)) and other specific restrictions on transmission (UCDC 152.616(HHH)(11)(a) and still other restrictions apply to "tower and project components including transmission lines." UCDC 152.616(HHH)(6)(a)(5). There can be no doubt but that the challenged decisions purport to subject to the "County's discretionary authority" "transmission facilities connecting the project to the grid." UCDC 152.616(HHH)(5)(b)(3): *Id.* The challenged decisions purport to absolutely prohibit any wind power components, including transmission facilities in

whole areas of the county. UCDC 152.616(HHH)(11)(a) (restrictions on siting transmission lines on highly erodible soils in the Walla Walla River basin). The county has impermissibly subjected utility facilities subject only to state EFU zone standards in ORS 215.283(1)(c) and (u) to county discretionary authority. In so doing the county makes no effort and indeed does not to comply with the requirements of ORS 215.275. The county's decision must be reversed.[32] *WKN Chopin, supra.*

Sixth Assignment of Error

The challenged decision are contrary to law in that they violate ORS 215.427(3)(a) by allowing changes to the applicable criteria after application submittal, and violate ORS 227.416(8)(a) in that they are impermissibly vague.

A. **ORS 215.427(3)(a):** ORS 215.427(3)(a) authorizes the county to apply only those "standards and criteria" in effect at the time an application is filed. Contrary to this statute, the county purports to apply its restrictive 2 mile "setback" based on "rural residences" "existing on the parcel at the time an application is deemed complete." UCDC 152.616(HHH)(6)(3). App 4. Rural residences are in turn defined as a "legal, conforming dwelling existing on the parcel". *Id.* Determining what constitutes a "rural residence" is not merely a reference to a change in facts, but instead is its own legal standard requiring a discretionary application of subjective criteria in the county's code and state law. The 2-mile setback is thus a substantive standard composed of two provisions – the 2-mile reference distance and the determination of rural residences. Neither can be known or applied at the time the application is submitted, and this violates ORS 215.427(3).

B. ORS 215.416(8)(a): ORS 215.416(8)(a) has as its purpose to ensure that land use standards are clear enough that an applicant knows what must be shown to gain approval of a particular use. *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982) (applying

[32] Because the challenged decisions so hopelessly intertwine ORS 215.283(1) and (2) facilities, if LUBA does not reverse the challenged decisions, then at a minimum it should remand them for the county to comply with ORS 215.283 as well as ORS 215.275.

identically worded provisions in ORS 227.173(1)); *see also Lane County v. K A. Heintz Construction Co.*, 228 Or 152 (1961) (in order to be valid a zoning ordinance must "be definite enough to serve as a guide to those who have a duty imposed on them.") Where standards are so vague that the applicant does not know what is expected of him, those standards are invalid. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003). See also *West Linn Corporate Park v. City of West Linn*, 349 Or 58, 88 (1010).[33]

Here, standards in the challenged ordinances violate ORS 215.416(8)(a) and are impermissibly vague. The first such standard is the requirement for a two-mile setback from a "rural residence" (UCDC 152.616(HHH)(6)(3) (App 4). There is no definition of "rural residence" other than a "legal conforming dwelling existing on the parcel." Conforming to what? Building codes, land use standards, land division standards? If so which ones? Do temporary dwellings qualify, RV's, nonconforming uses? Even if an applicant were to guess, an applicant could not make any binding judgment about which "rural residences" qualify. The 2-mile setback standard is simply not clear enough to tell an applicant on what is expected of him and is therefore invalid.

The second challenged standard that violates ORS 215.416(8)(a) is the prohibition on any "Wind Power Generation Facility" on "soils identified as highly erodible." UCDC 152.616(HHH)(11)(A). App 8. There is no way to know what soils are considered "highly erodible." The most the code says is "those soils identified by the Oregon Department of

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[33] "As other ordinances, zoning ordinances are required to be reasonably definite and certain in terms so that they may be capable of being understood * * * "Further, as the Court in *Lingle*[33] acknowledged, the Due Process Clause may serve as a check on arbitrary land use regulation. 544 U.S. at 540, 125 S. Ct. 2074 *See State ex rel West Main Townhomes v. City of Medford*, 234 Or App 343, 346, 228 P3d 607 (2010) (land use regulation too vague to comply with the ORS 227.173(1) requirement for "standards and criteria") * * *"

Agriculture [DOA] as highly erodible." However, nothing in the record shows that the DOA provides any published or other source of information identifying such soils. There is no official classification for "highly erodible soils" evident in the record or where they would be located. The county does not even know as it only portrayed where it thinks there are "High *Potential* Areas" for highly erodible soils. (Emphasis supplied.) The county does not describe what soils and under what circumstances soils fall into this classification – a classification that leads to complete prohibition on wind energy facilities. There is no published or record document that gives meaning to this prohibition. The county plan discusses average soil capability taking into account "steep erodible soils". App 74. The county plan identifies "deep loess soils such as Shano, Ritzville, Walla Walla and Athena soils" as "very good dryland wheat areas and are classed as II and III." App 69; *see also* 2012 Rec 217, 246. But these soils are spread all over the county. App 76-77. Presumably areas good for grazing and other farming (tilling, harvesting, roads, irrigating, etc.) are not "highly erodible soils" where the challenged soils disturbance prohibition applies. There is a suggestion elsewhere in the record that "loess soils" are highly erodible. Rec. 1749; 2012 Rec 217. But are all "loess soils" the "highly erodible soils to which the county's restrictions apply? Only a draft document in the record identifies "highly erodible soils" as a category, but it merely references a report, which is not in the record. Rec. 3398. The record establishes that regardless, any development has the same impacts to erodible soils. Rec 3392. It is not reasonably possible for an applicant to identify the areas constituting "highly erodible soils" for which Wind Power Generation Facilities" are absolutely prohibited, and this is error.

The third category of prohibition/restriction that is not capable of reasonable identification is the requirement to show a setback from "*known archeological. historical or cultural* sites". UCDC 152.616(HHH)(6)(A)(5)(sic) (App 21). Known to whom? Known, as shown on what document?

Moreover, determining what type of place, item or structure constitutes an archeological historical or cultural sites is covered is not capable of being reasonably understood because there are no applicable definitions. Especially given the county's claim that its restrictive program to be applied to wind energy has nothing to do with Goal 5 or significant resources identified in its plan, it is simply not reasonably possible for an applicant to know how to comply with this provision. Demonstrating the problem, the county submitted a map into the record showing "berry picking areas" for example as "significant cultural and natural sites." Rec 385 (App 78).

The fourth prohibition that an applicant cannot reasonably understand compliance with is the requirement that a wind energy generation facility and components be set back a minimum of two miles from streams and tributaries containing Federally listed threatened and endangered species. App 8. The provision does not identify what "Federally listed threatened and endangered species" are referred to or where an applicant would go to find out. The challenged decision does not identify what streams or what the extent would be of the tributaries are referred to or where an applicant would go to find that out either. Making matters worse, as written the standard can be applied based on anecdotal claims of sightings of "Federally listed threatened and endangered species" in some stream or tributary, ostensibly at any point in the approval process. Concerning the latter, then not only is the standard hopelessly uncertain, its scope could never be set at the time the application is submitted, violating ORS 215.427(3). Rather, claimed sightings of celebratory fish in little-known "tributaries" will be the centerpiece of an opponents' case in an effort to kill a project including its necessary transmission "components." Under the challenged ordinance, given the lack of any standards to guide its application, an applicant has no way to disprove such a claim.

Finally, structurally, the challenged ordinances violate ORS 215.416(8)(a) in their entirety. The challenged ordinances purport to restrict or prohibit wind energy generation facilities as well as any "components." See, e.g., UCDC 152.616(HHH)(11), App 9, 18-20. Given the regulated and

prohibited "components" include all transmission and other facilities ostensibly transcending the power generation project boundaries and that are the responsibility of others (BPA, PGE etc.), it is impossible for an applicant for a wind generation project to know how to comply with the challenged standards. For facilities that the applicant neither owns nor controls, the applicant is unlikely to be in any position to know the scope or specifics of the transmission and "component" side of a project.

Seventh Assignment of Error

The County Ordinance 2012-04, 2012-05 and the 2011 wind energy facility ordinances that they readopt as amended, fails to comply with applicable law and lacks the support of substantial evidence because it is preempted by state law.

The challenged county ordinances are a comprehensive county program in the EFU zone, restricting all wind energy facilities using one or more turbines generating greater than 1 MW of electrical power. Preemption exists where a local regulation is incompatible with state law because either state law expressly leaves no room for the local regulation or because both state law and local law cannot operate concurrently. *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or. App. 457, 228 P.3d 650 *rev. den*, 348 Or. 524, 236 P.3d 152 (2010); *Li v. State*, 338 Or. 376, 396, 110 P.3d 91, 101-02 (2005) (Marriage laws are matters of statewide, not local, concern.) The preemptive effect of state law is a question of legislative intent. *Doe v. Medford Sch. Dist. 549C*, 232 Or. App. 38, 46, 221 P.3d 787, 792 (2009); *City of Portland v. Jackson,* 316 Or. 143, 147-48, 850 P.2d 1093 (1993); *State v. Robison,* 202 Or.App. 237, 241, 120 P.3d 1285 (2005). The intention of the legislature is ascertained by examining the text of the statute in its context, along with legislative history, and canons of statutory construction. *Doe v. Medford Sch. Dist. 549C , supra; State v. Gaines,* 346 Or. 160, 171-73, 206 P.3d 1042 (2009); *PGE v. Bureau of Labor and Industries,* 317 Or. 606, 610-12, 859 P.2d 1143 (1993). It is not necessary to use the word

"preempt" to manifest an intention to preclude local regulation. *AT & T Communications of the Pac. Nw., Inc. v. City of Eugene*, 177 Or. App. 379, 395, 35 P.3d 1029, 1040 (2001).

State law preempts the challenged county wind energy restriction program because:

1. State law declares that any wind energy facility applied for or approved by EFSC is a "significant energy resource". OAR 660-023-190(1)(a). The challenged program forecloses any possibility wind energy over 1 MW applied for through EFSC could ever enjoy the benefits of a "significant" energy resource;

2. The county program exceeds its delegated authority under the state's comprehensive renewable energy program; is inconsistent with the comprehensive state program encouraging renewable energy development because the county program restricts rather than encourages wind energy; impairs the state's ability to reach its renewable energy goals; and specifically makes the development of significant wind energy projects in Umatilla County impossible because it removes entire wind corridors from eligibility for wind energy facilities, including transmission facilities;

3. The county program makes it impossible for EFSC and the ODOE to perform their state law responsibilities with respect to wind energy development and renewable energy generally.

A: **Wind Energy Facilities Applied for or approved by EFSC must be given "significant" energy resource status:** In two ways, state law treats energy facilities as unique natural resources, assigning them special status not applied to other natural resources. First, energy resources either applied for or approved by EFSC are conclusively presumed to be significant energy resources. OAR 660-023-0190(1)(a). It does not matter that a local government may or may not have put energy resources on an "inventory." Inventory or not, energy facilities submitted to EFSC "shall be deemed significant energy resources". *Id.* Second, "to "protect" an energy source – regardless of whether applied for or approved by EFSC -- means to (a) limit uses that conflict with the energy resource, and (b) "authorize the present or future development or use of the energy source at the site."

The county program ignores these special rules, making no distinction between facilities applied for or approved by EFSC. Instead, the challenged county wind energy restrictions deem all wind energy facilities involving more than 1 MW a "conflicting use" and prohibits them in most of

the Walla Walla Watershed (App 68, 78-80), within two miles of a "rural residence" or UGB and within 1 mile of a unincorporated community with no possibility of waiver, as well as transmission facilities within 500 feet of an existing residence unless the owner waives the restriction.

While it is the county's obligation to apply Goal 5 to significant energy resources like wind energy facilities, including to *protect them* from conflicting uses (OAR 660-023-0190(1)(b))[34] and to allow the "development or use of the energy source at the site", the challenged decision forecloses wind facilities (including support facilities like transmission lines) greater than 1 MW from ever receiving protection *from* conflicting uses. *See* Ordinance 2012-05(2) (wind as "conflicting facilities") (2912 Rec 8); purpose of Ordinance 2012-05(2) to protect "highly erodible soils" from wind facilities and protect certain streams and certain fish from wind facilities (Section (11) (2012 Rec 9), Ordinance No 2011-07(8) and (11)[35] (Rec 30) and flatly prohibiting wind energy facilities on "highly erodible soils", or within two miles of a UGB, or within 1 mile of an "unincorporated community" or within 2 miles of a "rural residence" (Section 11(1)-(3)) Rec 21, 27-28, 31; 2012 Rec 5, 9. In theory a wind applicant can seek relief from the county prohibitions and restrictions as conflicting uses, by seeking a post acknowledgement plan amendment to send a particular wind facility application through the county ESEE process (on a so called "case by case" basis). However, that means in all cases the wind applicant will then be (1) foreclosed from seeking land use approval from EFSC, and (2) if it loses absolutely precluded and restricted as the challenged ordinances contemplate. This is because EFSC rules specifically state that an applicant may seek land use authorization from local government, but once an applicant applies for an energy project through a county's land use authority, the applicant cannot change its mind. ORS

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[34] The term "protect" in this context 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." OAR 660-023-0190(1)(b).

[35] The county appears to have retained these findings from Ordinance 2011-07 at Rec 30.

469.504(4); OAR 345-021-010(1)(k). Accordingly the county land use regulations impermissibly serve as a proxy to force an energy facility applicant to abandon any hope of gaining the benefits of the specific Goal 5 type of :"protection" offered energy facilities in OAR 660-023-0190(2), that are supposed to attach to the submittal of an EFSC application. OAR 660-023-190(1)(b). The county's program is preempted.

B: The county wind energy program is inconsistent with the state's comprehensive renewable energy development program because it restricts rather than encourages wind energy; significantly impairs the state's ability to reach its renewable energy goals; interferes with the state's ability to participate in wind energy in interstate commerce and specifically makes the development of significant wind energy projects in Umatilla County impossible because it removes whole wind corridors from eligibility for development of wind energy facilities, including transmission facilities: The state totally occupies the field of renewable energy development, siting and regulation. ORS 469.010[36], 469.310, 469.501 and 469.504. State preemption exists in two broad categories (viz.) (1) state programs and goals to develop and maintain renewable energy facilities in the state, and (2) a comprehensive program for siting of renewable energy facilities.

Regarding the former, state law establishes a comprehensive program to encourage use and development of renewable energy (including wind energy) facilities. ORS 469.010 (quoted in n 49). The Oregon Renewable Energy Act of 2007 further determines:

> "Whereas the Legislative Assembly finds that it is in the interest of the state to promote research and development of new renewable energy sources in Oregon; and
> Whereas the Legislative Assembly finds that it is necessary for Oregon's electric utilities to decrease their reliance on fossil fuels for electricity generation and to increase their use of renewable energy sources; and
> Whereas this 2007 Act may be cited as the Oregon Renewable Energy Act; and

[36] "It is the goal of Oregon *to promote* the efficient use of energy resources and *to develop permanently sustainable energy resources.* The need exists for *comprehensive state leadership* in energy production, distribution and utilization." *(Emphasis supplied.)*

Whereas the Oregon Renewable Energy Act provides a comprehensive renewable energy policy for Oregon, enabling industry, government and all Oregonians to accelerate the transition to a more reliable and more affordable energy system;" Rec 3910.

The 2007 Act requires larger scale Oregon energy companies to provide at least 25% of their energy from renewable sources including wind (called the Renewable Portfolio standard or RPS) by the year 2025. Rec 3910-3934 (reference to inclusion of wind at Rec 3911); 3935, 3807, 1932, 1934, 2137, 785, 729; Sec. Supp. Rec. 786.

The type of wholesale local control evident in the challenged county decisions circumvents state policy and the state's wind energy siting program and cannot coexist with the state program and is ultra vires. *See Eker Bros. v. Calumet County*, 321 Wis.2d 51, 772 N.W.2d 240 (2009).[37]

The challenged prohibitory program is particularly harmful to the state policy encouraging renewable energy, as the County has at least 70% of the state's wind energy resources. Rec 346.[38] It is impossible to promote and develop wind energy in Oregon, where the Oregon county having 70% or more of the state's wind resources significantly restricts or prohibits its development. Moreover, the County program makes no allowance for mitigation to remove to narrow the prohibition on wind energy facility development within the various setback prohibition areas.[39] See App 44 showing approved wind energy facilities in county. Moreover, the County's prohibitions in the "Walla Walla Watershed" are particularly devastating because they remove all or nearly all of the entire area from ever being a candidate for wind energy development. *Compare* maps showing

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[37] "* * * This determination must be made on a case-by-case basis where the local governing arm first hears the specifics of the particular wind system and then decides whether a restriction is warranted. But here, Calumet County promulgated an ordinance in which it arbitrarily set minimum setback, height and noise requirements for any wind system that might want to exist in Calumet County. We hold that this "one size fits all" scheme violates the legislative idea that localities must look at each wind system on its own merits and decide, in each specific case, whether the wind system conflicts with public health or safety. We reverse and remand with directions that the circuit court strike the County's ordinance as ultra vires."

[38] Oregon provides more than 5% of its electricity from renewable sources. Rec 3894.

[39] No wind energy development including transmission facilities in the "Walla Walla Watershed" on "highly erodible soils", or within 2 miles of certain streams or tributaries (App 8); no transmission outside of the former within 500 feet of "an existing residence" (App 20); no wind towers 2 miles from a "rural residence", 1 mile from an unincorporated community, 2 miles from a UGB. App 4.

significant wind energy leases in this area App 43, with App 68, 78-80. Further, the county has shown other areas here it thinks wind in Umatilla County is likely to be concentrated in the future. Supp. Rec. 2288, 2289, 2291, 2293, 2295; 3334, 3335, 3336, 3339. Together, it is evident that the challenged prohibitions and restrictions roughly correspond with the apparent wind corridors the state relies on to meet its energy objectives. *Compare* Supp Rec 672, 673, 3340. See UCDC 152.616(HHH)6(5); (11); Rec 21; 380, Supp Rec 388. The devastating impact of the county's restrictive program also flows from the undisputed fact that the development of wind energy facilities requires adequate spacing between rows of turbines of between 1/3 to 1 mile. Supp. Rec.788. The Challenged rules leave very little room for flexibility in siting wind energy facility to enable adequate spacing.

There is no dispute that wind energy facilities can only be developed where the wind is. Supp Rec 777, 780. If the county prohibits or restricts wind energy development where the wind is, there will be little or no wind energy development in the county. The county's regulatory scheme removes whole wind corridors in the county from any possibility of wind power development, leaving spotty chunks of land not shown to be suitable for the development of wind energy because connectivity and corridors are all but destroyed by the county program.

Further, making matters worse, the latest iteration of the county's requirement for a "2-mile setback" from "rural residences" and from the 2 miles from a UGB and 1 mile from an unincorporated community removes any possibility that the various setbacks can be waived. 2012 Rec 5. These are now "hard stops" that purport under land use authority to forever remove large wind corridors from any possibility of producing or transmitting wind energy. Because the County has so much of the state's wind energy resources, so significantly restricts wind energy, fails to account for the "significant" resource status of wind projects applied for or approved by EFSC, fails to provide for any possibility that wind energy resources will be protected as required by OAR

660-023-0190(1)(b) and fails to attempt to show its program complies with ORS 469.010, the county's restrictive program is preempted as inconsistent with the state program.

C. County Exceeds Delegated Authority: There is no dispute that the state employs a comprehensive program for siting wind energy facilities. ORS 469.401; 501 and 504; OAR 345-021-000 et seq; 345-022-000 et seq; 345-024-000 et seq. EFSC has the authority to issue site certificates for facilities applied through it. ORS 469.401. The state explicitly preempts local decisions or actions on matters addressed by an EFSC site certificate. ORS 469.401(3) and (4). Necessarily, this extends to matters EFSC has authority to regulate in its site certificate. The state's siting authority extends to requiring the county to "amend its comprehensive plan and land use regulations as necessary to reflect the decision of the council pertaining to a site certificate or amended site certificate" on or before the next periodic review. ORS 469.401(7). The state delegates only specific, limited and conditional land use authority to local government over siting of wind energy facilities voluntarily or required to be submitted to EFSC. This delegated authority is conditioned on, and limited to, applying local land use "substantive criteria" that are (1) required by "the applicable goal" [40], and (2) in effect at the time the application is submitted. ORS 469.504(1)(b)(A); OAR 345-022-0030(3)[41]; OAR 345-022-0030(1) and (1)(b)(A). Importantly, consideration of purported land use impacts of energy facilities applied for or approved by EFSC are restricted to the "land use impacts" within the "site boundary" and within "one half mile" of it. OAR 345-001-010(59)(c). Clearly, the county program vastly exceeds these thresholds.

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[40] ORS 469.504(1)(b) provides: EFSC will consider local substantive land use law "from the affected local government's acknowledged comprehensive plan and land use regulations *that are required by the statewide planning goals and in effect on the date the application is submitted.*" (Emphasis supplied.) In this regard, Goal 3 is the only applicable goal because the county's restrictions only apply in the county's EFU zone.

[41] OAR 345-022-0030(3) provides in relevant part: "the 'applicable substantive criteria' are criteria from the affected local government's acknowledged comprehensive plan and land use ordinances that are *required by the statewide planning goals* and that are *in effect on the date the applicant submits* the application * * *" (Emphasis supplied.)

County rules not required by "applicable goal" and conflict with express state standards: As explained above, the county is authorized to impose land use standards "required" by Goal 3. ORS 459.504(1)(b)(A); OAR 345-022-0030(3). Goal 3 "Agriculture" has as its purpose: "To preserve and maintain agricultural land". It authorizes "farm and nonfarm uses * * * that will not have a significant adverse impact on accepted farm or forest practices." The challenged county decisions include nothing to suggest that they are "required by" Goal 3 and it is not evident that they are. The closest the county comes is in prohibiting any wind energy development on "highly erodible soils" in the Walla Walla watershed, but the challenged decision states this requirement flows from OAR 690-507-0020 (watershed rules not agricultural rules), and "to facilitate compliance with applicable federal laws" citing the Endangered Species Act and the Clean Water Act. (Rec. 30). Moreover, protecting "highly erodible land"[42] from erosion is achieved by the county in all other cases through mitigation not proscription. ("Cropland management systems should be designed to control sheet and rill erosion and gully erosion on all cropland, not just land designated as Highly Erodible Land"). Rec. 1763. The undisputed evidence is that mitigation is effective and achieves the purposes of protecting soils that tend to erode, and this undermines any claim that the "highly erodible soils" prohibition has anything to do with agriculture or protecting soils. The challenged county program exceeds the county's limited delegated authority as not "required by the applicable goal".

Further, the challenged county wind energy prohibition/restrictions creates significant conflict between the applicable state wind energy facility siting standards and purported local "applicable substantive criteria". The county intends this conflict. The new county requirements apply to wind power facilities, including those required to be applied for through EFSC and those

[42] This does not appear to be the same thing as "highly erodible soils", but the point is where there is a potential for high erosion, the county plan recognizes mitigation. The challenged program purports to deny mitigation and this is a significant change in the county Goal 5 program requiring the Goal 5 process as explained under the Second Assignment of Error.

for which the applicant elects to apply to EFSC. The only exception in the county program is that wind projects applied for through EFSC need not comply with county "procedural requirements" for hearing and pre-application conferences. Ordinance 2011-05 (UCDC 152.616(HHH)(1). Rec 18. Other manifestations the county's intention to replace the comprehensive state program governing renewable energy facilities with its own, the county removed all references to deference to EFSC standards on matters under state law that EFSC is required to address. *See* Ordinance 2011-005 UCDC 152.616(HHH)(2), Rec 18 (EFSC avian monitoring requirements); Rec 22 (county not required to accept EFSC application documentation (6); Rec 24 (compliance with EFSC financial assurance standards not adequate to establish compliance with local dismantling and decommissioning standards). Specific examples of conflicts between state rules and the challenged county program follow. (1) In regulating the siting of wind energy facilities, the state regulates "Soil Protection" per OAR 345-022-022. Under this state standard, the state recognizes erosion mitigation and allows projects to be approved where the project is "not likely to result in significant adverse impact to soils including, but not limited to erosion * * *" OAR 345-022-022. On the other hand, the county simply prohibits all wind energy development on "highly erodible soils" in the Walla Walla watershed. Rec 30; 2012 Rec 9. (2) The state has a comprehensive regulatory program for wind energy facilities that ensures public safety. OAR 345-024-010. To the extent that the county's challenged restrictive program is designed to protect public safety by establishing absolute requirements for distances between turbines and UGBs, "rural residences", and unincorporated communities, the county is preempted. Similarly, EFSC comprehensively regulates siting standards for transmission lines. OAR 345-024-0090. (3) The state authorizes development of wind facilities in all areas other than those the state has deemed to be "protected areas" per OAR 345.022-0040. The county on the other hand includes absolute prohibitions on development of wind energy facilities within 2 miles of streams having fish protected by the ESA; 2 miles of a

"rural residence", 2 miles of a UGB, 1 mile of an "unincorporated community, and an undetermined distance of certain cultural and historic facilities, all of which vastly exceed the areas the state has decided are off limited to renewable energy development. Supp Rec 388. While in the exercise of its authority to apply rules "required" by Goal 3 the county could employ discretionary review standards "required by Goal 3" to be applied on a case by case basis, the county lacks authority to expand areas where absolute wind energy prohibitions exist. The county has in effect impermissibly amended the state's list of areas where wind power is prohibited. Moreover, even for prohibited areas, the state allows some development of transmission and related facilities where there are no reasonable alternatives. OAR 340-022-0040(2) and (3). On the other hand, the county prohibitions are absolute, with no adjustment contemplated. (4) The state comprehensively resolves fish and wildlife habitat issues, considering mitigation and requires consistency with OAR 635-415-0025. OAR 345-022-0060. The state comprehensively regulates threatened and endangered species issues that arise in the context of wind energy proposals under applicable state statutes. OAR 345.022-070. On the other hand the county flatly prohibits any wind development within 2 miles of certain streams taking huge wind energy corridors ("significant energy resources") out of consideration for wind energy production, flatly prohibits any wind energy development on "highly erodible soils", demands its own review of bird and avian data and requires the applicant to develop specific plans for the county to "minimize adverse impacts". Rec 20-21. (5) The state comprehensively regulates historic, cultural and archaeological resources in the context of the development of wind energy proposals. OAR 345-022-090. On the other hand, the county requires setbacks of undetermined distance from these resources when a tribe or other person identifies them, ostensibly even anecdotally. The scope of this county prohibition is stunning as is evident from one map in the record. Supp Rec. 388. It is likely that EFSC would approve a certificate that the county scheme would foreclose. (6) The state program protects scenic resources described in a

comprehensive plan. OAR 345-022-0080. However, the county imposed absolute 2-mile setbacks from UGBs, from "rural residences" and 1 mile from "unincorporated communities" ostensibly on scenic resources bases without bothering to identify these resources in its comprehensive plan. The state program totally occupies the field of the permissible types of scenic resources to protect from renewable energy facilities and the county's indiscriminate and blanket program is inconsistent with the state program.

County program applies criteria not in effect at the time the application is submitted: The challenged county program also fails to meet the second delegation condition (viz.) that the applicable substantive criteria are those in effect at the time the application is submitted. Under the challenged county program, at the time an application for a wind project is submitted to EFSC, it is impossible to identify the applicable land use criteria when the application is submitted to EFSC. Specifically, the EFSC wind energy applicant could not know the location of any "rural residences" and hence the location of the "2-mile setback from rural residences" because "rural residences" are not identified under the county program until *after* a submitted application is "deemed complete." This contravenes state law, requiring land use standards be applied that are in effect at the time the application is *submitted.* ORS 215.427(3); ORS 459.504(1)(b)(A) (same) compare to 152.616(HHH)(6)(3)). App 4. Similarly, at the time an application is submitted there is no published document identifying "highly erodible soils". The record contains no map, no verifiable description of what these soils are.[43] Reference to the DOA (UCDC 152.616(HHH)(11) App 8) is of no assistance because there is nothing in the record to show that at the time an application is submitted, it is possible to identify through any published source, all the "highly erodible soils' for which wind energy development is absolutely precluded by the county.

[43] The county merely included a map of where it *thinks* such soils might be. Rec 387, App 68.

The possibility that EFSC can potentially avoid applying the challenged county requirements is no defense to preemption. Preemption applies where, as here, the county program on its face conflicts and is inconsistent with the comprehensive state renewable energy development and siting program. There is a good reason for this. The substantial uncertainty created by having a county prohibit wind energy facilities in vast swaths of the county means submitting a wind energy facility application to EFSC is confusing and uncertain. On the assumption that the county's land use regulations are required by Goal 3, EFSC is required to apply the "applicable substantive law" of the county that is identified by the county governing body.[44] Under OAR 345-022-0030, EFSC may not apply the "balancing test" regarding the public interest to avoid applying the "applicable substantive law" recommended by the "special advisory group." OAR 345-022-030(b). There is only one potential option left for EFSC if a project does not comply with "one or more" "applicable substantive criteria".[45] That option is for EFSC to find that the project does not comply with "one or more of the applicable substantive criteria," but otherwise complies with "the applicable statewide planning goal", and then the project may be approved if complies with the applicable goal (ORS 469.504(1)(b)(B) or EFSC may take an exception to the applicable goal. *Id. See Save our rural Oregon v. EFSC,* 339 Or 353, 368, 121 P 3d 1141, 1150 (2005) (interpreting ORS 469.504 after first "cautioning the reader at the outset[46] that this statutory interpretation exercise involves mind numbing detail").

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[44] The administrative rule uses the term "special advisory group" but this means the county governing body. *See* ORS 469.480(1) (special advisory group is governing body); ORS 469.504(5) (EFSC to apply criteria recommended by the special advisory group).

[45] A finding of noncompliance with the applicable substantive criteria does not appear to be the same thing as a finding of a conflict between an applicable substantive criteria and a state statute and rule. See OAR 345-022-0030(5). The issue we are discussing here involves a situation where a proposed large scale wind energy project does not meet the county restrictions challenged in this appeal and whether.EFSC has the authority to waive compliance with such local "applicable substantive law".

[46] 339 Or at 364.

This built-in conflict between the state's largest wind resource producing county prohibiting or severely restricting wind energy and state policy favoring developing and siting wind energy facilities, means the state cannot "encourage" the development of wind energy in Umatilla County (ORS 469.010) or look forward to Umatilla County contributing to the state's ability to meet its 25% RPS. Instead, the built-in conflict between the established state program and the challenged county program adds confusion, delay and uncertainty into the comprehensive state process, which can only discourage wind energy proposals in Umatilla County. This is exacerbated by the fact that there are no cases interpreting ORS 469.504 in the context of a proposed energy facility that does not meet the applicable substantive law identified by the EFSC "special advisory group." Thus, a wind energy proposal submitted to EFC within 2 miles of a "rural residence" and within 2 miles of a UGB or within one mile of an unincorporated community, within the Walla Walla Watershed on soils the county calls "highly erodible soils" is a project seeking waiver of the county "applicable substantive law" and is not one seeking, but failing, to establish compliance with them. Whether a court would decide that, in such a circumstance, EFSC may "waive" the applicable substantive law and simply apply Goal 3, is unknown. The only thing that is clear is that the challenged county decisions improperly attempt to create applicable local substantive law that trumps wind energy facility policy and siting standards established by the state.

D. County has no authority to prohibit or restrict transmission facilities: The county program purports prohibits transmission facilities within 500 feet of an "existing residence". App 20. Within the Walla Walla Watershed, no transmission facilities at all are allowed on soils claimed to be "highly erodible." App 8. The challenged county prohibitions and restrictions make no room for state programs for siting new and expanded transmission facilities in protected "existing

corridors" ORS 469.300 and 469.442; OAR 345-01-010(20).[47] The county prohibitions exceed the state-identified permissible land use impact areas identified in OAR 345-001-010(59)(c). The county prohibitions on transmission facilities restricts projects crossing interstate lines adversely affecting interstate commerce in contravention of federal authority delegated to the state by FERC. See Federal Energy Policy Act of 2005; 16 U.S.C. § 824(b). *See also New York v. FERC*, 535 U.S. 1, 6-8 (2002) (FERC regulates the transmission of electric transmission in interstate commerce). The state's delegated authority does not contemplate the kind of protectionism and prohibitory regulations the county has adopted. The challenged county program is preempted and should be reversed as exceeding the county's authority or remanded.

Eighth Assignment of Error

The County's failure to coordinate its wind energy restrictions with the Oregon Department of Energy violates Goal 2's coordination requirement and the Goal 5 administrative rule. Relatedly, the County decision fails to establish compliance with ORS 465.010, as required by state law.

1. **Failure to Coordinate:** Goal 2 requires the county to coordinate its land use decisions with affected units of government. *Ghena v. City of Grants Pass*, 50 Or LUBA 552 (2005). Goal 2 requires written notice of a proposed land use plan amendment be provided to all potentially affected governmental units, and the notice must accurately explain the proposed action and invite written comment. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998). Moreover, under the coordination requirement, the county must adopt findings that respond to state agency concerns. *DLCD v. Douglas County*, 33 Or LUBA 216 (1997).

Affected governmental units include all "local governments, state and federal agencies and special districts which have programs, land ownerships or responsibilities within the area included in the plan." Goal 2. ODOE prepares and administers a comprehensive energy plan, pursuant to

[47] "'Existing corridor,' as used in ORS 469.300 and ORS 469.442, means the right-of-way of an existing transmission line, not to exceed 100 feet on either side of the physical center line of the transmission line or 100 feet from the physical center line of the outside lines if the corridor contains more than one transmission line."

ORS 469.060. Given the state policy to encourage renewable energy resources and ODOE's responsibilities in planning for and regulating such resources, there is no question that ODOE constitutes an "affected governmental unit". The county states as much in its 2011 DLCD notice. App 49. Accordingly, Goal 2 requires the county to coordinate the challenged decisions with ODOE; nothing in the record suggests that the county did so. OAR 660-023-0190(3) also requires coordination of planning activities with ODOE under Goal 5.

Moreover, the county's notices have consistently identified the proposal as "clarifying the process" and "refining standards" (Rec 4429) or as merely amendments to "large scale commercial wind energy standards" Rec 14, 15; or such amendments on remand. 2012 Rec 299, 300-301. Therefore, not only is there no evidence ODOE was furnished any notice, it is safe to assume that any notice ODOE could have received was deficient. Failures to comply with Goal 2 and Goal 5's coordination responsibility are particularly problematic in light of the county's twin failure to comply with ORS 469.010. The county's decisions should be remanded pursuant to ORS 197.835(7)(b) for failing to coordinate with DOE, as required by Goals 2 and 5.

2. **Failure to Comply with ORS 469.010:** Agencies are required to consider ORS 469.010 in rule and policy amendments. ORS 469.100. Moreover, "all agencies are required to review their rules and policies to determine their consistency with the policy stated in ORS 469.010." ORS 469.100. The county is an "agency" for purposes of this rule. ORS 469.020(1). The challenged decisions fail to establish compliance with these requirements.[48] The county decisions should be remanded.

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[48] ORS 469.010 states in relevant part:

"(2) It is the goal of Oregon to promote the efficient use of energy resources *and to develop permanently sustainable energy resources*. The *need* exists for *comprehensive state leadership in energy production, distribution and utilization*. It is, therefore, the policy of Oregon:

"(a) *That development and use of a diverse array of permanently sustainable energy resources be encouraged* utilizing to the highest degree possible the private sector of our free enterprise system.

Conclusion

For the reasons set forth herein, the County's decision must be reversed or at a minimum remanded.

Dated this 1st day of August, 2012.

/S/ BRUCE W. WHITE

Bruce W. White, OSB 85095
Attorney for Petitioner Hatley

"(f) That cost-effectiveness be considered in state agency decision-making relating to energy sources, facilities or conservation, *and that cost-effectiveness be considered in all agency decision-making relating to energy facilities.*

"(g) *That state government shall provide a source of impartial and objective information in order that this energy policy may be enhanced.*" *(Emphasis Supplied)*

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM HATLEY Petitioner, vs. UMATILLA COUNTY BOARD OF COMMISSIONERS Respondent, and BLUE MOUNTAIN ALLIANCE, DAVE PRICE and RICHARD JOLLY Intervenor-Respondents.	LUBA No. 2012-017, 018, 030 **CERTIFICATE OF FILING AND SERVICE**

CERTIFICATE OF FILING

I hereby certify that on August 1, 2012, I filed the original of this Petition for Review together with four copies with the Land Use Board of Appeals, 550 Capitol Street N.E., Suite 235, Salem, Oregon 97301-2552, by causing the Petition for Review to be deposited in the United States Postal Service first class mail, certified.

Dated: August 1, 2012.

Bruce W. White, OSB #850950
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2012, I served a true and correct copy of this Petition for Review on the parties by causing the Brief to be deposited in the United States Postal Service first class mail, certified, addressed to:

Daniel Kearns, #893952
Reeve Kearns PC
621 SW Morrison St., Suite 1225
Portland, OR 97205
503 225-1127
dan@reevekearns.com
Attorney for Intervenors-Respondents Blue Mountain Alliance, Dave Price and Richard Jolly

Douglas R. Olsen, #844383
Umatilla County Counsel
216 SE 4th St.
Pendleton, OR 97801
541 278-6208
dougo@umatillacounty.net
Attorney for Respondent Umatilla County

Dated: August 1, 2012

Bruce W. White, OSB #850950
Bruce W. White, Attorney, LLC
P. O. Box 1298
Bend, OR 97709
(541) 382-2085
bwwlaw@yahoo.com
Attorney for Petitioner