BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM HATLEY,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

BLUE MOUNTAIN ALLIANCE,
DAVE PRICE and RICHARD JOLLY,
Intervenors-Respondents.

LUBA Nos. 2012-017, 2012-018 and 2012-030

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Bruce W. White, Bend, filed the petition for review and argued on behalf of petitioner.

Michael C. Robinson, Portland, and Douglas R. Olsen, County Counsel, Pendleton, filed the response brief and argued on behalf of respondent. With them on the brief were Corinne S. Selko and Perkins Coie LLP.

Daniel Kearns, Portland, represented intervenors-respondents.

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

AFFIRMED (LUBA Nos. 2012-017/018)	10/04/2012
DISMISSED (LUBA No. 2012-030)	10/04/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

In LUBA Nos. 2012-017 and 2012-018, petitioner appeals Ordinance No. 2012-04 and Ordinance 2012-05, which amend the county's land use regulations regarding wind energy facilities. In LUBA No. 2012-030, petitioner appeals Order No. 2012-021, which adopts additional findings.

REPLY BRIEF

Petitioner moves to file a reply brief to address new matters raised in the response brief regarding waiver of issues. The reply brief is allowed.

FACTS

The county adopted the two challenged ordinances, Ordinances No. 2012-04 and 2012-05 (together, the 2012 Ordinances), following LUBA's remand in *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-070/071/072), January 12, 2012.

Cosner involved appeals of three related county ordinances, Ordinance 2011-05, 2011-06, and 2011-07 (collectively, the 2011 Ordinances). The 2011 Ordinances amended the county's land use regulations, at Umatilla County Land Development Ordinance (LDO) 152.616(HHH), governing wind energy facilities in the county's exclusive farm use (EFU) zone. The 2011 Ordinances included a number of amendments to LDO 152.616(HHH), but only two amendments are relevant in the present appeal.

First, Ordinances 2011-05 and 2011-06 increased the required setback between a wind energy facility and certain residential or urban areas from 3,520 feet to two miles, with provision for the city council or affected land owner to authorize a lesser setback. In *Cosner*, LUBA sustained the first assignment of error, concluding that the provisions allowing a landowner or city council to authorize a lesser setback violated the Delegation Clause of Article I, section 21 of the Oregon Constitution.

Second, Ordinance 2011-07 adopted additional measures intended to protect inventoried Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resources from the impacts of wind energy facility development. In *Cosner*, LUBA sustained the second assignment of error in part, concluding that because Ordinance 2011-07 amended the county's program to protect inventoried Goal 5 resources, the county erred in failing to address the requirements of the Goal 5 rule, at OAR 661-023-0250.

Finally, LUBA remanded under the sixth assignment of error, for the county to address whether the three 2011 Ordinances are consistent with several county comprehensive plan policies regarding energy. LUBA rejected all other assignments of error, and remanded the 2011 Ordinances to the county for further proceedings.

On remand, the county conducted a single proceeding to address the three bases for remand identified in *Cosner*. However, the county chose to address each of the three bases for remand separately, which resulted in the adoption of the two ordinances challenged in these appeals, Ordinances Nos. 2012-04 and 2012-05, and adoption of Order No. 2012-021. Ordinance 2012-04 responds to the first assignment of error in *Cosner*, by deleting the setback waiver provisions in the 2011 Ordinances. Ordinance 2012-05 responds to the second assignment of error in *Cosner*, by deleting text in one of the 2011 Ordinances, with the intent of deleting all the additional measures to protect inventoried Goal 5 resources adopted by the 2011 Ordinances, thus making it unnecessary for the county to address the Goal 5 rule. Ordinance 2012-05 is supported by findings that are included in Ordinance 2012-05.

To address the sixth assignment of error in *Cosner*, the county adopted Order No. 2012-021, which sets forth additional findings concluding that the 2011 Ordinances are consistent with five identified comprehensive plan energy policies that encourage development of alternative energy sources. A second order, Order No. 2012-020, was also adopted, which initiated a proceeding before the county planning commission to recommend

ways to replace the setback waiver provisions deleted in Ordinance 2012-04. Order No. 2012-020 is not at issue in this appeal.[1]

The county adopted the 2012 Ordinances and the two orders on February 28, 2012, mailing a combined notice of the two ordinances and two orders to petitioner and others who participated in the remand proceeding and by virtue of that participation became entitled to notice.

On March 20, 2012, petitioner, who was party to the *Cosner* appeal, filed with LUBA timely appeals of the 2012 Ordinances, and those two appeals were consolidated for LUBA review. On April 18, 2012, petitioner appealed Order No. 2012-021, but in an order dated July 2, 2012, LUBA concluded that the appeal of Order No. 2012-021 was untimely filed. *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA No. 2012-030, Order, July 2, 2012).[2] However, given the relationship between the 2012 Ordinances and Order No. 2012-021, the likelihood that our dispositions of all three appeals would be appealed further, and the possibility of cross-over issues and disjointed timing if further appeals of LUBA's dispositions of the three appeals proceeded on different tracks, we chose to consolidate LUBA No. 2012-030 with LUBA Nos. 2012-017/018 for the limited purpose of ensuring that the appeals are disposed of on the same timeline. In doing so we stated that we would delay issuance of a final opinion dismissing LUBA No. 2012-030 until we issued the final opinion in the appeal of the 2012 Ordinances.

[1] We understand that the county has recently adopted an ordinance, Ordinance No. 2012-013, which provides adjustment criteria under which the county can approve reductions in the two-mile setback.

[2] In a separate order denying a motion to dismiss the appeal of Ordinance No. 2012-04, we left open the question of whether the findings adopted in Order No. 2012-021 are intended to support the amendments adopted in the 2012 Ordinances, and thus could be challenged in the appeal of the 2012 Ordinances. *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2012-017/018, Order, July 2, 2012), slip op 5.

MOTION TO RECONSIDER

In the petition for review, petitioner requests that we reconsider our July 2, 2012 order concluding that the appeal of Order No. 2012-021 was untimely filed under the second sentence of ORS 197.830(9).[3] We have considered his arguments and adhere to our conclusion that petitioner's appeal of Order No. 2012-021 was untimely filed under ORS 197.830(9), because petitioner filed the appeal 50 days after the county mailed notice of that decision to petitioner and other persons entitled to notice.

The only point that merits additional discussion is petitioner's argument that our conclusion that petitioner's appeal was untimely filed is inconsistent with the holding in *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041 (2000). Petitioner cites *Craig Realty* for the proposition that the 21-day appeal deadline in the second sentence of ORS 197.830(9) does not commence for any party unless and until the date that the local government submits the plan or land use regulation amendment decision and all required information and forms to DLCD as required under ORS 197.615(1).[4] In the present case,

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[3] ORS 197.830(9) provides, in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. *A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615.* Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. * * *" (Emphasis added.)

[4] ORS 197.615 provides in relevant part:

> "(1) When a local government adopts a proposed change to an acknowledged comprehensive plan or a land use regulation, the local government shall submit the decision to the Director of the Department of Land Conservation and Development within 20 days after making the decision.
>
> "* * * * *
>
> "(3) The director shall cause notice of the decision and an explanation of the requirements for appealing the land use decision under ORS 197.830 to 197.845 to be provided to:

petitioner argues that because the county failed to submit Order No. 2012-021 to DLCD pursuant to ORS 197.615(1), the 21-day deadline to appeal Order No. 2012-021 to LUBA under the second sentence of ORS 197.830(9) has not yet commenced. Therefore, petitioner argues, his appeal of Order No. 2012-021 approximately 50 days after the notice of decision was provided to petitioner is timely.

As we noted in our July 2, 2012 order, the premise for petitioner's argument is that Order No. 2012-021—which adopts additional findings in support of the 2011 Ordinance—impliedly *re-adopted* the 2011 Ordinances. If Order No. 2012-021 re-adopted the 2011 Ordinances, petitioner argues, those re-adopted 2011 ordinances constitute an "amendment" to the county's land use regulations, and are therefore a post acknowledgment land use regulation amendment subject to ORS 197.615(1).

The premise that Order No. 2012-021 silently readopted the 2011 Ordinances is questionable. Although we did not reject that premise in our July 2, 2012 order, we do so now. Nothing in the text of Order No. 2012-021 suggests that it is intended to "re-adopt" the 2011 Ordinances, and petitioner does not explain how an *order* could have the legal effect of adopting an *ordinance* for purposes of ORS 197.615(1).

> "(a) Persons that have requested notice of changes to the acknowledged comprehensive plan of the particular local government, using electronic mail, electronic bulletin board, electronic mailing list server or similar electronic method; and
>
> "(b) Persons that are generally interested in changes to acknowledged comprehensive plans, by posting notices periodically on a public website using the Internet or a similar electronic method.
>
> "(4) On the same day the local government submits the decision to the director, the local government shall mail, or otherwise deliver, notice to persons that:
>
> "(a) Participated in the local government proceedings that led to the decision to adopt the change to the acknowledged comprehensive plan or the land use regulation; and
>
> "(b) Requested in writing that the local government give notice of the change to the acknowledged comprehensive plan or the land use regulation."

Although our conclusion that Order No. 2012-021 did not silently or implicitly re-adopt the 2011 Ordinances makes it unnecessary to address petitioner's argument that dismissal of LUBA No. 2012-030 is inconsistent with our holding in *Craig Realty*. Nonetheless, we will briefly address that argument. Even assuming that Order No. 2012-021 impliedly re-adopted the 2011 Ordinances or otherwise constitutes a land use regulation "amendment" subject to ORS 197.615, we disagree with petitioner that *Craig Realty* compels the conclusion that a petitioner may receive timely notice of a decision and nonetheless wait 50 days to file an appeal of a post-acknowledgment land use regulation amendment with LUBA, simply because the county failed to submit a copy of the decision to DLCD as required by ORS 197.615(1).[5] To the extent *Craig Realty* stands for that proposition, we disavow it.

The motion to reconsider our order in LUBA No. 2012-030 is denied.

WAIVER OF ISSUES

The county argues that the first, second, and fifth through eighth assignments of error raise issues that could have been, but were not, raised in *Cosner*, and that under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), petitioner is precluded from raising those issues in this appeal of the county's decisions on remand. Stated differently, we

[5] In *Craig Realty*, the city provided DLCD with a copy of the decision and the documents that DLCD rules require, except for one document. Two days later, the city mailed DLCD the missing document. Twenty-one days after the city mailed the missing document, DLCD and ODOT filed appeals of the decision. We held that under DLCD's rules the decision has not been "submitted" to DLCD until all of the required documentation was mailed, and therefore DLCD's deadline to file an appeal of the decision to LUBA did not commence until the requirement documentation was mailed to DLCD. Turning to ODOT's appeal, we held that the 21-day deadline for ODOT to appeal was "tolled" until the city provided DLCD with the required documentation, and therefore ODOT's appeal, filed within 21 days of that second mailing to DLCD, was timely. It is the latter conclusion that petitioner relies upon, for the proposition that the appeal deadline for parties other than DLCD that are entitled to notice of the decision is "tolled" until 21 days from the date that the local government submits a copy of the decision and all required documentation to DLCD. That conclusion is arguably inconsistent with the plain language of the second sentence of ORS 197.830(9), which provides for a deadline of "21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615[.]" *See Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 224, 939 P2d 625 (1997) (overturning a court-created tolling doctrine inconsistent with the deadline to appeal to LUBA set out in the first sentence of what is now codified at ORS 197.830(9)).

understand the county to argue that these six assignments of error allege errors in the 2011 Ordinances that could have been challenged in *Cosner*, and cannot be challenged in an appeal of the 2012 Ordinances that are the only decisions before LUBA.

In *Beck*, the Supreme Court held that issues that LUBA resolves in remanding a decision cannot be relitigated in a subsequent appeal of the decision on remand. In the 20 years since *Beck* was decided, LUBA has consistently understood *Beck* to stand for the additional proposition that issues that could have been, but were not, raised in a first appeal of a decision that LUBA remands cannot be raised in an appeal of the decision on remand. *See, e.g. Wetherell v. Douglas County*, 60 Or LUBA 131 (2009), *DLCD v. Douglas County*, 37 Or LUBA 129 (1999), *Adler v. City of Portland*, 25 Or LUBA 546 (1993), among many others. However, petitioner argues that LUBA has misunderstood *Beck*, and that the reasoning and language of *Beck* do not support that additional proposition.

We disagree with petitioner. At two points in *Beck*, the Court declined to address an issue because the issue had not been raised in either the initial appeal or the appeal of the decision on remand. 313 Or at 154-55; *Id.* at 156 n 6. Petitioner reads that language to suggest that had the issue been raised at some point in the LUBA proceedings, including only during the second appeal, the Court would have considered it. However, we believe that language instead indicates that to preserve on issue on appeal, the issue must be raised at all steps in the appeal proceedings where it can be raised, and failure to raise it at an initial step precludes LUBA's review of that issue, even if it raised at a later step, and vice versa.

In addition, the Court noted that the parties to the first appeal in *Beck* were not the same as the parties to the second appeal, but found that difference immaterial, because the additional parties had the opportunity to participate in the first appeal but did not. The Court expressly agreed with the statement of the Court of Appeals in *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 527, 746 P2d 728 (1987), that a party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as

precluded from later raising the issue as a party who did participate but neglected to raise the issue. 313 Or at 153, n 2. In *Mill Creek Glen Protection Assoc.*, the Court of Appeals expressly agreed with LUBA that the "law of the case" or "waiver" doctrine precludes a party from raising issues in a subsequent appeal that could have been, but were not, raised in the initial appeal leading to remand. In its actual holding, the Court of Appeals extended that rather commonplace principle to include parties that could have participated in the initial appeal but chose not to, and precluded such parties from raising issues that could have been, but were not, raised in the initial appeal.

Finally, both *Beck* and *Mill Creek Glen Protection Assoc.* cite to statutory policies, such as the legislative policy at ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use," to support application of the waiver doctrine to preclude issues from being raised piecemeal throughout the course of appellate review. In our view, that reasoning applies just as strongly to preclude raising new issues that could have been raised and resolved at earlier stages of appellate review, as it does to preclude relitigation of resolved issues. Accordingly, we disagree with petitioner that the *Beck* waiver doctrine does not apply to bar petitioner in the present case from raising issues on appeal of the county's remand decisions that could have been, but were not, raised in *Cosner*.

In the reply brief, petitioner argues nonetheless that *Beck* is distinguishable. Petitioner notes that *Beck* involved a quasi-judicial decision, and the Court cited and relied in part on statutes, such as ORS 197.763, that apply only to quasi-judicial proceedings. Petitioner contends that the waiver doctrine articulated in *Beck* should not apply to appeals of legislative decisions, such as the present case. We disagree. LUBA has applied the waiver doctrine to legislative decisions. *See, e.g.*, *DLCD v. Douglas County*, 37 Or LUBA 129, 143 (1999) (petitioner's failure to raise an issue in the first appeal of a county population projection precludes raising that issue on appeal of the decision on remand, citing *Mill Creek Glen Protection Assoc.*). Petitioner cites no persuasive authority suggesting any reason why

the *Beck* waiver principle should not apply to narrow issues in sequential appeals of legislative decisions. Applying the waiver doctrine to legislative decisions as well as quasi-judicial decisions seems entirely consistent with the policy at ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use."

Finally, petitioner argues that in *Morsman v. City of Madras,* 196 Or App 67, 100 P3d 761 (2004), the Court of Appeals distinguished *Beck* and held that a party who failed to raise a constitutional issue in the initial appeal may nonetheless raise that issue in a subsequent appeal of a related decision. Petitioner understands *Morsman* to limit application of the *Beck* waiver doctrine to issues that were actually raised and resolved by LUBA in the initial appeal. However, that is too broad a reading of *Morsman,* which in our view turns on the particular facts of that case. The initial appeal in *Morsman* involved an annexation decision that was made without providing the required notice to persons entitled to notice. While the appeal of that initial decision was pending before LUBA, the city initiated a *second* proceeding, providing the required notice and a hearing, resulting in a second annexation decision with slightly different boundaries than the first annexation decision, and that second annexation was subsequently appealed to LUBA. The constitutional issue was not raised during the LUBA appeal of the initial annexation decision, but was raised below during the hearing on the second annexation decision, and presented in the LUBA appeal of the second annexation decision. LUBA concluded that the petitioners, some of whom were not parties to the initial appeal, were precluded from raising the constitutional issue in the appeal of the second annexation decision, because petitioner Morsman had not raised that issue in his appeal of the initial annexation decision.

The Court of Appeals disagreed with LUBA for several reasons that are not factors in the present case. [6] The Court of Appeals noted that in *Beck* all of the parties had received

[6] The Court of Appeals' *Morsman* decision states, in relevant part:

legally adequate notice of the initial proceeding, but none of the parties had received legally adequate notice of the first proceeding before the first LUBA appeal, and due to that notice failure at least some of the parties had not participated in the initial proceedings or the initial appeal. Thus, in the second proceeding the city for the first time provided legally required notice and meaningful opportunity to raise issues to all the parties in the second appeal. In the present case, there is no dispute that petitioner received all legally required notice of the county's 2011 and 2012 decisions, and was actually a party to *Cosner* and filed a petition for review.

Second, the Court of Appeals emphasized that the city's second proceeding had been initiated while the appeal of the first annexation decision was before LUBA, and concluded that it would be paradoxical to narrow the issues that can be raised in the proceedings of the second annexation decision based on a LUBA decision that had not yet been issued. In other words, the second annexation decision was not really a decision on *remand* from LUBA, but in essence a separate, if closely related, proceeding and decision. In the present case, the county's second decision was indisputably on remand from LUBA, and the issues framed on remand were necessarily limited by LUBA's remand.

> "This case differs materially from *Beck* in several respects. First, all of the parties in *Beck* received legally adequate notice of the initial hearing—even those who did not participate in the first LUBA appeal. Here, by contrast, *none* of the petitioners received legally adequate notice of the first hearing before the first LUBA appeal.
>
> "Moreover, *Beck* concerned an issue that had been raised and resolved in the previous LUBA appeal and, thus, was not within the scope of LUBA's remand. Here, by contrast, the constitutional issue had not been raised, much less resolved, in *Morsman I.* Further, as noted in the procedural history set out above, the city gave notice pursuant to ORS 197.763 and commenced the new public hearing on the annexation on June 24, 2003, *before* LUBA *or* this court had even remanded the case. Under those circumstances, it would be paradoxical to hold that the matters properly cognizable in those new proceedings were somehow controlled by the scope of a LUBA remand that had not yet occurred—much less by the scope of our remand in *Morsman II*, which did not occur until two months after the city had issued its final order on the constitutional issue on October 1, 2003." 196 Or App at 78-79 (footnotes omitted).

It is true, as petitioner points out, that in *Morsman* the Court of Appeals described *Beck* as concerning "an issue that had been raised and resolved in the previous LUBA appeal and, thus, was not within the scope of LUBA's remand." *Id.* at 78. As discussed above, that is indeed the actual holding of *Beck*. The Court of Appeals then distinguished *Beck* from the situation presented in *Morsman*, noting that "by contrast, the constitutional issue had not been raised, much less resolved" in the LUBA appeal of the first annexation issue. *See* n 3. Petitioner seizes on that language, and argues that it recognizes that the scope of the *Beck* waiver doctrine is limited to issues that had been actually resolved in the first appeal, and therefore does not include issues that could have been raised, but were not, in the first appeal. We think petitioner reads too much into that language. The Court had already concluded that due to notice failures the initial proceeding did nothing to narrow the issues for further proceedings, particularly for parties who failed to participate in the first appeal due to those notice failures. The Court also recognized that the peculiar circumstances of *Morsman*, with the city initiating a new proceeding on a modified annexation proposal to replace its first annexation decision while that first decision was on appeal to LUBA and the Court, meant that the LUBA review did not operate to narrow the issues for purposes of the second annexation proceeding, or the appeal of that decision, and therefore petitioner's failure to raise the constitutional issue before LUBA in the first appeal did not preclude raising that issue in the subsequent appeal. We do not think the Court of Appeals meant to declare, unnecessarily and contrary to cases such as *Mill Creek Glen Protection Assoc.*, that the waiver doctrine applies *only* to issues that were actually resolved in the initial appeal.

To summarize, we agree with the county that any issues that petitioner could have raised in the first, second, and fifth through eighth assignments of error that could have been raised in *Cosner*, but were not, cannot now be raised in the current appeal of the 2012 Ordinances. As a practical matter, that means petitioner cannot challenge in this appeal alleged errors in the 2011 Ordinances, other than those within the narrow scope of remand

under *Cosner*, and the issues raised in these appeals are limited to challenges to the 2012 Ordinances adopted on remand.

A final related observation: in the third assignment of error, discussed below, petitioner attempts to challenge various provisions of the 2011 Ordinances, pursuant to one of his alternative theories in this appeal that the 2012 Ordinances implicitly re-adopted the 2011 Ordinances, and therefore the 2011 Ordinances may be challenged in the present appeal. As we noted in *Hatley v. Umatilla County*, __ Or LUBA __ (Order on Motion to Dismiss, July 2, 2012), slip op at 6, when we remanded the 2011 Ordinances those ordinances became legally ineffective, and some county action on remand was necessary to render them effective again. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000). Petitioner takes the position that the only means to do so was to formally re-adopt the 2011 Ordinances by ordinance, and argues that the 2012 Ordinances are the only lawful vehicles for the county to re-adopt the 2011 Ordinances and make them effective again. Petitioner may or may not be correct that re-adoption by ordinance is the only lawful method for the local government to render a remanded ordinance effective again. But even if that is the case, it does not follow that we must assume the 2012 Ordinances had the effect of re-adopting the 2011 Ordinances. There is no express language in the 2012 Ordinances that purports to re-adopt the 2011 Ordinances after remand, and it is not clear to us that an ordinance can "implicitly" adopt another ordinance. It is worth noting that the 2012 Ordinances do not purport to amend the 2011 Ordinances; instead they purport to directly amend (largely by deletion) language in LDO 152.616(HHH), albeit language in the county's code that the 2011 Ordinances added to LDO 152.616(HHH).

The more accurate view may be that the county has not yet taken action to render the 2011 Ordinances effective again, and those ordinances remain in limbo, pending the required action. We need not resolve this point, however, because even if the county implicitly re-

adopted the 2011 Ordinances, by operation of *Beck* waiver no issue can be raised in these appeals that could have been, but was not, raised in *Cosner*. As discussed below, most of petitioner's assignments of error in the present appeal challenge provisions in the 2011 Ordinance based on theories or authority that could have been, but were not, raised in *Cosner*.

We turn now to address each assignment of error.

FIRST ASSIGNMENT OF ERROR

As noted, Ordinance 2012-05 deleted language in LDO 152.616(HHH)(11) that was adopted by Ordinance 2011-07. Ordinance 2011-07 imposed restrictions on wind energy facilities in the Walla Walla Valley, in part to protect Goal 5 resources in the valley, including critical winter range.[7] Under the second assignment of error in *Cosner*, LUBA concluded that Ordinance 2011-07 included amendments to the county's program to protect

[7] As amended by Ordinance 2012-05, LDO 152.616(HHH)(11) provides (strikethrough is language deleted, underline and italics language added):

> "Lands located within the Walla Walla Sub-basin east of Highway 11 shall be subject to additional standards. The purpose of these criteria is to prevent impacts to the following: ~~inventoried Goal 5 resources~~ highly erodible soils (as defined by the Oregon Department of Agriculture) and federally listed threatened and endangered species, ~~and the Critical Winter Range~~. The standards are also designed to protect sensitive streams and to be consistent with the Clean Water Act.
>
> "(A) There shall be no construction of project components, including wind turbines, transmission lines and access roads on soils identified as highly erodible. The highly erodible soils are those soils identified by the Oregon Department of Agriculture as highly erodible.
>
> "(B) ~~The application shall demonstrate that the Wind Power Generation Facility and its components, wind turbines, transmission lines, and roads, will not conflict with existing significant Goal 5 Resources within the Walla Wall Sub-basin.~~
>
> ~~"(C)~~ The application shall demonstrate that the Wind Power Generation Facility and its components will be setback a minimum of two miles from streams and tributaries that contain federally listed threatened and endangered species, and, that the project will generate no runoff or siltation into the streams.
>
> ~~"(D) The application shall demonstrate that the Wind Power Generation Facility and its components will not be located within the Critical Winter Range."~~ Record 9.

Goal 5 resources, and remanded the Ordinance 2011-07 to the county to address the requirements of Goal 5. On remand, rather than address the requirements of Goal 5, the county chose to delete from LDO 152.616(HHH)(11) the language that purported to add protections for Goal 5 resources, leaving only those provisions that, in the county's view, did not protect Goal 5 resources.

Specifically, the county deleted the requirement that the applicant for a wind energy facility demonstrate that the facility will not conflict with significant Goal 5 resources within the Walla-Walla sub-basin, and that the facility will not be located within critical winter habitat. Critical winter habitat is a Goal 5 resource. Ordinance No. 2012-05 left unchanged requirements that the facility not be constructed on soils identified has highly erodible, and that the facility be set back at least two miles from streams and tributaries that contain federally listed threatened and endangered species.

In the first assignment of error, petitioner argues that the prohibition on constructing a wind energy facility on highly erodible soils and the two-mile setback from streams that contain federally listed threatened and endangered species are also intended to protect Goal 5 resources, and thus the county's attempt to avoid addressing Goal 5 was insufficient. Petitioner argues that the county comprehensive Goal 5 element identifies the riparian areas of all perennial and intermittent streams in the county and all "fish habitat" as protected Goal 5 resources. According to petitioner, the LDO 152.616(HHH)(11) restrictions on development on "highly erodible soils" and within two miles of a streams that contain federally listed species are at least in part intended to protect riparian areas and fish habitat areas protected as Goal 5 resources under the county's plan. Therefore, petitioner argues, the county erred in failing to either delete those restrictions from LDO 152.616(HHH)(11) or undertaking a Goal 5 analysis to justify those amendments to the county's program to protect riparian and fish habitat Goal 5 resources

The county responds that no issue was raised in *Cosner* regarding whether the LDO 152.616(HHH)(11) restrictions on development on highly erodible soils and within two miles of streams with federally listed species protect Goal 5 resources and must be evaluated under Goal 5, and any such issue is waived under the reasoning in *Beck*. On the merits, the county argues that highly erodible soils and streams with federally listed species are not Goal 5 resources, and therefore the restrictions in LDO 152.616(HHH)(11)(a) and (b) left remaining after adoption of Ordinance No. 2012-05 do not require evaluation under Goal 5.

In the reply brief, petitioner contends that the second assignment of error in *Cosner* did not single out specific restrictions in Ordinance No. 2011-07, but in relevant part simply argued that the county had completely failed to address the requirements of Goal 5 when adopting additional protections to inventoried Goal 5 resources. Petitioner argues that LUBA's remand was equally broad and non-specific, simply requiring the county to address Goal 5 and the Goal 5 rule. Under these circumstances, petitioner argues, the waiver doctrine should not apply to preclude petitioner from challenging the completeness of the county's action on remand.

Petitioner is correct that the second assignment of error in *Cosner* did not single out specific restrictions in LDO 152.616(HHH)(11)(a) through (d) as adopted by Ordinance No. 2011-07, and LUBA's remand did not specify which restrictions the county must evaluate under Goal 5. On remand, the question of precisely which restrictions in LDO 152.616(HHH)(11)(a) through (d) required evaluation under Goal 5 was an open, unresolved question. We agree with petitioner that he is not precluded under *Beck* from challenging the county's resolution of that unresolved question.

However, on the merits, we agree with the county that the county did not err in failing to apply the Goal 5 rule to the remaining restrictions on developing highly erodible soils and within two miles of streams with federally listed species. OAR 660-023-0250(3) provides in relevant part that:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA [post-acknowledgment plan amendment] unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5[.]"

There is no dispute that highly erodible soils and streams with federally listed species are not inventoried Goal 5 resources in the county. Petitioner argues however that the restrictions on developing on highly erodible soils or within two miles of streams with federally listed species will have the secondary effect of protecting at least some riparian and fish habitat areas that are inventoried Goal 5 resources.

The question is whether Ordinance No. 2012-05 amends a portion of an acknowledged plan or land use regulation adopted "in order to protect" a significant Goal 5 resource or to address specific requirements of Goal 5. The county clearly did not intend to protect a significant Goal 5 resource. As the findings supporting Ordinance No. 2012-05 reflect, the county clearly did not intend to adopt any restriction "in order to protect" any inventoried Goal 5 resource, or as an amendment to the county's program to protect any Goal 5 resource. The county's intent, presumably, was to protect highly erodible soils and federally listed species. The fact that such protections may have the unintended effect of providing additional protection to some of the riparian and fish habitat areas listed in the county's Goal 5 inventory is not sufficient, in our view, to constitute an amendment to "a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource," for purposes of OAR 660-023-00250(3)(a). Accordingly, we agree with the county that it was not required to address Goal 5 in deciding to retain the restrictions on development on highly erodible soils or within two miles of a stream with federally listed species.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner argues that the 2011 Ordinances violate Goal 5, because they foreclose the county from ever being able to apply Goal 5 to protect significant wind energy resources, even on a case-by-case basis.

Petitioner acknowledges that in *Cosner* LUBA rejected an argument that in adopting the 2011 Ordinances the county was required to adopt a comprehensive county-wide inventory and program to protect significant energy resources, including sites suitable for wind energy facilities. LUBA concluded that Goal 5 allows the county to inventory and protect individual wind energy resource sites on a case-by-case basis. In the present appeal, petitioner argues that the 2011 Ordinances preclude applying Goal 5 to energy resources on a case-by-case basis, because the 2011 Ordinances deem wind energy facilities to be conflicting uses to inventoried Goal 5 resources in all cases. According to petitioner, no party raised this precise argument in *Cosner*, and LUBA did not address it, and therefore it is appropriate to raise and resolve that issue in the present appeal of the 2012 Ordinances.

The county responds, and we agree, that whether the 2011 Ordinances violate Goal 5 by effectively precluding case-by-case application of the goal with respect to individual wind energy sites is an issue that could have been raised in *Cosner*, but was not, and therefore cannot be raised in the present appeal. The issue raised in this assignment of error is a variant of the issue raised and rejected in *Cosner*, and petitioner identifies no reason why that issue could not have been raised in *Cosner*, or how that issue can possibly be raised in an appeal of the very limited amendments adopted under the 2012 Ordinances. As discussed above, the issue is waived under *Beck*.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county failed to adopt adequate findings addressing whether the setbacks and other restrictions on wind energy facilities adopted in the 2011 Ordinances are consistent with certain comprehensive plan policies referencing energy.

As explained above, Order No. 2012-021 responds to the sixth assignment of error in *Cosner*, and adopts additional findings concluding that the 2011 Ordinances are consistent with five comprehensive plan policies that potentially have some bearing on the development of wind energy facilities.[8] Pursuant to our ruling dismissing petitioner's untimely appeal of Order No. 2012-021, that order is not before us as an independent decision, and cannot be challenged in this appeal of the 2012 Ordinances.

Nonetheless, petitioner argues that the adequacy of the findings adopted in Order No. 2012 can be challenged in his appeal of the 2012 Ordinances. The premise for that argument is petitioner's theory that the 2012 Ordinances implicitly re-adopted the 2011 Ordinances. As we understand petitioner, he argues that if the 2011 Ordinances were re-adopted as part of the 2012 Ordinances, there is no need to independently appeal Order No. 2012-021 in order to challenge the adequacy of those findings to support the 2011 Ordinances, because the findings supporting a land use decision, even if embodied in a different document, are

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[8] The five comprehensive plan policies identified by the county are as follows:

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

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

Energy Conservation Policy 1: "Encourage rehabilitation/weatherization of older structures and the utilization of locally feasible renewable energy resources through the use of tax and permit incentives."

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

Economy of the County, Policy 7: "Cooperate with development oriented entities in promoting advantageous aspects of the area." Supplemental Record 333-337.

integral to the decision. For that proposition, petitioner relies on *Dyke v. Clatsop County*, 97 Or App 70, 775 P2d 331 (1989). In *Dyke*, the Court of Appeals held that an ordinance adopting an exception to Goal 4 to authorize a conditional use need not be appealed separately from a conditional use permit decision approving that same use, because under the county code the exception is a required component of the conditional use permit decision, and appeal of the permit decision allows the petitioner to also challenge the exception.

As discussed above, petitioner has not demonstrated that the 2012 Ordinances implicitly re-adopted the 2011 Ordinances. In our view, an express or at least unambiguous action of some kind was needed to render the 2011 Ordinances effective again following our remand in *Cosner*. The text and findings supporting the 2012 Ordinances include no language that suggests the county intended the 2012 Ordinances to re-adopt the entire 2011 Ordinances. On the contrary, the findings supporting Ordinance 2012-05, which amends Section 11 of LDO 152.616(HHH) by deleting certain subsections, state that the "[t]he County is not required to readopt Section 11 in its entirety[.]" Record 8. It is reasonably clear under those findings that the county intended Ordinance No. 2012-05 to adopt only the amendments to Section 11 specifically set out in the ordinance. Similarly, Ordinance 2012-04 appears to adopt only certain deletions to the text of LDO 152.616(HHH)(6), and does not purport to re-adopt the text of the three 2011 Ordinances. If that is the case, then petitioner's premise under this assignment of error is erroneous. Petitioner offers no other theory that we understand, under which he can challenge in this appeal of the 2012 Ordinances the adequacy of the findings in Order No. 2012-021.

Nonetheless, in case our understanding of Ordinance 2012-04 is found to be erroneous on appeal, we will address petitioner's arguments on the merits. We will assume for the remainder of this assignment of error that the 2012 Ordinances impliedly re-adopted the 2011 Ordinances or that petitioner is otherwise entitled to challenge in this appeal the adequacy of the findings adopted in Order No. 2012-021 to demonstrate that the setbacks and

other restrictions in the 2011 Ordinances are consistent with the identified comprehensive plan policies. Even under those assumptions, petitioner has not demonstrated that those findings are inadequate or erroneous.

Petitioner argues that Open Space Policy 42a and to a lesser extent the other comprehensive plan policies require the county to "encourage" development of alternate energy resources, and that the setbacks and other restrictions imposed in the 2011 Ordinances fail to "encourage" development of one alternate energy resource, wind facilities. According to petitioner, the five comprehensive plan policies collectively require the county to provide a supportive regulatory environment for wind energy facilities, and the findings fail to establish that the county provides a supportive regulatory environment for wind energy facilities.

The county clearly does not agree with petitioner's apparent understanding of Open Space Policy 42a and the other comprehensive plan policies, to preclude the county from adopting additional restrictions on wind energy facilities to protect other uses and values from the impacts of such facilities. The findings state, in relevant part:

> "The County finds that these Comprehensive Plan Policies are satisfied for several reasons. The County allows for the siting of commercial wind energy facilities and other renewable energy facilities. The conditional use standards apply to all zones in which commercial energy projects are allowed. The standards contained in Section 152.616(HHH) are clear and objective and therefore make the process more attainable for a landowner and developer. The standards do not preclude the siting of facilities in the county. In addition to the siting standards the County has made information such as mapping and other literature available. Additionally, the County provides notice to affected agencies as part of the conditional use process, thereby further enhancing the review process. The County allows, but does not require, that a wind energy facility be included in the Goal 5 inventory, thus allowing development without a time-consuming and subjective legislative amendment, thus expediting the review process. * * *
>
> "* * * * *
>
> "The County finds that [Open Space Policy 37] is met where commercial wind energy facilities are permitted on all resource land in the county and where resource designation such as Exclusive Farm Use and Grazing Farm have the effect of preserving areas for future development of energy facilities.

> "* * * * *
>
> "* * * The standards [in LDO 152.616(HHH)] may limit development in highly sensitive areas, but do not preclude the siting of facilities in the county." Supplemental Record 335-336.

The language of Open Space Policy 42a, to "encourage" alternative energy sources, hardly imposes much of a mandate on the county, and the other comprehensive plan policies are even less strongly worded. The county apparently understands these policies to require, at most, that the county allow wind energy facilities as a conditional use in the county's resource zones, but the policies do not prevent the county from adopting additional restrictions to protect other uses or values from the impacts of wind energy facilities, as long as the standards do not preclude siting of such facilities. Petitioner has not established that that understanding of the plan policies is erroneous. Under that view, the above quoted findings are adequate to explain why the additional setbacks and other restrictions imposed under the 2011 Ordinances are consistent with the identified plan policies.

Nonetheless, petitioner argues that the county's claim that wind energy facilities are not precluded under the additional restrictions is not supported by substantial evidence. Notwithstanding that LDO 156.616(HHH) nominally allows wind energy facilities in resource zones that cover most of the county, petitioner argues that the practical effect of the new restrictions is to largely preclude siting new wind energy facilities in the areas that have the best wind resources. Petitioner cites to testimony during the 2011 proceedings that the two-mile setback from all rural residences would preclude siting wind energy facilities in many areas of the county, and to testimony that the county's existing wind energy facility leases tend to be concentrated in certain parts of the county, such as the Walla Walla River valley. That testimony certainly suggests, for example, that the two-mile setback from rural residences will likely make it more difficult to site new wind energy facilities in many areas of the county, compared to the previous 3,520-foot setback from property boundaries, but it does not indicate that siting such facilities is "precluded" in the county. Because LDO

156.616(HHH) authorizes wind energy facilities as conditional uses in most of the county, and it is undisputed that at least some new wind energy facilities can be sited in the county notwithstanding the restrictions imposed under the 2011 Ordinances, the county's finding that its land use regulations do not "preclude" the siting of wind energy facilities is supported by substantial evidence.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error is styled as an alternative to the third assignment of error, in which petitioner argues that if the findings adopted in Order No. 2012-021 apply *only* to the 2011 Ordinances, there are no findings that address whether the *2012 Ordinances* are consistent with the five identified comprehensive plan energy policies discussed above. Petitioner argues that the 2012 Ordinances must be remanded for additional findings, for the same reason LUBA remanded under the sixth assignment of error in *Cosner*.

It is not clear to us whether the findings adopted in Order No. 2012-021 are intended to consider only whether the 2011 Ordinances are consistent with the comprehensive plan energy policies, as required by the sixth assignment of error in *Cosner*, or whether they are also intended to consider the 2012 Ordinances. The findings mention only the 2011 Ordinances, and do not specifically discuss the two sets of deletions to LDO 156.616(HHH)(6) and (11) accomplished by the 2012 Ordinances.

The county responds that Order No. 2012-021 was not intended to address the 2012 Ordinances, but given the limited nature of the deletions set out in those ordinances, no additional findings are necessary. To the extent that additional findings are necessary, the county argues, for the same reasons the county concluded in Order 2012-021 that the 2011 Ordinances are consistent with the plan policies, LUBA can conclude that the 2012 Ordinances are consistent with the plan policies.

We agree with the county that the absence of findings specifically addressing whether the 2012 Ordinances are consistent with the five identified comprehensive plan policies does not warrant remand. The 2012 Ordinances, like the 2011 Ordinances, are legislative decisions, and there is no generally applicable requirement that legislative decisions be supported by findings. All of the setbacks and other restrictions on wind energy facilities that concern petitioner were adopted as part of the 2011 Ordinances. The 2012 Ordinances do not impose any additional restrictions on wind energy facilities. Indeed, Ordinance 2012-05 deletes some of the restrictions originally adopted in Ordinance 2011-07.

It is true that Ordinance 2012-04 deletes the "waiver" provisions allowing landowners and city councils to authorize a lesser setback than the two-mile setback otherwise required under the 2011 Ordinances, pursuant to our ruling in *Cosner* that the waiver provisions are unconstitutional. But that is not a new restriction on wind energy facilities imposed by Ordinance No. 2012-04. We affirmed, above, the county's findings that the restrictions in the 2011 Ordinances, including the two-mile setbacks, are consistent with the identified comprehensive plan policies. Those findings did not rely upon the waiver provisions to support the county's conclusion that the restrictions imposed by the 2011 Ordinances are consistent with the plan policies. That being the case, it is difficult to understand how amending LDO 156.616(HHH)(6) to delete those unconstitutional waiver provisions could cause the county to reach a different conclusion. The findings in Order No. 2012-021 demonstrate that no purpose would be served in remanding the 2012 Ordinances to the county to consider whether deleting the waiver provisions is consistent with the above comprehensive plan policies.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the 2011 Ordinances impermissibly restrict or prohibit wind energy facilities, in violation of ORS 215.283(1)(c), 215.283(1)(u), and 215.283(2)(g), which

authorize on EFU-zone land "utility facilities" as a permitted use and commercial power generation facilities as conditional uses.

The county responds that in *Cosner* LUBA rejected a similar, but more narrowly focused, argument that the 2011 Ordinances are inconsistent with ORS 215.283(2)(g). Slip op 20-21. The county argues, and we agree, that whether the 2011 Ordinances are inconsistent with any of the cited EFU statutes could have been raised in *Cosner*, but was not, and that issue is therefore waived under *Beck*. Petitioner does not contend that the issue could not have been raised in *Cosner*, or explain why that issue can be raised in an appeal of the 2012 Ordinances.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the two-mile setback from rural residences adopted in the 2011 Ordinances is contrary to the "goal-post" statute at ORS 215.427(3)(a), which in relevant part provides that the county may apply only those standards and criteria in effect at the time a development application is filed. We understand petitioner to argue that at the time an application is filed, it will not be known whether there are any rural residences from which a two-mile setback is required. According to petitioner, determining what constitutes a "rural residence" is a discretionary inquiry. Because that inquiry will not occur until after an application is submitted, the two-mile setback from rural residences amounts to a new substantive approval standard that is applied after the application is submitted in violation of the goal-post statute.

Petitioner also argues that the two-mile setback, and several other provisions of the 2011 Ordinances, violate ORS 215.416(8)(a), which requires that approval or denial of a permit application be based on "standards and criteria" set forth in the county's zoning ordinance. The other challenged provisions in the 2011 Ordinances are the prohibition on constructing facilities on "highly erodible soils," a setback from "known archeological,

historical or cultural sites," a setback from streams and tributaries containing federally listed threatened and endangered species, and application of these restrictions not only to the wind energy facility itself but also to components such as roads, transmission lines, etc., that are subject to regulation and approval by other entities. According to petitioner, these restrictions are impermissibly vague and therefore fail to provide adequate "standards and criteria," because they fail to provide an applicant with a clear notion of what must be demonstrated to gain permit approval. *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982).

The county responds, and we agree, that these issues could have been raised in *Cosner*, but were not, and so cannot be raised in the present appeal of the 2012 Ordinances. Petitioner does not argue that the issue of whether the identified restrictions are consistent with ORS 215.427(3)(a) and ORS 215.416(8)(a) could not have been raised in the appeal of the 2011 Ordinances, or explain why those restrictions can be challenged in an appeal of the 2012 Ordinances, which do not change those restrictions.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the setbacks and other restrictions imposed on wind energy facilities under the 2011 Ordinances are preempted by various state laws, for example ORS chapter 469, which encourages and governs renewable energy.

Again, the county argues, and we agree, that the issue of whether state law preempts the setbacks and other restrictions in the 2011 Ordinances is waived, because it could have been raised in the *Cosner* appeal, but was not. Petitioner cites no reason why the issue of whether the setback and other restrictions imposed in 2011 Ordinances are preempted by state law could not have been raised in *Cosner*.

The only argument nominally directed at one of the 2012 Ordinances, and thus an argument that might not be waived under *Beck*, is an argument that Ordinance No. 2012-04,

which amends LDO 152.616(HHH)(6) to delete the provisions allowing a landowner or city council to agree to a lesser setback than the code-required two-mile setback, makes the alleged preemption problem worse by eliminating the possibility of obtaining a reduced setback. However, that argument is akin to invited error: it was petitioner, after all, who with others argued successfully in *Cosner* that the setback reduction provisions deleted by Ordinance No. 2012-04 are unconstitutional and must be stricken. Petitioner cannot argue that the setback reduction provisions are unconstitutional and then, when those provisions are deleted on remand, turn around and argue that the deletion creates conflicts between state statutes and other provisions that were unchallenged in the first appeal. Even if that argument is permissible, it is an argument that could have been, but was not, raised in *Cosner*, and is therefore waived.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

In the eighth assignment of error, petitioner argues that the county failed to coordinate its new restrictions on wind energy facility development with the Oregon Department of Energy (DOE), in violation the Statewide Planning Goal 2 (Land Use Planning) requirement to coordinate land use decisions with affected units of government. According to petitioner, there is no evidence in the record of the 2011 Ordinances or the 2012 Ordinances that the county coordinated its new wind energy facility development restrictions with DOE. In addition, petitioner argues that the county erred in failing to consider the energy policies set out ORS 469.010, as required by ORS 469.100, in adopting the 2011 and 2012 Ordinances.[9]

[9] ORS 469.100 provides that all "agencies," which ORS 469.020(1) defines to include local governments, "shall consider the policy stated in ORS 469.010 in adopting or modifying their rules and policies." ORS 469.010(2) states, in relevant part:

> "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:

The county responds, and again we agree, that the alleged failure to coordinate the 2011 Ordinances with DOE could have been raised in *Cosner*, but was not, and therefore cannot be advanced in the present appeal.[10] Similarly, whether the county erred in failing to consider the energy policies set out in ORS 469.010 in adopting the 2011 Ordinances was not raised in *Cosner*, and is therefore waived.

With respect to the 2012 Ordinances, the county argues that the 2012 Ordinances did not adopt any new restrictions on wind energy facility development, but merely deleted two restrictions in response to the remand order in *Cosner*. We understand the county to argue that given the limited scope of the amendments adopted in the 2012 Ordinances, there was no additional obligation to coordinate with DOE the deletions accomplished by the 2012 Ordinances, or to consider whether those deletions are consistent with the energy policies at ORS 469.010.

Petitioner devotes not a single sentence in the eighth assignment of error to explain why the 2012 Ordinances must be remanded so that the record can be supplemented to include evidence that the county coordinated the 2012 Ordinances with DOE, or why the 2012 Ordinances require findings of consistency with the ORS 469.010. The 2012

> "(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.
>
> "* * * * *
>
> "(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."

[10] We do not understand the county to concede that it failed to coordinate the 2011 Ordinances with DOE. As petitioner points out, the notice of adoption of the 2011 Ordinances lists DOE as an affected state agency, which suggests that the county was aware that DOE was an affected state agency for purposes of the Goal 2 coordination requirement. However, the county does not dispute petitioner's contention that the record of the 2011 Ordinances does not include evidence of any such coordination.

Ordinances make limited deletions to the restrictions imposed by the 2011 Ordinances. Given the limited nature of those deletions, we see no purpose in remanding the 2012 Ordinances to either include evidence of coordination or to adopt additional findings. DOE might be concerned with an ordinance that imposes additional restrictions on wind energy facilities, but petitioner does not explain why DOE might have concerns with an ordinance that deletes previously imposed restrictions. Similarly, with respect to the policies in ORS 469.010, petitioner makes no effort to explain why the deletions accomplished by the 2012 Ordinances trigger the need for consideration of those policies. Absent a more developed argument, the eighth assignment of error does not establish a basis to reverse or remand the 2012 Ordinances.

The eighth assignment of error is denied.

CONCLUSION

The ordinances appealed in LUBA Nos. 2012-017 and 2012-018 are affirmed. The order appealed in LUBA No. 2012-030 is dismissed.