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I. STANDING

The standing requirements in the challenge of a post acknowledgement plan amendment ("PAPA") are found in ORS 197.830(9) and ORS 197.620. First, the timely notice of intent to appeal a PAPA under ORS 197.830(9) must be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to the parties entitled to notice under ORS 197.615. *Ettro v. City of Warrenton*, 52 Or LUBA 567, 573 (2006). Second, under ORS 197.830(2) a petitioner must have "participated" in the proceedings that lead to a PAPA. *Id.* The "participation" standard that must be met to appeal a PAPA is a higher hurdle to clear than the "appearance" standard that applies to other kinds of land use decisions. *Id.*

The challenged ordinances were adopted on June 28, 2011 and notice of the decision was mailed under ORS 197.615 on July 6, 2011. Petitioners' notice of intent to appeal was filed on July 22, 2011 within 21 days of mailing the final decision. Petitioners appeared in writing and participated during the local proceeding before the Umatilla County Board of Commissioners (hereinafter "County" or "Respondent"). Rec. pp. 704 and 1836. In addition, Intervenors Richard Stewart, Ted Reid, Jo Lynn and Tom Buell, Ken and Ida Schiewe, and Jim Hatley appeared orally during public hearings and in writing during the local proceeding.[1] Rec. pp. 379-381, 696-697, 2441, 3344-3346, 3571-3573, 3791-3792, 4224, 4322, 4323 and elsewhere. Petitioners and Intervenors Richard Stewart, Tom and Jo Lynn Buell, Ken and Ida Schiewe, Greg and Doris Tsiatsos, and Jim Hatley participated in the proceedings as affected property owners because they each have recorded leases to enable wind facility development on their farmland. Rec. pp. 697, 2441, and Affidavit of Cheryl Cosner attached hereto. All of this testimony regarded the merits of particular provisions considered by the Respondent in its adoption of the subject ordinances. Therefore, Petitioners participation was more than just appearance because their testimony included active involvement in raising concerns about the adoption of the subject ordinances. Thus, Petitioners have standing.

[1] Petitioners and the above group of Intervenors will be referred to hereinafter, collectively as Petitioners.

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II. STATEMENT OF THE CASE

A. Nature of the Decision and Relief Sought.

The challenged decisions, Umatilla Board of Commissioners Ordinance Nos. 2011-05, 2011-06, and 2011-07 (the "challenged ordinances"), amend Umatilla County Code Sections 152.615 and 152.616 HHH. Petitioners seek reversal or remand of the Respondent's decision.

B. Summary of Argument.

The Respondent's adoption of Ordinances Nos. 2011-05 and 2011-06 contain waiver provisions that unlawfully delegate legislative authority to surrounding cities and rural residential landowners. This grant of waiver to neighboring cities and individual property owners, to allow relief from applicable setback requirements regarding wind facility components in certain areas, violates Article I, Section 21 of the Oregon Constitution as an unlawful delegation of the Respondent's authority. In addition, that delegation of authority violates the due process clause of the Fourteenth Amendment of the U.S. Constitution.

The challenged ordinances effectively adopt a program to add protections to certain Goal 5 resources. However, Respondent did not comply with Goal 5 in amending regulations that affect these resources because no analysis of that Goal and its implementing rules occurred nor is provided in the record. Moreover, Goal 5 contains an obligation to the County to protect wind energy resources and the challenged ordinances contradict that obligation. Further, the Goal 5 inventory is out of compliance with LCDC's acknowledgement order and must be updated before the challenged ordinances can be adopted.

In failing to apply Goal 5, the Respondent necessarily erred in adopting a decision that lacks an adequate factual basis under the Goal. In particular, the Respondent's failure to provide a conflicting use review and an ESEE analysis resulted in adoption of the challenged ordinances without providing an adequate factual basis in violation of Goal 2.

The Respondent's decision imposing a two-mile setback from rural residences and UGBs lacks an adequate factual base in violation of Goal 2, and is not supported by substantial reason.

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In legislative decision making, there must be enough in the way of findings or substantial evidence to show the criteria were applied and required considerations were analyzed. The Respondent's record contains no findings adequately analyzing the two-mile setback against the criteria of the Goals.

The two-mile setback from rural residences and UGB's also violates ORS 215.283(2) and 215.296. The veto power granted to project neighbors in an exclusive farm use ("EFU") zone by the provision allowing them to waive without standards the setback over wind facilities reaches beyond the protections of farm and forest practices under ORS 215.283(2) and ORS 215.296(1). Further, the Respondent's decision to allow the potential waiver of the setback fails to meet the clear and objective requirements of ORS 215.296(2).

Respondent erred by making a decision that is inconsistent with the County's Comprehensive Plan in violation of Goal 2 and ORS 197.175(2). The challenged ordinances fail to address or follow Plan policies that encourage wind facility development within the County.

Finally, Goal 2 instructs that all elements of the Comprehensive Plan fit together as a consistent whole. The Respondent's decision to create particular standards for road construction connected to wind facility applications creates an inconsistency with the Comprehensive Plan's erosion control standards applied to roads connected to other uses allowed on farmland.

C. Summary of Material Facts.

The challenged ordinances are post-acknowledgement plan amendments (PAPA) under ORS 197.610 and OAR 660-023-0010(5) because they apply new land use regulations on farmland. These ordinances impose additional restrictions on Commercial Wind Power Generation Facilities (referred to hereinafter as "wind facilities") already subject to discretionary review standards. Although adopted as three separate ordinances, the challenged regulations all concern amendments to the same section of the Umatilla County Code of Ordinances ("Code") 152.616 HHH - the standards for review of conditional uses and land use decisions for wind

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facilities.[2] The challenged ordinances impose a two-mile setback from all existing rural residences as well as from all urban growth boundaries. Rec. pp. 21, 27-28 (the setbacks are set forth in Section 6 of Ordinance No. 2011-05 and as amended by Ordinance No. 2011-06). However, both setback restrictions may be waived by the respective landowner or affected city. Rec. pp. 21 and 28. The ordinances do not identify when in the process the setbacks need to be determined, and it appears that, so long as construction complies with the setback agreement between the applicant and project neighbor or affected city, the ordinance requirements will be satisfied. Further, the ordinances do not define rural residence, nor does the County's Code. Therefore, rural residences must incorporate those dwellings built on County lands designated "Rural Residential" as well as farm use dwellings and non-farm related dwellings that could be built on land throughout the County. The Comprehensive Plan maps showing the extent of the UGBs, Rural Residential Designation and other farmland on which rural residences could be placed are shown in Appendix B.[3] App. B 1-7.

The Respondent provided three examples of how the two-mile setback from rural residences would work in its depictions of three township areas. Rec. pp. 2288-2289, 2291, 2293, 2295. The orange circles on the maps show the two-mile setback distance from rural residences in that particular township. Rec. p. 2291, 2293, and 2295. In each instance, the setbacks cover much of the township land with the result that wind facility development will be severely restricted. Although these three examples show that a small portion of the township could be available for wind facility development, the two-mile setback from rural residences was shown by challengers to the ordinance to effectively result in no new wind turbines in a 65,000 acre area of the County. Rec. p. 3574 and map at 3787. The record does not contain evidence

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[2] Ordinance No. 2011-05 also contains amendments to Code Section 152.615. Rec. p. 17-18. The notices required by ORS 197.610 and 197.615 make no mention of amendment to Code Section 152.615. Rec. pp. 4429 and 15.

[3] Although the record does not contain copies of the Comprehensive Plan Map, the Court may take official notice of these documents. *Fort Vannoy Irr. Dist. v. Water Resources Com'n*,, 345 Or 56, 188 P3d 277 (2008).

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illustrating the effect of the two-mile setback from UGBs. Nonetheless, the four illustrations described above provide a sample of the effects of the two-mile setbacks and show that the area available for wind facility development within the County will be drastically reduced and could work to nullify existing leases for the construction of wind facilities or require the removal of existing towers that are within two-miles and lack a waiver.

In addition, the Respondent adopted special regulations for the Walla Walla Watershed providing: (1) the construction of any wind facility components may not occur on certain soils identified as highly erodible or within the Critical Winter Range; (2) regulations intended to prevent conflicts with existing significant Goal 5 Resources within the Walla Walla sub-basin, and (3) a two-mile setback from streams and tributaries that contain endangered species. Rec. p. 31. Goal 5 protects thirteen categories of resources – riparian corridors, wetlands, wildlife habitat, federal wild and scenic rivers, scenic waterways, groundwater resources, approved Oregon recreation trails, natural areas, wilderness areas, mineral and aggregate resources, energy resources, historic resources and scenic views and sites. The Respondent identified that five out of the thirteen Goal 5 resource categories are found in the Walla Walla Watershed - significant wetlands, wildlife habitat, significant natural areas, outstanding scenic views, and historic resources. Rec. pp. 389-394. In addition, Goal 5 resources are also found beyond the borders of the Walla Walla Watershed. Appendix B contains excerpts from the County's Goal 5 inventory showing the locations of protected resources throughout the County. App. B pp. 8-37.[4] The County's Goal 5 inventory, found in the Technical Report, incorporated by reference in the Comprehensive Plan, includes protection for all categories of protected resources except for

[4] See note 3. Although the record does not contain copies of the Technical Report, the Court may take official notice of these documents. The County is operating from its acknowledged 1983 Comprehensive Plan that based its Goal 5 analysis on its Technical Report. Various sections of the Comprehensive Plan have been amended since 1983. The Technical Report adopted in 1982 provided the basis for the plan's Goal 5 policies and is incorporated into the plan by reference. The Technical Report was last updated in 1984.

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wilderness areas, federal wild and scenic rivers, scenic waterways, recreational trails, and energy sites all of which were not inventoried in the County's Goal 5 program.

Beyond the Goal 5 protected resources, the Respondent also based these amendments on the protection of highly erodible soils. Rec. p. 387. The testimony regarding erosion in the record concerns the potential erosion associated with road construction as part of the development of wind facilities. Rec. pp. 170, 172,681, 710, 1844, 2185, 3392, 4230, 4236, 4205, and 4218. The Respondent conditionally limits some uses on farmland including public or private parks or playgrounds or community centers owned and operated by a governmental agency or a non profit community organization, public or semi public uses, recreational resort facilities and utility facilities. The soil erosion controls for road development for these other ORS 215.283(2) authorized uses provides:

> "Road construction be consistent with the intent and purposes set forth in the 208 Water Quality Program to minimize soil disturbance and help maintain water quality"

152.616 QQ(4), SS(2), TT(4), CCC(9).[5] The 208 Water Quality Program requires an applicant to provide a program to avoid sedimentation under the Clean Water Act during project construction. The challenged ordinances adopt a new and different standard for limiting roads associated only with wind facilities in the Walla Walla Watershed under Ordinance 2011-07, Sections 11(A) and 11(C),

> "(A) There shall be no construction of project components, including * * * access roads on soils identified as highly erodible. * * *
>
> (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 streams."

Rec. p. 31.

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[5] See note 3. Although the record does not contain copies of Code Sections 152.616 QQ, SS, TT, and CCC, the Court may take official notice of these documents.

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The combined results of the added Goal 5 resource protections and the setbacks based on highly erodible soils create an absolute bar on wind facilities in the Walla Walla Watershed. Maps documenting the extent of Goal 5 resources and highly erodible soils within the Walla Walla Watershed show that the three new restrictions will not allow wind facilities anywhere in the watershed boundaries. Rec. pp. 385 – 387. Highly erodible soils occupy the entire south and southeast portions of the County leaving only the northwest portion available to accommodate towers. Rec. p. 387. In the northwest portion of the watershed, the two-mile setback from the protected streams shown on the Fish, Stream and Water Resources map severely restricts turbine development. Rec. p. 386. Therefore, in effect, wind facility development is precluded in the Walla Walla Watershed.

The County's acknowledgement process accomplished in the early 1980s provides relevant context to understanding the shortfalls of the challenged ordinances in failing to comply with the Statewide Planning Goals and the acknowledged Comprehensive Plan. DLCD's pre-acknowledgement comments related to Goal 5 and subsequently adopted by LCDC are attached hereto in Appendix B.[6] App. B pp. 38-145.

With respect to wind resources specifically, the County recognized such resources as protected by Goal 5, but did not identify any specific wind resource areas in its inventory. Instead, the County accepted a condition of acknowledgment that it would amend its plan to include a policy to protect wind energy resources under OAR 660-016-0000 when adequate information becomes available to properly inventory that resource. App. B p. 71. In response to the condition, the County adopted policy 43(d) in its Comprehensive Plan to complete its Goal 5 analysis process for wind resources when information becomes available,

[6] See note 3. Although the DLCD acknowledgement comments are not in the record, the Court may take official notice of these documents.

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"43(d). With the availability and/or addition of adequate information on wind, solar and other alternate energy resources, the County shall complete the Goal 5 analysis process for those resources (OAR 660-16-000)."[7]

App. B p. 81. The Respondent has yet to fulfill this condition.

By the approval of the subject ordinances the Respondent adopted a Goal 5 program concluding that wind energy resources must be restricted as they conflict with other identified Goal 5 resources. The ordinances were adopted without paying any heed to the Goal 5 requirement to protect wind energy resources, or the Goal 5 process for those acknowledged resources affected by the challenged regulations. In neither the 45-day notice required by ORS 197.610 nor notice of adoption of the amendments required by ORS 197.615 did Umatilla County refer to the Statewide Land Use Planning Goals. Rec. pp. 15 and 4429. Nevertheless, much of the testimony submitted during the proceeding noted inconsistent application of the Goals, particularly Goals 2 and 5. Rec. pp. 37, 43, 428-429, 433, 4106-4113. However, the Respondent's staff failed to respond. Further, only in its adoption of Ordinance No. 2011-07 did the Respondent adopt minimal findings in support of its adoption, but those findings make no reference to a Goals analysis. Rec. pp. 29-30. Moreover, the Respondent made no findings in support of adoption of Ordinance Nos. 2011-05 and 2011-06. Rec. pp. 17 and 27.

D. Statement of Jurisdiction

Respondent's final decisions involve approval of amendments to a land use regulation. Accordingly, the County decisions are land use decisions as that term is defined under ORS 197.015(10).

III. STANDARD OF REVIEW

Under ORS 197.835(9)(a)(E), LUBA must reverse or remand the Respondent's decision if it is unconstitutional. As discussed below, the Respondent's decision is unconstitutional because it prospectively delegates decision making to nearby cities and private landowners

[7] The current version of the Comprehensive Plan now has the policy listed as Policy 42(d). Petitioners use the revised numbering here.

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within the County's boundary in contravention of the Oregon and federal constitutions. Therefore, LUBA must reverse or remand the Respondent's decision.

Under ORS 197.835(9)(a)(C) and (D), LUBA must also reverse or remand the Respondent's decision if it improperly construed the law or made a decision that is unsupported by substantial evidence. The Respondent's decision amends its Code without complying with Goals 2 and 5. In addition, the challenged regulations fail to comply with the County's Comprehensive Plan. Moreover, adoption of a PAPA requires analysis under Goals 2 and 5, but the Respondent never considered the application of the Goals to the adoption of this legislation. Because the challenged decisions involve application of state law, LUBA is not required to give the Respondent's interpretation of the statutes, Goals or state administrative rules, or lack thereof, deference; instead LUBA must determine whether the Respondent correctly interpreted and applied the Goals and their implementing regulations. *Collins v. Klamath County*, 148 Or App 515, 520, 941 P2d 559 (1997) (citing *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 380, 936 P2d 990 (1997)).

IV. ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR - The Waiver Provisions Contained in Ordinance Nos. 2011-05 and 2011-06 Unlawfully Delegate Legislative Authority to Surrounding Cities and Rural Residential Landowners.

A. Ordinance No. 2011-05's Provision that Allows Cities to Waive Setbacks for Wind Facilities Unlawfully Delegates Legislative Authority to those Cities because the County Improperly Enables Cities to Make Standardless Decisions Concerning Applications in the Respondent's Jurisdiction.

Article I, Section 21, of the Oregon Constitution provides,

> "[n]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution* * *"

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This constitutional provision has been construed to prohibit laws that delegate the power of amendment to another governmental entity. *Barnes v. City of Hillsboro,* 61 Or. LUBA 375, 392 17 (2010), *aff'd on other grounds* 239 Or App 73, 243 P.3d 139 (2010); *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 311, 981 P2d 368 (1999). Both cases also make clear that the term "law" in Article I, Section 21 of the Oregon Constitution includes ordinances adopted by local governments. *Barnes v. City of Hillsboro*, 61 Or. LUBA at 392, and *Advocates for Effective Regulation v. City of Eugene*, 160 Or App at 312. Further, *Barnes,* 61 Or. LUBA at 392, emphasized,

> "Respondents have not cited any authority suggesting that zoning ordinance amendments are not 'laws' for purposes of Article I, Section 21."

Therefore, LUBA ruled that PAPAs are subject to analysis for improper delegation of authority under the state constitution. The purpose of the review for improper prospective delegation is to provide adequate safeguards to property owners affected by an administrative action. *Warren v. Marion County*, 222 Or 307, 314, 353 P2d 257 (1960). No safeguards are provided by Respondent regarding the waivers in the challenged ordinances.

In the challenged ordinances, the Respondent imposed a two-mile setback for wind facilities but also included waiver language that allows nearby cities to grant waivers of the setbacks without any reference to an urban growth management agreement that would govern the grant of waivers. The ordinance provided that,

> "The minimum setback shall be a distance of not less than the following:
>
> (1) From a turbine tower to a city's urban growth boundary (UGB) shall be two miles, unless a city council action authorizes a lesser setback. The measurement of the setback is from the centerline of a turbine tower to the edge of the UGB that was adopted by the city as of the date the application was deemed complete." (strikethroughs omitted) (emphasis added).

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Rec. p. 21. This provision is defective as it unconstitutionally delegates authority to other bodies and does not provide adequate safeguards to property owners affected by the regulation; therefore, the decision must be reversed.

In this case, affected stakeholders, including the subject and adjacent property owners, may be prejudiced by a nearby city making an arbitrary decision to waive the setback (or not) without standards or procedures to guide their review. Further, wind facility applicants would also be affected by the standardless grant of authority to nearby cities. In prospectively delegating the determination of setbacks for wind turbines from UGBs occurring within the Respondent to the affected cities, property owners and wind facility applicants are not provided any safeguards against improper actions by those cities in exercising discretion to change or not change setbacks without adopting relevant standards. Here, in addition to providing no standards governing the grant of a waiver, the ordinance does not provide for notice, hearing or appeal rights.

Moreover, in this conditional use approval context, the prohibition on delegation of authority is a protection against future discretionary acts of other governing bodies to vary application approval standards adopted by the County. In *Barnes v. City of Hillsboro,* 61 Or. LUBA at 392, LUBA reviewed an ordinance that required uses within a new overlay zone to satisfy environmental regulations "hereafter in effect, as the same may be amended from time to time" to other governmental bodies that control amendment of environmental regulations in violation of Article I, Section 21 of the Oregon Constitution. In *Barnes,* 61 Or. LUBA at 394-395, LUBA explained,

> "[t]he city has delegated to the Port not only the authority to effectively *amend* the city standards that govern land uses in the AU zone (prospective delegation), the city has actually delegated to the Port the authority to determine what uses are in fact allowed in the AU zone. . . In the words of Article I, Section 21, the city has made the 'taking effect' of HZO 135(E)(2) depend upon the authority of the Port" (emphasis in original).

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Similar prospective delegation was granted to cities in the subject ordinances because the Respondent granted affected cities the future ability to vary setbacks for wind facility applications subject to the County's jurisdiction. Upon the grant of a waiver by an affected city, the approval of a wind facility will take effect based not on the decision of the Respondent that maintains jurisdiction over the application, but on the decision of another city in violation of Article I, Section 21 of the Oregon Constitution.

In another prospective delegation case *Advocates for Effective Regulation*, the Court of Appeals considered a Eugene initiative, the Right to Know Initiative. The Court examined whether the initiative's new charter provisions requiring businesses within the city to disclose their use of hazardous substances constituted an unconstitutional delegation of authority. The list of "hazardous substances" in the initiative included a variety of lists and noted specifically that the lists included "any substances added, subsequent to the effective date of this Act" to those lists. *Id.* at 296. Federal agencies maintained some of the qualifying lists. *Id.* The Court held that federal regulations defining "hazardous substances" not promulgated at the time the Eugene Right to Know Initiative was enacted, yet incorporated by reference in the initiative language, violated the rule against prospective delegation. *Id.* at 313.

Notwithstanding the clear direction in the *Advocates for Effective Regulation* case, the Respondent appears to have created a similar issue to the one faced by the City of Eugene in that case. In *Advocates*, the issue involved the prospective definition of "hazardous substances" to be defined in a law adopted by the federal government, including prospective changes. *Id.* In the case of Umatilla County's challenged ordinances it is impossible to know what standards or criteria these nearby city councils would apply to authorize a setback of less than two-miles for turbine towers in a particular wind facility application with no right to challenge such a decision. Such grant of discretionary, legislative authority to another government entity to waive a County land use requirement is exactly the kind of prospective delegation the Oregon Constitution prohibits.

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This case is dissimilar from the one that the Court of Appeals faced in *Olson v. State Mortuary and Cemetery Board*, 230 Or App 376. In *Olson*, the Court of Appeals reviewed a state law that governed license violations in the funeral industry. In 1985, the state amended the statute to allow violations based on failure to comply with the "regulations adopted by the Federal Trade Commission regulating the funeral industry." *Id.* In order to avoid the potential constitutional problem of prospective delegation, the Court of Appeals interpreted the amendment to refer to the Federal Trade Commission Funeral Rule as it was then written, in 1985. *Id.* at 388.

However, unlike the phrase "adopted" used in the state statute in Olson, the County's grant of authority to neighboring cities to decide setbacks for wind facility applications contains no limit or suggestion that any fixed standards or criteria be applied by the cities when considering a reduction in the setback. Instead, the challenged ordinances simply grant broad authority to cities to decide on an ad hoc basis whether to reduce the two-mile setback from the city's urban growth boundary. Such ad hoc decision making is inconsistent with Goal 5 protection because a true planning program would apply across the board to protect inventoried resources instead of allowing cities to vary standards on an application-by-application basis.

Under its holding in *Barnes*, 61 Or..LUBA at 395-396, LUBA must reverse the Respondent's approval of the challenged ordinances because of this improper prospective delegation.

B. Ordinance No. 2011-06 Unlawfully Delegates Authority to Project Neighbors.

1. The Delegation of Authority to Project Neighbors Violates the Fourteenth Amendment of the U.S. Constitution because it Grants Authority to Rural Residential Landowners to Decide Without Standards Whether to Reduce Setbacks from Wind Facilities.

The Fourteenth Amendment's due process clause provides that, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law* * *." In *State of*

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Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928), the U.S. Supreme Court interpreted the due process clause to prevent legislatures, under the guise of the police power, to impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.

The Respondent's decision in Ordinance No. 2011-06 sets forth the setback requirements for a wind turbine tower from a rural residence,

> "Setbacks. The minimum setback shall be a distance of not less than the following:
>
> (3) From a turbine tower to a rural residence shall be 2 miles, unless the landowner of the rural residence authorizes by written waiver of a lesser setback and the waiver is recorded with the county deed records* * *" (strikethroughs omitted) (emphasis added).

Rec. pp. 27-28. The waiver provision grants authority to private rural residential landowners to decide whether to authorize a lesser setback for a wind turbine tower in violation of the Fourteenth Amendment's due process clause because it unnecessarily and unreasonably prohibits the use of private property.

The grant of authority to project neighbors in Umatilla County is similar to the grant of authority at issue in *Roberge*. In *Roberge*, the construction of a philanthropic home for children and the elderly was a permitted use subject to the applicant obtaining written consent from the owners of two-thirds of the property within four hundred feet of the proposed building. The applicant submitted an application for the philanthropic home without obtaining the necessary consent and was denied a permit solely on the lack of consent. *Id.* at 119. The applicant appealed on the grounds that, if the consent requirement could prevent the construction of the home, such requirement was repugnant to the due process clause of the federal constitution.

The Supreme Court reviewed the land use code to determine whether the construction of the philanthropic home was a legitimate use of property within the protection of the Constitution. Although the land use code in question purported to subject permission for such building to the consent of neighbors, the fact that the legislative body amended the code to allow the home in

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the first place established it as a legitimate use of property protected by the Constitution. *Id.* at 121. In the Umatilla County case, the grounds to find that wind facilities in exclusive farm use zones are a legitimate use of property is found both in County's Code Section 152.616 HHH standards for approval of these facilities and also by state law allowing wind facilities under ORS 215.283(2), subject only to clear and objective standards under ORS 215.296(2) discussed in the Fifth Assignment of Error. Therefore, the use of property for wind facilities is subject to the protection of the due process clause guaranteed by the U.S. Constitution because the Code and state law legitimize the use.

Turning to the grant of authority to project neighbors in Umatilla County, as in *Roberge*, the Respondent would be bound by the decision or inaction of project neighbors to reduce the setback. *Id.* at 122. In *Roberge* there was no provision for review of the neighbor's decision under the ordinance; their failure to give consent was final. Further, the Court found that the neighbors are not bound by any official duty, but are free to withhold consent for selfish reasons or may arbitrarily subject the applicant to their will or caprice and not necessarily for any planning-related reason. *Id.* Ultimately, the Court held that the unreviewable grant of authority delegated to project neighbors was repugnant to the due process clause of the Fourteenth Amendment because it gave project neighbors authority to prevent the applicant from building the philanthropic home. *Id.* at 123. The Supreme Court had adopted the same view in *Eubank v. City of Richmond*, 226 U.S. 137 (1912) in regards to a grant of authority to neighbors to decide the location of building setbacks from property lines. In *Eubank*, the Court determined that the grant of authority to one set of owners to determine not only the extent of use, but the kind of use which another set of owners may make of their property violated the due process clause. *Id.* at 143.

Oregon courts have similarly reasoned that ordinances that grant discretionary project approval powers to project neighbors violate the due process clause. In *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 140 Or 600, 610, 15 P2d 391 (1932), the Court ruled

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that the arbitrary power given to project neighbors, where the applicant had to obtain signatures of 50% of its neighbors to meet permit requirements for a parochial school, violated the due process clause because such signature gathering requirement subjected the applicant to the caprice of 50% of its neighbors.[8]

Here, the Respondent's grant of waiver is a grant of authority to project neighbors that violates the due process clause of the Fourteenth Amendment because it arbitrarily allows project neighbors to determine setback distances from home to turbine without any method of review. The waiver right granted to a rural residential landowner allows for a discretionary change in setbacks without any relevant standards for such landowner to grant a waiver. The problem with this grant of waiver authority is that it can be exercised without the Respondent maintaining any control over the manner in which setbacks for wind facilities will be established around rural residences. In effect, a single rural landowner is granted the right to change the regulations applicable to a wind facility applicant based on his or her whims. Therefore, under the Fourteenth Amendment such grant of waiver authority to project neighbors is a violation of the due process clause.

LUBA must reverse the adoption of the challenged ordinances because the waiver provision to allow project neighbors to arbitrarily decide the setback distance from rural residences violates the due process clause of the Fourteenth Amendment of the Constitution.

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[8] In *Anderson v. Peden*, 284 Or 313, 328-329, 587 P2d 59 (1978), the Oregon Supreme Court considered an applicant's claim that the county Planning Commission and Board of Commissioners improperly relied on the number of opposing neighbors at a hearing to make its decision. The Court disagreed, finding that neighborhood approval was not included in the governing ordinance or improperly considered in the decision making process. *Id.* at 330. Nonetheless, the opinion agreed that, if the county had provided discretionary approval authority to project neighbors, such grant of authority would violate the due process clause. *Id.* at 329.

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2. The Delegation of Authority to Project Neighbors Unlawfully Delegates Authority under the Oregon Constitution because it Cedes County Authority to Project Neighbors.

Article I, Section 21, of the Oregon Constitution[9] prohibiting prospective delegation of authority is also implicated by the waiver provision in Ordinance No. 2011-06[10] allowing a rural residential landowner to decide whether to authorize a lesser setback for a wind turbine tower. Further, as identified in the previous section, Oregon courts have reasoned that ordinances that grant discretionary project approval powers to project neighbors violate the due process clause. *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 140 Or at 610.

The delegation of authority to private property owners was reviewed by the Oregon Supreme Court in *Schmidt v. City of Cornelius*, 211 Or 505, 316 P2d 511 (1957). In that case, the court reviewed a statute that provided that an owner of land within a city, if the land had a minimum acreage, could have the land de-annexed from the city solely by the owner and the courts. *Id.* at 509. The procedure called for the owner to file a complaint in the circuit court which, if it found the requirement fulfilled, must decree disconnection of the land. *Id.* The Court found that the statute empowered a private individual at his sole option to initiate a judicial proceeding that, upon proof of specified facts, would result in mandatory action of the court that would change the city boundaries as specified in the city charter. *Id.* at 525-526. The Court held the statute unconstitutional, finding that this delegation of legislative power was in effect an amendment to the charter of the city. The Court based its decision on the unlawful delegation of

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[9] Article I, Section 21 of the Oregon Constitution was set forth in Section A of this Assignment of Error, and provides,

> "[n]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution* * *"

[10] The waiver provision was set forth above in Section B.1 of this Assignment of Error and provides,

> "Setbacks. The minimum setback shall be a distance of not less than the following:
> (3) From a turbine tower to a rural residence shall be 2 miles, unless the landowner of the rural residence authorizes by written waiver of a lesser setback and the waiver is recorded with the county deed records* * *" (emphasis added)

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authority because the city's decision to allow an individual to exercise the de-annexation authority of the city was a violation of the Oregon constitutional mandate that no law shall be passed which depends upon any authority except as provided in the constitution. *Id.*

In *Schmidt* the Court's decision prevented a single landowner from exercising legislative discretion in deciding the boundaries of a city. In the present case, the same principle should drive the analysis of a rural residential landowner's right to waive a County setback requirement. The Respondent has the authority under its general land use authority to adopt setbacks that protect the health, safety and welfare of the community. Adoption of this setback provision violates the state's prohibition on the prospective delegation of authority because it allows for landowner discretion to change setbacks without any relevant standards, subjecting a wind applicant to the whims of a project neighbor. Such a grant of discretion to a rural residential landowner conflicts with Oregon Constitution Article I, Section 21, in that it allows legislative decision making outside of the authority granted to the County Board of Commissioners.

Further, the grant of discretion to vary setbacks deprives a person of a property right without due process because the Respondent does not maintain authority over a wind facility application. This grant of authority, like the arbitrary power given to project neighbors in *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 140 Or at 610, to withhold signatures to allow a parochial school, violates the due process clause because such authority granted to rural residential landowners will subject wind facility applicant's to the caprice of its neighbors. See also *Anderson v. Peden,* 284 Or at 329 (if the county had provided discretionary approval authority to project neighbors such grant of authority would violate the due process clause). Under Oregon constitutional analysis, due process is implicated and violated when an unlawful delegation of authority results in the deprivation of property.

Therefore, LUBA must reverse the Respondent's decision to adopt the challenged ordinances.

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C. The Analysis of Ex Post Facto and Takings Cases Offer Contexts and Support because these Cases Show that the Constitution Protects Wind Facility Applicants from Delegation of Authority that Results in Deliberate Actions by Third Parties to Prevent the Use of Property for Wind Facility Components.

Two decisions involving the constitutionality of statutes governing where sex offenders may reside after release from prison provide additional authority explaining why the grant of authority in the challenged ordinances to allow waiver of some provisions violates constitutional protections of private property.

A Kentucky case, *Commonwealth v. Baker*, 295 S.W.3d 437, 440 (Ky. 2009) involved a challenge to amendments to existing sex offender restrictions governing where registered sex offenders ("RSO") could live, as those regulations were applied to Defendant who had an existing dwelling before the law was adopted.[11] Plaintiff claimed the legislation constituted *ex post-facto* punishment and violated the federal and state constitutions.

The Kentucky law prohibited residences of RSOs within 1,000 feet of a school, preschool, playground or daycare for those on parole, probation or supervised release. *Id.* Baker challenged the residential prohibitions claiming they were punitive so as to constitute an ex post facto legislation. The court cited the United States Supreme Court decision in *Smith v. Doe*, 538 U.S. 84 (2003) to set out a two-part inquiry to apply in consideration of whether the challenged regulation was punitive or not, and, even if not so intended, whether the law was so punitive in effect to render it subject to ex post facto prohibitions. *Id.* at 442.

The court concluded that, although the Kentucky legislature did not intend the law to be punitive, the residency restrictions were so punitive in effect as to negate any intention to deem them civil. *Id.* at 447. One of the portions of the law leading to the conclusion of punitive effect

[11] The Kentucky statute was a variation on "Megan's Law" under which sex offenders were required to be registered. *Id.* at 440. A copy of *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) is included in Appendix B. App. B pp. 146-158.

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was based on the court finding that a defendant could be displaced if a school, playground or daycare facility were subsequently located near his or her dwelling,

> "While a sex offender may be permitted one day to live in a particular home, he may the next day find himself prohibited by the opening of a school, daycare facility, or playground. Perhaps even more troublesome is the fact that a city could easily designate an area a playground, and the statute provides no guidance as to what exactly qualifies as a 'playground.'"

Id. at 446-447. Therefore, the deliberate acts of a neighbor could require a RSO to relocate his or her residence.

In *Mann v. Georgia Dept. of Corrections*, 653 S.E.2d 740 (Ga. 2007), the Georgia Supreme Court considered a takings challenge to a similar statute.[12] The state statutes prohibited a convicted sex offender from living or working within 1,000 feet of places where minors could congregate. *Id.* at 741. Plaintiff's home and business met those requirements initially, but childcare facilities moved within 1,000 feet of both places and his parole officer directed him not to be present at either. *Id.* at 742.

The court analyzed the effects of the law and found that offenders face the possibility of being repeatedly uprooted and forced to abandon homes in order to comply with the restrictions. *Id.* Such abandonment could occur as a result of the whimsy of third parties that may readily learn the location of a RSO's residence. The court recognized the possibility that such third parties may deliberately establish a child care facility or any of the numerous other facilities designated in the regulations within 1,000 feet of a RSO's residence for the specific purpose of using the statutes to force the offender out of the community. *Id.* at 742- 743. The court ruled that the statutes resulted in a taking of plaintiff's home because the regulations were functionally equivalent to the classic taking in which government directly ousts the owner from his domain. *Id.* at 744.

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[12] A copy of *Mann v. Georgia Dept. of Corrections*, 653 S.E.2d 740 (Ga. 2007) is included in Appendix B. App. B pp. 159-165.

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Under Umatilla County's wind ordinances, the unlawful delegation of authority to cities and rural residential owners subjects a wind facility applicant and the owner of the property where such facility is proposed to the deliberate acts of neighboring property owners and cities who may refuse to grant a waiver of setbacks for the sole purpose of preventing the construction of a wind facility and may provide for a house to be built or UGB extended to block the facility regardless of its planning merits. This delegation of authority allowing project neighbors and cities to prevent wind energy development are the same types of activities encouraged by the RSO statutes in *Commonwealth v. Baker* and *Mann v. Georgia Dept. of Corrections* to strategically place playgrounds and child care facilities to prevent RSOs from living in a particular neighborhood because it grants veto authority to particular third parties for particular uses in rural areas of the County. In addition, like the warnings from the courts in the two RSO cases, the wind facility applicant could be targeted by a project neighbor who decides to build a rural residence while an application is pending. The delegation of authority to grant or not grant waiver under the challenged ordinances, combined with the very real possibility that more rural property owners will build more rural residences, will subject wind facility applicants to the possibility of having to constantly modify application plans for a use that is allowed under state law or the removal of an existing facility for no planning-related reason at all.[13] Therefore, based

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[13] These grants of authority to rural residential landowners and cities lack any rational basis. As Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) explained, there must be a rational basis for deprivation of property rights. In *Nollan*, the Supreme Court reviewed the nexus between the applicants' desire to rebuild their house and the commission's requirement that the permit be conditioned on the applicants' grant of a public easement across their beachfront property. *Id.* at 827. In finding that the commission had not established the necessary nexus and that the requirement to grant the easement constituted a takings, the Court explained,

> "When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

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on the reasoning in *Commonwealth v. Baker* and *Mann v. Georgia Dept. of Corrections,* subjecting wind facility applicants to the discretion of neighboring rural property owners and cities deprives Petitioners who have lease agreements executed for placement of facilities on their lands to a deprivation of property right without due process in violation of the Fourteenth Amendment.

D. The Waiver Provisions Unlawfully Allow for a Discretionary Land Use Decision to be Made Without Use of the Procedural Requirements of ORS 215.402 to 215.437 and ORS 197.763.

The application and hearing procedures for the Respondent to follow when reviewing a wind facility permit application are set forth in ORS 215.402 – 215.437 and ORS 197.763. Under ORS 215.416(2) state law guarantees that all approvals needed for a wind facility will be considered in a single proceeding before the governing body,

> "The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427* * *."

In addition, ORS 215.416(9) requires findings to explain how the criteria and standards are applied to a particular application,

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

In consideration of permit applications, counties are not authorized to abridge notice requirement and other procedures which are required by state law in connection with land use decisions.

Id. at 837. Allowing rural residential landowners or neighboring cities to grant waivers of setbacks to wind facility applicants in the County under the challenged ordinances is tantamount to allowing them to cry "Fire" in a crowded theater in exchange for making the required $100 payment because, merely based on their geographic location, these stakeholders are granted a veto right over the existence of a wind facility subject to the County's jurisdiction in violation of the constitutional protection against delegation of authority.

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Doughton v. Douglas County, 88 Or App 198, 202, 744 P2d 1299 (1987).

In addition to the requirements under ORS 215.402 – ORS 215.437, the raise it or waive it provision in ORS 197.763(1) requires public hearing participants to raise issues that may be the basis for appeal to LUBA,

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

The Respondent's grant of authority to project neighbors and affected cities to waive setback requirements allows for discretionary application of approval standards outside of the public hearing process. The provisions regarding the waiver of setbacks do not require the waiver to be granted prior to the Respondent's issuance of a decision on a wind facility application. Rec. pp. 21 and 28. Therefore, the ultimate issue regarding the adequacy of a setback from a rural residential landowner or city will be decided outside of the hearings process in violation of ORS 215.416. As such, the setback provisions violate ORS 197.763 because a participant at the public hearing would not have enough information to raise the issue of whether the setback is adequate or meets the approval criteria.

These waiver provisions give rise to the same problem the Court of Appeals had with a mitigation plan approved by Deschutes County for a destination resort in *Gould v. Deschutes County*, 216 Or App 150, 157 171 P3d 1017 (2007). In *Gould,* the county conditioned approval of a destination resort on the future approval of a mitigation plan by the Oregon Department of Fish and Wildlife (ODFW) and the Bureau of Land Management (BLM) and committed the applicant to "work cooperatively with ODFW and BLM to determine the specific locations where the mitigation plan will be implemented." *Id.* The Court ruled that this conditional approval was not supported by substantial evidence in the record, because particulars of the plan

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were to be based on future discussions among the developer, ODFW and BLM, rather than evidence submitted during public hearings. *Id.* at 160.

Similarly, the waiver provisions in the challenged ordinances at issue here enable the Respondent to consider and make a decision on wind facilities without the applicant and project neighbor, or affected city providing evidence regarding the setbacks for project components. These waiver provisions make it impossible for interested persons to raise issues during the public proceedings in accordance with ORS 197.763(1). Therefore, any decision by the Respondent under the challenged ordinances will violate the procedural requirements for permit approval and robs interested persons of the right to participate in the public review process guaranteed under ORS 215.402 *et seq*. and ORS 197.763.

The quasi-judicial procedures in connection with applications for permits established in ORS 215.402 *et seq.* and ORS 197.763 are state legislative mandates with which the Respondent is required to comply. *Department of Transportation v. City of Mosier*, 161 Or App 252, 258, 984 P2d 351 (1999). In adopting regulations that abridge the rights of interested persons to meaningfully participate in public review of wind facility applications, the Respondent violated the state mandates to review the setbacks in the public record because the ordinances allow for arrangement of the setbacks by the applicant and third parties outside of the County's jurisdiction. Therefore, LUBA must remand the challenged ordinances to require the Respondent to adopt permit standards that will be reviewed in accordance with ORS 215.402 *et seq.* and ORS 197.763.

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E. The Challenged Ordinances are Inconsistent with the Comprehensive Plan Provisions on Protection of Inventoried Natural Resources - Riparian Corridors, Wetlands, Wildlife Habitat, Groundwater Resources, Natural Areas, Mineral and Aggregate Resources, Historic Resources and Scenic Views and Sites - under ORS 197.175(2) because the Ordinances Provide, in part, for Granting Standardless Waivers without Any Reference to the Plan and without Any Opportunity to be Heard.

Under ORS 197.175(2)(d), the challenged ordinances must be consistent with the County's acknowledged Comprehensive Plan. The Comprehensive Plan contains the County's acknowledged Goal 5 program protecting inventoried resources including riparian corridors, wetlands, wildlife habitat, groundwater resources, natural areas, mineral and aggregate resource, historic resources and scenic views. Notwithstanding the Plan's 49 policies adopted to protect these resources, the challenged ordinances leave the policies at the door when it comes to setbacks for wind facilities from rural residences and UGBs. App. B pp. 166-192. The waiver provisions in the challenged ordinances allow a rural residential landowner or affected city to choose a reduced setback for wind facility components without any regard to whether such waiver will adversely affect or conflict with the Comprehensive Plan's Goal 5 program to protect resources that may be co-located with the setback area.

For example, the Technical Report identified that road construction is in conflict with big game habitat protection. App. B p. 193. Certainly the location of the setback from rural residences or cities could govern the location of roads in connection with the wind facility. Consequently, big game habitat could be adversely affected by a decision to waive a setback that may encourage road development in habitat areas without the Respondent giving consideration to such impact during the public review process.

In authorizing a waiver of setbacks without standards, with no reference to the Plan's Goal 5 program and other policies, and as set forth in the previous sub-assignments of error, without any opportunity for interested parties to be heard, considerations other than planning,

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such as paying off the landowner become paramount. Therefore, LUBA must remand the decision to require the Respondent to adopt setback standards that are consistent with the Comprehensive Plan and allow interested parties the opportunity to participate in meaningful review of a wind facility application.

SECOND ASSIGNMENT OF ERROR - The Respondent's Decision Fails to Satisfy Goal 5, OAR 660-023-0000 et seq. and ORS 197.175(2) because it did not Apply Goal 5, Failed to Protect Wind Energy Sources and Used an Out of Date Resource Inventory.

A. The Challenged Ordinances Constitute Regulations that Protect Goal 5 Resources and as such the Respondent was Required to Apply Goal 5.

The challenged ordinances are PAPAs as defined by OAR 660-023-0010(5). The circumstances where a County must apply Goal 5 before adopting a PAPA are set forth in OAR 660-023-0250(3). That rule provides, in part:

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

LUBA reviewed this requirement in *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 297 (2001), *aff'd by* 175 Or App 419, 28 P3d 1229 (2001) and concluded that the rule is awkwardly written, but nonetheless requires that the local government must apply Goal 5 where it adopts a new land use regulation to "protect a significant Goal 5 resource." Further, when a local government creates a Goal 5 program it must comply with the requirements in steps outlined in OAR 660-023-0040(1):

1) identification of conflicting uses;

2) analysis of the ESEE consequences;

3) determination of the impact area; and

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4) development of a program to achieve Goal 5.[14]

Although the Respondent claims that the purpose of the challenged ordinances, particularly Ordinance 2011-07 is to provide greater protections for Goal 5 resources, the Respondent failed to undertake the required Goal 5 review before it adopted the ordinances. Rec. p. 31. Instead, the Respondent ignored Goal 5 and its implementing rules in OAR 660 Ch. 23 as it increased protections for some inventoried resources while failing to protect other resources identified for protection in Goal 5's implementing regulations. Rec. pp 4429 and 15. The primary impact is that these added Goal 5 protections severely limit other Goal 5 resources without following the Goal 5 process. Rec. pp. 2288-2289, 2291, 2293, 2295, 3574, and 3787.

The Respondent's new land use regulations establish a Goal 5 program because the ordinances are intended to add protections to inventoried Goal 5 resources throughout the County. For example, in Ordinance No. 2011-05's Sections 5g and 5k Goal 5 resource protection is provided for as follows:

> (g) A fish, wildlife and avian impact monitoring plan. The monitoring plan shall be designed and administered by the Wind Power Generation Facility owner/operator's wildlife professionals. * * *
>
> (k) Information pertaining to the impacts of the Wind Power Generation Facility on:
>
> (1) Wetlands and streams, including intermittent streams and drainages;
>
> (2) Fish, avian and wildlife (all species of concern, as well as threatened and endangered species);
>
> (3) Fish, avian and wildlife habitat; * * *
>
> (5) Open space, scenic, historic, cultural and archaeological resources as identified and inventoried in the Comprehensive Plan. The applicant shall consult with the Confederated Tribes of the Umatilla Indian Reservation on developing an inventory of these resources." (strikethroughs omitted)

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[14] *See Von Lubken v. Hood River County,* 22 Or LUBA 307 (1991) regarding the obligation to comply with the Goals in post-acknowledgment amendments. ORS 197.175(2)(d) requires the challenged ordinances to be consistent with both the Goals and the County's acknowledged comprehensive plan.

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Rec. pp. 19-21. Further, the entirety of Ordinance No. 2011-07 is aimed at adding protections to the Goal 5 resources inventoried in the Walla Walla Watershed. As set forth in the findings, Respondent states:

> "7. The acknowledged Umatilla County Comprehensive Plan and Technical Report contain inventories of Goal 5 resources and findings and policies that support appropriate standards for protection of resources in the Walla Walla Watershed."

Rec. p. 30. Thus, when it comes to Goal 5 resources, the ordinances "protect and preserve existing trees, vegetation, water resources, wildlife, wildlife habitat, fish, avian, [sic.] resources historical, cultural and archaeological site." Rec. p. 21-22 and Rec. pp. 385-388.

Further, in a document entitled "Summary of Applicable Comprehensive Plan and Technical Report references in support of proposed protection standards for the Walla Walla Watershed Sensitive Resource Area, section (11) of 152.616(HHH), the record explains the Goal 5 protective function of the challenged ordinances:

> "The proposed section (11) standards would apply to the geographic area identified on four maps entitled 'Walla Walla Watershed Sensitive Resource Area,' including the (1) 'Fish, Stream & Waters Resources Map;' (2) 'Highly Erodible Soils,' (3) 'Land Use Zones;' and (4) 'Comprehensive Plan Significant Goal 5 Resources.'"

Rec. p. 389. This explanatory document then continues to set forth the Goal 5 resources being protected, including significant wetlands, wildlife habitat, significant natural areas, outstanding scenic views, and historic resources. Rec. pp. 389-394. Therefore, the amendments to Section 152.616 HHH constitute a land use regulation adopted in order to protect significant Goal 5 resources and thus must, in turn, comply with Goal 5.

Further, the Respondent cannot adopt a PAPA that amends the program to protect significant Goal 5 resources without establishing that the amendment complies with Goal 5 and the Goal 5 implementing regulations, even if the purpose of the amendment is to increase the level of protection afforded inventoried Goal 5 resources. *Home Builders Assoc. v. City of*

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Eugene, 41 Or LUBA 370, 432 (2002). As the Court determined in *Rest-Haven Memorial Park v. City of Eugene*, 175 Or App at 424,

> "Nothing in OAR 660-023-0250(3) suggests that it excuses compliance with Goal 5 for those local ordinances that have multiple purposes, only one of which is to protect significant Goal 5 resources. An ordinance may have more than one purpose, as this one apparently does. So long as one of the purposes of the ordinance was to protect Goal 5 resources and no other provision of the law permits the city's action without compliance with OAR 660-023-0250(3), the rule is applicable."

Because the challenged ordinances create a Goal 5 program to increase protection for inventoried resources, the Respondent was required to comply with the Goal 5 planning requirements of OAR 660-023-0040(1), to identify conflicting uses, analyze ESEE consequences, determine the impact area, and develop a program to achieve Goal 5. Although the Respondent never admits straightforwardly that it is implementing Goal 5, it cannot adopt these ordinances by pretending the Goal 5 requirements do not exist.

These requirements are fleshed out in subsequent regulations regarding the identification of conflicting uses and the ESEE analysis. With respect to the identification of conflicting uses OAR 660-023-0040(2)(b) requires the Respondent to determine the level of protection for each significant site. As to the ESEE analysis, under OAR 660-023-0040, its purpose is to prioritize conflicting uses. The ESEE analysis should provide a detailed analysis of the tradeoffs resulting from prioritizing one Goal 5 resource to the detriment of the other. Yet, the record is silent in addressing any of these planning requirements under Goal 5.

LUBA's decision in *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA at 298, is directly on point regarding how the Respondent should have applied the OAR 660-023-0040 planning steps in the present case,

> "OAR 660-023-0030 requires that the city complete an inventory process to determine the 'significance' of the Goal 5 resources. Once that is done, OAR 660-023-0040 requires the city to analyze the * * * ESEE * * * consequences of allowing, prohibiting or <u>limiting</u> uses that might conflict with those other

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> significant Goal 5 resource sites before it adopts a program to achieve Goal 5. In other words, the regulatory programs that are required by the goal must be based on these prior planning exercises." (emphasis added).

See also *Coats v. Land Conservation and Development Commission*, 67 Or App 504, 510-511, 672 P2d 898 (1984) (an ordinance that allowed development of lots adjacent to a mining operation without an ESEE analysis did not satisfy Goal 5). Here, the Respondent failed to identify and analyze conflicting uses resulting from increased environmental protections of watersheds and wildlife habitat.

In *League of Women Voters of Oregon v. Klamath County*, 16 Or LUBA 909, 923-924 (1988), LUBA concluded that the early Goal 5 planning steps, including review of conflicting uses and performing an ESEE analysis, must be addressed prior to ordinance adoption when the ordinance involves Goal 5 resources.[15] In this case, by not completing the earlier Goal 5 planning steps, including review of conflicting uses and performing an ESEE analysis, the Respondent has failed to establish the required basis for adopting the challenged ordinances as a means of achieving Goal 5.

Moreover, the Respondent completely ignored the existing Goal 5 program in the Comprehensive Plan that protects the inventoried resources found in its boundaries - riparian corridors, wetlands, wildlife habitat, groundwater resources, natural areas, wilderness areas, mineral and aggregate resources, historic resources and scenic views and sites. These inventoried resources are located throughout the County. App. B pp. 8-37. The Respondent's Goal 5 program is set forth in the findings and policies in the Open Space section of the Plan. App. B pp. 166-192. By adding the protections described above, the challenged ordinances are inconsistent with the Comprehensive Plan in that they:

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[15] Although this case applied OAR 660-016-0010, the requirement for adoption of a land use regulation based on the identification of conflicting uses and an ESEE analysis is similar to that provided in current OAR 660-023-0040(5).

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- Adopt conditional use standards for wind facilities asserting that wind facilities are in fact a conflicting use with wildlife habitat when the Plan does not so recognize that assertion. These standards contradict Policy 2(e),

> "The County Development Ordinance shall include conditional use standards, overlay zones, and/or other provisions to limit or mitigate conflicting uses between rare, threatened and endangered species habitat areas and surrounding land uses." App. B pp. 194-195

Because the standards are imposed on a use that has not been established as conflicting with threatened or endangered species through the Goal 5 process the Plan does not support subjecting them to conditional use standards. In fact, the Technical Report specifically concluded, "Very little energy consequences can be imagined because of protection of upland bird habitat since no general change of land use pattern is necessary." App. B p. 196. This conclusion is not addressed at all in the ordinances.

- Adopt conditional use standards for wind facilities that are inconsistent with Policy 13(b),

> "When conflicting uses are proposed for sites identified as having high potential as scientifically and ecologically significant natural areas, Umatilla County shall determine and evaluate the environmental, energy, economic and social consequences of allowing the conflicting use and of retaining the area in its existing state." App. B pp. 197-198

The Respondent did not prepare an ESEE analysis and could not have complied with this policy.

Thus, the challenged ordinances adopt a Goal 5 program that is inconsistent with the Comprehensive Plan and must be remanded.

The Respondent misconstrued the law by failing to apply Goal 5 when it adopted these PAPAs as part of a program that affected protection of its Goal 5 resources. Further, the Respondent did not undertake the advanced Goal 5 planning steps of identifying conflicting uses

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or preparing an ESEE analysis before adopting the ordinances. By ignoring the Goal 5 program, the Respondent adopted a decision that is inconsistent with the Comprehensive Plan in violation of ORS 197.175(2)(d). Thus, the Respondent's decision must be remanded so that it can comply with Goal 5.

B. In Adopting a Two-mile Setback from Rural Residences, the Respondent Failed to Meet Its Mandatory Duty to Protect Wind Energy Sources under Goal 5 because Wind Energy Development is Severely Curtailed.

Pursuant to OAR 660-023-0190(2), the protection of energy sources in Goal 5 is mandatory,

> "In accordance with OAR 660-023-0250(5), local governments shall amend their acknowledged comprehensive plans to address energy sources using the standards and procedures in OAR 660-023-0030 through 660-023-0050." (emphasis added).

Goal 5 explicitly protects energy sources and OAR 660-023-0190(1)(a) defines an energy source to include naturally occurring locations of wind areas. Further, the Goal 5's energy specific regulations expressly define "protect" for energy sources,

> "[m]eans 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." (emphasis added).

OAR 660-023-0190(1)(b). In contrast, the Goal 5 regulations make protection of open space, aesthetics, and scenic views optional. *See* OAR 660-023-0220 and OAR 660-023-0230, respectively. The challenged ordinances protect open space resources without regard to wind energy resources, thereby violating Goal 5.

Those who challenged the three subject ordinances below demonstrated that the two-mile setback from rural residences effectively resulted in no new wind turbines in a 65,000 acre area within the County. Rec. p. 3574 and map at p. 3787. Notwithstanding the effective end of development of wind facilities (Rec. p. 3787), the County completely ignored the conflicts of

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these ordinances with Goal 5's requirement to protect wind energy sources. The approval of these ordinances is contrary to a condition of approval in the acknowledgment of the County's land use plan that wind energy resources are to be included in the Goal 5 inventory.

In *NWDA v. City of Portland*, 50 Or LUBA 310, 330 (2005), LUBA considered the converse situation of mandatory protection of energy resources, where particular Goal 5 regulations applicable to historic preservation provided a blanket exemption from an ESEE update under OAR 660-023-0200(7). As a result, the specific historic resource Goal 5 regulations applied, and the city was required to only protect historic resources as required under OAR 660-023-0200(1)(e) (where "Protect" means to require local government review of applications for demolition, removal, or major exterior alteration of a historic resource).[16] LUBA focused on the optional phrasing of the Goal 5 historic resource section in OAR 660-023-0200. *Id.* at 328. In contrast, the Respondent is subject to the Goal 5 regulations that require mandatory protection of energy resources, where the subject ordinances that implement Goal 5 must protect energy sources, by authorizing present or future development or use of the energy source under OAR 660-023-0190(1)(b). The Respondent does not provide any discussion of the application of Goal 5 to wind resources, let alone protection of wind energy resources as required by Goal 5.

Further, even when resource specific provisions of Goal 5 such as the energy specific regulations in OAR 660-023-0190 apply, the definitions of "protect" in OAR 660-023-0010(7) still apply. *Id.* at 331. In consideration of the broad definition of protect under OAR 660-023-0010(7) that "When applied to a resource category, 'protect' means to develop a program consistent with this division," the County has not identified how wind energy is protected within the program adopted under the challenged ordinances. Therefore, the challenged ordinances

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[16] *See also Columbia Riverkeeper v. Clatsop County*, 238 Or App 439, 243 P3d 82 (2010) (Court affirmed LUBA's determination that the term "protect" for purposes of Goal 16 means causing no more than *de minimis* harm).

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must be remanded and the Respondent instructed to protect wind energy resources through its Goal 5 program.

C. Before the Respondent can Analyze Goal 5 Impacts it Must Update its Goal 5 Inventory because the Respondent has Never Satisfied Its Condition of Acknowledgement to Include Energy Sources in the Inventory.

Under ORS 197.013 implementation and enforcement of acknowledged comprehensive plans and land use regulations are matters of statewide concern. *Yamhill County v. LCDC,* 115 Or App 468, 472, 839 P2d 238 (1992).[17] The County's acknowledged Comprehensive Plan contains a list of protected Goal 5 resources and the conflicting uses that may adversely affect resource protection. See generally App. B pp. 8-145, 166-192. Further, as to Goal 5 resource protection, LCDC required as part of acknowledgement that Umatilla County update its resource inventory when information about wind energy became available. App. B p. 71. At no time has the Respondent performed this update. Allowing the Respondent to effectively bar development of wind energy facilities in the County while simultaneously disregarding LCDC's condition of acknowledgement makes the acknowledgement process meaningless and the analysis of conflicting uses impossible.

The Respondent's situation is similar to the Goal 2 exception case in *Central Oregon Landwatch v. Deschutes County ("Landwatch"),* __ Or LUBA __ slip op. 3 (2010). In the *Landwatch* case, LUBA ruled that transportation need could not be based on information not contained in the county's acknowledged Transportation System Plan (TSP). *Id.* at 8. LUBA ruled in that case that the county could not rely on the City of Redmond's identification of need in its TSP to justify the county's decision. *Id.* In this case, the County's Goal 5 protections must be based on a Goal 5 inventory that, as demonstrated by LCDC's acknowledgment order, has not occurred. To the extent there is sufficient information about wind energy to bar its development,

[17] This case analyzed Goal 5 requirements in the context of periodic review which is not at issue in the current case.

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the County must first be required to update its inventory to understand the implications and analyze the impacts on the Goal 5 resources. Rec. pp. 43 and 2289 (showing existing wind facilities in the County). The Respondent cannot be allowed to announce a new Goal 5 program in the guise of resource protection without an up to date Goal 5 inventory reflecting the requirement in LCDC's acknowledgement order that wind energy be included in the inventory. Only then will the Respondent have an inventory from which to evaluate conflicting uses and identify ESEE impacts.

Although the Respondent may claim that it is not required to update its Goal 5 inventory until periodic review under *Urquhart v. Lane Council of Governments*, 80 Or App 176,180, 721 P2d 870 (1986), this case differs because LCDC's acknowledgement order for Umatilla County did not delay inclusion of wind energy sources to periodic review. Further, the record contains testimony that information is available to update the Comprehensive Plan to reflect wind energy resources. Rec. p. 43. Therefore, when and if the Respondent chooses to proceed in the adoption of these challenged ordinances in compliance with Goal 5, it must take into account LCDC's acknowledgement order to add wind energy sites to its inventory prior to analyzing conflicting uses and preparing the ESEE analysis.

Within the record, testimony regarding Goal 5 notes the need to update the energy section of the Goal 5 inventory, but then concludes, "Such a Goal 5 update would be a large undertaking." Rec. p. 394. Simply because significant effort would be required to update the County's Goal 5 inventory does not enable Respondent to avoid the correct application of the Goal to the challenged ordinances.

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THIRD ASSIGNMENT OF ERROR – The Respondent Erred in Adopting the Challenged Ordinances without an Adequate Factual Basis under Goal 2 and in a Manner Inconsistent with the Comprehensive Plan under ORS 197.175(2) because the Ordinances do not Comply with the County's Acknowledged Goal 5 Program.

In *GMK Developments, LLC v. City of Madras*, 225 Or App 1, 199 P3d 882 (2008), the Court of Appeals explained that land use decisions must have an adequate factual base:

> "Goal 2 provides, in part, that, '[t]o establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions,' all land use plans must include inventories and other factual information for each applicable statewide planning goal."

As LUBA indicated in *OCAPA v. City of Mosier*, 44 Or LUBA 452, 462 (2003), in alleging a Goal 2 factual base inadequacy, a petitioner must establish that some applicable statewide planning goal or other criterion imposes obligations that are of such a nature that a factual base is required to determine if the zoning ordinance amendment is consistent with the goal or other criteria. Further, ORS 197.175(2) requires that the challenged ordinances be consistent with the Comprehensive Plan. *Id.* at 461. As set forth above, under OAR 660-023-0040(1) the Respondent must analyze conflicting uses and prepare an ESEE analysis in order to comply with Goal 5 and the Comprehensive Plan. In failing to provide the inventory, conflicting use review and ESEE analysis required for achieving Goal 5, the Respondent adopted the challenged ordinances without providing an adequate factual basis in violation of Goal 2 and failed to enact land use regulations that are consistent with the Plan under ORS 197.175(2).

Similar to *OCAPA*, 44 Or LUBA at 467, where LUBA found that the record lacked any Goal 5 findings suggesting an adequate factual basis for ordinances that would prevent the operation of a quarry, the Respondent has not provided an adequate factual basis for approving the challenged ordinances as complying with Goal 5. The lack of adequate factual base is highlighted by the fact that the Respondent's record does not analyze how the challenged

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ordinances will protect some Goal 5 resources without conflicting with other Goal 5 protected resources, or whether the ordinances permissibly reduce the ability to build wind facilities that ought to be protected in the County's Goal 5 inventory.

In its analysis of compliance with Goal 2 in the *Landwatch* case, __ Or LUBA __ slip op. 10, that involved the Deschutes County's attempt to widen a street, LUBA ruled that the TSP must be amended to allow the county to justify a Goal 2 exception and that in so making the amendments, an adequate factual basis would be required. LUBA's ruling requiring an adequate factual basis meant that Deschutes County would not be allowed to rely on what the petitioners contended were the county's attempts to identify transportation needs on a random basis that singly or collectively might justify an exception to extend the street in question. *Id.* at slip op. 9 and footnote 6. On remand, LUBA ought to provide the Respondent with the same admonition it gave Deschutes County in the *Landwatch* case, slip op. 10 – that it must supply an adequate factual base for finding the challenged ordinances protect all Goal 5 resources, including wind energy, which may include amending the County's Goal 5 inventory. It is not enough for the County to decide to protect some resources at the expense of others without providing an adequate factual basis with Goal 5.

FOURTH ASSIGNMENT OF ERROR The Respondent's Decision Imposing a Two-Mile Setback from Rural Residences and UGBs Lacks an Adequate Factual Base in Violation of Goal 2, is Inconsistent with the Comprehensive Plan in Violation of ORS 197.175(2), and is not Supported by Substantial Reason because Respondent did not Justify Its Decision.

In legislative decision making, there must be enough in the way of findings or substantial evidence to show the criteria were applied and required considerations were analyzed. *Citizens Against Irresponsible Growth v. Metro,* 179 Or App 12, 16 n6, 38 P3d 956 (2002), *Barnes*, 61 Or LUBA at 397, *Granada Land Co. v. City of Albany*, 56 Or LUBA 475, 492 (2008). In *1050 Drew v. PSRB*, 322 Or 491, 497-500, 909 P2d 1211 (1996), the Oregon Supreme Court

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cautioned local governments to base decisions on substantial evidence. The Court emphasized one policy reason for the requirement of substantial evidence – namely to avoid a governmental entity from saying, "There's enough evidence but, even if it doesn't seem like enough to you-trust us. We have expertise beyond that of the average person in these cases, and we're satisfied." *Id.*

Accompanying its Notice of Proposed Amendment to DLCD, the Respondent attached a draft of the challenged ordinances that contained a one-half mile setback for wind turbines from existing residences and made no mention of a setback from a UGB. Rec. p. 4437. By the time the Planning Commission made a recommendation to the Board of Commissioners, the challenged ordinances contained setback standards from rural residences and UGBs measured as a two-mile setback or 20 times tower to blade tip, whichever was greater. Rec. p. 4180. Thereafter, the Board of Commissioners considered another version of the ordinance at a May 3, 2011 work session that contemplated 1) a lesser setback of only one-half or one mile depending on whether the rural residence was within the project area or outside the boundary of a proposed wind facility[18]; and 2) a setback from a city's UGB if the city so requested. Rec. p. 1857. Nothing in the record explains why the setback recommended by the Planning Commission was not presented to the Board at the May 3rd work session or why a shorter setback was being contemplated. In the absence of any findings or further analysis, the Respondent ultimately adopted a two-mile setback from rural residences in Ordinance 2011-06 and a two-mile setback from UGBs in Ordinance 2011-05. Rec. pp. 28, and 21. Further, the Respondent failed to provide an explanation or evidence about how the regulation implements the County's goals and policies and instead took the "trust-us" approach in deciding on a two-mile setback and adopted ordinances that are inconsistent with the Comprehensive Plan under ORS 197.175(2) as set forth in the Second Assignment of Error.

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[18] The County's draft ordinance did not define the boundary of a proposed wind facility. Assumedly, the boundary would be derived from the legal description of the property involved in the construction of the wind facility that was required to be submitted to the County under the draft ordinance. Rec. p. 1854.

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In addition to the requirement that all decisions are supported by substantial evidence, LUBA must also review the decision for "substantial reason" to ensure that the Respondent articulates the reasoning that leads from the facts found to the conclusions drawn. *1000 Friends of Oregon v. LCDC* ("*Woodburn*"), 237 Or App 213, 224-225, 239 P3d 372 (2010) and *1000 Friends of Oregon v. LCDC* ("*McMinnville*") 244 Or App 239, 271, __ P3d __ (2011); *see also 1050 Drew v. PSRB,* 322 Or 491, *Salosha, Inc. v. Lane County*, 201 Or App 138, 143, 117 P3d 1047 (2005) and *Dubray v. SAIF Corporation*, __ Or App __, __ P3d __ (2011) (A143368). In both the *Woodburn* and *McMinnville* decisions, LCDC's findings were determined to be inadequate because the findings did not provide enough evidence to address the standards of the Goals. Here, the Respondent made no findings relating the setbacks from rural residences and UGBs to any values or requirements contained in its Comprehensive Plan policies or the Goals. In fact, there is no reasoning at all that supports the imposition of a two mile setback or why the setback was appropriate against rural residences or UGBs when the entire thrust of the ordinance appears directed to the protection of natural resources. Therefore, these ordinances lack enough in the way of findings or substantial evidence to show the criteria were applied and required considerations were analyzed. *Citizens Against Irresponsible Growth v. Metro,* 179 Or App at 16 n6. LUBA must remand because the Respondent's decision to adopt the challenged ordinances contain no substantial evidence or reason describing what led the Board of Commissioners to a two-mile setback.

FIFTH ASSIGNMENT OF ERROR The Respondent's Decision Imposing a Two-Mile Setback from Rural Residences Violates ORS 215.283(2) and ORS 215.296 in EFU Zones because these Standards Extends Beyond Farm and Forest Protection and Fail the Clear and Objective Test.

State law allows counties to approve particular uses on farmland in EFU zones and subject such uses to conditions under ORS 215.283(2). Under the direction of ORS 215.283(2), local governments may only condition ORS 215.283(2) uses based on the parameters established

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in ORS 215.296. Pursuant to ORS 215.296(1) the local government can only impose conditions on ORS 215.283(2) to protect farm and forest practices.[19] This ordinance goes further.

These two-mile setbacks can operate as a veto power given to affected cities and rural residential landowners in the exclusive farm use zone (EFU) to prevent construction of wind facilities. This veto power is authorized for both bona fide farmers and other rural residential landowners. The adopted two-mile setback from UGBs and rural residences will affect a major part of the area within the County's boundaries both as to lands with dwellings in conjunction with farm use and to non-farm dwellings. App. B pp. 1-7. As shown on the County's Comprehensive Plan Map, the EFU zones are a major part of the area affected by the challenged ordinance, where the location of UGBs and construction of rural residences (in the land designated Rural Residential, as well as on EFU land for farm and non-farm related dwellings) could significantly reduce wind energy utilization in the County. However, by granting a veto power to cities and rural residential landowners to vary the setback from wind facilities with no standards, the challenged ordinances fail to protect farm or forest practices. Further, ORS 215.283(2) and ORS 215.296 were not enacted to protect rural residences or nearby cities from the impacts of wind facilities. Thus, these standards lack an adequate factual base under Goal 2 because the two-mile setback distance does not meet the parameters for conditions allowed under ORS 215.283(2) and ORS 215.296(1).

Even if the Respondent could argue that the two-mile setback provisions were somehow related to farm and forest practices, the standards would still fail under ORS 215.296(2)'s requirement that conditions on ORS 215.283(2) uses be clear and objective. The Respondent did not adopt a clear and objective standard, such as a two-mile setback from UGBs and rural

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[19] ORS 215.296(1) states,

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> (b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

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residences. Rather it adopted a subjective standard that allows a property owner or city to waive the setback or not waive it with no explanation. This subjective standard violates ORS 215.296(2), therefore, the Respondent cannot establish an adequate factual base for the setback provisions.

SIXTH ASSIGNMENT OF ERROR The Respondent 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 Decision does not Address Policies in the Plan Regarding Wind Energy.

Under ORS 197.175(2)(d), the challenged ordinances must be consistent with the County's acknowledged Comprehensive Plan. In addition, the Court of Appeals has held that both ORS 197.175(2) and Goal 2 require that PAPAs be consistent with the comprehensive plan. *NWDA v. City of Portland*, 198 Or App 286, 291, 108 P3d 589 (2005).

The County's Comprehensive Plan contains the following policies[20]:

- Open Space Policy 42(a), "Encourage development of alternative sources of energy."
- Open Space Policy 37 "The County shall ensure compatible interim uses provided through Development Ordinance standards, and where applicable consider agriculturally designated land as open space for appropriate and eventual resource or energy facilities use."
- Energy Conservation Policy 1, "Encourage rehabilitation/weatherization of older structures and the utilization of locally feasibly renewable energy resources through use of tax and permit incentives."
- Economy of the County, Policy 1 "Encourage diversification within existing and potential resource-based industries."

[20] *See* Note 3. Although these Comprehensive Plan policies are not in the record, the Court may take official notice of these documents.

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

App. B pp. 199-203.

Although the challenged ordinances effectively preclude the development of wind energy resources within the County, the record in this matter did not contain any testimony or analysis related to the existing and unamended policies of the Comprehensive Plan listed above that relate to wind energy resources. For example, the challenged ordinances discourage development of alternative sources of energy and preclude diversification within the County's existing agriculturally based economy contrary to Economy of the County, Polices 1 and 7. Moreover, under ORS 215.110(5), the Planning Commission had the authority to enact land use regulations that "encourage and protect the installation and use of wind energy systems," but instead adopted regulations that accomplish the opposite. Under ORS 215.110(2), the County Board of Commissioners had the final word to amend the recommended ordinances to reflect the public interest as defined in the Comprehensive Plan. Instead, the Respondent failed to address existing Comprehensive Plan policies that protect wind energy resources. Therefore, LUBA should remand the challenged ordinances for compliance with Goal 2 and ORS 197.175(2).

SEVENTH ASSIGNMENT OF ERROR The Respondent's Decision to Adopt Special Requirements for Roads Built in Connection with Wind Facility Applications Violates Goal 2 and ORS 197.175(2) because the Decision Creates Internal Inconsistency with the Comprehensive Plan.

Goal 2 requires that for comprehensive plans, "All of the elements should fit together and relate to one another to form a consistent whole at all times." ORS 197.175(2) requires that the challenged ordinances be consistent with the Comprehensive Plan. The Respondent's decision adopts special standards for roads built in connection with wind facilities,

> "(5) From tower and project components, including * * * access roads, to known archeological, historical or cultural sites shall be on a case by case basis, and for

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> any known archeological, historical or cultural site of the Confederated Tribes of the Umatilla Reservations the set back (*sic.*) shall be no less than 164 feet (50) meters," Rec. p. 21
>
> "(2) Project Roads. Layout and design of the project roads shall use best management practices in consultation with the Soil Water Conservation District. The project road design shall be reviewed and certified by a civil engineer. Prior to road construction the applicant shall contact the State Department of Environmental Quality and if necessary, obtain a storm water permit (NPDES)," Rec. p. 22

and for roads in the Walla Walla Watershed,

> "(A) There shall be no construction of project components, including * * * access roads, on soils identified as highly erodible* * *,
>
> "The applicant shall demonstrate that the * * * 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." Rec. p. 31.

In contrast, the Respondent has adopted standards for other ORS 215.283(2) uses for public or private parks or playgrounds or community centers owned and operated by a governmental agency or a non profit community organization, public or semi public uses, recreational resort facilities and utility facilities that contain mirror standards related to soil erosion controls for road development:

> "Road construction be consistent with the intent and purposes set forth in the 208 Water Quality Program to minimize soil disturbance and help maintain water quality"

152.616 QQ(4), SS(2), TT(4), CCC(9). The 208 Water Quality Program requires an applicant to provide a program to avoid sedimentation under the Clean Water Act during project construction.

The record contains no explanation of the Respondent's reason for adopting road standards for the allowed use of wind facilities on farmland that differ from other conditional uses allowed on farmland which may have similar or greater impacts. Further, the Respondent

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failed to explain why roads leading to wind facilities would have any greater impact than roads associated with other ORS 215.283(2) uses allowed in the County subject only to the requirement of consistency with the 208 Water Quality Program. In violation of both Goal 2 and ORS 197.175(2), the road limitations and restrictions adopted for wind facilities create an inconsistency with the standards applied to roads associated with ORS 215.283(2) uses because no differentiation has been made between a road to a wind turbine as compared to a road to a recreational resort that would presumably be large and accommodate more traffic. As a result of this inconsistency within the County's Comprehensive Plan, the Respondent's decision should be remanded to adopt an internally consistent PAPA.

V. CONCLUSION

The Respondent's decision includes impermissible delegations of authority to nearby cities and rural residential landowners in violation of the Oregon and federal constitutions. In addition, the Respondent completely ignored its obligation to comply with the Statewide Planning Goals in adopting the challenged ordinances, most particularly in violation of Goals 2 and 5. Rather then deal with these known obligations, the Respondent chose to wait and see if anyone would take this matter up on appeal. The Respondent's bluff has been called and therefore, LUBA should reverse or remand the Respondent's decision.

Dated: October 27, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the original and four copies of this PETITIONERS' AND INTERVENORS' JOINT PETITION FOR REVIEW with the:

Land Use Board of Appeals
Public Utilities Building
550 Capitol Street, N.E., Suite 235
Salem, Oregon 97301-2552

by first-class mail, postage prepaid. On the same date I served a true and correct copy of the same, by first-class mail, postage prepaid, on the following party:

The Confederated Tribes of the Umatilla Indian Reservation
CTUIR Office of Legal Counsel
Attn: Joe Pitt
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Douglas R. Olsen
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Jo Lynn Buell
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DATED this 27th day of October, 2011.

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