

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

JIM HATLEY,
Petitioner,

v.

UMATILLA COUNTY BOARD OF
COMMISSIONERS,
Respondent,

and

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

LUBA Nos. 2012-017; 2012-018; and
2012-030
(Consolidated)

RESPONDENT'S RESPONSE BRIEF

Bruce W. White, OSB No. 850950
Bruce W. White, Attorney, LLC
PO Box 1298
Bend, OR 97709
Telephone: (541) 382-2085

Attorney for Petitioner

Daniel Kearns, OSB No. 893952
Reeve Kearns PC
621 SW Morrison St., Suite 1225
Portland, OR 97205
Telephone: (503) 225-1127

Attorney for Intervenors-Respondent

Douglas R. Olsen, OSB No. 844383
Umatilla County Counsel
216 SE 4th St.
Pendleton, OR 97801
Telephone: (541) 278-6208

and

Michael C. Robinson, OSB No. 910909
Corinne S. Celko, OSB No. 001737
Perkins Coie LLP
1120 NW Couch, 10th floor
Portland, OR 97209
Telephone : (503) 727-2000

Attorneys for Respondent Umatilla County

TABLE OF CONTENTS

	Page
I. PETITIONER'S STANDING	1
II. STATEMENT OF THE CASE.....	1
A. Nature of the Local Decision	1
B. Summary of the Arguments	1
C. Summary of Material Facts.....	2
1. County Actions Prior to and Including 2011 Decisions.	2
2. Remand of 2011 Decisions.	3
D. Jurisdiction.....	4
III. RESPONSE TO ASSIGNMENTS OF ERROR.....	4
A. Response to First Assignment of Error.	5
1. Waiver doctrine.....	5
2. Petitioner is precluded from raising this particular Goal 5 issue now.....	7
3. Challenged Ordinance 2012-05 does not "affect" a Goal 5 resource.	8
4. Petitioner's Goal 2 argument should be rejected under the law of the case doctrine, and because it adds nothing substantive to Petitioner's Goal 5 argument.....	10
B. Response to Second Assignment of Error.	11
C. Response to Third Assignment of Error.	12
D. Response to Fourth Assignment of Error.....	13
E. Response to Fifth Assignment of Error.	13
F. Response to Sixth Assignment of Error.....	15
G. Response to Seventh Assignment of Error.	17
H. Response to Eighth Assignment of Error.....	18
IV. CONCLUSION.....	19

TABLE OF AUTHORITIES

Page

Cases

<i>Beck v. City of Tillamook</i> , 313 Or 148, 831 P2d 678 (1992).....	passim
<i>Brentmar v. Jackson County</i> , 321 Or 481, 900 P2d 1030 (1995).....	15
<i>Cosner v. Umatilla County</i> , ___ Or LUBA ___ (LUBA Nos. 2011-070/071/072, January 12, 2012)	passim
<i>Frewing v. City of Tigard</i> , 52 Or LUBA 518 (2006).....	passim
<i>Homebuilders Assoc. of Lane County v. City of Eugene</i> , 41 Or LUBA 370 (2002).....	8
<i>Wetherell v. Douglas County</i> , 58 Or LUBA 638 (2009)	5, 11, 17, 18

Statutes

ORS 197.175(2)(d)	13
ORS 197.825(1)	4
ORS 197.830(10)	14, 15, 16
ORS 215.283(1)	2, 14, 15
ORS 215.283(2)	14, 15
ORS 215.283(2)(g)	15

Regulations and Rules

OAR 660-023-0250(3).....	8, 10
ORAP 6.25	4

Other Authorities

Umatilla County Development Code 152.616.....	passim
---	--------

I. PETITIONER'S STANDING

Respondent accepts Petitioner's standing.

II. STATEMENT OF THE CASE

A. Nature of the Local Decision

Petitioner appeals Ordinance Nos. 2012-04 and 2012-05, two final land use decisions of Umatilla County adopted in partial response to LUBA's remand in *Cosner v. Umatilla County*, ___ Or LUBA ___ (LUBA Nos. 2011-070/071/072, January 12, 2012). In *Cosner*, LUBA remanded three county ordinances that amended the county's land use regulations regarding wind power generation facilities. On remand, Umatilla County addressed each of the three bases for remand separately, which resulted in the adoption of two ordinances and two orders. Petitioner did not appeal Order 2012-20. Petitioner attempted to appeal Order 2012-21; however, by an Order on Motion to Dismiss in LUBA No. 2012-030, dated July 2, 2012, LUBA found that Petitioner had failed to timely appeal Order 2012-21 and dismissed the appeal. Therefore, Ordinance Nos. 2012-04 and 2012-05 are the only challenged decisions in this matter.

B. Summary of the Arguments

1. Petitioner's first assignment of error should be denied because Petitioner has waived this argument and the challenged decisions do not "affect" a Goal 5 resource, as defined in the Goal 5 rule.

2. Petitioner's second assignment of error should be denied because Petitioner has waived the argument that the challenged ordinances violate Goal 5 by precluding the County from ever treating significant energy resources as Goal 5 resources.

3. Petitioner's third assignment of error should be denied because Petitioner's appeal of Order 2012-21, which addressed the relevant comprehensive plan policies related to wind energy development, has been dismissed by LUBA.

4. Petitioner's fourth assignment of error should be denied because no additional findings were necessary to demonstrate compliance with the comprehensive plan.

5. Petitioner's fifth assignment of error should be denied because Petitioner's argument that the challenged ordinances impermissibly restrict wind power generation facilities categorized as EFU uses listed in ORS 215.283(1) was not properly preserved and has been waived.

6. Petitioner's sixth assignment of error should be denied because Petitioner's argument that the challenged ordinances violate state statute by allowing changes to applicable criteria after application submittal and contain terms that are impermissibly vague was not properly preserved and has been waived.

7. Petitioner's seventh assignment of error should be denied because Petitioner's argument that the challenged ordinances are preempted by state law has been waived.

8. Petitioner's eighth assignment of error should be denied because Petitioner's argument that the County failed to coordinate its wind energy restrictions with ODOE, in violation of state law, has been waived.

C. Summary of Material Facts

1. County Actions Prior to and Including 2011 Decisions.

In 2003, the County established requirements for the siting of wind power generation facilities within the County. In 2011, the County adopted three ordinances amending the County's land use regulations for the siting of wind energy facilities. Ordinance 2011-05 amended Umatilla County Development Code ("UCDC") 152.616 (HHH) in several ways and, in particular, allowed cities and owners of land zoned Unincorporated Communities to waive a two-mile setback from wind energy facilities. *Cosner* Rec. 17-26.¹ Ordinance 2011-06 amended

¹ The record in *Cosner* has been made part of the record in this appeal. Citations to the record in *Cosner* are identified as "*Cosner* Rec.," citations to the record in the current appeal are identified as "Rec.," and citations to the supplemental record in the current appeal are identified as "Supp. Rec."

the UCDC to provide that same waiver authority to owner of rural residences. *Cosner* Rec. 27-28. Ordinance 2011-07 added a UCDC provision to address the impacts of wind energy facilities on natural resources and inventoried Goal 5 resources in the Walla Walla Watershed. *Cosner* Rec. 29-32.

2. Remand of 2011 Decisions.

In *Cosner*, ___ Or LUBA ___, (LUBA Nos. 2011-070/071/072, January 12, 2012), LUBA remanded the three 2011 Ordinances on three separate grounds. On remand, the County adopted two ordinances and two orders directed at complying with the three different bases for remand, as follows:

- Ordinance No. 2012-04 deleted the setback waiver provisions of Ordinances 2011-05 and 2011-06, in response to LUBA's conclusion that such waiver provisions were unconstitutional. R. 4-6.
- Ordinance 2012-05 deleted certain sections of the regulation that provided additional protections to Goal 5 resources, in response to LUBA's conclusion that since additional protection was provided to inventoried Goal 5 resources in the Walla Walla Watershed, the County was obligated to perform a Goal 5 ESEE analysis. Specifically, the County struck reference to "inventoried Goal 5 resources" and "the Critical Winter Range" in the purpose section of the code provision, and, in addition, struck entirely the subsections requiring demonstration that the wind facilities will not conflict with existing significant Goal 5 resources and demonstration that wind facilities will not be located within the Critical Winter Range. R. 7-10.
- Order 2012-20 initiated the planning commission proceeding to draft an adjustment process to replace the setback waiver provisions deleted by Ordinance 2012-04. Petitioner did not appeal Order 2012-20.
- Order 2012-21 adopted findings of compliance with certain comprehensive plan policies regarding energy, in response to LUBA's conclusion that the County was required to address whether the subject regulations were consistent with such comprehensive plan policies. As discussed in more detail below, Petitioner's appeal of Order 2012-21 was dismissed by LUBA. Supp. Rec. 333-38.

Therefore, Ordinance Nos. 2012-04 and 2012-05 are the only challenged decisions in this matter. The challenged decisions were adopted in direct response to the remand in *Cosner*, and served to delete, not add, certain amendments to the UCDC adopted by the 2011 Ordinances.

D. Jurisdiction

The challenged decisions are land use decisions and LUBA has jurisdiction under ORS 197.825(1).

III. RESPONSE TO ASSIGNMENTS OF ERROR

Petitioner's request for reconsideration of LUBA's order dismissing the appeal of Order 2012-21 should be denied as improper.

As a preliminary matter, Petitioner's request that the Board reconsider its interim order dismissing Petitioner's appeal of Order 2012-21 should be denied. Umatilla County filed a motion to dismiss Petitioner's appeal of Order 2012-21 as untimely, and LUBA granted the motion by its Order on Motion to Dismiss, LUBA No. 2012-030, July 2, 2012. Petitioner's opening brief is not the mechanism by which it may seek reconsideration of the Board's order, and Petitioner is not entitled to raise new arguments in response to Umatilla County's motion to dismiss at this late date.² For the reasons set forth in Umatilla County's original motion to dismiss and the reasons articulated by the Board in its interim order dismissing Petitioner's appeal of Order 2012-21, Petitioner's request for reconsideration should be denied. Therefore, Ordinance Nos. 2012-04 and 2012-05 are the only challenged decisions in this matter.

Most of Petitioner's arguments have been waived because they could have been raised, but were not, during the prior LUBA appeal.

This appeal is the second phase of the same case. In 2011, the County adopted ordinances amending land use regulations relating to the siting of wind energy facilities

² See ORAP 6.25. In general, the basis for a motion for reconsideration is limited to a claim of factual error in the decision or the need to correct the procedural disposition of the appeal to be consistent with the holding of the decision. Claims addressing legal issues already argued in the parties' briefs are disfavored.

(collectively, the "2011 Ordinances"). The 2011 Ordinances were appealed to LUBA, and LUBA remanded them. *Cosner*, ___ Or LUBA ___ (LUBA Nos. 2011-070/071/072, January 12, 2012). In 2012, the County adopted two ordinances and two orders for the purpose of addressing the remand issues raised in *Cosner*. Accordingly, under the waiver doctrine, issues that could have been raised, but were not raised during the prior LUBA appeal, cannot be raised in this appeal of the decision on remand. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009); *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006); *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). As discussed in more detail below, most of the arguments Petitioner advances have been waived because they could have been raised before the Board in *Cosner*, but were not, thereby foreclosing the ability to raise them now.

A. Response to First Assignment of Error.

Petitioner has waived this argument, and the challenged decisions do not "affect" a Goal 5 resource, as defined in the Goal 5 rule.

Petitioner's first assignment of error should be denied under the waiver doctrine because this issue could have been raised during the first appeal to LUBA, but was not. *Wetherell*, 58 Or LUBA at 638; *Frewing*, 52 Or LUBA at 518; *Beck*, 313 Or at 148. Under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand.

1. Waiver doctrine.

As the Supreme Court of Oregon explained in *Beck*, for reasons of judicial economy and to facilitate the "policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use," LUBA is to decide all issues that it can before remanding a case. *Beck*, 313 Or at 152. In *Wetherell*, after a lengthy appellate history and upon remand from LUBA, the county approved an application to remove farm use preferential tax treatment from the subject property because it concluded the property was not resource land protected by Goal 3 or Goal 4. *Wetherell*, 58 Or LUBA at 638. The petitioners in *Wetherell* did

not dispute the county's conclusion that the subject property was not commercial forest land protected under Goal 4, but argued that harvesting timber from small woodlots is a farm use under Goal 3. LUBA found as follows:

"[T]he issue of considering woodlots as a farm use for purposes of OAR 660-033-0020(1)(a)(B) could have been raised during the initial rounds of appeal, but was not, and that issue is therefore waived under *Beck*." *Id.* at 662.

In *Frewing*, the city's decision approving a subdivision was before LUBA for the third time. *Frewing*, 52 Or LUBA at 518. In the second appeal, called *Frewing II*, LUBA remanded the decision for the city to either explain why it is not possible to preserve certain identified trees or to require that the tree plan be amended to preserve those trees. *Frewing*, 52 Or LUBA at 521. On remand, the city approved the subdivision with the applicant's revised tree plan, which proposed to preserve all of the identified trees. The petitioner appealed the decision again, contending that some of the identified trees are not identified by species in the tree inventory, as the city's code required. *Id.* at 523. LUBA concluded that the issue of species identification could not be raised in the current appeal, under *Beck*. Specifically, LUBA found as follows:

"We agree with intervenor that petitioner waived the issue by failing to raise it in his petition for review in *Frewing II*. See *DLCD v. Douglas County*, 37 Or LUBA 129, 143 (1999) (where the petitioner could have but did not challenge coordinated city population projections in its initial appeal before LUBA, petitioner waives the right to challenge those projections in its appeal of the decision on remand)." *Frewing*, 52 Or LUBA at 523.

Thus, as *Beck* and its progeny make clear, where an issue could have been raised in the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

2. Petitioner is precluded from raising this particular Goal 5 issue now.

Under the waiver doctrine expressed in *Beck* and its progeny, Petitioner is precluded from raising this issue now because it could have been raised in the first appeal to LUBA, but was not. In *Cosner*, the petitioners, including Petitioner Hatley, argued that UCDC 152.616 (HHH)(11), as adopted in Ordinance 2011-07, added additional protections to Goal 5 resources inventoried in the Walla Walla Watershed. R. 169. Specifically, the petitioners argued that the record sets forth "the Goal 5 resources being protected, including significant wetlands, wildlife habitat, significant natural areas, outstanding scenic views, and historic resources." *Id.* The petitioners concluded, "Therefore, the amendments to Section 152.616HHH constitute a land use regulation adopted in order to protect significant Goal 5 resources and thus must, in turn, comply with Goal 5." *Id.*

Notably, the Goal 5 resources for which Ordinance 2011-07 is alleged to have provided additional protection do not include "highly erodible soils" or "federally listed threatened or endangered species." At no time did the petitioners in *Cosner* assign error to the specific sections of the regulation protecting "highly erodible soils" or "federally listed threatened and endangered species," nor did they raise the issue that areas with "highly erodible soils" or "federally listed threatened or endangered species" coincide with areas inventoried as Goal 5 resources, such that protection of "highly erodible soils" and "federally listed threatened and endangered species" has the effect of protecting existing inventoried Goal 5 resources.

On remand, the County did not amend its existing Goal 5 program and adopted Ordinance 2012-05, which amended UCDC 152.616 (HHH)(11) by deleting those sections that provided additional protections to Goal 5 resources. R. 7-10. Specifically, the County struck the reference to "inventoried Goal 5 resources" and "the Critical Winter Range" in the purpose section of the UCDC provision, and also struck entirely the subsections requiring demonstration that the wind facilities will not conflict with existing significant Goal 5 resources and

demonstration that wind facilities will not be located within the Critical Winter Range. *Id.* Because this assignment of error is not based on any new evidence or any action the County took on remand, this issue could have been raised before the Board in *Cosner* but was not and is, therefore, waived.

3. Challenged Ordinance 2012-05 does not "affect" a Goal 5 resource.

Alternatively, Petitioner's first assignment of error must be denied because UCDC 152.616 (HHH)(11), as amended by challenged Ordinance 2012-05, does not "affect" any Goal 5 resource, as defined in the Goal 5 rule, and is consistent with Goal 5. In adopting a post-acknowledgment plan amendment ("PAPA"), local governments are required to apply Goal 5 only if the PAPA "affects a Goal 5 resource." OAR 660-023-0250(3). Pursuant to that rule, a PAPA "affects a Goal 5 resource" only if it (1) "creates or amends a resource list;" (2) amends a "land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;" or (3) "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." *Homebuilders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370 (2002), citing OAR 660-023-0250(3). UCDC 152.616 (HHH)(11) does not "affect a Goal 5 resource" because it does not create or amend a resource inventory list, is expressly not adopted to protect any Goal 5 resource, and does not allow new uses that could conflict with inventoried Goal 5 resource sites.

As first adopted by Ordinance 2011-07, UCDC 152.616 (HHH)(11) applied to the following resources:

- inventoried Goal 5 resources;
- highly erodible soils (as defined by the Department of Agriculture);
- federally listed threatened and endangered species; and
- the Critical Winter Range.

Cosner Rec. 29-32.

In *Cosner*, LUBA found that the County's existing Goal 5 program with respect to inventoried resources and wind facilities limited, but did not prohibit, conflicting uses such as wind facilities. *Cosner*, ____ Or LUBA ____ (Slip. Op. at 16). LUBA concluded that Ordinance 2011-07 was adopted to provide additional protections to Goal 5 resources in the Walla Walla valley, thereby adjusting the balance of the existing Goal 5 program and requiring the County to address the requirements of Goal 5. *Id.* On remand, the County decided that it did not wish to amend its existing Goal 5 program and adopted Ordinance 2012-05, which amended UCDC 152.616 (HHH)(11) by deleting those sections that provided additional protections to Goal 5 resources. R. 7-10. Specifically, the County struck reference to "inventoried Goal 5 resources" and "the Critical Winter Range" in the purpose section of the code provision, and, in addition, struck entirely the subsections requiring demonstration that the wind facilities will not conflict with existing significant Goal 5 resources and demonstration that wind facilities will not be located within the Critical Winter Range. *Id.*

In its findings, the County stated:

"2. On remand, the County finds that it is not required to adjust the ESEE analysis adopted in its original Goal 5 program. As LUBA noted in its decision, because the County allows wind facilities as a conditional use in resource zones, the County's existing Goal 5 program limits, but does not prohibit, conflicting uses such as wind facilities."

* * *

"4. The County now finds that it does not wish to amend its Goal 5 program and will adopt Section 11 on remand by striking subsections (B) and (D) in their entirety. By doing so, the County has not adjusted the Goal 5 program and the administrative rule at issue in this assignment of error is no longer relevant to this issue.

5. The County finds that with the adoption of amended Section (11) consistent with the existing and acknowledged Goal 5 program, it has appropriately addressed this sub-assignment of error on remand." R. 8.

There is no dispute that highly erodible soils and federally listed threatened and endangered species are not listed in the County's acknowledged Goal 5 inventory.

Because highly erodible soils and federally listed threatened and endangered species are not listed as existing Goal 5 resources within the County, UCDC 152.616 (HHH)(11) does not "affect a Goal 5 resource" under OAR 660-023-0250(3) and the challenged ordinances are consistent with Goal 5.

4. Petitioner's Goal 2 argument should be rejected under the law of the case doctrine, and because it adds nothing substantive to Petitioner's Goal 5 argument.

Additionally, Petitioner's argument that the County erred in adopting the challenged ordinances without an "adequate factual base" as required under Statewide Planning Goal 2 by failing to demonstrate compliance with Goal 5 should be rejected. In their Third Assignment of Error in *Cosner*, the petitioners raised an almost identical argument, and LUBA dismissed the third assignment of error as adding nothing to the substantive Goal 5 argument and providing no additional basis for reversal or remand. R. 177-78. Specifically, LUBA stated,

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

As far as we can tell, petitioners' arguments under this assignment of error add nothing to those advances under the second assignment of error, and provide no additional basis for reversal or remand. The third assignment of error is denied." *Cosner*, ___ Or LUBA ___ (Slip. Op. at 21).

Based on the law of the case doctrine, Petitioner is precluded from raising this issue again. *Beck*, 313 Or at 156 (rulings made by LUBA where no judicial review is sought remain

the law of the case.) Alternatively, for the same reasons as LUBA stated in *Cosner*, Petitioner's argument should be rejected.

For all of the reasons discussed above, Petitioner's first assignment of error should be denied.

B. Response to Second Assignment of Error.

Petitioner has waived the argument that the challenged ordinances violate Goal 5 by precluding the County from ever treating significant energy resources as Goal 5 resources.

Petitioner's second assignment of error should be denied under the waiver doctrine because this issue is a variation of an argument rejected by LUBA in *Cosner*, which could have been raised at that time, but was not. *Wetherell*, 58 Or LUBA 638; *Frewing*, 52 Or LUBA 518; *Beck*, 313 Or 148. As discussed in Section III.A.1. above, under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand. Respondent adopts the same analysis and incorporates by reference the arguments contained in Section III.A.1. regarding the waiver doctrine. Thus, where an issue could have been raised in the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

In his second assignment of error, Petitioner argues that the challenged ordinances preclude the County from ever treating significant energy resources as inventoried Goal 5 resources, in violation of Goal 5. Petition for Review, p. 16-17. A similar argument was raised and rejected by LUBA in *Cosner*. As Petitioner succinctly states in his Petition for Review,

"Petitioner acknowledges that in *Cosner*, LUBA rejected an argument that the challenged County program of restrictions and prohibitions on wind energy facilities violates Goal 5. LUBA decided that because the county is free to evaluate energy facilities under Goal 5 on a case-by-case basis, the challenged program did not violate Goal 5. *Cosner*, supra, at 20. However, in *Cosner*, no party raised and LUBA did not resolve whether the challenged

decisions preclude the county from ever employing a case-by-case Goal 5 analysis of the type contemplated in OAR 660-023-190."

Petition for Review, p. 18 (emphasis in original).

Because this assignment of error is not based on any new evidence or any action the County took on remand, this issue could have been raised before the Board in *Cosner*, but was not.

Therefore, under the waiver doctrine established by *Beck* and its progeny, Petitioner is precluded from raising this issue now. For these reasons, Petitioner's second assignment of error should be denied.

C. Response to Third Assignment of Error.

Petitioner's appeal of Order 2012-21, which addressed the relevant comprehensive plan policies related to wind energy development, has been dismissed by LUBA.

Petitioner's third assignment of error should be denied because LUBA has already determined that it does not have jurisdiction over the appeal of Order 2012-21. In his Petition for Review, Petitioner argues as follows:

"The Comprehensive Plan policies to which the *Cosner* remand was addressed and which were addressed by the County on remand are as set forth in *Cosner* [sic] and in the County's Order 2012-021. For the reasons set forth below, the County's findings do not demonstrate compliance with the County's comprehensive plan and are not supported by substantial evidence." Petition for Review, p. 19.

However, the County filed a motion to dismiss Petitioner's appeal of Order 2012-21 as untimely, and LUBA granted the motion by its Order on Motion to Dismiss, LUBA No. 2012-030, July 2, 2012. Therefore, Order 2012-21 is not properly before the Board for review. For these reasons, and for the reasons stated in LUBA's Order on Motion to Dismiss, referenced above, Petitioner's third assignment of error should be denied.

D. Response to Fourth Assignment of Error.

No additional findings were necessary to demonstrate compliance with the comprehensive plan.

Petitioner's fourth assignment of error must be denied because County Order 2012-21 addressed all applicable comprehensive plan policies and no additional findings were necessary. Petitioner argues that the 2012 Ordinances violate Goal 2 and ORS 197.175(2) because they do not address policies in the comprehensive plan regarding Wind Energy Development. Petition for Review, p. 27. However, the 2012 Ordinances only deleted language in accordance with LUBA's remand in *Cosner* and did not add any new provisions. Specifically, the 2012 Ordinances were adopted to address the remand issues in *Cosner* by deleting the unconstitutional waiver provisions of Ordinance 2011-05 and 2011-06, and by deleting the additional protections to Goal 5 resources in Ordinance 2011-07. R. 4-6; R. 7-10. The remaining language in the 2012 Ordinances was, therefore, previously included in the 2011 Ordinances. Thus, there is an adequate factual base under Goal 2 for the decision and the decision is consistent with the Plan as required by ORS 197.175(2)(d).

Order 2012-21 was adopted to demonstrate that the 2011 Ordinances complied with the Comprehensive Plan. 333-38. As mentioned above, Petitioner failed to timely challenge such order and Petitioner's appeal of Order 2012-21 was dismissed. The County was not required to demonstrate that the remaining language of the 2012 Ordinances complied with the Comprehensive Plan because the findings in Order 2012-21 already demonstrated that the underlying regulations complied with the Comprehensive Plan. To the extent that findings of compliance are required for the 2012 Ordinances, the Board can find that the findings in Order 2012-21 support adoption of the 2012 Ordinances. Since Order 2012-21 is not before LUBA for review, Petitioner's fourth assignment of error must be denied.

E. Response to Fifth Assignment of Error.

Petitioner's argument that the challenged ordinances impermissibly restrict wind power generation facilities categorized as EFU uses listed in ORS 215.283(1) was not properly preserved and has been waived.

Petitioner's fifth assignment of error should be denied because this issue was not properly preserved below and because this issue is a variation of an argument rejected by LUBA in *Cosner*, which could have been raised at that time, but was not, so is therefore waived.

ORS 197.830(10) provides as follows:

"Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763."

Furthermore, as discussed in Section III.A.1. above, under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand. Respondent adopts the same analysis and incorporates by reference the arguments contained in Section III.A.1. regarding the waiver doctrine. Thus, where an issue was not preserved below or where the issue could have been raised in the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

In his fifth assignment of error, Petitioner argues that the challenged ordinances impermissibly restrict wind power generation facilities categorized as EFU uses listed in ORS 215.283(1), including "utility facilities necessary for public service" and "utility facility service lines," because such uses cannot be subjected to local discretionary standards. Petition for Review, p. 28-29. In their fifth assignment of error in *Cosner*, petitioners argued that the County impermissibly restricted nonfarm uses listed in ORS 215.283(2), such as "commercial utility facilities for the purpose of generating power for public use by sale" because such uses cannot be subject to local discretionary standards. R. 180-181. LUBA rejected petitioners' argument that the County could not impose additional standards on non-farm uses, particularly "commercial utility facilities for the purpose of generating power for public use by sale" under ORS

215.283(2)(g), that were unrelated to protection of farm and forest practices, citing *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). *Cosner*, ___ Or LUBA ___ (Slip. Op. at 22-24). In essence, having lost the argument that a local government cannot restrict nonfarm uses listed in ORS 215.283(2) in the first appeal to LUBA, Petitioner now attempts to characterize wind power generation facilities as EFU uses listed in ORS 215.283(1) and argue that a local government is precluded from restricting such uses in EFU zones.

First, Petitioner failed to raise, and thus did not preserve, this issue before the Board of County Commissioners during the remand hearing process. Petitioner's attorney submitted one (1) letter into the record of the proceeding. R. 121-130. However, such letter fails to raise the issue that the County is precluded from restricting wind power generation facilities in EFU zones because such facilities are EFU uses listed in ORS 215.283(1). Having failed to raise this issue before the local government in the remand proceeding, Petitioner is barred from raising it now. ORS 197.830(10).

Secondly, because this assignment of error is not based on any new evidence or any action the County took on remand, this issue could have been raised before the Board in *Cosner*, but was not. Therefore, under the waiver doctrine established by *Beck* and its progeny, Petitioner is precluded from raising this issue now. For these reasons, Petitioner's fifth assignment of error should be denied.

F. Response to Sixth Assignment of Error.

Petitioner's argument that the challenged ordinances violate state statute by allowing changes to applicable criteria after application submittal and contain terms that are impermissibly vague was not properly preserved and has been waived.

Petitioner's sixth assignment of error should be denied because it was not properly preserved below and because this issue could have been raised at the time of the first appeal to LUBA, but was not.

ORS 197.830(10) provides as follows:

"Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763."

Furthermore, as discussed in Section III.A.1. above, under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand. Respondent adopts the same analysis and incorporates by reference the arguments contained in Section III.A.1. regarding the waiver doctrine. Thus, where an issue was not preserved below or where such issue could have been raised in the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

In his sixth assignment of error, Petitioner argues that the challenged ordinances violate state statute by allowing changes to applicable criteria after application submittal and contain terms that are impermissibly vague. Petition for Review, p. 30. However, Petitioner failed to raise and preserve this issue before the Board of County Commissioners during the remand hearing process. Petitioner's attorney submitted one (1) letter into the record of the proceeding, but such letter fails to raise the issue that the challenged ordinances allow changes to applicable criteria after application submittal and contain terms that are impermissibly vague. R. 121-130. Having failed to raise this issue before the local government in the remand proceeding, Petitioner is barred from raising it now. ORS 197.830(10).

Additionally, Petitioner fails to demonstrate that this assignment of error is based on any new evidence that came before the county in addressing the remand issues in *Cosner* or that it is based on any amendments to the 2011 Ordinances as a result of the remand. The criteria and terms that the Petitioner asserts violate state statute existed in the 2011 Ordinances and were not added or amended as a result of the remand in *Cosner*. Petitioner could have raised this issue before the Board in *Cosner*, but did not. Therefore, under the waiver doctrine established by

Beck and its progeny, Petitioner is precluded from raising this issue now. For these reasons, Petitioner's sixth assignment of error should be denied.

G. Response to Seventh Assignment of Error.

Petitioner's argument that the challenged ordinances are preempted by state law has been waived.

Petitioner's seventh assignment of error should be denied under the waiver doctrine because this issue could have been raised at the time of the first appeal to LUBA, but was not. *Wetherell*, 58 Or LUBA 638; *Frewing*, 52 Or LUBA 518; *Beck*, 313 Or 148. As discussed in Section III.A.1. above, under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand. Respondent adopts the same analysis and incorporates by reference the arguments contained in Section III.A.1. regarding the waiver doctrine. Thus, where an issue could have been raised in the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

In his seventh assignment of error, Petitioner argues that the challenged ordinances are preempted by state law under the rules established by the Oregon Department of Energy ("ODOE") and the Energy Facility Siting Council ("EFSC"). Petition for Review, p. 34-47. However, Petitioner fails to demonstrate that this assignment of error is based on any new evidence that came before the county in addressing the remand issues in *Cosner* or that it is based on any amendments to the 2011 Ordinances as a result of the remand. The County adopted the 2011 Ordinances for the purpose of regulating wind energy facilities. Nothing in the amendments to such ordinances on remand established additional regulations applicable to wind energy facilities. In fact, the effect of the 2012 Ordinances was to delete certain restrictions in response to the remand in *Cosner*.

Petitioner's attorney acknowledges that the amendments adopted by the 2012 ordinances are negligible and do not alter the preemption analysis. Specifically, in his letter to the Board of County Commissioners during the remand proceedings, Petitioner's attorney stated,

"In earlier submittals made before the Board of County Commissioners, attorneys for landowners Cunningham Sheep Company (LUBA Record 3802-3804) and Terjeson Ranches (LUBA Record, 427. [sic] 429-430) have argued that the proposed ordinances conflict with state energy policy and are therefore preempted by superior conflicting state authority. The Hatleys renew those arguments (incorporated herein by reference) here in regards to the proposed revised amendments. The relatively minor changes to the ordinance do not change the analysis previously offered by these previous comments. The proposed ordinances still amount to a ban on wind power development in Umatilla County in contravention to state policy." R. 130.

Petitioner's seventh assignment of error could have been raised before the Board in *Cosner*, but was not. Therefore, under the waiver doctrine established by *Beck* and its progeny, Petitioner is precluded from raising this issue now.

For these reasons, Petitioner's seventh assignment of error should be denied.

H. Response to Eighth Assignment of Error.

Petitioner's argument that the County failed to coordinate its wind energy restrictions with ODOE, in violation of state law, has been waived.

Petitioner's eighth assignment of error should be denied under the waiver doctrine because this issue could have been raised at the time of the first appeal to LUBA, but was not. *Wetherell*, 58 Or LUBA 638; *Frewing*, 52 Or LUBA 518; *Beck*, 313 Or 148. As discussed in Section III.A.1. above, under *Beck* and its progeny, issues that could have been raised, but were not raised during a prior LUBA appeal, cannot be raised in appeal of the decision on remand. Respondent adopts the same analysis and incorporates by reference the arguments contained in Section III.A.1. regarding the waiver doctrine. Thus, where an issue could have been raised in

the first appeal to LUBA, but was not, a petitioner has waived his right to raise that issue in an appeal of the decision on remand.

In his eighth assignment of error, Petitioner argues that the County failed to coordinate its wind energy restrictions with ODOE, in violation of state law. Petition for Review, p. 47-48. However, Petitioner fails to demonstrate that this assignment of error is based on any new evidence that came before the county in addressing the remand issues in *Cosner* or that it is based on any amendments to the 2011 Ordinances as a result of the remand. The County adopted the 2011 Ordinances for the purpose of regulating wind energy facilities. Nothing in the amendments to such ordinances on remand established additional regulations applicable to wind energy facilities. In fact, the effect of the 2012 Ordinances was to delete certain restrictions in response to the remand order in *Cosner*. Petitioner's eighth assignment of error could have been raised before the Board in *Cosner*, but was not. Therefore, under the waiver doctrine established by *Beck* and its progeny, Petitioner is precluded from raising this issue now.

For these reasons, Petitioner's eighth assignment of error should be denied.

IV. CONCLUSION

For all of the above-stated reasons, Petitioner's assignments of error should be denied, and the challenged decisions of Umatilla County should be affirmed.

DATED: August 23, 2012.

RESPONDENT UMATILLA COUNTY

By Michael C. Robinson
Michael C. Robinson, OSB No. 910909
Corinne S. Celko, OSB No. 001737
Douglas R. Olsen, OSB No. 844383

Attorneys for Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 23, 2012, I filed the original of the foregoing Respondent's Response Brief, together with four copies, with the Land Use Board of Appeals, 550 Capitol Street NE, Salem, OR 97310, by first class mail.

I also certify that on August 23, 2012, I served a true and correct copy of the foregoing Respondent's Response Brief on the following persons by first class mail:

Bruce W. White, OSB No. 850950
Bruce W, White, Attorney, LLC
PO Box 1298
Bend, OR 97709

Daniel Kearns, OSB No. 893952
Reeve Kearns PC
621 SW Morrison St., Suite 1225
Portland, OR 97205

DATED: August 23, 2012.

RESPONDENT UMATILLA COUNTY

By Michael C. Robinson
Michael C. Robinson, OSB No. 910909
Attorneys for Respondent