

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

3  
4 JIM HATLEY,  
5 *Petitioner,*

6  
7 vs.

8  
9 UMATILLA COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 BLUE MOUNTAIN ALLIANCE,  
15 DAVE PRICE and RICHARD JOLLY,  
16 *Intervenors-Respondents.*

17  
18 LUBA No. 2012-017 and 2012-018

19 ORDER

20 **MOTION TO INTERVENE**

21 Blue Mountain Alliance, Dave Price and Richard Jolly move to intervene on the side  
22 of respondent. No party objects to the motion, and it is granted.

23 **MOTION TO DISMISS**

24 The county moves to dismiss LUBA No. 2012-017, which challenges Ordinance No.  
25 2012-04. LUBA No. 2012-017 is consolidated with LUBA No. 2012-018, which challenges  
26 a concurrently adopted ordinance, Ordinance No. 2012-05.

27 The procedural background of these appeals is complex. Further background is  
28 provided in *Hatley v. Umatilla County*, \_\_ Or LUBA \_\_ (LUBA No. 2012-030), issued this  
29 date, which concludes that petitioner’s appeal of one of two orders adopted concurrently with  
30 Ordinance Nos. 2012-04 and 2012-05 was untimely filed.

31 The county adopted Ordinance Nos. 2012-04 and 2012-05 in partial response to  
32 LUBA’s remand in *Cosner v. Umatilla County*, \_\_ Or LUBA \_\_ (LUBA Nos. 2011-  
33 070/071/072). In *Cosner*, LUBA remanded three county ordinances that amended the

1 county's land use regulations regarding wind power generation facilities, on three separate  
2 grounds. LUBA sustained the first assignment of error, holding that a new code provision  
3 allowing cities and landowners to "waive" a two-mile setback from wind towers is an  
4 unconstitutional delegation of legislative authority. LUBA sustained two other assignments  
5 of error on other grounds, and remanded all three ordinances to the county. Petitioner was a  
6 party in *Cosner*.

7 On remand, the county board of commissioners conducted a single proceeding to  
8 address remand in *Cosner*. However, the county chose to address each of the three bases for  
9 remand separately, which resulted in the adoption of two ordinances and two orders.  
10 Specifically, on February 28, 2012, the county adopted (1) Ordinance No. 2012-04, which  
11 deleted from the county's land use regulations the setback waiver provisions in two of the  
12 ordinances at issue in *Cosner*; (2) Ordinance No. 2012-05, which amends the text of the third  
13 ordinance at issue in *Cosner*; (3) Order No. 2012-20, which initiates a planning commission  
14 proceeding to draft text amendments to replace the setback waiver provisions deleted in  
15 Ordinance No. 2012-04 with an adjustment-type process; and (4) Order No. 2012-21, which  
16 adopts additional findings to respond to one of the three bases for remand in *Cosner*.

17 On March 20, 2012, petitioner filed with LUBA timely appeals of Ordinance No.  
18 2012-04 and Ordinance No. 2012-05, and those two appeals were consolidated for review.  
19 Petitioner did not appeal Order No. 2012-20, which initiated the planning commission  
20 proceeding to draft a replacement for the setback waiver provisions deleted by Ordinance No.  
21 2012-04. On April 18, 2012, petitioner belatedly filed an appeal of Order No. 2012-21,  
22 which as noted adopts additional findings to respond to one of the bases for remand in  
23 *Cosner*. As discussed further below, in an order issued this date, *Hatley v. Umatilla County*,  
24 \_\_ Or LUBA \_\_ (LUBA No. 2012-030, July 2, 2012), we conclude that we lack jurisdiction  
25 over petitioner's belated appeal of Order No. 2012-21.

1 In the present appeal, the county moves to dismiss LUBA No. 2012-017, which  
2 challenges Ordinance No. 2012-04, on two grounds. First, the county argues that Ordinance  
3 No. 2012-04 is not a “final” decision subject to LUBA’s review, because in the same  
4 proceeding in which the county adopted Ordinance No. 2012-04 the county commissioners  
5 also adopted Order No. 2012-20, which initiates a planning commission process to draft text  
6 amendments to replace the setback waiver deleted by Ordinance No. 2012-04.

7 Second, the county argues that Ordinance No. 2012-04 simply deletes the setback  
8 waiver provisions in the 2011 ordinances that LUBA found to be unconstitutional. If  
9 petitioner believes that LUBA erred in concluding that the setback waiver provisions are  
10 unconstitutional, the county argues, the only means to challenge that conclusion was to  
11 appeal LUBA’s decision to the Court of Appeals. We understand the county to argue that  
12 any attempt in the appeal of Ordinance No. 2012-04 to argue the contrary is an impermissible  
13 collateral attack on LUBA’s decision in *Cosner*. We address each argument in turn.

14 **A. Final Decision**

15 ORS 197.015(10)(a) defines a “land use decision” subject to LUBA’s exclusive  
16 jurisdiction in relevant part as a “final” decision that adopts, amends or applies a land use  
17 regulation. Petitioner responds, and we agree, that Ordinance No. 2012-04 is a final decision.  
18 The ordinance deletes text from the county’s land use regulations, and there is nothing on the  
19 face of the ordinance that suggests that deletion is not a final action by the county. The fact  
20 that the county contemplates replacing the deleted provisions with a different means of  
21 dealing with setback issues does not mean that Ordinance No. 2012-04 is not a final decision  
22 subject to LUBA’s jurisdiction.

23 **B. Collateral Attack on *Cosner***

24 Petitioner does not respond to the county’s argument that the appeal of Ordinance No.  
25 2012-04 is an impermissible collateral attack on LUBA’s conclusion in *Cosner* that the  
26 setback waiver provisions are unconstitutional. We tend to agree with the county that any

1 argument in the present appeal regarding the constitutionality or validity of the 2011 setback  
2 waiver provisions would be beyond LUBA’s scope of review under the law of the case  
3 doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).  
4 However, that does not mean that the appeal of Ordinance No. 2012-04 is outside our  
5 jurisdiction. It remains to be seen whether petitioner can advance any challenges to  
6 Ordinance No. 2012-04 that are within our scope of review. But even if petitioner cannot  
7 advance any assignment of error against Ordinance No. 2012-04 that is within our scope of  
8 review, that simply means that we will affirm the appeal of Ordinance No. 2012-04, not that  
9 the appealed decision is beyond our jurisdiction.

10 **C. Findings Adopted in Order No. 2012-21**

11 For reasons not entirely clear to us, petitioner devotes the majority of his response to  
12 the motion to dismiss to disputing a statement the county makes in its motion regarding  
13 Order No. 2012-21, which as noted is the subject of a different LUBA appeal and adopts  
14 additional findings to address one of the bases for remand in *Cosner*. Specifically, Order No.  
15 2012-21 adopts findings that the three original 2011 ordinances at issue in *Cosner* are  
16 consistent with several comprehensive plan policies regarding energy. The 2011 ordinances  
17 did not include such findings, and under the sixth assignment of error in *Cosner* LUBA  
18 remanded the 2011 ordinances to address those comprehensive plan policies.

19 In its motion to dismiss the appeal of Ordinance 2012-04, the county argues:

20 “The Petitioner has indicated that the appeal is to address the [in]adequacy of  
21 findings to support the setback requirements in compliance with the county  
22 comprehensive plan policies. The decision on the findings [Order No. 2012-  
23 21], however, was not appealed by the Petitioner, and that matter is not within  
24 the scope of this appeal.” Motion to Dismiss 2.

25 In response, petitioner filed an untimely appeal of Order No. 2012-21. As noted, we  
26 conclude in a separate order issued this date that we lack jurisdiction over petitioner’s belated  
27 appeal of Order No. 2012-21.

1           In the alternative, petitioner argues that there was no need to appeal Order No. 2012-  
2 21, because it is not a separately appealable decision. If we understand petitioner correctly,  
3 he contends that because Order No. 2012-21 includes findings in support of Ordinance Nos.  
4 2012-04 and 2012-05, the findings adopted by Order No. 2012-21 are necessarily part of  
5 Ordinance Nos. 2012-04 and 2012-05. We question that contention. Order No. 2012-21  
6 appears to be limited to addressing the sixth assignment of error in *Cosner*, which had  
7 nothing to do with the setback waiver and Goal 5 findings issues presented in the first and  
8 second assignments of error, which were in turn addressed by Ordinance No. 2012-04 and  
9 Ordinance No. 2012-05, respectively. Nothing cited to us in Order No. 2012-21 suggests that  
10 the findings therein are intended to address whether Ordinance Nos. 2012-04 and 2012-05  
11 comply with the comprehensive plan policies considered in the order. On the contrary, Order  
12 2012-21 appears to address only whether the *2011 ordinances* are consistent with the  
13 comprehensive plan energy policies, which was the specific issue remanded under the sixth  
14 assignment of error in *Cosner*.

15           However, petitioner's contention on this point goes perhaps more to the possible  
16 merits of an assignment of error directed against Ordinance Nos. 2012-04 and 2012-05, not to  
17 any jurisdictional defect in the appeal of those ordinances. Nothing in the foregoing is  
18 intended to preclude petitioners from advancing arguments or assignments of error  
19 challenging Ordinance Nos. 2012-04 or 2012-05 based on the inadequacy of the findings or  
20 record supporting those two ordinances.

21           **RECORD OBJECTIONS**

22           On April 25, 2012, petitioner filed objections to the consolidated record of Ordinance  
23 Nos. 2012-04 and 2012-05. Petitioner advises us that the county has agreed to file a  
24 supplemental record to resolve the first and third objections. The second objection involves  
25 Order No. 2012-21, which petitioner argues should be included in the record of Ordinance

1 Nos. 2012-04 and 2012-05, because it was before the board of county commissioners during  
2 the single proceeding conducted below.

3 As explained, the county conducted a single proceeding on remand from *Cosner*,  
4 which resulted in four separate decisions. The county apparently compiled a single record to  
5 support all four decisions. We agree with petitioners that in these circumstances Order No.  
6 2012-21 should be included in the record submitted to LUBA, because it was “placed before”  
7 the final decision maker during the proceedings leading up to adoption of the two decisions  
8 appealed to LUBA. OAR 661-010-0025(1)(b). The county shall include Order No. 2012-21  
9 in the supplemental record.<sup>1</sup>

10 Dated this 2nd day of July, 2012.

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Tod A. Bassham  
Board Chair

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<sup>1</sup> We express no opinion regarding the role Order No. 2012-21 might play in resolving assignments of error directed at Ordinance Nos. 2012-04 and 2012-005 in this appeal.