BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

IBERDROLA RENEWABLES, LLC,
*Petitioner,*

vs.

UMATILLA COUNTY,
*Respondent.*

LUBA No. 2012-082

JIM HATLEY,
*Petitioner,*

vs.

UMATILLA COUNTY,
*Respondent.*

LUBA No. 2012-083

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Elaine R. Albrich, Portland, filed a petition for review and argued on behalf of petitioner Iberdrola Renewables, LLC. With her on the brief was Stoel Rives LLP.

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

Douglas R. Olsen, Umatilla County Counsel, Pendleton, filed the response brief and argued on behalf of respondent. With him on the brief were Michael C. Robinson and Perkins Coie LLP.

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

REMANDED 02/28/2013

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

provisions of ORS 197.850.

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioners appeal Ordinance 2012-13, which amends county land use regulations governing commercial wind power generation facilities to provide a process to reduce a code-required two-mile setback between wind towers and rural residences, to allow a lesser setback.

**FACTS**

Commercial wind power generation facilities (wind facilities) are allowed as conditional uses in the county's exclusive farm use (EFU) zones pursuant to ORS 215.283(2)(g), and local regulations at Umatilla County Land Development Ordinance (LDO) 152.616(HHH).

In 2011, the county adopted three related ordinances, Ordinances No. 2011-05, 2011-06, and 2011-07 (collectively, the 2011 Ordinances), which amended the LDO 152.616(HHH) conditional use standards and approval criteria for siting commercial wind facilities. In relevant part, Ordinance 2011-06 replaced the existing wind facility setback of 3,520 feet with a two-mile setback from any "rural residence," unless the rural residential landowner recorded a written waiver for a lesser setback, in which case the county would apply the lesser setback in approving any conditional use permit application for a wind facility.

The 2011 Ordinances were appealed to LUBA in *Cosner v. Umatilla County*, _Or LUBA _ (LUBA Nos. 2011-070/071/072, January 12, 2012). LUBA remanded the three 2011 Ordinances. As relevant here, LUBA sustained the first assignment of error, in part, concluding that the provisions allowing a rural residence landowner to authorize a lesser setback violated the Delegation Clause of Article I, section 21 of the Oregon Constitution. *Id*. at slip op 7-8.

On remand, the county conducted a single proceeding to address the bases for remand identified in *Cosner*. On February 28, 2012, the county adopted Ordinances No. 2012-04 and 2012-05 (collectively, the 2012 Ordinances) that in relevant part deleted the waiver provisions adopted in 2011-06.[1] On the same date, the county board of commissioners adopted Order No. 2012-020, which initiated an amendment to LDO 152.616(HHH) and directed the planning commission to recommend language to replace the setback waiver provisions deleted by Ordinance 2012-04.

The county planning commission held a public hearing on July 19, 2012, and forwarded the proposed amendment to the board of commissioners with a recommendation that the board of commissioners adopt the proposed amendment. On August 16, 2012, the county board of commissioners held a public hearing on the proposed amendment to LDO 152.616(HHH)(6)(a) and adopted the challenged ordinance, Ordinance No. 2012-013, and findings of fact and conclusions of law in support of the ordinance. In relevant part, Ordinance No. 2012-013 authorizes wind facility applicants to request an "adjustment" or variance to the two-mile setback. Pursuant to LDO 152.616(HHH)(6)(a) as amended, the adjustment application must be signed by the rural residential landowner involved in the adjusted setback. LDO 152.616(HHH)(6)(a)(4)(A) and (B) provide two approval criteria, under which the county may approve or deny the requested adjustment.[2]

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[1] The 2012 Ordinances were appealed to LUBA in *Hatley v. Umatilla* County, _ Or LUBA _ (LUBA Nos. 2012-017, 2012-018, and 2012-030, October 4, 2012), *review pending* CA 152777. LUBA denied all assignments of error, and affirmed the 2012 Ordinances. LUBA rejected several assignments of error that raised issues that could have been, but were not, raised in the appeal of the 2011 Ordinances at issue in *Cosner*, under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). One of the issues rejected under *Beck* was whether the two-mile setback adopted in the 2011 Ordinances is preempted by state law, which is also one of the issues raised in the present appeal.

[2] Ordinance 2012-013 amends LDO 152.616(HHH)(6)(a), to provide in relevant part:

> "(4) A Wind Power Generation Facility applicant may apply for and receive an adjustment for a reduced distance between a turbine tower and a rural residence under the following approval criteria. The adjustment application shall be submitted on a form provided by the County and signed by the rural residence landowner.

This appeal followed.

**FIRST ASSIGNMENT OF ERROR (IBERDROLA)**
**FIRST ASSIGNMENT OF ERROR (HATLEY)**

In these assignments of error, petitioners argue that Ordinance 2012-13 violates the Delegation Clause of Article I, Section 21 of the Oregon Constitution, and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Specifically, petitioners argue that the requirement that the setback adjustment application be "signed by the rural residence landowner" contravenes the state Delegation Clause and the federal Due Process Clause.

**A. Article I, Section 21 Delegation Clause**

Article I, Section 21 of the Oregon Constitution prohibits passing any law, "the taking effect of which, shall be made to depend upon any authority, except as provided in this Constitution[.]" In *Cosner*, LUBA held that county ordinances that allowed a private landowner to record a waiver to the two-mile setback and thus substitute a lesser setback, the existence and extent of which is subject to the sole discretion of the landowner, violated the Delegation Clause. As explained, the county deleted the unconstitutional waiver provisions

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> "(A) The adjustment will not significantly detract from the livability of the subject rural residence. This standard is satisfied if applicable DEQ noise standards are satisfied, there is no significant adverse impact to property access and traffic conditions, and other evidence demonstrates that the residence remains suitable for peaceful enjoyment or, such impacts to the livability of the rural residence resulting from the adjustment are mitigated to the extent practical; and
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> "(B) All other requirements of the Wind Power Generation Facility application remains satisfied.
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> "(5) An adjustment application under this section shall be processed as a Land Use Decision concurrently with the Wind Power Generation Facility application. For applications subject to Energy Facility Siting Council (EFSC) jurisdiction, an adjustment application shall be included as the applicable substantive criteria evaluated by EFSC when granting or denying an application for a Site Certificate."

from the county code, and replaced them with the adjustment process challenged in Ordinance No. 2012-13.

Petitioners acknowledge that the adjustment process adopted in Ordinance No. 2012-013 corrected some of the flaws to the waiver scheme identified in *Cosner*, but contend that the landowner signature requirement nonetheless violates the state Delegation Clause, because it allows a private landowner to effectively "veto" any adjustment application.

The principal authority petitioners cite is *Corvallis Lodge No. 1411 v. OLCC*, 67 Or App 15, 677 P2d 76 (1984), a case that was not cited by the parties or discussed in *Cosner*. *Corvallis Lodge* involved a challenge to an agency rule that prohibited private clubs from selling liquor to non-members, but provided for an exception for specific events if a club contacted all commercial establishments that sold liquor by the drink within a 10-mile radius, to ascertain whether those commercial establishments were willing and able to host the event. The rule provided standards under which commercial establishments were supposed to determine whether they could accommodate the event. Despite those standards, the Court of Appeals concluded that, given the commercial establishments' self-interest in making the determination, the exception lacked sufficient procedural safeguards to protect against the arbitrary and unaccountable exercise of government power that was delegated to the commercial establishments.

In *Qwest Corporation v. Public Utility Commission*, 205 Or App 370, 135 P3d 321 (2006), the Court of Appeals characterized the regulation at issue in *Corvallis Lodge* as one that impermissibly gave commercial establishments "the authority to veto the event based on the ability to accommodate the event regardless of their intention to host it." *Id.* at 384. *Qwest* involved a challenge to an agency rule that authorized the owner of a utility pole to conduct fact-finding to determine whether third parties had violated a different agency rule that prohibited attachments to utility poles. The challenged agency rule also allowed the pole owner to determine the prescribed penalty, and provided the possibility of subsequent review

and ultimate appeal to the agency. The Court distinguished *Corvallis Lodge* and upheld the agency rule, concluding that the rule sufficiently constrained the pole owner's fact-finding exercise and included sufficient procedural safeguards to avoid the arbitrary and unaccountable exercise of delegated governmental power.

In the present case, petitioners argue that Ordinance 2012-13's requirement that the setback adjustment application include the signature of rural residential landowners effectively authorizes landowners to "veto" the application, by simply not signing it, for any reason or no reason.

The county responds that the signature requirement is not an impermissible delegation, or a delegation at all, because it does not confer upon the landowner the ability to actually grant or deny the adjustment application. Instead, the county argues, the county reserves the sole authority to approve or deny the adjustment application, pursuant to the standards set forth in Ordinance 2012-13.

However, the county does not dispute that it will reject or refuse to process any adjustment application that does not include the required signature of the rural residential landowner. The signature requirement effectively prevents a wind tower applicant from seeking the county's consideration of a requested setback adjustment, unless the rural residential landowner consents to the reduced setback or is otherwise willing to sign the application. The signature requirement thus allows the landowner to effectively "veto" the adjustment application, even more plainly than the regulation at issue in *Corvallis Lodge*. Further, unlike the regulation at issue in *Corvallis Lodge*, Ordinance No. 2012-13 provides no standards at all under which the landowner is supposed to exercise the decision whether or not to consent to the application. And, unlike the regulation at issue in *Qwest*, there are no provisions for further review or appeal. The wind tower applicant has no means and no standards under which it can challenge a landowner's refusal to consent to the application.

We conclude, based on *Corvallis Lodge* and *Qwest*, that the signature requirement of Ordinance No. 2012-13 is inconsistent with Article I, Section 21 of the Oregon Constitution.

The county argues, nonetheless, that similar "neighbor consent" provisions have been upheld under the federal Due Process Clause, which embodies an implicit proscription on the unlawful delegation of legislative authority, similar to the express proscription in Article I, Section 21 of the state constitution. The county points out that in *Cusak v. City of Chicago*, 242 US 526, 37 S Ct 190, 61 L Ed 472 (1917), the U.S. Supreme Court rejected a challenge under the federal Due Process clause to an ordinance that prohibited construction of a billboard in a residential neighborhood unless the applicant obtained the written consent of a majority of the owners fronting the street on which the sign is located. The Court held that it was within the Police Power for the city to prohibit billboards, and therefore an exception allowing a billboard upon consent of the neighbors did not violate Due Process. In addition, the Court reasoned that the billboard applicant cannot be injured by exercise of the consent requirement, because without the exception the prohibition on billboards otherwise would be absolute.

Applying *Cusak*, the Nebraska Supreme Court in *Coffee v. County of Otoe*, 274 Neb 796, 743 NW 2d 632 (2008), upheld a zoning regulation that prohibited construction of a single family dwelling within a certain distance of an animal feeding and waste handling facility, unless the owner of the dwelling granted an impact easement to the facility owner and the facility owner accepted the easement. The Nebraska Court discussed *Cusak* and an earlier US Supreme Court case that *Cusak* distinguishes, *Eubank v. Richmond*, 226 US 137, 33 S Ct 76, 57 L Ed 156 (1912), and concluded that a neighbor consent provision does not violate the federal Due Process Clause as an unlawful delegation of legislative authority, if the consent functions to *remove* a restriction that the legislative body has lawfully created.

In the present case, the county argues that the county's signature requirement is like the consent provisions at issue in *Cusak* and *Coffee*, because it simply allows neighboring

landowners to consent to removal or modification of a restriction—the two mile setback—that the county has already adopted and that would otherwise apply absolutely.

The county may be correct that, as far as the federal Due Process Clause is concerned, Ordinance No. 2012-13's signature requirement is not an impermissible delegation of legislative authority for the reasons stated in *Cusak* and *Coffee*. However, the Delegation Clause of the Oregon Constitution is not necessarily identical to the delegation doctrine embodied in the federal Due Process Clause. *See Deras v. Myers*, 272 Or 47, 64, n17, 535 P2d 541 (1975) (the federal constitution is not controlling over a similar state constitutional provision, even where the language in both constitutions is the same, where the court concludes that the Oregon constitution is intended to provide a larger measure of protection).

In *Corvallis Lodge* and *Qwest*, the Oregon Court of Appeals did not discuss or apply any federal constitutional clauses or federal jurisprudence. The regulatory scheme at issue in *Corvallis Lodge* resembled those at issue in *Cusak* and *Coffee*, in that the regulatory scheme provided for a prohibition that could be lifted or modified based on the consent of private parties. The Court of Appeals possibly could have chosen to apply the distinction drawn in *Cusak* and *Coffee*, and concluded that the agency rule at issue did not infringe the state Delegation Clause. However, the Court did not apply that analysis. As it stands, the Court of Appeals in *Corvallis Lodge* rejected under the state Delegation Clause a consent requirement that is substantially similar to the one before us. Given that holding, we have no basis to read into the Delegation Clause the different understanding of the federal Due Process Clause embodied in *Cusak* and *Coffee*.

**B. Due Process Clause of the U.S. Constitution**

As explained above, *Cusak* and *Coffee* indicate that the delegation doctrine embodied in the federal Due Process Clause is not infringed by a "neighbor consent" requirement that allows neighbors to simply remove a lawful restriction on the use of property that would otherwise apply absolutely. If those cases accurately reflect the current federal jurisprudence

on this point, it may be that we were incorrect in *Cosner* in concluding that the waiver scheme at issue in that appeal also violated the federal Due Process Clause.

The foregoing illustrates the prudence of not reaching federal constitutional challenges when a state constitutional provision resolves the controversy and appears to provide the petitioner with a complete remedy. Because we have concluded that the signature requirement of Ordinance No. 2012-13 violates Article I, Section 21 of the Oregon Constitution, there is no need for us to consider whether that requirement also violates the federal Due Process Clause, and we decline to do so.

The first assignment of error (Iberdrola) and the first assignment of error (Hatley) are sustained, in part.

**SECOND ASSIGNMENT OF ERROR (HATLEY)**

Petitioner Hatley argues that the setback adjustment provisions of Ordinance No. 2012-13, and the two-mile setback itself, conflict with and are preempted by state law.

The primary state law at issue is ORS 469.504, part of a statutory scheme at ORS 469.300 *et seq.*, regulating approval of "energy facilities," including certain large wind power generating facilities, and requiring that such facilities obtain a site certificate from the Energy Facility Siting Council (EFSC). Under ORS 469.320(8), smaller wind power generating facilities are not required to obtain, but may elect to obtain a site certificate from EFSC, instead of or in addition to any local government approvals.

ORS 469.503 sets out the criteria for EFSC approval, and requires in relevant part that EFSC find that the facility complies with the statewide planning goals. In turn, ORS 469.504(1) provides that a facility shall be found to be in compliance with the statewide planning goals if either (a) the local government has approved the facility under its acknowledged comprehensive plan and land use regulations, or (b) EFSC determines that the facility complies with "applicable substantive criteria from the affected local government's

acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals," along with other state laws. [3] ORS 469.504(1)(b)(A).

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[3] ORS 469.504 provides, in relevant part:

> "(1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:
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> > "(a) The facility has received local land use approval under the acknowledged comprehensive plan and land use regulations of the affected local government; or
> >
> > "(b) The Energy Facility Siting Council determines that:
> >
> > > "(A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;
> >
> > > "(B) For an energy facility or a related or supporting facility that must be evaluated against the applicable substantive criteria pursuant to subsection (5) of this section, that the proposed facility does not comply with one or more of the applicable substantive criteria but does otherwise comply with the applicable statewide planning goals, or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section; or
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> > > "(C) For a facility that the council elects to evaluate against the statewide planning goals pursuant to subsection (5) of this section, that the proposed facility complies with the applicable statewide planning goals or that an exception to any applicable statewide planning goal is justified under subsection (2) of this section.
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> "* * * * *
>
> "(4) An applicant for a site certificate shall elect whether to demonstrate compliance with the statewide planning goals under subsection (1)(a) or (b) of this section. The applicant shall make the election on or before the date specified by the council by rule.
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> "(5) Upon request by the State Department of Energy, the special advisory group established under ORS 469.480 shall recommend to the council, within the time stated in the request, the applicable substantive criteria under subsection (1)(b)(A) of this section. If the special advisory group does not recommend applicable substantive criteria within the time established in the department's request, the council may either determine and apply the applicable substantive criteria under subsection (1)(b) of this section or determine compliance with the statewide planning goals under

Pursuant to ORS 469.480(1), when an energy facility is proposed to EFSC, EFSC must designate as a special advisory group the governing body of the local government within whose jurisdiction the facility is proposed to be located. Under ORS 469.504(5), if requested by the Oregon Department of Energy, the special advisory committee determines what constitute the "applicable substantive criteria." Thus, there are circumstances where the Umatilla County Commissioners, acting as a special advisory group as requested by the Department of Energy, will determine what county land use regulations apply as substantive criteria in an EFSC proceeding.

However, if the special advisory committee fails to make a timely determination, EFSC may "determine and apply" the applicable substantive criteria. ORS 469.504(5). Even if a facility does not comply with "applicable substantive criteria" from a local government comprehensive plan or land use regulation, EFSC may approve the site certificate if EFSC finds that the facility otherwise complies with the statewide planning goals, or takes an exception to the goals. ORS 469.504(1)(b)(B). *See Save Our Rural Oregon v. Energy*

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> subsection (1)(b)(B) or (C) of this section. If the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 or a related or supporting facility that does not pass through more than one local government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. If the special advisory group recommends applicable substantive criteria for an energy facility as defined in ORS 469.300 (11)(a)(C) to (E) or a related or supporting facility that passes through more than one jurisdiction or more than three zones in any one jurisdiction, the council shall review the recommended criteria and determine whether to evaluate the proposed facility against the applicable substantive criteria recommended by the special advisory group, against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals. In making its determination, the council shall consult with the special advisory group and shall consider:
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> "(a) The number of jurisdictions and zones in question;
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> "(b) The degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process; and
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> "(c) The level of consistency of the applicable substantive criteria from the various zones and jurisdictions."

*Facility Siting Council*, 339 Or 353, 121 P3d 1141 (2005) (providing an overview of ORS 459.504)

**A. Subsection 5 of Ordinance No. 2012-13**

Ordinance No. 2012-13 adopted the following language into the county's code, codified at UCZO 152.616(HHH)(6)(a)(5) (Subsection 5):

> "An adjustment application under this section shall be processed as a Land Use Decision concurrently with the Wind Power Generation Facility application. *For applications subject to Energy Facility Siting Council (EFSC) jurisdiction, an adjustment application shall be included as the applicable substantive criteria evaluated by EFSC when granting or denying an application for a Site Certificate*." (Emphasis added.)

Petitioner challenges the emphasized sentence, arguing that the county lacks authority to declare that the setback adjustment provisions, including the signature requirement and standards, constitute "applicable substantive criteria" for applications before EFSC. According to petitioner, the setback adjustment criteria are not "required by the statewide planning goals" and even if they were the county cannot usurp EFSC's authority to determine, in certain circumstances, what constitute the "applicable substantive criteria."

The county responds that the issue of whether the setback adjustment provisions are preempted by state law is an issue that could have been raised in *Cosner*, but was not, and therefore that issue has been waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). The county notes that in *Hatley*, LUBA found that a similar state law preemption challenge had been waived under *Beck*, because such a challenge could have been made in the appeal of the county's 2011 ordinances at issue in *Cosner*, but was not.

We disagree with the county that the issue of whether the setback adjustment provisions adopted in Ordinance 2012-13 are preempted by state law could have been raised in appeal of the county's 2011 ordinances and challenged in *Cosner*. *Hatley* involved a challenge to two ordinances adopted on remand from *Costner* that in relevant part deleted the setback *waiver* provision that LUBA found to be unconstitutional. LUBA held that in an

appeal of the remand ordinances the petitioner could not advance new challenges to the county's original 2011 ordinances that were not advanced in *Cosner*, pursuant to the *Beck* waiver principle. Neither the 2011 nor the 2012 ordinances included the setback *adjustment* provisions and criteria adopted in Ordinance 2012-013, and we fail to see how the setback adjustment provisions, including Subsection 5, could possibly have been challenged in *Cosner* or *Hatley*.

On the merits, the county responds that ORS 469.504 does not preclude a county from adopting land use regulations and designating those regulations as "applicable substantive criteria," subject to EFSC's discretion on how and whether such criteria are to be applied under ORS 469.504(1) and (5).

As explained above, in certain circumstances the county governing body, acting as a special advisory group when invoked by the Department of Energy, determines which local criteria constitute the "applicable substantive criteria." If Subsection (5) were limited to those circumstances it would arguably not conflict with the framework set out in ORS 469.504. However, Subsection 5 purports to mandate that the "adjustment application," which would presumably include the required landowner signatures and implicate the adjustment criteria, "shall be included as the applicable substantive criteria" that EFSC must use to evaluate, grant or deny a Site Certificate application to EFSC. In other words, Subsection 5 purports to bind EFSC as to the applicable substantive criteria, even in circumstances where that determination is left entirely up to EFSC.

The county may have intended Subsection 5 to operate only as a non-binding recommendation to EFSC, as the county suggests in its brief. However, the terms of Subsection 5 are mandatory and appear to require that EFSC "evaluate[]" the adjustment application when granting or denying an application for a Site Certificate, even in circumstances where EFSC has the sole authority to determine what constitute the applicable

substantive criteria. At least to that extent, we agree with petitioner that as presently worded Subsection 5 is inconsistent with the framework established in ORS 469.504.

This sub-assignment of error is sustained.

**B. Two-Mile Setback**

Petitioner argues that the two-mile setback adopted in the 2011 Ordinances is inconsistent with or preempted by a number of statutes and Oregon administrative rules. Petitioner acknowledges that the present appeal concerns only Ordinance No. 2012-13, not the 2011 Ordinances, and that for the reasons stated in *Hatley*, LUBA will likely conclude that the two-mile setback adopted in the 2011 Ordinances cannot be challenged in an appeal of Ordinance No. 2012-13. Nonetheless, petitioner advances this sub-assignment of error as a precaution and to preserve the argument, noting that *Hatley* is pending review by the Court of Appeals.

As explained, in *Hatley*, petitioner raised a similar preemption challenge against the 2011 Ordinances. We rejected that challenge under the reasoning in *Beck v. City of Tillamook*. Specifically, we concluded that petitioner, who was a party in *Cosner*, could have but did not raise such preemption challenges in the appeal of the 2011 Ordinances at issue in *Cosner*, and that petitioner's failure to raise such challenges precluded him from raising them in the appeal of the 2012 Ordinances on remand from *Cosner*. Petitioner offers no reason in the present case to reach a different conclusion, and we adhere to our holding in *Hatley*.

The second assignment of error (Hatley) is sustained, in part.

The county's decision is remanded.