BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM HATLEY,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

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

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

FINAL OPINION
AND ORDER

Appeal on remand from the Court of Appeals.

Bruce W. White, Bend, and Wendie L. Kellington, Lake Oswego, represented petitioner.

Michael C. Robinson, Portland, and Douglas R. Olsen, County Counsel, Pendleton, represented respondent.

Daniel Kearns, Portland, represented intervenors-respondents.

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

AFFIRMED 10/30/2013

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

Opinion by Ryan.

This matter is on remand from the Court of Appeals. *Hatley v. Umatilla County*, 256 Or App 91, 301 P3d 920 (2013). The challenged decisions involve two ordinances, 2012-04 and 2012-05, that the county adopted in 2012 (the 2012 Ordinances).

BACKGROUND

A. *Cosner v. Umatilla County* and the 2011 Ordinances

Several LUBA decisions, a Court of Appeals decision, and a Supreme Court decision have resulted from the county's undertaking, begun in 2011, to adopt a setback for Wind Power Generation Facilities (WPGFs) from rural residences and the urban growth boundary (UGB), and we summarize the decisions here.[1] Our decision in *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-070/071/072, January 12, 2012) remanded two previous county ordinances, Ordinance 2011-05 and 2011-06 (the 2011 Ordinances). The 2011 Ordinances significantly amended the county's regulatory scheme governing WPGFs in exclusive farm zones. Among other things, the 2011 Ordinances replaced a provision requiring a 3,250 foot setback between WPGFs and property zoned for residential uses, with a two-mile setback, measured from rural residences and a UGB and a one-mile setback measured from a property zoned unincorporated community. The 2011 Ordinances also included a waiver provision that allowed owners of rural residences and city councils to "waive" the required two-mile setback. In *Cosner*, LUBA concluded that the waiver provision was unconstitutional, and remanded the two 2011 Ordinances for the county to remedy that unconstitutional provision.

[1] UDC 152.003 defines Wind Power Generation Facility as "[a]n energy facility that consists of one or more wind turbines or other such devices and their related or supporting facilities that produce electric power from wind and are: (a) Connected to a common switching station, or (b) Constructed, maintained, or operated as a contiguous group of devices." UDC 152.003 defines Commercial Wind Power Generation as "[a]n activity carried out for monetary gain using one or more wind turbine generators operated as a single Wind Power Generation Facility that has a combined generating capacity greater than 1 MW."

B. *Hatley v. Umatilla County* and the 2012 Ordinances

After our decision in *Cosner*, the county adopted the 2012 ordinances. Ordinance 2012-04 amended Umatilla County Development Code (UDC) 152.616(HHH)(6) to impose a two mile setback for WPGFs from rural residences and the urban growth boundary and a one mile setback from a property zoned unincorporated community, without any possibility of a waiver of the setback. Ordinance 2012-05 amended UDC 152.616(HHH)(11)'s provisions that restrict, as relevant here, development of WPGFs in the Walla Walla watershed.

Petitioner, who was a party in *Cosner*, appealed the 2012 Ordinances to LUBA, arguing in the seventh assignment of error in relevant part that the two-mile setback codified at UDC 152.616(HHH)(6) is preempted by state law. In *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2012-017/018/030, October 4, 2012) (*Hatley I*), we held that petitioner was precluded by the holding in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) from raising the issue raised in his seventh assignment of error.[2] That issue is whether state law preempts the setback provisions in Ordinance 2012-04, codified at UDC 152.616(HHH)(6). *Hatley I*, slip op 26-27. However, in *Hatley II*, the Court of Appeals agreed with petitioner that he "is not precluded from raising his preemption challenge to the new setback requirement in UDC 152.616(HHH)" and remanded the decision for LUBA to consider the preemption challenge to the new setback requirement in the first instance. *Id*. at 113. After we received the appellate judgment in *Hatley II*, we granted the county's motion to allow additional briefing on the remanded issue, and the county and petitioner submitted additional briefing.

[2] Petitioner in his petition for review to LUBA and the Court of Appeals in its decision in *Hatley II* limit their discussion of the seventh assignment of error to petitioner's challenge to the two-mile setback, and we similarly limit our discussion in this opinion to the two-mile setback.

C. *Iberdrola Renewables, LLC v. Umatilla County* and the Setback Adjustment Ordinance

While *Hatley I* was pending before LUBA, the county initiated planning commission proceedings that subsequently led to the county board of commissioners adopting Ordinance 2012-13 in August, 2012. Ordinance 2012-13 adopted amendments to UDC 152.616(HHH)(6) to authorize applicants for a WPGF in an exclusive farm use zone to seek an adjustment, or variance, to the two-mile setback. The amendments provided two approval criteria under which the county could approve an adjustment to the setback.

Petitioner and other parties appealed Ordinance 2012-13 in *Iberdrola Renewables, LLC v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2012-082/083, February 28, 2013). In *Iberdrola*, we remanded Ordinance 2012-13 in part because we agreed with the petitioner's argument that the new adjustment provision violated the Delegation Clause of Article I, Section 21 of the Oregon Constitution. As we explain in more detail below, we also agreed with petitioner that the county exceeded its authority in designating the adjustment application that is required as part of the new adjustment procedure as one of the "applicable substantive criteria * * * that are required by the statewide planning goals * * *" to be applied pursuant to ORS 469.504(1)(b) by the Energy Facility Siting Council (EFSC) to an application for a site certificate.

D. *Blue Mountain Alliance v. EFSC*

Finally, the two-mile setback adopted by Ordinance 2012-04 was an issue in an Energy Facility Siting Council (EFSC) site certificate appeal to the Oregon Supreme Court. *Blue Mountain Alliance v. EFSC*, 353 Or 465, 300 P3d 1203 (2013) was an appeal of an EFSC determination to issue an amended site certificate to a wind "energy facility" as defined in ORS 469.300(11)(a)(J), located in the county. As we explain in more detail below, ORS 469.504(1)(b) required EFSC to determine that the amended site certificate application complied with the "applicable substantive criteria from the [county'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*[.]" (Emphasis added.) EFSC determined that the setback provisions were not part of the "applicable substantive criteria" because the setback provisions were not "* * * in effect on the date the application [was] submitted * * *[.]" EFSC also determined that the setback provisions were not laws adopted for the protection of the public health and safety as that term is used in ORS 469.401(2), which EFSC can apply in certain circumstances to a site certificate application even if such laws were enacted after the date the application was submitted, if such laws are "in effect on the date the * * * amended site certificate is executed[.]"

The petitioners in *Blue Mountain Alliance* challenged EFSC's determination that the setback provisions were not laws adopted "for the protection of the public health and safety" as that term is used in ORS 469.401(2), and the Supreme Court upheld EFSC's determination.

PREEMPTION

In his seventh assignment of error, petitioner argues that the challenged county ordinances are preempted by state law. Petition for Review 34. Initially, we note that the seventh assignment of error challenges "the 2011 wind energy facility ordinances that [Ordinances 2012-04 and 2012-05] readopt as amended[.]" Petition for Review 34. In *Hatley I*, we addressed and rejected petitioner's argument throughout his brief that the 2012 Ordinances readopted the 2011 Ordinances.[3] *Hatley I*, slip op 13. In *Hatley II*, the Court of

[3] In *Hatley I*, we observed:

> "[W]hen we remanded the 2011 Ordinances those ordinances became legally ineffective, and some county action on remand was necessary to render them effective again. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000). Petitioner takes the position that the only means to do so was to formally re-adopt the 2011 Ordinances by ordinance, and argues that the 2012 Ordinances are the only lawful vehicles for the county to re-adopt the 2011 Ordinances and make them effective again. Petitioner may or may not be correct that re-adoption by ordinance is the only lawful method for the local government to render a remanded ordinance effective again. But even if that is the case, it does not follow that we must assume the 2012 Ordinances had the effect of re-adopting the 2011 Ordinances. There is no express language in the 2012 Ordinances that purports to re-

Appeals explained that "Ordinance 2012-04 is a new piece of legislation that the county adopted *instead of amending and readopting Ordinances 2011-05 and 2011-06*." *Hatley II*, 256 Or App at 110 (emphasis added). Accordingly, as far as we are aware, the 2011 Ordinances remain before the county on remand, and to the extent petitioner's seventh assignment of error challenges the setback provisions of the 2011 Ordinances as preempted by state law, we do not consider those challenges.

In addressing petitioner's preemption arguments under the seventh assignment of error, a detailed explanation of the various statutes and administrative rules governing the siting and development of energy facilities is helpful.

A. ORS 215.283(2) Nonfarm Uses as Conditional Uses

ORS 215.283(2)(g) allows in exclusive farm use zones "[c]ommercial utility facilities for the purpose of generating power for public use by sale," subject to the approval of county governing bodies and subject to the requirements of ORS 215.296. Pursuant to that regulatory authority, the county previously established conditional use standards for a type of "utility facility" it identifies as WPGFs. *See* n 1. As noted earlier, one of those previously adopted standards imposed a 3,250 foot setback for WPGFs from property zoned for residential use. The county contends that the previously adopted 3,250 foot setback and the modifications and additions adopted by the 2011 and 2012 Ordinances are simply an exercise of the statutory authority it has been granted by ORS 215.283(2)(g).

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adopt the 2011 Ordinances after remand, and it is not clear to us that an ordinance can 'implicitly' adopt another ordinance. It is worth noting that the 2012 Ordinances do not purport to amend the 2011 Ordinances; instead they purport to directly amend (largely by deletion) language in LDO 152.616(HHH), albeit language in the county's code that the 2011 Ordinances added to LDO 152.616(HHH).

"The more accurate view may be that the county has not yet taken action to render the 2011 Ordinances effective again, and those ordinances remain in limbo, pending the required action. * * *." *Hatley I*, slip op 13.

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C. ORS 469.300 et seq - Energy Facility Siting Council Review

State statutes regulate the siting of certain types of "[e]nergy facilit[ies]" as defined in ORS 469.300(11)(a). With limited exceptions, ORS 469.320 requires a site certificate to be issued by EFSC prior to construction or expansion of an "energy facility" produced from wind, defined in ORS 469.300(11)(a)(J) as "[a]n electric power generating plant with an average electric generating capacity of 35 megawatts [mw] or more if the power is produced from * * * wind energy at a single energy facility or within a single energy generation area." A wind facility that has an average electric generating capacity of less than 35 mw is not required under ORS 469.320(1) to obtain a site certificate from EFSC, but in 2001 the legislature enacted ORS 469.320(8), which allows such a wind energy facility to elect to obtain a site certificate from EFSC.

To obtain a site certificate, an applicant must demonstrate, among other things, that the proposed facility complies with the statewide planning goals. ORS 469.503(4).[4] To make that demonstration, an applicant may either obtain land use approval for its facility from the local government (Path A), or may request that EFSC make the determination of compliance with the statewide planning goals (Path B). A local government determination that the proposal complies with the relevant local acknowledged comprehensive plan and land use regulations is sufficient to demonstrate that the proposed facility complies with the statewide planning goals under Path A. ORS 469.504(1)(a).

ORS 469.504 sets out different ways for EFSC to determine compliance with the statewide planning goals under Path B. First, EFSC can determine that the energy facility

[4] In 1993, the legislature enacted Oregon Laws 1993, Chapter 569, Section 22, currently codified at ORS 469.503(4), which requires EFSC to determine that a proposed energy facility complies with the statewide planning goals in order to issue a site certificate. The 1993 legislature also adopted ORS 469.504, which specifies how EFSC may determine compliance with the goals. ORS 469.501(m) allows EFSC to adopt standards that address compliance with the statewide planning goals for the siting, construction, operation and retirement of energy facilities. EFSC has adopted general land use standards at OAR 345-022-0030, and standards for wind facilities at OAR 345-024-0010 and -0015.

complies with the "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" (referred to herein as the applicable substantive criteria), and complies with any directly applicable LCDC rules, goals, or state statutes. Second, EFSC can determine that the energy facility does not comply with the county's applicable substantive criteria, but it complies with the applicable statewide planning goals. Third, EFSC can determine that the energy facility justifies an exception to any statewide planning goals that the facility does not comply with. ORS 469.504(1)(b)(A) – (C).[5] *See Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 361, 121 P3d 1141 (2005) (providing an overview of ORS 459.504).

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), the special advisory committee determines the applicable substantive criteria. ORS 469.504(5) provides that "[i]f the special advisory group recommends applicable substantive criteria for an energy facility described in ORS 469.300 * * * [EFSC] shall apply the criteria recommended by the [local governing body]."[6] ORS 469.504(8) provides for direct review

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[5] OAR 345-022-0030(3) defines "applicable substantive criteria" as "criteria from the affected local government's acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals * * *." OAR 345-021-0050(6)(b)(A) also provides in relevant part that "'[a]pplicable substantive criteria' means the criteria and standards that the local government would apply in making all land use decisions necessary to site the proposed facility in the absence of a [EFSC] proceeding."

[6] ORS 469.504(5) provides in relevant part:

> "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 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

by the Oregon Supreme Court of "the affected local government's land use approval of a proposed facility under [ORS 469.504(1)(a)] and the special advisory group's recommendation of applicable substantive criteria under [ORS 469.504(5)]." *See Thomas v. City of Turner*, 42 Or LUBA 39, 44-45 (2002) (so noting).

C. Seventh Assignment of Error

LUBA is authorized to reverse or remand a land use decision if the local government "[e]xceeded its jurisdiction" or "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(A) and (D). The present appeal involves a facial challenge to a legislative decision. In such a context, petitioner must demonstrate that the UDC 152.616(HHH)(6) setback provisions are facially inconsistent with applicable law and are incapable of being applied consistently with controlling law. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 4, 970 P2d 685 (1999) (challenge to legislative zoning ordinance amendments is a facial challenge that, to succeed, must demonstrate that the amendments are categorically incapable of being applied consistent with statutory requirements for clear and objective regulations).

In the seventh assignment of error, we understand petitioner to argue that the setback provisions are preempted by, and are therefore facially inconsistent with, state laws that preempt the field of energy regulation, development and siting. We also understand petitioner to argue that the UDC 152.616(HHH)(6) setback provisions are preempted by state law because they cannot operate concurrently with state law.

Local government authority to regulate may be preempted expressly, or it may be preempted by virtue of the fact that it cannot operate concurrently with state law. *LaGrande/Astoria v. PERB*, 281 Or 137, 148, 576 P2d 1204, *adhered to on reh'g* 284 Or

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government jurisdiction or more than three zones in any one jurisdiction, the council shall apply the criteria recommended by the special advisory group. * * *"

173, 586 P2d 765 (1978) (local law will be considered preempted by state law if local and state law cannot operate concurrently or if the state legislature intended to preempt the local law). In his argument in support of the seventh assignment of error, we understand petitioner to argue that ORS 469.010, ORS 469.310, ORS 469.501, and ORS 469.504 indicate the legislature's intent to preempt the county's authority to regulate the siting and development of energy facilities. We understand petitioner to argue that ORS 469.010 and ORS 469A.052(1)(d) establish a program to encourage use and development of renewable energy, that ORS 469.501 and ORS 469.504 establish a program for siting of renewable energy facilities, and that read together these statutes evidence the legislature's intent to occupy the field of energy regulation, development and siting.[7]

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[7] ORS 469.010 provides:

"The Legislative Assembly finds and declares that:

"(1) Continued growth in demand for nonrenewable energy forms poses a serious and immediate, as well as future, problem. It is essential that future generations not be left a legacy of vanished or depleted resources, resulting in massive environmental, social and financial impact.

"(2) It is the goal of Oregon to promote the efficient use of energy resources and to develop permanently sustainable energy resources. The need exists for comprehensive state leadership in energy production, distribution and utilization. It is, therefore, the policy of Oregon:

"(a) That development and use of a diverse array of permanently sustainable energy resources be encouraged utilizing to the highest degree possible the private sector of our free enterprise system.

"(b) That through state government example and other effective communications, energy conservation and elimination of wasteful and uneconomical uses of energy and materials be promoted. This conservation must include, but not be limited to, resource recovery and materials recycling.

"(c) That the basic human needs of every citizen, present and future, shall be given priority in the allocation of energy resources, commensurate with perpetuation of a free and productive economy with special attention to the preservation and enhancement of environmental quality.

"(d) That state government assist every citizen and industry in adjusting to a diminished availability of energy.

In order for a state statute or statutes to have the effect of preempting local enactments, an express or implied intent to preempt is required. *LaGrande/Astoria*, 281 Or at 156; *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 471, 228 P3d 650 (2010) (city ordinances that regulate conversion of a mobile home park to other uses and require a conversion permit and require compensation of displaced tenants not preempted by ORS 90.115). We disagree with petitioner that the statutes cited by petitioner evidence the legislature's express or implied intent to preempt or occupy the field of energy regulation, development and siting. ORS 469.010 is merely an expression of legislative intent to

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> "(e) That energy-efficient modes of transportation for people and goods shall be encouraged, while energy-inefficient modes of transportation shall be discouraged.
>
> "(f) That cost-effectiveness be considered in state agency decision-making relating to energy sources, facilities or conservation, and that cost-effectiveness be considered in all agency decision-making relating to energy facilities.
>
> "(g) That state government shall provide a source of impartial and objective information in order that this energy policy may be enhanced."

ORS 469.310 provides:

> "In the interests of the public health and the welfare of the people of this state, it is the declared public policy of this state that the siting, construction and operation of energy facilities shall be accomplished in a manner consistent with protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state. It is, therefore, the purpose of ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992 to exercise the jurisdiction of the State of Oregon to the maximum extent permitted by the United States Constitution and to establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state. It is furthermore the policy of this state, notwithstanding ORS 469.010 (2)(f) and the definition of cost-effective in ORS 469.020, that the need for new generating facilities, as defined in ORS 469.503, is sufficiently addressed by reliance on competition in the market rather than by consideration of cost-effectiveness and shall not be a matter requiring determination by the Energy Facility Siting Council in the siting of a generating facility, as defined in ORS 469.503."

ORS 469A.052(1)(d) requires large Oregon energy companies to provide at least 25% of their energy from renewable sources by 2025.

promote energy efficiency and develop sustainable energy resource, and does not expressly limit county regulation of commercial utility facilities in EFU zones.

More importantly, ORS 469.503(4) and ORS 469.504 explicitly recognize and provide a role for local comprehensive plan and land use regulations in demonstrating that an energy facility complies with the statewide planning goals. The statutes allow an applicant to show compliance with the statewide planning goals by securing direct land use approval by the local government in accordance with its acknowledged land use regulations, or by having EFSC determine that a proposal complies with either the local government's applicable substantive criteria or the statewide planning goals. It is hard to imagine a statutory scheme that more clearly does not preempt the county's comprehensive plan and land use regulations.

Additionally, the county has delegated authority under state statutes to regulate land uses within the county. *See,* e.g., ORS 215.050 (authority of county governing body to adopt a comprehensive plan and zoning, subdivision and other ordinances applicable to all the land in the county); ORS 197.175(1) (obligation of county to exercise planning and zoning responsibilities in accordance with statewide planning goals); ORS 197.175(2)(a) (county duty to adopt comprehensive plan consistent with statewide planning goals); ORS 215.283(2)(g) (allowing the county to adopt regulations to regulate the siting and development of utility facilities on land zoned exclusive farm use). Nothing in the statutes cited by petitioner indicate an intent to restrict the authority delegated to the county in those statutes to regulate land uses within the county.

Petitioner also argues that the UDC 152.616(HHH)(6) setback is preempted by state law because it conflicts with state statutes and EFSC and LCDC administrative rules that regulate the siting and development of energy facilities. A local law is preempted if compliance with a local law results in violation of a state statute. *Thunderbird Mobile Club,* 234 Or App at 474. Local law will not conflict with state restrictive law merely because state law regulates less restrictively in the same area. *Id.*; *see also Westfair Associates*

Partnership v. Lane County, 25 Or LUBA 729, 732-33 (1993) (to the extent a local government does not run afoul of other goal requirements or other applicable legal requirements, a local government may regulate more restrictively than the goal requires).

We understand petitioner to first argue that the setback provisions cannot operate concurrently with OAR 660-023-0190, an LCDC Goal 5 rule that requires energy resources *applied for or approved by EFSC* to be protected from conflicting uses.[8] The setback provisions cannot operate concurrently with OAR 660-023-0190(1), we understand petitioner

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[8] OAR 660-023-0190 provides:

> "1) For purposes of this rule,
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> > "(a) 'Energy source' includes naturally occurring locations, accumulations, or deposits of one or more of the following resources used for the generation of energy: natural gas, surface water (i.e., dam sites), geothermal, solar, and wind areas. Energy sources applied for or approved through the Oregon Energy Facility Siting Council (EFSC) or the Federal Energy Regulatory Commission (FERC) shall be deemed significant energy sources for purposes of Goal 5.
> >
> > "(b) 'Protect,' for energy sources, means 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.
>
> "(2) 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. Where EFSC or FERC regulate a local site or an energy facility that relies on a site specific energy source, that source shall be considered a significant energy source under OAR 660-023-0030. Alternatively, local governments may adopt a program to evaluate conflicts and develop a protection program on a case-by-case basis, i.e., upon application to develop an individual energy source, as follows:
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> > "(a) For proposals involving energy sources under the jurisdiction of EFSC or FERC, the local government shall comply with Goal 5 by amending its comprehensive plan and land use regulations to implement the EFSC or FERC decision on the proposal as per ORS 469.504; and
> >
> > "(b) For proposals involving energy sources not under the jurisdiction of EFSC or FERC, the local government shall follow the standards and procedures of OAR 660-023-0030 through 660-023-0050.
>
> "(3) Local governments shall coordinate planning activities for energy sources with the Oregon Department of Energy."

to argue, because the setback provisions reverse the conflicting use protection required in the rule and instead protect "rural residences" and the urban growth boundary *from* the WPGFs.

The short answer to petitioner's argument is that OAR 660-023-0190(1) applies by its terms to energy resources "applied for or approved through the [EFSC]." It does not require energy resources that are applied for through the county's conditional use process to be protected from conflicting uses.

We next understand petitioner to argue that the setback provisions cannot operate concurrently with ORS 469.504(1)(b), which limits the applicable substantive criteria that EFSC may apply to a site certificate application to criteria that are "required by the statewide planning goals." We understand petitioner to argue that ORS 469.504(1) limits the county land use regulations the *county* may apply to an application for a conditional use permit for a WPGF in an EFU zone to the "applicable substantive criteria * * * that are required by the statewide planning goals and in effect on the date the application is submitted," and that because the setback provisions are not "required by the statewide planning goals" the county may not apply them to an application for a conditional use permit. Petition for Review 41; Reply Brief 4.

We disagree with petitioner that ORS 469.504(1)(b) has any bearing on the land use regulations *the county* may apply to an application for a conditional use permit for a WPGF. ORS 469.504(1) governs proceedings before EFSC; it does not govern county proceedings or decisions regarding conditional uses on EFU zoned land.

We understand petitioner to argue next that the setback provisions applicable to a county conditional use permit application are inconsistent with various EFSC siting standards: OAR 345-001-0010(59)(c) (the impact area for land use considerations); OAR 345-022-0022 (soil protection); OAR 345-024-0010 (public safety); OAR 345-024-0090 (transmission lines); and OAR 345-022-0040 (protected areas). We reject petitioner's argument for a number of reasons. First, the siting standards that petitioner references do not

contain any provisions that either allow or prohibit a setback for wind energy facilities subject to EFSC's jurisdiction, and for that reason the setback provisions are not inconsistent with those siting standards. More importantly, petitioner's argument fails to recognize that there would be no purpose for the legislature to create Path A and Path B as *alternative* paths to goal compliance if the county, under a Path A determination, is prohibited from adopting and applying local standards governing WPGFs that regulate differently from EFSC siting standards. Stated differently, petitioner points to no statute or other authority that limits the county's regulation of WPGFs for which conditional use approval is sought from the county to the standards adopted by EFSC. EFSC's administrative rules and siting standards apply to EFSC's consideration of an application for a site certificate applied for through EFSC. EFSC's administrative rules simply do not apply to a county conditional use permit application for a WPGF.

To the extent petitioner may be arguing that the setback provisions are applicable substantive criteria to be identified by the special advisory group or EFSC under ORS 469.504(1)(b) and (5) in a proceeding before EFSC, and in that context they will create an inconsistency with EFSC's siting standards that also apply to a site certificate application, we do not reach that argument. Petitioner's challenge that is before us is a facial challenge to the county's ordinance, and speculation about what might occur in a future proceeding before EFSC on a particular application for a site certificate regarding identification of the applicable substantive criteria does not satisfy the requirement that petitioner must demonstrate that the setback provisions of the challenged ordinance are incapable of being applied consistently with controlling law.[9]

[9] Even if the setback provisions were identified as an applicable substantive criterion and even if the proposed facility did not comply with the setback, that would not require EFSC to deny the proposal. EFSC may, under ORS 469.504(1)(b)(B), determine that an energy facility does not comply with the applicable substantive criteria but does comply with the applicable statewide planning goals.

Additionally, to the extent that petitioner is arguing that in an EFSC proceeding on an application for a site certificate the setback provisions should not be determined by either the special advisory group or EFSC to be applicable substantive criteria, we reject it. In *Iberdrola* we rejected the county's attempt to designate the adjustment application requirement of the UDC as a mandatory applicable substantive criterion in a proceeding before EFSC. We similarly reject petitioner's attempt to eliminate the setback provisions as potentially applicable substantive criteria in a proceeding before EFSC. As we explained in *Iberdrola*, that determination is left to the special advisory group or to EFSC. *Iberdrola*, slip op 14-15. As we explain here, that determination is also directly appealable to the Supreme Court. ORS 469.504(8).

Finally, we understand petitioner to argue that the setback provisions cannot operate concurrently with an applicant's election under Path B that EFSC determine compliance with the "applicable substantive criteria * * * that are * * * in effect on the date the application is submitted" because (1) rural residences within the two-mile setback are not identified until an application is submitted; and (2) at the time an application is submitted to EFSC it is impossible to identify the applicable substantive criteria. To the extent we understand petitioner's argument, it does not demonstrate that the setback provisions cannot operate concurrently with controlling law.

In addition, we note that ORS 469.504(3) appears to provide a method for resolving any inconsistency between applicable substantive criteria and EFSC rules or siting standards:

> "If compliance with applicable substantive local criteria and applicable statutes and state administrative rules would result in conflicting conditions in the site certificate * * * [EFSC] shall resolve the conflict consistent with the public interest. A resolution may not result in a waiver of any applicable state statute."

Although ORS 469.503(3) and OAR 345-022-0000(3) prohibit EFSC from applying the "consistent with the public interest" test (called the "balancing determination" in OAR 345-022-0000(2)) to *EFSC's* land use standard in OAR 345-022-0030, nothing in ORS 469.504(3) or ORS 469.503(3) prohibits EFSC from resolving a conflict between applicable substantive local criteria and the EFSC land use standard by applying the balancing determination. Stated differently, we understand ORS 469.504(3) to allow EFSC to resolve a conflict between applicable substantive criteria and EFSC's administrative rules "consistent with the public interest."

The seventh assignment of error is denied.

The county's decisions are affirmed.