BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID SETNIKER, JOAN SETNIKER
and ACMPC 2 LLC,
Petitioners,

and

RICKREALL COMMUNITY WATER
ASSOCIATION,
Intervenor-Petitioner,

vs.

POLK COUNTY,
Respondent,

and

CPM DEVELOPMENT CORPORATION,
Intervenor-Respondent.

LUBA No. 2016-072

FINAL OPINION
AND ORDER

Appeal from Polk County.

Zack Mittge, Eugene, filed a petition for review and argued on behalf of petitioners. With him on the brief were William H. Sherlock and Hutchinson Cox.

David C. Noren, Hillsboro, filed a petition for review and argued on behalf of intervenor-petitioner.

Morgan B. Smith, County Counsel, Dallas, filed a joint response brief

and argued on behalf of respondent.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Wallace W. Lien P.C.

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

REMANDED 01/06/2017

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 a county board of commissioners' decision approving comprehensive plan text amendments, a zoning map amendment, and a conditional use permit, to facilitate a mining operation on land zoned exclusive farm use (EFU).

REPLY BRIEF

Petitioners move to file a reply brief to respond to four alleged new matters raised in the respondents' brief, and for permission to file an overlength six-page reply brief.

Intervenor-respondent CPM Development Corporation (CPM) objects that only the first alleged new matter is in fact a "new matter" that authorizes filing a reply brief under OAR 661-010-0039.[1] The second through fourth alleged new matters involve issues raised in the consolidated response brief regarding (1) whether landowners affected by the zone change can withdraw consent to the zone change, (2) whether petitioner ACMPC 2, LLC (ACMPC) is estopped from opposing the zone change, and (3) whether an alternate access road for the mining site, not approved by the county, can be secured. We believe that the disputed issues raised for the first time in the response brief are

[1] OAR 661-010-0039 provides that a reply brief shall be "confined solely to new matters raised in the respondent's brief, state agency brief or amicus brief."

all "new matters" within the meaning of OAR 661-010-0039. The overlength reply brief is allowed.

MOTION TO STRIKE; MOTION TO TAKE OFFICIAL NOTICE

Respondents attached to their brief Appendix D and E, which include several interlocutory rulings from a circuit court judge and an arbitrator, involving pending litigation between CPM and petitioner ACMPC concerning the proposed haul road for the mining operation, which would cross ACMPC's property. Petitioners move to strike the documents in Appendix D and E and associated arguments in the response brief, because the documents are not part of the record and not "decisional law" potentially subject to official notice under Oregon Evidence Code (OEC) 202(1), codified at ORS 40.090.

CPM responds that the interlocutory orders in Appendices D and E are "decisional law" subject to official notice under OEC 202. In addition, after oral argument, CPM filed a motion to take official notice of a subsequent final decision by the arbitrator.

As explained below, we conclude that the rulings by the circuit court and arbitrator in the quiet title suit involve a contractual dispute between some of the parties, and are not controlling with respect to the legal challenges raised against the land use approval that is before us in this appeal. Nonetheless, we agree with CPM that the rulings fall within the scope of "decisional law" potentially subject to official notice, and therefore we shall consider them to the extent they have a bearing on the issues before us.

Petitioners' motion to strike is denied, and CPM's motions for official notice are granted.

FACTS

The challenged decision concerns a proposed 124-acre mining site on what was formerly a 704-acre parent parcel. In 2001, CPM's predecessor-in-interest and the property owners of the parent parcel filed applications for (1) a comprehensive plan text amendment to add the site to the county's inventory of significant mineral and aggregate resources, (2) a zoning map amendment to add a Mineral and Aggregate (MA) overlay zone to the 124-mining site and to an impact area consisting of 212 acres, totaling 336 acres, and (3) a conditional use permit to mine the site. After many delays, the county approved the applications in 2006. That approval was appealed to LUBA, which remanded to correct procedural errors and to address compliance with transportation-related standards. *Rickreall Community Water Assoc. v. Polk County* (*Rickreall*), 53 Or LUBA 76 (2006), *aff'd* 212 Or App 497, 158 P3d 524 (2007).

In 2010, the county conducted remand proceedings and again approved the applications. The 2010 approval was appealed to LUBA, which ultimately remanded the decision to the county to (1) again address certain transportation related standards, (2) adopt the analysis of economic, social, environmental and energy (ESEE) consequences that was prepared by the applicant into the county comprehensive plan, and (3) modify certain conditions of approval. *Setniker v.*

Polk County, 63 Or LUBA 38, *rev'd and rem'd in part*, 244 Or App 618, 260 P3d 800, *rev den*, 351 Or 216, 262 P3d 402 (2011), *on remand* 65 Or LUBA 49, *aff'd* 253 Or App 607, 293 P3d 1091 (2012) (*Setniker*).

In May 2014, the owners of the 704-acre parent parcel sold most of that parcel, excluding the 124-acre mining site, to petitioner ACMPC, which incorporated the land into its nearby agricultural operation. One consequence of that sale is that approximately 122 acres within the impact area surrounding the mining site are now owned by ACMPC. The land now owned by ACMPC includes a dwelling now used to house ACMPC's agricultural workers, and for offices and an employee lunchroom, as well the proposed route of the haul road from the mining site to Highway 51.

On May 15, 2014, CPM requested that the county conduct proceedings on remand, and submitted 300 pages of new material to address the transportation issues outstanding on remand. The new material also modified the applications to eliminate a proposed batch plant, removed a small area from the impact area intended for the batch plant, and modified the ESEE analysis to reflect those changes. Based on a staff recommendation, the board of commissioners determined that the remand hearing would be conducted by the county hearings officer.

The hearings officer conducted a hearing on February 17, 2015, at which ACMPC and four other adjoining owners with property within the impact area proposed to be rezoned to MA submitted a "Notice of Withdrawal of Petition

for a Zone Change Overlay to Mineral Aggregate Designation," along with a survey and legal description. ACMPC argued that the signatories to the withdrawal presently own 59 percent of the land to be rezoned MA, and that under county code the zone change can proceed only if the owners of at least 50 percent of the area to be rezoned petition the county for the rezone.

At the hearing, intervenor-petitioner Rickreall Community Water Association (RCWA) and others argued that only the board of commissioners, and not the hearings officer, had authority under the county code to conduct the remand proceedings. Further, RCWA and others argued that the county should expand the scope of the remand proceedings to include several new circumstances that have changed since the remand. The hearings officer rejected those arguments, and generally limited his review to the three issues remanded in LUBA's *Setniker* decision.

On June 15, 2015, the hearings officer issued a decision recommending approval of the plan text amendment, zone change, and conditional use permit. A year later, on June 15, 2016, the board of commissioners ratified the hearings officer's decision as part of its consent agenda at a public meeting, and adopted Ordinance 16-02 on June 16, 2016. This appeal followed.

ASSIGNMENT OF ERROR (RCWA)
FIRST ASSIGNMENT OF ERROR (PETITIONERS)

RCWA and petitioners (referred to collectively under these assignments of error as "petitioners") argue that the county erred in delegating the remand proceedings on the comprehensive plan text amendment to the hearings officer,

instead of conducting the remand proceedings before the board of commissioners, as petitioners argue is required by ORS 215.060 and Polk County Zoning Ordinance (PCZO) chapter 115. We address both assignments together.

A component of the challenged decision is a comprehensive plan text amendment, which modifies the comprehensive plan to include the subject site on the county's inventory of significant mineral resources, and includes the ESEE analysis supporting the decision to allow mining. Under PCZO chapter 115, which governs comprehensive plan amendments, the plan text amendment must be processed according to the county's procedures for adopting legislative amendments, which include a public hearing before the board of commissioners. *Rickreall*, 53 Or LUBA at 84 (so holding). On remand from *Rickreall*, the county followed the code process for adopting a legislative amendment in PCZO chapter 115. However, as noted, on remand from *Setniker*, 65 Or LUBA 49, the county commissioners accepted a staff recommendation for the hearings officer to conduct the remand proceedings pursuant to PCZO 111.280, which is part of a chapter governing administrative proceedings.

PCZO 111.280 concerns in part "Remand Consideration Procedures" and provides in relevant part that upon receipt of a request to conduct proceedings on remand from LUBA, the board of commissioners shall schedule a public

hearing.[2] However, PCZO 111.280 also provides that "[t]he public hearing, as determined by the Board of Commissioners, will be conducted by either the Hearings Officer or the Board." *See* n 2. If the public hearing is conducted by the hearings officer, PCZO 111.280(C) provides that the hearings officer's decision "shall thereafter be ratified by the Board of Commissioners as part of the Board's Consent agenda." *Id.* The remand process followed PCZO 111.280(C), with the board of commissioners electing to delegate the conduct

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[2] PCZO 111.280 is entitled "Appeal and Remand Consideration Procedures," and provides in relevant part:

> "(B) On receiving an appeal or request by the applicant for reconsideration of a land use application on remand from the Land Use Board of Appeals, the Community Development Department shall deliver to the Board the application and all other documents constituting the entire record of the action under appeal or remand.
>
> "(C) Upon receipt of an appeal filed with the Community Development Department of a decision by the Planning Director or request by the applicant for reconsideration of a land use application on remand from the Land Use Board of Appeals, the Board of Commissioners shall review the matter and thereafter set the matter for a public hearing and cause notice of the time and place of the hearing to be given as provided under Section 111.340. The public hearing, as determined by the Board of Commissioners, will be conducted by either the Hearings Officer or the Board. The decision resulting from this public hearing shall constitute the final county decision. Decisions of the Hearings Officer shall thereafter be ratified by the Board of Commissioners as part of the Board's Consent agenda."

of the required public hearing to the hearings officer, and then ratifying the hearings officer's decision without conducting any public hearing on its own.

Petitioners argue that PCZO 111.280(C) is implicitly limited to remand proceedings on quasi-judicial permit decisions, and that the PCZO includes no provisions allowing the hearings officer to render a final decision on remand of a comprehensive plan text amendment that the code requires be processed under legislative procedures. Even if PCZO 111.280(C) applies, petitioners argue that delegating to the hearings officer to conduct the final public hearing on a comprehensive plan amendment is inconsistent with ORS 215.060, which requires the "governing body" to conduct "one or more public hearings" on actions involving the comprehensive plan.[3] Further, petitioners contend that the delegation to the hearings officer is inconsistent with ORS 215.431, which authorizes a governing body to delegate decision-making authority on comprehensive plan amendments to a hearings officer, except in circumstances

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[3] ORS 215.060 provides:

> "Action by the governing body of a county regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the governing body approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

that involve "lands designated under a statewide planning goal addressing agricultural lands or forestlands."[4] Because the subject property is designated as agricultural land, petitioners argue, the commissioners' delegation to the hearings officer to conduct the public hearing on remand is not authorized by ORS 215.431.

Respondents argue that PCZO 111.280 is not limited to remand of quasi-judicial permit decisions, but can be applied, as the board of commissioners

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[4] ORS 215.431 provides:

> "(1) A county governing body may authorize, by ordinance or order, the planning commission or hearings officer to conduct hearings on applications for plan amendments and to make decisions on such applications.
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> "(2) A decision of the planning commission or hearings officer on a plan amendment may be appealed to the county governing body.
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> "(3) This section shall apply notwithstanding the provisions of ORS 215.050, 215.060 and 215.110.
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> "(4) A decision of a planning commission, hearings officer or county governing body under this section shall comply with the post-acknowledgment procedures set forth in ORS 197.610 to 197.625.
>
> "(5) The provisions of this section shall not apply to:
>
> "(a) Any plan amendment for which an exception is required under ORS 197.732; or
>
> "(b) Any lands designated under a statewide planning goal addressing agricultural lands or forestlands."

implicitly determined here, to decisions that involve comprehensive plan text amendments. With respect to ORS 215.060, respondents argue that that statute does not require that the governing body conduct *all* hearings on actions involving the comprehensive plan, and notes that the board of commissioners has already conducted public hearings in earlier stages of the application process that lead to the commissioners' 2006 and 2010 decisions. Similarly, with respect to ORS 215.431, respondents argue that the statute may prohibit a *complete* delegation to the hearings officer to hold hearings and make the final decision on a plan amendment involving agricultural land, but does not prohibit the process followed here, where the county commissioners conducted some hearings in 2006 and 2010 on the same application, and where the county commissioners ratified the hearings officer's decision on remand in the present appeal.

We agree with respondents that PCZO 111.280 is not limited by its text or context to quasi-judicial proceedings, but appears to apply broadly to any remand proceeding. Further, it is clear from the fact that the board of commissioners applied PCZO 111.280(C) to delegate the conduct of the public hearing to the hearings officer that the commissioners do not share RCWA's view that PCZO 111.280 is limited to quasi-judicial permit decisions. RCWA has not established that PCZO 111.280, read in context with PCZO chapter 115, must be interpreted to be limited to remand proceedings on quasi-judicial permit decisions, and to exclude all comprehensive plan amendment decisions.

Whether PCZO 111.280 as applied in the present case is consistent with ORS 215.060 and 215.431 is more problematic. In *Colwell v. Washington Co.*, 79 Or App 82, 718 P2d 747 (1986), the Court interpreted ORS 215.060, among other statutes, to require the county governing body to conduct a public hearing and make the final decision on a comprehensive plan amendment.[5] ORS 215.431 was adopted the following year, in 1987, and it was likely intended to partially limit *Colwell*, and provide for some circumstances where the governing body can delegate to a hearings officer the conduct of hearings on plan amendments, as well as the authority to render a final decision on such amendments.

However, the present case involves a comprehensive plan amendment regarding agricultural land, and the present circumstance is not one where ORS 215.431 authorizes the county to delegate the conduct of hearings and the authority to render a final decision on the plan amendment. ORS 215.431(5)(b). Nonetheless, respondents argue that the county's proceedings did not violate ORS 215.060 or ORS 215.431 because (1) the county commissioners conducted multiple public hearings in 2006 and 2010, and (2) the commissioners exercised sufficient final decision-making authority over the

[5] In *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405, 413-15 (2016), we extended the reasoning in *Colwell* to apply also to a city governing body's obligation to conduct a hearing on a comprehensive plan amendment, under statutes that apply to cities.

plan amendment when it "ratified" the hearings officer's decision pursuant to PCZO 111.280(C).

We disagree with respondents on both points. If the proposed comprehensive plan amendment were unchanged between the commissioners' last hearing in 2010 and the final 2016 decision, one could argue that a final hearing before the board of commissioners is not required. However, RCWA argues, and respondents do not dispute, that in the most recent remand proceedings CPM modified the application to remove a proposed batch plant, which entailed modifications to the map and text amendments, including the ESEE analysis incorporated into the county's comprehensive plan. ORS 215.060 requires the governing body to hold at least one public hearing on a plan amendment. A related statute, ORS 215.050, obligates the governing body to approve revisions to the comprehensive plan. Read together, it is clear that the governing body must approve a comprehensive plan amendment after holding a hearing on the comprehensive plan amendment. In the present case, the county commissioners held no hearing or substantive review over the modifications proposed on remand.

ORS 215.431 authorizes the county, in certain circumstances, to delegate to the hearings officer the duty to conduct hearings and render a final decision on a plan amendment. Read together with ORS 215.050 and 215.060, it is clear that where ORS 215.431(1) does not operate, the governing body cannot

delegate to the hearings officer the conduct of hearings and the county's final decision on a plan amendment, as PCZO 111.060 expressly purports to do.

To the same effect, in *Young v. Douglas County*, 31 Or LUBA 545 (1996), LUBA held that the governing body's final decision on a plan amendment must be more than a pro forma ratification. In *Young*, the county processed a plan amendment involving a goal exception (and thus a circumstance where ORS 215.431(1) does not apply) pursuant to a code provision that provided for the planning commission to render the county's final decision, if no appeal is filed to the governing body. No local appeal was filed, and the governing body's only apparent role was to ministerially adopt the ordinance necessary to implement the planning commission's final decision, without conducting a public hearing. We concluded that the governing body's subsequent action in adopting the ordinance to implement the planning commission's final decision was merely "pro forma," and that ORS 215.050 and 215.060 require more than a forced "yes" from the governing body. *Id.* at 549-50.

In the present case, PCZO 111.280(C) provides that the decision resulting from a public hearing before the hearings officer "shall constitute the final county decision," and that "[d]ecisions of the Hearings Officer shall thereafter be ratified by the Board of Commissioners as part of the Board's Consent agenda." Unlike the code provision at issue in *Young*, PCZO 111.280(C) does not provide even for the possibility of a local appeal or a

public hearing by the board of commissioners. Respondents argue that "ratification" under PCZO 111.280(C) is not inconsistent with some degree of review and actual decision-making. Even if PCZO 111.280(C) could be interpreted to that effect, however, in the present case the commissioners conducted no substantive review. The ratification occurred as part of the consent agenda at the commissioners' June 15, 2016 public meeting, at which staff advised the commissioners that "the Hearings Officer's decision constitutes the final local decision and shall be ratified by the Board of Commissioners." Record 102. Nothing in the record suggests that the commissioners in the present case rendered anything more than a pro forma decision on the plan amendment, if not a forced "yes." We agree with petitioners that the county's application of PCZO 111.280(C) in the present case is inconsistent with the county's obligations under ORS 215.060, read in context with ORS 215.431.

Finally, respondents argue that any violation of ORS 215.060 is procedural in nature, and that under ORS 197.835(9)(a)(B) procedural error provides a basis for reversal or remand only if the error prejudiced the substantial rights of the petitioner. Respondents argue that the inability to participate in a final public hearing before the board of commissioners or have the commissioners render the county's final decision did not prejudice any petitioner's substantial rights, all of whom had a full opportunity to participate in the proceedings before the hearings officer. However, violations of ORS

215.060 have the consequence of rendering the plan amendment without legal effect, and thus no showing of prejudice to substantial rights is required. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508, 513 (1993).

In sum, we agree with petitioners that remand is necessary for the board of commissioners to adopt the county's final decision on the proposed plan amendment, after conducting the final public hearing.

RCWA's assignment of error is sustained; petitioners' first assignment of error is sustained in part.[6]

SECOND ASSIGNMENT OF ERROR (PETITIONERS)

As noted, in May 2014, the then-owner of the 704-acre parent parcel, McKay, sold most of that property to petitioner ACMPC, which incorporated it into a much larger nearby farm operation. The property sold to ACMPC included approximately 122 acres of land within the impact boundary that was

[6] Petitioners' first assignment of error also includes arguments that the county erred in refusing to address three new issues that could not have been raised during earlier proceedings: (1) the May 2014 withdrawal of the petition for zone change, (2) the location of new dust-sensitive agricultural uses within the impact area, and (3) the inability to obtain an easement from ACMPC for the haul road needed for the mining site to access Highway 51. All three issues have the same genesis: the fact that in May 2014 petitioner ACMPC acquired much of the land within the impact area to be rezoned MA for its agricultural operation, and over which the proposed haul road to Highway 51 would be located. Petitioners' second, third and fourth assignments of error concern the merits of these same three issues. We address under those assignments of error the parties' dispute regarding whether the county erred in refusing to consider these three new issues on remand.

proposed to be rezoned MA. McKay retained ownership of the 124-acre mining site.

During the proceedings before the hearings officer, the owners of approximately 198.8 acres within the impact area that would be rezoned MA, representing 59 percent of the property to be rezoned, filed a document entitled "Notice of Withdrawal of Petition for A Zone Change Overlay to Mineral Aggregate Designation." Petitioners argued to the hearings officer that because a majority of property owners subject to the proposed zone change effectively withdrew their consent, the county thereby lost jurisdiction to proceed on the zone change application. Record 722-32. The hearings officer's findings did not address this issue.

On appeal, petitioners argue that LUBA has long held that withdrawal of a land use application at any point prior to reaching a final decision deprives the local government of jurisdiction to approve the application. *Grabhorn v. Washington County*, 50 Or LUBA 344, 351 (2005); *Witzel v. Harney Co.*, 34 Or LUBA 433, 436 (1998); *Torgeson v. City of Canby*, 19 Or LUBA 214, 219 (1990); *Randall v. City of Wilsonville*, 8 Or LUBA 185, 189-90 (1983). Further, petitioners argue that the same principle applies when the application is withdrawn on remand. *See Jacobsen v. Douglas County*, 62 Or LUBA 461, 463-64 (2010) (after voluntary remand of a decision, withdrawal of the application deprives the local government of jurisdiction). Petitioners contend that the county's code requires that a zone change application be supported by

a petition signed by the owners of at least 50 percent of the area to be rezoned, and that the withdrawal of that petition in May 2014 meant that the county was thereafter deprived of jurisdiction to proceed on the zone change application.

As petitioners argue, PCZO 111.160 provides that a quasi-judicial zone change may be initiated by the owners (or contract purchasers) of the property within the area to be rezoned, by filing a petition within 45 days prior to the date of the hearing.[7] The petition must be signed by "the owners of at least 50 percent of the area of the property sought to be reclassified[.]"

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[7] PCZO 111.160 provides:

> "INITIATION OF ZONE CHANGE. Property owners, or persons purchasing property under contract, if they state in writing that they are purchasing the property under contract, may file a zone change petition. The petition shall be in writing on forms provided by the Planning Director and shall be filed with the Planning Director not less than 45 days prior to the date of the hearing. The petition shall contain the following information:
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> "(A) The present zone;
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> "(B) The proposed zone;
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> "(C) The street address, or where none exists, the location of the property;
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> "(D) The legal description of the property sought to be reclassified;
>
> "(E) The names, addresses and zip codes of the owner(s) of the property sought to be reclassified; and
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> "(F) The signatures of the owners of at least 50 percent of the area of the property sought to be reclassified and the extent

PCZO 111.180 provides that after the petition is filed planning staff must "check the petition and determine if the petition is complete under the provisions of Section 111.170," and if so schedule the application for a hearing.[8] PCZO 111.170 sets out detailed rules for counting signatures to determine if the 50 percent requirement at PCZO 111.160(F) is met.[9]

> or percentage of interest or portion of the property as may be owned by the person signing the petition."

[8] PCZO 111.180 provides:

> "FILING AND CHECKING PETITION. After the complete zone change petition has been filed with the Planning Director, the staff shall check the petition and determine if the petition is complete under the provisions of Section 111.170, and if the petition is sufficient, the Planning Director shall then fix the time of the hearing on such petition before the Planning Commission or Hearings Officer and cause notice of hearing to be given as provided in Sections 111.340 through 111.370."

[9] PCZO 111.170 provides, in relevant part:

> "ZONE CHANGE SIGNATURES: HOW COUNTED. Pursuant to Section 111.160 (F), the following rules shall apply:
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> "(A) Tenants in Common. When but one tenant in common, or several but less than all, signs a zone change petition or waiver it shall be counted only for such interest or portion of the common property as the person or persons signing may own.
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> "(B) Tenants by the Entirety; Joint Tenancy. Where property is owned by a husband and wife as tenants by the entirety and only one of them signs, he or she shall be deemed the owner of 1/2 of the property and shall be counted accordingly. * * *.

Respondents do not dispute that this issue was raised during the proceedings on remand, or that the record accurately reflects that the owners of 59 percent of the area to be rezoned have now withdrawn consent to the zone change application. However, respondents argue for three reasons that this assignment of error should be denied.

First, respondents argue that this issue was not within the limited scope of LUBA's remand in *Setniker*, and the county was under no obligation to expand the scope of the remand proceedings to include this issue, citing *Beck v.*

> "(C) Purchasers Under Contract. Any person purchasing property under a contract of sale may sign a petition, waiver, or other instrument required by this ordinance, as owner, provided that he states he is purchasing the property under contact.
>
> "(D) Government Property * * *
>
> "(E) Corporations. Where property is owned by a private corporation, a petition, waiver, or other instrument convening such property under this ordinance shall be signed by an authorized officer of the corporation.
>
> "(F) Prima Facie Proof of Ownership. When any person signs as the owner of property or as an officer of a public or private corporation owning the property, or as an attorney in fact or agent of any such owner, or when any person states that he is buying the property under contract, the Hearings Officer and the governing body may accept such statements to be true, unless the contrary be approved, and except where otherwise in this ordinance more definite and complete proof is required, the Hearings Officer or governing body may demand proof that the signer is such owner, officer, attorney in fact, or agent."

City of Tillamook, 313 Or 148, 831 P2d 678 (1992). Under *Beck*, issues resolved on appeal, or that could have been raised and resolved at earlier stages of an appeal proceeding, cannot be revisited or raised on remand or at later stages of appellate review.[10]

However, petitioners argue that *Beck* does not preclude parties from raising on remand, or the local government from addressing, new issues that by their nature or timing could not have been raised during earlier stages of the proceedings. *Schatz v. City of Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992); *Prineville Properties, Inc. v. City of Prineville*, 32 Or LUBA 139, 143 (1996), *aff'd* 146 Or App 247, 930 P2d 903 (1997). According to petitioners, the hearings officer conducted the remand proceedings under the apparent belief that he was precluded from addressing new issues that could not have been raised during earlier stages. Moreover, petitioners argue that the issue raised in the second assignment of error presents a fundamental jurisdictional issue: whether the withdrawal of the zone change application deprived the county of jurisdiction over the application. We understand petitioners to argue that the county is obliged to address issues raised on remand regarding the

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[10] The *Beck* law of the case doctrine applies only to quasi-judicial decisions and does not apply to legislative decisions. *Hatley v. Umatilla County*, 256 Or App 91, 112, 301 P3d 920, *rev den* 353 Or 867, 306 P3d 639 (2013). Because no party argues otherwise, we assume that the challenged decision is a quasi-judicial decision for purposes of *Beck*, notwithstanding that the PCZO requires that the comprehensive plan text amendment component of the decision be processed under procedures for legislative decisions.

county's jurisdiction, even if that issue is not within the scope of LUBA's remand.

We agree with petitioners. While a local government generally may not be required to expand the scope of remand to include new issues that could not have been raised before, we believe that an exception to that general rule should apply to new issues that concern the ongoing jurisdiction of the local government to continue processing the application. Jurisdictional issues are fundamentally different from other types of issues. Timing and preservation constraints generally do not limit consideration of jurisdiction, at least before LUBA. *See Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997) (LUBA is obligated to examine its jurisdiction *sua sponte*, regardless of whether the issue is raised by the parties), citing *Springer v. Gollyhorn*, 146 Or App 389, 393, 934 P2d 501 (1997), and *Lyke v. Lane County*, 70 Or App 82, 84, 688 P2d 411 (1984)). In our view, the county has a similar obligation on remand from LUBA, and cannot simply ignore a challenge to its continued jurisdiction over the application, once such a challenge is fairly raised below.

Next, respondents argue that this issue does not provide a basis for reversal or remand, because ACMPC is bound by the development agreement signed by a preceding property owner to cooperate in the filing of the applications needed for the proposed mining operation. We understand respondents to argue that even though the development agreement is a contract personal to its signatories, ACMPC as the succeeding property owner is

contractually bound to cooperate in the filing of the zone change application, and would breach that contractual obligation if it withdraws its consent to the zone change petition. Respondents note that in the pending litigation between ACMPC and CPM, the arbitrator has concluded that ACMPC is bound by at least some aspects of the development agreement.

The short answer to that argument is that even if ACMPC is deemed to be a party to the contract or otherwise bound by its obligations, ACMPC always has the option of deviating from a contractual obligation. While there may be financial consequences to such a course of action, if it is ruled to be a breach of its contractual obligations, that does not mean ACMPC's signature on the notice of withdrawal of the petition, along with the signatures of other opposing property owners whose property would be rezoned, is not effective at withdrawing the petition.

Finally, respondents argue that on the merits PCZO 111.060 should be interpreted to the effect that the consent of affected property owners is fixed as of the date of the application, and cannot be revoked afterward. According to respondents, the PCZO lacks any provision authorizing the withdrawal of landowner consent once it is given. Respondents also argue that even if PCZO includes implicit authority to withdraw a petition, such authority is limited to the original owner, and does not extend to subsequent purchasers.

Respondents are correct that PCZO chapter 111 does not include express provisions for the withdrawal of the petition required by PCZO 111.160;

however, neither does it state or suggest that a petition, once filed, cannot be withdrawn. Under respondents' proposed interpretation—that the petition is effective forevermore on the date it is filed and can never be withdrawn—that interpretation would apparently prevent withdrawal of any zone change application, even in circumstances where only one property and one owner is involved, and the applicant no longer wishes to rezone the property. Such an interpretation has no support in any code language cited to us, and seems contrary to *Grabhorn* and the other cases cited above. In addition, respondents cite nothing in the PCZO or elsewhere suggesting that a subsequent purchaser has any less ability to withdraw a pending land use application for their property than the original owner/applicant.

Nonetheless, we need not try to interpret the PCZO in the first instance, or speculate on the how the PCZO can be interpreted to address the situation where a majority of property owners withdraw a pending zone change petition. As explained earlier remand is necessary in any event for the board of commissioners to conduct a final hearing and render a final decision on the applications. *See Green v. Douglas County*, 245 Or App 430, 441, 263 P3d 355 (2011) (where the decision must be remanded to the governing body in any event, LUBA should not exercise its authority under ORS 197.829(2) to interpret ambiguous code provisions in the first instance, but allow the governing body to do so). As part of that remand proceeding, the county must

consider this jurisdictional issue in the first instance, and determine the consequences of the withdrawn zone change petition.

The second assignment of error (petitioners) is sustained.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the county erred in approving a plan amendment, zone change, and conditions of approval that are predicated on the mining site using a specific haul route to Highway 51, a haul route that petitioners argue became unavailable in 2014, when petitioner ACPMC acquired much of the land over which the approved haul road would run. Petitioners argue that there is no recorded easement or other legal requirement for ACPMC to allow the haul road on its property and, based on the quiet title suit ACMPC filed in circuit court, it is clear that ACMPC does not intend to provide CPM the easement necessary to construct the haul road.

Respondents argue that this issue is not within the limited scope of LUBA's remand. Anticipating this position, petitioners argue that LUBA's remand included several transportation related issues concerning compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060. According to petitioners, the location of the haul road and its access to Highway 51 is an integral component of the findings addressing compliance with the TPR, as well as other standards, and therefore new issues regarding the feasibility of the haul road, that could not have been raised before, can be raised on remand.

Petitioners appear to be correct that a number of findings addressing compliance with the TPR, among other standards, as well as the traffic studies and evidence regarding transportation impacts on various intersections, are predicated on the existence of the haul road over ACMPC's property, and the road's proposed and approved location and access point to Highway 51. If the easement required for that haul road route and access point is no longer available, then a key element for the county's findings regarding compliance with the TPR and other standards is undermined. For example, calculation of traffic counts for impacted intersections, which is one of the issues remanded in *Setniker*, are presumably based in part on the location and access point for the haul road. If the proposed haul road is unavailable, and the haul road must be relocated to a different location and a different access point to the surrounding transportation system, that may significantly impact nearby transportation facilities.[11]

Under these circumstances, we agree with petitioners that the scope of remand includes consideration of this new issue, at least to the extent necessary for the county to determine that the conditions imposed are sufficient to ensure either that the required and approved access will be in place or, if alternative

[11] Apparently, the haul road to Highway 51 was proposed as an alternative to the shorter access route to Halls Ferry Road to the south, in order to avoid impacts on agricultural vehicles and equipment using Halls Ferry Road. A condition of approval prohibits using Halls Ferry Road.

access may be necessary, that alternative access is subject to appropriate review and approval.

The hearings officer did not consider this issue or any other new issue, under the apparent belief that remand was strictly limited to the remand issues identified in *Setniker*. For the following reason, we conclude that this issue is properly within the scope of LUBA's remand on transportation-related issues.

Even if this issue is not deemed to fall within the scope of remand, as noted the county has the option on remand of expanding the scope of remand to include new issues that could not have been raised in earlier proceedings. The hearings officer acknowledged that option, but indicated that he was constrained by LUBA's remand and the commissioners' delegation to address only the three issues remanded in *Setniker*. *See* Record 11 (stating that the hearings officer lacks authority to expand the scope of remand absent "plain and explicit language" providing that authority). Petitioners argue, however, that nothing in LUBA's remand or the commissioners' delegation to the hearings officer suggests an intent to constrain the hearings officer from expanding the scope of remand to consider issues that could not have been raised during earlier proceedings.

We generally agree with petitioners. Certainly, nothing in LUBA's remand suggested an intent to limit the scope of remand, and nothing cited to us in the brief proceedings in which the county delegated the remand proceedings and final decision to the hearings officer suggests that intent. As

far as we can tell, the hearings officer's belief that "plain and explicit" authority is necessary to expand the scope of remand to consider a new issue, such as the present unavailability of an access road on which much of the application and decision is predicated, has no basis in any statute, rule or code provision cited to us.

Accordingly, we agree with petitioners that remand is necessary for the county to consider this issue in the first instance.

The third assignment of error (petitioners) is sustained.

FOURTH ASSIGNMENT OF ERROR (PETITIONERS)

The fourth assignment of error concerns another circumstance that has changed since LUBA's remand in 2012: the development of new agricultural uses on land ACMPC acquired in 2014.

After acquiring land within the impact area in 2014, ACMPC planted "no wash" blueberry crops as part of its larger agricultural operation. Petitioners cite to evidence that the blueberry crop cannot be washed without destroying the crop, and cannot be sold coated with dust, citing estimated losses of millions of dollars if the mining operation commences. In addition, ACMPC's new property includes an existing dwelling, which ACMPC now uses to provide housing, offices and a lunchroom for its agricultural workers. The county's original decision had required the applicants to sign and record a waiver of remonstrance limiting redress for mining impacts within the impact area owned by the applicants, including the dwelling and its occupants.

However, no waiver of remonstrance was recorded, and ACMPC now refuses to execute one. In addition, ACMPC dug new groundwater wells within a few hundred feet of the mining site to support its agricultural operations, and cites to evidence that the mining operation would harm its new wells. Petitioners also note that the county's decision requires CPM to dig monitoring wells to evaluate mining impacts on RCWA's water wells, but that the monitoring wells would be located on ACMPC's property, which is now unavailable to CPM.

Under the fourth assignment of error, petitioners argue that the hearings officer erred in failing to address new issues raised regarding conflicts between proposed mining and new agricultural uses within the impact area. Petitioners argue that the issues raised regarding these changed circumstances are relevant to one of the three remand issues identified by LUBA: to adopt the ESEE analysis, as modified by the changes CPM proposed on remand. As noted, the hearings officer did not address these changed circumstances, under the apparent belief that remand was strictly limited as a matter of law to the three issues identified in LUBA's remand.

Respondents argue that the ESEE remand issue was merely a technical one of adopting the ESEE analysis into the comprehensive plan, and neither that remand issue nor the modest changes to the ESEE analysis proposed on remand involving the batch plant should open the door for petitioners to raise new issues based on changed circumstances arising from their acquisition of land in and near the impact area.

We agree with respondents that LUBA's remand for the county to adopt the ESEE analysis into its comprehensive plan was a limited, technical remand, simply to correct the county's oversight during the last remand proceeding in failing to re-adopt the ESEE analysis. Such a narrow, technical remand does not require reexamination of any aspect of the ESEE analysis, and we do not believe that based on such a remand a party is entitled to challenge the adequacy of the ESEE analysis, based on new conflicts that the party argues should be evaluated and weighed against other considerations in the ESEE analysis, to reach the ultimate determination whether the mining use should be allowed. The parties on remand *were* entitled to raise new issues regarding the proposed modifications to the ESEE analysis, and had an opportunity to do so, but those modifications involved only the proposed batch plant, and the new issues based on changed circumstances petitioners now seek to raise have nothing to do with the batch plant.

As noted above, the county has the option of considering new issues on remand that could not have been raised in prior proceedings. Because the decision must be remanded for other reasons, on remand the county may choose, if it likes, whether or not to expand the scope of remand to consider the issues raised in the fourth assignment of error. However, for present purposes, petitioners have not established that they were *entitled* to raise new issues regarding mining impacts on new agricultural uses, or that the county was *obligated* to reweigh the evidence establishing compliance with approval

standards that concern mitigation of conflicts between mining uses and nearby agricultural uses, based on the new agricultural uses within the impact area.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

On remand, the county re-imposed five conditions of approval, A, F, M, Q and V, that in various ways relate to activities that affect lands now owned by ACMPC. Petitioners argue that each of the five conditions is no longer feasible, or sufficient to ensure compliance with the applicable approval criteria, due to the changed circumstances within the impact area.

Condition A requires that the applicant sign and record a waiver of remonstrance stating that the owner of the dwelling within the impact areas shall indemnify the county and the mining operator against any costs arising out of a remonstrance proceeding. No such waiver was recorded prior to ACMPC's acquisition.

Condition F requires the operator to install monitoring wells near the extraction site, between the site and RCWA's wells, to monitor against contamination of RCWA's wells. Petitioners contend that Condition F is no longer feasible, because the proposed monitoring wells would be located on land now owned by ACMPC, which will not grant permission.

Condition M requires the mining operator to mine the site using wet methods rather than dewatering. Petitioners argue that this condition is no

longer feasible, citing to evidence that wet mining would effectively dewater ACMPC's new wells.

Condition Q requires the mining operation to conform to applicable county and state environmental regulations. Petitioners argue that Condition Q is no longer feasible, as the mining operation as approved would contaminate groundwater, deposit fugitive dust on the adjoining ACMPC property, and cause impermissible levels of noise impacts that previously were mitigated by proposed waivers and encumbrances that are no longer available, given ACMPC's acquisition of land within the impact area.

Condition V sets extended hours of operation for various mining activities, including blasting, drilling, crushing, stockpiling/delivery, and maintenance operations. Petitioners contend that the extended hours were predicated on the absence of non-applicant-owned noise sensitive uses (e.g., the dwelling now owned by ACMPC), and without that predicate the extended hours cannot be justified.

As with the similar arguments under the fourth assignment of error, petitioners have not established that the county was *obligated* on remand to address the feasibility of these five conditions of approval, given the changed circumstances stemming from ACMPC's acquisition of land and dwelling within the impact areas. As explained, *Beck* does not bar the county from expanding the scope of remand to include issues that could not have been

raised during earlier stages of the appeal. But nothing cited to us in the PCZO or elsewhere obligates the county to do so.

That said, we tend to agree with petitioners that a prudent decision maker might at least consider expanding the scope of remand to include a review of the sufficiency of conditions that were predicated on particular circumstances formerly within the applicants' control that have now changed, such that the circumstances are no longer within the applicants' control.

A good example is Condition A, which is predicated on the applicants' ownership or control of land within the impact area on which the dwelling is located, in order to provide the required waiver of remonstrance. ACMPC's acquisition of that land and dwelling now makes it unlikely that the required waiver of remonstrance will be executed and recorded. Condition A requires the waiver to be recorded prior to commencement of the mining operation, so a decision maker might decide that, as written, Condition A is sufficient to ensure that, if the requirement to record a waiver of remonstrance cannot be satisfied prior to commencing the mining operation, the applicant will have to return to the county to modify or eliminate the condition, or seek approval of an alternative method to satisfy the approval criterion that requires the waiver of remonstrance. If so, the decision maker might choose to leave Condition A unchanged. However, a decision maker might also decide for the sake of efficiency to proactively address the issue before issuing the final decision on remand, and in that proceeding modify or eliminate the condition, or approve

an alternative, or take other steps to ensure the condition still functions to ensure consistency with the approval criterion at issue. We are aware of no impediment for doing so.

As with the fourth assignment of error, on remand the county may choose whether or not to expand the scope of remand to include the sufficiency of some or all of the cited conditions of approval. However, as explained, petitioners have not established that the county is obligated to do so.

The fifth assignment of error is denied.

The county's decision is remanded.