

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4                                   BARRY J. BUTCHER,  
5                                                 *Petitioner,*  
6

7                                                         vs.  
8

9                                   WASHINGTON COUNTY,  
10                                                 *Respondent.*  
11

12                                                         LUBA No. 2012-001  
13

14                                                         FINAL OPINION  
15                                                         AND ORDER  
16

17                                   Appeal from Washington County.  
18

19                                   Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf  
20 of petitioner.  
21

22                                   No appearance by Washington County.  
23

24                                   RYAN, Board Chair; HOLSTUN, Board Member, participated in the decision.  
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26                                   BASSHAM, Board Member, did not participate in the decision.  
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28                                                         REMANDED                                   05/11/2012  
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30                                   You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the county hearings officer approving a special use review permit to operate a dog kennel.

**FACTS**

The subject property is a 5.78-acre parcel zoned Agricultural-Forestry 5 (AF-5) that contains a residence located in the northern portion of the property, barns that are used as dog kennel buildings located on the western portion of the property, and an office. The existing barns/kennel buildings are located approximately 15 feet from the west property line, 85 feet within the 100 foot minimum yard area setback for a kennel provided by Washington County Community Development Code (CDC) 430-73.2. An existing 135' by 120' outdoor fenced area with dog runs is located to the east of the existing kennel building in the center of the property. Record 433. Evergreen trees are present on the northerly 2/3 of the subject property along the eastern property line, and the southern one-third of the property is pasture. Record 325.

For several years, the applicant, Reynolds Kennels, operated a dog kennel operation on the property. In 2011, the applicant applied for special use review to obtain a permit to operate the kennel operation on the property.<sup>1</sup> The applicant proposes to construct a new 32' by 96' feet kennel building to the east of the existing fenced outdoor area containing dog runs, approximately 103 feet from the eastern property line, and to convert the existing barns that have been used for boarding dogs to storage, shop and barn uses. During the proceedings below, the applicant submitted testimony that the existing kennel operation averaged approximately 40 dogs per day during the summer of 2010, and housed 48 dogs

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<sup>1</sup> Dog kennels are subject to a special use review in the AF-5 zone. CDC 348-4.1(K).

1 three different times during the summer prior to the application being submitted. Other  
2 testimony from the applicant described averaging 8 to 10 dogs per day.

3 Petitioner owns the property directly west of the subject property and the residence on  
4 that property is located near its eastern property line. The other properties adjacent to the  
5 subject property to the east, south and southwest are also in residential use. The hearings  
6 officer held a hearing on the application and approved the application with conditions. This  
7 appeal followed.

### 8 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

9 During the proceedings before the hearings officer, neighbors of the kennel voiced  
10 their concerns about the incompatibility of the kennel operation with surrounding residential  
11 uses due to noise from dogs barking. Two CDC criteria are relevant to the noise issue. One,  
12 CDC 423-6, requires that “[a]ll development shall comply with the State Department of  
13 Environmental Quality Standards relating to noise. Demonstration of compliance may be  
14 required by the Review Authority.” OAR chapter 340, division 35 is the Department of  
15 Environmental Quality’s (DEQ’s) “Noise Control Regulations.” For purposes of this appeal  
16 the applicable DEQ noise regulation is the one that applies to new industrial and commercial  
17 noise sources. That regulation provides that such facilities may not “increase the ambient  
18 statistical noise levels, L10 or L50, by more than 10 dBA [decibels] in any one hour \* \* \*.”  
19 OAR 340-035-0035(1)(b)(B)(i). The second criterion that is relevant to the noise issue, CDC  
20 348-4.2(A), is discussed below.

21 Neighbors of the proposed kennel submitted into the record a report from a registered  
22 acoustical engineer that projected noise levels on the property directly to the east of the  
23 subject property from dogs barking on the subject property. Record 315-317. The report  
24 explains that the engineer measured ambient noise levels on the property directly to the east  
25 of the subject property during the time when he predicted that ambient noise levels would be  
26 highest due to the property’s proximity to I-5, and then projected the noise level over that

1 ambient noise level that would occur from dogs barking, based on data from measurements  
2 taken at another dog kennel facility. He concluded that projected noise levels at that property  
3 from dogs barking outside at a distance of 70 to 100 feet from the place he took his  
4 measurements could exceed the maximum allowable noise levels under OAR 340-035-  
5 0035(1)(b)(i) during the hours when the ambient noise level was likely to be highest. Record  
6 317.

7 The hearings officer relied on the engineer's report submitted by neighbors of the  
8 kennel to conclude that it is feasible for the proposed kennel operation to meet the DEQ noise  
9 standard:

10 “\* \* \* The Hearings Officer finds that based on sound measurements that took  
11 into account the ambient noise in the area, were made at the subject property  
12 and not at some other location, and were measured as being within DEQ limits  
13 are persuasive of the feasibility that the subject property as improved by the  
14 proposed application can meet the DEQ noise limits that apply \* \* \*. The fact  
15 that a barking dog can emit sounds exceeding DEQ limits does not establish  
16 that the noise emanating from the subject property will violate those standards  
17 at any given time. \* \* \*.” Record 26.

18 The hearings officer concluded that the applicant had demonstrated that noise from the  
19 kennel operations could satisfy CDC 423-6 and applicable DEQ noise standards:

20 “\* \* \* The applicant has noted several different methods utilized to keep the  
21 barking of dogs within code standard. These methods include sound-proofing  
22 the kennel building; providing at least three play times a day so that dogs will  
23 sleep when inside; employees are out with the dogs at play time; screening the  
24 arrival of new dogs from dogs already at the site; and the use of barking  
25 sensors in the outdoor play area. The requirement of a 100 foot setback from  
26 the property line increases the chances of containing noise.” Record 25.

27 In his third assignment of error, petitioner argues that the hearings officer's decision  
28 that it is feasible for the kennel operation to comply with the county's noise standard is not  
29 supported by substantial evidence in the record. According to petitioner, the only evidence in  
30 the record regarding whether noise levels from the proposed kennel will meet CDC 423-6 is  
31 the engineer's report submitted by neighbors of the kennel, and the hearings officer's

1 conclusion that the report supports a finding that it is feasible to comply with the standard is  
2 simply inconsistent with the report's conclusion. Petitioner also argues that the hearing's  
3 officer's finding that it is feasible to meet the standard with respect to the noise generated  
4 from the proposed new building because it will be "sound proofed" is not supported by  
5 evidence in the record, where there is no evidence in the record regarding projected noise  
6 levels within the new building and there is no condition of approval that requires sound  
7 proofing in the new building.

8 We agree with petitioner that the engineer's report is not substantial evidence that  
9 CDC 423-6 can be met, at least with respect to noise generated from dogs barking outside in  
10 the fenced dog run area. The report concludes:

11 " \* \* \* [D]ogs barking at the proposed \* \* \* [k]ennel facility could radiate  
12 sound levels as high as 64 dBA to a point [within] 25 feet of the \* \* \*  
13 residence [directly to the east of the subject property] (a point located  
14 approximately 250 feet away from the dog play area). Given the fact that  
15 there is a potential that dogs barking in the kennel play area could cause sound  
16 levels to exceed the hourly L10 noise level limit of 60 dBA and the hourly  
17 noise level limits at the property directly to the east of the subject property], it  
18 is imperative that a more thorough analysis be made of the proposed noise  
19 mitigation measures being proposed by the County and applicant before a  
20 final conclusion is made. Without that analysis, there is no way to say for  
21 sure that the noise radiating from the \* \* \* [k]ennels will be in compliance  
22 with the DEQ noise regulation limits." Record 317.

23 There does not appear to be anything in the record that either projects noise levels from the  
24 kennel operation or rebuts the conclusions in the engineer's report that noise from dogs  
25 barking in the outdoor kennel play area could exceed the DEQ hourly noise level limits on  
26 the property directly to the east. Moreover, the proposed dog management methods that the  
27 hearings officer relied on in part to find that it is feasible to meet CDC 423-6 do not provide  
28 any evidence about the sound level created from dogs barking. Rather they are measures that  
29 could reduce the noise that is produced by the kennel operation, through employee

1 management of the dogs and barking sensors. But those measures, alone, are not sufficient to  
2 establish that the specific noise levels in applicable DEQ standards can be met.

3 We also agree with petitioner that there is not substantial evidence in the record to  
4 support the hearings officer's conclusion that it is feasible to satisfy CDC 423-6 with respect  
5 to noise levels generated by dogs barking when they are inside the new kennel building.  
6 There is no evidence in the record regarding the expected noise levels from dogs barking  
7 when they are inside the new kennel building, and there is no condition of approval that  
8 requires any particular level of sound-proofing of the new kennel building and therefore no  
9 way to know what the resulting sound levels may be.<sup>2</sup>

10 The second criterion that is relevant to the noise issue is CDC 348-4.2(A), which  
11 requires that for a conditional use in the AF-5 zone, the county must determine whether:

12 "The requested use is compatible with the surrounding uses or may be made  
13 more compatible through conditions of approval."<sup>3</sup>

14 With respect to CDC 348-4.2(A), the hearings officer concluded:

15 "[W]ith the insulated interior walls of the new kennel building and the care  
16 taken by the applicant to keep the dogs from barking while outdoors, *noise*  
17 *will be kept to the code standard, which is outlined in detail further in this*  
18 *Final Order*. The applicant has taken precautions to screen the area of arrival  
19 for new dogs, which can generate barking. The small plots of evergreen trees  
20 within the site can somewhat deflect the sound of barking that may take place.  
21 Trees will not stop noise but can aid in it being muffled." Record 22  
22 (emphasis added.)

23 Petitioner challenges the hearings officer's findings that the kennel operation is  
24 "compatible with surrounding uses" under CDC 348.4-2(A). According to petitioner, the

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<sup>2</sup> The record includes testimony that the new building will contain R-19 insulation but the record does not contain any evidence regarding sound proofing characteristics of that type of insulation or what the impact of that particular level of insulation might be on the noise from the kennel building.

<sup>3</sup> CDC 106-37 defines "compatible" as "[c]apable of existing together in harmony; capable of orderly, efficient integration and operation with other elements in a system considering building orientation, privacy, lot size, buffering, access, and circulation."

1 hearings officer misconstrued CDC 348.4-2(A) when she found that it is met where CDC  
2 432-6 and the DEQ noise standards are met. Petitioner argues that un rebutted evidence in the  
3 record from an acoustical expert that explains that there are additional aspects of dog barking  
4 noise that make such noise more annoying than other noise, and argues that that evidence  
5 demonstrates that the proposed kennel is incompatible with the surrounding residential uses.  
6 Record 138-39. Petitioner argues that the hearings officer's findings are inadequate where  
7 the findings do not address that evidence.

8 We agree with petitioner that the hearings officer erred to the extent she concluded  
9 that compliance with the applicable DEQ noise standards necessarily means that the  
10 proposed use is compatible with surrounding residential uses. *Moorefield v. City of Corvallis*,  
11 18 Or LUBA 95, 108 (1989). Although the hearing officer may interpret CDC 348-4.2(A)  
12 to be met with respect to noise compatibility where the noise levels from the kennel  
13 operations will not exceed DEQ noise levels, the decision must explain why that is the case.

14 The first and third assignments of error are sustained.

15 **SECOND ASSIGNMENT OF ERROR**

16 As explained above, prior to applying for special use review, the kennel operated on  
17 the property for approximately 7 years and boarded in the two existing barns on the property  
18 up to 48 dogs at a time, averaging approximately 40 dogs at a time during the summer prior  
19 to the application being submitted. The proposed new 3,000 square foot kennel building will  
20 be able to board up to 48 dogs in individual pens or crates. In his second assignment of error,  
21 petitioner argues that the hearings officer's findings that the proposed kennel operation is  
22 compatible with surrounding uses under CDC 348-4.2(A) are inadequate and are not based  
23 on substantial evidence in the record, because the findings underestimate the impacts from  
24 the noise and traffic associated with the kennel operation.

25 According to petitioner, the hearings officer based her conclusion that noise impacts  
26 would not be incompatible on her assumption that the facility will board the maximum

1 number of dogs only infrequently during the summer months and holidays, where the  
2 evidence in the record does not support that assumption. Also according to petitioner, the  
3 applicant's traffic analysis underestimated the amount of traffic to be generated by the kennel  
4 operation given that the new kennel building will be able to board 48 dogs at a time and the  
5 evidence in the record demonstrates that the kennel averages 40 dogs per day.

6 The applicant testified that during the summer immediately before the application  
7 was submitted the kennel averaged approximately 40 dogs per day. The new kennel building  
8 is proposed to have the ability to board 48 dogs at a time. Based on that testimony and  
9 evidence, we agree with petitioner that it is not clear that the hearings officer understood or  
10 correctly estimated the proposed scope of the kennel operation or that she analyzed the  
11 impacts of the kennel operation based on the proposed scope. On remand, the hearings  
12 officer must analyze the impacts from the kennel, including traffic impacts, based on an  
13 assumption that the kennel will board an average of 40 dogs a day or otherwise explain why  
14 the traffic impact should be based on some other assumption.

15 The second assignment of error is sustained.

16 **FOURTH ASSIGNMENT OF ERROR**

17 CDC 430-73.2 requires that in the AF-5 zone, "[a]ll setbacks shall be no less than 100  
18 feet." The setback from the western property line to the eastern edge of the fenced outdoor  
19 play area is 75 feet. Record 433. In his fourth assignment of error, petitioner argues that the  
20 hearings officer erred in failing to require that the fenced outdoor play areas meet the setback  
21 requirement. According to petitioner, the purpose of the setback is to mitigate the impacts  
22 from the kennel on adjoining uses and the CDC 430-73 special use standards do not limit the  
23 setbacks to buildings. Thus, we understand petitioner to argue, where the outdoor play areas  
24 are an integral component of the kennel operation and the kennel operations that take place in  
25 those outdoor play areas could have significant impacts on the adjoining uses, the outdoor  
26 play areas must meet the setback requirement of CDC 430-73.2.

1           The hearings officer's findings do not explain why she interprets CDC 430-73.2 to  
2 apply only to the proposed new building and to not apply to the outdoor play areas.  
3 Although we tend to agree with petitioner that the setback requirement applies to all  
4 components of the kennel operation, on remand, the hearings officer should explain why  
5 CDC 430-73.2 applies only to buildings and not to the outdoor play area.

6           The fourth assignment of error is sustained.

7           **FIFTH ASSIGNMENT OF ERROR**

8           In his fifth assignment of error, petitioner argues that the hearings officer erred in  
9 failing to list on Exhibit 1 that is attached to the final order a condition of approval that a  
10 maximum of 48 dogs will be allowed at any one time to be boarded at the kennel. According  
11 to petitioner, the hearings officer in the main body of her final order conditioned her approval  
12 on a maximum of 48 dogs being boarded at the kennel. Record 18. But Exhibit 1 to the Final  
13 Order that lists conditions of approval does not include a condition of approval that limits the  
14 maximum number of dogs to 48. Record 33-37.

15           Because the decision is being remanded, we need not address this assignment of  
16 error. On remand, the county may correct any error in failing to include a condition of  
17 approval imposed in the decision on Exhibit 1 that is included in the Final Order by listing  
18 that condition on the exhibit.

19           We do not reach the fifth assignment of error.

20           The county's decision is remanded.