

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CHERYL BURGERMEISTER,

5 *Petitioner,*

6
7 vs.

8
9 TILLAMOOK COUNTY,

10 *Respondent,*

11
12 and

13
14 BTT, LLC,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-121

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from Tillamook County.

23
24 Gregory S. Hathaway, Portland, filed the petition for review and argued
25 on behalf of petitioner. With him on the brief was Hathaway Koback Connors
26 LLP.

27
28 No appearance by Tillamook County.

29
30 Michael B. Kittell, Tillamook, filed the response brief and argued on
31 behalf of intervenor-respondent. With him on the brief was Albright Kittell PC.

32
33 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
34 Member, participated in the decision.

35
36 AFFIRMED

05/15/2017

37
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners’ decision that grants conditional use approval to site four wind turbines on top of an existing restaurant.

MOTION TO INTERVENE

BTT, LLC (intervenor), one of the applicants below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

Intervenor proposes to site the disputed wind turbines on top of the Schooner Restaurant. The Schooner Restaurant is located in the unincorporated community of Netarts, next to Netarts Boat Basin, near the mouth of Netarts Bay and the Pacific Ocean. There are residences to the north and northeast of the restaurant. One residence is located approximately 50 feet from the restaurant, another residence is approximately 150 feet away, and the remaining residences are all more than 250 feet away.

Under the Tillamook County Land Use Ordinance (TCLUO) a wind turbine that generates electrical energy is categorized as a Wind Energy Conversion System (WECS). The Schooner Restaurant is located in the Netarts Neighborhood Commercial (NT-C1) zone. The NT-C1 zone does not list WECS as either a permitted or conditional use. The disputed WECS were

1 approved under TCLUO 2.040, as a use that “is of the same general character,
2 or has similar impacts” as communication towers, utility substations and
3 transmission lines, all of which are allowed conditionally in the NT-C1 zone.¹

4 This is the second time LUBA has considered this matter. In
5 *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016) (*Burgermeister*
6 *D*), we remanded a county decision that granted conditional use approval for the
7 four wind turbines. The board of county commissioners’ decision that is before
8 us in this appeal was adopted to respond to our remand in *Burgermeister I*.

9 TCLUO 6.040 sets out six approval criteria for conditional uses. One of
10 those criteria, TCLUO 6.040(4), is as follows:

11 “The proposed use will not alter the character of the surrounding
12 area in a manner which substantially limits, impairs or prevents the
13 use of surrounding properties for the permitted uses listed in the
14 underlying zone.”

15 In her third assignment of error in *Burgermeister I*, petitioner argued the
16 city failed to show the proposed WECS comply with the TCLUO 6.040(4)
17 “will not alter the character of the surrounding area” standard. We sustained
18 that assignment of error, finding “[t]he board of commissioners adopted no

¹ TCLUO 2.040 was codified at TCLUO 5.020 at the time the applications for the disputed WECS were filed and provides:”

“The Director may permit a use not listed in a particular zone, provided that it is of the same general character, or has similar impacts on nearby properties, as do other uses permitted in the zone.”

1 findings addressing TCLUO 6.040(4).” 73 Or LUBA at 297. We rejected
2 intervenor’s argument that LUBA could rely on ORS 197.835(11)(b) to affirm
3 the county’s decision despite the lack of findings addressing TCLUO
4 6.040(4).² We explained that ORS 197.835(11)(b) only applies to allow LUBA
5 to affirm a decision despite inadequate or missing findings regarding a
6 mandatory approval criterion, “where the evidence makes a finding of
7 compliance with the applicable criteria ‘obvious’ or ‘inevitable.’” *Id.* at 298.
8 We concluded the evidence in this case concerning the noise impacts the
9 turbine may have on surrounding evidence “is at best conflicting.” *Id.* We
10 ultimately concluded “[t]he board of commissioners needs to identify the
11 evidence it found persuasive and why that evidence led it to conclude TCLUO
12 6.040(4) is satisfied.” *Id.* at 299.

13 With regard to the TCLUO 2.040 “same general character” or “similar
14 impact” standard, in its initial decision the county simply quoted the standard

² ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

1 and concluded it was satisfied. We sustained petitioner’s challenge to that
2 finding:

3 “There may be unique cases where the facts and standard are such
4 that it will suffice to simply quote the standard and conclude that
5 the standard is met, without any further explanation for why the
6 standard is met. However, this is not such a case. As petitioner
7 points out none of the uses allowed in the NT-C1 zone have
8 external moving parts like the wind turbine’s moving propeller.
9 And as already noted, the wind turbine propellers will generate at
10 least some noise that the uses permitted in the NT-C1 zone
11 presumably do not. Some explanation is required to support the
12 board of commissioners’ conclusion that ‘[c]ommunication
13 towers, utility substations and transmission lines’ ‘are of the same
14 general character, and have similar impacts on nearby properties,
15 as wind energy conversion systems.’” *Id.* at 300.

16 Following our remand the board of commissioners elected to not reopen
17 the evidentiary record, but adopted findings addressing TCLUO 2.040 and
18 6.040(4). In this appeal, petitioner challenges the adequacy of, and evidentiary
19 support for, those findings.

20 **FIRST ASSIGNMENT OF ERROR**

21 **A. Introduction**

22 Before turning to the parties arguments concerning the noise the wind
23 turbine will make, we emphasize that the TCLUO 6.040(4) standard is only
24 indirectly a noise standard. Petitioner contends the wind turbines will generate
25 enough noise to violate the TCLUO 6.040(4) standard that a conditional use
26 “will not alter the character of the surrounding area in a manner which
27 substantially limits, impairs or prevents the use of surrounding properties for
28 the permitted uses listed in the underlying zone.” It is important to keep in

1 mind that TCLUO 6.040(4) is concerned with surrounding permitted uses and
2 only requires that conditional uses may not substantially limit, impair or
3 prevent those uses.

4 Relatedly, petitioner cites Tillamook County Comprehensive Plan Goal
5 6, Policy 4.2. That policy describes the Oregon Department of Environmental
6 Quality (DEQ) noise regulation program. The policy’s description of DEQ’s
7 noise program includes the statement that: “

8 “During the night, noise is any sounds that disturb sleep. Tests
9 have shown this to be sounds above 45 decibels.”

10 Tillamook County Comprehensive Plan Goal 6, Policy 4.2 does not establish
11 that 45 decibel threshold as a Tillamook County Comprehensive Plan standard.
12 And as pointed out later in this opinion, DEQ no longer enforces its noise
13 standards.

14 In addition, the board of commissioners, whose interpretations of the
15 TCLUO are entitled to deference under ORS 197.829(1) and *Siporen v. City of*
16 *Medford*, 349 Or 247, 259, 243 P3d 776 (2010), interpreted the word
17 “substantially” in TCLUO 6.040(4) to set “a fairly high bar,” meaning TCLUO
18 6.040(4) can be satisfied notwithstanding “minor” noise impacts on
19 neighboring properties.³ Record 33.

³ Under ORS 197.829(1) LUBA is directed to affirm a local governing body’s interpretation of its own land use laws unless LUBA finds the interpretation:

1 **B. The Evidence**

2 Intervenor submitted a number of documents to support its position that
3 any noise impacts the proposed turbines might have on the residential uses on
4 the properties to the north of the Schooner Restaurant would be minor and
5 would “not alter the character of the surrounding area in a manner which
6 substantially limits, impairs or prevents the use of surrounding properties for
7 the permitted uses listed in the underlying zone.” That evidence included (1)
8 two planning magazine articles by Erica Heller [Record 775-93], (2) an article
9 regarding regulating small wind turbines by Dwight H. Merriam in the
10 Vermont Journal of Environmental Law [Record 794-809], (3) an article on
11 permitting small wind turbines by the Energy Trust of Oregon [Record 745-

-
- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
 - “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
 - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
 - “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

In applying ORS 197.829(1) the Oregon Supreme Court in *Siporen* explained that LUBA is to affirm a governing body’s interpretation of its own land use regulations unless the interpretation is implausible.

1 49],⁴ (4) the specifications for the two types of wind turbines proposed [Record
2 209-215], and (5) what the parties refer to as the Woolsey Report [Record 545-
3 56], which provided estimates of the noise impacts from the proposed turbines
4 on surrounding properties.

5 Petitioner relied primarily on what the parties refer to as the Daly
6 Standlee & Associates (DSA) Report [Record 188-217], which also attempted
7 to estimate from other evidence in the record what the noise impacts of the
8 proposed turbines would be on neighboring properties.

9 **C. Petitioner’s Findings and Substantial Evidence Challenge**

10 The city adopted a total of eleven findings regarding likely noise
11 impacts. Petitioner criticizes findings one and two, which take the position that
12 ambient noise from the nearby ocean and nearby sewage pumps might be
13 louder than the turbines. Petitioner contends those findings are unsupported by
14 any evidence in the record. Petitioner is correct. Those findings are likely
15 based on the decision maker’s familiarity with the area, but there does not
16 appear to be any testimony or other evidence about precisely how loud the
17 ocean and the sewer pumps are at the Schooner Restaurant.

18 Finding 3 is set out below:

19 “The Energy Trust of Oregon Report, Small Wind Permitting
20 Considerations, indicates that the sound WECS * * * emit ‘is
21 barely discernible from ambient sound . . . [and that] [s]ound

⁴ The copy of this article in the record is of such poor copy quality that it is almost unreadable.

1 decreases four-fold with every doubling of distance from the
2 turbine . . . [f]or example, sound level readings at 25 feet from the
3 top of the tower drop by a factor of four at 50 feet, and by a factor
4 of 16 at 100 feet.’ The two closest residences to the subject site
5 are roughly 50 feet and 150 feet away; all other residences are
6 located over 250 feet from the proposed location of the wind
7 turbines.” Record 34 (underscoring in original).

8 Petitioner challenges the above finding as not supported by substantial
9 evidence because it is not based on an actual measurement of the ambient
10 sound at the Schooner Restaurant.

11 The parties use the term “ambient sound” somewhat loosely. In windless
12 conditions, a wind turbine makes essentially no noise. We understand the
13 ambient sound referenced above to be a reference to sound of the wind needed
14 to turn the turbines. If petitioner thinks that wind noise varies dramatically
15 from site to site, she cites no evidence to that effect. If petitioner is referring to
16 the noise from the ocean or sewage treatment plant pumps, we do not
17 understand the study to be considering that type of ambient noise.

18 Petitioner next challenges the county’s findings, based on the two Heller
19 articles and the Woolsey Report, that the proposed wind turbines will be
20 relatively quiet. Petitioner challenges those findings as not supported by
21 substantial evidence because the articles and report on which they are based are
22 not based on the particular ambient noise at the Schooner Restaurant and
23 because the DSA Report estimates the noise from the turbines will exceed
24 Oregon Department of Environmental Quality (DEQ) noise standards.

1 We agree with petitioner that to the extent the county was relying on
2 ocean and sewage pump noise as a mitigating factor, there is no evidence in the
3 record that establishes the level of the ocean or sewer pump noise or the
4 mitigating effect that ambient noise might have on the noise impact of the wind
5 turbines on surrounding properties. However, the ambient noise mentioned in
6 those reports appears to be the ambient noise caused by the wind needed to
7 drive the turbines. Petitioner offers no reason to believe that type of noise is
8 site-dependent and the articles and report are not rendered something other than
9 substantial evidence simply because they do not take into account the complete
10 mix of ambient noises at the Schooner restaurant.

11 Finally, the county adopted three findings that petitioner neither
12 acknowledges nor specifically challenges. Those findings are set out below.

13 “9. The specification for the SkyStream 3.7 WECS model
14 indicates that the sound pressure level was largely between
15 40–50 dBA with respect to wind speeds up to approximately
16 30 mph.

17 “10. Ms. Burgermeister presented evidence on the noise issue as
18 well, in the form of a report by DSA Engineers. However,
19 this report is almost entirely based on DEQ regulations. The
20 standard that the Board must apply under TCLUO § 6.040 is
21 whether the proposed use will alter the character of the
22 surrounding area in a manner which substantially limits,
23 impairs or prevents the use of the surrounding properties.
24 DEQ regulations may be a factor in this analysis, but they
25 are not conclusive. We also note that enforcement of the
26 DEQ regulations was terminated long ago and that,
27 according to the DSA report, the DEQ regulations used in
28 that report technically do not apply to the proposed wind
29 turbines in this case (‘the proposed turbines...are not

1 explicitly governed by the wind turbine regulations,’ as
2 noted on page 3 of the DSA report). Also, importantly, the
3 DSA report did not consider the ambient noise at the
4 proposed site, which is significant.

5 “11. Ultimately, we find that the DSA report corroborates the
6 other evidence in the record on the noise issue. According to
7 that report, the cumulative noise level of four wind turbines
8 at winds speeds between 13 mph and 27 mph was between
9 50-60 dBA – or roughly the level of a ‘kitchen refrigerator’
10 or ‘average home’ – for a location immediately adjacent the
11 proposed wind turbines (roughly 50 feet from the base of
12 the wind turbines) and between 46-53 dBA – or less than a
13 ‘kitchen refrigerator’ –at the house closest to the proposed
14 turbines (roughly 150 feet away for the base of the wind
15 turbines).[⁵] The DSA report finds that the sound level
16 would not exceed 60 dBA immediately next to all four
17 turbines and would quickly reduce as one moved away from
18 the turbines, resulting in noise at neighboring residences
19 roughly equivalent to a ‘kitchen refrigerator,’ ‘quiet library,’
20 or a ‘quiet bedroom at night.’ This is in accord with Heller
21 reports, the Woolsey report, and the Energy Trust of Oregon
22 report.” Record 35 (underscoring in original).

23 The above findings, particularly finding 11, are sufficient to explain why
24 the county ultimately concluded the proposed wind turbines “will not alter the
25 character of the surrounding area in a manner which substantially limits,
26 impairs or prevents the use of surrounding properties for the permitted uses
27 listed in the underlying zone.” Those findings are supported by substantial

⁵ The findings at Record 33 state that one house is 50 feet from the proposed turbines.

1 evidence, *i.e.*, evidence a reasonable person would rely on to make such
2 findings. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 TCLUO 2.040, formerly codified at TCLUO 5.020, was set out earlier at
6 n 1. Under TCLUO 2.040 the county may authorize a use that is not
7 specifically listed as a permitted or conditional use in a zoning district if that
8 use “is of the same general character, or has similar impacts on nearby
9 properties, as do other uses permitted in the zone.” The uses in the NT-C1
10 zone that the county cited are utility substations, power transmission lines, and
11 towers for communication, fire and ambulance stations, water supply and
12 treatment facilities, mobile home parks, tennis facilities, and recreational
13 campgrounds. Although the “same general character” or “similar impacts”
14 standards are alternative, the county found that the proposed wind turbines are
15 both of the “same general character” and will have “similar impacts.”

16 “We understand the TCLUO to only require the Board to find that
17 the proposed wind turbines (1) are of the same general character as
18 other uses allowed in the NT-C1 zone, or (2) have similar impacts
19 on neighboring properties as other uses allowed in the NT-C1
20 zone. In this case we find that the Applicant has shown that the
21 proposed wind turbines satisfy both these standards.” Record 36
22 (underscoring in original).

23 The earlier findings that the county relied on to reach the above
24 conclusion regarding TCLUO 2.040 include a finding that a number of county
25 zoning districts authorize as conditional uses “[t]owers for communications,

1 [WECS], or structures having similar impacts.” Record 36. From that
2 language the county then reasoned WECS “have similar impacts to towers for
3 communications, as a matter of legislative policy.” *Id.* The obvious flaw in that
4 reasoning is that the phrase “or structures having similar impacts” applies to
5 WECS *and* towers for communications, to allow (1) structures that have similar
6 impacts as WECS and (2) structures that have similar impacts as
7 communication towers. While one might infer that the drafters of that TCLUO
8 language viewed WECS and communications towers as similar uses, that
9 TCLUO language is not a “legislative” declaration that communication towers
10 and WECS have similar impacts.

11 But the county also adopted other findings, including the following
12 finding:

13 “D. Many photographs of the proposed wind turbines are in the
14 record, as well as photographs of transmission lines. From
15 these photographs, as well as from the testimony in the
16 record, we find that the proposed wind turbines are of the
17 same general character as towers for communication,
18 transmission lines, or utility substations: the wind turbines
19 are utility in nature, extend many feet above ground, are
20 relatively immovable, and are of the same general size. We
21 note that the proposed wind turbines have moving parts, but
22 as discussed * * *, the effect on nearby properties from
23 these moving parts (i.e. shadow flicker, noise) is likely to be
24 insubstantial and therefore not a persuasive reason to
25 distinguish the general character of the proposed wind
26 turbines from towers for communication, transmission lines,
27 or utility substations.” Record 36.

28 Petitioner offers the following critique of the above finding:

1 “Finding 4(D) ignores the point LUBA made in *Burgermeister I*
2 that the proposed Wind Turbines have a ‘moving propeller’.
3 Finding 4.D. simply finds that these uses have similar
4 characteristics without addressing the most important operating
5 distinction.” Petition for Review 29.

6 Petitioner is correct that in sustaining her second assignment of error we
7 concluded:

8 “Some explanation is required to support the board of
9 commissioners’ conclusion that ‘[c]ommunication towers, utility
10 substations and transmission lines’ ‘are of the same general
11 character, and have similar impacts on nearby properties, as wind
12 energy conversion systems.’” *Burgermeister I* at 300.

13 However, petitioner mischaracterizes the county’s finding, which supplies the
14 explanation that was missing in *Burgermeister I*. The county’s finding on
15 remand emphasizes the similarities the county believes WECS have with
16 communication towers, utility substations and transmission lines (all are
17 utilities that extend high above the ground and are relatively immovable). It is
18 inaccurate to say the findings do not address the moving part of the wind
19 turbines that that makes wind turbines dissimilar to those other utility uses in
20 that one regard. Rather the findings address that difference, but conclude
21 impacts from the moving propellers are “likely to be insubstantial and therefore
22 not a persuasive reason to distinguish the general character of the proposed
23 wind turbines from towers for communication, transmission lines, or utility
24 substations.” While that arguably conflates the “same general character” and
25 “similar impacts” prongs of TCLUO 2.040 somewhat, we understand the
26 finding to be addressing the “same general character” prong of TCLUO 2.040.

1 The “same general character” prong of TCLUO 2.040 is a subjective standard,
2 and unlike the decision in *Burgermeister I*, the decision before us in this appeal
3 thoroughly explains why the board of commissioners concluded the proposed
4 wind turbines are of the same general character as towers for communication,
5 transmission lines, or utility substations. We conclude those findings are
6 adequate and supported by substantial evidence.

7 The second assignment of error is denied.

8 The county’s decision is affirmed.