BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JULIA FOLLANSBEE, RONALD BRAATZ
and GARY BELL,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

HILL & GLOVER BROADCASTING, LLC,
Intervenor-Respondent.

LUBA No. 2008-019

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

William Hugh Sherlock, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, P.C.

Laurie E. Craghead, Assistant Legal Counsel, Bend, filed a response brief on behalf of respondent.

Tamara E. MacLeod, Bend, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Karnopp Petersen, LLP.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 11/26/2008

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 county approval of a broadcast tower in an exclusive farm use zone.

MOTION TO INTERVENE

Hill & Glover Broadcasting, LLC (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

Intervenor applied for county approval for an AM radio utility facility on a 12.6-acre leased area of a 40-acre parcel that is planned agricultural and zoned exclusive farm use-alfalfa subzone (EFU-AL). The proposed utility facility would consist of three 198-foot high towers, spaced 273 feet apart, and running diagonally southwest-northeast. Lands to the north and west of the property are developed with residences and a private airstrip known as Juniper Airpark owned by petitioners. Juniper Airpark is a county recognized conditional use airport which has an east-west alignment due to the prevailing westerly winds. Petitioners base six airplanes at Juniper Airpark, and it is also used by guests and for emergency landings.

The county hearings officer approved the placement of the AM radio facility and petitioners appealed to the board of county commissioners (BCC). The BCC declined to hear the appeal and thereby affirmed the decision of the hearings officer. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county erroneously interpreted ORS 215.275(1) and (2) and implementing county code regulations, and failed to make adequate findings supported by

substantial evidence, in concluding that it is necessary to site the proposed towers on EFU land.[1]

Under ORS 215.283(1)(d), a utility facility that is "necessary for public service may be established as provided in ORS 215.275." Under ORS 215.275(1), a utility facility is necessary for public service when it must be sited on EFU land to provide the service.[2] ORS 215.275(2) requires the applicant to demonstrate that reasonable alternatives have been considered, and that the facility must be sited on EFU land due to one or more of six factors.

---

[1] The applicable Deschutes County Code (DCC) regulations implement the state statutes, so for convenience we will discuss only the state statutes. *See Jordan v. Douglas County*, 40 Or LUBA 192, 198 n 6 (2001) (when local ordinances must implement state law, LUBA will refer to state statute).

[2] ORS 215.275 provides in part:

> "(1) A utility facility established under ORS 215.213 (1)(d) or 215.283 (1)(d) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> "(2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(d) or 215.283 (1)(d) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
>
> "(a) Technical and engineering feasibility;
>
> "(b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
>
> "(c) Lack of available urban and nonresource lands;
>
> "(d) Availability of existing rights of way;
>
> "(e) Public health and safety; and
>
> "(f) Other requirements of state or federal agencies.
>
> "(3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar."

ORS 215.275(3) explains how cost should be considered when analyzing alternative locations. Together, ORS 215.275(2) and (3) "identify the reasons why potentially reasonable alternatives to siting the facility on EFU land may be rejected." *Sprint PCS v. Washington County*, 186 Or App 470, 478, 63 P3d 1261 (2003).

In the present case, intervenor considered and rejected a number of alternative non-EFU sites, based on several desired characteristics. Among the sites considered and rejected was an 8.2-acre parcel located in the City of Bend that is owned by the KICE AM radio station (KICE site), developed with several broadcast towers. Intervenor originally intended to co-locate its antennas on those existing KICE towers and even obtained FCC approval for that location. However, KICE ceased operations at the site, moved its transmitters to a different site and put the KICE site up for sale. Petitioners argued below that the KICE site is a reasonable alternative on non-EFU land and therefore intervenor has not demonstrated that it is necessary to locate the proposed broadcast facility on the EFU-zoned subject property, in order to provide the broadcast service.

The hearings officer found with respect to the KICE site:

> "[Intervenor's] FCC license identifies its broadcast area is the greater Bend area. The applicant's burden of proof states it originally intended to co-locate its AM facility at the KICE AM radio station facilities on Butler Market Road in northeast Bend. However, KICE sold this property and planned by early June 2007 to remove and relocate its towers to a site north of Bend. The applicant's burden of proof states KICE's new location is not suitable for its AM radio facilities broadcasting at 900 KHz because it must locate its transmission towers on the east side of Bend to achieve its desired signal coverage area under its FCC license. * * *." Record 34.

The above-quoted findings suggest that the hearings officer did not consider the KICE site available because it had already been sold and the towers would be removed. The findings then explain why the new KICE site does not meet intervenor's coverage requirements. There is no evidence in the record, however, that the KICE site has been sold or is otherwise unavailable. To the contrary, intervenor submitted evidence that at the time of the hearings officer's decision the property was still for sale, and therefore presumably

available. There is also no evidence that the towers have been removed, or must be removed as a condition of sale or lease. Because intervenor previously intended to use the KICE site and obtained an FCC license for that site there appears to be no dispute that the site meets intervenor's coverage requirements.

The only other basis identified by the hearings officer to reject the KICE site is cost. The hearings officer found:

> "Finally, the applicant's burden of proof states that it elected not to site its proposed AM radio facility on land owned by KICE in part because it was too expensive, and the applicant had made a business decision to lease rather than to buy a tower site. Opponents argue the application's cost consideration is not relevant. The Hearings officer disagrees. [The DCC provision implementing ORS 215.275] states the applicant's costs 'may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service.' Based on the foregoing findings concerning the other locational factors, I find cost alone was not the only consideration that led the applicant to choose the subject property." Record 38.

Consideration of "costs" and "land costs" is governed by ORS 215.275(3), the text of which we repeat here:

> "Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar."

ORS 215.275(3) distinguishes between "costs" and "land costs." Pursuant to the last sentence of ORS 215.275(3), the Land Conservation and Development Commission (LCDC) has promulgated an administrative rule that provides, simply, that "[l]and costs shall not be included when considering alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar." OAR 660-033-0130(16)(b). In other words, under the rule land costs shall not be considered at all in determining whether

a non-EFU-zoned site is a reasonable alternative to locating a utility facility on EFU land.[3] Therefore, the hearings officer clearly erred in rejecting the KICE site based on the fact that it is "too expensive" to purchase.

Whether the KICE site can be rejected based on intervenor's "business model" to lease land rather than purchase land is a closer question. Intervenor cites *Sprint PCS* for the proposition that a utility facility applicant's business model is a relevant factor to consider and would allow the KICE site to be rejected. In *Sprint PCS*, the utility facility applicant wanted to build its own cell towers on which to locate its antennae and also to rent out space on its towers to competitors. Opponents argue that Sprint could instead collocate its antennas on existing cell towers owned by its competitors. LUBA concluded that under ORS 215.275 the county must generally defer to and not attempt to second-guess the applicant's business objectives. The Court of Appeals disagreed in part, concluding that consideration of the applicant's business objectives is appropriate only when it "advances the statutory goal of providing the utility service." 186 Or App at 481-82.[4]

---

[3] It is not entirely clear what the statute and rule mean by "substantially similar utility facilities" or how that plays into the alternative sites analysis. The concept may reflect the possibility that different technological approaches or utility designs may be necessary for different alternative sites, depending on topography or other factors. However, we need not consider the question further, as the rule makes clear that land costs cannot be considered at all. Further, in the present case the proposed broadcast towers on the subject property and the alternative use of the existing broadcast towers at the KICE site are, for all we can tell, substantially similar utility facilities, if not identical utility facilities.

[4] The Court of Appeals stated:

> "LUBA's answer was to require local governments to defer to a utility's defined objectives. That standard, however, finds no support in the text, context, or legislative history of ORS 215.283(1)(d) or ORS 215.275. Rather, ORS 215.283(1)(d) allows as a permitted use on EFU land '[u]tility facilities necessary for public service.' Utility facilities are permitted uses on EFU land because they advance those service needs. That statutory goal provides the appropriate criterion for local governments to apply in determining what constitutes a reasonable alternative. When a utility's defined objective is inconsistent with placing a facility on an otherwise reasonable non-EFU site, local governments should ask whether that objective advances the statutory goal of providing the utility service. We accordingly agree with the [petitioners] that LUBA's test gives too much deference to a utility's defined objectives.

Intervenor does not explain why a business model that prefers to site towers on leased land rather than purchased land is necessary to advance the statutory goal of providing utility service. Further, *Sprint PCS* did not concern ORS 215.275(3) or the question of different land acquisition costs between alternative sites. Although it is a reasonably close question, we believe the term "land costs" refers to the cost to acquire the right to place the proposed utility facility on a particular unit of land, whether acquisition of that right is accomplished by land purchase, land lease or other means. Under OAR 660-033-0130(16)(b), such land costs shall not be considered when evaluating alternative locations for utility facilities.

In sum, the hearings officer erred in rejecting the KICE site based on (1) lack of availability and (2) land costs. The first basis is not supported by the record, and the second basis is prohibited under OAR 660-033-0130(16)(b).

The first assignment of error is sustained.

> "In the context of this case, Sprint wishes to provide communication services, and collocating on an existing cellular tower rather than constructing a new one on EFU land would appear, at least at first blush, to be a reasonable alternative site that Sprint should and the county may consider. Sprint, however, wants to build a new cellular tower so that it can provide its own telecommunications service and also lease space to other telecommunications providers. If, as the [petitioners] argue, a utility wants to construct a commercial tower on EFU land to maximize profit by selling space on that tower's utilities, a county could find that that objective does not advance the statutory goal of providing utility service and thus would not preclude collocation from being considered as a reasonable alternative to building a new cell tower. Conversely, Sprint argues:
>
> > "'[U]tility providers routinely plan for more capacity than what is absolutely, minimally required at a given time, especially when constructing a facility with a life span of 30 years or more. It is simply an efficient and cost-effective way to plan a facility and provide service.'
>
> "If a county were persuaded that the additional capacity was a reasonable part of the utility's plan to provide the service, the county could find that building a new tower rather than collocating on an existing one would advance the statutory goal of providing utility services. The county then could conclude that collocation was not a reasonable alternative. That question, however, presents a factual issue for local governments, subject to review by LUBA."

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer erred in concluding that the proposed towers do not pose a hazard to air operations at the adjoining Juniper Park airport.

ORS 836.600 through 836.630 govern local government airport regulation. ORS 836.623(1) provides:

> "A local government may adopt land use compatibility and safety requirements that are more stringent than the minimum required by Land Conservation and Development Commission rules * * *. If a local government receives information in a hearing on a land use application alleging that public safety requires a higher level of protection than the minimum established in commission rules and if the information is supported by evidence, the governing body shall consider the information and adopt findings explaining the bases for any decision regarding the need for more stringent requirements. Land use requirements regarding safety and compatibility shall consider the effects of mitigation measures or conditions that could reduce safety risks and incompatibility."

The hearings officer concluded that based on this requirement she must consider whether additional safety requirements are needed, determine whether potential mitigation measures could reduce safety risks, and adopt findings explaining the basis for any decision regarding the need for more stringent requirements.

Petitioners cite to extensive testimony from area pilots that due to prevailing winds the most common landing pattern at Juniper Airpark requires pilots to fly over the subject property near the towers while descending. Further, petitioners argue that because Juniper Airpark is an untowered airpark, low altitude passes on approach are required before landings, to check that the runway is clear of airplanes, livestock and wildlife, which means aircraft often fly lower than the minimum 500-foot altitude required under the FAA regulations, even before entering the landing pattern.

The hearings officer was not persuaded that additional protective measures were required. The findings state:

> "* * * the Hearings Officer finds that although there is evidence in the record to support opponents' information that the proposed towers would pose a

hazard to Juniper Airpark's operations, I find this evidence is not sufficient to justify a finding that airport safety requires imposition of more stringent standards – or denial of the applicant's proposal – to protect operations at Juniper Airpark. In particular, I am persuaded that flight operations at Juniper Airpark can occur safely with the applicant's proposed facility- and without additional protective measures or restrictions – for the following reasons:

"[1] The towers would be located at least 1,500 feet from the nearest point on the runway and therefore several hundred feet southeast of aircraft flying the upwind leg of the pattern for landing to the west – the most common landing procedure.

"[2] The tops of the 198-foot tall towers would be at least 600 to 800 below aircraft flying the upwind leg of the pattern for landing to the west."

"[3] The tops of the 198-foot-tall towers would be at least 300 feet below aircraft transiting the area at the minimum 500-foot altitude required by the FAA.

"[4] The level of permitted traffic at Juniper Airpark is very low, consisting of only 10 take-offs and landings per month, or roughly only two landings and take-offs per week.

"[5] Because most permitted users of Juniper Airpark are its owners and their invited guests, the owners can make the vast majority of pilots using the airpark aware of the height and location of the towers both orally and in written publications and public information concerning the airstrip.

"[6] The FAA has determined the proposed towers will create no hazard to air navigation within the airspace near Juniper Airpark. While the Hearings Officer acknowledges and values the opinions of local pilots who regularly use Juniper Airpark and are familiar with weather and other conditions peculiar to this airstrip, *I find the FAA's opinion is more credible and persuasive than those of local pilots in light of the agency's particular expertise in evaluating hazards to air navigation presented by towers and similar structures.*

"For the foregoing reasons, the Hearings Officer finds public safety does not require a higher level of protection for Juniper Airpark than the minimum established in LCDC's administrative rules governing airport planning in general, and protection of airport imaginary surfaces in particular.

"In making the findings required under ORS 836.623(1), the Hearings Officer also must consider 'the effects of mitigation measures or conditions that could reduce safety risks and incompatibility.' Because I have concluded no higher level of protection is warranted for Juniper Airpark on the basis of evidence

> and argument in this record in this [appeal,] I find I need not decide whether mitigation, such as tower lighting is necessary." Record 51-52 (emphasis added).

Petitioners challenge the hearings officer's reasons. In particular, petitioners argue that the hearings officer erred in relying on the FAA's determination of no hazard.[5] We agree with petitioners that the FAA determination does not support the hearings officer's conclusion that the towers do not represent a hazard to Juniper Airpark flight operations. The FAA determination of no hazard is a one page document that considered only potential conflicts that the proposed towers pose to the Bend Municipal Airport, which is more than six miles away from Juniper Airpark. Record 558. The FAA determination does not address the proposed towers' potential conflicts with Juniper Airpark or any other private airport. Because the hearings officer's decision appears to rely heavily upon the FAA determination, the decision is not supported by substantial evidence.

In addition, the hearings officer found that the towers are located several hundred feet southeast of aircraft flying the most common landing pattern. This is apparently based on earlier findings that the landing pattern is approximately 1,000 feet south of the runway and the towers are located approximately 1,500 feet from the runway. However, petitioners dispute that the towers are located 1,500 feet from the runway, citing to statements in the staff report that at least one tower is located 1,400 feet from the runway. Further, petitioners argue that there is no evidence in the record indicating that the landing pattern takes aircraft only 1,000 feet south of the runway. According to petitioners, the distance from the runway during the three legs of the landing pattern varies considerably, depending on the pilot and the circumstances, and that during high wind conditions planes are commonly blown

---

[5] The findings also state:

> "I find it is reasonable to conclude the county is preempted by federal law from finding the proposed towers constitute a hazard to air navigation * * * I agree with the applicant that at the very least the FAA's determination constitutes credible expert opinion of no hazard." Record 51.

downwind toward the towers. Finally, petitioner's dispute the hearings officer's related finding that the planes will pass over the tower location at an altitude of 600 to 800 feet above the surface. Petitioners contend there is no support for this finding, and cites to evidence that pilots typically enter the landing pattern around 500 feet in altitude and descend throughout each of the three legs as they pass near the proposed location of the three 198-foot tall towers.

Intervenor cites to no evidence supporting the hearings officer's findings with respect to the proximity of the towers to the most common landing pattern and the height of the aircraft in that landing pattern. The only evidence intervenor cites is a page from a document entitled the "Airport Land Use Compatibility Guidebook," which illustrates a "typical" airport traffic pattern. Record 114. The illustration indicates that the typical downwind leg, base leg and final approach occur at distances of 2,000 feet to 5,000 feet from the runway, based on the length of runway. From this intervenor argues that because the proposed towers are located 1,500 feet from the runway the towers will be *inside* the most common landing pattern at Juniper Airpark (*i.e.* closer to the runway) and the planes will fly *outside* and around the towers, at a distance of at least 2,000 feet from the runway. However, that contradicts the hearings officer's finding that the towers are located outside the most common landing pattern and that the planes will fly between the towers and the runway.

Because the evidentiary record appears not to support the hearings officer's findings regarding the most common landing pattern, the altitude of planes within the pattern, and likely proximity of planes to the proposed towers during the landing approach, remand is also necessary to address those issues.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer erred in concluding that the proposed towers are permitted under the Airport Safety Combining Zone (AS) that surrounds the Juniper Airpark.

The AS combining zone, at DCC 18.80, includes an airport's "imaginary surfaces" and noise impact boundaries.[6] The proposed towers are located within the Juniper Airpark's noise impact boundary, which extends to all sides of the airport, but not within its "imaginary surfaces," which extend east and west along the approach and takeoff corridors. DCC 18.80.028 expressly restricts the height of structures within the airport's imaginary surfaces.[7]

---

[6] DCC 18.80.022(E) defines airport imaginary surfaces as:

> "Airport Imaginary Surfaces (and zones). Imaginary areas in space and on the ground that are established in relation to the airport and its runways.
>
> "* * * *
>
> "For the Cline Falls and Juniper airports, the imaginary areas are only defined by the primary surface and approach surface."

DCC 18.80.022(G) defines "Airport Noise Impact Boundary" as:

> "Areas located within 1,500 feet of an airport runway or within established noise contour boundaries exceeding 55 Ldn."

[7] DCC 18.80.028 provides:

> "All uses permitted by the underlying zone shall comply with the height limitations in DCC 18.80.028. When height limitations of the underlying zone are more restrictive than those of this overlay zone, the underlying zone height limitations shall control.
>
> "A. Except as provided in DCC 18.80.028(B) and (C), no structure or tree, plant or other object of natural growth shall penetrate an airport imaginary surface.
>
> "B. For areas within airport imaginary surfaces but outside the approach and transition surfaces, where the terrain is at higher elevations than the airport runway surfaces such that existing structures and permitted development penetrate or would penetrate the airport imaginary surfaces, a local government may authorize structures up to 35 feet in height.
>
> "C. Other height exceptions or variances may be permitted when supported in writing by the airport sponsor, the Department of Aviation and the FAA. Applications for height variances shall follow the procedures for other variances and shall be subject

The hearings officer found that the DCC 18.80.028 height restrictions do not apply to structures within the noise impact boundary.[8]

Petitioners argue however that language in other sections of DCC 18.80 indicate that uses incompatible with the airport are prohibited within any part of the AS zone, including the noise impact boundary. Petitioners cite first to DCC 18.80.024, which makes clear that all land within the AS zone is "subject to the requirements of this overlay zone." Petitioners next cite to DCC 18.80.010, the AS Zone purpose statement, which provides:

> "In any zone that is overlain by an Airport Safety Combining Zone (AS Zone), the requirements and standards of DCC 18.80.010 shall apply in addition to those specified in the ordinance for the underlying zone. If a conflict in regulations or standards occurs, the more restrictive provisions shall govern.
>
> "*The purpose of the AS Zone is to restrict incompatible land uses and airspace obstructions around airports in an effort to maintain an airport's maximum benefit.* The imaginary surfaces and zones; boundaries and their use limitations comprise the AS Zone. Any uses permitted outright or by conditional use in the underlying zone are allowed except as provided for in DCC 18.80.044, 18.80.050, 18.80.054, 18.80.056 and 18.80.058. The protection of each airport's imaginary surfaces will be accomplished through the use of those land use controls deemed necessary to protect the community it serves. *Incompatible uses may include the height of trees, buildings, structures or other items and uses that would be subject to frequent aircraft over-flight or might intrude into areas used by aircraft.*" (Emphases added.)

> to such conditions and terms as recommended by the Department of Aviation and the FAA (for Redmond, Bend and Sunriver.)"

[8] The hearings officer found:

> "Section 18.80.028 prohibits structures and other objects from penetrating 'airport imaginary surfaces.' * * * [DCC} 18.80.022(E) defines Juniper Airpark's 'imaginary surfaces' as 'only defined by the primary surface and approach surface.' Therefore, the Hearings Officer finds that under the descriptions in [DCC] 18.80.028(A) and (B), the only areas within the Juniper Airpark AS Zone in which a structure may neither penetrate the imaginary surface nor exceed 35 feet in height are the primary surface (essentially the runway and areas on the ground immediately adjacent to it) and the approach surfaces extending out in a narrow cone from each end of the runway. Consequently, I find the height limitations in [DCC] 18.80.028 do not apply to areas that are outside the primary and approach surfaces but within the 'airport noise impact boundary.' In other words, while the Juniper Airpark AS Zone includes the noise impact area, the structure height limitations applicable to Juniper Airpark apply only within the imaginary surfaces." Record 44-45 (emphases omitted).

Petitioners argue that reading DCC 18.80.024 and DCC 18.80.010 together it is clear that all AS restrictions apply within the noise impact boundary, and that "incompatible" uses, including tall structures that interfere with flight operations, are prohibited within the noise impact boundary. According to petitioners, the hearings officer therefore erred in concluding that the noise impact boundary does not restrict the proposed towers.

The only express height restrictions in any provision of DCC 18.80 apply to uses within imaginary surfaces. The only express restrictions governing uses within the noise impact boundary are found at DCC 18.80.044(A), which do not restrict the height of structures.[9] Read in that context, we agree with respondents that the purpose statement at DCC 18.80.010 does not operate as an approval criterion that independently restricts structures within the noise impact boundary that may be "incompatible" with flight operations due to their height. It is reasonably clear that the noise impact boundary is intended to restrict only uses that are noise-sensitive. Absent some more specific provision indicating that the noise impact boundary restricts or prohibits the proposed towers, we cannot say the hearings officer erred in her findings under DCC 18.80 *et seq.*

The third assignment of error is denied.

The county's decision is remanded.

---

[9] DCC 18.80.044(A) provides:

> "Noise. Within airport noise impact boundaries, land uses shall be established consistent with the levels identified in OAR 660, Division 13, Exhibit 5 (Table 2 of DCC 18.80). Applicants for any subdivision or partition approval or other land use approval or building permit affecting land within airport noise impact boundaries, shall sign and record in the Deschutes County Book of Records, a Declaration of Anticipated Noise declaring that the applicant and his successors will not now, or in the future complain about the allowed airport activities at the adjacent airport. In areas where the noise level is anticipated to be at or above 55 Ldn, prior to issuance of a building permit for construction of a noise sensitive land use (real property normally used for sleeping or as a school, church, hospital, public library or similar use), the permit applicant shall be required to demonstrate that a noise abatement strategy will be incorporated into the building design that will achieve an indoor noise level equal to or less than 55 Ldn. [NOTE: FAA Order 5100.38A, Chapter 7 provides that interior noise levels should not exceed 45 decibels in all habitable zones.]"