BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID M. MINGO,
Petitioner,

and

MIKE EATON, SHERRY EATON,
DENNIS WADE, LORRIE WADE,
and DAN WILLIAMS,
Intervenors-Petitioners,

vs.

MORROW COUNTY,
Respondent,

and

INVENERGY LLC,
and WILLOW CREEK ENERGY LLC,
Intervenors-Respondents.

LUBA No. 2011-014

MIKE EATON, SHERRY EATON,
DENNIS WADE, LORRIE WADE,
and DAN WILLIAMS,
Petitioners,

and

DAVID M. MINGO,
Intervenor-Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

INVENERGY LLC,
and WILLOW CREEK ENERGY LLC,

Intervenors-Respondents.

LUBA No. 2011-016

INVENERGY LLC,
and WILLOW CREEK ENERGY LLC,
Petitioners,

vs.

MORROW COUNTY,
Respondent,

and

DAVID M. MINGO, MIKE EATON,
SHERRY EATON, DENNIS WADE,
LORRIE WADE and DAN WILLIAMS,
Intervenors-Respondents.

LUBA No. 2011-017

FINAL OPINION
AND ORDER

Appeal from Morrow County.

Andrew W. Sprauer, Salem, filed a petition for review and a response brief, and argued on behalf of petitioner/intervenor David Mingo. With him on the briefs was Churchill Leonard Lawyers.

Richard H. Allan, Portland, filed a petition for review and a response brief, and argued on behalf of petitioners/intervenors Eaton, Wade and Williams. With him on the briefs was Ball Janik LLP.

Jeffrey G. Condit, Portland, filed a petition for review and a response brief, and argued on behalf of petitioners/intervenors Invenergy LLC and Willow Creek Energy LLC. With him on the briefs was Miller Nash LLP.

Ryan M. Swinburnson, Kennewick, Washington, filed a response brief and argued on behalf of Morrow County. With him on the brief was Harkins & Swinburnson, PLLC.

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

REMANDED 06/01/2011

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision regarding noise complaints that were filed by the owners of four properties located in the vicinity of a wind energy facility that is owned and operated by Invenergy LLC and Willow Creek Energy LLC (together Invenergy). Petitioner Mingo (Mingo) and petitioners Eaton, Wade and Williams (collectively Eaton) are the property owners that filed those complaints. [1]

REPLY BRIEF

Petitioners Eaton move for permission to file a reply brief to respond to new issues raised in the county's reply brief. The motion is allowed.

FACTS

In 2005, Invenergy was granted conditional use approval for a wind energy facility. Pursuant to that 2005 conditional use permit, Invenergy constructed the Willow Creek Wind Energy Center, which is made up of 48 wind turbines. One of the conditions attached to the 2005 conditional use permit, "Condition No. 1," required that the facility "comply with OAR 340 Division 35 Standards relative to wind facilities * * *." Planning Commission Record 286.

OAR chapter 340, division 35 is the Department of Environmental Quality's (DEQ's) "Noise Control Regulations." For purposes of this appeal the critical DEQ noise regulation is the one that applies to new industrial and commercial noise sources. That regulation provides that such facilities may not "increase the ambient statistical noise levels, L10 or L50, by more than 10 dBA [decibles] in any one hour * * *." OAR 340-035-

[1] Because all parties but the county in this consolidated appeal are petitioners, intervenors-petitioners and intervenors-respondents, we will refer to the parties by shortened names and identify their party status only where necessary for clarity.

0035(1)(b)(B)(i).[2] In this appeal we are only concerned with the L50 ambient statistical noise level (or background level). Since the required measurement time in OAR 340-035-0035(1)(b)(B)(i) is one hour, the L50 ambient statistical noise level is the ambient noise level that is not exceeded for more than 30 minutes in any hour (50 percent of 60 minutes). According to Invenergy's expert, noise "[l]evels will be above and below this value exactly one-half of the measurement time, and therefore the L50 is sometimes referred to as the median sound level."[3] Planning Commission record 336.

For wind energy facilities, the allowable 10 dBA increase can be measured in two ways:

> "The increase in ambient statistical noise levels is based on an assumed background L50 ambient noise level of 26 dBA or the actual ambient background level. The person owning the wind energy facility may conduct measurements to determine the actual ambient L10 and L50 background level." OAR 340-035-0035(1)(b)(B)(iii)(I).

Under OAR 340-035-0035(1)(b)(B)(iii)(I), the L50 ambient noise level with the wind turbines in use must not exceed 36 dBA (26 + 10), if the assumed background ambient noise level of 26 dBA is used. Alternatively, under OAR 340-035-0035(1)(b)(B)(iii)(I), the ambient noise level with the wind turbines must not exceed the sum of 10 dBA and the actual L50 ambient noise level without the turbines. Measured in that way, the ambient noise level with the wind turbines could exceed an L50 ambient noise level of 36 dBA, if the measured or actual background ambient noise level without the wind turbine noise exceeds 26 dBA. In

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[2] As relevant, OAR 340-035-0035(1)(b)(B)(i) provides:

> "No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L10 or L50, by more than 10 dBA in any one hour, or exceed the levels specified in Table 8 * * *."

[3] The L10 ambient statistical noise is the noise level that is not exceeded for more than 10 percent of each hour (10 percent of 60 minutes, or six minutes). According to Invenergy's sound expert, "[t]he L10 typically represents the loudest and shortest noise events occurring in the environment, such as nearby car and truck pass-bys or aircraft flyovers." Planning Commission Record 336.

this opinion we will refer to the ambient noise level without any wind turbine noise as either the "assumed background ambient noise level" or the "actual background ambient noise level," depending on whether the background ambient noise level is assumed to be 26 dBA or measured. We will refer to the ambient noise level after wind turbines are constructed and in operation as the "combined ambient noise level."

One of the complications in this matter arises from the fact that OAR chapter 340, division 35 was drafted and adopted by DEQ and the rule assumes that it is DEQ that will administer and enforce the rule. However, since 1991 there has been no DEQ funding to administer and enforce the noise rule, and DEQ has not administered or enforced OAR chapter 340, division 35 for the past 20 years. Morrow County has adopted OAR chapter 340, division 35 as its noise regulation, and administration and enforcement of OAR chapter 340, division 35 in Morrow County has fallen to Morrow County.

Willow Creek Wind Energy Center began operation in 2008. Before and after the center commenced operation, noise complaints were filed with the county. The planning department initiated a public process before the planning commission. All parties submitted expert testimony regarding sound levels at the four properties. Planning Commission Record 34-127; 293-370 (Invenergy); 26-33; 130-146; 245-74 (Eaton); 149-55; 214-41 (Mingo). After the public hearings before the planning commission, the planning commission did not adopt a decision with findings of fact and conclusions of law. The draft minutes of the May 25, 2010 planning commission hearing merely stated that the planning commission passed a motion that "Invenergy is in violation of the Condition [and] that Invenergy has 6 months to fix it." Planning Commission Record 12. In its notice to the parties, the planning department restated the planning commission's motion slightly, to describe the planning commission motion as follows: "Invenergy is not in compliance and they have 6 months to get compliant." Planning Commission Record 6. All parties appealed the planning commission's decision to the county court. The county court remanded the planning

commission's decision for a new decision. As the planning commission described the county court's remand, the planning commission's decision on remand was to include:

> "● Specific Written Factual Findings that support the Planning Commission decision;
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> "● Conclusions drawn from those findings; [and]
>
> "● [A p]rocedure for determining and/or providing compliance within the six month time frame[.]" Planning Commission Remand Record 2.

The planning commission's remand decision included the following findings:

> "● Both parties provided evidence that the Willow Wind energy facility operation exceeds the noise threshold allowed in OAR chapter 340 Division 35. There is evidence in the record (pg 88) that indicates that noise does exceed the allowable level of 36 dBA at the Eaton, Williams and Mingo residences and at the Wade residence under specific wind conditions (pg 273);[4]
>
> "● The allowable 'unusual and/or infrequent events' exception does not apply to the instances where noise exceeds the allowable level of noise;[5]
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> "● Compliance will be treated as compliant or not (i.e. 'black and white');
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> "● Data provided by the respective parties tends to have a certain level of bias;

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[4] The table at Planning Commission Record 88 was prepared by Invenergy's expert and shows that with the wind turbine noise added, the ambient noise level exceeds 36 dBA by one to four dBA two percent of the time at the Eaton residence, by one to two dBA one percent of the time at the Mingo residence and by one to eight dBA ten percent of the time at the Williams residence. Planning Commission Record 273 is a page from a report prepared by Eaton's expert and states the following with regard to the Wade residence: "[n]oise radiating from the Willow Creek facility violates the DEQ noise regulation at the Eaton residence, the Williams residence and possibly at the Wade residence when the wind is out of a southerly to westerly direction."

[5] OAR 340-035-0035(6) provides in part:

> "Exceptions: Upon written request from the owner or controller of an industrial or commercial noise source, the Department may authorize exceptions to section (1) of this rule, pursuant to rule 340-035-0010, for:
>
> "(a) Unusual and/or infrequent events[.]"

"● Future data collection, evaluation and monitoring should be done by a third party consultant, and the cost [of] those efforts should not be Morrow County's responsibility;

"● The permit holder should have a reasonable amount of time to bring the facility into compliance[.]" Planning Commission Remand Record 2.

In the remainder of its remand decision, the planning commission gave Invenergy six months to bring its facilities into compliance with noise limits and directed the planning department to contract with an independent third party to monitor noise for three weeks to three months at the four properties at the end of that six month period to confirm that Invenergy's facility is operating in compliance with noise limits. The planning commission specifically found:

"X. Compliance will be achieved when the data indicates that the facility does not exceed 36 dBA." Planning Commission Remand Record 3.

All parties again appealed. The county court considered those appeals on the record. Invenergy argued that although it generally used the assumed background ambient noise level of 26 dBA, in some cases where the 26 + 10=36 dBA noise limit was exceeded, actual background ambient noise levels without the turbines exceeded 26 dBA and Invenergy would only violate the DEQ noise limit if it generated more than 10 dBA of additional noise. Invenergy complained that planning commission Condition X appeared to require that Invenergy use only the assumed 26 dBA background ambient noise level and foreclosed use of the actual background ambient noise level in cases where actual background ambient noise levels exceed 26 dBA. In their appeal letters, the property owners argued that third party monitoring is essential to ensure continued compliance with the administrative rule noise standard and that Invenergy should be required to pay the cost of their expert at the planning commission hearing.

The county court considered the appeals on the record and rendered its final decision on January 26, 2011. County Court Remand Record 2-4. As relevant, the county court's decision is set out below:

> "WHEREAS, the Morrow County Court found that there was substantial evidence in the record to support the Planning Commission decision with regard to the Williams property;
>
> "WHEREAS, the Morrow County Court found that there was not substantial evidence in the record to support the Planning Commission decision with regard to the remaining complainants;
>
> "WHEREAS, after deliberations Commissioner Rea made the motion, 'to uphold a portion of the Planning Commission's decision specifically regarding the Williams' residence and overturn the Planning Commission's decision regarding the other three residences, with the statement that this body does not have the authority to approve any costs for any expert witnesses.' The motion was seconded by Commissioner Grieb followed by unanimous approval." County Court Remand Record 2-3.

In essence, the county court adopted the planning commission's decision with regard to the Williams residence, rejected the planning commission's decision as unsupported by substantial evidence with regard to the Mingo, Eaton and Wade residences, rejected requests that Invenergy be required to pay the costs of the residents' expert witnesses and apparently set 36 dBA as the combined ambient noise level standard that Invenergy must meet. The county court adopted the same approach the planning commission had adopted to ensure compliance with the noise standard at the Williams residence, giving Invenergy six months to bring its facilities into compliance with noise standard and directing the planning department to contract with an independent third party to monitor noise for three weeks to three months at the Williams property at the end of that six month period to confirm that Invenergy's facility is operating in compliance with the noise standard. The county court also adopted the same finding "X" that the planning commission adopted, requiring that the combined ambient noise level may not exceed 36 dBA. Once again all parties appeal—this time to LUBA.

JURISDICTION

As relevant here, LUBA's jurisdiction is restricted to "land use decisions." ORS 197.825(1). As defined by ORS 197.015(10), a land use decision is a decision that concerns

the application of a comprehensive plan, land use regulation or other specified land use laws. Intervenors-Respondents Eaton suggest in their response brief in LUBA No. 2011-014 that the county court decision on appeal does not apply a land use regulation or any other land use laws and therefore may not be a land use decision subject to LUBA review.[6] It is probably not surprising that Eaton's suggestion is not more fully developed and no party joins in Eaton's suggestion, since all parties other than the county have filed appeals that would have to be dismissed if we agreed with Eaton's suggestion that we lack jurisdiction. Although Eaton's suggestion is certainly not frivolous, we reject it.

As defined by ORS 197.015(11), a land use regulation is "any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan." In adopting its decision, the county applied its Code Enforcement Ordinance. Section 1.200 of that ordinance expressly provides that "[c]ounty policies and ordinances to be enforced under this Ordinance" include "the Morrow County Comprehensive Plan." By virtue of Section 1.200, the Code Enforcement Ordinance likely qualifies as a land use regulation. Even if it does not, the challenged decision effectively modifies condition No. 1 in the 2005 conditional use permit. A modification of a land use decision is a land use decision itself. We conclude that we have jurisdiction over this consolidated appeal.

MOOTNESS

The county moves to dismiss the Mingo and Eaton appeals, arguing that the steps that will be taken to bring Invenergy's facility into compliance with regard to the Williams residence necessarily will bring Invenergy's facility into compliance at the Mingo, Eaton and Wade residences. Eaton responds that there is no evidence in the record to support the county's assumption that any corrective measures Invenergy may take to bring its facility

[6] However, in their petition for review Eaton argues that the challenged decision is a land use decision. Eaton Petition for Review 1.

into compliance with regard to the Williams residence necessarily will also be sufficient to bring its facility into compliance with regard to the remaining residences. Eaton also points out that an option that is available to Invenergy is to secure an easement or covenant under OAR 340-035-0035(1)(b)(B)(iii)(III) to allow Invenergy to increase the background ambient noise level at the Williams residence by more than 10 dBA. In that event there would be no reduction in noise at the Mingo, Eaton and Wade Residences. We agree with Eaton. The Mingo and Eaton appeals are not moot.

FIRST ASSIGNMENT OF ERROR (EATON); FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (MINGO)

Petitioners Eaton and Mingo argue the county court's substantial evidence review in this appeal was improper, and that if the county court had correctly reviewed the planning commission's decision for substantial evidence, the county court would have been compelled to conclude the planning commission's decision is supported by substantial evidence—as a matter of law. Alternatively, petitioners Eaton and Mingo contend the county court's decision is not supported by adequate findings.

A. The Planning Commission's and County Court's Decisions

Following the county court's remand of the planning commission's first decision, the planning commission explained why it concluded that Invenergy's facility exceeds applicable noise standards and adopted a plan for confirming that any measures Invenergy might adopt to bring its Willow Creek facility into compliance with that noise limit are successful. In doing so, the planning commission confronted and addressed several key legal issues. We restate the planning commission's findings below to clarify the planning commission's key findings:

1. Invenergy's facility violates noise limits at the Eaton, Mingo, Wade and Williams Residence.

2. The evidence that the planning commission relied on to conclude that noise limits are violated at those four locations was provided by

Invenergy's expert Michael Theriault Acoustics, Inc. (MTA) and Eaton's expert Daley Standlee & Associates, Inc. (DSA) and that evidence appears at Planning Commission Record 88 and 273.

3. Invenergy will comply with the applicable noise limit when the noise measurements at those four locations do not exceed 36 dBA.

4. Invenergy's noncompliance with the noise standard at the four residences does not qualify for the exception for "unusual and/or infrequent" events at OAR 340-035-0035(6)(a).

5. Compliance with the 36 dBA noise limit means compliance ("black and white"); it does not mean substantial compliance or no more than a *de minimis* violation.

Although the county court agreed with the planning commission's first finding regarding violations at the Williams residence, it disagreed with the planning commission regarding the Eaton, Mingo and Wade residences. But the only reason the county court gave for that disagreement is the following

> "[T]he Morrow County Court found that there was substantial evidence in the record to support the Planning Commission decision with regard to the Williams property;
>
> "[T]he Morrow County Court found that there was not substantial evidence in the record to support the Planning Commission decision with regard to the remaining complainants[.]" County Court Remand Record 2.

B. Error in Applying Substantial Evidence Review

When LUBA reviews land use decisions for substantial evidence under ORS 197.835(9)(a)(C) and it finds that the decision on review is supported by evidence in the record that a reasonable person would believe, it rejects the substantial evidence challenge and affirms the decision. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). LUBA affirms in such cases even if other reasonable persons or LUBA might have resolved evidentiary conflicts differently, if they had been the land use decision maker, so long as LUBA concludes a reasonable person could also have resolved the evidentiary conflicts as the decision maker did. *Id*.; *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990). In performing substantial evidence review, LUBA is solely to determine if

the evidence is such that a reasonable decision maker would rely on the evidence; LUBA is not to conduct its own reweighing of the evidence, and LUBA does not duplicate the role of the original decision maker. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 586-88, 842 P2d 441 (1992). We understand petitioners to argue that the above findings show the county court attempted to apply a substantial evidence scope of review in this case but that it failed to correctly do so because not only is the evidence cited by the planning commission evidence that a reasonable person would have relied on, given the lack of any conflicting evidence, the planning commission's decision is supported by substantial evidence as a matter of law, and the county court must affirm the planning commission's decision if substantial evidence review is correctly applied in this case.

The quoted findings permit petitioners to make the argument that they make. But as we explain in the next section of this opinion, the county court's error was its failure to adopt adequate findings to explain why it only found a noise limit violation at the Williams residence, but no noise limit violation at the other residences. The county court's error was not a failure to correctly apply substantial evidence review. Petitioners do not explain why they believe the county court was required to apply substantial evidence review to the planning commission's decision, as opposed to conducting a *de novo* review in which the county court was free to engage in its own fact finding and reverse the planning commission's decision if it viewed the evidence differently. Petitioners cite no legal requirement that the county court must limit its review to determining whether the planning commission's decision is supported by substantial evidence. If Morrow County Zoning Ordinance (MCZO) 9.030 governed the county court's decision on the appeals of the planning commission's remand decision, and no one argues that any other section of the

MCZO applies, it is clear that the county court is not limited to substantial evidence review and is free to adopt its own findings of fact based on its own understanding of the evidence.[7]

C. Adequacy of the County Court's Findings

Petitioners are clearly correct that the county court's findings are inadequate. If the county court was relying on the same evidence the planning commission relied on, that evidence shows that the combined ambient sound levels at the Mingo, Eaton and Williams residences exceed 36 dBA at times and that they may exceed 36 dBA in certain wind conditions at the Wade residence. While that evidence shows that the violations are more severe and more frequent at the Williams' residence, the evidence shows violations at all four residences. If the county court is relying on the same evidence to conclude there are noise standard violations at the Williams residence, it must explain how that evidence supports its finding that there are no violations at the other three residences, if it can.

Importantly, the planning commission found that the 36 dBA standard is a "black and white" standard, and is violated even if the violation is small and relatively infrequent, and also found that the exemption for "unusual or and/or infrequent events" does not apply to violations such as the ones that are occurring at the four residences. If the county court interprets the OAR 340-035-0035(1)(b)(B) 10 dBA increase standard to be met if any

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[7] MCZO 9.030 provides as follows:

> "**SECTION 9.030. APPEALS.** A person may appeal to the County Court from a decision or requirement made by the Planning Commission. * * * Written notice of the appeal must be filed with the county within 15 days after the decision or requirement is made. The notice of appeal shall state the nature of the decision or requirement and the grounds for appeal.
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> "* * * * *
>
> "C. An appeal or review proceeding shall be based upon, but not limited to, the record of the decision being appealed or reviewed.
>
> "D. Following the hearing, the County Court * * * may overrule or modify any decision or requirement and shall set forth findings for such decision.
>
> "* * * * *."

violations of that standard are so small or infrequent that they can be overlooked as *de minimis*, the county court must assert that position in its decision and justify that position, if it can.[8] On this record we cannot infer that the county court applied a *de minimis* exception or, if it did, what the justification for that *de minimis* exception might be. Similarly, if the county court is relying on the "unusual and/or infrequent events" exception at OAR 340-035-0035(6) that the planning commission expressly rejected, the county court adopted no explanation for that position in its findings. The county court's written decision neither applies the "unusual and/or infrequent events" exception nor explains why the evidence might support application of that exception. If the county court elects to apply the "unusual and/or infrequent events" exception, in its written decision the county court will need to confront and respond to Mingo's and Eaton's contentions that the "unusual and/or infrequent events" exception is a much more limited exception for rare, isolated events and does not apply to violations of the frequency and duration that were identified at the Williams, Mingo, Eaton and Wade residences.

These assignments of error are sustained in part. On remand, if the county court adheres to its view that the 36 dBA standard is violated at the Williams residence, but is not violated at the other residences, it must adopt an explanation for that view that is sufficiently developed for LUBA review. Without such an explanation, the county's court's finding concerning the Mingo, Eaton and Wade residence is not supported by substantial evidence.

FOURTH ASSIGNMENT OF ERROR (MINGO)

In his fourth assignment of error, petitioner Mingo argues that the planning commission correctly concluded that the "unusual and/or infrequent events" exception does

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[8] For example, it may be that the equipment and techniques that were used to record, measure and analyze noise are sufficiently imprecise that the measured violations are sufficiently small that they are within expected margins of error. In that circumstance it might be that the county could interpret the 36 dBA noise standard not to be violated by violations that are within the expected margins of error. We express no opinion on whether such is the case, but that is the kind of explanation that, if supported by the record, might justify a finding that very small measured violations of the 36 dBA standard are not sufficient to demonstrate a violation in fact.

not apply to allow the types of violations that were found at the four residences. Mingo contends that to the extent the county court applied the "unusual and/or infrequent events" exception its decision should be reversed or remanded.

We have already agreed with petitioners that if the county court is relying on the "unusual and/or infrequent events" exception it needs to more clearly articulate its intent to do so and explain why it believes that exception applies here. Because the county court has not actually applied the "unusual and/or infrequent events" exception, Mingo's fourth assignment of error is premature.

Mingo's fourth assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR (INVENERGY)

A key legal issue in the appeal of the planning commission's second decision to the county court was whether—in assessing whether Invenergy's Willow Creek facility violates the county's noise standard at the four residences—the applicable noise standard is 36 dBA (26 dBA assumed background ambient noise level + 10 dBA), or whether—in instances where the combined ambient noise level at the four residences exceeds 36 dBA—Invenergy retains a right under the administrative rule to submit evidence to establish that (1) the actual background ambient noise level in those instances exceeds the assumed 26 dBA background ambient noise level and (2) the turbines add no more than 10 dBA in those instances. Invenergy contends that under OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V), Invenergy retains that choice, both at the time a wind energy facility is proposed and after it goes into operation.[9]

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[9] As noted earlier OAR 340-035-0035(1)(b)(B)(iii) governs "noise levels generated or caused by a wind energy facility," and provides in relevant part;

> "(I) The increase in ambient statistical noise levels is based on an assumed background L50 ambient noise level of 26 dBA or the actual ambient background level. *The person owning the wind energy facility may conduct measurements to determine the actual ambient L10 and L50 background level*.

In support of its appeal, Invenergy submitted a July 1, 2010 letter in which it makes a number of arguments under a bold letter heading "**The Interpretational and Factual Issues that the County Must Address**." County Court Appeal Record 20. In one of the issues Invenergy raised in the letter, it contended that while it used the assumed background ambient noise level of 26 dBA as "its base line standard," the administrative rule also allows it to use "the higher of [either the] assumed [background] ambient noise level of 26 dBA or [the] actual [background] ambient * * * noise [level]." Invenergy argued that it provided evidence that in some cases where testing showed noise levels exceeded 36 dBA at the measurement point after the turbines were in operation, the actual background ambient noise level without the turbines "was the significant contributing factor" and therefore "Willow Creek was not in violation of the condition." Planning Commission Remand Record 21. Invenergy went on to complain that:

> "Invenergy cannot tell from the Planning Commission decision whether it rejected Invenergy's interpretation that it could consider an increase in actual * * * background [ambient] noise [level], whether the Commission

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"* * * * *

"(IV) For purposes of determining whether *a proposed wind energy facility* would satisfy the ambient noise standard where a landowner has not waived the standard, noise levels at the appropriate measurement point are predicted assuming that all of the proposed wind facility's turbines are operating between cut-in speed and the wind speed corresponding to the maximum sound power level established by IEC 61400-11 (version 2002-12). *These predictions must be compared to the highest of either the assumed ambient noise level of 26 dBA or to the actual ambient background L10 and L50 noise level, if measured*. The facility complies with the noise ambient background standard if this comparison shows that the increase in noise is not more than 10 dBA over this entire range of wind speeds."

"V. For purposes of determining whether *an operating wind energy facility* complies with the ambient noise standard where a landowner has not waived the standard, noise levels at the appropriate measurement point are measured when the facility's nearest wind turbine is operating over the entire range of wind speeds between cut-in speed and the wind speed corresponding to the maximum sound power level and no turbine that could contribute to the noise level is disabled. *The facility complies with the noise ambient background standard if the increase in noise over either the assumed ambient noise level of 26 dBA or to the actual ambient background L10 and L50 noise level, if measured, is not more than 10 dBA over this entire range of wind speeds*. (Emphases added.)

> determined that the standard had to be 36 dBA with no variation, or whether the Commission did not find our evidence convincing with regard to the effect of the actual [background] ambient levels (we note that there was no rebutting evidence in the record). Planning Commission Remand Record 21-22.

The affected residents disputed Invenergy's position. Mingo argued that while Invenergy had a right under OAR 340-035-0035(1)(b)(B)(iii)(IV) to have its proposed wind energy facility reviewed under the 26 dBA assumed background ambient noise level *or* the actual background ambient noise level, once Invenergy chose the 26 dBA assumed background ambient noise level it does not have a right once the facility is operating to oscillate back and forth between the 26 dBA assumed background ambient noise level and actual background ambient noise levels. County Court Remand Record 60-62. Moreover, Mingo argued that Invenergy submitted inadequate evidence to establish, as a matter of fact, what the actual background ambient noise levels are without the turbines in operation. *Id*. Eaton argued that the evidence establishes that during late night hours the actual background ambient noise level without the turbines drops below 26 dBA and that Invenergy's own evidence establishes that during those late night hours when the wind is from the south/southwest and turbines are operated at maximum sound output the combined ambient noise level exceeds 36 dBA at times, with the result that the sound standard is violated no matter whether the assumed or actual background ambient noise level is used. County Court Remand Record 69. The county planning director took the position that it was within the county court's discretion to allow Invenergy to use either the measured, actual background ambient noise level or the assumed 26 dBA background ambient noise level.

Invenergy contends in its first assignment of error that in adopting planning commission Condition X, without explaining why it adopted Condition X, the county court's decision is not supported by adequate findings to explain how it resolved the interpretive question raised by Invenergy concerning OAR 340-035-0035(1)(b)(B)(iii), *see* n 9.

Invenergy contends this lack of adequate findings violates ORS 215.416(9).[10] Invenergy goes on to suggest that LUBA might be able to find under ORS 197.835(11)(b) that despite the inadequate findings the county court did not intend to impose an absolute 36 dBA noise limit in all operating circumstances, but that if LUBA cannot do so it must remand for the county court to adopt adequate findings.[11] In its second assignment of error, Invenergy contends that if the county court in adopting Condition X intended to mandate a 36 dBA combined ambient noise level standard in all circumstances and to find that Invenergy is not entitled to present evidence to establish that the actual background ambient noise level without the turbines exceeds 26 dBA in instances where the evidence shows the combined ambient noise level with the turbines exceeds 36 dBA (in an attempt to show the turbines contribute no more than 10 dBA in those circumstances) the county court erred.

A. The Statutory Requirement for Findings

Eaton argues Invenergy's first assignment of error provides no basis for remand because ORS 215.416(9) only requires that counties adopt findings when approving *permits or expedited land divisions* and the disputed county court decision is neither a permit decision nor an expedited land division.

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[10] ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

[11] 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."

In rejecting Eaton's jurisdictional challenge, we have already observed that the disputed county court decision may be properly viewed as an amendment of Condition 1 of the original conditional use permit decision. If the county court's decision is correctly viewed as an amendment of a permit decision, it is a permit decision, and ORS 215.416(9) applies.

But even if ORS 215.416(9) does not apply, the county court's decision must be supported by adequate findings. The requirement that quasi-judicial land use decisions be supported by adequate findings predates ORS 215.416(9). *West v. City of Astoria* 18 Or App 212, 221-222, 524 P2d 1216 (1974) (quasi-judicial decision approving conditional use permit must be supported by findings). In fact, given the complexity of the land use laws that now apply to both legislative and quasi-judicial land use decision making, adequate findings are likely to be required for legislative decisions as well as quasi-judicial decisions to permit appellate review, even though land use statutes generally do not require that legislative decisions be supported by findings. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). Without regard to whether ORS 215.416(9) applies to the appealed county court decision, the county court's quasi-judicial land use decision must be supported by adequate findings.

B. The County Court's Findings

If the county court determined that Invenergy was free to attempt to demonstrate that it complies with the noise standard because noise from the wind turbines does not exceed 10 dBA at times when the combined ambient noise level at the residences with the turbines in operation exceeds 36 dBA, the county court's decision is inadequate to express that position. Indeed, by simply adopting the planning commission's Condition X, which seems to establish 36 dBA as the exclusive combined ambient noise level standard that Invenergy must meet at the four residences, the county court seems to have implicitly rejected Invenergy's interpretation.

At the time an applicant for a wind energy facility proposes a facility and afterwards during operation, OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) clearly permits a wind energy facility applicant and operator to have the noise standard applied to its facility based on the assumed 26 dBA background ambient noise level or the actual background ambient noise level. To the extent the county court found otherwise, we agree with Invenergy that the county's interpretation is not supported by adequate findings and is inconsistent with the text of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V).

OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) clearly give Invenergy the choice between (1) a combined ambient noise level standard based on an assumed 26 dBA background ambient noise level plus 10 dBA and (2) a combined ambient noise level standard based on actual background ambient noise levels plus 10 dBA. But that does not necessarily mean that OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) must be interpreted to give Invenergy a unilateral right to move back and forth between "assumed" and "actual" background ambient noise levels at individual measurement points, depending on the circumstances, so that Invenergy can rely on the assumed 26 dBA background ambient noise level in circumstances where actual background ambient noise levels may be less than 26 dBA and can rely on the actual background ambient noise level when the actual background ambient noise level is greater than 26 dBA. The text of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) does not unambiguously answer that interpretive issue. The parties clearly raised this interpretive issue, and the county court should have expressed its interpretation of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) and resolved the issue.

We have some question whether the state's decision not to enforce OAR chapter 340, division 35 and the county's decision to adopt the rule as a county noise regulation makes the administrative rule county land use legislation and whether the county would therefore be entitled to interpretive deference under ORS 197.829(1). However, we need not consider that question here, because even if the county would have been entitled to interpretive

deference, it adopted no reviewable interpretation of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V). Under ORS 197.829(2), LUBA is authorized to interpret county land use regulations in the first instance, in cases where the local government has failed to do so.[12]

We understand petitioner Mingo to argue that if a wind energy facility applicant/operator initially selects the assumed background ambient noise level of 26 dBA when seeking approval under OAR 340-035-0035(1)(b)(B)(iii) (I) and (IV), or when responding to alleged violations of the operating noise limit imposed by OAR 340-035-0035(1)(b)(B)(iii) (I) and (V), that choice is irrevocable. Stated differently, we understand petitioner Mingo to argue that a wind energy facility must elect between assumed *or* actual background ambient noise levels and apply that choice uniformly at all measurement points at all hours of the day.

The text of the rule was set out earlier at n 9. We see nothing in the language of the rule that suggests a single background ambient noise level (actual or assumed) must be selected and applied uniformly to all of a wind energy facility's noise measurement points at the time the facility is proposed and throughout its operating life. If the authors of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) had intended to limit wind energy facility applicants and operators in that manner, we believe the authors would have adopted language to express that intent. There simply is no such language in OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V). We note that reading such a constraint into OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) could easily leave an applicant or operator who selected the assumed background noise level of 26 dBA unable to avoid violating the operating noise limit imposed by OAR 340-035-0035(1)(b)(B)(iii)(V) if the actual background ambient noise level

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[12] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

at any measurement point turned out to be in excess of 36 dBA. In that circumstance the wind energy facility would violate the noise standard under the assumed 26 dBA background ambient noise level even if the wind energy facility produced no noise at all. We conclude it is highly unlikely that the authors of OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) would have intended that result. We conclude that under OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) an applicant may select either the assumed background ambient noise level or the actual background ambient noise level at individual measurement points when seeking approval for the proposal and if required to prove that its operating facility complies with the OAR 340-035-0035(1)(b)(B)(i) requirement that the wind energy facility increase background ambient noise levels by no more than 10 dBA.

In sum, we agree with Invenergy that where the evidence shows that combined ambient noise levels with the wind turbines in operation exceeds 36 dBA at a measurement point, Invenergy nevertheless complies with the OAR 340-035-0035(1)(b)(B)(i) 10 dBA standard if Invenergy can establish that its wind energy facility contributes no more than 10 dBA to the actual background ambient noise level at the measurement point .

Finally, while we agree with Invenergy on the interpretive issue, there is an evidentiary issue that remains to be resolved. Even if OAR 340-035-0035(1)(b)(B)(iii)(I), (IV) and (V) are correctly interpreted to permit Invenergy to attempt to show that its facility does not violate the county noise standard in cases where the combined ambient noise level exceeds 36 dBA (by showing that the actual background ambient noise level exceeds 26 dBA and Invenergy's turbines do not add more than 10 dBA to the actual background ambient noise level) the residents dispute whether Invenergy submitted adequate evidence to establish that Invenergy's facility complies with OAR 340-035-0035(1)(b)(B)(iii)(V) based on actual background ambient noise levels. Specifically, Eaton and Mingo contend that because Invenergy's wind turbine facility is already constructed and in operation and there is limited data available from periods when the wind turbine facility was not in operation, Invenergy

has not carried its burden of proof to present substantial evidence regarding the part of combined ambient noise level that is attributable to Invenergy's turbines and the part of the combined ambient noise level that is attributable to other sources.

Even if Invenergy is entitled to attempt to show that its turbines contribute no more than 10 dBA to the actual background ambient noise, that does not necessarily mean that Invenergy has carried that evidentiary burden. On remand, the county court will need to resolve the parties' disagreement over whether the evidence submitted by the parties, viewed as a whole, is adequate to demonstrate that in circumstances where the measured combined ambient noise levels at the four residences exceeds 36 dBA, the noise that is properly attributable to Invenergy's wind turbines does not exceed 10 dBA and the actual background ambient noise level without the turbines exceeds 26 dBA.

Invenergy's first and second assignments of error are sustained in part.

FIFTH ASSIGNMENT OF ERROR (MINGO)

In his fifth assignment of error, petitioner Mingo argues that the planning commission correctly determined that Invenergy failed to carry its evidentiary burden to establish the amount of noise that is properly attributable to the Invenergy's wind turbine in circumstances where the combined ambient noise level with the turbines exceeds 36 dBA. Mingo contends that it was therefore proper for the planning commission to require that Invenergy's facility comply with the 36 dBA standard based on assumed background ambient noise levels.

There are a number of problems with Mingo's fifth assignment of error. In this appeal it is the county court's decision that is on review, not the planning commission's decision. In addition, Mingo's fifth assignment of error is not an assignment of *error*, since Mingo argues the planning commission correctly found that Invenergy failed to carry its evidentiary burden. The legal and factual issue that we understand Mingo to attempt to raise in his fifth assignment of error has already been addressed in our resolution of Invenergy's first and second assignments of error.

Mingo's fifth assignment of error is denied.

The county's decision is remanded.