BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID MINGO, MICHAEL EATON,
SHERRY EATON, DENNIS WADE,
LORRIE WADE and DANIEL WILLIAMS,
Petitioners,

vs.

MORROW COUNTY,
Respondent,

and

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

LUBA No. 2011-100

FINAL OPINION
AND ORDER

Appeal from Morrow County.

Andrew W. Sprauer, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Churchill Leonard Lawyers.

Ryan M. Swinburnson, Kennewick, Washington, filed the response brief and argued on behalf of respondent.

Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of the intervenors-respondents. With him on the brief was Miller Nash LLP.

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

AFFIRMED 03/19/2012

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 court decision that finds that noise from a wind energy facility violates applicable noise standards at three of petitioners' residences but that the violations are not serious enough to warrant revocation of the wind energy facility's conditional use permit or further enforcement action by the county.

FACTS

An earlier county decision concerning the disputed wind energy facility was appealed to LUBA. *Mingo v. Morrow County*, ___ Or LUBA ___ (LUBA Nos. 2011-014, 2011-016, 2011-017, June 1, 2011) (*Mingo I*). An understanding of that prior appeal and the county's action following remand helps frame and understand the issues presented in this appeal and our resolution of those issues. We set out the prior events in some detail before discussing our jurisdiction in this matter and turning to petitioners' assignments of error.

A. The 2005 Conditional Use Permit Decision

On January 31, 2005, Invenergy LLC and Willow Creek Energy LLC (together Invenergy) were granted conditional use approval to operate an electric wind energy facility (Willow Creek Energy Facility), which includes 48 wind turbines. One of the conditions of approval was "Condition No. 1," which requires that the facility "[c]omply with OAR 340 Division 35 standards relative to wind facilities and the appropriate sections of the Morrow County Noise Ordinance." Petition for Review Exhibit B, page 11. The referenced administrative rule is the Oregon Department of Environmental Quality's (DEQ's) noise standards at OAR chapter 340, division 35, and the referenced Morrow County Noise Ordinance is a separate county noise regulation. Sometime after the conditional use permit was granted, the county repealed the Morrow County Noise Ordinance. As explained later, although it is not entirely clear, we assume for purposes of this opinion that the county has adopted the DEQ's noise standards as the county's own noise standards.

B. The County's First Decision

In adopting its first decision in this matter, the planning commission and the county court each adopted two decisions.

1. The Planning Commission's First Decision

During and after construction of the Willow Creek Energy Facility in 2008, complaints were filed with the county by petitioners concerning the noise generated by Willow Creek Energy Facility wind turbines. Before the planning commission, all parties submitted expert evidence concerning the turbine noise. The planning commission's first decision was not reduced to writing, beyond the minutes of the meeting at which the planning commission took action. However, those minutes show that the planning commission concluded that the Willow Creek Energy Facility does not comply with the noise standards and that Invenergy should have six months to bring the facility into compliance. Record D, page 12.[1]

2. The County Court's First Decision

All parties appealed the planning commission's first decision to the county court. On July 7, 2010, the county court remanded the planning commission's first decision to the planning commission, with instructions that the planning commission should adopt findings in support of its decision and specify a procedure by which Invenergy could bring the Willow Creek Energy Facility into compliance with the noise standards within the six month deadline. Record C, page 1.[2]

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[1] The county has divided the record into five parts: (1) the record before the planning commission that led to its first decision (Record D), (2) the record before the county court that led to its initial decision (Record C), (3) the record before the planning commission that led to its second decision (Record B), (4) the record before the county court that led to its second decision (Record A), and (5) the record before the county court following our remand in *Mingo I* that led to the decision that is before us in this appeal, which is cited simply as the "Record."

[2] The DEQ noise standards are complex but as we explain later in the text the noise standard at issue in this appeal is relatively straightforward. For simplicity we simply refer to the applicable DEQ noise standard as the noise standard.

3. The Planning Commission's Second Decision

On October 27, 2010, the planning commission adopted its second decision. As relevant in this appeal, the planning commission found: (1) that the evidence shows the facility violates the noise standard at times at three petitioners' residences (Eaton, Williams and Mingo) and at a fourth residence in some wind conditions (Wade), (2) the wind standard is an objective standard rather than a subjective standard and is either met or not met, "black and white," (3) future data collection should be done by a third party with Invenergy paying the cost, (4) Invenergy should have six months to bring the facility into compliance, and (5) to comply with the noise standard, total noise (combined noise from background sources and the facility) may not exceed 36 decibels (dBA). Record B, pages 2-3.

4. The County Court's Second Decision

All parties appealed the planning commission's second decision to the county court. On January 26, 2011, the county court adopted its second decision. As relevant, the county court found: (1) the evidence shows the facility violates the noise standard at the Williams residence but not at the other residences, (2) Invenergy should have six months to bring the facility into compliance with the noise standard, (3) the planning department should engage a third party expert to determine whether the facility has been brought into compliance, and (4) to comply with the noise standard, total noise (noise from background sources and the facility) may not exceed 36 dBA. Record A, pages 2-4.

C. LUBA's Decision in *Mingo I*

All parties appealed the county court's second decision to LUBA. LUBA's June 1, 2011 decision in *Mingo I* first determined that because the evidence the county court relied on to find that the noise standard was only violated at the Williams residence showed that there were also noise standard violations at other residences, the county court's decision was not supported by adequate findings or substantial evidence. LUBA concluded that if the county was relying on an exception that is provided by DEQ's noise rule for "[u]nusual

and/or infrequent events," *see* n 12, or on a *de minimis* exception, the county court must assert and defend those positions. Second, LUBA determined that under DEQ's noise standards Invenergy could rely on either of two methods for establishing that the Willow Creek Energy Facility complies with the noise standard. Under the first method, the Willow Creek Energy Facility may add as much as 10 dBA to an assumed background noise level of 26 dBA. Under the second method, the facility can add as much as 10 dBA to the actual, measured background noise level.[3] Both the planning commission's and the county court's decision had erroneously suggested that, in defending against the allegations of noise standard violations, Invenergy is limited to the first method. LUBA remanded the county court's decision.

D. The County Court's Decision Following *Mingo I*

Following LUBA's remand, the county court held a hearing and entered its third decision in this matter on October 5, 2011, without reopening the record. The county court found that based on Invenergy's experts' evidence there were noise standard violations at the Eaton, Mingo and Williams residences, but no noise standard violation at the Wade residence. The county court rejected petitioners' challenge to Invenergy's experts' methodologies and found that the evidence submitted by Invenergy's experts was believable. Based on that evidence, the county court ultimately concluded that the Willow Creek Energy Facility is violating the noise standard at the Eaton, Mingo and Williams residences but that those violations are not serious or significant enough to warrant either revoking the conditional use permit or taking further action to require that those violations be corrected. Record 4-5. This appeal followed.

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[3] The first method would allow the Willow Creek Energy Facility to make more noise in circumstances where background noise is less than 26 dBA. The second method would allow the Willow Creek Energy Facility to make more noise in circumstances where background noise exceeds 26 dBA. For example where background noise is 30 dBA, under the first method the facility would violate the noise standard if the turbines added more than 6 dBA, but under the second method the facility could add as much as 10 dBA to the actual background noise for a total noise level of 40 dBA.

JURISDICTION

Although our jurisdiction was challenged in *Mingo I*, we rejected that jurisdictional challenge, and no party questions our jurisdiction in this appeal of the county's decision following our remand in *Mingo I*. However, LUBA may consider whether it has jurisdiction over an appeal on its own motion, and if it is uncertain whether it has jurisdiction, LUBA is obligated to do so without regard to whether the parties raise any jurisdictional question. *Stewart v. City of Salem*, 61 Or LUBA 77, 82, *aff'd* 236 Or App 268, 236 P3d 851 (2010); *Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997). We therefore consider whether we have jurisdiction before turning to petitioners' assignments of error.

As relevant here, under subsection (1) of ORS 197.825, LUBA has exclusive jurisdiction to review land use decisions.[4] As defined by ORS 197.015(10)(a)(A), land use decisions include final local government decisions that concern the application of a comprehensive plan or land use regulation.[5] LUBA's scope of review is limited and ORS 197.835 only authorizes LUBA to affirm, remand or reverse land use decisions.

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[4] ORS 197.825(1) provides in relevant part:

> "Except as provided in [ORS 197.825(3)], the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

[5] The text of ORS 197.015(10)(a)(A) is set out below:

> "Land use decision":
>
> "(a) Includes:
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> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

However, as subsection (3) of ORS 197.825 makes clear, notwithstanding the exclusive jurisdiction that subsection (1) of ORS 197.825 grants LUBA to review land use decisions, circuit courts retain jurisdiction "[t]o grant declaratory, injunctive, or mandatory relief in * * * proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]"[6] ORS 215.185 and Morrow County Zoning Ordinance (MCZO) 10.030 similarly make it clear that the county and affected property owners may "institute injunction, mandamus, abatement, or other appropriate proceedings" to eliminate or correct land use law violations.[7] Such land use law violations include violations of land use permit conditions of approval that were imposed to ensure compliance with land use laws. *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 515-16, 944 P2d 976 (1997).

Not surprisingly, applying these potentially overlapping grants of jurisdiction to LUBA and the circuit courts has presented problems at times. Although the division between LUBA's and the circuit court's jurisdiction in land use law enforcement matters is sometimes difficult to identify, there is no overlap in LUBA's and the circuit court's

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[6] The complete text of ORS 197.825(3) is set out below:

> "Notwithstanding [ORS 197.825(1)], the circuit courts of this state retain jurisdiction:
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> "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and
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> "(b) To enforce orders of [LUBA] in appropriate proceedings brought by [LUBA] or a party to the [LUBA] proceeding resulting in the order."

[7] ORS 215.185(1) provides in part:

> "In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. * * *"

The text of MCZO 10.030 is nearly identical to the text of ORS 215.185(1)

jurisdiction in such matters. *Wright v. KECH-TV*, 71 Or App 662, 664, 694 P2d 545, *aff'd* 300 Or 139, 707 P2d 1232 (1985). LUBA has exclusive jurisdiction in such circumstances to review any land use decisions a local government may render in enforcing its land use laws, but circuit courts otherwise retain jurisdiction over proceedings that are brought to enforce county land use laws. Just as LUBA in reviewing land use decisions to determine whether they should be affirmed, remanded or reversed under ORS 197.835 "has no authority to enforce" local land use laws, circuit courts lack jurisdiction to review local government land use decisions when proceedings are brought in circuit court to enforce land use laws. *Doughton v. Douglas County*, 90 Or App 49, 52, 750 P2d 1174 (1988). This does not mean however, that the circuit court cannot *itself* resolve any land use law ambiguities that may need to be resolved in a circuit proceeding to enforce land use laws or permit conditions of approval. *Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2 110 (1994). It simply means that if a local government decides to apply land use laws in a local government proceeding to determine whether land use laws have been violated and adopts a final decision that (1) applies land use laws, (2) determines whether those laws have been violated, and (3) determines whether to require that the violation be corrected, such local government enforcement decisions are land use decisions and a circuit court lacks jurisdiction to review such local government land use decisions.

It appears to us to be beyond question that under ORS 197.825(1), 215.185(1) and MCZO 10.030, *see* ns 6 and 7, petitioners as affected land owners and county could have elected to proceed directly to circuit court to make their case that the Willow Creek Energy Facility is violating the noise standards and to ask the circuit court for one or more of the remedies specified by the statutes to compel Invenergy to comply with the noise standard. And had they done so, the existence and potential availability of the county's own enforcement ordinance would not preclude a circuit court enforcement proceeding so long as petitioners and the county did not also attempt to take advantage of the county's enforcement

ordinance procedures. *Clackamas County v. Marson*, 128 Or App at 23-24. Petitioners may still have the right to pursue an enforcement action in circuit court if the county maintains its position that it will not take action to require Invenergy to comply with the noise standard.[8] *Doughton v. Douglas County*, 90 Or App at 55.

However, notwithstanding the potential availability of an enforcement remedy at circuit court, neither petitioners nor the county initiated an enforcement proceeding in circuit court. Instead petitioners filed complaints with the county. In response to those complaints, the county held hearings and adopted decisions based on the evidence submitted during those hearings. In its January 26, 2011 decision, the county court found that the Willow Creek Energy Facility is violating the noise standard at one of petitioners' homes and ordered Invenergy to correct the violation. Following our remand in *Mingo I*, the county court has now concluded in its October 5, 2011 decision that the Willow Creek Energy Facility is violating the noise standard at three of petitioners' residences, but the county court declined to revoke Invenergy's conditional use permit or take any other action to require that the Willow Creek Energy Facility comply with the noise standard. The jurisdictional question in this appeal is whether that county court decision is a final decision that concerns the application of county land use regulations, so that the decision is a land use decision as defined by ORS 197.015(10)(a) and subject to LUBA's review jurisdiction.

It is reasonably clear that if all the county had done when it received petitioners' complaints was decide it will not enforce Condition 1, without adopting any final decision that applied land use laws or without amending any prior land use decision in adopting that decision, the decision would not qualify as a land use decision, and this appeal would have to

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[8] Of course this does not necessarily mean that petitioners will prevail in any such action. And it does not mean that petitioners are entitled to any of the specific remedies they ask LUBA to grant in this appeal. *See Cordil v. City of Estacada*, 67 Or App 481, 486, 678 P2d 1257 (1984) (pursuant to mandamus circuit court may direct local government to exercise whatever discretion it may have to enforce local law in alternative ways but may not direct local government to select a particular alternative); *Doughton v. Douglas County*, 90 Or App at 54 (same).

be dismissed. *Mar-Dene Corp. v. City of Woodburn*, 149 Or App at 515-16. *See also Wygant v. Curry County*, 110 Or App 189, 821 P2d 1109 (1991) (where there is no related land use matter that must be resolved, a county decision to seek a circuit court injunction to correct land use law violation is not a land use decision). But the county did not simply refuse to take action to enforce the noise standard. The county held hearings and adopted final decisions that apply the noise standard, including the final decision that is before us in this appeal. In their jurisdictional statement in the petition for review in this appeal, petitioners contend that while the county repealed its noise ordinance it adopted the DEQ noise standards as county noise standards. Morrow County Code Enforcement Ordinance (MCCEO) 7.100(A).[9] Petitioners contend the noise standards are a land use regulation. Because the challenged decision applies the noise standards, petitioners contend the challenged decision qualifies as a land use decision.

We have some question whether MCCEO 7.100(A) actually adopts the DEQ noise standards as county noise standards and whether the noise standards are accurately described as a land use regulation. But no party questions petitioners' jurisdictional argument and both respondent and intervenor-respondent appear to share petitioners' view that the DEQ noise standards have been adopted as a county land use regulation. *See* Respondent's Brief 5 (arguing that the county's interpretation of the DEQ noise standards is an interpretation of county land use laws entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010); Intervenor-Respondent's Brief 7-8 (same)). Absent any argument to the contrary, we conclude for purposes of this appeal that the county's noise standards are

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[9] MCCEO Section 7 provides in part:

"Section 7. Noise as a Public Nuisance

"7.100 Citations

"A. Citations may be issued for violations of Oregon Administrative Rule 340-035 Noise Control Regulations."

a land use regulation and that the county's final decision applying that land use regulation therefore qualifies as a land use decision subject to LUBA review.

SCOPE OF REVIEW

One of the major difficulties we have encountered with this appeal is that the relief petitioners seek in many cases is the kind of injunctive or mandatory relief that the county or petitioners could seek in a circuit court proceeding under ORS 197.825(3)(a), 215.185(1) and MCZO 10.030. But as we noted in our discussion of jurisdiction, LUBA only has authority to affirm, remand or reverse land use decisions and does not have authority to grant the injunctive and mandatory relief that petitioners seek. In our resolution of petitioners' assignments of error below, we reject those assignments of error or portions of assignments of error where LUBA lacks authority to grant the relief that is requested under those assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is quoted below;

> "Invenergy fails to meet it[s] burden of proof based on the failure of the County Court in identifying any evidence relied upon in applying the actual background ambient plus 10 dBA standard in this matter." Petition for Review 10.

As respondent and Invenergy (together respondents) correctly note, an initial difficulty with petitioners' first assignment of error is that it is not stated in a way that permits easy application of LUBA's standard of review. Among other things, ORS 197.835(9) directs LUBA to reverse or remand a local government decision if LUBA concludes the decision maker "[m]ade a decision not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). It is the local government that determines—either explicitly or implicitly—whether the party with the burden of proof has carried his or her burden of proof. A local government decision must conclude that the governing criteria are satisfied—presumably because the party with the burden of proof carried his or her burden.

Once that decision is made, it is subject to LUBA review to determine whether the local government's decision is supported by substantial evidence. For purposes of deciding the first assignment of error, we will treat petitioners' first assignment of error as alleging that the county court's decision in this matter is not supported by substantial evidence.

But even interpreting the first assignment of error to allege an error that might provide a basis for LUBA to remand or reverse, petitioners' arguments under the first assignment of error are insufficient to establish that the county court's decision is not supported by substantial evidence. Petitioners argue as follows:

> "Invenergy does not meet its burden of proof for establishing a valid measurement of the actual background ambient noise level pursuant to OAR 340 Division 35 where the only evidence in the record relied upon by the County Court are the specific violations at the residences of Petitioners Eaton, Mingo and Williams. Petition for Review 10-11.

Restating petitioners' argument, petitioners appear to argue that the county court's decision concerning noise standard violations at petitioners' residences is not supported by substantial evidence, because the county only considered evidence of noise violations at petitioners' residences. If that is an accurate restatement of petitioners' argument, we do not understand the argument. The issue below was whether the Willow Creek Energy Facility is violating the noise standard at petitioners' residences. How the county court could err by limiting its consideration to evidence of noise violations at petitioners' residence is not apparent to us.

Turning to the county court's findings and the evidence the county court relied on, we also do not agree with petitioners that the county court inadequately identified the evidence it relied on. On December 15, 2009, Invenergy submitted evidence concerning noise at petitioners' residences. Record D 292-328 (Mingo) and Record D 328-379 (Wade, Eaton and Williams).[10] Those measurements considered noise with turbines on and noise with

[10] The pages in LUBA's copy of Record D are out of order following Record D 308. All of the pages are included but they appear in the following order: Record 330-309, 352-331, 353-379.

turbines turned off to establish the actual ambient noise without the turbine and the combined ambient + turbine noise level. Record D, pages 90-127. Following criticisms by petitioners' experts that the measurements did not consider an adequate number of days or wind speeds, Invenergy's expert submitted an additional analysis on February 15, 2010 regarding noise at petitioners' residences. Record D, pages 82-89. That analysis concluded that there were minor violations at the Eaton and Mingo residences, greater violations at the Williams residence and no violations at the Wade residence. That additional analysis includes the following explanation of the methodologies that were employed in circumstances where the 36 dBA standard was violated using the assumed ambient noise level method, making it necessary to determine if the actual ambient noise level method was also violated:

> "[F]or any hour when measured levels are greater than 36 dBA, it is necessary to determine how much noise is due to the turbines and how much noise is due to background sources. The ideal way to make this determination is to take measurements when noise levels are above 36 dBA while the turbines are operating, and then turn the turbines off to immediately measure background noise. However, this is not always possible or practical. In lieu of this, we use octave band plots, or 'acoustic signatures' as well as audio recordings to help us separate 'turbine-only' noise from background noise. Each noise source (birds, insects, turbines, and wind) tends to have its own unique acoustic signature or fingerprint." Record D, page 83.

Invenergy's expert appears to have relied in part on sound measurements at petitioners' residences with the turbines turned on and then turned off and in part on acoustic signatures to distinguish background and turbine noise when utilizing the actual ambient plus 10 dBA method. The County Court adopted the following findings:

> "3. The County Court now turns to the evidence in the record. Invenergy submitted evidence to the Planning Commission that supported a conclusion that there was:
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> "• no noise exceedence at all at the Wade residence;
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> "• an exceedence of 1 to 4 dBA at the Eaton residence three percent of the time that the Wind Facility was in operation;

"• an exceedence of 1 to 2 dBA at the Mingo residence six percent of the time that the Wind Facility was in operation; and

"• an exceedence of 1 to 8 dBA at the Williams residence ten percent of the time that the Wind Facility is in operation. * * *

"As the studies indicate, these exceedences occur in rare wind conditions where wind speeds aloft (at turbine hub height) are sufficient to operate the wind turbines, but wind speeds near the ground are low enough such that very little, if any, ambient noise is created.

"4. The primary technical criticism of Invenergy's sound analysis presented by the Complainants' acoustical specialist during the January 19, 2010 Planning Commission hearing was that Invenergy's analysis was not conducted over a sufficiently large wind speed range and did not consider a sufficiently large number of hours in drawing conclusions regarding compliance with the actual ambient standard. * * *

"The County Court disagrees. Invenergy's conclusions are based on Invenergy's sound measurements and a review of four years of meteorological data pursuant to the original and expanded analyses submitted by its sound expert. Invenergy's sound analysis was conducted by a credentialed professional at the locations required under the DEQ rule. In response to the January 19 comments by Complainants' specialist, Invenergy expanded its review of measurement data (Expanded Noise Analysis, dated February 15, 2010). The updated analysis includes the entire wind-speed operating range of the turbines (originally from 3.5 to 9.9 m/s [meters per second], but now from 3.5 to 25 m/s) as well as a larger set of noise data (originally 823 hours, but now 2,800 hours). Despite considering the entire wind-speed operating range as well as substantially more hours of noise data, the results were substantially the same as Invenergy's initial study * * *. The County Court finds that this represents a significant level of analysis and supports the conclusions in Invenergy's studies. For these reasons, the County Court finds Invenergy's initial analysis, 'Noise level Compliance Results for the Willow Creek Wind Energy Facility,' and Invenergy's February 15, 2010, 'Expanded Noise Analysis,' submitted into the record, to be the most convincing evidence in the whole record of noise impacts on the Complainants, even after consideration of Complainants' conflicting evidence." Record 4-5.

The county court explains in the above-quoted findings why it believes Invenergy's expert's analysis is reliable. Petitioners offer no argument that we can understand that supports their contention that the county court's decision is not supported by substantial evidence.

Finally, we note that even if petitioners had succeeded in establishing that the county court's decision is not supported by substantial evidence, the remedy petitioners request under the first assignment of error is for LUBA to order the county to utilize only the assumed 26 dBA ambient background plus 10 dBA method of determining whether the sound standard is met:

> "* * * Petitioners ask LUBA for instructions that Respondent Morrow County be required to enforce the OAR under the assumed background ambient standard (36 dBA) and that measurements and enforcement of this standard be conducted at the residences of all four Petitioners consistent with the prior decision of the Morrow County Planning Commission." Petition for Review 12-13.

There are two problems with the requested relief. First, we already determined in *Mingo I* that in defending against allegations that the Willow Creek Energy Facility is violating the noise standard, Invenergy is entitled to select either method of setting the noise standard (assumed ambient plus 10 dBA or actual ambient plus 10 dBA). Second, as already noted, LUBA only has authority to affirm, remand or reverse a land use decision. LUBA does not have authority to give the county the requested instructions.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners contend the county has erroneously created a "*de minimis*" exception to the noise standards. In our decision in *Mingo I*, we suggested that the county might be able to justify a *de minimis* exception in applying the noise standards if the county or Invenergy could establish that any measured violations of the noise standard were within the margins of error of the equipment used to measure noise. That speculation and the use of the word *de minimis* was, with the benefit of hindsight, probably a mistake on LUBA's part. However, the county court in the decision in this appeal does not use the term *de minimis* in the way we suggested might be possible in *Mingo I*. The county does not find that the noise standard is met (*i.e.*, not violated), because any violations

are within the margins of error of the sound measuring equipment (*de minimis*). Rather, the county finds that the noise standard is violated but that the county elects not to revoke Invenergy's conditional use permit or take further action against Invenergy to require that the Willow Creek Energy Facility comply with the noise standard, because the noise standard violations are *de minimis, i.e.*, not sufficiently serious or significant.

Petitioners' second assignment of error is based on the following language in the county court's decision:

> "Although the County Court concludes that the Wind Facility is violating the noise standard at the Eaton, Mingo and Williams residence[s], the County Court does not believe the violation is serious or significant enough to warrant revocation of the conditional use permit. The County Court determines that the * * * violations are de minimis, and as such, Morrow County should not expend additional resources in further evaluating these de minimis violations." Record 5.

Petitioners argue:

> "Based on the findings of a violation of Condition of Approval No. 1, which requires compliance with the OAR and County Noise Ordinance, *Respondent Morrow County has a clear duty to enforce compliance with these rules or to revoke the permit and suspend operation of the Willow Creek Energy Facility until Invenergy proves compliance with those standards*. * * * Petition for Review 14 (emphasis added).

Petitioners go on to argue that although the noise standard includes exceptions for "unusual and/or infrequent events" and allows noise in excess of the noise standard pursuant to an easement from adjoining landowners, the noise standard "does not provide a *de minimis* exception to noise violations for wind farms." *Id* at 15. Petitioners conclude their second assignment argument with the following argument:

> "Here the violations of the OAR cannot be ignored, nor can Respondent Morrow County refuse enforcement based on what they perceive as a 'de minimis' exceedence, where no such exception exists in the OAR and Respondent provides no evidence in support of the application consistent with the previous scenario contemplated by this Board. For this reason, the County Court's application of a de minimis exception is an error of law and that determination of the County Court should be reversed." Petition for Review 17.

The issue under the second assignment of error is not whether the Willow Creek Energy Facility is violating the noise standard. The county found that it is violating the noise standard at three of petitioners' residences, and we do not understand petitioners to challenge that finding.[11] Rather petitioners argue that the county therefore has a legal obligation either to revoke Invenergy's conditional use or to take some other enforcement action to force Invenergy to comply with the noise standard. While the county may well have such a legal obligation, petitioners do not identify the source of that legal obligation; petitioners simply assert that it exists.

ORS 215.185 and MCZO 10.030 provide that the county "may" seek to enforce its land use laws in circuit court. Neither the statute nor the zoning ordinance provides that the county "must" do so, or that the county is legally obligated to do so. ORS 197.825(3) similarly reserves circuit court jurisdiction to grant declaratory, injunctive or mandatory relief, but does not require that the county seek such relief in every case that a land use regulation violation is detected. MCZO 9.080(D) provides as follows:

> "A permit may be revoked or modified on the basis that the permit granted is being, or recently has been exercised contrary to the terms or conditions of such approval, or in violation of any statute, code, resolution, law or regulation."

MCZO 9.080(D) permits or enables the county to adopt the remedial responses that are authorized; it does not mandate or require that the county revoke or modify a permit in all cases where the holder of the permit violates the terms of the permit or the permit's conditions. Finally, as noted earlier MCCEO 7.100(A) provides that "[c]itations may be issued for violations of" the noise standard. *See* n 9. Similarly MCCEO 7.100(B) says "a violation [of the noise standard] may be enjoined by a civil action * * *." The remedies authorized by MCCEO 7.100(A) and (B) are permissive rather than mandatory.

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[11] Petitioners do suggest elsewhere in the petition for review that the noise standard is violated at a fourth residence (the Wade residence) and that the violations may be more significant than Invenergy contends and the county court found. However, petitioners do not present those arguments under the second assignment of error.

There may well be limits on the county's discretion to allow land use law violations to continue without challenge, although petitioners cite no legal basis for such a limit and do not demonstrate that any such limits are violated here. Because petitioners cite no authority for their position that the county committed legal error in declining to revoke Invenergy's conditional use permit or take further action to enforce the noise standard based on the measured violations, the second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

OAR 340-035-0035(6)(a) authorizes DEQ to approve exceptions to the noise standards imposed under OAR 340-035-0035(1) for "[u]nusual and/or infrequent events."[12] Petitioners' third assignment of error is set out below:

> "The Morrow County Court's creation of a 'de minimis' exception for not enforcing the requirements of the OAR and the [2005 conditional use permit] does not fall within the exception allowed for unusual and/or infrequent events allowed in the OAR." Petition for Review 17.

Because the county court did not rely on the OAR 340-035-0035(6)(a) exception for "[u]nusual and/or infrequent events" and did not find that it applies here to excuse the measured noise standard violations, petitioners' third assignment of error provides no basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error largely duplicates their second assignment of error. Petitioners contend enforcement of the DEQ noise standards has been "delegated to the individual counties" and the county has a duty to enforce those noise standards, if the

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[12] 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[.]"

county is going to approve wind energy facilities, or has a duty to deny permits for wind energy facilities, if the county is unwilling to enforce the noise standards. Petition for Review 21. Petitioners go on to argue:

> "* * * Morrow County errs in denying enforcement of the OAR 340 Division 35 noise standards where the County Court made a clear determination of violations at the residences of Petitioners Eaton, Williams and Mingo. The decision of the County Court should be reversed in part with instructions to modify the decision to require enforcement of the OAR noise standards by Respondent Morrow County at the residences of Petitioners. Further, based on the significant amount of time taken in the proceedings on this matter (over two years), the continued operation of Willow Creek in violation of the OAR standards during that time, and the expiration of the previously granted 6 months grace period provided to Invenergy by the Planning Commission and addressed in *Mingo I*, Petitioners request that Willow Creek be required to cease operation until compliance can be proven through the use of a 3rd party noise expert consistent with the final decision of the Planning Commission on October 27, 2010." Petition for Review 22.

As far as we can tell, it is not accurate to say the state "delegated" responsibility for enforcing DEQ's noise standards to the counties. At least petitioners cite no statutory or administrative rule language that expressly delegates responsibility for enforcing DEQ's noise standards to counties, and we have been unable to locate any such express delegation. It is more accurate to say that by failing to appropriate any funding for enforcement of the noise regulations the state has abdicated any responsibility it may have to enforce the DEQ noise standards. Counties are free to enforce those regulations if they wish, but as we explain in our resolution of the second assignment of error, petitioners cite no authority that would *require* that the county do so in this case.

In addition to citing no authority that requires the county to enforce DEQ's noise standards, petitioners ask that LUBA instruct the county to enforce the DEQ noise standards and to require Invenergy to cease operations until compliance with the noise standards can be confirmed by a third party. As previously explained, LUBA lacks authority to issue the required instruction or to order that Willow Creek Energy Facility cease operation until a third party can confirm that the facility complies with the DEQ noise standard.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

We set out petitioners' fifth assignment of error below:

> "Substantial evidence exists in the record to support a finding of potential violations at the Wade residence and any enforcement of the OAR standard should include monitoring of compliance at Petitioner Wade's residence." Petition for Review 22.

As respondents correctly point out, even if there is substantial evidence in the record of this appeal that the noise standard is violated at the Wade residence, that does not necessarily mean that the county court's finding that the noise standard is not violated at the Wade residence is unsupported by substantial evidence in the whole record, *i.e*. evidence a reasonable person would believe. Where there is conflicting believable evidence regarding an applicable standard, LUBA generally will affirm a decision maker's choice between that conflicting evidence. 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. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990).

As we have already noted, Invenergy's expert testified that the Willow Creek Energy Facility does not violate the noise standard at the Wade residence, whereas petitioners' experts took the position that it does. Petitioners contend that while Invenergy's expert expanded the number of days for collection of data, data was collected at the Wade residence only 37 days while data was collected at the other residences for 78 days. However, this criticism and other criticisms petitioners advance in their petition for review fall substantially short of demonstrating that a reasonable person would not rely on Invenergy's expert's testimony to conclude that the noise standard is not violated at the Wade residence.

The fifth assignment of error is denied.

The county's decision is affirmed.