BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHERYL BURGERMEISTER,
Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

BTT, LLC,
Intervenor-Respondent.

LUBA No. 2016-007

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

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

No appearance by Tillamook County.

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

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

REMANDED 05/09/2016

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

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

MOTION TO INTERVENE

BTT, LLC, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

The Schooner Restaurant is located next to Netarts Boat Basin, near the mouth of Netarts Bay, in the unincorporated community of Netarts in Tillamook County. Tillamook County has adopted zoning districts for five unincorporated communities in the county: Neahkahnie, Oceanside, Neskowin, Pacific City, and Netarts. Tillamook County Land Development Ordinance (TCLDO) 3.300 through 3.348. In the terminology of the TCLDO, a wind turbine that generates electrical energy is a Wind Energy Conversion System (WECS).[1] WECSs are listed as permitted or conditional uses in a large number of county zoning districts, including several zoning districts in the unincorporated communities of Neskowin and Pacific City. The Schooner

[1] Included in the general definitions set out at TCLDO 11.030 is the following:

> "WIND ENERGY CONVERSION SYSTEM (WECS): A system for converting energy from moving air masses into electrical energy. * * *"

Restaurant is located in the Netarts Neighborhood Commercial (NT-C1) zone. TCLDO 3.348. The NT-C1 zone lists "Uses Permitted Outright" and "Uses Permitted Conditionally[.]" TCLDO 3.348(2), (3). WECSs are not listed as an outright or conditional use in the NT-C1 zone. Moreover, WECSs are not listed as a permitted or conditional use in any of the Netarts zoning districts or any of the county zoning districts for Neahkahnie, or Oceanside.

At the time of the disputed decision, TCLDO 5.020 provided that the county may approve uses that are not listed as permitted or conditional uses in the applicable zoning district, "provided that [the unlisted use] is of the same general character, or has similar impacts on nearby properties, as do other uses permitted in the zone."[2] TCLDO 5.020 has been recodified at TCLDO 2.040, but the recodification did not change the wording of TCLDO 5.020. The planning director determined that the disputed WECSs could be approved as a conditional use, under TCLDO 5.020, as a use that has similar impacts as communication towers, utility substations and transmissions lines, all of which are allowed conditionally in the NT-C1 zone. Thereafter the planning commission granted conditional use approval for the disputed WECSs and the

[2] At the time of the challenged decision, TCLDO 5.020 provided:

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

board of county commissioners denied petitioner's appeal of the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

TCLDO 6.040 sets out "Review Criteria" for conditional uses. One of those review criteria, TCLDO 6.040(1), requires that "[t]he use is listed as a CONDITIONAL USE in the underlying zone * * *." (Capitalization in original.) As we have already noted, WECSs are not listed as either a permitted or conditional use in the NT-C1 zone. Notwithstanding that undisputed fact, the challenged decision includes a sentence, which, read in isolation, can be understood to take the position that WECSs are conditionally allowed in the NT-C1 zone:

> "a. *The proposed wind turbine project is conditionally allowed in the NT-C1 zone*. While acknowledging that such projects are conditionally allowed in other unincorporated [community] districts within the county, it does not necessarily follow that they are prohibited in the NT-C1 zone.
>
> "b. The Planning Director had the authority to conditionally allow the wind turbines through a 'similar use determination.' Tillamook County Land Use Ordinance 5.020 gives such authority to the Planning Director by giving him the discretion to permit a use not listed in a particular zone, provided that the use 'is of the same general character, or has similar impacts on nearby properties, as do other uses permitted in the zone.'
>
> "c. Communication towers, utility substations and transmission lines are of the same general character, and have similar impacts on nearby properties, as wind energy conversion systems." Record 34 (emphasis added).

Petitioner assigns error to the italicized finding, arguing that it is clear that the NT-C1 zone does not list WECSs as a conditional use.

Viewed in context, we conclude the county did not intend to find that WECSs are listed as a conditional use in the NT-C1 zone, as the first sentence seems to say. The second sentence of paragraph "a" takes the position that the fact that WECSs are listed as conditional uses in other unincorporated community zones does not mean that WECSs are prohibited in the NT-C1 zone. That sentence at least implies that WECSs are not listed as conditional uses in the NT-C1 zone. The two sentences of paragraph "b" take the position that the planning director is empowered to allow WECSs in the NT-C1 zone if the required findings are made. Similar use authorization of WECSs as a conditional use in the NT-C1 zone would be entirely unnecessary if WECSs were listed as an allowable conditional use in the NT-C1 zone.

Petitioner challenges the county's "similar use" determination in her second and third assignments of error, and we address those challenges below. It was perhaps prudent for petitioner to assign error to the italicized finding, because it says what it says. But when that sentence is viewed in context, we conclude it was not intended as a finding that WECSs are listed as a permissible conditional use in the NT-C1 zone.

Finally, petitioner may have intended to argue in addition under this assignment of error that the TCLDO 6.040(1) requirement the "[t]he use is listed as a CONDITIONAL USE in the underlying zone" must be read literally

to preclude use of the TCLDO 5.020 "similar use" authority to allow WECSs as a conditional use, because even if the findings required by TCLDO 5.020 can be made, WECSs still would not be "listed as a CONDITIONAL USE in the underlying zone[.]" If so, that argument is not stated clearly enough and is not developed. We will not develop that argument for petitioner, and we do not consider arguments that are unclearly stated and undeveloped. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner makes the following undisputed points:

1. Wind Energy Conversion Systems, or WECSs, are a defined use in the TCLDO.

2. WECSs are listed as permissible conditional uses in a number of zoning districts in the TCLDO.

3. But WECSs are not listed as a permitted or conditional use in the NT-C1 zone or any of the other zoning districts that apply in Netarts.

Based on the structure of the TCLDO, which expressly allows WECSs in some zoning districts, but does not list WECSs as a permitted or conditional use in the NT-C1 zone, we understand petitioner to argue that even if the findings that are required by TCLDO 5.020 to authorize similar uses could be made, the city erred by using the "similar use" provision of TCLDO 5.020 to authorize the proposed WECS as conditional uses in the NT-C1 zone. Simply stated,

petitioner argues that TCLDO structure creates a negative inference that the county legislatively intended to prohibit WECSs in the NT-C1 zone and using the "similar use" authority to authorize WECSs in the NT-C1 zone is error, because it is inconsistent with that legislative intent.

Petitioner first argues LUBA should remand the county's decision because it failed to adopt findings that address the "negative inference" issue it raised below. The county's finding on this point, quoted earlier, is sparsely stated. But it is adequate to flatly reject petitioner's "negative inference" interpretation:

> "* * * While acknowledging that [WECSs] are conditionally allowed in other unincorporated [community] districts within the county, it does not necessarily follow that [WECSs] are prohibited in the NT-C1 zone." Record 34.

On the merits, we rejected a similar negative inference argument in *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295, *aff'd* 230 Or App 202, 214 P3d 68 (2009). While the issues in *Western Land & Cattle* were a bit more complicated than the issue presented in this assignment of error, primarily because there were two "similar use" provisions and the issue of the relationship of those two "similar use" provisions presented greater complexity than we have in this appeal, we squarely rejected the similar "negative inference" "legislative intent to prohibit" arguments in that appeal:

> "In the present case, the county's code includes not one but two provisions that authorize the county to approve uses that are not permitted in a particular zone (or listed anywhere in the zoning code for that matter), if the proposed use is 'similar' to or of the

> same general type as uses permitted in that zone. That strongly suggests that the county is not concerned with maintaining bright lines between use categories. In particular it suggests that the county did not intend, by authorizing a particular use category in one zone but not authorizing that use category in a second zone, to preclude the possibility of approving that particular use category in the second zone, if it is similar to the uses that are listed in the second zone." 58 Or LUBA at 302.

Petitioner attempts to distinguish *Western Land & Cattle*. Petition for Review 25-26. To the extent we understand the attempt, we do not find it persuasive.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

We have already discussed one of the conditional use criteria in TCLDO 6.040 in resolving the first assignment of error. Another conditional use criterion is set out at TCLDO 6.040(4):

> "The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone."

Petitioner contends the noise from the disputed turbines will violate Oregon Department of Environmental Quality (DEQ) noise standards and thereby "alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone."

The board of commissioners adopted no findings addressing TCLDO 6.040(4). The closest the board of commissioners came to addressing TCLDO 6.040(4) is the following:

> "The Tillamook County Board of Commissioners opened a de novo public hearing on November 4, 2015. * * * Public testimony was received at the hearing. After reviewing the Conditional Use criteria listed in Section 6.040 of the Tillamook County Land Use Ordinance, Appellant's submission, the Planning Commission's decision, the staff report, testimony, and the record and file, the Board, by a vote of 2 to 1, denied [the appeal] and upheld the Planning Commission's decision. * * *" Record 33.

The only other findings the board of commissioners adopted in the appealed decision are the three paragraphs of findings we quoted earlier in discussing the first assignment of error. Those findings address the "similar use" issue, not the TCLDO 6.040 conditional use criteria.

LUBA is required to remand a land use decision where "[t]he findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b)[.]" OAR 661-010-0071(2)(a). The requirements for sufficient findings were set out in *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). To be sufficient, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision[.]" Although the county commissioner's findings identify the TCLDO 6.040 conditional use approval criteria (the first *Heiller* requirement), the above quoted findings do not satisfy the second and third *Heiller* requirements to identify the facts the board of

commissioners relied upon and explain how those facts led the board of commissioners to conclude the approved WECSs "will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone." The board of commissioners' findings are simply insufficient for LUBA to perform its review function.

The exception that allows LUBA to affirm a decision despite insufficient findings where the evidence clearly supports the decision is set out at ORS 197.835(11)(b).[3] We have held that the ORS 197.835(11)(b) exception allowing LUBA to affirm a decision despite insufficient findings only applies where the evidence makes a finding of compliance with the applicable criteria "obvious" or "inevitable." *Terra v. City of Newport*, 36 Or LUBA 582, 590 (1999); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). We have explained that this limited view of the nature of evidence that "clearly supports" a decision is even more appropriate where the applicable approval

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[3] 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."

standards are subjective. *Terra*, 36 Or LUBA at 590. In this case, the applicable standard, TCLDO 6.040(4), is reasonably subjective. And as the parties' arguments ably demonstrate, the evidence of the significance of the expected impacts of noise from the turbines on surrounding residences is at best conflicting. Petition for Review 28-31; Intervenor-Respondent's Brief 17-22. Petitioner emphasizes evidence that relies heavily on DEQ standards and intervenor emphasizes evidence that relies heavily on ambient noise levels and comparisons of the level of noise expected from the turbines as compared to other relatively quiet noise sources. Intervenor-respondent dismisses DEQ noise standards because they are not currently enforced. The board of commissioners needs to identify the evidence it found persuasive and why that evidence led it to conclude TCLDO 6.040(4) is satisfied. ORS 197.835(11)(b) does not authorize LUBA to perform that function for the board of commissioners.

Finally, the board of commissioners' finding quoted above refers to a number of documents that the board of commissioners "review[ed]:" (1) "appellant's submission," (2) "the Planning Commission's decision," (3) "the staff report," and (4) "testimony, and the record and file[.]" The statement that the board of commissioners "review[ed]" those documents is not sufficient to adopt or incorporate those documents as the board of commissioners "findings" regarding the applicable approval criteria generally and TCLDO 6.040(4) in particular. *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992):

> "[W]e hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." (Footnote omitted.)

There may be adequate findings regarding TCLDO 6.040(4), or at least a beginning of adequate findings, in the various documents the board of commissioners says it "review[ed]." But it is the board of commissioners' obligation to identify those findings and further develop those findings if necessary to resolve the conflicting testimony at the hearing before the board of commissioners.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

The text of TCLDO 5.020 was set out earlier at n 2. TCLDO 5.020 authorizes the planning director to allow a use that is not listed as a permitted or conditional use in a zoning district "provided that it is of the same general character, or has similar impacts on nearby properties, as do other uses permitted in the zone." The board of commissioners finding "c," set out earlier in our discussion of the first assignment of error, simply concludes that "[c]ommunication towers, utility substations and transmission lines," which are

allowed in the NT-C1 zone "are of the same general character, and have similar impacts on nearby properties, as wind energy conversion systems." Record 34.

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

The fourth assignment of error is sustained.

The board of commissioners' decision is remanded.