BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID M. MINGO,
Petitioner,

vs.

MORROW COUNTY,
Respondent.

LUBA No. 2011-014

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

vs.

MORROW COUNTY,
Respondent.

LUBA No. 2011-016

INVENERGY LLC,
and WILLOW CREEK ENERGY LLC,
Petitioners,

vs.

MORROW COUNTY,
Respondent.

LUBA No. 2011-017

ORDER

MOTIONS TO INTERVENE

Petitioner David M. Mingo (Mingo) moves to intervene on the side of petitioners in LUBA No. 2011-016 and on the side of respondent in LUBA No. 2011-017. Petitioners Mike Eaton, Sherry Eaton, Dennis Wade, Lorrie Wade, and Dan Williams (collectively, "Eaton") move to intervene on the side of petitioner in LUBA No. 2011-014, and on the side

of respondent in LUBA No. 2011-017. Invenergy LLC and Willow Creek Energy LLC (collectively, "Invenergy") move to intervene on the side of respondent in LUBA Nos. 2011-014 and 2011-015. There is no opposition to the motions, and they are allowed. Because listing all intervenors on future captions would make for unwieldy captions, the parties may if they wish use the abbreviated caption used in this order.

MOTION FOR STAY

The challenged decision is a county court decision determining that Invenergy's wind farm operation, earlier approved under a 2005 conditional use permit, is in partial violation of a condition of approval with respect to compliance with OAR chapter 340 Division 35 noise standards. The challenged decision also amended the 2005 permit conditions to impose additional requirements. Specifically, within a six month period commencing from January 26, 2011, Invenergy must determine and implement any necessary compliance measures intended to ensure that noise from the facility "does not exceed 36 dBA [decibels]" with respect to a particular neighboring dwelling. During a portion of that six month period, Invenergy must collect noise data and submit that data to a third-party consultant hired by the county but paid for by Invenergy. At the end of the six month period compliance monitoring will begin at a neighboring residence, if the neighbor requests, and the consultant will submit a final monitoring report to the planning commission. If the neighbor does not request monitoring, then whatever noise levels are produced are deemed acceptable.

Invenergy moves to stay the county court's decision pursuant to ORS 197.845(1) and ORS 661-010-0068. Under ORS 197.845(1), LUBA may stay a decision under review if the petitioner demonstrates a "colorable claim of error" in the decision and that the petitioner "will suffer irreparable injury if the stay is not granted."

A. Colorable Claim of Error

Invenergy argues that the requirement that noise from the facility not exceed 36 dBA is based on OAR 340-035-0035(1)(b)(B)(iii)(V), part of an administrative rule subsection

governing noise generated by wind farms that the county has adopted as the applicable county noise standard. The rule states in relevant part that "[t]he 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." In plainer English, the rule provides that a wind facility complies with the noise standard if it does not increase noise more than 10 dBA over either (1) an assumed background noise level of 26 dBA, or (2) the actual background noise level, "if measured." Under the rule, the choice of which approach to take is apparently up to the facility owner. Under the "actual background noise" approach, as we understand it, the total actual background noise plus facility noise could exceed 36 dBA and still comply with the rule, as long as the facility does not contribute more than 10 dBA to the actual background noise.

Invenergy argues that the condition stating that "[c]ompliance will be achieved when the data indicates that the facility does not exceed 36 dBA" is unclear and might be inconsistent with OAR 340-035-0035(1)(b)(B)(iii)(V), if it is intended to impose a single, fixed 36 dBA standard. We understand Invenergy to argue that a fixed 36 dBA standard could be inconsistent with the rule. For example, if the wind facility's contribution is 10 dBA, consistent with the rule, but the actual background noise is greater than 26 dBA, the result would be that the facility plus background total exceeds 36 dBA. We understand Invenergy to contend that level of noise plus background noise might fail the county's condition, depending on how that condition is understood, but that level of noise plus background noise would not be inconsistent with OAR 340-035-0035(1)(b)(B)(iii)(V).

The "colorable claim of error" prong of ORS 197.845(1) is not a demanding standard, and does not require petitioners to show that they will prevail on the merits. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 537, 538 (1991). Petitioner Mingo argues that Invenergy has not adequately demonstrated a "colorable claim of error," contending that

the above-quoted condition effectively requires Invenergy to use the *assumed* background noise approach instead of the actual background noise approach. We conclude that reasonable attorneys could disagree on what the condition requires, and whether it is consistent with the rule, and we agree with Invenergy that it has demonstrated a colorable claim of error.

B. Irreparable Injury

In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988), we set out the factors to be considered in whether a petitioner has adequately demonstrated that the petitioner will suffer irreparable injury if the stay is not granted:

1. Has the petitioner adequately specified the injury he or she will suffer?

2. Is the identified injury one that cannot be compensated adequately in money damages?

3. Is the injury substantial and unreasonable?

4. Is the conduct petitioner seeks to bar through the stay probable rather than merely threatened or feared?

5. If the conduct is probable, is the resulting injury probable rather than merely threatened or feared?

Invenergy argues that it will be irreparably injured if it is forced to pay the costs of collecting noise data and the services of a third-party consultant, and the costs of developing any measures necessary to ensure compliance with the condition requiring that the "facility does not exceed 36 dBA" without knowing what the county intends that standard to mean. According to Invenergy, it is unlikely that it can obtain a ruling from LUBA on the merits of that issue prior to expiration of the six month period imposed in the challenged decision.

Mingo and Eaton *et al*. respond that Invenergy has not demonstrated that any unspecified monetary loss from complying with the conditions imposed constitutes irreparable injury. Eaton notes that as a general matter, LUBA has found irreparable injury from failure to grant a stay only with respect to proposals involving destruction or injury to

unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once destroyed. *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002). Eaton argues that any potential monetary loss here is speculative and not the type of injury that generally warrants a stay of the decision. Eaton also argues that the noise standards at OAR 340-035-0035(1)(b) are intended to protect the health, safety and welfare of neighbors to wind farms such as themselves, and staying the decision during the pendency of this appeal would continue to subject the opponents to noise levels that may not comply with applicable standards. According to Eaton, such adverse impacts on neighbors to the wind farm must be equitably weighed against any monetary injury to Invenergy from failing to grant the stay.

We disagree with Mingo and Eaton to the extent they argue that a permittee cannot seek to stay a decision imposing a condition of permit approval that requires financial expenditures within a short time frame, if the permittee can demonstrate that the decision will cause irreparable injury. However, we agree with Mingo and Eaton that Invenergy has not demonstrated in this case that failure to grant the stay would cause irreversible injury to Invenergy, considering the first, third, fourth and fifth factors described above.

Invenergy does not attempt to specify the potential cost of collecting and evaluating data, or the cost of measures to ensure compliance with the condition, and has not "adequately specified" the injury Invenergy will suffer. For the same reason, Invenergy has not adequately demonstrated that the feared injury is "substantial," or provided LUBA with information necessary to determine whether the injury will be "unreasonable." For all we are informed, such costs may be extremely modest.

In addition, with respect to the cost of collecting and evaluating data, we do not understand Invenergy to dispute that the county can legitimately require it to incur costs to collect noise data and to pay for the services of a third-party consultant within the required six-month period. Those costs must be incurred even under Invenergy's view of the

appropriate noise standard, and thus would not be irreparably "lost" even if Invenergy's view prevails on appeal. Therefore, Invenergy has not demonstrated that the costs of collecting and evaluating noise data are part of the alleged "injury" for purposes of ORS 197.845(1).

With respect to the unspecified "measures" Invenergy might have to adopt to comply with the condition that the noise from the facility not exceed 36 dBA, the potential type and extent of such measures might well turn on how the condition is interpreted and applied. As we understand the county's conditions, the necessary "measures" if any will be determined following data collection and evaluation. Depending on what the data show, it may be that no measures at all are required under either the assumed or actual background noise approach. If it is determined that some measures are required under one or both approaches, it is not clear to us who makes that determination or how and when it is made. Presumably, Invenergy will initially propose certain measures based on its understanding of OAR 340-035-0035(1)(b)(B)(iii)(V) and the condition. The consultant and the county will then review the data and proposed measures and some ultimate determination will be made whether the measures are sufficient to ensure compliance with the condition, as the county understands it. It is quite possible during that evaluation that the county will agree with Invenergy's view of the rule and the condition. If that is the case, we do not see how the decision could cause Invenergy any irreparable injury.

It is also possible that the county will interpret and apply the condition in the manner that Invenergy fears it might, to apply a rigid 36 dBA standard in a manner that, Invenergy argues, would be inconsistent with OAR 340-035-0035(1)(b)(B)(iii)(V).[1] However, at this

[1] Even if the county ultimately interprets and applies the condition in the manner Invenergy fears, it is not clear to us that any costs incurred within the initial six-month period to implement measures that Invenergy may propose under its view of the condition would be irreparably "wasted" or lost. It is more likely that Invenergy would simply have to provide additional measures on top of those it has initially proposed. One could easily speculate that the financial cost of such additional measures might be "wasted" if Invenergy ultimately prevails on appeal, but because it is uncertain whether any measures at all will be required, and if so what measures, that speculation is insufficient to justify a stay under ORS 197.845(1).

point in LUBA's review proceeding, we have no way of knowing what the county will do when and if Invenergy proposes specific measures. We conclude, therefore, that Invenergy has not demonstrated that the conduct it seeks to bar through the stay is probable rather than merely threatened or feared, or that, if the conduct is probable, the resulting injury is probable rather than merely threatened or feared. The motion for stay is denied.

Invenergy's motion for stay did not, as required by OAR 661-010-0068(1)(d), suggest an expedited briefing schedule, but that omission is mooted by denial of the motion. Nonetheless, we note that the parties may, if they wish, stipulate to an expedited briefing even if no stay is in effect.

Dated this 15th day of March, 2011.

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Tod A. Bassham
Board Member