

**BEFORE THE MORROW COUNTY COURT
OF MORROW COUNTY**

**AN ORDER AFFIRMING THE DECISION OF
THE PLANNING COMMISSION ON
CUP-N-291, REGARDING THE APPLICATION
OF 2MORROW ENERGY, LLC**

COUNTY ORDER NO.
OR-1-2012

WHEREAS, ORS 203.035 authorizes Morrow County to exercise authority within the County over matters of County concern; and

WHEREAS, ORS 469.300 et seq. authorizes the developer of a wind energy project with a nameplate capacity of 105 megawatts (MW) or less to seek land use authorization for the project from the County at its option; and

WHEREAS, an application was filed by 2Morrow Energy, LLC ("Applicant") under File No. CUP-N-291 for a conditional use permit to approve an approximate 104 MW commercial wind power facility on land in Morrow County zoned Exclusive Farm Use ("EFU") with the associated transmission lines and other support facilities; and

WHEREAS, after due notice of the application in the manner required by the Morrow County Zoning Code and state law, the Morrow County Planning Commission held a public hearing and accepted testimony regarding the application on December 6, 2011, at Heppner City Hall, Heppner, Oregon; and

WHEREAS, the Morrow County Planning Commission approved the request and adopted Final Findings of Fact with Conditions of Approval signed by the Planning Commission Chair David Sykes on December 14, 2011; and

WHEREAS, an appeal of the Planning Commission's decision was filed with the Morrow County Planning Department on December 27, 2011, by James Robert Jepsen, Gina Marie Jepsen, and John W. Jepsen; and

WHEREAS, the Morrow County Court did consider the testimony and evidence presented to them at a public hearing on the appeal held on January 25, 2012 at the Morrow County Courthouse in Heppner, Oregon; and

WHEREAS, the public hearing was closed at the conclusion of the hearing on January 25, 2012, but with the agreement of the parties the record was held open for written rebuttal by the appellant until February 1, 2012, followed by an opportunity for written rebuttal by the Applicant until February 8, 2012; and

WHEREAS, at public deliberations held on February 15, 2012 at the Port of Morrow Riverfront Center in Boardman, Oregon, the Morrow County Court did affirm the decision of the Planning Commission and adopted the findings of the Planning Commission and supplemental findings as discussed below;

NOW THEREFORE THE COUNTY COURT OF MORROW COUNTY FINDS AND ORDERS AS FOLLOWS:

Section 1. Decision.

The Morrow County Court affirms the decision of the Planning Commission and denies the appeal. The Planning Commission's findings are adopted as the findings of the Morrow County Court as supplemented below. To the extent that there is a conflict between the Planning Commission's decision and findings and these findings, these findings prevail.

Section 2. Procedural Considerations.

The Notice of Appeal filed December 27, 2012 named three appellants: James Robert Jepsen, Gina Marie Jepsen and John W. Jepsen. James Robert Jepsen submitted testimony to the Planning Commission on application CUP-N-291 in the form of a letter dated November 20, 2011. Neither Gina Marie Jepsen nor John W. Jepsen provided testimony to the Planning Commission, either oral or written, or otherwise appeared or participated in the proceedings on the application before the Planning Commission.

The Morrow County Zoning Code does not address the issue of standing to file an appeal of a decision of the Planning Commission. Accordingly, the County Court looks to state law. ORS 215.422(1)(a) provides, in part:

A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the ... county governing body, however the governing body prescribes.

Further, ORS 197.763(1) provides in part, with respect to quasi-judicial land use hearings conducted before a local body such as the Planning Commission, that:

An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

The County Court finds that neither Gina Marie Jepsen nor John W. Jepsen appeared before the Planning Commission, either orally or in writing, before the closing of the record, nor was any objection raised to the Planning Commission that either of them would be aggrieved by approval of the project. Accordingly, they are not "parties aggrieved" by the decision of the Planning Commission and did not have standing to appeal that decision under ORS 215.422(1)(a), nor could an argument that they were aggrieved by the approval of the project be the basis of an appeal to LUBA under ORS 197.763(1). Accordingly, the County Court finds that neither Gina Marie Jepsen nor John W. Jepsen had standing to appeal the decision of the Planning Commission to the County Court.

The County Court further finds that prior to closing of the record of the proceedings before the Planning Commission, James Robert Jepsen was the only witness to testify in opposition to the proposed project. Therefore, the only issues that had been raised by any opponent of the project prior to closing of the record were those raised in James Robert Jepsen's letter dated November 20, 2011, namely: (1) effect on property value and marketability; (2) viewsheds; (3) noise and (4) wildlife impacts. Under ORS 197.763(1), those were the only issues that could validly be the basis of an appeal to LUBA, and therefore only those issues were preserved for any appeal to the County Court.

However, the December 27, 2011 Notice of Appeal raised only the following issues: (1) failure to follow proper procedures (by the Planning Commission); (2) noise; (3) medical concerns; and (4) potential lost revenue to the Jepsens as a result of the project. The County Court finds that an allegation that the Planning Commission failed to follow proper procedure is a proper grounds for appeal. As to the remaining grounds for appeal identified in the Notice of Appeal, they are only properly before the County Court to the extent they were raised to the Planning Commission in Mr. Jepsen's November 20, 2011 letter. The only overlap between the November 20, 2011 letter and the Notice of Appeal is with respect to the noise impacts that would be generated by the project, and the potential impacts of the project on property values.

Accordingly, the County Court finds that only James Robert Jepsen is a proper appellant in this matter, and the only issues properly preserved for, and asserted on, appeal are: (1) whether or not the Planning Commission followed proper procedures; (2) whether or not the Planning Commission erred in approving the project notwithstanding the potential noise impacts of the project; and (3) whether or not the Planning Commission erred in approving the project notwithstanding the potential impacts of the project on property values. The County Court also finds that, to the extent Mr. Jepsen raised new issues in the Notice of Appeal that were not raised prior to the close of the record of the Planning Commission proceedings, the issues were not "accompanied by statements or evidence sufficient to afford the [County Court] and the parties an adequate opportunity to respond to each issue" and, as such, the issues were not properly before the County Court as part of the appeal.

Section 3. Certification of the Record.

Morrow County Zoning Code Section 9.030(C) provides that an appeal of a decision of the Planning Commission "shall be based upon, but not limited to, the record of the decision being appealed or reviewed." Consistent with Section 9.030(C), the County Court accepted testimony and evidence into the record up through the close of the public hearing on the appeal on January 25, 2012. The additional testimony and evidence submitted through the close of the January 25, 2012 hearing was:

1. Public Notice dated January 4, 2012;
2. Memorandum from Carla McLane, Morrow County Planning Director, to the County Court and Interested Parties delivered January 13, 2012, which included copies of: (i) a vicinity map; (ii) the Notice of Appeal; (iii) the November 20, 2011 letter from James Robert Jepsen to the Planning Commission; (iv) the December 14, 2011 Final Findings of Fact of the Planning Commission; and (v) correspondence dated January 11, 2012 from David J. Petersen, attorney for Applicant, including attachments A through E thereto.

3. Testimony of James Robert Jepsen at the hearing, including 11 pages of handwritten notes in support thereof; and
4. Testimony of David J. Petersen, attorney for Applicant, at the hearing.

The County Court finds that items 1 and 2 above were received into the record and available to the parties no later than January 13, 2012. Accordingly, the parties had ample opportunity to review items 1 and 2 and to provide rebuttal to them at or prior to the January 25 hearing if they chose. The County Court also finds that no objection was received from any party at the January 25 hearing that it had not been given sufficient opportunity to rebut any new testimony or evidence submitted into the record prior to the hearing.

At the conclusion of the January 25 hearing, the County Court closed the public hearing but left the record open to additional argument by the parties in response to evidence or testimony submitted at the January 25 hearing (items 3 and 4 above). Additional submissions were received from the appellant and Applicant as follows:

5. January 30, 2012 fax from appellant's attorney Charles Gillis, including a one-page letter from Mr. Gillis and a 17-page attachment entitled *Responses of the ear to low frequency sounds, infrasound and wind turbines*;
6. 10 pages from the appellant regarding hearing loss issues for Mr. John Jepsen;
7. January 31, 2012 fax from Mr. Gillis, including a one-page letter from Mr. Gillis and a 25-page attachment entitled *Values in the Wind: A Hedonic Analysis of Wind Power Facilities*; and
8. February 3, 2012 letter from Mr. Petersen on behalf of Applicant.

The County Court finds that all of the foregoing items 5 through 8 did not constitute argument in rebuttal to evidence or testimony received at the January 25 hearing and therefore are not part of the record on appeal. The County Court further finds that items 5 and 6 concern the alleged health impacts of wind energy projects, which is not an issue preserved for appeal, and therefore those items also are excluded from the record as irrelevant. Accordingly, the County Court finds that the record on this appeal consists of the entire record of the proceedings before the Planning Commission under File No. CUP-N-291, plus items 1 through 4 listed above.

Section 4. Supplemental Findings.

Appellant has preserved three issues on appeal. The County Court, having considered the testimony of the parties and the evidence in the record, finds as follows with respect to those issues:

Failure of the Planning Commission to follow proper procedure.

In the Notice of Appeal, the appellant alleges the following procedural errors by the Planning Commission: failure to include the noise ordinance in the permitting process, failure to follow proper procedure in land use planning, and that the application should have been considered by the Oregon Energy Facility Siting Council and not by the Planning Commission. The County

Court also finds that the appellant submitted no evidence or testimony beyond the Notice of Appeal in support of these allegations.

Based on the record, the County Court finds that noise issues were discussed at length in the application and at the December 6, 2011 hearing of the Planning Commission, and that the Planning Commission followed proper procedures for considering and evaluating the potential noise impacts of the project and the relevance of those potential impacts to the applicable approval criteria. The County Court also finds, based on the record, that the Planning Commission more generally followed proper land use procedures applicable to the subject application. The County Court also finds that the application was properly within the jurisdiction of the Planning Commission pursuant to ORS 469.300 et seq. This ground for appeal is denied.

The Planning Commission erred in approving the project notwithstanding the potential noise impacts of the project.

The County Court finds that in considering the application, the Planning Commission properly applied applicable noise regulations for wind turbines set forth in OAR Chapter 340, Division 35 and that the noise impacts of the project were exhaustively studied in the application and discussed at the December 6, 2011 Planning Commission hearing. Based on the record, the County Court finds that the Planning Commission's determination that the applicable noise standards were met is supported by substantial evidence. The County Court also finds, based on the record, that the noise from the proposed project that the appellant will experience at his home under any meteorological conditions will comply with the standards established by state law, and therefore the appellant is not a person aggrieved by any potential noise impacts of the project. This ground for appeal is denied.

The Planning Commission erred in approving the project notwithstanding the potential impacts of the project on property values.

The County Court finds that neither the Morrow County Zoning Code nor other applicable law requires consideration of the impact of the project on property values in order to determine whether or not the applicable approval criteria are met. Alternatively, the County Court finds that even if impact on property values was relevant to any applicable approval criterion, the record does not contain any evidence that this project would negatively impact property values. To the contrary, the appellant in his testimony admitted that any negative impacts to his business are a result of his decision to appeal the Planning Commission's decision, not Applicant's decision to file the application. On the other hand, the record contains substantial evidence that the proposed project would not negatively impact property values, including without limitation Attachments C and D to the January 11, 2012 letter from Applicant's attorney. Thus, the County Court finds that this ground for appeal is not relevant to any applicable approval criterion, and alternatively there is substantial evidence in the record to support a finding that the project would not negatively impact property values, including the value of appellant's property or business. This ground for appeal is denied.

Section 5. Conclusion.

Based on the foregoing findings of fact and conclusions of law, the Morrow County Court denies the appeal of CUP-N-291 and affirms the December 14, 2011 decision of the Morrow County Planning Commission approving the project, without change.

Section 6. Effective Date.

This order shall be effective on February 22, 2012.

DONE AND ADOPTED BY THE MORROW COUNTY COURT THIS 22nd DAY OF FEBRUARY, 2012.



ATTEST:

MORROW COUNTY COURT:

*Bobbi Childers by
Theresa Crawford Deputy Clerk*
Bobbi Childers
County Clerk

Terry K. Tallman
Terry K. Tallman, Judge

Ken Grieb
Ken Grieb, Commissioner

APPROVED AS TO FORM:
Ryan Swinburnson
Ryan Swinburnson
County Counsel

Leann Rea
Leann Rea, Commissioner

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MORROW COUNTY, OREGON **CJ2012-0011**
Commissioners' Journal 02/22/2012 10:17:10 AM



I, Bobbi Childers, County Clerk for Morrow County, Oregon, certify that the instrument identified herein was recorded in the Clerk records.

Bobbi Childers - County Clerk

