



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: February 21, 2018

Department: Public Works Agenda Planning Date: Feb. 15, 2018 Time required: None

☐ Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision approving, on remand, Conditional Use (CU) Case 17-020/ Brush Creek Solar LLC, and Klopfenstein, Clerk's File #5735.

Issue, Description & Background The Marion County Hearings Officer issued a decision on October 30, 2017, to deny CU17-020. On November 14, 2017, the applicant appealed the hearings officer's decision to the Marion County Board of Commissioners. On November 24, 2017, the board accepted the appeal and on December 4, 2017, issued Order 17-148, remanding the matter back to hearings officer. The hearings officer conducted a public hearing on the remand on January 3, 2018, and on February 8, 2018, issued a remanded decision approving the request. As part of the land use process, the board of commissioners must officially receive notice of the remanded decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

Options for Consideration: 1. Receive notice of the decision.
2. Receive notice of the decision and call the matter up.

Recommendation: Staff recommends the board receive the notice of decision.

List of attachments: Hearings officer's remanded decision dated February 8, 2018
BOC Order 17-148
Hearings officer's initial decision dated October 30, 2017

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore - gfennimore@co.marion.or.us

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No.	CU 17-020
)		
Application of:)	Clerk's File No.	
)		
BRUSH CREEK SOLAR, LLC ON PROPERTY)	Conditional Use	
OWNED BY KAREN & WALTER KLOPFENSTEIN)		

ORDER ON REMAND

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on Marion County Board of Commissioners (BOC) order 17-148, accepting applicant's appeal and remanding the case to the hearings officer for further consideration of the hearings officer's denial of the application of Brush Creek Solar, LLC on property owned by Karen and Walter Klopfenstein for a conditional use permit to establish a photovoltaic solar power generation facility on 12-acres of a 15.15-acre tract in an EFU (EXCLUSIVE FARM USE) zone in the 12,100 block of Selah Springs Road NE, Silverton, Marion County, Oregon (T7S, R1W, S04D, tax lots 00600 and 700).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119, 17.120 and 17.136.

III. Public Hearing

The original hearing on this matter was held on August 2, 2017. The Planning Division file was made part of the record. The record remained open until August 9, 2017 for applicant, August 18, 2017 for opponents and August 25, 2017 for applicant. The following persons appeared and provided testimony on the application:

1.	Brandon Reich	Planning Division
2.	John Rasmussen	Marion County Public Works Engineering
3.	Donald Kelley	Attorney for appellants Harris
4.	Patricia Harris	Appellant
5.	George Harris	Appellant
6.	Damien Hall	Attorney for applicant Brush Creek Solar, LLC
7.	Troy Snyder	For Brush Creek Solar, LLC
8.	Jeff Pike	Opponent
9.	Scott Walker	Opponent
10.	Brooke Crager-Stadeli	Opponent

The following documents were entered into the record as exhibits:

- Ex. 1 Statement of George Harris with attached photographs (3), soil map overlay, wetland/hydric soil overlay, and topographic map
- Ex. 2 Statement of Patricia Harris
- Ex. 3 "Applicant's [Appellants'] Statement of Objections"
- Ex. 4 Drift Creek Solar, LLC weed mitigation and erosion, sediment and soil compaction plans
- Ex. 5 Letter from Jeffrey and Freda Pike
- Ex. 6 Stadeli reservoir information
- Ex. 7 Solar farm runoff article
- Ex. 8 August 8, 2017 transmittal from Damien R. Hall with attached wetlands delineation report and source materials A through J
- Ex. 9 August 18, 2017 letter from Donald M. Kelley with attached July 29, 2017 valuation letter and material data safety sheet
- Ex. 10 August 17, 2017 letter from appellant George Harris with four pages of photographs attached
- Ex. 11 August 25, 2017 final response letter from Damien Hall

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at that hearing.

The hearings officer denied the application on October 30, 2017. Applicant appealed the hearings officer's decision to the Marion County Board of Commissioners (BOC) on November 14, 2017. The BOC took up the matter at its regularly scheduled Board session on November 29, 2017, and issued BOC order 17-148 December 4, 2017, remanding the issue to the Marion County Hearings Officer.

A public hearing was held on the remanded matter on January 3, 2018. The BOC file was made part of the record. The following persons appeared and provided testimony on the application.

- | | | |
|----|-----------------|---|
| 1. | Lisa Milliman | Planning Division |
| 2. | Damien Hall | Attorney for applicant Brush Creek Solar, LLC |
| 3. | Troy Snyder | For Brush Creek Solar, LLC |
| 4. | Donald Kelley | Attorney for opponents Harris |
| 5. | George Harris | Opponent |
| 6. | Patricia Harris | Opponent |
| 7. | Leland Hardy | For opponents Harris |
| 8. | Jeff Pike | Opponent |
| 9. | Lisa Hodson | Opponent |

The following documents were entered into the record as exhibits:

- Remand Ex. 1 Long term maintenance agreement
- Remand Ex. 2 Supplemental opposition statement, George & Patricia Harris
- Remand Ex. 3 Engineering comments
- Remand Ex. 4 Written testimony of George Harris
- Remand Ex. 5 Written testimony of Patricia Harris

At the beginning of the hearing the hearings officer set forth a limited scope for the hearing based on BOC order 17-148. Applicant agreed with the scope of the hearing as set forth by the hearings officer. Opponents Harris (prior appellants) objected to limiting the scope of the hearing, but if limited, opponents objected to including the rodent control plan as beyond the scope of the remand. The hearings officer accepted testimony, evidence and argument on all matters raised at hearing but reserved resolution of the scope of the hearing and determination of the open record period for hearing participants to an interim order to be rendered by January 5, 2018.

On January 5, 2018, the hearings officer issued an interim order in this matter that is part of the record in this case. The order included the following findings of fact, conclusions of law and interim ruling:

V. Findings of Fact and Conclusions of Law

1. In the background section of its November 14, 2017 appeal letter, applicant emphasizes soil compaction and weed mitigation plans, saying the conditional use was denied "based solely on findings that the soil compaction plan and weed mitigation plan submitted with the Application were insufficiently detailed and site-specific." This could lead a belief that the only issues appealed were failure to meet MCC 17.120.110(B) (4) and 17.120.110(B) (5), relating to the soil compaction and weed mitigation. But, the reasons-for-appeal section of the letter states:

The [hearings officer's] Decision failed to conform to the standards of the Marion County Rural Zoning Code ("MCC"). Specifically, the Decision erred in finding that the Application did not satisfy MCC 17.120.110(B) (4), 17.120.110(B) (5), and 17.136.060(A) (1). (Emphasis added.)

2. The Planning Director's summation at the November 29, 2017 Board Session, noted that the issues in the case were the soil compaction and weed mitigation plans under MCC 17.120.110(B) (4) and 17.120.110(B) (5). The Director noted a new soil compaction plan was submitted with applicant's appeal letter and that a new weed mitigation plan was commissioned and would be submitted at an appeal hearing if granted.
3. During the November 29, 2017 Board session, Marion County commissioners discussed the requested appeal. A commissioner suggested accepting the appeal and remanding the matter to the hearings officer to look at applicant's new documents, specifically mentioning the soil compaction and weed mitigation plans. The motion passed verbally at hearing did not specifically mention soil compaction and weed mitigation plans; it was "moved and seconded that we take option 1, accept the appeal and remand it back to the hearings officer..." The motion passed by voice vote. The final Board order used somewhat different language in specifying "soil compaction and weed mitigation plans." The order was signed by all three commissioners.
4. The hearings officer finds:
 - a. Applicant, at page two of its appeal letter, appealed the hearings officer's findings relating to MCC 17.120.110(B) (4), 17.120.110(B) (5), and 17.136.060(A) (1).
 - b. The hearings officer's MCC 17.136.060(A) (1) findings include the following:

Weed control issues were also addressed above, and for the reasons set forth above (and incorporated here), the hearings officer found applicant's weed control was not adequate. Applicant did not address the rodent control issues. These issues are not merely speculative, because appellant provided first hand examples of how unabated weed and rodent issues can harm her farm practices. Applicant has not proven it is more likely than not that the proposed use will

not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.136.060(A)(1) is not satisfied. (Emphasis in the original.)

- c. The weed mitigation plan played a big part in the hearings officer's finding that MCC 17.136.060(A)(1) was not met, but the rodent issue was also an issue the hearings officer believed needed to be addressed.
- d. BOC discussions at its November 29, 2017 session emphasized its desire to limit consideration only to criteria the hearings officer previously found were not met.
- e. The hearings officer limits the scope of the hearing to considering matters relating only to satisfaction of MCC 17.120.110(B)(4), 17.120.110(B)(5), and 17.136.060(A)(1). This includes considering applicant's newly submitted soil compaction plan, weed mitigation plan (with incorporated rodent control element), and long term maintenance agreement.

5. The hearings officer also sets the following open record periods:

For applicant:	Until 5:00 p.m. on January 10, 2018
For appellants:	Until 5:00 p.m. on January 16, 2018
For applicant:	Until 5:00 p.m. on January 19, 2018

The record will be at the Marion County Planning Division. Submit materials to that office for inclusion in the record.

VI. Interim Ruling

It is hereby found that the scope of the remand is limited to considering testimony, evidence and argument relating to MCC 17.120.110(B)(4), 17.120.110(B)(5), and 17.136.060(A)(1). The open record period is as set forth in V(5) above.

The following documents were submitted and entered into the record as exhibits during the open record period:

Remand Ex. 6	January 10, 2018 letter from Damien Hall with email transmittal and January 9, 2018 letter from Mark Risch with attached remand exhibit 3, rainfall graph and modified erosion and control plan
Remand Ex. 7	January 15, 2018 letter from George and Pati Harris and Lisa Hodson, with three attached photographs and Leland Hardy's January 12, 2018 response to Risch submittal (remand exhibit 6)
Remand Ex. 8	January 16, 2018 letter from Donald M. Kelley with Milliman to Kelley email and Handy response from remand exhibit 7
Remand Ex. 9	January 19, 2018 letter from Damien R. Hall with transmittal email

No objections were raised to notice, jurisdiction or conflict of interest. In remand exhibit 8, opponents Harris again object to limiting the scope of the hearing and contend applicant submitted material outside the record. The hearings officer considered opponents' renewed objection and, after a review of the record, stands by the January 5, 2018 interim order limiting the scope of the hearing to matters relating only to satisfaction of MCC 17.120.110(B)(4), 17.120.110(B)(5), and 17.136.060(A)(1).

In remand exhibit 8 opponents claim the submission now labeled as remand exhibit 6 was not submitted to the record until January 11, 2018, and was outside

applicants January initial open record period. The paper record was kept at the Planning Division office during the open record period and the hearings officer asked to have open records documents sent to the Planning Division for inclusion in the record. Materials referenced by opponents were delivered to the hearings officer (put before the decision maker) during the open record period. The hearings officer accepted the submission (not rejected by the decision maker). The documents are a part of the local record. Opponents did not ask for rejection of the documents or request any remedy (such as additional open record period for response). No prejudice was claimed and no prejudice is found.

Under ORS 215.427(1), the county governing body or designee shall take final action on a land use permit, including all local appeals within 150 days after an application is determined to be complete. The subject application was determined to be complete on June 19, 2017, making November 16, 2017 the 150 day deadline. The 23-day open record period at the end of the first hearing extended the 150 day limit to February 7, 2018. Two days after the close of the January 3, 2018 hearings officer issued an interim decision on Friday January 5, 2018 as agreed to by the applicant. The hearings officer then gave applicant three work days (five calendar days) to respond, opponents three work days to respond (six calendar days--including a Monday holiday), and applicant three work days (three calendar days) to respond; 16 days altogether. Applicant sent a follow up letter to the hearings officer acknowledging a 14 day extension request "as discussed at hearing" putting the 150 day time limit at February 21, 2018. The hearings officer finds the open record period after remand hearing was 16 days, bringing the 150 day limit to February 23, 2018.

IV. Findings of Fact

The hearings officer adopts and incorporates the following findings of fact from the hearings officer's October 30, 2017 order:

1. The conditional use application identifies the subject property as 15.15 acres made up of tax lots 071W04D00600 and 071W04D00700. The Planning Director's decision considered only tax lot 071W04D00600 and putting it at 14.5 acres. Tax lots and acreage are discussed in more depth at V2 below.
2. The subject property is designated Primary Agriculture in the MOCF and zoned EFU. The intent of the designation and zone is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, may be approved where they do not have a significant adverse impact on farming operations.
3. The subject property is on the north side of Selah Springs Drive NE, at its intersection with Cascade Highway. Tax lot 600 is undeveloped and in farm use. Tax lot 700 is developed with a farm related vehicle and equipment service and repair business established by conditional use case 16-014 (CU 16-014) as a commercial activity in conjunction with farm use. Surrounding properties are zoned EFU and are in farm use.
4. The *Web Soil Survey of Marion County Area, Oregon* shows the subject property contains three soil types discussed more thoroughly in section V below.
5. The Marion County Planning Division requested comments on the application from various governmental agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) asked to include engineering condition A as a condition of approval in the Planning Director's decision, and provided engineering requirements B through F as issues applicant should be aware of if the proposal were approved:

ENGINEERING CONDITION

Condition A - Prior to issuance of building permits, dedicate a 30-foot right-of-way half-width for public road purposes along the portion of the subject property Selah Springs Road frontage abutting the array.

Right-of-Way dedication requirements for conditional uses are in general accordance with Marion County Code 17.119.060. All dedications shall be to the public. Nexus for this Condition is commercial development of property adjacent to a road in need of widening and roadway safety improvements, and sufficient space for utilities. It appears an additional 10 feet of width is needed. The R/W shall be indicated as a 30-foot half-width on the sketch and legal description.

ENGINEERING REQUIREMENTS

- B. In accordance with Marion County Driveway Ordinance #651 driveways must meet sight distance, design, spacing, and safety standards. The following sub-requirements, numbered 1 through 6, are access related.
 - 1) A total of one (1) direct access point to Selah Springs Road at a maximum width of 24 feet will be allowed to serve the solar array.
 - 2) At the time of application for building permits, an Access Permit will be required.
 - 3) A drainage culvert will need to be installed.
 - 4) The access security gate must be set back a minimum of 25 feet from the roadway edge of pavement to allow a vehicle to be completely off the road during ingress/egress.
 - 5) Due to the roadway vertical curvature component, adequate Intersection [Sight] Distance from the proposed access location will need to be verified.
 - 6) The eastern field access shall be removed.
- C. Prior to building permits, the Applicant shall provide a civil site plan to PW Engineering for review and approval that addresses pre- and post-construction erosion control Best Management Practices (BMPs) as related to stormwater runoff. An example of a post-construction BMP is shallow drainage swales between panel rows to promote stormwater infiltration. The plan shall also verify access location. Due to the moderately sloping nature of the site and proximity to a mapped seasonal drainage tributary to Brush Creek alongside the eastern property line, the need for stormwater attenuation is also anticipated.
- D. Along with construction of the array security fencing, the existing field fence located within the to-be-expanded 30-foot R/W half-width along Selah Springs Road shall be removed. To that end, any new fencing shall be located on private property.
- E. Any excavation work within the public right-of-way for public and franchise utilities requires permits from MCPW Engineering.
- F. Prior to issuance of building permits, Applicant/Contractor shall demonstrate proof of having acquired a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more.

Marion County Building Inspection Division commented that building permits are required for the placement of the ground mount solar arrays.

Silverton Fire District (SFD) commented that the fire district "has only a concern for access to and around the site. The site will need to meet our access requirements in case of an emergency at the site. Our access requirements can be found on our website at www.silvertonfire.com under the fire prevention tab there is a link to a pdf called fire code application guide. If you have any further questions please feel free to contact me at the information provided below."

Marion County Tax Assessor's Office provided tax information for the subject property.

Marion County Code Enforcement (MCCE) noted no code enforcement issues with the property.

All other contacted agencies either did not respond or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

The hearings officer adopts and incorporates the following findings of fact and conclusions of law from the hearings officer's October 30, 2017 order with **modifications set out in bold:**

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. The preponderance of the evidence standard is a lesser standard than a clear and convincing or reasonable doubt standard. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is in applicant's favor, then the burden of proof is met and the application must be approved.

TAX LOTS AND ACREAGE

2. The conditional use application identifies the subject property as 15.15 acres. The accompanying narrative states the project is to construct a 12-acre photovoltaic solar power generation facility on a 15.15-acre tract and identifies map tax lots as 071W04D00600 and 071W04D00700 as the tract. The two tax lots are legally separate parcels. The Planning Director's decision cites the subject property as tax lot 071W04D00600 only and puts its acreage at 14.5 acres. Marion County Assessor's Office records show tax lot 600 as 14.15 acres and tax lot 700 as 1.0 acre, a 15.15-acre total. Assessor's Office acreages are accepted as correct for purposes of this order.

At hearing, applicant explained that tax lot 700 was included in the application only for applying MCC chapter 17.120 acreage standards. The Planning Division representative explained that no solar facility infrastructure or activities will take place on tax lot 700 so tax lot 700

was considered for purposes of specific criteria but was not considered as part of the subject property. Both tax lots were included in the application as the subject property. Applicant did not modify the application prior to or at hearing to exclude tax lot 700. The property subject to the application includes tax lots 600 and 700 in a 15.15-acre tract. Both tax lots are considered in addressing applicable criteria.

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to decide all conditional use applications. Under MCC 17.119.140, after the Planning Director's final decision, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's final decision is dated June 19, 2017. The 15th day of the appeal period fell on Monday, July 4, 2017, a holiday, extending the appeal period to Tuesday, July 5, 2017. Neighboring property owners appealed the decision on July 5, 2017. The appeal was timely filed by interested persons.
4. Under MCC 17.119.150, if the Planning Director's decision is appealed, the hearings officer shall conduct a hearing. The hearings officer may hear and decide this matter.
5. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a warranty deed recorded in Marion County deed records at reel 3261 page 189 showing that tax lot 071W04D00600 was conveyed to Walter R. Klopfenstein and Karen S. Klopfenstein on February 17, 2011. The Marion County Assessor's Office also lists the Klopfensteins as property owners of tax lot 700. Walter Klopfenstein authorized Brush Creek Solar, LLC to file the application. Karen Klopfenstein, the other owner of the property did not sign the authorization. As a condition of any approval, Ms. Klopfenstein must also authorize Brush Creek Solar, LLC to file the application. As conditioned, MCC 17.119.020 will be satisfied.
6. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including the authorized agent of an owner. Mr. Klopfenstein authorized Brush Creek Solar, LLC to apply for the conditional use permit for the photovoltaic solar power array on the subject property; Ms. Klopfenstein did not. Troy Snyder, Brush Creek Solar, LLC manager signed the conditional use application. Under ORS 63.077(h), an LLC manager may conduct an LLC's business. Mr. Snyder could sign the application for the LLC, but to be effective, all property owners would need to authorize the LLC to file the application. With a condition of approval requiring Ms. Klopfenstein's additional authorization, MCC 17.119.025 would be satisfied.
7. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:

- (A) That the hearings officer has the power to grant the conditional use;
- (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
- (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.

8. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. MCC 17.136.050(F)(3) lists a photovoltaic solar power generating facility, subject to MCC 17.120.110, as a conditional use in the EFU zone. Photovoltaic solar power generation facility as defined in OAR 660-033-0130(38)(e):

[I]ncludes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. A photovoltaic solar power generation facility does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.

ORS 757.300 and OAR 860-039 deal with electricity provider customers who generate power for personal use and sell excess power to the provider. ORS 757.365 and OAR 860-084 involve a Public Utility Commission pilot program for small retail customer solar energy systems. Neither program applies here. Applicant proposes a photovoltaic solar power generation facility as conditionally permitted under the MCC. MCC 17.119.070(A) is met.

9. MCC 17.136.010 contains the EFU zone purpose statement:

The purpose of the EFU (exclusive farm use) zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in those areas composed of tracts that are predominantly high-value farm soils as defined in OAR 660-033-0020(8). These areas are generally well suited for large-scale farming. It is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming activities and the wider range of non-farm uses otherwise allowed on non-high-value farmland. Moreover, to provide the needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

The EFU zone is also intended to allow other uses that are compatible with agricultural activities, to protect forests, scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include the lot of record non-farm dwelling provisions in OAR 660-033-0130(3). The provisions limiting non-farm dwellings to existing parcels composed on Class IV - VIII soils [OAR 660-033-0130(4)] are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.

Under MCC 17.119.010, a conditional use is an activity similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. MCC

17.136 and, by reference, MCC 17.120.110 provisions are intended to carry out the purpose and intent of the EFU zone. Meeting these criteria ensures a proposed use will be in harmony with the purpose and intent of the EFU zone. **The criteria are discussed below and are all met. MCC 17.119.070(B) is met.**

10. **Conditions set forth below are necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood. MCC 17.119.070(C) is met.**

MCC 17.120.110

11. MCC 17.120.110 is based ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. (An additional OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1) below.) MCC 17.120.110 provides three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on the subject property determine which scenario applies. OAR 660-033-0130(38)(f) refers to ORS 195.300(10) in defining soil types, and ORS 195.300(10) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition for the whole state. MCC 136.140(D) refines the administrative rule and provides just those definitions applying in the Marion County EFU zone. Under OAR 660-033-0030(8), for approving land use applications on high-value farmland, soil classes, soil ratings or other soil designations are those in the Natural Resources Conservation Service (NCRS) Web Soil Survey. The record contains an NRCS soil resource report for Marion County Area, Oregon. The Web Soil Survey shows 82.5% of the subject property is composed of Willamette silt loam, 3 to 12 percent slopes (W1C) (a class IIe soil), 6.4% Amity silt loam (Am) (a class IIw soil), and 11.2% Wapato silty clay loam (Wc) (a class IIIw soil). MCC 17.136.140(D) defines high-value farmland as a tract of land composed predominantly of class I and II soils and certain class III and IV soils. Class III Wapato soils are not listed as high-value soils, but with 88.9% class II soils, the subject tract qualifies as high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

12. Under MCC 17.120.110(B), for high-value farmland soils:
 1. A photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004;
 2. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of

property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;

3. The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;
4. Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;
5. Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;
6. The project is not located on high-value farmland soil unless it can be demonstrated that:
 - a. Non-high-value farmland soils are not available on the subject tract; or
 - b. Siting the project on non-high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or
 - c. The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised on non-high-value farmland soils;
7. A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:

- a. If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary;
 - b. When at least 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits, either as a single project or multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar power generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the overall land use pattern of the area will be materially altered if the overall effect of existing and potential photovoltaic solar power generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.
13. *No more than 12 acres.* Applicant states the subject photovoltaic solar power generation facility will enclose only 12 acres and will not preclude more than 12 acres from use as a commercial agricultural enterprise. Appellants argue that, looking at the aerial site plan (sheet Z 1.0), it appears the current farm use of the property is greater than 12 acres, that the solar facility will strand the left over farmed portion, making it too small for farming and effectively precluding more than 12 acres from agricultural enterprise use. Applicant counters that the left over land is not farmland or part of any agricultural enterprise because it is made up of the intermittent stream and riparian vegetation that cannot be disturbed.

Tax lot 700 is developed and unavailable for farm use. Applicant's site plan shows a sliver of what may be cultivated land on the eastern side of the property outside the fenced facility area. The site plan is an initial plan and does not provide exact detail; it overlays the subject property, but the vicinity map and site data box show an incorrect property address, and property lines look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area moves east and envelopes the sliver of what may be cultivated land. That area also appears to be made up of non-high-value Wapato soils. The area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use.

Appellants also argue that the additional 10' of right-of-way requested by MCPW will take more land out of farm use, but it appears any right-of-way

dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use.

A more exacting site plan will be required as a condition of any approval, but from the evidence in the record as a whole, it is more likely than not that the photovoltaic solar power generation facility will not preclude more than 12 acres from use as a commercial agricultural enterprise. No goal 3 exception is required. MCC 17.120.110(B) (1) is met.

14. *On-site agricultural use impacts.* The current agricultural enterprise takes place on the 12 acres where the solar facility is proposed. Of the remaining land, tax lot 700 is subject to CU 16-014 and is not in nonfarm use, and the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B) (2) is met.
15. *Erosion and sedimentation control impacts on on-site agricultural productivity.* Erosion and sedimentation control are important for preventing loss of on-site farm soils and keeping the site's viability for farm use. (See exhibit 1 photograph 3 and exhibit 7.) No author was identified in applicant's initial erosion and sediment control plan and the plan was not well detailed. A later submitted erosion and sediment control plan (sheets 1-3) is a preliminary bid set but the plan is more detailed and specific. For example, a general note on sheet two states that the site will not be stripped of vegetation for construction, that no mass grading is proposed, and that excavation will occur only on the proposed entry/access road. And, under a grading and utility erosion and sediment construction note, any stripped topsoil will be stockpiled in a stable location and covered with plastic sheeting or straw mulch, and sediment fences placed around the pile. The plan is stamped and signed by Erik J. Huffman, an Oregon registered professional engineer and land surveyor. And, MCPW LDEP, in its written comments and as attested to at hearing, states that prior to building permits being issued, applicant would have to provide a civil site plan to Public Works Engineering for review and approval that would address pre- and post-construction erosion control best management practices (BMPs) for stormwater runoff. And, because the site slopes toward the seasonal drainage tributary to Brush Creek, Public Works anticipates requiring stormwater attenuation. An Oregon Department of Environmental Quality (DEQ) National Pollution Discharge Elimination System (NPDES) 1200-C discharge permit is also required, and applicant's erosion and sedimentation plan requires the permittee to meet all NPDES permitting standards and to implement all plan measures and practices.

Any approval will be conditioned on implementing applicant's stormwater, grading and drainage plans as reviewed and approved by Public Works, and requiring NPDES 1200-C permitting requirements to be met. As conditioned, the presence of the photovoltaic solar power generation facility will not

result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B) (3) will be met.

16. *Soil compaction and on-site agricultural productivity.* Applicant's **original** soil compaction plan **was** part of **an** anonymously authored erosion, sediment and soil compaction plan. A signed and certified plan is not required under this criterion, but applicant must still show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." The submitted plan reads:

Soil Compaction Minimization during construction (Emphasis in the original.)

Project construction both manual labor and mechanical equipment. Mechanical equipment, such as material delivery trucks and diggers, will be restricted to roads. Construction of the solar array occurs in roughly the following order, with potential areas of compacted soil marked in *italics*:

1. Site preparation
 - a. *Construction of roads*
 - b. Clearing of obstructive vegetation (large trees)
 - c. Laydown and staging areas
2. Solar array construction
 - a. Driving foundations
 - b. Installing solar panel racking
 - c. Installing solar panels
 - d. *Digging electrical trenches*
 - e. Installation of electrical wiring
 - f. Placement of inverter/transformer pads
3. Post Construction
 - a. Removal of equipment and excess materials
 - b. Re-vegetation using a natural seed mix
 - c. Operations and Maintenance which includes vegetation management and module washing)

The total estimated area of the solar facility is 12 acres but the compacted soil will be isolated to the roads and electrical trenches. The areas where the new road/driveway will be constructed for access and long-term maintenance will remain compacted. The electrical trenches will be backfilled with native material at the same compaction level as the native surface. Therefore, electrical trench footprints should not have an increase in long-term compactions. Areas overly compacted outside of the roads due to distribution of materials within the project site will be de-compacted and revegetated with a native grass seed mix. These areas are not anticipated to be compacted due to minimal off-road driving. However, if these areas due occur, they will be addressed.

The hearings officer found:

The submitted plan provides a good overview but little detail and is not site-specific. The plan does not explain why road construction and trenching are the only phases with potential areas of compaction, even though it states there will be other overly compacted areas that will be de-compacted. The plan does identify the areas, say how extensive the compaction may be or say how they will be de-compacted. The plan says road areas will "remain compacted" but not whether they will remain compacted just through the useful life of the project and then de-compacted or remain compacted into perpetuity. Soil compaction/de-compaction is important, especially in this field composed of high-value class II agricultural soils. Applicant has not provided substantial evidence in the record proving it is more likely than not that construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production.

The hearings officer found MCC 17.120.110(B) (4) was not met. On appeal applicant submitted a revised soil compaction plan, and stated that it replaces the previously submitted plan.

The plan, prepared and signed by registered professional engineer Mark Risch, provides general information to better understand the concept and conditions leading to soil compaction, such as clay versus sand versus silt soil content, with clay most prone to compaction, sand least prone and silt in the middle range. The site is made up of mostly (if not entirely) Willamette silt loam (WLC). Development related compaction is expected in roadway/driveway, equipment and material staging, and employee parking areas. Relief compaction is planned in all but "exception" areas. Pre- and post-construction compaction testing will occur, with a goal of restoring post-construction to preconstruction compaction levels with an exception for areas of intentional permanent compaction (such as a roadway area). Compaction relief areas were summed up as primary, secondary and trench areas. Primary areas have topsoil removed. Secondary areas have no soil removed. Trench areas have been trenched to install conduit. In primary areas subsoils will be decompacted with a non-inversion, agriculture subsoiler, and top soil will be placed, decompacted and leveled with disc and harrow. In secondary areas soil will be decompacted and leveled with disc and harrow. And, in trench areas the trenches will be backfilled and matched to the compaction state of adjacent soils or will be relieved after backfilling by one of the other mentioned relief methods. Operational notes state:

- Generally, soil compaction will be avoided where possible.
- Compaction relief operations will take place in suitably dry weather conditions and when the soils are of a moisture content necessary to obtain the target compaction values.

- Backfilling of trenches should only be done in dry soils. Dewatering of the trench and allowing soils to dry may be required.
- Compaction relief measures will be completed in a manner which completely avoids soil inversion (mixing of top soil with subsoil).

The content, adequacy and feasibility of the plan were not challenged per se, but Mr. Harris testified that he was told by a county engineer that possible stormwater runoff mitigation requirements might include cross-terrain ditching or stormwater retention facility, but he would not know for sure until plans are submitted for building permits. Mr. Harris noted that additional construction requirements could result in additional soil compaction not considered in the soil compaction plan. And in remand exhibit 7, opponents Harris, Harris and Hodson state:

Although the scope of the hearing was to be limited to Weed mitigation and Soil Compaction, we feel that Soil Erosion and Storm Water runoff are directly correlated with soil compaction and that all testimony presented at hearing should be considered.

The connection between soil compaction and runoff was acknowledged in the new soil compaction plan's purpose statement:

Compacted soils lose innate water-carrying and holding capacity, which in turn contributes towards higher runoff volumes...

But, the purpose of the plan is to prevent unnecessary soil compaction, and the intent is to restore preconstruction soil compaction values on the site. As stated on the first paragraph of the second page of the report, "All areas encountering compaction will be considered compaction relief areas..." unless in exception areas. If additional compaction occurs because of erosion or stormwater control needs, applicant will have to address decompaction in those areas. A condition of approval can make sure this is a requirement of the soil compaction plan. As conditioned, it is more likely than not that the proposal will not result in unnecessary soil compaction that reduces the productivity of soil for crop production, and MCC 17.120.110(B) (4) will be met.

17. *Weed control.* MCC 17.120.110(B) (1) through (4) deal specifically with on-site impacts to the subject property. MCC 17.120.110(B) (5) is not so constricted and off-site impacts can be considered. Weed control is important not just for keeping the subject site from being infested, but also for keeping the subject property from becoming a source of infestation for other properties. The property to the east contains appellants' plant nursery and Patricia Harris explained how uncontrolled weeds can infest nursery stock and require hand weeding or other practices that could increase production costs.

Applicant submitted a weed mitigation plan, but the plan is not signed, certified or site-specific. It calls for minimizing site clearing, re-vegetating disturbed areas with native seed mixes, and making construction crews responsible for inspecting the subject site, construction equipment and materials entering and exiting the site for noxious weeds. According to the plan, after construction, weeds will be monitored on a regular basis and the weeds will be primarily hand eradicated, but that spraying or livestock grazing may be used, and the vegetative mix may need adjusting, and Marion County Weed Control District may be consulted if weed infestation persists or worsens, or if native species fail to thrive. Unlike the bid set provided for erosion and sediment control, this plan is not long on specifics; it contains too many may's and not enough shall's and does not prove it is more likely than not that construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species.

The hearings officer found MCC 17.120.110(B) (5) was not met. On appeal applicant submitted a revised soil compaction plan, and stated that it replaces the previously submitted plan.

The new weed abatement plan, prepared by Ecological Land Services, Incorporated and signed by a senior wetland scientist and a senior wildlife biologist (individual qualifications stated), addresses noxious and undesirable weeds. Opponents Harris, owners of the neighboring plant nursery) do not object to the scope of the weed plan. The plan points out that the project area will be most vulnerable to weeds during construction, when disturbed soil will be exposed. The plan notes several weeds identified by the Marion County Weed Control District (MCWCD) as noxious or undesirable and determines which weeds would most feasibly be able to grow on the property. These findings are not disputed. The plan states there is currently no weed problem on the subject property, and calls for measures to prevent weed establishment on the site. Weed identification materials will be available to on-site crews to inspect construction areas and incoming materials for noxious and undesirable weeds. Equipment is to be washed prior to coming on-site to help prevent weeds from coming in from off site. Routine site inspections will be carried out after an initial pre-construction inspection. Inspections will be conducted weekly during construction and monthly during the growing season and beyond for one year. After construction, native grasses from a local native plant nursery will be planted in exposed soils, and should be fully established by the end of 12 months, making it more difficult for weeds to take root on the site. Opponents claim native grasses will not grow under the solar panels but cite no specific source for this belief. Two biologists prepared the plan and have determined it is feasible to viably reseed the site. With nothing more than an unsupported statement to the contrary, the hearings officer finds the weed mitigation plan more reliable and rejects opponents' counter contention. The plan details its maintenance, monitoring and performance and contingency plans. Essentially, if weeds are found on the site, manual removal is the preferred first course of action because of its lower environmental impact versus chemical treatment. If chemical treatment is

deemed necessary, two chemicals were chosen, with reasons explained. Material data sheets for each were attached. Weed location will be annotated on a map and updated regularly. Twelve months after end of construction, the site is expected to be weed free, but if not, on-site species and eradication methods used can be reviewed and alternate methods can be determined. Quarterly monitoring then takes over for the life of the project. A sample long term maintenance agreement was submitted at hearing.

The biggest point of contention with this plan is the section that states:

"At no point in the project's construction, or afterwards, will the site have greater than 5 percent coverage of noxious weeds or greater than 20 percent coverage of undesirable weeds. If these are exceeded, immediate notification of MCWCD and Marion County will be required, followed by submission of a revised weed management plan. Weekly monitoring will be reinstated (if quarterly monitoring has begun) and will continue until the 5 and 20 percent thresholds are achieved or eclipsed.

If just the enclosed site is considered, at 12 acres, 5% noxious weeds would be 0.6 acre, and 20% of undesirable weeds would be 2.4 acres. Applicant states the objective of the plan is to remove all weeds, that there is no allowance for 25% of the site to be covered in weeds, that opponents mischaracterize the substance of the plan and conflate the contingency threshold requiring county notice and a new plan with the objectives of the plan.

The hearings officer finds that the plan itself as stated appears well thought out and adequate to sufficiently control weeds, until it gets to the contingency planning section. Waiting until a potential of 0.6, 2.4 or 3.0 acres of weeds are on the site to trigger the contingency plan is disquieting, when potential weed contamination of the adjacent nursery operation was a basis for denial of this criterion in the first order, and when another witness noted at hearing that 25% weed infestation could cause issues for the field across the street used for experimental specialty and experimental crops.

The hearings officer is not a biologist or weed control specialist, but with no explanation as to why the contingency percentages were chosen, this part of the plan needs reconsideration, explanation and perhaps modification, or the hearings officer could set a lower threshold. Here, it seems reasonable that if a 5% contingency threshold is appropriate for noxious weeds, it would also be reasonable and appropriate for undesirable weeds. The neighboring nursery owner did not express a higher concern for noxious over undesirable weeds; infestation of either type could potentially prompt a need for hand weeding and increased cost of farm practices. The hearings officer accepts the weed control plan as a feasible plan for containing weeds on and off the subject property, but does not accept the 5% and 20% contingency implementation threshold. With a condition modifying the plan to require a 5% combined total noxious and

undesirable weed threshold for implementation of contingency planning, the hearings officer finds it more likely than not that weeds will be appropriately controlled and will not cause problems for on- or off-site farm uses, and MCC 17.120.110(B) (5) will be met.

18. *Location on high-value soils.* Applicant proposes placing the subject facility on high value farmland soils. Most soils on the tract are high-value farmland soils except the 1.7-acre portion containing non-high-value Wapato soils and riparian vegetation associated with a seasonal stream. The riparian edge of the property needs to remain intact, so siting the project on non-high-value farmland soils on the subject tract is impracticable and would reduce the project's efficiency and output. MCC 17.120.110(B) (6) is met.
19. *Other solar sites.* A map entitled, Approved Solar Sites As of June 7, 2017, is in the record and shows no solar sites on the map. Appellants say the map is inadequate and argue that all solar panels, including individual residential rooftop panels, need to be considered in evaluating this criterion.

This criterion specifically considers only "photovoltaic solar power generation facilities" as defined in 17.120.110(A) (5), on EFU zoned land, constructed or approved under a land use process, that has obtained building permits. Every stray solar panel is not considered; only those meeting specific prerequisites.

The hearings officer agrees that the solar site map in the record does not clearly show a one mile boundary as depicted in the map's legend, and the legend only mentions approved and not constructed solar facilities. However, the Planning Division representative testified at hearing that there are no other built or approved photovoltaic solar power generation facilities within one mile of the subject site, and the Planning Director found in his decision that there are no other constructed or approved solar facilities within a one-mile radius of the subject property. A planning staff report (or in this case, a Planning Director's decision) can itself constitute substantial evidence even if it is not supported by other evidence. *Petes Mountain Homeowners Association v. Clackamas County*, 55 Or. LUBA 287, 313 (2007). Here, the Planning Director's finding and Planning staff's testimony are substantial evidence in the record that shows applicant met its burden of proving there are no other solar facilities within one mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) is met.

20. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility shall require the project owner to sign and record in the deed records of Marion County a document binding the project owner and project owner's successor in interest, prohibiting them from pursuing a claim for federal relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). A condition of any approval will require the project owner to sign and record in the

deed records of Marion County a farm/forest declaratory statement binding the project's owner and successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). As conditioned, MCC 17.120.110(E) is satisfied.

21. Under MCC 17.120.110(F), nothing in this section shall prevent a county from requiring a bond or other security from a developer or otherwise imposing on a developer the responsibility for retiring the photovoltaic solar power generation facility. Neighboring property owners propose bonding for the project. Applicant notes that it is bound by an agreement with the property owner to remove the facility at the end of its useful life and to restore the site to its original condition. Any approval will require applicant to sign an ongoing site maintenance and decommissioning agreement binding to applicant and future owners. The document shall be recorded with the county. As conditioned, bonding is not required.

MCC 17.136.060(A)

22. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:
 1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
 2. Adequate fire protection and other rural services are or will be available when the use is established.
 3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
23. *Farm practices.* MCC 17.136.060(A)(1) incorporates OAR 660-033-0130(5) and ORS 215.196(1) requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding

lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

No forest practices are alleged or obvious on surrounding properties. All surrounding properties are zoned EFU. Applicant describes the three properties to the south as two 6.8-acre parcels and a 5.38-acre parcel, each with a dwelling. Two ponds are also on properties to the south. Looking at applicant's site plan, it appears that the Pike property contains a grass seed field. Ms. Pike, an appellant, appeared in writing and orally through her son, but did not complain of interference with the grass seed operation. Grass seed fields are also west of the subject property. Applicant provided no detailed information on the grass seed operations and the grower did not appear at hearing. Still, grass seed would require attention to grow and harvest the crop.

A young filbert orchard is to the north. The orchard owner did not appear, but appellant George Harris testified that the young orchard is planted with clover between the rows of trees, but as the trees mature and produce nuts, cover crops are typically stripped so that nuts can be swept up to harvest. According to Mr. Harris, sweeping produces dust that could cover solar panels and reduce their efficiency.

Appellants Harris have a plant nursery directly east of the subject property. Patricia Harris testified that weed mitigation and rodent control are concerns for the nursery operation. Weed infestation of nursery crops would cause additional work, such as hand weeding products, and that would require additional staff and add to the cost of farm practices. The 'unattended nature of the site is also a concern because a different neighbor allowed a field to go unattended and it became infested with vole that eventually migrated to the nursery property and ate the roots of thousands of gallons of plants. Because the solar site will be left basically unattended for years, Ms. Harris is concerned it will become susceptible to rodent infestation and result in similar losses for her nursery. Another nursery is on the Stadeli property northeast of the subject property, beyond intervening properties. The Stadeli nursery property contains the 8.17-acre Stadeli Reservoir. Brooke Crager-Stadeli testified that the reservoir is used to irrigate her wholesale tree nursery operation, and is fed by the unnamed stream that abuts the subject property. Ms. Crager-Stadeli is concerned that sedimentation of the creek will result in water deprivation for the reservoir and interfere with irrigation practices. Ms. Crager-Stadeli is also concerned that any sprays used to control weeds on the subject property could run off into the creek, contaminate the reservoir and interfere with the nursery operation.

Erosion and sedimentation control was discussed above as it pertains to farm uses on the subject property, the issues are basically the same for

off-site farm operations. Applicant's latest erosion and sediment control plan is more detailed and specific and was prepared by an Oregon registered professional engineer. MCPW LDEP is also addressing runoff and sedimentation issues by requiring a civil site plan prior to building permit issue. The plan must be reviewed and approved by Public Works and must address pre- and post-construction erosion control BMPs for stormwater runoff. A DEQ NPDES 1200-C discharge permit is also required, and applicant's erosion and sedimentation plan requires the permittee to meet all NPDES permitting standards, and implement all of the plan's measures and practices. A condition of approval requiring implementation of applicant's stormwater plan, DPW review and approval of grading and drainage plans, and NPDES 1200-C permitting approval, will address on- and off-site sedimentation and runoff issues that could impact farm practices.

In the hearings officer's previous order, it was found that applicant's originally submitted weed control plan was inadequate and found this criterion was not met. On remand, applicant submitted a new weed mitigation plan that the hearings officer evaluated in V(17) above. The discussion and findings in that paragraph are adopted and incorporated here. For the reasons stated above, and with the condition stated above, the hearings officer finds the new plan is adequate and will, more likely than not, prevent weed infestation from interfering with neighboring farm practices.

The hearings officer also previously found that opponents Harris sufficiently showed, based on prior experience with an unattended neighboring farm field, that vole infestation on an unmonitored neighboring property could lead to infestation of the nursery property, and to increased costs of farm practices needed to prevent crop destruction. Applicant integrated a rodent control element into its weed control document. The vole plan relies on three possible control methods, encouraging and facilitating natural predation, vole fencing, and trapping. To encourage daytime predators (red tail hawk) and nighttime predators (barn owls), nesting platforms and nesting boxes will be provided and maintained. The bird species encouraged in the plan are common and shown to be effective vole predators in cited studies. The environment of the site (solar facility) was evaluated and found to be an acceptable hunting environment for red tail hawk and barn owl. Vole fencing is also proposed in combination with encouraging predation. The plan notes vole normally burrow and tunnel at a depth of two to six inches but have been known to burrow to 12". The wire mesh vole fencing will be installed to 16" below ground, vole can climb and the fencing will also be installed to 12" above ground. Should it become necessary, live traps that can hold multiple vole at a time will also be used. As described, the proposed rodent control plan will, more likely than not, ensure vole from the subject property will not have a significant negative impact on farm practices in the area. With a condition of approval implementing the plans, the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use, and MCC 17.136.060(A) (1) will be satisfied.

24. *Adequate services.* Utility lines are available to the subject property. No new well or septic systems are proposed. According to the MCCC Rural Transportation System Plan (RTSP) Appendix B, Selah Springs Road is, in the area of the subject property, a two-lane local road with 1' gravel shoulders and a 20' paved travel surface, in a 40' right-of-way that is in good condition and operates at a level of service A. DPW LDEP noted that the county right-of-way standard for a local road is a 60'. LDEP requested, and applicant agreed to, a tax lot 600 property frontage half-width dedication to accommodate roadway improvements for the site. LDEP anticipates a 10' dedication would be required. DPW will also require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. The Silverton Fire District commented it is concerned about access to and around the site. A condition can be included in any approval requiring SFD to sign off on a site access plan for the site prior to issuing building permits. With conditions requiring right-of-way dedication, drainage control and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.137.060(A) (2) is satisfied.
25. *Significant adverse impact.* The subject property is not within a sensitive groundwater overlay (SGO) zone and no water use is anticipated. Neighbors note wildlife species in the area, but the site is not within or near an MCCC identified major or peripheral big game habitat area. MCC 17.110.835 shows that MCCC identified big game and wildlife habitat areas are the county's concern and what must be considered in evaluating this criterion. No MCCC identified watershed areas are on or near the subject property though appellants and others note that the adjacent unnamed creek drains into Brush Creek and eventually into the Pudding River watershed. Even though the property is not within an MCCC identified sensitive watershed, as noted above, applicant's drainage and sedimentation plan, with DPW oversight of drainage, runoff attenuation and NPDES permitting, watershed concerns are addressed. The unnamed creek may overflow during the wet season, but the subject property is not in or near an MCCC identified floodplain area. Supporting materials in the record show the solar panels are solidly encased and emit no particulates and leach no materials that will seep into area groundwater. The solar array site is sloping, but applicant submitted stormwater and erosion control plans that show adequate containment is possible, and final plans will be reviewed by DPW as a condition of approval. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 136.060(A) (3) will be met.
26. *Noise.* Marion County's noise ordinance, MCC chapter 8.45, at MCC 8.45.080(A) specifically exempts sounds generated by conditional use permit activities from prosecution if the activities are conducted in accordance with the terms and conditions of the permit. Conditional uses do not get a free pass on noise, but noise standards must be set in the conditional use permitting process to be effectively enforced. State noise regulations are found in Oregon Department of Environmental Quality (DEQ) OAR 340-035 but

they were not adopted as part of the noise ordinance. See, *Johnson v. Marion County*, 58 Or LUBA 459 at 470 (2009). The OAR can be looked to for guidance when evaluating noise in specific situations and may be set as the noise standard in conditional use decisions. The following standard is adopted as a part of this order to ensure MCC 17.136.060(A)(4) is met:

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

A new industrial or commercial noise source means any industrial or commercial noise source for which installation or construction was commenced after January 1, 1975 on a site not previously occupied by the industrial or commercial noise source in question. There are no known prior commercial or industrial uses of the subject property on January 1, 1975 or before so the subject proposed solar power generating facility is a new industrial or commercial noise source.

A previously unused industrial or commercial site means property that has not been used by any industrial or commercial noise source during the 20 years immediately preceding commencement of construction of a new industrial or commercial source on that property. No known commercial or industrial uses occurred on the subject property in the past 20 years, so the subject site is a previously unused industrial or commercial site.

As a condition of any approval, applicant must meet OAR 340-035-0035(1)(b)(B) standards for a new noise source on a previously unused site. The noise limit for new sources on previously unused sites is **the lower of** the ambient statistical noise level, L10 or L50, plus 10 dBA (decibels on an A weighted scale), **or** the OAR 340-035 Table 8 noise level. L10 is the noise level equaled or exceeded 10% of an hour (six minutes). L50 is the noise level equaled or exceeded 50% of an hour (30 minutes). Table 8 allowable statistical noise levels allowed in any one hour, from 7 a.m. to 10 p.m. are, L50=55 dBA, L10=60 dBA, L1=75 dBA, and from 10 p.m. to 7 a.m. are, L50=50 dBA, L10=55 dBA, L1=60 dBA. **(Emphasis in the original.)**

Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity for transfer to the electrical grid produce noise from a cooling fan. Inverter noise abates with distance. The proposed facility requires only one inverter that will be placed in the center area of the facility, about 375' to 406' from the property line and about 600' from the nearest residences (estimating distances based on the Z 1.0 site plan and measurements on map 071W040D). Inverter noise also abates as the sun goes down because electricity production declines, and the noise stops altogether during hours of darkness. See, exhibit 8, document I, page 33. The low level of

inverter fan activity shows it is feasible to meet sound standards set for this conditional use permit. To do that, applicant will be required to record baseline measurements to determine the ambient noise level of the site to calculate ambient level plus 10 dBA. This measurement will be used to determine whether the plus 10 dBA or table 8 standard will be used, and to show specifically how the requirement will be met. A condition of approval will require applicant to provide a site-specific engineer-certified plan showing how the facility will operate within the determined standard. As conditioned, noise associated with the use will not have a significant adverse impact on nearby land uses, and MCC 17.136.060(A)(4) will be satisfied.

27. *Water impounds/mineral and aggregate sites.* No MCCC identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

MCC 17.110.680

28. Under MCC 17.110.680:

'No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation

Tax lot 700 is operating under a conditional use permit granted by the Marion County Board of Commissioners (BOC) and subject to conditions. The use allows agricultural vehicle and equipment service and repairs with a 25% allowance for non-farm vehicle service and repair, and with certain reporting requirements. Testimony at hearing indicated a strong belief that the business is operating outside the permit by exceeding the 25% percent non-farm vehicle repair limit. MCCE commented there are no code enforcement issues with the property. Code enforcement is complaint driven and it is likely that no complaints have been received, providing no cause for it to investigate. With no open enforcement case and no specific information, there is insufficient evidence in the record for the hearings officer to find a violation and disallow approval of the subject application. This section of MCC 17.110.680 is not applicable.

VI. Order

It is hereby found that applicant **has** met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a photovoltaic solar array power generation facility on a 15.15-acre parcel in an EFU zone have been met. Therefore, the conditional use application is **GRANTED**.

The following conditions of approval are necessary for public health, safety and welfare:

1. Before any building permits may issue, applicant must submit proof via signature that property owner Karen Klopfenstein authorizes the filing of the subject application.
2. Applicant shall obtain all required permits from the Marion County Building Inspection Division.
3. Prior to issuance of building permits, applicant shall provide evidence of an Oregon Department of Environmental Quality 1200-C construction storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.
4. Prior to final building inspection applicant shall dedicate a 30-foot right-of-way half-width along the Selah Springs NE frontage of tax lot 071W04D00600. Dedications are to the public, not to Marion County.
5. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final stormwater erosion and sediment control plan, and civil site plans for grading and stormwater management.
6. Applicant shall implement its Weed and Rodent Management Plan, prepared by Ecological Land Services and dated December 12, 2017, except as modified as follows: The contingency portion of the Weed and Rodent Management Plan shall be triggered by a threshold presence of 5% of noxious or undesirable or 5% combination of both on the property.
7. Prior to building permit approval, applicant shall include a long-term maintenance agreement for the weed and rodent control plan in substantial compliance with the agreement at REMAND exhibit 1.
8. Applicant shall implement its Soil Compaction Relief Plan, prepared by Becon Civil Engineering and Land Surveying and dated November 13, 2017.
9. Applicant shall provide a site-specific, engineer-certified plan showing how the proposed solar facility will operate within the noise standard adopted as a part of this order.
10. Applicant shall submit a signed decommissioning plan and agreement that binds applicant or any successor to, at the end of the useful life of the photovoltaic solar power generation facility, retire it in substantial conformance with the decommissioning plan, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and returning the land to a useful agricultural state.

11. Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Applicant shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.
12. Applicant shall provide proof to the Marion County Planning Division that Silverton Fire District has approved applicant's access and premise identification plan.
13. Applicant shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed.
14. Failure to continuously comply with conditions of approval may result in this approval being revoked by the Planning Director. Any revocation may be appealed to the county hearings officer for a public hearing.
15. This conditional use shall be effective only when commenced within two years from the effective date of this order. If the right has not been exercised, or an extension granted, the variance shall be void. A written request for an extension of time filed with the director prior to the expiration of the variance shall extend the running of the variance period until the director acts on the request.

VII. Other Permits

The applicant herein is advised that the use of the property proposed in this application may require additional permits from other local, state or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve the applicant of responsibility for, acquiring such other permits, or satisfy any restrictions or conditions thereon. The land use permit approved herein does not remove, alter or impair in any way any covenants or restrictions imposed on this property by deed or other instrument.

VIII. Effective Date

The application approved herein shall become effective on the 24th day of February 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

IX. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 23rd day of February 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 8th day of February 2018.

A handwritten signature in dark ink, appearing to read 'Ann M. Gasser', written over a horizontal line.

Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Don Kelley
Kelley & Kelley
110 N 2nd St
Silverton, OR 97381

Damien Hall
Ball Janick LLP
101 SW Main St #1100
Portland, OR 97204

George & Patricia Harris
4177 Cascade Hwy NE
Silverton, OR 97381

Brook Crager-Stadeli
PO Box 1986
Silverton, OR 97381

Jeff Pike
3258 Cascade Hwy NE
Silverton, OR 97381

Lt. Ron Parvin
Silverton Fire District
819 Rail Way NE
Silverton, OR 97381

Dawn Olson
15056 Quall Rd
Silverton, OR 97381

Friends of Marion County
PO Box 3274
Salem, OR 97302

Agencies Notified

Planning Division (via email: gfennimore@co.marion.or.us)
(via email: breich@co.marion.or.us)
Assessor's Office (via email: assessor@co.marion.or.us)
Tax Collector (via email: adhillon@co.marion.or.us)
Code Enforcement (via email: bdickson@co.marion.or.us)
Building Inspection (via email: twheeler@co.marion.or.us)
Public Works Engineering
(via email: jrassmussen@co.marion.or.us)
AAC Member No. 7
Silverton Fire Department
Friends of Marion County
1000 Friends of Oregon

Troy Snyder
3519 NE 15th #325
Portland, OR 97212

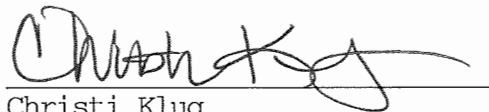
D. Michael Hodges
PO Box 270
Silverton, OR 97381

Meriel Darzen
1000 Friends of Oregon
155 NW Irving Ave
Bend, OR 97703

James Sinn
3168 Cascade Hwy NE
Silverton, OR 97381

Lisa Hodson
4257 Cascade Hwy NE
Silverton, OR 97381

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 8th day of February 2018, and that the postage thereon was prepaid.


Christi Klug
Secretary to Hearings Officer

**BEFORE THE BOARD OF COMMISSIONERS
FOR MARION COUNTY, OREGON**

In the Matter of the
Application of
Brush Creek Solar LLC and
Klopfenstein

)
)
)
)

Case No. CU17-020

Clerk's File No: 5735

ORDER # 17-148

This matter came before the Marion County Board of Commissioners at its regularly scheduled public meeting on November 29, 2017, to consider the application of Brush Creek Solar, LLC, on property owned by Karen and Walter Klopfenstein, for a conditional use to establish a photovoltaic solar power generating facility on a 12 acre portion of a 15.5 acre parcel in an EFU (Exclusive Farm Use) zone located in the 12,100 block of Selah Springs Road NE, Silverton. (T7S; R1W; Section 04D; tax lot 600 and 700).

The planning director issued a decision on June 19, 2017, approving the request. That decision was appealed to the hearings officer who conducted a public hearing on August 2, 2017. On October 30, 2017, the hearings officer issued a decision denying the request. On November 14, 2017, the hearings officer's decision was appealed to the Board.

In the appeal the applicant submitted a revised soil compaction plan and stated that they have commissioned a revised weed mitigation plan to be submitted if the appeal is accepted.

IT IS HEREBY ORDERED that the appeal is accepted and the matter is remanded to the hearings officer for decision after considering the revised soil compaction and weed mitigation plans.

DATED at Salem, Oregon this 4th day of December 2017.

MARION COUNTY BOARD OF COMMISSIONERS


Chair


Commissioner


Commissioner

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No.	CU 17-020
)		
Application of:)	Clerk's File No.	
)		
BRUSH CREEK SOLAR, LLC ON PROPERTY)	Conditional Use	
OWNED BY KAREN & WALTER KLOPFENSTEIN)		

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's approval of the application of Brush Creek Solar, LLC on property owned by Karen and Walter Klopfenstein for a conditional use permit to establish a photovoltaic solar power generation facility on 12-acres of a 15.15-acre tract in an EFU (EXCLUSIVE FARM USE) zone in the 12,100 block of Selah Springs Road NE, Silverton, Marion County, Oregon (T7S, R1W, S04D, tax lots 00600 and 700).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119, 17.120 and 17.136.

III. Public Hearing

A public hearing was held on this matter on August 2, 2017. The Planning Division file was made part of the record. The record remained open until August 9, 2017 for applicant, August 18, 2017 for opponents and August 25, 2017 for applicant. The following persons appeared and provided testimony on the application:

1.	Brandon Reich	Planning Division
2.	John Rasmussen	Marion County Public Works Engineering
3.	Donald Kelley	Attorney for appellants Harris
4.	Patricia Harris	Appellant
5.	George Harris	Appellant
6.	Damien Hall	Attorney for applicant Brush Creek Solar, LLC
7.	Troy Snyder	For Brush Creek Solar, LLC
8.	Jeff Pike	Opponent
9.	Scott Walker	Opponent
10.	Brooke Crager-Stadeli	Opponent

The following documents were entered into the record as exhibits:

Ex. 1	Statement of George Harris with attached photographs (3), soil map overlay, wetland/hydric soil overlay, and topographic map
Ex. 2	Statement of Patricia Harris
Ex. 3	"Applicant's [Appellants'] Statement of Objections"

- Ex. 4 Drift Creek Solar, LLC weed mitigation and erosion, sediment and soil compaction plans
- Ex. 5 Letter from Jeffrey and Freda Pike
- Ex. 6 Stadeli reservoir information
- Ex. 7 Solar farm runoff article
- Ex. 8 August 8, 2017 transmittal from Damien R. Hall with attached wetlands delineation report and source materials A through J
- Ex. 9 August 18, 2017 letter from Donald M. Kelley with attached July 29, 2017 valuation letter and material data safety sheet
- Ex. 10 August 17, 2017 letter from appellant George Harris with four pages of photographs attached
- Ex. 11 August 25, 2017 final response letter from Damien Hall

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at hearing.

IV. Findings of Fact

The hearings officer, after careful consideration of testimony and evidence in the record, issues the following findings of fact:

1. The conditional use application identifies the subject property as 15.15 acres made up of tax lots 071W04D00600 and 071W04D00700. The Planning Director's decision considered only tax lot 071W04D00600 and putting it at 14.5 acres. Tax lots and acreage are discussed in more depth at V2 below.
2. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The intent of the designation and zone is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, may be approved where they do not have a significant adverse impact on farming operations.
3. The subject property is on the north side of Selah Springs Drive NE, at its intersection with Cascade Highway. Tax lot 600 is undeveloped and in farm use. Tax lot 700 is developed with a farm related vehicle and equipment service and repair business established by conditional use case 16-014 (CU 16-014) as a commercial activity in conjunction with farm use. Surrounding properties are zoned EFU and are in farm use.
4. The *Web Soil Survey of Marion County Area, Oregon* shows the subject property contains three soil types discussed more thoroughly in section V below.
5. The Marion County Planning Division requested comments on the application from various governmental agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) asked to include engineering condition A as a condition of approval in the Planning Director's decision, and provided engineering

requirements B through F as issues applicant should be aware of if the proposal were approved:

ENGINEERING CONDITION

Condition A - Prior to issuance of building permits, dedicate a 30-foot right-of-way half-width for public road purposes along the portion of the subject property Selah Springs Road frontage abutting the array.

Right-of-Way dedication requirements for conditional uses are in general accordance with Marion County Code 17.119.060. All dedications shall be to the public. Nexus for this Condition is commercial development of property adjacent to a road in need of widening and roadway safety improvements, and sufficient space for utilities. It appears an additional 10 feet of width is needed. The R/W shall be indicated as a 30-foot half-width on the sketch and legal description.

ENGINEERING REQUIREMENTS

- B. In accordance with Marion County Driveway Ordinance #651 driveways must meet sight distance, design, spacing, and safety standards. The following sub-requirements, numbered 1 through 6, are access related.
- 1) A total of one (1) direct access point to Selah Springs Road at a maximum width of 24 feet will be allowed to serve the solar array.
 - 2) At the time of application for building permits, an Access Permit will be required.
 - 3) A drainage culvert will need to be installed.
 - 4) The access security gate must be set back a minimum of 25 feet from the roadway edge of pavement to allow a vehicle to be completely off the road during ingress/egress.
 - 5) Due to the roadway vertical curvature component, adequate Intersection [Sight] Distance from the proposed access location will need to be verified.
 - 6) The eastern field access shall be removed.
- C. Prior to building permits, the Applicant shall provide a civil site plan to PW Engineering for review and approval that addresses pre- and post-construction erosion control Best Management Practices (BMPs) as related to stormwater runoff. An example of a post-construction BMP is shallow drainage swales between panel rows to promote stormwater infiltration. The plan shall also verify access location. Due to the moderately sloping nature of the site and proximity to a mapped seasonal drainage tributary to Brush Creek alongside the eastern property line, the need for stormwater attenuation is also anticipated.
- D. Along with construction of the array security fencing, the existing field fence located within the to-be-expanded 30-foot R/W half-width along Selah Springs Road shall be removed. To that end, any new fencing shall be located on private property.

- E. Any excavation work within the public right-of-way for public and franchise utilities requires permits from MCPW Engineering.
- F. Prior to issuance of building permits, Applicant/Contractor shall demonstrate proof of having acquired a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more.

Marion County Building Inspection Division commented that building permits are required for the placement of the ground mount solar arrays.

Silverton Fire District (SFD) commented that the fire district "has only a concern for access to and around the site. The site will need to meet our access requirements in case of an emergency at the site. Our access requirements can be found on our website at www.silvertonfire.com under the fire prevention tab there is a link to a pdf called fire code application guide. If you have any further questions please feel free to contact me at the information provided below."

Marion County Tax Assessor's Office provided tax information for the subject property.

Marion County Code Enforcement (MCCE) noted no code enforcement issues with the property.

All other contacted agencies either did not respond or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. The preponderance of the evidence standard is a lesser standard than a clear and convincing or reasonable doubt standard. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is in applicant's favor, then the burden of proof is met and the application must be approved.

TAX LOTS AND ACREAGE

2. The conditional use application identifies the subject property as 15.15 acres. The accompanying narrative states the project is to construct a 12-acre photovoltaic solar power generation facility on a 15.15-acre tract and identifies map tax lots as 071W04D00600 and 071W04D00700 as the tract. The two tax lots are legally separate parcels. The Planning Director's decision cites the subject property as tax lot 071W04D00600 only and puts its acreage at 14.5 acres. Marion County Assessor's Office records show tax lot 600 as 14.15 acres and tax lot 700 as 1.0 acre, a 15.15-acre total. Assessor's Office acreages are accepted as correct for purposes of this order.

At hearing, applicant explained that tax lot 700 was included in the application only for applying MCC chapter 17.120 acreage standards. The Planning Division representative explained that no solar facility infrastructure or activities will take place on tax lot 700 so tax lot 700 was considered for purposes of specific criteria but was not considered as part of the subject property. Both tax lots were included in the application as the subject property. Applicant did not modify the application prior to or at hearing to exclude tax lot 700. The property subject to the application includes tax lots 600 and 700 in a 15.15-acre tract. Both tax lots are considered in addressing applicable criteria.

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to decide all conditional use applications. Under MCC 17.119.140, after the Planning Director's final decision, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's final decision is dated June 19, 2017. The 15th day of the appeal period fell on Monday, July 4, 2017, a holiday, extending the appeal period to Tuesday, July 5, 2017. Neighboring property owners appealed the decision on July 5, 2017. The appeal was timely filed by interested persons.
4. Under MCC 17.119.150, if the Planning Director's decision is appealed, the hearings officer shall conduct a hearing. The hearings officer may hear and decide this matter.
5. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a warranty deed recorded in Marion County deed records at reel 3261 page 189 showing that tax lot 071W04D00600 was conveyed to Walter R. Klopfenstein and Karen S. Klopfenstein on February 17, 2011. The Marion County Assessor's Office also lists the Klopfensteins as property owners of tax lot 700. Walter Klopfenstein authorized Brush Creek Solar, LLC to file the application. Karen Klopfenstein, the other owner of the property did not sign the authorization. As a condition of any approval, Ms. Klopfenstein must also

authorize Brush Creek Solar, LLC to file the application. As conditioned, MCC 17.119.020 will be satisfied.

6. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including the authorized agent of an owner. Mr. Klopfenstein authorized Brush Creek Solar, LLC to apply for the conditional use permit for the photovoltaic solar power array on the subject property; Ms. Klopfenstein did not. Troy Snyder, Brush Creek Solar, LLC manager signed the conditional use application. Under ORS 63.077(h), an LLC manager may conduct an LLC's business. Mr. Snyder could sign the application for the LLC, but to be effective, all property owners would need to authorize the LLC to file the application. With a condition of approval requiring Ms. Klopfenstein's additional authorization, MCC 17.119.025 would be satisfied.
7. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
 - (A) That the hearings officer has the power to grant the conditional use;
 - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
8. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. MCC 17.136.050(F)(3) lists a photovoltaic solar power generating facility, subject to MCC 17.120.110, as a conditional use in the EFU zone. Photovoltaic solar power generation facility as defined in OAR 660-033-0130(38)(e):

[I]ncludes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as

any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. A photovoltaic solar power generation facility does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.

ORS 757.300 and OAR 860-039 deal with electricity provider customers who generate power for personal use and sell excess power to the provider. ORS 757.365 and OAR 860-084 involve a Public Utility Commission pilot program for small retail customer solar energy systems. Neither program applies here. Applicant proposes a photovoltaic solar power generation facility as conditionally permitted under the MCC. MCC 17.119.070(A) is met.

9. MCC 17.136.010 contains the EFU zone purpose statement:

The purpose of the EFU (exclusive farm use) zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in those areas composed of tracts that are predominantly high-value farm soils as defined in OAR 660-033-0020(8). These areas are generally well suited for large-scale farming. It is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming activities and the wider range of non-farm uses otherwise allowed on non-high-value farmland. Moreover, to provide the needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.

To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.

To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

The EFU zone is also intended to allow other uses that are compatible with agricultural activities, to protect forests,

scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

Non-farm dwellings generally create conflicts with accepted agricultural practices. Therefore, the EFU zone does not include the lot of record non-farm dwelling provisions in OAR 660-033-0130(3). The provisions limiting non-farm dwellings to existing parcels composed on Class IV - VIII soils [OAR 660-033-0130(4)] are included because the criteria adequately limit applications to a very few parcels and allow case-by-case review to determine whether the proposed dwelling will have adverse impacts. The EFU zone is intended to be a farm zone consistent with OAR 660, Division 033 and ORS 215.283.

Under MCC 17.119.010, a conditional use is an activity similar to other uses permitted in the zone, but due to some of its characteristics that are not entirely compatible with the zone could not otherwise be permitted. MCC 17.136 and, by reference, MCC 17.120.110 provisions are intended to carry out the purpose and intent of the EFU zone. Meeting these criteria ensures a proposed use will be in harmony with the purpose and intent of the EFU zone. The criteria are discussed below and are not all met. MCC 17.119.070(B) is not met.

10. Because not all criteria are met, no conditions attach to this order. MCC 17.119.070(C) is not applicable.

MCC 17.120.110

11. MCC 17.120.110 is based ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. (An additional OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1) below.) MCC 17.120.110 provides three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on the subject property determine which scenario applies. OAR 660-033-0130(38)(f) refers to ORS 195.300(10) in defining soil types, and ORS 195.300(10) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition for the whole state. MCC 136.140(D) refines the administrative rule and provides just those definitions applying in the Marion County EFU zone. Under OAR 660-033-0030(8), for approving land use applications on high-value farmland, soil classes, soil ratings or other soil designations are those in the Natural Resources Conservation Service (NRCS) Web Soil Survey. The record contains an NRCS soil resource report for Marion County Area, Oregon. The Web Soil Survey shows 82.5% of the subject property is composed of Willamette silt loam, 3 to 12 percent slopes (W1C) (a class IIe soil), 6.4% Amity silt loam (Am) (a class IIw soil), and 11.2% Wapato silty clay loam (Wc) (a class IIIw soil). MCC 17.136.140(D) defines high-value farmland as a tract of land composed predominantly of class I and II soils and certain class III and IV soils. Class III Wapato soils are not listed as high-value soils,

but with 88.9% class II soils, the subject tract qualifies as high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

12. Under MCC 17.120.110(B), for high-value farmland soils:

1. A photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004;
2. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;
3. The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;
4. Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;
5. Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;
6. The project is not located on high-value farmland soil unless it can be demonstrated that:

- a. Non-high-value farmland soils are not available on the subject tract; or
 - b. Siting the project on non-high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or
 - c. The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised on non-high-value farmland soils;
7. A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:
- a. If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary;
 - b. When at least 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits, either as a single project or multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar power generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the overall land use pattern of the area will be materially altered if the overall effect of existing and potential photovoltaic solar power generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.
13. *No more than 12 acres.* Applicant states the subject photovoltaic solar power generation facility will enclose only 12 acres and will not preclude more than 12 acres from use as a commercial agricultural enterprise. Appellants argue that, looking at the aerial site plan (sheet Z 1.0), it appears the current farm use of the property is greater than 12 acres, that the solar facility will strand the left over farmed portion, making it too small for farming and effectively precluding more than 12 acres from agricultural enterprise use. Applicant counters that the left over land is not farmland or part of any agricultural enterprise because it is made up of the intermittent stream and riparian vegetation that cannot be disturbed.

Tax lot 700 is developed and unavailable for farm use. Applicant's site plan shows a sliver of what may be cultivated land on the eastern side of the property outside the fenced facility area. The site plan is an initial plan and does not provide exact detail; it overlays the subject property, but the vicinity map and site data box show an incorrect property address, and property lines look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area moves east and envelopes the sliver of what may be cultivated land. That area also appears to be made up of non-high-value Wapato soils. The area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use.

Appellants also argue that the additional 10' of right-of-way requested by MCPW will take more land out of farm use, but it appears any right-of-way dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use.

A more exacting site plan will be required as a condition of any approval, but from the evidence in the record as a whole, it is more likely than not that the photovoltaic solar power generation facility will not preclude more than 12 acres from use as a commercial agricultural enterprise. No goal 3 exception is required. MCC 17.120.110(B)(1) is met.

14. *On-site agricultural use impacts.* The current agricultural enterprise takes place on the 12 acres where the solar facility is proposed. Of the remaining land, tax lot 700 is subject to CU 16-014 and is not in nonfarm use, and the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B)(2) is met.
15. *Erosion and sedimentation control impacts on on-site agricultural productivity.* Erosion and sedimentation control are important for preventing loss of on-site farm soils and keeping the site's viability for farm use. (See exhibit 1 photograph 3 and exhibit 7.) No author was identified in applicant's initial erosion and sediment control plan and the plan was not well detailed. A later submitted erosion and sediment control plan (sheets 1-3) is a preliminary bid set but the plan is more detailed and specific. For example, a general note on sheet two states that the site will not be stripped of vegetation for construction, that no mass grading is proposed, and that excavation will occur only on the proposed entry/access road. And, under a grading and utility erosion and sediment construction note, any stripped topsoil will be stockpiled in a stable location and covered with plastic sheeting or straw mulch, and sediment fences placed around the pile. The plan is stamped and signed by Erik J. Huffman, an Oregon registered professional engineer and land surveyor. And, MCPW LDEP, in its written comments and as attested to at hearing, states

that prior to building permits being issued, applicant would have to provide a civil site plan to Public Works Engineering for review and approval that would address pre- and post-construction erosion control best management practices (BMPs) for stormwater runoff. And, because the site slopes toward the seasonal drainage tributary to Brush Creek, Public Works anticipates requiring stormwater attenuation. An Oregon Department of Environmental Quality (DEQ) National Pollution Discharge Elimination System (NPDES) 1200-C discharge permit is also required, and applicant's erosion and sedimentation plan requires the permittee to meet all NPDES permitting standards and to implement all plan measures and practices.

Any approval will be conditioned on implementing applicant's stormwater, grading and drainage plans as reviewed and approved by Public Works, and requiring NPDES 1200-C permitting requirements to be met. As conditioned, the presence of the photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B) (3) will be met.

16. *Soil compaction and on-site agricultural productivity.* Applicant's soil compaction plan is part of its anonymously authored erosion, sediment and soil compaction plan. A signed and certified plan is not required under this criterion, but applicant must still show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." The submitted plan reads:

Soil Compaction Minimization during construction

Project construction both manual labor and mechanical equipment. Mechanical equipment, such as material delivery trucks and diggers, will be restricted to roads. Construction of the solar array occurs in roughly the following order, with potential areas of compacted soil marked in *italics*:

1. Site preparation
 - a. *Construction of roads*
 - b. Clearing of obstructive vegetation (large trees)
 - c. Laydown and staging areas
2. Solar array construction
 - a. Driving foundations
 - b. Installing solar panel racking
 - c. Installing solar panels
 - d. *Digging electrical trenches*
 - e. Installation of electrical wiring
 - f. Placement of inverter/transformer pads
3. Post Construction
 - a. Removal of equipment and excess materials
 - b. Re-vegetation using a natural seed mix
 - c. Operations and Maintenance which includes vegetation management and module washing)

The total estimated area of the solar facility is 12 acres but the compacted soil will be isolated to the roads and electrical trenches. The areas where the new road/driveway will be constructed for access and long-term maintenance will remain compacted. The electrical trenches will be backfilled with native material at the same compaction level as the native surface. Therefore, electrical trench footprints should not have an increase in long-term compactions. Areas overly compacted outside of the roads due to distribution of materials within the project site will be de-compacted and revegetated with a native grass seed mix. These areas are not anticipated to be compacted due to minimal off-road driving. However, if these areas do occur, they will be addressed.

The submitted plan provides a good overview but little detail and is not site-specific. The plan does not explain why road construction and trenching are the only phases with potential areas of compaction, even though it states there will be other overly compacted areas that will be de-compacted. The plan does identify the areas, say how extensive the compaction may be or say how they will be de-compacted. The plan says road areas will "remain compacted" but not whether they will remain compacted just through the useful life of the project and then de-compacted or remain compacted into perpetuity. Soil compaction/de-compaction is important, especially in this field composed of high-value class II agricultural soils. Applicant has not provided substantial evidence in the record proving it is more likely than not that construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. **MCC 17.120.110(B) (4) is not met.**

17. *Weed control.* MCC 17.120.110(B)(1) through (4) deal specifically with on-site impacts to the subject property. MCC 17.120.110(B)(5) is not so constricted and off-site impacts can be considered. Weed control is important not just for keeping the subject site from being infested, but also for keeping the subject property from becoming a source of infestation for other properties. The property to the east contains appellants' plant nursery and Patricia Harris explained how uncontrolled weeds can infest nursery stock and require hand weeding or other practices that could increase production costs.

Applicant submitted a weed mitigation plan, but the plan is not signed, certified or site-specific. It calls for minimizing site clearing, re-vegetating disturbed areas with native seed mixes, and making construction crews responsible for inspecting the subject site, construction equipment and materials entering and exiting the site for noxious weeds. According to the plan, after construction, weeds will be monitored on a regular basis and the weeds will be primarily hand eradicated, but that spraying or livestock grazing may be used, and the vegetative mix may need adjusting, and Marion County Weed Control District may be consulted if weed infestation persists or worsens, or if native species fail to thrive. Unlike the bid set provided for erosion and sediment control, this plan is not

long on specifics; it contains too many may's and not enough shall's and does not prove it is more likely than not that construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weed species. **MCC 17.120.110(B) (5) is not met.**

18. *Location on high-value soils.* Applicant proposes placing the subject facility on high value farmland soils. Most soils on the tract are high-value farmland soils except the 1.7-acre portion containing non-high-value Wapato soils and riparian vegetation associated with a seasonal stream. The riparian edge of the property needs to remain intact, so siting the project on non-high-value farmland soils on the subject tract is impracticable and would reduce the project's efficiency and output. MCC 17.120.110(B) (6) is met.
19. *Other solar sites.* A map entitled, Approved Solar Sites As of June 7, 2017, is in the record and shows no solar sites on the map. Appellants say the map is inadequate and argue that all solar panels, including individual residential rooftop panels, need to be considered in evaluating this criterion.

This criterion specifically considers only "photovoltaic solar power generation facilities" as defined in 17.120.110(A) (5), on EFU zoned land, constructed or approved under a land use process, that has obtained building permits. Every stray solar panel is not considered; only those meeting specific prerequisites.

The hearings officer agrees that the solar site map in the record does not clearly show a one mile boundary as depicted in the map's legend, and the legend only mentions approved and not constructed solar facilities. However, the Planning Division representative testified at hearing that there are no other built or approved photovoltaic solar power generation facilities within one mile of the subject site, and the Planning Director found in his decision that there are no other constructed or approved solar facilities within a one-mile radius of the subject property. A planning staff report (or in this case, a Planning Director's decision) can itself constitute substantial evidence even if it is not supported by other evidence. *Petes Mountain Homeowners Association v. Clackamas County*, 55 Or. LUBA 287, 313 (2007). Here, the Planning Director's finding and Planning staff's testimony are substantial evidence in the record that shows applicant met its burden of proving there are no other solar facilities within one mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) is met.

20. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility shall require the project owner to sign and record in the deed records of Marion County a document binding the project owner and project owner's successor in interest, prohibiting them from pursuing a claim for federal relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). A condition

of any approval will require the project owner to sign and record in the deed records of Marion County a farm/forest declaratory statement binding the project's owner and successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). As conditioned, MCC 17.120.110(E) is satisfied.

21. Under MCC 17.120.110(F), nothing in this section shall prevent a county from requiring a bond or other security from a developer or otherwise imposing on a developer the responsibility for retiring the photovoltaic solar power generation facility. Neighboring property owners propose bonding for the project. Applicant notes that it is bound by an agreement with the property owner to remove the facility at the end of its useful life and to restore the site to its original condition. Any approval will require applicant to sign an ongoing site maintenance and decommissioning agreement binding to applicant and future owners. The document shall be recorded with the county. As conditioned, bonding is not required.

MCC 17.136.060(A)

22. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:
 1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
 2. Adequate fire protection and other rural services are or will be available when the use is established.
 3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
 4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
 5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.
23. *Farm practices.* MCC 17.136.060(A)(1) incorporates OAR 660-033-0130(5) and ORS 215.196(1) requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or

significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

No forest practices are alleged or obvious on surrounding properties. All surrounding properties are zoned EFU. Applicant describes the three properties to the south as two 6.8-acre parcels and a 5.38-acre parcel, each with a dwelling. Two ponds are also on properties to the south. Looking at applicant's site plan, it appears that the Pike property contains a grass seed field. Ms. Pike, an appellant, appeared in writing and orally through her son, but did not complain of interference with the grass seed operation. Grass seed fields are also west of the subject property. Applicant provided no detailed information on the grass seed operations and the grower did not appear at hearing. Still, grass seed would require attention to grow and harvest the crop.

A young filbert orchard is to the north. The orchard owner did not appear, but appellant George Harris testified that the young orchard is planted with clover between the rows of trees, but as the trees mature and produce nuts, cover crops are typically stripped so that nuts can be swept up to harvest. According to Mr. Harris, sweeping produces dust that could cover solar panels and reduce their efficiency.

Appellants Harris have a plant nursery directly east of the subject property. Patricia Harris testified that weed mitigation and rodent control are concerns for the nursery operation. Weed infestation of nursery crops would cause additional work, such as hand weeding products, and that would require additional staff and add to the cost of farm practices. The unattended nature of the site is also a concern because a different neighbor allowed a field to go unattended and it became infested with vole that eventually migrated to the nursery property and ate the roots of thousands of gallons of plants. Because the solar site will be left basically unattended for years, Ms. Harris is concerned it will become susceptible to rodent infestation and result in similar losses for her nursery. Another nursery is on the Stadel property northeast of the subject property, beyond intervening properties. The Stadel nursery property contains the 8.17-acre Stadel Reservoir. Brooke Crager-Stadel testified that the reservoir is used to irrigate her wholesale tree nursery operation, and is fed by the unnamed stream that abuts the subject property. Ms. Crager-Stadel is concerned that sedimentation of the creek will result in water deprivation for the reservoir and interfere with irrigation practices. Ms. Crager-Stadel is also concerned that any sprays used to control weeds on the subject property could run off into the creek, contaminate the reservoir and interfere with the nursery operation.

Erosion and sedimentation control was discussed above as it pertains to farm uses on the subject property, the issues are basically the same for off-site farm operations. Applicant's latest erosion and sediment control plan is more detailed and specific and was prepared by an Oregon registered professional engineer. MCPW LDEP is also addressing runoff and sedimentation issues by requiring a civil site plan prior to building permit issue. The plan must be reviewed and approved by Public Works and must address pre- and post-construction erosion control BMPs for stormwater runoff. A DEQ NPDES 1200-C discharge permit is also required, and applicant's erosion and sedimentation plan requires the permittee to meet all NPDES permitting standards, and implement all of the plan's measures and practices. A condition of approval requiring implementation of applicant's stormwater plan, DPW review and approval of grading and drainage plans, and NPDES 1200-C permitting approval, will address on- and off-site sedimentation and runoff issues that could impact farm practices.

Weed control issues were also addressed above, and for the reasons set forth above (and incorporated here), the hearings officer found applicant's weed control was not adequate. Applicant did not address the rodent control issues. These issues are not merely speculative, because appellant provided first hand examples of how unabated weed and rodent issues can harm her farm practices. Applicant has not proven it is more likely than not that the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. **MCC 17.136.060(A) (1) is not satisfied.**

24. *Adequate services.* Utility lines are available to the subject property. No new well or septic systems are proposed. According to the MCCP Rural Transportation System Plan (RTSP) Appendix B, Selah Springs Road is, in the area of the subject property, a two-lane local road with 1' gravel shoulders and a 20' paved travel surface, in a 40' right-of-way that is in good condition and operates at a level of service A. DPW LDEP noted that the county right-of-way standard for a local road is a 60'. LDEP requested, and applicant agreed to, a tax lot 600 property frontage half-width dedication to accommodate roadway improvements for the site. LDEP anticipates a 10' dedication would be required. DPW will also require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. The Silverton Fire District commented it is concerned about access to and around the site. A condition can be included in any approval requiring SFD to sign off on a site access plan for the site prior to issuing building permits. With conditions requiring right-of-way dedication, drainage control and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.137.060(A) (2) is satisfied.
25. *Significant adverse impact.* The subject property is not within a sensitive groundwater overlay (SGO) zone and no water use is anticipated. Neighbors note wildlife species in the area, but the site is not within or near an MCCP identified major or peripheral big game habitat area. MCC 17.110.835 shows that MCCP identified big game and wildlife habitat areas are the

county's concern and what must be considered in evaluating this criterion. No MCCC identified watershed areas are on or near the subject property though appellants and others note that the adjacent unnamed creek drains into Brush Creek and eventually into the Pudding River watershed. Even though the property is not within an MCCC identified sensitive watershed, as noted above, applicant's drainage and sedimentation plan, with DPW oversight of drainage, runoff attenuation and NPDES permitting, watershed concerns are addressed. The unnamed creek may overflow during the wet season, but the subject property is not in or near an MCCC identified floodplain area. Supporting materials in the record show the solar panels are solidly encased and emit no particulates and leach no materials that will seep into area groundwater. The solar array site is sloping, but applicant submitted stormwater and erosion control plans that show adequate containment is possible, and final plans will be reviewed by DPW as a condition of approval. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 136.060(A) (3) will be met.

26. *Noise.* Marion County's noise ordinance, MCC chapter 8.45, at MCC 8.45.080(A) specifically exempts sounds generated by conditional use permit activities from prosecution if the activities are conducted in accordance with the terms and conditions of the permit. Conditional uses do not get a free pass on noise, but noise standards must be set in the conditional use permitting process to be effectively enforced. State noise regulations are found in Oregon Department of Environmental Quality (DEQ) OAR 340-035 but they were not adopted as part of the noise ordinance. *See, Johnson v. Marion County*, 58 Or LUBA 459 at 470 (2009). The OAR can be looked to for guidance when evaluating noise in specific situations and may be set as the noise standard in conditional use decisions. The following standard is adopted as a part of this order to ensure MCC 17.136.060 (A) (4) is met:

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

A new industrial or commercial noise source means any industrial or commercial noise source for which installation or construction was commenced after January 1, 1975 on a site not previously occupied by the industrial or commercial noise source in question. There are no known prior commercial or industrial uses of the subject property on January 1, 1975 or before so the subject proposed solar power generating facility is a new industrial or commercial noise source.

A previously unused industrial or commercial site means property that has not been used by any industrial or commercial noise source during the 20

years immediately preceding commencement of construction of a new industrial or commercial source on that property. No known commercial or industrial uses occurred on the subject property in the past 20 years, so the subject site is a previously unused industrial or commercial site.

As a condition of any approval, applicant must meet OAR 340-035-0035(1)(b)(B) standards for a new noise source on a previously unused site. The noise limit for new sources on previously unused sites is **the lower of** the ambient statistical noise level, L10 or L50, plus 10 dBA (decibels on an A weighted scale), **or** the OAR 340-035 Table 8 noise level. L10 is the noise level equaled or exceeded 10% of an hour (six minutes). L50 is the noise level equaled or exceeded 50% of an hour (30 minutes). Table 8 allowable statistical noise levels allowed in any one hour, from 7 a.m. to 10 p.m. are, L50=55 dBA, L10=60 dBA, L1=75 dBA, and from 10 p.m. to 7 a.m. are, L50=50 dBA, L10=55 dBA, L1=60 dBA.

Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity for transfer to the electrical grid produce noise from a cooling fan. Inverter noise abates with distance. The proposed facility requires only one inverter that will be placed in the center area of the facility, about 375' to 406' from the property line and about 600' from the nearest residences (estimating distances based on the Z 1.0 site plan and measurements on map 071W040D). Inverter noise also abates as the sun goes down because electricity production declines, and the noise stops altogether during hours of darkness. See, exhibit 8, document I, page 33. The low level of inverter fan activity shows it is feasible to meet sound standards set for this conditional use permit. To do that, applicant will be required to record baseline measurements to determine the ambient noise level of the site to calculate ambient level plus 10 dBA. This measurement will be used to determine whether the plus 10 dBA or table 8 standard will be used, and to show specifically how the requirement will be met. A condition of approval will require applicant to provide a site-specific engineer-certified plan showing how the facility will operate within the determined standard. As conditioned, noise associated with the use will not have a significant adverse impact on nearby land uses, and MCC 17.136.060(A)(4) will be satisfied.

27. *Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

MCC 17.110.680

28. Under MCC 17.110.680:

No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any

condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation

Tax lot 700 is operating under a conditional use permit granted by the Marion County Board of Commissioners (BOC) and subject to conditions. The use allows agricultural vehicle and equipment service and repairs with a 25% allowance for non-farm vehicle service and repair, and with certain reporting requirements. Testimony at hearing indicated a strong belief that the business is operating outside the permit by exceeding the 25% percent non-farm vehicle repair limit. MCCE commented there are no code enforcement issues with the property. Code enforcement is complaint driven and it is likely that no complaints have been received, providing no cause for it to investigate. With no open enforcement case and no specific information, there is insufficient evidence in the record for the hearings officer to find a violation and disallow approval of the subject application. This section of MCC 17.110.680 is not applicable.

VI. Order

It is hereby found that applicant has not met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a photovoltaic solar array power generation facility on a 15.15-acre parcel in an EFU zone have been met. Therefore, the conditional use application is **DENIED**. If the application is approved on any appeal, the following sample conditions of approval are submitted for BOC consideration.

1. Before any building permits may issue, applicant must submit proof via signature that property owner Karen Klopfenstein authorizes the filing of the subject application.
2. Applicant shall obtain all required permits from the Marion County Building Inspection Division.
3. Prior to issuance of building permits, applicant shall provide evidence of an Oregon Department of Environmental Quality 1200-C construction storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.
4. Prior to final building inspection applicant shall dedicate a 30-foot right-of-way half-width along the Selah Springs NE frontage of tax lot 071W04D00600. Dedications are to the public, not to Marion County.
5. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final stormwater erosion and sediment control plan, and civil site plans for grading and stormwater management.

6. Applicant shall submit a detailed and site-specific weed control plan requiring replanting disturbed soils with a weed-free local seed mix and committing to establishing a schedule of weed eradication and vegetation management activities sufficient to maintain a healthy and sustainable plant community on the project site for as long as the photovoltaic solar power generation facility remains on the property to Marion County DPW for review.
7. Applicant shall provide a site-specific, engineer-certified plan showing how the proposed solar facility will operate within the noise standard adopted as a part of this order.
8. Applicant shall submit a signed decommissioning plan and agreement that binds applicant or any successor to, at the end of the useful life of the photovoltaic solar power generation facility, retire it in substantial conformance with the decommissioning plan, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and returning the land to a useful agricultural state.
9. Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Applicant shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.
10. Applicant shall provide proof to the Marion County Planning Division that Silverton Fire District has approved applicant's access and premise identification plan.
11. Applicant shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed.
12. Failure to continuously comply with conditions of approval may result in this approval being revoked by the Planning Director. Any revocation may be appealed to the county hearings officer for a public hearing.
13. This conditional use shall be effective only when commenced within two years from the effective date of this order. If the right has not been exercised, or an extension granted, the variance shall be void. A written request for an extension of time filed with the director prior to the expiration of the variance shall extend the running of the variance period until the director acts on the request.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court

Street NE, Salem) by 5:00 p.m. on the 14th day of November 2017. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 30th day of October 2017.

A handwritten signature in dark ink, appearing to read 'Ann M. Gasser', is written over a horizontal line.

Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

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Salem, OR 97302

Agencies Notified

Planning Division (via email: jfennimore@co.marion.or.us)
(via email: breich@co.marion.or.us)

Assessor's Office (via email: assessor@co.marion.or.us)

Tax Collector (via email: adhillon@co.marion.or.us)

Code Enforcement (via email: bdickson@co.marion.or.us)

Building Inspection (via email: twheeler@co.marion.or.us)

Public Works Engineering

(via email: jrassmussen@co.marion.or.us)

AAC Member No. 7

Silverton Fire Department

Friends of Marion County

1000 Friends of Oregon


Troy Snyder
3519 NE 15th #325
Portland, OR 97212

D. Michael Hodges
PO Box 270
Silverton, OR 97381

Meriel Darzen
1000 Friends of Oregon
155 NW Irving Ave
Bend, OR 97703

James Sinn
3168 Cascade Hwy NE
Silverton, OR 97381

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 30th day of October 2017, and that the postage thereon was prepaid.



Joanna Ritchie
Secretary to Hearings Officer