



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: August 15, 2018

Department: Public Works Agenda Planning Date: August 9, 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 Conditional Use (CU) Case 18-022/Sulus Solar 22, LLC, on property owned by Aaron and Jessica Mengucci.

Issue, Description & Background The Marion County Hearings Officer issued a decision on August 2, 2018, approving CU18-022. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the 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 of commissioners receive the notice of decision.

List of attachments: Hearings officer's decision

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 18-022
Application of:) Clerk's File No.
SULUS SOLAR 22, LLC ON PROPERTY OWNED) **Conditional Use**
BY AARON AND JESSICA MENGUCCI)

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Sulus Solar 22, LLC, on property owned by Aaron and Jessica Mengucci¹ for a conditional use permit to establish a photovoltaic solar power generation facility on no more than 12 acres of a 70.5-acre unit of land in an EFU (Exclusive Farm Use) zone at 3486 Edison Road NE, Silverton, Marion County, Oregon (T7S, R1W, S11, tax lot 200).

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 April 25, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

1. Brandon Reich Marion County Planning Director
2. Conor Grogan Sulus Solar, LLC for Sulus Solar, LLC
3. Aaron Mengucci Property owner

A presentation slide show printout was entered into the record as exhibit 1. 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 subject property is designated Primary Agriculture in the MCCP and is zoned EFU. The intent of the designation and zoning is to promote and

¹ The property deed is in the names of Aaron Mengucci and Jessica MacIsaac. Signatures of Jessica MacIsaac and Jessica Mengucci appear in the record. It was affirmed at hearing that Jessica MacIsaac and Jessica Mengucci are the same person. Jessica Mengucci is used except where noted in the order.

protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, can be approved where they do not have a significant adverse impact on farming operations in the area and meet conditional use approval criteria.

2. The subject property is on the east side of Edison Road NE in the 3400 block. The property contains a dwelling and accessory buildings. The property was described by deed at least as far back as April 10, 1974 (volume 776, page 208) and is legally created for land use purposes.
3. Properties in all directions are zoned EFU and are in farm use.
4. The *Soil Survey of Marion County Area, Oregon* indicates that 48% of the subject property contains high-value farm soils.
5. Applicant proposes establishing a photovoltaic solar array power generation facility on no more than 12 acres of the subject property.
6. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) provided engineering requirements A through F as issues applicant should be aware of if the proposal is approved:

- A. Driveways must meet sight distance, design, spacing, and safety standards. At the time of application for building permits, an Access Permit will be required for the change-in-use and to administrate any required modifications to the approach, for instance adding compacted crushed rock to support the construction traffic [MCC 11.10].
- B. Prior to application for 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. A post-construction BMP in the form of a shallow drainage perimeter swale situated between the array and any downgradient water body or flow way to promote stormwater volume infiltration and sediment capture will be required, typically approved for these arrays as a 6' wide x 0.5' deep swale.
- C. Excavation work within the public right-of-way for any electrical interconnection requires both Work-in-R/W and Utility Permits from MCPW Engineering.
- D. Prior to issuance of an Access Permit, evidence of a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more shall be provided.
- E. Applicant is advised that Brush Creek traversing the subject property is under the jurisdiction of DSL/ACOE.
- F. The subject property is within the unincorporated area of Marion County and is subject to assessment of Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R.

Marion County Building Inspection Division commented that building permits are required for new construction.

Marion County Code Enforcement commented that there are no code enforcement issues on the property.

Silverton Fire District commented that the site will need to be evaluated for access around the complex and to any structures that may be placed on the site.

Other contacted agencies did not respond or stated no objection to the proposal.

V. Additional Findings of Fact-Applicable Law-Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. 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 whole 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 a hair in applicant's favor, then the burden of proof is met and the application must be approved.

MCCP AGRICULTURAL LANDS POLICIES

2. Friends of Marion County (FOMC) comments refer to a Yamhill County Board of Commissioner's order where Yamhill County Comprehensive Plan policies were a basis for denying a solar voltaic power generating facility application. FOMC cited to MCCP agricultural lands policies:

Although the Comp Plan policies and goals are aspirational and not binding criteria, these goals and policies must be balanced and the approved conditional use must be consistent with them. (FOMC March 16, 2018 letter, item 5.)

Some MCC criteria incorporate comprehensive plan policies, such as MCC 17.138.030(A)(7) which states that a dwelling will be consistent with the density policy if located in the MCCP identified big game habitat area. This criterion incorporates MCCP Fish and Wildlife Habitat policy 5. Policy 5 also contains mandatory language and is an example of a directly

applicable M CCP criterion regardless of incorporating language. The criteria involved here do not incorporate M CCP policies, and FOMC does not claim any of the nine M CCP agricultural lands policies have mandatory language, calling the policies "aspirational." Without mandatory or incorporating language, M CCP agricultural lands policies are not criteria and are not considered.

Even if the nine M CCP agricultural lands policies are considered, they are either not applicable or are met. Under policy 1, agricultural lands will be protected by EFU and SA (Special Agriculture) zoning. The subject property is zoned EFU. The policy is met. Policy 2 is to maintain agricultural lands in the largest area in large tracts to encourage larger scale farming. This proposal does not change parcel boundaries or permanently remove the subject property from farm use. The policy is met. Policy 3 (specifically cited by FOMC) discourages nonfarm uses on high-value farmland and seeks to ensure allowed nonfarm uses have no adverse impacts on farm uses. State and county law implement nonfarm uses in the county's farm zones by legislative process. The county, at the time this application was filed, conditionally permitted photovoltaic power generating facilities in the EFU zone and the application is reviewed under then applicable county criteria in accordance with state law. This policy is met. Policies 4 through 9 apply to land divisions and residential uses not requested here. Policies 4 through 9 are not applicable. Even if M CCP agricultural lands policies are considered criteria here, they are either not applicable, have been satisfied, or are addressed via MCC implementing criteria.

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to forward conditional use applications to the hearings officer for initial decision. The Planning Director forwarded this application to the hearings officer. The hearings officer may hear and decide this matter.
4. 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 statutory warranty deed recorded in Marion County deed records at reel 3548, page 324 showing that the subject property was conveyed to Aaron Mengucci and Jessica MacIsaac on September 27, 2013. On January 11, 2018, Aaron Mengucci, and on January 22, 2018, Jessica MacIsaac (Mengucci), authorized Sulus Solar 22, LLC, to apply for this conditional use permit and other necessary permits. Sulus Solar 22, LLC, could file the application. MCC 17.119.020 is satisfied.
5. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including the authorized agent of an owner. Aaron Mengucci and Jessica MacIsaac (Mengucci) authorized Sulus Solar, LLC, to apply for the subject conditional use permit on the property. Conor Grogan, Sulus Solar, LLC manager, signed the application for Sulus Solar 22, LLC, a Sulus Solar subsidiary. MCC 17.119.025 is satisfied.

6. 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.
7. *MCC 17.119.070(A)*. 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 SA zone. Under MCC 17.120.110(A)(5), a photovoltaic solar power generation facility:
- [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. Applicant proposes a photovoltaic solar power generation facility as conditionally permitted under the MCC. MCC 17.119.070(A) is met.
8. *MCC 17.119.070(B)*. 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 of 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 characteristics is not entirely compatible with the zone, it could not otherwise be permitted. MCC 17.136 and by reference, MCC 17.120.110, are intended to carry out the purpose and intent of the EFU zone for this application. Meeting these criteria ensures a proposal is in harmony with the purpose and intent of the EFU zone. The criteria are discussed below and are met. MCC 17.119.070(B) is met.

9. *MCC 17.119.070(C)*. Conditions attached to this order 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.

10. MCC 17.120.110 is based on ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. An OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1). 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 a property generally 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)(a) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition. MCC 136.140(D) refines the high-value farmland rule to include only those definitions that apply in the Marion County EFU zone. For approving land use applications on high-value farmland, OAR 660-033-0030(8) states that soil classes, soil ratings, or other soil designations are those in the Natural Resources Conservation Service (NCRS) Web Soil Survey. Applicant submitted an NCRS *Web Soil Survey of Marion County Area, Oregon*, report showing Abiqua silty clay loam, 3 to 5% slopes (AbB), and Stayton silt loam, 0 to 7% slopes (SvB), Nekia silty clay loam, 2 to 7% slopes (NeB), Nekia silty clay loam, 7 to 12% slopes (NeC), Nekia silty clay loam, 12 to 20% slopes (NeD), and Nekia very stoney silty clay loam, 30 to 50% slopes (NsF) soils are on the subject property. AbB and NeB are prime high-value agricultural soils, NeC and NeD are class III high-value agricultural soils, and SvB and NsF are non-high-value class VI soils. SvB and NsF soils make up 54% of the subject property. While the property is not majority high-value farmland based on ORS 195.300(10)(a) alone, applicant submitted an overlay printout showing that a significant portion of the property falls under the ORS 195.300(10)(e) high-value farmland definition:

Land that is in an exclusive farm use zone and that is at an elevation between 200 and 1,000 feet above mean sea level, with an aspect between 67.5 and 292.5 degrees and a slope between zero and 15 percent, and that is located within:

* * *

- (C) The Willamette Valley viticultural area as described in 27 C.F.R. 9.90.

The subject property is within the Willamette Valley viticultural area. Applicant's overlay printout shows a majority of the class VI SvB soils, which make up 40% of the subject property, are high-value ORS 195.300(10)(e) soils, left out of the ORS 195.300(10)(a) high-value definition. Together, ORS 195.300(10)(a) and (e) soils make up more than 50% of the property. The site is high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

11. 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.
12. *MCC 17.120.110(B)(1)-No more than 12 acres.* Applicant states the subject photovoltaic solar power generation facility will encompass no more than 12 acres. The solar array as proposed is a long, oddly shaped portion of the subject property above the southern tree line. Applicant's site plan shows access coming off Edison Road NE and arching toward the central portion of the property. The access appears to be graveled to the developed part of the property and dirt road to the array site. A turnaround must be provided as required by the Silverton Fire District and included in the 12-acre photovoltaic facility limit. A final site plan will be submitted to the Planning Division for review and approval, and will accurately depict all components of the proposed facility and provide accurate acreage for the project. As conditioned, MCC 17.120.110(B)(1) will be met.
13. *MCC 17.120.110(B)(2)-On-site agricultural use impacts.* The subject property, including the proposed photovoltaic site is used for a cattle grazing operation. Property owners say a lot of the property, especially the class VII SvB portion, is rocky and not conducive to traditional cropping, so they raise cattle. The solar facility will be set back from the treed portion of the property to prevent shading of the panels, leaving a cleared fringe area between the array site and the tree line. The odd and somewhat narrow area might be difficult to effectively use for traditional row crops, but cattle can generally wander anywhere that is not fenced off. The property owners intend to continue grazing the fringe area. Aaron Mengucci testified that he has owned the subject property for six years and

has broken a lot of farm equipment (bailer, tractor tires, etc.) on the property. Each time he would disc, he would hit rocks at about six inches. Mr. Mengucci states the array will be in an area that leaves the rest of the farm accessible for continued grazing. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on portions of the property not occupied by project components. MCC 17.120.110(B) (2) is met.

14. *MCC 17.120.110(B) (3)-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 viable for farm use. The proposed array site slopes south and west and is used for grazing livestock. No tree removal is required or approved under this application. The aerial photo with soil type overlay in the *Web Soil Survey* report shows the area where the array will be sited contains NeC and SvB soils, and both have an erosion hazard rating of slight. Applicant's erosion and sedimentation control plan states that the majority of stormwater runoff infiltrates on site but during heavy rainstorms can pool in the two freshwater emergent wetlands/ponds, or run into Brush Creek about 250' west and south of the array site. Water also flows onto the property from the northeast.

Although erosion hazard for the NeC and SvB soils is slight, applicant's plan will minimize soil disturbance and traffic. The plan includes 20 erosion and sedimentation control notes outlining erosion prevention, sedimentation control and site stabilization measures for the project. Environmental scientist, Shawn Childs of Environmental Planning Group, LLC (EPG), prepared the plan and included a qualifications summary. The plan will be upgraded as needed during construction to meet local, state, and federal erosion control regulations. MCPW LDEP will require detailed site plans showing grading and stormwater runoff management and permanent best management practices to prevent concentrated flow of stormwater prior to building permits. LDEP also requires an Oregon Department of Environmental Quality NPDES 1200-C discharge permit. Applicant has proven that meeting erosion and sedimentation criteria is feasible, and with conditions of approval requiring submission of a more detailed final plan, LDEP review and approval of the grading and drainage plan, and NPDES 1200-C permitting, the project will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. As conditioned, MCC 17.120.110(B) (3) will be met.

15. *MCC 17.120.110(B) (4)-Soil compaction and on-site agricultural productivity.* Applicant's soil compaction plan, prepared by EPG's Shawn Childs, is included with the erosion and sediment plan. The plan must show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." The plan points out that soils within the project site are highly prone to compaction. Soil compaction will be prevented by avoiding and minimizing equipment traffic on-site during saturated conditions, keeping traffic to the designated access road, ensuring proper tire inflation, and avoiding use of oversized equipment. Soil compaction may occur in areas where

topsoil is removed and backfilled with original or compatible materials, in areas where topsoil is not removed but equipment is staged, and in trenching areas where equipment is installed and then backfilled. According to the plan, any compaction will be remedied by using plowing or subsoiling techniques and then replanting with deep-rooted vegetation where possible. Remediation will not take place when soils are saturated and mixing top and sub soils will be avoided. Remediation will not occur in areas intended to be compacted for the life of the project such as accessways, but applicant will be required to remediate those areas at the end of the project's life. With a condition of approval requiring a more detailed, site specific decompaction plan for Planning Director review and approval, MCC 17.120.110(B) (4) will be met.

16. *MCC 17.120.110(B) (5)-Weed control.* MCC 17.120.110(B)(1) through (4) deal with on-site impacts to the subject property. MCC 17.120.110(B)(5) has no "on-site" restriction, so off-site impacts are considered. Weed control is important for keeping the subject site free from weeds and keeping it from becoming an infestation source for other properties. Weed seeds and starts can be carried in and out of a site via air, water, equipment and clothing, and so on. The proposed solar site directly abuts farm property to the east, but is fairly well isolated from other farm properties. Erosion, sedimentation, and compaction plans discussed above will help prevent weed transportation via runoff.

Applicant's weed control plan, prepared by EPG ecologist Adrien Elseroad, was developed with information from the Marion County Weed Control District target weed list, Oregon's noxious weed list, and Oregon Department of Agriculture's WeedMapper. The author notes few weeds on the subject property because recent agricultural practices have included herbicide application and regular tillage. The report's table 1 lists noxious or invasive weed species known to have occurred on-site and within three miles of the subject site. Tansy ragwort and Queen Anne's lace are known to occur on the subject property and have been regularly sprayed to prevent further establishment and spread. Other listed weeds have a potential to occur.

The weed control plan has three components: construction BMPs, post construction site restoration, and long-term maintenance. Weeds occur more easily in disturbed soils. Applicant proposes keeping disturbed soils to a minimum. No wholesale site clearing will occur. Array supports will be driven rather than dug into the ground. BMPs will include inspecting the site for and eradicating noxious and undesirable weeds; inspecting and cleaning weeds from clothing, footwear, equipment, and supplies; and covering disturbed areas with seed and mulch as quickly as possible. The seed mix will be chosen in consultation with the Marion County Soil and Water Conservation District. A long-term maintenance agreement is required as a condition of approval. The property is in the Marion County weed control district and subject to MCC chapter 8.20. Applicant must submit a final weed mitigation and control plan to the Marion County Planning Division for review and approval. As conditioned, construction or maintenance activities will not result in the unabated introduction or

spread of noxious weeds and other undesirable weeds species. As conditioned MCC 17.120.110(B) (5) is met.

17. *MCC 17.120.110(B) (6)-Location on high-value soils.* The subject property has about nine acres of class VI NsF very stony, 30-50% slope soils on the western, treed portion of the property. Cutting trees to make way for the solar array may make the area more prone to erosion. And, nearly all of the NsF soils are in a designated geologically hazardous overlay zone. Siting the project on the steep, stony, treed, geologically hazardous, non-high-value farm soil part of the property would significantly reduce the project's ability to operate successfully. MCC 17.120.110(B) (6) (b) is met.
18. *MCC 17.120.110(B) (7)-Other solar sites.* Applicant provided a map of solar sites approved and under review. The map shows no solar sites within one mile of the subject property. Applicant has proven there are fewer than 48 acres of solar facilities within one mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) (a) applies. No further action is required under this criterion.
19. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility will 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 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.
20. Under MCC 17.120.110(F), nothing in the 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. Applicant does not favor bonding but states that given the salvage value of materials and applicant's willingness to accept a condition of approval that requires applicant to be responsible for retiring the facility at the end of its useful life, no bonding is necessary. 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 under MCC 17.120.110(F) is not required.

MCC 17.136.060(A)

21. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the SA 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.

22. MCC 17.136.060(A)(1)-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 the county to 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.

All surrounding properties are zoned EFU. Portions of the subject and some surrounding properties are wooded, but no forest practices are alleged or obvious on any of the properties. Applicant provided an aerial photo of the subject and surrounding properties with a table and narrative of uses on land within 1,000' of the subject property. The 1,000' study area is reasonable considering the land use hearing notification area, the presumed area of interest in the EFU zone, is 750' from the property boundary.

Cattle and sheep are grazed on property directly north. Livestock practices include feeding, watering and otherwise caring for the animals. The northeast tip of the solar array is fairly distant (about 460') from the northern property. The solar field will have no moving parts that might startle cattle or sheep. Noise from the solar field estimated at 22 dBA at the north property line. MCC 8.45 restricts daytime noise to 66 dBA and nighttime noise to 55 dBA. Noise generated by the solar facility will not be disruptive to livestock. The Mengucci's intend to graze their cattle directly adjacent to the solar array once it is in place. The panels are passive collectors and noise from the property will be minimal.

Property to the east, south and west are in grass seed and hay. Farm practices include seeding, spraying for pre-emergent weeds in fall and broadleaf weeds in spring, cutting and windrowing, combine harvesting, and burning stubble when allowed. Hay and grass seed production are not too dissimilar. The grass and hay fields to the south and west are well insulated from the proposed array by distance and wooded areas. A wooded area separates most of the array site from the field to the east but the northeast point of the array site is only 172' from the cultivated portion of the field. But given the passive nature of the use, it is more likely than not that the solar facility will have little impact on grass seed and hay operations in the area.

A property planted to Christmas trees is over a thousand feet northeast of the northeast tip of the solar array area. Christmas trees are planted, monitored for pests and disease, sprayed, sheared, harvested and transported off site. Stumps are removed and fields are replanted. Given the distance to the field from the array and the generally passive nature of the proposed use, no interference with these farm practices is likely.

A filbert orchard is to the southeast. Filbert trees are commonly pruned in the fall, fertilized in February/March, cultivated, and mechanically harvested in September/ October. This field is also protected by distance and an intervening wooded area sufficient to prevent any interference with any associated farm practices.

Off-site intrusion of water and sediment, and weed and rodent infestation from the site could be problems for neighboring farms. Potential farm impacts from erosion and sedimentation are addressed by applicant's erosion and sediment control plans that will mitigate impacts on and off the site. And, MCPW LDEP's civil site plan and DEQ NPDES 1200-C discharge permitting requirements also address off-site drainage issues. Weed control measures were addressed above and conditions adopted to help keep the subject and surrounding properties from succumbing to weed infestation that could increase weed control costs. A rodent pest control plan was submitted with the application and can be feasibly implemented. Applicant will also submit a farm/forest declaratory statement as a condition of approval. As conditioned, applicant has 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 satisfied.

23. *MCC 17.136.060(A)(2)-Adequate services.* Utility lines are available to the subject property. No new well or septic systems are proposed or required for the use. The solar site will be accessed from Edison Road NE, a county roadway. PW LDEP did not request conditions of approval and applicant stated no objections to PW LDEP engineering requirements. A condition will be included in any approval requiring Silverton Fire District to sign off on a site access and identification plan prior to building permit issue. With conditions requiring fire district regulation compliance, adequate services are or will be available upon development. MCC 17.136.060(A)(2) is satisfied.

24. *MCC 17.136.060(A)(3)-Significant adverse impact.* The subject property is not within a sensitive groundwater or floodplain overlay zone. A portion of the property is in a geologically hazardous area overlay zone but not the array site. Any access improvements in the geohazard overlay zone will be examined during the permitting process. The site is not within an MCCP identified peripheral or major big game habitat area, or near or MCCP identified sensitive rivers, streams or headwaters. Brush Creek flows through the southeast portion of the property about 250' south of the solar field, and two small wetlands are identified in the array area. With applicant's soil erosion, sedimentation and compaction plan, any impact on the Brush Creek would likely be minimal. Wetlands are under the jurisdiction of the Oregon Division of State Lands (DSL) and U.S. Army Corp of Engineers (USACE). Applicant's wetlands report recommends a condition of approval requiring applicant to conduct a field investigation prior to construction, and if the wetlands are found to be jurisdictional and affected by the project, require coordination and permitting with DSL and USACE. With a DSL/USACE coordination and permitting condition, any jurisdictional wetlands will be protected. No MCCP identified watershed areas are on the subject property. The solar panels are solidly encased, emit no airborne particulates, and leach no materials into groundwater. 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. MCC 136.060(A)(3) is met.
25. *MCC 17.136.060(A)(4)-Noise.* Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity, and transformers that regulate the alternating current for transfer to the electrical grid, produce noise from cooling fans. Multiple string inverters will be throughout the site. Preliminary placement is illustrated by a series of crosses across the site in applicant's appendix 8, figure 2. The one central transformer is also shown. Smaller string inverters are quieter than previously used large central inverters. All inverter noise abates as the sun goes down because electricity production declines, and stops altogether during hours of darkness. Noise measurements were modeled at property boundaries and nearest residences. Table 2 shows noise will be loudest at the south boundary at about 26 dBA, within MCC 8.45 55 and 65 dBA noise levels. Noise at the nearest residences (950' to 1480' away), is estimated to reach only 17 to 19 dBA, well below MCC 8.45 noise limits. Applicant also agrees to a baseline ambient noise study as a condition of approval. As conditioned, it is more likely than not that noise associated with the use will have no significant adverse impact on nearby land uses. MCC 17.136.060(A)(4) is satisfied.
26. *MCC 17.136.060(A)(5)-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.

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 no more than 12-acres in an EFU zone have been met. The conditional use application is **GRANTED**. The following conditions are necessary to protect the public health, safety and welfare:

1. Applicant shall obtain all required permits from the Marion County Building Inspection Division.
2. Prior to issuance of building permits, applicant shall provide evidence of obtaining 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.
3. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final detailed stormwater erosion and sediment control and maintenance plan, and civil site plan for grading and stormwater management. Applicant shall implement the plans prior to final inspection of building permits.
4. Applicant shall submit a final detailed and site-specific, on-going weed mitigation, maintenance and control plan requiring replanting of disturbed soils with a weed-free local seed mix and agreeing 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 and approval.
5. Applicant shall submit to Marion County Planning for review and approval, a detailed and site-specific soil compaction prevention plan that will be implemented and will require minimal soil disturbance and decompaction of temporarily compacted areas due to construction and maintenance activities, and showing final decompaction of the subject site at decommissioning.
6. Applicant shall submit a signed decommissioning agreement, binding applicant or any successor, and agreeing that at the end of its usual life, the photovoltaic solar power generation facility will be retired in substantial conformance with the decommissioning plan submitted with the application, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and decompacting soils as necessary to allow farm use of the solar site.
7. 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.

8. Applicant shall provide proof to the Planning Division that the Silverton Fire District has approved applicant's access and premise identification plan.
9. Prior to building permit issue, applicant shall provide proof to the Planning Division of coordination with the Oregon Department of State Lands and the U.S. Army Corps of Engineers, and shall obtain any required DSL/USACE permits.
10. Applicant shall submit a baseline ambient noise study prior to building permit issue.
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. Applicant shall implement the rodent management plan submitted to the record.
13. 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.
14. 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 18th day of August 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 17th day of August 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 2nd day of August 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Sulus Solar 6, LLC
700 SW 5th Ave.
Portland, OR 97204

Conor Grogan
c/o Weworks
700 SW 5th Ave.
Portland, OR 97204

Aaron and Jessica Mengucci
P.O. Box 1461
Silverton, OR 97381

Roger Kaye
Friends of Marion County
P.O. Box 3274
Salem, OR 97302

Agencies Notified

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

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

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

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

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

1000 Friends of Oregon (via email: meriel@friends.org)

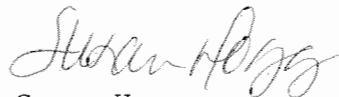
DLCD (via email: timothy.murphy@state.or.us)

Silverton FD (via email: ronparvin@silvertonfire.com)

AAC Member No. 7-2

James Sinn
3168 Cascade Hwy NE
Silverton, OR 97381

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. 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 2nd day of August 2018, and that the postage thereon was prepaid.



Susan Hogg
Secretary to Hearings Officer