

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No.	CU 18-004
)		
Application of:)	Clerk's File No.	
)		
SULUS SOLAR 25, LLC ON PROPERTY OWNED)	Conditional Use	
BY DENNIS CLARK)		

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Sulus Solar 25, LLC on property owned by Dennis Clark for a conditional use permit to establish a photovoltaic solar power generation facility on a 12-acre portion of a 61.72 acre unit of land in an EFU (Exclusive Farm Use) zone in the 24,400 block of Butteville Road NE Aurora, Marion County, Oregon (T3S, R1W, S33, tax lot 500).

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 February 14, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

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| 1. | Brandon Reich | Marion County Planning Division |
| 2. | Tim McMahan | Attorney for applicant Sulus Solar, LLC |
| 3. | Conor Grogan | For Sulus Solar, LLC |
| 4. | Dennis Clark | Property owner |
| 5. | Susan Clark | General |

The following documents were entered into the record as exhibits:

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| Ex. 1 | Paper copy of slide presentation |
| Ex. 2 | Testimony notes of Dennis Clark |
| Ex. 3 | Supplemental noise-related information |

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 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 parcel is about 4,300 feet east of the 24,000 block of Butteville Road NE in Marion County, Oregon. The north property line borders Clackamas County. The property is undeveloped and in farm use.
3. EFU zoned properties in farm use surround most of the subject property. The southern property line in the area of the proposed solar site borders a wooded AR (Acreage Residential) zoned area. Beyond the wooded area are residential lots in a planned unit development.
4. Applicant proposes establishing a photovoltaic solar array power generation facility on 12 acres of the subject property.
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) provided engineering requirements A through D as issues applicant should be aware of if the proposal is approved:

ENGINEERING REQUIREMENTS

- A. 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 3, are access-related.
 - 1) Prior to issuance of building permits, evidence of legal access to the public right-of-way is required.
 - 2) At the time of application for building permits, an Access Permit from Marion County will be required if access is taken from Butteville Road inside of Marion County. If access is taken from within Clackamas County, evidence of meeting their requirements will be necessary.
 - 3) Any proposed 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.
- B. 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. 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 sediment capture and volume attenuation through infiltration may be required, typically approved for these arrays as a 6-foot wide x 5' deep swale. The plan shall also verify access location.

- C. Any excavation work within the public right-of-way for electrical utility work requires permits from MCPW Engineering.
- D. Prior to issuance of building permits, proof of a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more shall be demonstrated.

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

All other contacted agencies either 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. Preponderance of the evidence is a lesser standard than clear and convincing or reasonable doubt standards. 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 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) and 1000 Friends of Oregon (1000 Friends) submitted comments to the record invoking MCCP agricultural lands policies as criteria in this matter:

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 February 9, 2018 letter, item 3.)

FOMC referred to Yamhill County Board Order 18-21 with Exhibit A (attached to 1000 Friends' February 13, 2018 letter). In Order 18-21, the Yamhill County Board of Commissioners extensively examined Yamhill County Comprehensive Plan (YCCP) policies in denying a solar voltaic power generating facility application. The Board's YCCP policy consideration was in response to Yamhill County Zoning Ordinance (YCZO) criterion 1202.02(B):

The use is consistent with those goals and policies of the Comprehensive Plan which apply to the proposed use.

This YCZO criterion incorporates YCCP policy consideration, but MCC 17.136.060(A) and MCC 17.120.110 have no similar incorporating provisions. Some MCC criteria incorporate comprehensive plan policies, such as MCC 17.138.030(A) (7) which states in the section dealing with dwellings in big game habitat areas, a dwelling will be consistent with the density policy if located in the MCCP identified big game habitat area. This incorporates MCCP Fish and Wildlife Habitat policy 5 into the criterion. But, this policy also contains mandatory language and is an example of a directly applicable criterion regardless of incorporating language. Here, FOMC does not claim any of the nine MCCP agricultural lands policies have mandatory language and calls them aspirational. Without mandatory or incorporating language, MCCP agricultural lands policies are not considered.

Even if the nine MCCP agricultural lands policies are considered, they are either not applicable or are met. Under policy 1, agricultural lands will be protected by zoning them EFU and SA (Special agriculture). 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 to by FOMC and 1000 Friends) discourages nonfarm uses on high value farmland and seeks to ensure allowed nonfarm uses have no adverse impacts on farm uses. The state and county determine which nonfarm uses are allowed in the county's farm zones. The county, at the time this application was filed, conditionally permitted photovoltaic power generating facilities in the EFU zone under county criteria in accordance with state law. This policy is met. Policies 4 through 9 apply to land divisions and residential uses which are not requested. Policies 4 through 9 are not applicable.

In sum, MCCP agricultural lands policies are not criteria in this matter, and even if they are considered criteria, they are either not applicable, have been satisfied, or are addressed via MCC implementing criteria.

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 the application to the hearings officer for initial decision. 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 warranty deed recorded in Marion County deed records at reel 2250, page 380 showing that tax lot 031W3300500 was conveyed to Dennis Clark on December 1, 2003. Property owner Dennis Clark authorized Sulus Solar 25, LLC, to apply for the conditional use permit and other necessary permits. Sulus Solar 25, 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. Property owner Dennis Clark authorized Sulus Solar 25, LLC to apply for the conditional use permit for the photovoltaic solar power array on the subject property. A Sulus Solar 26, LLC, manager signed the application. 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 EFU 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 here. 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 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 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.

MCC 17.120.110

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 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. 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 that shows a tract of land in Marion County and Clackamas County that applicant considers in common ownership. The hearing notification map

indicates that tax lot 031W32A00100, adjacent to the westerly most point of the subject property, is owned by Kenneth and Susan Clark, but not Dennis Clark. While it is not clear whether the tract identified in the Web Soil Survey report is an accurate depiction of Dennis Clark's holdings, the majority of that tract is high value farmland. The individual parcel where the proposed solar array would be located, tax lot 031W3300500, is described in a Marion County soil analysis printout as containing 5.6 acres of non-high value farmland, citing to McBee (Mb), Wapato (Wc), and Terrace escarpment (Te) soils. Mb soils are cited a few lines down in the printout as high value farm soils, which is a verified class II prime soil in the Web Soil Survey. Prime, unique, class I and II, and some other class III and IV soils are high value soils under state law. All Mb soils are high value. Te soils are class VI and are all non-high value farm soils. Wc soils are class III soils listed as prime farmland if drained and either protected from flooding or not frequently flooded during the growing season. The hearings officer cannot determine whether the individual Wc portion of this property is drained and protected from flooding or not often flooded during the growing season, but even if Wc soils are considered non-high value, the majority of the subject property is still composed predominantly of high value farm soils, making the subject property 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 only 12 acres and will not preclude more than 12 acres from use as a commercial agricultural enterprise. Applicant's site plan shows access coming off of Butteville Road in Clackamas County and following an existing apparently private road almost to the subject site. Additional roadway to reach the site, the area leading to the sites interconnection with the electrical grid, and any fire department required turnaround will be included in the 12 acre photovoltaic facility 12-acre limit and will be depicted on any final site plan submitted to the Planning Division. The proposed solar site abuts the east, south and west property lines, leaving everything north of the site as an intact, farmable unit. A condition of any approval will require applicant to accurately depict the facility and its acreage. 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 facility will be placed on a part of the current agricultural enterprise. The new access will hug the property boundary and not encroach into farm fields or break up the remaining land in the tract. And, as noted above, the proposed solar site abuts the east, south and west property lines, leaving everything north of the site as an intact, farmable unit. 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.
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 facility site is in an open, fairly flat field cropped in red clover. No tree removal is required or approved under this application. Applicant's erosion and sedimentation control plan identifies site soils with soil erosion hazard ratings, owner observed water pooling, absorption and drainage, drainage flow, receiving water bodies, and soil compaction potential with a prevention and remediation plan. The general strategy is to minimize vegetation and soil disturbance and to stabilize disturbed soils using best management practices (BMPs). For sediment control, applicant proposes using silt fencing, sediment removal, and site maintenance, monitoring, and follow up.

Emily Newell of Environmental Planning Group, LLC (EPG) prepared the plan and provided a summary of her qualifications. Applicant's plan shows minimum requirements for anticipated site condition and will be upgraded as needed during construction to meet local, state, and federal erosion control regulations. MCDPW 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. DPW 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, DPW review and approval of the grading and drainage plan, and requiring NPDES 1200-C permitting,

the project 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.

15. *MCC 17.120.110(B) (4)-Soil compaction and on-site agricultural productivity.* Applicant's soil compaction plan, prepared by Emily Newell of EPG and is found with the erosion and sediment plan and provides a summary of Ms. Newell's qualifications. 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 states 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. The plan notes that soil compaction may occur in areas where topsoil is removed and backfilled with original or compatible materials, 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 according to applicant those areas will be remediated at the end of the project's life.

A portion of the access road already exists so no increased compaction will occur and no decompaction will be needed there. This leaves only a short stretch of new roadway that hugs the property line. The plan shows applicant intends to keep compaction to a minimum. And applicant is required to decommission the solar facility at the end of its useful life and will remove items such as conduit, allowing for decompaction at that time. With a condition of any 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) 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. Seed can be carried in and out of a site by many methods, air, water, and on equipment and clothing and so on. The proposed solar field area directly abuts neighboring farm properties to the east and west, and AR zoned wetlands to the south. And though the property is relatively flat, drainage flows north, south, and west. The erosion, sedimentation, and compaction plans will help by containing runoff and providing native seed mix revegetation to help keep weeds out.

Initial and superseding weed control plans are in the record. The second plan, prepared by ecologist Adrien Elseroad, from EPG, is more individualized and informative. The plan was developed with property owner

input, information from the Marion County Weed Control District target weed list, Oregon's noxious weed list, and Oregon Department of Agriculture's WeedMapper. The weed control plan has three components: construction BMPs, post-construction site restoration, and long-term maintenance. The report identifies two state-identified noxious weed species that are known to have occurred on the subject site, Himalayan blackberry and tansy ragwort. More species have the potential to occur. Weeds can more easily occur in disturbed soils. Applicant proposes keeping disturbed soils to a minimum, so 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 identified noxious and undesirable weeds; inspecting and cleaning weeds from clothing, footwear, equipment, and supplies; and covering disturbed area 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 will be required as a condition of approval. The subject property is within the Marion County weed control district and subject to MCC chapter 8.20. Applicant shall 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 weed species. As conditioned MCC 17.120.110(B) (5) is met.

17. *MCC 17.120.110(B) (6)-Location on high-value soils.* Applicant proposes placing the subject facility on entirely high value farm soils. About one acre of non-high-value Te soils are just north of the proposed solar array field. Te soils are rated 20% to 40% slopes and are not conducive to farming or solar array construction. Putting a portion of the solar site in the Te area will strand prime WuA land south of the site in an unfarmable unit. Applicant's chosen area is better suited to the continuation of the existing commercial farm operation on the subject property. MCC 17.120.110(B) (6) is met.
18. *MCC 17.120.110(B) (7)-Other solar sites.* Applicant provided a map of approved solar sites and solar sites under review. The map shows no solar sites within one mile of the subject site. 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.
19. 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.

20. 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. 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 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.
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.

No forest practices are alleged or obvious on surrounding properties. Property to the south is wooded but zoned AR and is excepted from resource use requirements. Properties to the north, east and west are zoned EFU and must be considered. Applicant provided an aerial photo of the subject and surrounding properties with a table of farm uses on surrounding agricultural properties within 1,000' of the subject property. The study area is more than reasonable given that the land use hearing notification limit in the EFU zone is 750' from the boundary of the subject property. Most surrounding properties are used for grazing cattle, and growing wheat, red clover, and hay. Common farm practices for grazing cattle include watering, grazing, and supplemental feeding if needed. Growing red clover involves planting, flail chopping, combine harvesting, disking, fertilizer spraying and spraying for weeds, and trucking products off site. Similar practices are used in other growing operations in the area.

Once in place, solar panels are passive collectors and generate no emissions. Off-site intrusion of water and sediment flowing from the site, and weed and rodent infestation from the site could be problems for neighboring farms if not sufficiently addressed from the start. Potential on-site farm impacts from erosion and sedimentation was discussed above, and was sufficiently addressed by applicant's erosion and sediment control plan. The plan, prepared by a qualified person, with MCPW LDEP's civil site plan and DEQ NPDES 1200-C discharge permitting requirements, will help ensure drainage issues are properly addressed. On- and off-site weed control issues were also addressed above, and the findings and conditions are adopted here. Applicant also submitted a pest mitigation plan to help ensure the property does not succumb to rodent infestation that could spread to other farm properties. Applicant must 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. The solar site will be accessed from Clackamas County roadways. DPW will require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. Aurora Fire District was notified of the subject proposal but provided no comments for the record. A condition can be included in any approval requiring the Aurora Fire District to sign off on a site access and identification plan for the site prior to issuance of building permits. With conditions requiring drainage and 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, floodplain, or geologically hazardous area overlay zone. No on-site water use is anticipated. The site is not within or near an MCCP identified major or peripheral big game habitat area

or near MCCC identified sensitive rivers, streams or headwaters. No MCCC identified watershed areas are on the subject property. The Willamette River is north and west of the proposed solar site, but land north and west of the solar facility will remain undisturbed. No MCCC identified wetlands are on the proposed solar site but are in the wooded AR zone area to the south. With drainage and sedimentation control plans, wetlands will not be impacted by the proposed use. The solar panels are solidly encased, emit no particulates into the air, and leach no materials into groundwater. The solar array site is fairly flat, and with the submitted stormwater and erosion control plan and conditions of approval set out above, erosion will be sufficiently controlled. 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. Applicant proposes multiple string inverters throughout the site rather than a large central inverter. There will be one central transformer. The smaller string inverters are quieter than a large central inverter. Inverter noise abates as the sun goes down because electricity production declines, and stops altogether during hours of darkness. According to applicant, the nearest residential uses are 450' to the south in the AR zone. Applicant submitted an acoustical analysis of the proposed use based on site modeling, using specifications for transformers and inverter that will likely be used and sensitive noise receptors surrounding the property. Applicant found inverter fan noise will blend into background noise at the fence line and would be well below Marion County noise standards found in MCC 8.45. 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 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.

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 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 maintenance 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 useful 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 Aurora Fire District has approved applicant's access and premise identification plan.
9. 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.
10. Applicant shall implement the rodent management plan submitted to the record.
11. 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.

12. 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 17th day of May 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 16th day of May 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 1st day of May 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 25, LLC
700 SW 5th Ave.
Portland, OR 97204

Connor Grogan (via email:
conorgrogan@sulus-solar.com)

Dennis & Susan Clark
24679 Butteville Rd. NE
Aurora, OR 97204

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

Tim McMahan
Stoel Rives LLP
760 SW 9th Ave., Ste. 3000
Portland, OR 97205

Agencies Notified

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

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

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

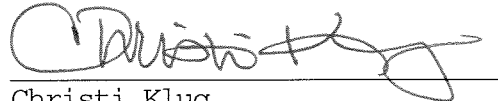
Building Inspection (via email: twheeler@co.marion.or.us)

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

1000 Friends of Oregon (via email: meriel@friends.org)
AAC Member No. 6

John Singer
21875 Butteville Rd NE
Aurora, OR 97002

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 1st day of May 2018, and that the postage thereon was prepaid.



Christi Klug
Secretary to Hearings Officer