MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:	January 16, 2019				
Department:	Public Works	Agenda Planning Date:	January 10, 2019	Time required:	10 min.
☐ Audio/Visual aids					
Contact:	Joe Fennimore	Phone:	503-566-4177		

Department Head Signature: Brian Nicholas

TITLE

Receive and consider appeal of hearings officer's second remand decision approving Conditional Use (CU) 17-020/Brush Creek Solar, LLC and Klopfenstein.

Issue, Description & Background

The hearings officer issued a decision on October 30, 2017, to deny CU17-020. On November 14, 2017, the applicant appealed the hearings officer's decision to the Marion County Board of Commissioners. On November 24, 2017, the board of commissioners accepted the appeal and on December 4, 2017, issued Order 17-148 remanding the matter back to hearings officer. The hearings officer conducted a public hearing on the remand on January 3, 2018, and on February 8, 2018, issued a remanded decision approving the request. That decision was appealed to the board and on February 28, 2018, the board denied the appeal and adopted the hearings officer's decision as its own. The board decision was appealed to Oregon Land Use Board of Appeals (LUBA), and on September 26, 2018, LUBA remanded the decision back to the county.

There are two reasons for the remand: 1) To determine whether police services are a "rural service" under the Marion County Code and if so, whether adequate police services are or will be available; and, 2) To determine whether the solar array will create unnecessary negative impacts on agricultural operations on any portion of the property not occupied by the solar array.

On October 24, 2018, in Order 18-110, the board remanded the application to the hearings officer to conduct a public hearing limited to issues that were the basis for LUBA's remand. The board further stated that issues that could have been raised during the previous appeal, but were not, may not be raised on remand. On November 15, 2018, the hearings officer conducted a public hearing on the LUBA remand where additional testimony and evidence were presented. After considering all evidence and testimony, on December 21, 2018, the hearings officer issued a decision approving the request, and on January 4, 2019, that decision was appealed to the board.

In the appeal, appellant claims the hearings officer erred in concluding that the facility will not preclude more than 12 acres from use as a commercial agricultural enterprise. It is first argued that the hearings officer misinterpreted the ordinance by only considering land that is currently being farmed when determining whether land is being precluded. Secondly, the hearings officer states that it is not impossible that some small area under current cultivation might be left outside the facility boundary but that it would be de minimus. Appellant argues that the term "de minimus" means a small strip would be left out, therefore, the criterion in Marion County Code (MCC) 17.120.110(B), is not met.

The appellant further argues that the proposal does not comply with MCC 17.137.010(A)(2), because there is no evidence in record that adequate police service is available.

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Financial Impacts:	None.
Impacts to Department & External Agencies	None.
Options for Consideration:	1. Accept the appeal and remand the matter back to the hearings officer for further consideration. 2. Accept the appeal and schedule a de-novo public hearing; the suggested hearing date is January 30, 2019 or later. 3. Accept the appeal and schedule a public hearing limited to issues that were the basis for LUBA's remand; the suggested hearing date is January 30, 2019 or later. 4. Deny the appeal and uphold the hearing officer's decision approving the request.
Recommendation:	Staff recommends the board of commissioners deny the appeal and uphold the hearings officer's decision approving the request.
List of attachments:	Appeal Hearings officer's decision dated 12/21/18 LUBA No. 2018-022
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

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January 3, 2019

Marion County Board of Commissioners
555 Court Street NE
Salem, Oregon 97309

Re: Appeal of CU 17-020
Brush Creek Solar, LLC

Dear Commissioners:

Please accept this letter on behalf of my clients George and Patricia Harris as their appeal of the above referenced case. Submitted herewith is a check for $500 representing payment of the filing fee for the appeal.

GROUNDS FOR THE APPEAL

1. The application does not comply with MCC 17.120.110. The property is largely on high value farmland soils and therefore the application may 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. Also, the power facility may not result in a small or isolated piece of property that is more difficult to farm. The Application violates both requirements of this code section in that it will leave an unusable strip of high value farmland in addition to the 12 acres proposed for the facility. In considering this, the Hearings Officer in Section 14 on page 19 of the December 21, 2018 Remand Order states:

> The criterion is reasonably interpreted to be concerned with current agricultural use conducted on the property, not past or potential future use. To interpret this otherwise would not acknowledge current property conditions and would lead to speculation about what might happen in the future. This interpretation by the hearings officer removes the land not currently under cultivation in the northeast corner of the property from consideration when evaluating land taken out of use on the property. The surveyor states that the solar facility boundary area generally follows the tree line and edge of a slope to the east, and that the boundary lies easterly of areas

currently being farmed. The eastern solar facility lines are not shown staked out on the ground, so it is not impossible that some small area under current cultivation might end up outside the eastern facility boundary, but it is unlikely that the area would be more than *de minimus*.

In stating the above, the Hearings Officer errs in two regards. First, she misinterprets the language of the ordinance to limit the consideration to only land that is currently being farmed. The ordinance does not state that limitation. The Hearings Officer is adding to the ordinance in order to reach that result. This additional restriction ignores common farming practice which does not always cover exactly the same ground on an annual basis.

Second, the Hearings Officer admits that the surveyor states that the boundary only "generally" follows the tree line and edge of a slope. The Hearings Officer goes on to say that "it is not impossible that some small area under current cultivation might end up outside the facility boundary". The Hearings Officer tries to justify this exception by stating that it would be no more than "*de minimus*". De minimus is exactly the criteria applied in the ordinance. De minimus means a small strip. In fact, the Hearings Officer agreed that the proposed facility violates MCC 17.120.110(B), but chooses not to apply the ordinance.

2. The application does not comply with MCC 17.137.060(A)(2). There is no substantial evidence in the record that adequate police service is available. The letter from Joseph Miller which is relied on by the Hearings Officer states plainly that "the Marion County Sheriff's Office cannot speak to the services that may be required by your proposed facility". It, then, can not and does not reference the adequacy of such services for this facility.

Finally, the last time this case was appealed to you, the applicants refused to give an extension so as to allow for a hearing before the Board. This time, there is adequate time for the Board to consider the issues raised by the neighbors.

Respectfully submitted,

KELLEY • KELLEY

Donald M. Kelley

DONALD M. KELLEY

DMK:kdm

THE MARION COUNTY HEARINGS OFFICER

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

REMAND ORDER II

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on Marion County Board of Commissioners (BOC) order 18-110, remanding the case to the hearings officer after remand from the Land Use Board of Appeals (LUBA), to issue a decision, after a hearing, on the BOC's approval of the application of Brush Creek Solar, LLC on property owned by Karen and Walter Klopfenstein for a conditional use permit to establish a photovoltaic solar power generation facility on 12-acres of a 15.15-acre tract in an EFU (EXCLUSIVE FARM USE) zone in the 12,100 block of Selah Springs Road NE, Silverton, Marion County, Oregon (T7S, R1W, S04D, tax lots 00600 and 700).

II. Relevant Criteria

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.119, 17.120 and 17.136, and LUBA No. 2018-022, September 26, 2018.

III. Public Hearing

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

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

The following documents were entered into the record as exhibits:

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

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

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

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

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

The following documents were entered into the record as exhibits:

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

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

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

V. Findings of Fact and Conclusions of Law

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

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

2. The Planning Director's summation at the November 29, 2017 Board Session, noted that the issues in the case were the soil compaction and weed mitigation plans under MCC 17.120.110(B)(4) and 17.120.110(B)(5). The Director noted a new soil compaction plan was submitted with applicant's appeal letter and that a new weed mitigation plan was commissioned and would be submitted at an appeal hearing if granted.

3. During the November 29, 2017 Board session, Marion County commissioners discussed the requested appeal. A commissioner suggested accepting the appeal and remanding the matter to the hearings officer to look at applicant's new documents, specifically mentioning the soil compaction and weed mitigation plans. The motion passed verbally at hearing did not specifically mention soil compaction and weed mitigation plans; it was "moved and seconded that we take option 1, accept the appeal and remand it back to the hearings officer..." The motion passed by voice vote. The final Board order used somewhat different language in specifying "soil compaction and weed mitigation plans." The order was signed by all three commissioners.

4. The hearings officer finds:

   a. Applicant, at page two of its appeal letter, appealed the hearings officer's findings relating to MCC 17.120.110(B)(4), 17.120.110(B)(5), and 17.136.060(A)(1).

   b. The hearings officer's MCC 17.136.060(A)(1) findings include the following:

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

c. The weed mitigation plan played a big part in the hearings officer's finding that MCC 17.136.060(A)(1) was not met, but the rodent issue was also an issue the hearings officer believed needed to be addressed.

d. BOC discussions at its November 29, 2017 session emphasized its desire to limit consideration only to criteria the hearings officer previously found were not met.

e. The hearings officer limits the scope of the hearing to considering matters relating only to satisfaction of MCC 17.120.110(B)(4), 17.120.110(B)(5), and 17.136.060(A)(1). This includes considering applicant's newly submitted soil compaction plan, weed mitigation plan (with incorporated rodent control element), and long term maintenance agreement.

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

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

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

VI. Interim Ruling

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

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

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

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

In remand exhibit 8 opponents claim the submission now labeled as remand exhibit 6 was not submitted to the record until January 11, 2018, and was outside applicants January initial open record period. The paper record was kept at the Planning Division office during the open record period and the hearings officer asked to have open records documents sent to the Planning Division for inclusion in the record. Materials referenced by opponents were delivered to the

hearings officer (put before the decision maker) during the open record period. The hearings officer accepted the submission (not rejected by the decision maker). The documents are a part of the local record. Opponents did not ask for rejection of the documents or request any remedy (such as additional open record period for response). No prejudice was claimed and no prejudice is found.

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

On February 8, 2018, the hearings officer issued a decision approving the application. On February 15, 2018, the hearings officer's decision was appealed to the BOC, and on February 28, 2018, the BOC denied the appeal and adopted the hearings officer's decision as its own. The BOC decision was appealed to LUBA, and on September 26, 2018, LUBA remanded the decision to the BOC. On October 24, 2018 in Order 18-110, the BOC remanded the application to the hearings officer to conduct a hearing limited to issues that were the basis for LUBA's remand. The BOC further stated that issues that could have been raised during the previous appeal, but were not, may not be raised on remand.

A public hearing was held on the remanded matter on November 15, 2018. The BOC file was made part of the record. The following persons appeared and provided testimony on the application.

1.	Brandon Reich	Planning Division
2.	Sara Sayles	Attorney for applicant Brush Creek Solar, LLC
3.	Troy Snyder	For Brush Creek Solar, LLC
4.	Donald Kelley	Attorney for opponents Harris[1]
5.	George Harris	Opponent

The following documents were entered into the record as exhibits:

Remand2 Ex. 1 Land survey and site plan superimposed over aerial photograph (survey-site plan)

[1] Patricia and George Harris were appellants of the Planning Director's decision; Brush Creek was appellant of the hearings officer's denial; Patricia and George Harris were appellants from the hearings officer's approval on remand and then petitioners on appeal from the BOC approval to LUBA. Patricia and George Harris are referred to as opponents, appellants or petitioners in various parts of this order, depending on context. Brush Creek Solar, LLC has also been an appellant, but for clarity, it is referred to as applicant, Brush Creek, Brush Creek Solar or Brush Creek Solar, LLC.

Remand2 Ex. 2	Email from Joe Miller
Remand2 Ex. 3	November 15, 2018 submission from George Harris with listed attachments
Remand2 Ex. 4	November 15, 2018 letter from Donald M. Kelley with listed attachments
Remand2 Ex. 5	November 26, 2018 letter from Donald M. Kelley with listed attachments
Remand2 Ex. 6	November 28, 2018 letter from Sara A.H. Sayles with listed attachments
Remand2 Ex. 7	December 5, 2018 letter from Donald M. Kelley with listed attachments
Remand2 Ex. 8	December 11, 2018 final argument letter from Damien R. Hall (LUBA opinion not attached as stated, but a copy of the opinion is elsewhere in the record for reference)

After close of record, opponents asked the hearings officer to strike a portion of remand2 exhibit 8. The request did not allege applicant submitted new evidence to the record, and was deemed functionally equivalent to additional opponent argument. The request was denied.

IV. Findings of Fact

The hearings officer adopts and incorporates the following findings of fact from the hearings officer's February 8, 2018 order:

1. The conditional use application identifies the subject property as 15.15 acres made up of tax lots 071W04D00600 and 071W04D00700. The Planning Director's decision considered only tax lot 071W04D00600 and putting it at 14.5 acres. Tax lots and acreage are discussed in more depth at V2 below.

2. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The intent of the designation and zone is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, may be approved where they do not have a significant adverse impact on farming operations.

3. The subject property is on the north side of Selah Springs Drive NE, at its intersection with Cascade Highway. Tax lot 600 is undeveloped and in farm use. Tax lot 700 is developed with a farm related vehicle and equipment service and repair business established by conditional use case 16-014 (CU 16-014) as a commercial activity in conjunction with farm use. Surrounding properties are zoned EFU and are in farm use.

4. The *Web Soil Survey of Marion County Area, Oregon* shows the subject property contains three soil types discussed more thoroughly in section V below.

5. The Marion County Planning Division requested comments on the application from various governmental agencies.

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

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

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

ENGINEERING REQUIREMENTS

B. In accordance with Marion County Driveway Ordinance #651 driveways must meet sight distance, design, spacing, and safety standards. The following sub-requirements, numbered 1 through 6, are access related.

1) A total of one (1) direct access point to Selah Springs Road at a maximum width of 24 feet will be allowed to serve the solar array.
2) At the time of application for building permits, an Access Permit will be required.
3) A drainage culvert will need to be installed.
4) The access security gate must be set back a minimum of 25 feet from the roadway edge of pavement to allow a vehicle to be completely off the road during ingress/egress.
5) Due to the roadway vertical curvature component, adequate Intersection [Sight] Distance from the proposed access location will need to be verified.
6) The eastern field access shall be removed.

C. Prior to building permits, the Applicant shall provide a civil site plan to PW Engineering for review and approval that addresses pre- and post-construction erosion control Best Management Practices (BMPs) as related to stormwater runoff. An example of a post-construction BMP is shallow drainage swales between panel rows to promote stormwater infiltration. The plan shall also verify access location. Due to the moderately sloping nature of the site and proximity to a mapped seasonal drainage tributary to Brush Creek alongside the eastern property line, the need for stormwater attenuation is also anticipated.

D. Along with construction of the array security fencing, the existing field fence located within the to-be-expanded 30-foot R/W half-width along Selah Springs Road shall be removed. To that end, any new fencing shall be located on private property.

E. Any excavation work within the public right-of-way for public and franchise utilities requires permits from MCPW Engineering.

F. Prior to issuance of building permits, Applicant/Contractor shall demonstrate proof of having acquired a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more.

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

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

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

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

V. Additional Findings of Fact and Conclusions of Law

The hearings officer adopts and incorporates the following findings of fact and conclusions of law from the hearings officer's February 8, 2018 order with modifications underlined (**previous modification in bold**):

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. The preponderance of the evidence standard is a lesser

standard than a clear and convincing or reasonable doubt standard. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

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

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

TAX LOTS AND ACREAGE

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

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

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to decide all conditional use applications. Under MCC 17.119.140, after the Planning Director's final decision, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's final decision is dated June 19, 2017. The 15th day of the appeal period fell on Monday, July 4, 2017, a holiday, extending the appeal period to Tuesday, July 5, 2017. Neighboring property owners appealed the decision on July 5, 2017. The appeal was timely filed by interested persons.

4. Under MCC 17.119.150, if the Planning Director's decision is appealed, the hearings officer shall conduct a hearing. The hearings officer may hear and decide this matter.

5. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a warranty deed recorded in Marion County deed records at reel 3261 page 189 showing that tax lot 071W04D00600 was conveyed to Walter R. Klopfenstein and Karen S. Klopfenstein on February 17, 2011. The Marion County Assessor's Office also lists the Klopfensteins as property owners of tax lot 700. Walter Klopfenstein authorized Brush Creek Solar, LLC to file the application. Karen Klopfenstein, the other owner of the property did not sign the authorization. As a condition of any approval, Ms. Klopfenstein must also authorize Brush Creek Solar, LLC to file the application. As conditioned, MCC 17.119.020 will be satisfied.

6. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including the authorized agent of an owner. Mr. Klopfenstein authorized Brush Creek Solar, LLC to apply for the conditional use permit for the photovoltaic solar power array on the subject property; Ms. Klopfenstein did not. Troy Snyder, Brush Creek Solar, LLC manager signed the conditional use application. Under ORS 63.077(h), an LLC manager may conduct an LLC's business. Mr. Snyder could sign the application for the LLC, but to be effective, all property owners would need to authorize the LLC to file the application. With a condition of approval requiring Ms. Klopfenstein's additional authorization, MCC 17.119.025 would be satisfied.

7. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:

   (A) That the hearings officer has the power to grant the conditional use;

   (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;

   (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.

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

   > [I]ncludes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded

private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. A photovoltaic solar power generation facility does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.

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

9. MCC 17.136.010 contains the EFU zone purpose statement:

> The purpose of the EFU (exclusive farm use) zone is to provide areas for continued practice of commercial agriculture. It is intended to be applied in those areas composed of tracts that are predominantly high-value farm soils as defined in OAR 660-033-0020(8). These areas are generally well suited for large-scale farming. It is also applied to small inclusions of tracts composed predominantly of non-high-value farm soils to avoid potential conflicts between commercial farming activities and the wider range of non-farm uses otherwise allowed on non-high-value farmland. Moreover, to provide the needed protection within cohesive areas it is sometimes necessary to include incidental land unsuitable for farming and some pre-existing residential acreage.
>
> To encourage large-scale farm operations the EFU zone consolidates contiguous lands in the same ownership when required by a land use decision. It is not the intent in the EFU zone to create, through land divisions, small-scale farms. There are sufficient small parcels in the zone to accommodate those small-scale farm operations that require high-value farm soils. Subdivisions and planned developments are not consistent with the purpose of this zone and are prohibited.
>
> To minimize impacts from potentially conflicting uses it is necessary to apply to non-farm uses the criteria and standards in OAR 660-033-0130 and in some cases more restrictive criteria are applied to ensure that adverse impacts are not created.

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

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

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

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

MCC 17.120.110

11. MCC 17.120.110 is based ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. (An additional OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1) below.) MCC 17.120.110 provides three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on the subject property determine which scenario applies. OAR 660-033-0130(38)(f) refers to ORS 195.300(10) in defining soil types, and ORS 195.300(10) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition for the whole state. MCC 136.140(D) refines the administrative rule and provides just those definitions applying in the Marion County EFU zone. Under OAR 660-033-0030(8), for approving land use applications on high-value farmland, soil classes, soil ratings or other soil designations are those in the Natural Resources Conservation Service (NCRS) Web Soil Survey. The record contains an NRCS soil resource report for Marion County Area, Oregon. The Web Soil Survey shows 82.5% of the subject property is composed of Willamette silt loam, 3 to 12 percent slopes (W1C) (a class IIe soil), 6.4% Amity silt loam (Am) (a class IIw soil), and 11.2% Wapato silty clay loam (Wc) (a class IIIw soil). MCC 17.136.140(D) defines high-value farmland as a tract of land

composed predominantly of class I and II soils and certain class III and IV soils. Class III Wapato soils are not listed as high-value soils, but with 88.9% class II soils, the subject tract qualifies as high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

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

1. A photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004;

2. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;

3. The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;

4. Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;

5. Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;

6. The project is not located on high-value farmland soil unless it can be demonstrated that:

a. Non-high-value farmland soils are not available on the subject tract; or

b. Siting the project on non-high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or

c. The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised on non-high-value farmland soils;

7. A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:

a. If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary;

b. When at least 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits, either as a single project or multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar power generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the overall land use pattern of the area will be materially altered if the overall effect of existing and potential photovoltaic solar power generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.

13. *No more than 12 acres*. Applicant states the subject photovoltaic solar power generation facility will enclose only 12 acres and will not preclude more than 12 acres from use as a commercial agricultural enterprise. Appellants argue that, looking at the aerial site plan (sheet Z 1.0), it appears the current farm use of the property is greater than 12 acres, that the solar facility will strand the left over farmed portion, making it too small for farming and effectively precluding more than 12 acres from agricultural enterprise use. Applicant counters that the left over land is not farmland or part of any agricultural enterprise because it is made up of the intermittent stream and riparian vegetation that cannot be disturbed.

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

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

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

14. *On-site agricultural use impacts. LUBA remand order, 8th and 9th assignments of error.*

LUBA considered petitioners' 8th and 9th assignments of error together. These assignments of error deal with whether BOC findings, based on adopted hearings officer findings, for MCC 17.120.110(B)(2) were adequate and based on substantial evidence in the record. MCC 17.120.110(B)(2) states that for high value soils:

> 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;

The BOC order adopted the following findings in the appealed order:

> The current agricultural enterprise takes place on the 12 acres where the solar facility is proposed. Of the remaining land, tax lot 700 is subject to CU 16-014 and is not in nonfarm use, and the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B)(2) is met.

Petitioners' actual assignments of error and related arguments challenging this finding are not in LUBA's opinion or in the record of this case. LUBA found petitioners' argument was, "not entirely clear or well-developed," but understood petitioners to argue that "the proposed 12-acre facility will create a small or isolated piece of property between the solar facility perimeter fence and the riparian area that is *currently cultivated* as part of the farm use on tax lot 600." (Emphasis added.)

LUBA read BOC's MCC 17.120.110(B)(1) and (B)(2) findings together to interpret the county's MCC 17.120.110(B)(2) findings. In MCC 17.120.110(B)(1), the county found that

the area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use. LUBA denied opponents' MCC 17.120.110(B)(1) challenge. (B)(1) findings infer there will be no land left outside the solar facility perimeter that is in farm use, but LUBA pointed out that applicant's final rebuttal letter states that the balance of the subject property outside of the facility perimeter is comprised of land unsuitable for commercial agricultural use and "a small amount of land that is not wooded and is not precluded from commercial agricultural use." As such, LUBA found applicant's letter was not evidence clearly supporting a conclusion that that the solar facility will not create small or isolated pieces of property that are more difficult to farm. LUBA also found the letter provided no evidence that the 12 acres within the facility perimeter extends to the property's western boundary. LUBA concludes:

> The hearings officer [BOC] did not find that the solar facility will not create "small or isolated pieces of the property that are more difficult to farm" or that the entire remaining 2.15 acres on tax lot 600 are unfarmable or otherwise excluded from "agricultural operations conducted on any portion of the subject property not occupied by project components."

LUBA also pointed out it was not saying there was not substantial evidence in the record to make such findings, but that it would not make those findings in the first instance.

At remand hearing, applicant submitted a survey and site plan overlain on an aerial photograph of the subject property. (Remand2 exhibit 1.) Surveyor's notes state the proposed solar facility area, 12.00 acres, includes the area within the west, north, and east fence line, and inside the existing right-of-way line on south side. Notes also state that all property monuments were searched for, found and tied into survey equipment; that the easterly solar facility area generally follows the tree line and top of edge of significant downward slope toward Brush Creek; that the easterly solar facility area boundary lies easterly of areas that are currently being farmed; and that the north, west, and south solar facility area boundaries are coincident with existing property boundaries. The survey-site plan shows a layout similar to the one applicant originally proposed, except the eastern facility fence line is differently shaped.

Opponents pointed to various documents in the record which they claim indicate the solar site is more than 12 acres: a wetlands delineation cover sheet, a US Department of Agriculture (USDA) common land unit map, applicant's August 2017 final testimony letter, and a statement from the property lessee that he is paying for 13 acres of farm ground. (Remand2 exhibit 3.)

Opponents argue that applicant's survey should be rejected because it is overlain on an aerial photo with no scale or identifiable survey monuments, shows a misleading tree line shadow, and is labeled sheet one of two but does not include the second page. However, opponents then rely on the photo to show that cultivated land lies outside the facility perimeter. Opponents also argue that although the survey asserts the proposed solar facility encompasses all currently farmed land, the phrase "currently farmed" is not an MCC 17.120.110(B)(2) standard, and the issue is whether the development creates a small or isolated strip of *any* land that would be more difficult to farm. Opponents also say the

survey-site plan shows the facility border as a straight line rather than a line following the farmable ground on the east side of the property, and concludes that it is "mathematically impossible" for the straight lines on the map to accurately represent farmable ground.

Opponents also contend topographical lines on the survey-site show there is no "significant downward slope" on the east side of the subject property as stated in the survey-site plan.

Opponent George Harris agrees the facility boundary shown on the survey-site plan contains 12 acres, but also says there are areas outside of the facility perimeter that are currently farmed. Mr. Harris provided photos and a narrative about finding survey markers and taking measurements in the eastern property area based on distances shown on the survey-site plan. According to Mr. Harris, his submission shows that more than 12 acres are now farmed and have been farmed in the past.

In response to opponents' comments, applicant submitted a survey map without the overlying site plan or underlying aerial photograph layers. Applicant also submitted a statement from the surveyor saying surveys of this type and for this purpose are not normally recorded, but he would send the survey to the county surveyor for recording. (Remand2 exhibit 6.)

Opponents responded in remand2 exhibit 7:

1. The email from Erik J. Huffman indicates that the survey submitted is not yet approved by the Marion County Surveyor. It is subject to review and revision.

2. Neither the email nor the attached survey answers the question central to the issue on remand. Does the 12 acre solar installation [] leave an isolated or small strip that will be more difficult to farm?

3. Since this submittal does nothing to provide the hearings officer with information concerning the availability of adequate police services and since the submittal at the November 15, 2018 hearing by Applicant referenced a document which was not attached[, t]he Applicant's submittal should be stricken from the record. That area has not been adequately addressed.

To the extent that opponents' statement that applicant's submittal should be stricken from the record is intended as an actual request to strike, the request is denied. The survey, and related evidence and argument from all sources, will be considered and weighed by hearings officer when assessing the subject document's evidentiary value.

Remand2 exhibit 8, applicant's final arguments, notes that the November 15, 2018 hearing notice lists MCC 17.120.110(B)(1) as a land use decision criterion. Applicant points out petitioner's challenge to the BOC finding of compliance with MCC 17.120.110(B)(1) was denied by LUBA, and is outside the scope of the BOC remand.

Applicant is correct that opponents' challenge to the BOC's MCC 17.120.110(B)(1) finding of compliance was denied and cannot be challenged or its validity reconsidered. MCC 17.120.110(B)(1) is relevant only as it relates to LUBA's MCC 17.120.110(B)(2) findings.

The hearings officer observes that the Huffman record of survey at remand2 exhibit 6, submitted without the site plan overlay or aerial photograph underlay, is consistent with Howard Van Cleave's 1978 survey for the Lydia Gehring Estate, submitted by opponents in remand2 exhibit 4. The Huffman survey found the same survey monuments as Van Cleave and the same property line dimensions. The Van Cleave survey included the subject property and three acres to the west, and found the property contained 16.905 gross acres, including land within the Selah Springs Road right-of-way. The Huffman survey found 13.906 gross acres, including the right-of-way, for the subject property (Van Cleave survey minus the three acres to the west). The remand2 exhibit 1 survey-site plan, conservatively, rounds the gross acreage of the subject property up to 13.91 acres and finds a net acreage of 13.56 acres when existing right-of-way land is removed from the total. The property that would be dedicated as a condition of approval is included in the 13.56-acre total.

The survey-site plan, including stated acreage, is reliable; it shows survey monuments were found and described, notes the survey equipment used, names the people involved in field and office work on the survey, closely matches the acreage found in the 1978 Van Cleave survey that opponents submitted to the record (minus the three acres to the west), and it conservatively rounds up the acreage from the remand2 exhibit 6 survey. Other representations of acreage, such as the USDA crop map and wetlands delineation cover sheet, are made for purposes other than determining exact property acreage on the ground, and methods of determining acreage are not shown. On the ground surveys, Van Cleave and Huffman, are the better evidence in the record here for determining property dimensions and acreage. Opponents concede that the area depicted in the survey-site plan accurately represents 12 acres. The survey-site plan, without reference to the underlying photograph, depicts a solar facility boundary coexistent with the surveyed property boundary to the west and north, and with the current roadway right-of-way line on the south side. Applicant has proven, by substantial evidence in the record that the solar facility's western boundary extends to the subject property's western boundary. The eastern boundary is more complicated.

Evidence in the record shows 1.56 acres of the subject property are outside of the facility perimeter, not 2.15 acres as mentioned in the LUBA opinion, and it is uncontested that portions of the 1.56-acre remainder contain a wooded riparian area unavailable for farming. The survey-site plan states the easterly boundary generally follows the tree line and top edge of a significant downward slope toward Brush Creek. (The creek is elsewhere referred to as a Brush Creek tributary, not Brush Creek.) Opponents' argue that there is no significant slope to the creek, and refer to contour lines shown on the survey-site plan. Contour labels show elevation measurements in five foot intervals, and those lines are fairly easy to see. One foot interval lines are generally more difficult to distinguish. The five-foot intervals are generally wider at the north property line, indicating less slope, and closer together to the south, indicating more slope. The site's generally easterly slope appears fairly consistent throughout. The surveyor's comment does not say the whole easterly portion of the property slopes significantly, but indicates that at least a portion slopes more

than the other parts. Some one foot lines on the east side appear narrower than others on the property, but the slope in there is not likely so severe, wide ranging or significant that it would interfere with farming activities, though it was significant enough for the surveyor to note. The exact slope is not stated with certainty nor shown in relation to farmable land, but it is also not important to findings for this criterion. Opponents' comment about straight survey lines and mathematical calculation of farmed areas is also not important because the survey and site plan are not intended to depict farm field outlines or exact tree lines, but to show the dimensions of the property and the outline of the proposed solar facility.

Opponent George Harris identifies two areas he says will be isolated by the proposed solar facility: the northeast corner of the property not currently in farm use, and a southeasterly portion of the property in current farm use. Mr. Harris found northeast and southeast survey monuments, and using distances from the survey-site plan, measured from the markers to the solar site's depicted east boundary. Mr. Harris provided photographs showing the measurement process and property views. The third photograph provided by Mr. Harris was taken from north of the property, looking south onto the subject property. It shows a person on the left standing where the northeast surveyor's marker was found, and a pink flag at the 45' mark. The photo appears to show open ground at that end of the subject property. In photograph 4, the person from photo 3 is seen on the right side of the photo and is said to be standing again at the northeast corner marker. Photos 3 and 4 show a difficulty with photographic depictions. Angles can distort views, like a speedometer needle seen straight on by a driver showing a car going 60 mile per hour, while the person in the passenger might see the needle pointing to 70. This parallax view makes it difficult to evaluate the photos. The person in photo 3 appears to be immediately adjacent to the trees, but in photo 4, appears to be far away from the trees, though said to be standing in the same spot. The next set of photos for the southeast portion of the property show what is noted as a survey marker in Selah Springs Road. The narrative does not say how the marker was located, and the maker is obscured by a tarry looking substance, but for purposes of this order, the hearings officer accepts this as an accurate depiction of the marker's location. Using tape measures a distance of 109' was marked, and a photo was taken looking north from the roadway. The photo appears to show some open land at that location but again, based on potential angular distortion, it is hard to say how much land might be involved. The hearings officer looked back through the record at aerial and ground photos but they provided no clarity. In all, the photos offer little concrete information.

Survey-site plan notes speak of current farm use of the subject property being enclosed by the solar facility, but opponents would look at current, past or future farming areas when evaluating MCC 17.120.110(B)(2). LUBA found opponents' assignment of error was set forth in terms of "currently cultivated" land between the solar facility boundary and the riparian area of the property. This is consistent with the wording of the criterion in terms of "agricultural operations *conducted* on any portion of the subject property not occupied by project components." (Emphasis added.) The criterion is reasonably interpreted to be concerned with current agricultural use conducted on the property, not past or potential future use. To interpret this otherwise would not acknowledge current property conditions and would lead to speculation about what might happen in the future. This interpretation by the hearings officer removes the land not currently under cultivation in the northeast corner of the property from consideration when evaluating land taken out of use on the property.

The surveyor states that the solar facility boundary area generally follows the tree line and edge of a slope to the east, and that the boundary lies easterly of areas currently being farmed. The eastern solar facility lines are not shown staked out on the ground, so it is not impossible that some small area under current cultivation might end up outside the eastern facility boundary, but it is unlikely that the area would be more than *de minimis*. The leftover land is 1.56 acres, the northeastern portion of the property is not in agricultural use, and a large portion of the property is a treed riparian area, also not in farm use. The standard is not whether any portion of the current commercial farm enterprise is outside the solar facility area, but whether the facility will create unnecessary negative impacts on agricultural operations conducted on any portion of the property not occupied by project components. Project components will essentially and necessarily, given the size of the property and the areas not in farm use, envelop agricultural operations on the subject property.

LUBA affirmed that tax lot 700 is subject to CU 16-014 and is not in nonfarm use. Only tax lot 600 is at issue and it is shown, more likely than not, that the proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B)(2) is met.

15. *Erosion and sedimentation control impacts on on-site agricultural productivity*. Erosion and sedimentation control are important for preventing loss of on-site farm soils and keeping the site's viability for farm use. (*See* exhibit 1 photograph 3 and exhibit 7.) No author was identified in applicant's initial erosion and sediment control plan and the plan was not well detailed. A later submitted erosion and sediment control plan (sheets 1-3) is a preliminary bid set but the plan is more detailed and specific. For example, a general note on sheet two states that the site will not be stripped of vegetation for construction, that no mass grading is proposed, and that excavation will occur only on the proposed entry/access road. And, under a grading and utility erosion and sediment construction note, any stripped topsoil will be stockpiled in a stable location and covered with plastic sheeting or straw mulch, and sediment fences placed around the pile. The plan is stamped and signed by Erik J. Huffman, an Oregon registered professional engineer and land surveyor. And, MCPW LDEP, in its written comments and as attested to at hearing, states that prior to building permits being issued, applicant would have to provide a civil site plan to Public Works Engineering for review and approval that would address pre- and post-construction erosion control best management practices (BMPs) for stormwater runoff. And, because the site slopes toward the seasonal drainage tributary to Brush Creek, Public Works anticipates requiring stormwater attenuation. An Oregon Department of Environmental Quality (DEQ) National Pollution Discharge Elimination System (NPDES) 1200-C discharge permit is also required, and applicant's erosion and sedimentation plan requires the permittee to meet all NPDES permitting standards and to implement all plan measures and practices.

Any approval will be conditioned on implementing applicant's stormwater, grading and drainage plans as reviewed and approved by Public Works, and requiring NPDES 1200-C permitting requirements to be met. As conditioned, the presence of the photovoltaic solar

power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B)(3) will be met.

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

> **Soil Compaction Minimization during construction (Emphasis in the original.)**
>
> Project construction both manual labor and mechanical equipment. Mechanical equipment, such as material delivery trucks and diggers, will be restricted to roads. Construction of the solar array occurs in roughly the following order, with potential areas of compacted soil marked in *italics*:
>
> 1. Site preparation
>   - *a. Construction of roads*
>   - b. Clearing of obstructive vegetation (large trees)
>   - c. Laydown and staging areas
> 2. Solar array construction
>   - a. Driving foundations
>   - b. Installing solar panel racking
>   - c. Installing solar panels
>   - *d. Digging electrical trenches*
>   - e. Installation of electrical wiring
>   - f. Placement of inverter/transformer pads
> 3. Post Construction
>   - a. Removal of equipment and excess materials
>   - b. Re-vegetation using a natural seed mix
>   - c. Operations and Maintenance which includes vegetation management and module washing)
>
> The total estimated area of the solar facility is 12 acres but the compacted soil will be isolated to the roads and electrical trenches. The areas where the new road/driveway will be constructed for access and long-term maintenance will remain compacted. The electrical trenches will be backfilled with native material at the same compaction level as the native surface. Therefore, electrical trench footprints should not have an increase in long-term compactions. Areas overly compacted outside of the roads due to distribution of materials within the project site will be de-compacted and revegetated with a native grass seed mix. These areas are not anticipated to be compacted due to minimal off-road driving. However, if these areas due occur, they will be addressed.

The hearings officer found:

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

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

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

- **Generally, soil compaction will be avoided where possible.**
- **Compaction relief operations will take place in suitably dry weather conditions and when the soils are of a moisture content necessary to obtain the target compaction values.**
- **Backfilling of trenches should only be done in dry soils. Dewatering of the trench and allowing soils to dry may be required.**

- **Compaction relief measures will be completed in a manner which completely avoids soil inversion (mixing of top soil with subsoil).**

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

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

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

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

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

17. *Weed control.* MCC 17.120.110(B)(1) through (4) deal specifically with on-site impacts to the subject property. MCC 17.120.110(B)(5) is not so constricted and off-site impacts can be considered. Weed control is important not just for keeping the subject site from being infested, but also for keeping the subject property from becoming a source of infestation for other properties. The property to the east contains appellants' plant nursery and Patricia Harris explained how uncontrolled weeds can infest nursery stock and require hand weeding or other practices that could increase production costs.
Applicant submitted a weed mitigation plan, but the plan is not signed, certified or site-specific. It calls for minimizing site clearing, re-vegetating disturbed areas with native seed mixes, and making construction crews responsible for inspecting the subject site, construction equipment and materials entering and exiting the site for noxious weeds. According to the plan, after construction, weeds will be monitored on a regular basis and the weeds will be primarily hand eradicated, but that spraying or livestock grazing may be

used, and the vegetative mix may need adjusting, and Marion County Weed Control District may be consulted if weed infestation persists or worsen, or if native species fail to thrive. Unlike the bid set provided for erosion and sediment control, this plan is not long on specifics; it contains too many mays and not enough shalls and does not prove it is more likely than not that construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species.

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

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

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

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

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

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

The hearings officer is not a biologist or weed control specialist, but with no explanation as to why the contingency percentages were chosen, this part of the plan needs reconsideration, explanation and perhaps modification, or the hearings officer could set a lower threshold. Here, it seems reasonable that if a 5% contingency threshold is appropriate for noxious weeds, it would also be reasonable and appropriate for undesirable weeds. The neighboring nursery owner did not express a higher concern for noxious over undesirable weeds; infestation of either type could potentially prompt a need for hand weeding and increased cost of farm practices. The hearings officer accepts the weed control plan as a feasible plan for containing weeds on and off the subject property, but does not accept the 5% and 20% contingency implementation threshold. With a condition modifying the plan to require a 5% combined total noxious and undesirable weed threshold for implementation of contingency planning, the hearings officer finds it more likely than not that weeds will be appropriately controlled and will not cause problems for on- or off-site farm uses, and MCC 17.120.110(B)(5) will be met.

18. *Location on high-value soils*. Applicant proposes placing the subject facility on high value farmland soils. Most soils on the tract are high-value farmland soils except the 1.7-acre portion containing non-high-value Wapato soils and riparian vegetation associated with a

seasonal stream. The riparian edge of the property needs to remain intact, so siting the project on non-high-value farmland soils on the subject tract is impracticable and would reduce the project's efficiency and output. MCC 17.120.110(B)(6) is met.

19. *Other solar sites*. A map entitled, Approved Solar Sites As of June 7, 2017, is in the record and shows no solar sites on the map. Appellants say the map is inadequate and argue that all solar panels, including individual residential rooftop panels, need to be considered in evaluating this criterion.

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

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

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

21. Under MCC 17.120.110(F), nothing in this section shall prevent a county from requiring a bond or other security from a developer or otherwise imposing on a developer the responsibility for retiring the photovoltaic solar power generation facility. Neighboring property owners propose bonding for the project. Applicant notes that it is bound by an agreement with the property owner to remove the facility at the end of its useful life and to restore the site to its original condition. Any approval will require applicant to sign an ongoing site maintenance and decommissioning agreement binding to applicant and future

owners. The document shall be recorded with the county. As conditioned, bonding is not required.

MCC 17.136.060(A)

22. Under MCC 17.136.060(A), the following criteria apply to all conditional uses in the EFU zone:

    1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.

    2. Adequate fire protection and other rural services are or will be available when the use is established.

    3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.

    4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.

    5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.

23. *Farm practices*. MCC 17.136.060(A)(1) incorporates OAR 660-033-0130(5) and ORS 215.196(1) requirements. ORS 215.196(1) as interpreted in *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991), requires a three-part analysis to determine whether a use will force a significant change in or significantly increase the cost of farm or forest practices on surrounding lands devoted to farm use. First, the county must identify the accepted farm and forest practices occurring on surrounding farmland and forestland. The second and third parts of the analysis require that the county consider whether the proposed use will force a significant change in the identified accepted farm and forest practices, or significantly increase the cost of those practices.

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

operations and the grower did not appear at hearing. Still, grass seed would require attention to grow and harvest the crop.

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

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

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

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

adequate and will, more likely than not, prevent weed infestation from interfering with neighboring farm practices.

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

24. *Adequate services*. Utility lines are available to the subject property. No new well or septic systems are proposed. According to the MCCP Rural Transportation System Plan (RTSP) Appendix B, Selah Springs Road is, in the area of the subject property, a two-lane local road with 1' gravel shoulders and a 20' paved travel surface, in a 40' right-of-way that is in good condition and operates at a level of service A. DPW LDEP noted that the county right-of-way standard for a local road is a 60'. LDEP requested, and applicant agreed to, a tax lot 600 property frontage half-width dedication to accommodate roadway improvements for the site. LDEP anticipates a 10' dedication would be required. DPW will also require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. The Silverton Fire District commented it is concerned about access to and around the site. A condition can be included in any approval requiring SFD to sign off on a site access plan for the site prior to issuing building permits.

LUBA remand order, 5th assignment of error. In the original appeal from the Planning Director's approval of the subject application, appellant/opponents Harris stated there "is no evidence that either the Silverton Fire District [SFD] or the Marion County Sheriff's Office [MCSO] can adequately serve this property." (Exhibit 3, p. 2.) The hearings officer's initial order discussed SFD services but did not address MCSO services, nor did subsequent hearings officer and BOC orders. The BOC ultimately approved the application, and

opponents Harris appealed the BOC approval to LUBA. LUBA found the BOC adequately addressed fire district services, but not MCSO services:

> We agree with petitioners that the county's decision regarding rural services is deficient because it provides no explanation or interpretation that MCC 17.136.060(A)(2) does not require findings regarding adequacy of police services and contains no findings of adequate police services. We agree with petitioners that error warrants a remand.
>
> On remand, the hearings officer must explain whether police services are a "rural service" that requires a finding under MCC 17.136.060(A)(2) and, if such a finding is required, then the hearings officer must demonstrate whether adequate police services are or will be available.

(*Harris v. Marion County*, LUBA No 2018-022 (September 26, 2018).)

LUBA remanded the application to the BOC and, on BOC remand to the hearings officer, applicant submitted an email from the Marion County Counsel's Office to Damien Hall:

> Thank you for your phone call this morning regarding clarification regarding Lt. Baldridge's letter dated November 13, 2018. Again, the Marion County Sheriff's Office cannot speak to specific services that may be required by your proposed facility. However, I can confirm that the Marion County Sheriff's Office is the law enforcement agency that provides services to unincorporated Marion County, where your proposed facility would be located, and we are confident in our ability to provide law enforcement services throughout Marion County. (Remand2 exhibit 2.)

Opponents Harris responded:

> [The email] references another important letter, but we have not been given that letter. Even as it stands, the letter from the Marion County Legal Counsel's office indicates that Marion County is not aware of what services may be required and therefore cannot comment on the adequacy of services provided....[T]he statement that the Marion County Sheriff's Office can "provide law enforcement services" to the whole county does not indicate that it can adequately provide for the needs of this development. (Remand2 exhibit 5.)

Applicant responded that, to the extent that police services are rural services under MCC 136.060(A)(2), comments from MCSO's counsel show the MCSO believes adequate police services are available for the proposed facility. Applicant compares this with LUBA's fire district findings under the same assignment of error. Applicant notes the fire district said its only concern was with access to and around the site. LUBA found that statement was evidence adequate to prove the fire district had only one concern and that the BOC's condition remedied the fire district's sole concern. Here, applicant argues County Counsel's email is also evidence adequate to prove MCSO has no concern about its ability to serve the

subject site with police services. Applicant states MCSO's lack of response to the county's initial request for agency comment also shows MCSO had no issue with the proposal.

The Planning Division comment request checklist in the record shows which agencies were contacted for comment in this matter in compliance with Statewide Planning Goal 2. The checklist shows some agencies are contacted in all cases and some only under certain circumstances. The request for comments checklist does not list MCSO as a regular contact, and there is nothing on the form or elsewhere in the record indicating comments were requested from the MCSO. So, lack of initial MCSO comment does not infer lack of initial issue with the proposed use. But, what might be inferred from the checklist is that in the normal course of evaluating governmental services, the Planning Director does not consider police services an area of general concern for all applications. That does not mean MCSO would never be contacted, but in the normal course, MCSO ability to provide police services is evidently assumed. And here, the solar site, once built will not cause significant increased traffic, draw crowds, involve storage or use of harmful substances, and would have no characteristics showing a need for increased police scrutiny, services or supervision. The site will also be enclosed by 6' fencing topped with barbed wire and will have a locked gate. The will be remotely monitored for production disruptions, and police could be notified in response to any extra-ordinary disruption that might indicate a need for police services.

The statement from MCSO's counsel, with the passive nature of the proposed use, and precautions put in place as a part of development, support, by substantial evidence in the record, the hearings officer's conclusion that adequate police services are, or will be, in place when the use is established.

With conditions requiring right-of-way dedication, drainage control and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.137.060(A)(2) is satisfied.

25. *Significant adverse impact*. The subject property is not within a sensitive groundwater overlay (SGO) zone and no water use is anticipated. Neighbors note wildlife species in the area, but the site is not within or near an MCCP identified major or peripheral big game habitat area. MCC 17.110.835 shows that MCCP identified big game and wildlife habitat areas are the county's concern and what must be considered in evaluating this criterion. No MCCP identified watershed areas are on or near the subject property though appellants and others note that the adjacent unnamed creek drains into Brush Creek and eventually into the Pudding River watershed. Even though the property is not within an MCCP identified sensitive watershed, as noted above, applicant's drainage and sedimentation plan, with DPW oversight of drainage, runoff attenuation and NPDES permitting, watershed concerns are addressed. The unnamed creek may overflow during the wet season, but the subject property is not in or near an MCCP identified floodplain area. Supporting materials in the record show the solar panels are solidly encased and emit no particulates and leach no materials that will seep into area groundwater. The solar array site is sloping, but applicant submitted stormwater and erosion control plans that show adequate containment is possible, and final plans will be reviewed by DPW as a condition of approval. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds,

groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 136.060(A)(3) will be met.

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

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

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

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

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

Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity for transfer to the electrical grid produce noise from a cooling fan. Inverter noise abates with distance. The proposed facility requires

only one inverter that will be placed in the center area of the facility, about 375' to 406' from the property line and about 600' from the nearest residences (estimating distances based on the Z 1.0 site plan and measurements on map 071W040D). Inverter noise also abates as the sun goes down because electricity production declines, and the noise stops altogether during hours of darkness. *See*, exhibit 8, document I, page 33. The low level of inverter fan activity shows it is feasible to meet sound standards set for this conditional use permit. To do that, applicant will be required to record baseline measurements to determine the ambient noise level of the site to calculate ambient level plus 10 dBA. This measurement will be used to determine whether the plus 10 dBA or table 8 standard will be used, and to show specifically how the requirement will be met. A condition of approval will require applicant to provide a site-specific engineer-certified plan showing how the facility will operate within the determined standard. As conditioned, noise associated with the use will not have a significant adverse impact on nearby land uses, and MCC 17.136.060(A)(4) will be satisfied.

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

MCC 17.110.680

28. Under MCC 17.110.680:

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

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

VI. Order

It is hereby found that applicant **has** met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a photovoltaic solar array power

generation facility on a 15.15-acre parcel in an EFU zone have been met. Therefore, the conditional use application is **GRANTED. The following conditions of approval are necessary for public health, safety and welfare:**

1. Before any building permits may issue, applicant must submit proof via signature that property owner Karen Klopfenstein authorizes the filing of the subject application.

2. Applicant shall obtain all required permits from the Marion County Building Inspection Division.

3. Prior to issuance of building permits, applicant shall provide evidence of an Oregon Department of Environmental Quality 1200-C construction storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.

4. Prior to final building inspection applicant shall dedicate a 30-foot right-of-way half-width along the Selah Springs NE frontage of tax lot 071W04D00600. Dedications are to the public, not to Marion County.

5. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final stormwater erosion and sediment control plan, and civil site plans for grading and stormwater management.

6. **Applicant shall implement its Weed and Rodent Management Plan, prepared by Ecological Land Services and dated December 12, 2017, except as modified as follows: The contingency portion of the Weed and Rodent Management Plan shall be triggered by a threshold presence of 5% of noxious or undesirable or 5% combination of both on the property.**

7. **Prior to building permit approval, applicant shall include a long-term maintenance agreement for the weed and rodent control plan in substantial compliance with the agreement at REMAND exhibit 1.**

8. **Applicant shall implement its Soil Compaction Relief Plan, prepared by Becon Civil Engineering and Land Surveying and dated November 13, 2017.**

9. Applicant shall provide a site-specific, engineer-certified plan showing how the proposed solar facility will operate within the noise standard adopted as a part of this order.

10. Applicant shall submit a signed decommissioning plan and agreement that binds applicant or any successor to, at the end of the useful life of the photovoltaic solar power generation facility, retire it in substantial conformance with the decommissioning plan, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and returning the land to a useful agricultural state.

11. Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Applicant shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.

12. Applicant shall provide proof to the Marion County Planning Division that Silverton Fire District has approved applicant's access and premise identification plan.

13. Applicant shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed.

14. Failure to continuously comply with conditions of approval may result in this approval being revoked by the Planning Director. Any revocation may be appealed to the county hearings officer for a public hearing.

15. This conditional use shall be effective only when commenced within two years from the effective date of this order. If the right has not been exercised, or an extension granted, the variance shall be void. A written request for an extension of time filed with the director prior to the expiration of the variance shall extend the running of the variance period until the director acts on the request.

VII. Other Permits

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

VIII. Effective Date

The application approved herein shall become effective on the 8th day of January 2019, 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 7th day of January 2019. 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 21st day of December 2018.

Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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

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

Sara A.H. Sayles
Ball Janick, LLP
101 SW Main St #1100
Portland, OR 97204

George & Patricia Harris
4177 Cascade Hwy N.E.
Silverton, OR 97381

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

Bill Miles
Fire Chief
Silverton Fire District
819 Rail Way NE
Silverton, OR 97381

Agencies Notified

Planning Division *(via email: gfennimore@co.marion.or.us)*
(via email: breich@co.marion.or.us)
Assessor's Office *(via email: assessor@co.marion.or.us)*
Tax Collector *(via email: adhillon@co.marion.or.us)*
Code Enforcement *(via email: bdickson@co.marion.or.us)*
Building Inspection *(via email: twheeler@co.marion.or.us)*
Public Works Engineering
(via email:jrassmussen@co.marion.or.us)

Dawn Olson (AAC Member No. 7)
15056 Quall Road
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James Sinn (AAC Member No. 7)
3168 Cascade Hwy N.E.
Silverton, OR 97381

Meriel Darzen
1000 Friends of Oregon
133 SW 2nd Avenue, Suite 201
Portland, OR 97204

Roger Kaye
Friends of Marion County
PO Box 3274
Salem, OR 97302

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 21st day of December 2018, and that the postage thereon was prepaid.

Susan Hogg
Secretary to Hearings Officer

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE HARRIS and PATTI HARRIS,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

BRUSH CREEK SOLAR, LLC,
Intervenor-Respondent.

LUBA No. 2018-022

FINAL OPINION
AND ORDER

Appeal from Marion County.

Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of petitioners. With him on the brief was Kelley and Kelley.

Scott A. Norris, Marion County Assistant Legal Counsel, Salem, filed a response brief and argued on behalf of respondent.

Damien R. Hall, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sara A. H. Sayles and Ball Janik LLP.

ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 09/26/2018

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal an order by the board of county commissioners that approves a conditional use permit to establish a 12-acre photovoltaic solar power generation facility on property that is zoned exclusive farm use (EFU).

FACTS

The subject property is a 15.15-acre tract designated Primary Agriculture in the Marion County Comprehensive Plan (MCCP), zoned EFU, and characterized as high-value farmland because it contains predominately class II soils according to the Natural Resources Conservation Services soil survey. The property is composed of two parcels, designated tax lots 600 and 700. Tax lot 600 comprises approximately 14.15 acres and tax lot 700 comprises approximately one acre. A portion of tax lot 600 is in current farm use. Tax lot 700 is developed with a farm-related vehicle and equipment service and repair business established as a conditional use in conjunction with farm use. Surrounding properties are zoned EFU and in farm use. Petitioners own a plant nursery on property adjacent to the subject property. An unnamed seasonal stream, a tributary to Brush Creek, runs along the eastern boundary of tax lot 600. The southern boundary of the property abuts Selah Springs Road NE.

In June 2017, the planning director approved Brush Creek Solar, LLC's (intervenor's) application for a conditional use permit. Petitioners appealed the planning director's decision to the hearings officer, and the hearings officer

issued a decision denying the application. Intervenor appealed that denial to the board of county commissioners, which remanded the matter back to the hearings officer. The hearings officer conducted a public hearing on remand and issued a decision approving the application with conditions. That approval was appealed to the board of county commissioners, which denied the appeal and adopted the hearings officer's decision as its own. This appeal followed.[1]

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the county improperly construed Marion County Rural Zoning Code (MCC) 17.119.025(A)(1), which requires that the application for a conditional use permit include "[s]ignatures of all owners of the subject property." *See* ORS 197.835(9)(a)(D) (providing that the Board shall reverse or remand a land use decision if the Board finds that the local government "[i]mproperly construed the applicable law"). The subject property is owned by Karen Klopfenstein and Walter Klopfenstein. It is undisputed that Karen Klopfenstein did not sign the application. The hearings officer imposed a condition of approval requiring Karen Klopfenstein to sign the application. Record 50 ("Before any building

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[1] At oral argument, intervenor noted that petitioners' attorney presented issues that were not included in the petition for review. We focus our review on the issues framed in the petition for review, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. OAR 661-010-0040(1) (providing that LUBA "shall not consider issues raised for the first time at oral argument").

permits may issue, applicant must submit proof via signature that property owner Karen Klopfenstein authorizes the filing of the subject application." (Condition 1)).

In their first assignment of error, petitioners argue that the application's noncompliance with MCC 17.119.025 cannot be cured by a condition of approval because MCC 17.119.060 limits the authority of the county to impose conditions of approval to those that are "necessary for the public health, safety or general welfare, or to protect persons working or residing in the area, or the protection of property or improvements in the area."

Petitioners' summary of MCC 17.119.060 is incomplete. In full, MCC 17.119.060 provides:

> "The director, planning commission or hearings officer may prescribe restrictions or limitations for the proposed conditional use but may not reduce any requirement or standard specified by this title as a condition to the use. Any reduction or change of the requirements of this title must be considered as varying this title and must be requested and viewed as such. The director, planning commission or hearings officer shall impose conditions only after it has determined that such conditions are necessary for the public health, safety or general welfare, or to protect persons working or residing in the area, or the protection of property or improvements in the area. The director, planning commission or hearings officer may prescribe such conditions it deems necessary to fulfill the purpose and intent of this title."

Petitioners fail to acknowledge that MCC 17.119.060 permits the hearings officer to impose conditions the hearings officer "deems necessary to fulfill the

purpose and intent of this title."[2] We agree with intervenor that MCC 17.119.025 can be satisfied by a condition imposed under MCC 17.119.060 requiring Karen Klopfenstein to sign the application.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the county improperly construed MCC 17.136.060(A)(3), which applies to all conditional uses in the EFU zone and provides: "The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality." The hearings officer found:

> "The subject property is not within a sensitive groundwater overlay (SGO) zone and no water use is anticipated. Neighbors note wildlife species in the area, but the site is not within or near an MCCP identified major or peripheral big game habitat area. MCC 17.110.835 shows that MCCP identified big game and wildlife habitat areas are the county's concern and what must be considered in evaluating this criterion. No MCCP identified watershed areas are on or near the subject property though appellants and others note that the adjacent unnamed creek drains into Brush Creek and eventually into the Pudding River watershed. Even though the property is not within an MCCP identified sensitive watershed, as noted above, applicant's drainage and sedimentation plan, with [Marion County] DPW

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[2] Petitioners do not argue under the first assignment of error that the hearings officer failed to deem Condition 1 "necessary." Condition 1 is preceded by a statement: "The following conditions of approval are necessary for public health, safety and welfare * * *." Record 50. We do not understand petitioners to argue that that statement limited the conditions that the hearings officer could otherwise impose under MCC 17.119.060.

> [Department of Public Works] oversight of drainage, runoff attenuation and NPDES [National Pollution Discharge Elimination System] permitting, watershed concerns are addressed. The unnamed creek may overflow during the wet season, but the subject property is not in or near an MCCP identified floodplain area. Supporting materials in the record show the solar panels are solidly encased and emit no particulates and leach no materials that will seep into area groundwater. The solar array site is sloping, but applicant submitted stormwater and erosion control plans that show adequate containment is possible, and final plans will be reviewed by DPW as a condition of approval. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 136.060 (A) (3) will be met." Record 47.

MCC 17.110.835, cited in the above-quoted passage, is titled "Fish and wildlife habitats," and provides:

> "The impact of land use actions regulated by this title on fish and wildlife habitat identified in the [MCCP] shall be evaluated and the proposal modified or conditioned as necessary to minimize potential adverse impacts and to preserve the existing resource."

Petitioners argue that the county erred in interpreting the environmental impacts inquiry under MCC 17.136.060(A)(3) as limited to resources identified in the MCCP. Petitioners observe that, unlike MCC 17.136.060(A)(5), which specifically refers to significant adverse impacts on "potential water impoundments *identified in the Comprehensive Plan*," and "significant conflicts with operations *included in the Comprehensive Plan inventory* of significant mineral and aggregate sites," the requirement that a conditional use not have significant adverse impacts on the natural resources listed in MCC

17.136.060(A)(3) does not refer to resources identified in the comprehensive plan. (Emphases added.)

Intervenor responds, and we agree, that the county's findings are not actually limited to natural resources identified in the comprehensive plan. Instead, the county's findings demonstrate that it considered potential adverse impacts from the solar facility on the natural resources on the subject property—regardless of whether those resources are identified in the comprehensive plan—including impacts on the seasonal creek, connected watershed, groundwater, and soil and slope stability. In other words, the hearings officer apparently did not interpret MCC 17.136.060(A)(3), as petitioners argue, to be limited to resources identified in the comprehensive plan.

Moreover, because the board of county commissioners adopted the hearings officer's decision as its own, the hearings officer's interpretation of MCC 17.136.060(A)(3) is entitled to the deference due to a governing body's interpretation of local land use legislation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA is required to accept a local government's interpretation of its land development code that is plausible and not inconsistent with the express language of provisions at issue or purposes or policies underpinning them); *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995) (where a governing body adopts a decision as its own, interpretations of local provisions contained in the decision are afforded the

same deference as a governing body's own interpretations).[3] Even if the county had interpreted MCC 17.136.060(A)(3) in the way that petitioners argue, petitioners have not demonstrated that the county's interpretation and application of MCC 17.136.060(A)(3) is implausible or inconsistent with the express language of that provision or purposes or policies underlying that provision.

The second assignment of error is denied.

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[3] ORS 197.829(1) provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Former MCC 17.120.110 (2013) governed photovoltaic solar power generating facilities as a conditional use.[4] MCC 17.120.110 implemented ORS 215.283(2)(g), ORS 215.447, and Land Conservation and Development Commission (LCDC) rules at OAR 660-033-0130(38). Much of MCC 17.120.110, including the provisions at issue in this appeal, was adopted verbatim from OAR 660-033-0130(38). Although the parties' arguments in this appeal focus on the local code, we note that LUBA cannot affirm interpretations of local code provisions implementing state statutes, goals, or rules that are contrary to those statutes, goals, or rules. ORS 197.829(1)(d); *see* n 3; *see also Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den* 315 Or 271 (1992) (while counties may enact more restrictive criteria than ORS 215.283(2) imposes for permitting the uses described in that statute, counties may not apply criteria that are inconsistent with or less restrictive than the statutory standards). Intervenor concedes that the county's interpretations of local code provisions that implement OAR 660-033-0130(38) are not entitled to a deferential standard of review. Intervenor's Response Brief 10, 23, 28, 34. Accordingly, we review petitioners' challenges regarding the county's

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[4] The board of county commissioners issued its final order in this case on February 28, 2018. On March 21, 2018, the county amended the MCC to "repeal the [solar] use entirely from the EFU and SA [special agriculture] zones." Marion County Ordinance No. 1387. References in this opinion to MCC 17.12.110 are to the repealed 2013 version.

application of MCC 17.120.110 to determine whether the county correctly interpreted those provisions.

In the third and fourth assignments of error, petitioners argue that the county improperly construed MCC 17.120.110(B)(3), which provided:

> "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."

Petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(3) by approving the application without physically attaching an approved erosion control plan to the decision as a condition of approval. Petitioners further argue that the county's finding that the solar power facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property is not supported by substantial evidence in the record.

Intervenor submitted a detailed erosion and sedimentation control plan prepared by an Oregon-registered professional engineer and land surveyor. Record 91–93. According to that plan, excavation will occur only on the proposed entry/access road and any topsoil stripped from that area will be stockpiled in a stable location and covered with plastic sheeting or straw mulch with sediment fences placed around the pile. The erosion and sedimentation

plan requires intervenor to meet Oregon Department of Environmental Quality (DEQ) and NPDES discharge permit standards and requirements.

In addition to the erosion and sedimentation control plan, a county public works employee provided testimony during the hearing that, prior to building permits being issued, intervenor would be required to provide a civil site plan to a public works engineer for review and approval that would address pre- and post-construction erosion control best management practices for stormwater runoff. Public works anticipated that stormwater attenuation would be required because the site slopes toward a seasonal drainage tributary to Brush Creek. Record 37.

The hearings officer found:

> "Any approval will be conditioned on implementing [intervenor's] stormwater, grading and drainage plans as reviewed and approved by Public Works, and requiring NPDES 1200-C permitting requirements to be met. As conditioned, the presence of the photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B)(3) will be met." Record 37–38.

The hearings officer imposed a condition of approval requiring intervenor to submit to public works for review and approval its final stormwater erosion and sediment control plan and civil site plans for grading and stormwater management prior to issuance of building permits. Record 50.

Petitioners argue that the imposed condition indicates that the hearings officer "concede[d]" that the erosion plan as submitted is "inadequate" and

that, since MCC 17.120.110(B)(3) required an approved plan be "attached to the decision," the decision is inconsistent with MCC 17.120.110(B)(3). Petition for Review 9. Petitioners argue that the hearings officer lacked authority to approve the use based on a condition that the final erosion control measures and engineering requirements be approved by public works before building permits issue.

Intervenor responds, and we agree, that the hearings officer did not err in finding that development of the solar facility will "not result in unnecessary soil erosion or loss" based on its review of intervenor's submitted erosion and sediment control plan and county review processes included as conditions of approval. MCC 17.120.110(B)(3). That conclusion is supported by substantial evidence in the record, including intervenor's detailed and professionally prepared soil erosion and sediment control plans and statements from public works regarding public works review and approval processes. Record 91–93, 779–80. The issue then reduces to whether the county erred by failing to physically "attach" the erosion and sediment control plan to the decision as a "condition of approval."

MCC 17.120.110(B)(3) (and OAR 660-033-0130(38)(f)(B)) state that the provision "*may* be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual," and "[t]he approved plan *shall* be attached to the decision *as a condition of approval*." (Emphases added.) We interpret that provision to allow an applicant

and the county the option of relying on a qualified soil and erosion control plan to satisfy the provision and, if that option is followed, by imposing a condition of approval that requires compliance with the approved plan. The phrase "attached to the decision as a condition of approval" is a term of art that does not mean that the plan must be physically attached to the decision. Moreover, if the county does not elect to follow that option, *i.e.*, establishes compliance by some means other than by approving a soil and erosion control plan, the obligation to impose a condition requiring compliance with an approved plan does not apply.

In this case, the hearings officer did not approve the submitted soil and erosion control plans submitted by intervenor. Instead, the hearings officer found compliance with MCC 17.120.110(B)(3) by concluding, based on review of the submitted erosion control plans, and future review and approval of a final soil and erosion plan by county public works, in conjunction with DEQ/NPDES permitting requirements, that MCC 17.120.110(B)(3) "will be met." Record 38. The hearings officer accordingly imposed Conditions of Approval 3 and 5, which respectively require that, prior to building permit issuance, intervenor shall obtain DEQ/NPDES permits and further submit to public works for review and approval the final stormwater erosion and sediment control plan, along with civil site plans for grading and stormwater management. Record 50.

Petitioners do not argue in this appeal that finding that compliance with MCC 17.120.110(B)(3) "will be met" in the manner required by the conditioned approval impermissibly defers a finding of compliance with that provision, and we do not consider that issue. Petitioners argue only that the county erred in failing to "attach" the approved plan to the decision "as a condition of approval." However, as explained, the requirement to attach the approved plan to the decision as a condition of approval applies only if the county exercises the option of establishing compliance with MCC 17.120.110(B)(3) by approving the submitted soil and erosion plan, which option the hearings officer did not exercise. Accordingly, petitioners' arguments under the third and fourth assignments of error do not provide a basis for reversal or remand.

The third and fourth assignments of error are denied.

TENTH AND ELEVENTH ASSIGNMENTS OF ERROR

In the tenth and eleventh assignments of error, petitioners argue that that county violated MCC 17.120.110(B)(4) and (5) by approving the application without attaching an approved soil compaction plan and weed abatement plan as conditions of approval.

MCC 17.120.110(B)(4) and (5) provided:

> "(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[.]"

Intervenor submitted soil compaction and weed control plans. The hearings officer reviewed and ultimately approved those plans, with one modification not relevant here. The hearings officer then adopted Conditions of Approval 6 and 8, which require implementation of those approved plans (as modified by the hearings officer). Record 50. Intervenor argues that the county effectively incorporated those plans into its decision and conditions of approval. We agree. The hearings officer extensively reviewed and incorporated those plans into the decision and conditioned approval on compliance with those specific plans. That is sufficient to satisfy the requirement that the plans "attach" to the decision as conditions of approval. Record 38–48, 50.

The tenth and eleventh assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioners argue that the county's findings of compliance with MCC 17.136.060(A)(2) are inadequate and not

supported by substantial evidence in the record. MCC 17.136.060(A)(2) applies to all conditional uses in the EFU zone and provides: "Adequate fire protection and other rural services are, or will be, available when the use is established." The hearings officer found:

> "Utility lines are available to the subject property. No new well or septic systems are proposed. According to the MCCP Rural Transportation System Plan (RTSP) Appendix B, Selah Springs Road is, in the area of the subject property, a two-lane local road with 1' gravel shoulders and a 20' paved travel surface, in a 40' right-of-way that is in good condition and operates at a level of service A. DPW LDEP [Land Development and Engineering Permits Section] noted that the county right-of-way standard for a local road is 60'. LDEP requested, and [intervenor] agreed to, a tax lot 600 property frontage half-width dedication to accommodate roadway improvements for the site. LDEP anticipates a 10' dedication would be required. DPW will also require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. The Silverton Fire District [SFD] commented it is concerned about access to and around the site. A condition can be included in any approval requiring SFD to sign off on a site access plan for the site prior to issuing building permits. With conditions requiring right-of-way dedication, drainage control and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.13[6].060(A)(2) is satisfied." Record 47.

Petitioners argue that the findings do not establish that adequate fire, police, and stormwater control are or will be available when the use is established and there is no evidence in the record that those rural services are or will be available.

With respect to stormwater control, intervenor responds that "stormwater control" is not a "rural service" for purposes of MCC 17.136.060(A)(2).

Instead, intervenor argues that the county requires a stormwater management plan only as part of the building permit process. We agree that "stormwater control" is not a "rural service" that is provided by the county in the same manner as fire protection services, for purposes of MCC 17.136.060(A)(2). Thus, the county was not required to find that stormwater control is or will be available to satisfy MCC 17.136.060(A)(2).

With respect to fire protection, in response to the county's request for comments on the application, the fire district stated that it "has only a concern with access to and around the site. The site will need to meet our access requirements in case of an emergency at the site." Record 783. The county's findings of adequate services refer to that comment. The hearings officer reasoned that a condition of approval requiring proof of access acceptable to the fire district would ensure adequate fire protection. Condition 12 provides: "Applicant shall provide proof to the Marion County Planning Division that [the fire district] has approved applicant's access and premise identification plan." Record 51. While the county's finding and reasoning could have been clearer, it is sufficient to support the decision. The email from the fire district regarding the fire district's "only" concern is evidence upon which a reasonable person would rely to conclude that adequate fire protection will be available when the use is established as conditioned to remedy the fire district's sole concern regarding access.

With respect to police services, petitioners argue that "[p]olice protection is certainly a rural service similar to fire protection." Petition for Review 11. Intervenor responds that MCC 17.136.060(A)(2) does not require findings that "specifically call out police services." Intervenor's Response Brief 21. Neither party provides a definition of "rural services," and the hearings officer did not interpret that phrase. The hearings officer's finding regarding adequate rural services, quoted in full above, does not address police services at all or indicate whether such services are within the scope of "rural services" for purposes of MCC 17.136.060(A)(2).

In the absence of a county code interpretation that is adequate for review, LUBA may interpret the code provision in the first instance. ORS 197.829(2). We do not interpret MCC 17.136.060(A)(2) in the first instance in this case; however, we observe that MCC 17.136.060(A)(2) applies to all conditional uses in the EFU zone. It may be that police services are not particularly important for a solar facility use. Nevertheless, the adequacy of police services may be an important consideration for other conditional uses in the EFU zone and we are not prepared to say in the first instance that police services are not "rural services" as a matter of law.

Intervenor argues that, even if MCC 17.136.060(A)(2) requires a finding regarding the adequacy of police services, the record includes an email from a code enforcement officer at the Marion County Sheriff's office stating that the subject property has no code enforcement issues and that evidence "clearly

supports" a finding that police services are adequate pursuant to ORS 197.835(11)(b).[5] Record 789. We disagree with intervenor that the email at Record 789 constitutes sufficient evidence to affirm the decision under ORS 197.835(11)(b).

We agree with petitioners that the county's decision regarding rural services is deficient because it provides no explanation or interpretation that MCC 17.136.060(A)(2) does not require findings regarding adequacy of police services and contains no finding of adequate police services. We agree with petitioners that error warrants a remand.

On remand, the hearings officer must explain whether police services are a "rural service" that requires a finding under MCC 17.136.060(A)(2) and, if such a finding is required, then the hearings officer must determine whether adequate police services are or will be available.

The fifth assignment of error is sustained, in part.

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[5] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to receive adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

In the sixth and seventh assignments of error, petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(1), which implemented OAR 660-033-0130(38) and provided:

> "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."

The hearings officer found:

> "Tax lot 700 is developed and unavailable for farm use. Applicant's site plan shows a silver of what may be cultivated land on the eastern side of the property outside the fenced facility area. The site plan is an initial plan and does not provide exact detail; it overlays the subject property, but the vicinity map and site data box show an incorrect property address, and property lines look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area moves east and envelopes the silver of what may be cultivated land. That area also appears to be made up of non-high-value Wapato soils. The area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use.
>
> "Appellants also argue that the additional 10' of right-of-way requested by [DPW] will take more land out of farm use, but it appears any right-of-way dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use.
>
> "A more exacting site plan will be required as a condition of any approval, but from the evidence in the record as a whole, it is more likely than not that the photovoltaic solar power generation facility will not preclude more than 12 acres from use as a commercial agricultural enterprise. No goal 3 exception is required. MCC 17.120.110(B)(1) is met." Record 36–37.

Condition of Approval 13 provides:

> "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." Record 51.

Petitioners argue that, because the county approved a 12-acre solar facility *and* required a roadway dedication on the subject property, the approval necessarily will preclude more than 12 acres from use as a commercial agricultural enterprise. Petitioners further argue that the county's finding that the solar facility will not preclude more than 12 acres from use as a commercial agricultural enterprise is not supported by substantial evidence.

Intervenor responds that the 12-acre limitation in MCC 17.120.110(B)(1) applies only to "facility components." That is so, intervenor argues, because MCC 17.120.110(A)(5) defines "photovoltaic solar power generation facility" as "an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity." Intervenor points out that MCC 17.120.110(A)(5), like OAR 660-033-0130(38)(e), defines "photovoltaic solar power generation facility" as including "new or expanded *private* roads constructed to serve the photovoltaic solar power generation facility," and argues that the definition does not include *public* roadway dedications. (Emphasis added.)

The hearings officer found that "any right-of-way dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use," and relied on that finding to conclude that the 12-acre limitation was met. Record 37. Intervenor did not cross-appeal to challenge that finding. Thus, even if, as intervenor agues, the 12-acre limitation in MCC 17.120.110(B)(1) does not include public right-of-way dedications, a point which we do not decide, the 12-acre area that the county approved for the solar facility in this matter does include the area required to be dedicated for public right-of-way.

Intervenor argues that intervenor's application, statements, and site plan constitute substantial evidence that the solar facility will be limited to 12 acres. Intervenor's Response Brief 27 ("Specifically, the County finds that any dedication area appears to overlap that project area depicted on the site plan. Rec 36–37. This finding is supported by substantial evidence in the form of the approved site plan. Rec 36–37."). We agree that petitioners have not demonstrated that that finding is erroneous or unsupported by substantial evidence.

The sixth and seventh assignments of error are denied.

EIGHTH AND NINTH ASSIGNMENT OF ERROR

In the eight and ninth assignments of error, petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(2), which provided:

> "The proposed photovoltaic solar power generation 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."

The hearings officer found:

> "On-site agricultural use impacts. The current agricultural enterprise takes place on the 12 acres where the solar facility is proposed. Of the remaining land, tax lot 700 is subject to CU 16-014[6] and is not in nonfarm use, and the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B)(2) is met." Record 37.

While the argument is not entirely clear or well-developed, we understand petitioners to argue that the proposed 12-acre facility will create a "small or isolated" piece of property between the solar facility perimeter fence and the riparian area that is currently cultivated as part of the farm use on tax lot 600. We will refer to that area as the "stranded land."

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[6] Conditional use case CU 16-014 permitted a farm-related vehicle and equipment service and repair business as a commercial activity in conjunction with farm use.

Intervenor responds first that the site plan in the record is conceptual and subject to refinement as part of the building process and, therefore, petitioners have not accurately identified any "stranded land." We reject that argument. In response to the seventh assignment of error, intervenor argued, and we agreed, that the site plan is substantial evidence of the location and size of the proposed solar facility. Intervenor cannot have it both ways.

As petitioners imply in their argument, the hearings officer's finding of compliance with MCC 17.120.110(B)(1)—that the solar facility will not preclude more than 12 acres from use as a commercial agricultural enterprise relate to the alleged onsite agriculture impacts. Intervenor asserts that those findings relate only to MCC 17.120.110(B)(1). However, intervenor also relies on the hearings officer's findings of compliance with MCC 17.120.110(B)(1) as support for intervenor's argument that the hearings officer properly concluded that the proposed solar facility also complies with MCC 17.120.110(B)(2). We conclude that those findings are interrelated.

The hearings officer found that the location of the proposed facility fence lines in the site plan do not correspond to on-the-ground property lines. The hearings officer observed that intervenor's site plan "shows a sliver of what may be cultivated land on the eastern side of the property outside the fenced facility area." Record 36. However, the hearings officer also found that the property lines "look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area

moves east and envelopes the sliver of what may be cultivated land." Record 36.

We understand the hearings officer's findings, when read together, to find that the solar facility will not create an isolated strip of cultivated land between the proposed solar facility fence line and the riparian area to the east, because the site plan overlay lines were offset to the north and west, and once the site plan overlay lines are properly repositioned, the apparently stranded land adjacent to the riparian area is within the 12-acre facility area. Our inquiry does not end there, however. Petitioners argue, and we agree that, as a matter of simple arithmetic, some portion of the 14.15-acre tax lot 600 will remain outside the 12-acre solar facility.

Intervenor responds that the balance of the subject property does not contain agricultural operations. Intervenor emphasizes the hearings officer's findings that "the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property, " and that "[t]he area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use." Record 37, 36. Intervenor asserts that, while not specifically addressed in the county's findings, the record contains evidence that the facility extends to the western property boundary, the portion of the property outside the facility footprint to the east is comprised of sloping land and creek bed, and no small or

isolated strip of farmable land is created. Intervenor relies on Record 738–39, which is intervenor's final rebuttal argument in a letter to the hearings officer that states, in part:

> "The proposed solar farm is limited to 12 acres. The 12-acre footprint includes the area enclosed within the project fence as well as the access drive. The balance of the property is comprised of: (a) land unsuitable for commercial agricultural use, such as the area that is wooded and contains a stream, and (b) *a small amount of land that is not wooded and is not precluded from commercial agricultural use*." Record 738 (emphasis added).

The rebuttal letter does not constitute evidence that clearly supports a conclusion that the solar facility will not create "small or isolated pieces of property that are more difficult to farm." The rebuttal letter provides no evidence to support a finding that the facility extends to the western property boundary or that the entire portion of the property outside the facility footprint lies to the east of the facility and is comprised of uncultivatable land. Indeed, the rebuttal letter specifically states that a small amount of land will remain available for commercial agricultural use but does not identify the size or location of that land.

The hearings officer did not find that that the solar facility will not create "small or isolated pieces of property that are more difficult to farm" or that the entire remaining 2.15 acres on tax lot 600 are unfarmable or are otherwise excluded from "agricultural operations conducted on any portion of the subject property not occupied by project components." MCC 17.120.110(B)(2). It may be that substantial evidence in the record supports such findings and

conclusions. However, LUBA will not make those findings and conclusions in the first instance on this record. We disagree with intervenor that the evidence in the record "clearly supports the decision" so as to avoid remand under ORS 197.835(11)(b). *See* n 5. Remand is necessary for the hearings officer to make further findings regarding compliance with MCC 17.120.110(B)(2).

The eighth and ninth assignments of error are sustained.

The county's decision is remanded.