



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: June 20, 2018

Department: Public Works Agenda Planning Date: June 14, 2018 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision approving Conditional Use (CU) Case 18-010/Marion SSD 6, LLC, on property owned by Gabriel and Vassa Molodyh.

Issue, Description & Background The hearings officer issued a decision on June 13, 2018, approving CU18-010. As part of the land use process, the board of commissioners must officially receive notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

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

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

List of attachments: Hearings officer's decision

Presenter: Joe Fennimore

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

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

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No.	CU 18-010
)		
Application of:)	Clerk's File No.	
)		
MARION SSD 6, LLC on property owned by)	Conditional Use	
GABRIEL AND VASSA MOLODYH)		

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Marion SSD 6, LLC on property owned by Gabriel and Vassa Molodyh for a conditional use permit to establish a photovoltaic solar power generation facility on a 12-acre portion of an 86.66-acre unit of land in an EFU (Exclusive Farm Use) zone at 23006 Bents Road NE, Aurora, Marion County, Oregon (T4S, R1W, S04A, tax lot 500).

II. Relevant Criteria

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

III. Public Hearing

A public hearing was held on this matter on March 7, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

- | | | |
|----|----------------|----------------------------------|
| 1. | Brandon Reich | Marion County Planning Division |
| 2. | Garrett Lehman | For SSD Marion 6, LLC (Marion 6) |
| 3. | Mary Simpson | General |

The following documents were entered into the record as exhibits:

- | | |
|-------|--------------------------------------|
| Ex. 1 | March 7, 2018 email from Tim McMahan |
| Ex. 2 | Presentation outline |

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

IV. Findings of Fact

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

1. The subject property is designated Primary Agriculture in the MCCP and is zoned EFU. The intent of the designation and zoning is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, can be approved where they do not have a significant adverse impact on farming operations in the area and meet conditional use approval criteria.
2. The subject 86.66-acre parcel is on the east side of Bents Road NE about 720 feet north of its intersection with Fargo Road NE. The portion of the property where the development is proposed is undeveloped. BNSF Railway tracks cross the subject property.
3. EFU zoned properties in farm use surround the subject property.
4. According to the *Soil Survey of Marion County Area, Oregon* the subject property contains predominantly high-value farm soils.
5. Marion 6 proposes a photovoltaic solar power generation facility on no more than 12 acres of the northeastern portion of the subject property.
6. The Marion County Planning Division requested comments on the application from various government agencies.

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

- A. In accordance with Marion County Driveway Ordinance #651 driveways must meet sight distance, design, spacing, and safety standards. The following sub-requirements, numbered 1 and 2, are access-related.
 - 1) At the time of application for building permits, an Access Permit from Marion County will be required.
 - 2) The proposed access is located in close proximity to an at-grade rail crossing. Please be advised that pursuant to OAR 741-120-0020(8) pertaining to grade crossing construction and maintenance in proximity to a railroad, "The construction of new driveways within 100 feet of any railroad track at existing grade crossings requires an application (with ODOT Rail) under ORS 824.206..."
- B. Prior to application for building permits, the Applicant shall provide a civil site plan to PW Engineering for review and approval that addresses pre- and post-construction erosion control Best Management Practices (BMPs) as related to stormwater runoff. A post-construction BMP in the form of a shallow drainage perimeter swale situated between the array and any downgradient water body or flow way to promote stormwater sediment capture and volume attenuation through infiltration may be required, typically approved for these

arrays as a 6-foot wide x 0.5' deep swale. The plan shall also be accompanied with verification of access approval with respect to ODOT Rail.

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

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

Oregon Department of Aviation commented that the project shall be designed to not violate OAR 738-070.

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

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

1. Marion 6 has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. Preponderance of the evidence is a lesser standard than clear and convincing or reasonable doubt standards. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

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

Marion 6 must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, Marion 6 has not met its burden and the application must be denied. If the evidence for every criterion is in Marion 6's favor, then the burden of proof is met and the application must be approved.

MCCP AGRICULTURAL LANDS POLICIES

2. Friends of Marion County (FOMC) and 1000 Friends of Oregon (1000 Friends) commented for record in this case and referred to a Yamhill County Board of Commissioner's order where Yamhill County Comprehensive Plan (YCCP)

policies were a basis for denying a solar voltaic power generating facility application. Both organizations then cited to MCCP agricultural lands policies as criteria in this matter:

Although the Comp Plan policies and goals are aspirational and not binding criteria, these goals and policies must be balanced and the approved conditional use must be consistent with them. (FOMC February 9, 2018 letter, item 3, and 1000 Friends February 13, 2018 letter, p. 3.)

Some MCC criteria incorporate comprehensive plan policies, such as MCC 17.138.030(A)(7) which states in the section dealing with dwellings that a dwelling will be consistent with the density policy if located in the MCCP identified big game habitat area. This incorporates MCCP Fish and Wildlife Habitat policy 5 into the criterion. Policy 5 also contains mandatory language and is an example of a directly applicable criterion regardless of incorporating language. The criteria involved here do not incorporate MCCP policies, and FOMC nor 1000 Friends claim any of the nine MCCP agricultural lands policies have mandatory language, calling the policies "aspirational". Without mandatory or incorporating language, MCCP agricultural lands policies are not considered.

Even if the nine MCCP agricultural lands policies are considered, they are either not applicable or are met. Under policy 1, agricultural lands will be protected by zoning them EFU and SA (Special agriculture). The subject property is zoned EFU. The policy is met. Policy 2 is to maintain agricultural lands in the largest area in large tracts to encourage larger scale farming. This proposal does not change parcel boundaries or permanently remove the subject property from farm use. The policy is met. Policy 3 (specifically cited by FOMC and 1000 Friends) discourages nonfarm uses on high value farmland and seeks to ensure allowed nonfarm uses have no adverse impacts on farm uses. State and county law determines which nonfarm uses are allowed in the county's farm zones. The county, at the time this application was filed, conditionally permitted photovoltaic power generating facilities in the EFU zone under county criteria in accordance with state law. This policy is met. Policies 4 through 9 apply to land divisions and residential uses which are not requested. Policies 4 through 9 are not applicable.

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

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to forward conditional use applications to the hearings officer for initial decision. The Planning Director forwarded the application to the hearings officer for initial decision. The hearings officer may hear and decide this matter.

4. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a warranty deed recorded in Marion County deed records at reel 1340, page 446 showing that on September 13, 1996 the subject property was conveyed to Gabriel and Vassa Molodyh. Property owners, Gabriel and Vassa Molodyh signed and could file the subject application. MCC 17.119.020 is satisfied.
5. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including property owners. Property owners Gabriel and Vassa Molodyh signed the subject application on January 5, 2018. MCC 17.119.025 is satisfied.
6. Under MCC 17.119.070, before granting a conditional use, the hearings officer shall determine:
 - (A) That the hearings officer has the power to grant the conditional use;
 - (B) That the conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone;
 - (C) That any condition imposed is necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.
7. MCC 17.119.070(A). Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. MCC 17.136.050(F)(3) lists a photovoltaic solar power generating facility, subject to MCC 17.120.110 as a conditional use in the EFU zone. Under MCC 17.120.110(A)(5), a photovoltaic solar power generation facility:

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

consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.

ORS 757.300 and OAR 860-039 deal with electricity 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. Marion 6 proposes a photovoltaic solar power generation facility as conditionally permitted under the MCC. MCC 17.119.070(A) is met.

8. *MCC 17.119.070(B)*. MCC 17.136.010 contains the EFU zone purpose statement:

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

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

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

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

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

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

9. MCC 17.119.070(C). Conditions attached to this order are necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood. MCC 17.119.070(C) is met.

MCC 17.120.110

10. MCC 17.120.110 is based on ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. An OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1). MCC 17.120.110 provides three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on the subject property determine which scenario applies. OAR 660-033-0130(38)(f) refers to ORS 195.300(10) in defining soil types, and ORS 195.300(10) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition. MCC 136.140(D) refines the high-value farmland rule to include only those definitions that apply in the Marion County EFU zone. For approving land use applications on high-value farmland, OAR 660-033-0030(8) states that soil classes, soil ratings, or other soil designations are those in the Natural Resources Conservation Service (NCRS) Web Soil Survey.

Marion 6 submitted an NCRS Web Soil Survey of Marion County Area, Oregon report that shows soils on tax lot 041W04A00500. All soils are high value farm soils except possibly Wapato silty clay loam (Wc), a class IIIw. Wc soils are complicated because they are considered high value "prime" soils only if drained and either protected from flooding or not flooded frequently during the growing season. It is difficult from this record to tell whether the soils are drained or subject to flooding. But WC soils make up only 1% of the subject property. The subject tract is composed predominantly of high value farm soils and is high value farmland. MCC 17.120.110(B), (E) and (F) apply.

11. Under MCC 17.120.110(B), for high-value farmland soils:
 1. A photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004;
 2. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by

project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;

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

- a. If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary;
 - b. When at least 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits, either as a single project or multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar power generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the overall land use pattern of the area will be materially altered if the overall effect of existing and potential photovoltaic solar power generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.
12. *MCC 17.120.110(B) (1)-No more than 12 acres.* Marion 6 states the subject photovoltaic solar power generation facility will encompass no more than 12 acres and, as currently designed is only about 10.5 acres, and will not preclude more than 12 acres from use as a commercial agricultural enterprise. Marion 6's site plan shows access is from the existing driveway and traverses an existing compacted farm road. A portion of the internal roadway will be relocated to border the south line of the solar array area and the old, parallel portion of the road farther south will be decompacted and returned to farm use. The current roadway crosses the BNSF tracks. If crossing the track for the project is not approved, alternate access is proposed from a different entrance on Bents Road that requires no rail crossing. The area of alternate access (an additional 0.1 acre) is not currently in farm use and would not alter farm use of the property. The solar field itself borders portions of the north and east property lines, preventing the use from stranding portions of the property and taking more land out of farm use. Grid connection cables will be within the access roadway and will be shown on the final site plan. An accurate final site plan will be submitted to the Planning Division for review and approval and will accurately depict the components of the proposed facility and provide accurate acreage for the project. With this condition, MCC 17.120.110(B) (1) will be met.
13. *MCC 17.120.110(B) (2)-On-site agricultural use impacts.* The subject facility will be placed on a part of the current agricultural enterprise. The solar field will hug the north and east property boundary and not encroach into farm fields or break up the remaining land in the tract. Everything south and west of the site will remain an intact, farmable unit that is currently farmed with land leased from neighboring land owners. Access will be from an existing compacted farm road. A portion of the road will be relocated to just south of the solar site and the current compacted section of the road

will be decompacted. According to Mr. Molodyh, this reconfiguration will allow more efficient use of the property for berry production. Alternate access may require new 0.1 acre compaction in an area that is not and will not be in farm use. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B) (2) is met.

14. *MCC 17.120.110(B) (3)-Erosion and sedimentation control impacts on on-site agricultural productivity.* Erosion and sedimentation control are important for preventing loss of on-site farm soils and keeping the site viable for farm use. The proposed facility site is in an open and fairly flat area of the property away from a wetland corridor on the western portion of the subject property. No tree removal is required or approved under this application. Engineers Kelli Toynton and Charles Greely developed the site specific erosion and sediment control plan dated March 3, 2018 and superseding Marion 6's original submission. The new plan identifies two water flows from the property, one is across the site to the southwest along Bents Road, and the other is near the solar field site, draining north to northeast. The north-northeast flow is directed toward Deer Creek. The existing compacted farm roads that will be used to access the site will not affect water flow. The plan explains erosion and sediment control (ESC) BMPs selected specifically for this site. Communication and education will be handled by an ESC lead person and an independent certified ESC ensuring BMPs are implemented. Silt fencing, graveled entrance, and stockpile cover will be used variously over the life of the project.

As mentioned in the ESC plan, an NPDES permit will be needed, and DPW LDEP will require detailed site plans showing grading and stormwater runoff management and permanent BMPs to prevent concentrated flow of stormwater prior to issuing building permits. Marion 6 has proven that meeting erosion and sedimentation criteria is feasible, and with conditions of approval requiring submission of a more detailed final plan, DPW review and approval of the grading and drainage plan, and requiring NPDES 1200-C permitting, the project will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B) (3) will be met.

15. *MCC 17.120.110(B) (4)-Soil compaction and on-site agricultural productivity.* Marion 6's soil compaction plan is prepared by Andy Thompson, MS, Senior Restoration Ecologist at Dudek. The plan must show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." The plan notes that seven soils are on the property and all are silt loams except the Wc soil which is a silty clay loam that is more prone to compaction because of higher clay content. The subject solar array site will be in an area of Amity, Concord and Woodburn soils. According to the report, there is a moderate risk of compaction when the soils are moist. The plan calls for minimizing soil compaction by avoiding construction during saturated conditions when possible, using low ground pressure equipment, and limiting equipment

traffic on more highly compaction prone soils. Work areas or similar undisturbed sites will be pretested for compaction and assessed for potential impacts. Relatively light equipment will be used in work areas. Areas will be tested after construction and temporarily disturbed areas will be decompacted if compacted if more than 125% of pre-construction compaction. According to the plan, decompaction will be accomplished by mechanical means that avoid comingling of soil layers. If soil has been temporarily removed, the area will be decompacted prior to returning topsoil to the spot.

The plan shows Marion 6's intent to keep compaction to a minimum. Marion 6 is required to decommission the solar facility at the end of its useful life and will remove items such as conduit and the transformer pad, allowing for decompaction at that time as well. With a condition of any approval requiring a more detailed decompaction plan for Planning Director review and approval, MCC 17.120.110(B)(4) will be met.

16. *MCC 17.120.110(B)(5)-Weed control.* MCC 17.120.110(B)(1) through (4) deal with on site impacts to the subject property. MCC 17.120.110(B)(5) is not so constricted and off-site impacts can be considered. Weed control is important not just for keeping the subject site from being infested, but also for keeping the subject property from becoming a source of infestation for other properties. Seed can be carried in and out of a site by many methods, by air, water, and on equipment and clothing and so on. The proposed solar field area abuts neighboring farm properties on all sides, including Molodyh property to the west and south, a Molodyh leased property and a dwelling to the east, and a horse property to the north. The erosion, sedimentation, and compaction plans will help by containing runoff and providing native seed mix re-vegetation to help prevent weeds from seeding.

The superseding weed control plan, prepared by a professional engineer from Dudek, is individualized to the site, citing its use for berry farming and noting that the Molodyhs farm adjacent properties. The plan also considers the horse farm north of the array site. The author notes there are few weeds on the property because of current farming practices. The plan considers state listed noxious and invasive weed species declared by executive order. Tansy ragwort was found on the subject property in 2012 according to the Oregon Department of Agriculture's WeedMapper program. No other noxious weeds were reported within 0.5 miles of the property, but 13 others have been found within two miles of the site, and Himalayan blackberry is expected to be on-site because it is pervasive in the Willamette Valley. Other species are listed as having potential to occur. The weed plan addresses construction BMPs, post-construction site restoration and long term maintenance.

Weeds occur more easily in disturbed soils so construction will leave the site vulnerable to weed establishment. Marion 6 proposes keeping disturbed soils to a minimum. No wholesale site clearing will occur. Array supports will be driven rather than dug into the ground. BMPs will include inspecting the site for and eradicating identified noxious and undesirable

weeds; inspecting and cleaning weeds from clothing, footwear, equipment, and supplies; and covering disturbed area with seed and mulch as quickly as possible. Two local seed mixes are preferred and will be used subject to availability, or if not available, a similar Oregon-native, pollinator friendly, sun-shade tolerant mix will be used. A long-term maintenance agreement will be a condition of approval. Noxious weed pamphlets and materials will be on site for worker use in identifying and eradicating noxious weed species. Herbicides may be used occasionally. The property is within the Marion County Weed Control District and subject to MCC chapter 8.20. Marion 6 shall submit a final weed mitigation and control plan to the Marion County Planning Division for review and approval. As conditioned, construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. As conditioned MCC 17.120.110(B) (5) is met.

17. *MCC 17.120.110(B) (6)-Location on high-value soils.* Marion 6 proposes placing the facility entirely on high value farm soils. No non-high value soils are available on the subject tract, though Wc soils are considered non-high value under some circumstances. But, the Wc area is small, wooded and on the edge of the property. If the Wc soils are considered non-high value here, siting the project on non-high-value farm soils would significantly reduce the project's ability to operate successfully because of tree cover. The project site was chosen by the farm operator as better suited to continuing the existing commercial farm operation. MCC 17.120.110(B) (6) is met.
18. *MCC 17.120.110(B) (7)-Other solar sites.* Marion 6 provided a map of approved solar sites and solar sites under review. The map shows no solar site within one mile of the subject site. Marion 6 met its burden of proving there are no other solar facilities within one-mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) is met.
19. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility shall require the project owner to sign and record in the deed records of Marion County a document binding the project owner and project owner's successor in interest, prohibiting them from pursuing a claim for federal relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). A condition of any approval will require the project owner to sign and record in the deed records of Marion County a farm/forest declaratory statement binding the project's owner and successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). As conditioned, MCC 17.120.110(E) is satisfied.
20. Under MCC 17.120.110(F), nothing in the section prevents 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. Marion 6 does not favor bonding but states that given the salvage value of materials and Marion 6's willingness to accept a

condition of approval that requires Marion 6 to be responsible for retiring the facility at the end of its useful life, no bonding is necessary. Any approval will require Marion 6 to sign an ongoing site maintenance and decommissioning agreement binding to Marion 6 and future owners. The document shall be recorded with the county. As conditioned, bonding under MCC 17.120.110(F) is not required.

MCC 17.136.060(A)

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

No forest practices are alleged or obvious on surrounding properties. Properties in all directions are zoned EFU. Marion 6 provided an aerial photo of the subject and surrounding properties showing farm uses on surrounding agricultural properties. The subject property and properties

east and south are farmed by the Molodyhs and are in Marionberries and strawberries. Mr. Molodyh provided a written statement saying his farming practices will not be impacted by the proposed solar field. The property Mr. Molodyh farms insulates the proposed use from other farm uses, except the horse farm to the north. Common horse ranching practices are not described but animals must be fed, watered, sheltered and exercised to some extent. The horses are not apparently kept near the proposed solar site but likely could be. The solar field will not be disturbingly loud and will have no rotating parts that might startle a horse. Solar panels are passive collectors. Off-site intrusion of water and sediment flowing from the site, and weed and rodent infestation from the site could be problems for neighboring farms if not sufficiently addressed. Potential on-site farm impacts from erosion and sedimentation were discussed above, and were sufficiently addressed by Marion 6's erosion and sediment control plan. The plan, prepared by a qualified person, with MCPW LDEP's civil site plan and DEQ NPDES 1200-C discharge permitting requirements, will help ensure drainage issues are properly addressed. On- and off-site weed control issues were also addressed above, and those findings and conditions are adopted here. Marion 6 responded to the Planning Directors comments on lack of a rodent mitigation plan by outlining their plan in a later submission. The plan proposed is sufficient but must be put in finalized form accompanied by the author's credentials. Additionally, a farm/forest declaratory statement acknowledging and accepting farm practices is also required as a condition of approval. As conditioned, Marion 6 has proven it is more likely than not that the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.136.060(A) (1) is satisfied.

23. *MCC 17.136.060(A) (2)-Adequate services.* Utility lines are available to the subject property. No new well or septic systems are proposed or required for the use. The solar site will be accessed from Bents Road NE, a county roadway. Marion 6 proposes two alternate access plans; one using the current access road which includes a rail crossing, and the other is an alternate access near the southwest corner of the property that avoids the railway crossing. Whichever access is used, MCPW will require review prior to granting approval. County PW will also require grading and stormwater management plans and NPDES permitting that will be made conditions of approval. Aurora Fire District was notified of the subject proposal but provided no comments for the record. A condition will require the Aurora Fire District to sign off on a site access and identification plan prior to issuance of building permits. With conditions for access, requiring drainage and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.136.060(A) (2) is satisfied.
24. *MCC 17.136.060(A) (3)-Significant adverse impact.* The subject property is not within a sensitive groundwater, floodplain, or geologically hazardous area overlay zone. No on-site water use is anticipated. The site is not within or near an MCCP identified major or peripheral big game habitat area or near MCCP identified sensitive rivers, streams or headwaters. No MCCP

identified watershed areas are on the subject property. No MCCP identified wetlands are on the solar site. The solar panels are solidly encased, emit no particulates into the air, and leach no materials into groundwater. The solar array site is fairly flat, and with the submitted stormwater and erosion control plan and conditions of approval set out above, erosion will be sufficiently controlled. Marion 6 has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality. MCC 136.060(A) (3) is met.

25. *MCC 17.136.060(A) (4)-Noise.* Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity and transformers that regulate the alternating current for transfer to the electrical grid produce noise from cooling fans. A central transformer and multiple string inverters will be placed at the site. The smaller string inverters are quieter than a large central inverter. Inverter noise abates as the sun goes down because electricity production declines, and stops altogether during hours of darkness. The nearest residential use appears to be about 300 to 400' east of the solar field. Marion 6 submitted an acoustical analysis of the proposed use based on site modeling, using specifications for the transformer and inverters likely to be used, and the location of sensitive noise receptors surrounding the property. Marion 6 found inverter fan noise will likely be inaudible in the project vicinity and would be well below Marion County noise standards at the closest residence. It is more likely than not that noise associated with the use will have no significant adverse impact on nearby land uses. MCC 17.136.060(A) (4) is satisfied.
26. *MCC 17.136.060(A) (5)-Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A) (5) is satisfied.

MCC AIRPORT OVERLAY ZONE

27. The subject property is within the airport overlay (AO) zone of the Aurora State Airport. Under MCC 17.177.030, three airport development districts are provided within the airport overlay zone.
- A. Airport Development District. This district consists of those lands, waters and airspace area at or below the primary, transitional and approach surfaces described in MCC 17.177.020(C).
1. Use Limitations. Any use, accessory use, buildings and structures otherwise allowed in the underlying zone shall be permitted provided the following requirements are satisfied:
 - a. No obstruction or object shall be permitted if it extends above the transitional and approach surfaces as defined in MCC 17.177.020(C).

- b. Roadways, parking areas and storage yards shall be located in such a manner that vehicle lights will not result in glare in the eyes of the pilots, or in any other way impair visibility in the vicinity of the runway approach.
 - c. Sanitary landfills, sewage lagoons or sewage sludge disposal shall not be permitted closer than 10,000 feet to the airport runway.
 - d. No game preserve or game reservation shall be permitted if the animals or birds have the potential to become a hazard to air navigation.
 - e. No structure or use intended for public assembly shall be allowed except by a conditional use permit.
- B. Horizontal Surface District. This district consists of the land, water and airspace underneath the horizontal surface as described in MCC 17.177.020(C).
- 1. Use Limitations. Any use, accessory use, building and structure allowed in the underlying zone shall be permitted provided the following requirements are satisfied:
 - a. No obstruction shall penetrate the horizontal surface as defined in MCC 17.177.020(C).
 - b. Sanitary landfills, sewage lagoons or sewage sludge disposal shall not be permitted closer than 10,000 feet to the airport runway.
- C. Conical Surface District. This district consists of the land, water and airspace underneath the conical surface as described in MCC 17.177.020(C).
- 1. Use Limitations. Any use and accessory uses, buildings and structures allowed in the underlying zone shall be permitted; provided, that no obstruction penetrates the conical surface as defined in MCC 17.177.020(C).
28. Under local rules, the hearings officer may take official notice of judicially noticeable facts and ordinances, resolutions, rules and regulations of the United States, the State of Oregon, Marion County, and the incorporated cities within Marion County. To determine which district applies here, the hearings officer takes official notice of the Aurora State Airport Master Plan, chapter 6. An illustration shows the subject property is within the horizontal surface of Aurora State Airport. Under MCC 17.177.020, horizontal surface is a horizontal plane surrounding the airport 150 feet above the airport elevation. The interior portion of the surface terminates where it intersects with

transitional and approach surfaces. Its outer edge terminates where it intersects with the conical surface. Under MCC 17.177.030(B)(1), any EFU zone use is allowed as long as the horizontal surface is not penetrated and no sanitary landfill, sewage lagoon or sludge disposal are allowed closer than 10,000' to airport runways. The solar facility is at ground level at a height of no more than 12' and will not penetrate the 150' horizontal surface. No sanitary landfill, sewage lagoon or sludge disposal is requested or allowed. MCC 17.177.030(C) is satisfied.

VI. Order

It is hereby found that Marion 6 has met the burden of proving applicable standards and criteria for approval of a conditional use application to establish a photovoltaic solar array power generation facility on no more than 12-acres in an EFU zone have been met. The conditional use application is **GRANTED**. The following conditions are necessary to protect the public health, safety and welfare:

1. Marion 6 shall obtain all required permits from the Marion County Building Inspection Division.
2. Prior to issuance of building permits, Marion 6 shall provide evidence of obtaining an Oregon Department of Environmental Quality 1200-C construction storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.
3. Prior to issuance of building permits, Marion 6 shall submit to MCPW for review and approval, its final detailed stormwater erosion and sediment control and maintenance plan, and civil site plan for grading and stormwater management. Marion 6 shall implement the plans prior to final inspection of building permits.
4. Marion 6 shall submit a final detailed and site-specific, on-going weed maintenance control plan requiring replanting of disturbed soils with a weed-free local seed mix and agreeing to establishing a schedule of weed eradication and vegetation management activities sufficient to maintain a healthy and sustainable plant community on the project site for as long as the photovoltaic solar power generation facility remains on the property to Marion County DPW for review and approval.
5. Marion 6 shall submit to Marion County Planning for review and approval, a detailed and site-specific soil compaction prevention plan that will be implemented and will require minimal soil disturbance and decompaction of temporarily compacted areas due to construction and maintenance activities, and showing final decompaction of the subject site at decommissioning.
6. Marion 6 shall submit a signed decommissioning agreement, binding Marion 6 or any successor, and agreeing that at the end of its useful life, the photovoltaic solar power generation facility will be retired in substantial conformance with the decommissioning plan submitted with the application,

including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and decompacting soils as necessary to allow farm use of the solar site.

7. Marion 6 shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Marion 6 shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.
8. Marion 6 shall provide proof to the Planning Division that the Aurora Fire District has approved Marion 6's access and premise identification plan.
9. Marion 6 shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed.
10. Marion 6 shall implement the rodent management plan submitted to the record.
11. Marion 6 shall comply with OAR 738-070, physical hazards to aviation.
12. Failure to continuously comply with conditions of approval may result in this approval being revoked by the Planning Director. Any revocation may be appealed to the county hearings officer for a public hearing.
13. This conditional use shall be effective only when commenced within two years from the effective date of this order. If the right has not been exercised, or an extension granted, the variance shall be void. A written request for an extension of time filed with the director prior to the expiration of the variance shall extend the running of the variance period until the director acts on the request.

VII. 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 29th day of June 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board

review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

IX. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 28th day of June 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 13th day of June 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Gabriel and Vassa Molodyh
23006 Bents Road NE
Aurora, OR 97002

Garrett Lehman
SSD Marion 6 LLC
6525 SE 22nd Ave.
Portland, OR 97202

John and Mary Sampson
23045 Bents Road NE
Aurora, OR 97002

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

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

Agencies Notified


Planning Division (via email: gfennimore@co.marion.or.us)
(via email: breich@co.marion.or.us)
PW Engineering (via email: jrassmussen@co.marion.or.us)
Building Inspection (via email: deubanks@co.marion.or.us)
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Portland, OR 97204

Jeff Caines
Oregon Department of Aviation
3040 25th Street SE
Salem, OR 97302

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 13th day of June 2018, and that the postage thereon was prepaid.



Joanna Ritchie
Secretary to Hearings Officer