



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: August 15, 2018

Department: Public Works Agenda Planning Date: August 9, 2018 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision approving Conditional Use (CU) Case 18-021/Kerry Solar, LLC.

Issue, Description & Background The Marion County Hearings Officer issued a decision on August 7, 2018, approving CU18-021. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

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

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

List of attachments: Hearings officer's decision

Presenter: Joe Fennimore

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

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

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. CU 18-021
Application of:) Clerk's File No.
KERRY SOLAR, LLC)

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Kerry Solar, LLC, for a conditional use permit to establish a photovoltaic solar power generation facility on no more than 12 acres of a 39.4-acre unit of land in an EFU (Exclusive Farm Use) zone in the 4000 block of Frazer Road SE, Sublimity, Marion County, Oregon (T8S, R1E, S9, tax lot 1000).

II. Relevant Criteria

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

III. Public Hearing

A public hearing was held on this matter on April 25, 2018. The Planning Division file was made part of the record. Planning Division file AR 07-019 was also made a part of the record. The following persons appeared and provided testimony on the application:

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|----|---------------|---------------------------------------|
| 1. | Brandon Reich | Marion County Planning Director |
| 2. | Conor Grogan | Sulus Solar, LLC for Kerry Solar, LLC |
| 3. | Jim Heater | Proponent |

A presentation slide show printout was entered into the record as exhibit 1. No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at hearing. The record was left open until April 27, 2018 for applicant to submit a clear copy of the annotated aerial photo included in applicant's appendix 3 and a modified copy of the surrounding solar site map in applicant's appendix 7. These documents were submitted for the record and placed in the applicable appendices.

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 property is on the west side of Frazer Road SE in the 4000 block, and is undeveloped.
3. All surrounding properties are zoned EFU and in farm use.
4. *Soil Survey of Marion County Area, Oregon* indicates that 71% of the subject property consists of high-value farm soils.
5. Applicant proposes establishing a photovoltaic solar power generation facility on no more than 12 acres of the subject property.
6. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

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

- A. Driveways must meet sight distance, design, spacing, and safety standards. At the time of application for building permits, an Access Permit will be required [MCC 11.10]. The result of a preliminary field review indicates the proposed access will need to be adjusted southward to the apex of the roadway curve to maximize available Intersection Sight Distance.
- B. Prior to application for building permits, the Applicant shall provide a civil site plan to PW Engineering for review and approval that addresses pre- and post-construction erosion control Best Management Practices (BMPs) as related to stormwater runoff. A post-construction BMP in the form of a shallow drainage perimeter swale situated between the array and any downgradient water body or flow way to promote stormwater volume infiltration and sediment capture will be required, typically approved for these arrays as a 6' wide x 0.5' deep swale.
- C. Prior to issuance of an building permits, dedicate a 30-foot right-of-way half-width for public road purposes along the subject property Frazer Road frontage to meet the local road standard, for a minimum length adjacent to the array footprint [MCC 17.119.060].
- D. A mapped, dendritic system of seasonal drainage tributaries to East Fork Drift Creek having upstream origins to the east of Frazer Road are shown to traverse the property. Prior to site plan approval and issuance of an Access Permit, Applicant shall provide evidence of permits or waivers from Division of State Lands regarding those drainage flow ways.
- E. Anticipated excavation work within the public right-of-way for any electrical utilities requires both Work-in-R/W and Utility Permits from MCPW Engineering.

- F. The subject property is within the unincorporated area of Marion County and is subject to assessment of Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R.
- G. Prior to issuance of an Access Permit, evidence of a DEQ NPDES 1200-C Erosion Control Permit for land disturbance of 1.0 acre or more shall be provided.

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

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

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

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

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

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

MCCP AGRICULTURAL LANDS POLICIES

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

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

Some MCC criteria incorporate comprehensive plan policies, such as MCC 17.138.030(A)(7) which states that a dwelling will be consistent with the density policy if located in the MCCP identified big game habitat area. This criterion incorporates MCCP Fish and Wildlife Habitat policy 5. Policy 5 also contains mandatory language and is an example of a directly applicable MCCP criterion regardless of incorporating language (but see V(24) below for a discussion of MCCP Fish and Wildlife Habitat policy 5

under MCC 17.136.060(A)(3)). MCC 17.120.110 criteria here do not incorporate MCCC policies, and FOMC does not claim any of the nine MCCC agricultural lands policies have mandatory language, calling the policies "aspirational." Without mandatory or incorporating language, MCCC agricultural lands policies are not criteria and are not considered.

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

MCC 17.119

3. Under MCC 17.119.100, the Planning Director has the power to forward conditional use applications to the hearings officer for initial decision. The Planning Director forwarded this application to the hearings officer. The hearings officer may hear and decide this matter.
4. Under MCC 17.119.020, an application for a conditional use may be filed by the following only:
 - A. The owner of the property that is the subject of the application;
 - B. The purchaser of the property that is subject to the application when a duly executed written contract or earnest-money agreement, or copy thereof, is submitted with the application;
 - C. A lessee in possession of the property subject to the application who submits written consent of the owner to make the application;
 - D. The appropriate local government or state agency when the application is for a public works project;
 - E. A governmental body that has initiated condemnation proceedings on the property that is subject to the application, but has not yet gained title; or

F. A co-tenant if the property that is the subject of the application is owned by tenants in common.

The property is shown as tax lot 081E0901000, but tax lots are for tax and not land use purposes though they often are accurate shorthand for legal lots, parcels and other units of land. This property has a somewhat confusing history. Government lot 1 in township 8S, range 1E, section 9 was conveyed to Maurice and Lucille Heater by deed in 1942, along with several other government lots and portions of the Lorenzo Heater donation land claim. At that time, no more than a deed was required to create or transfer land. At various times in the early 1980s, Maurice and Lucille Heater conveyed specified percentages of undivided interest in 40 acres to John and Kathy Heater. The first two deeds (20% and 65%) described the land as government lot 1 in township 8 south, range 1 east of section 9, a square 40 acre parcel. Correction deeds for the two conveyances were recorded in 1982, reconfiguring the parcel to its current shape. A 1983 deed conveyed 15% interest in the newly configured property, and in 1985, John Heater conveyed the entire parcel back to Maurice and Lucille heater. In 1994, Maurice and Lucille Heater conveyed the property to John Heater. In 2000, John Heater conveyed the property to John W. and Sandra K. Heater. And, sometime after that, the property was conveyed to John and Sandra Heater, Trustees of the Heater Living Trust. No deed for that conveyance is in the record. John Heater has since died. Not addressed in the application or at hearing is the status of Sandra L. Heater's relationship to the property; she is still listed as trustee for the Heater Living Trust in the Marion County tax records. Applicant must account for Ms. Heater's interest in the property.

On March 2, 2018, Tim Heater authorized Kerry Solar, LLC, to apply for this conditional use and other necessary permits. On April 24, 2018, Conor Grogan, Sulus Solar, LLC, parent company of Kerry Solar, LLC, provided a new application and authorization for the proposed use. Mr. Grogan explained that the Heater family owned the property but it was not clear which specific family member or entity. Mr. Grogan believed, at the time the application was filed, that Tim Heater (John Heater's son) had the authority to sign but later, Mr. Grogan came to believe John Heater's niece, Jennifer Heater-Suthers is on the property title.

The deed in the case file shows a March 2, 2000 transfer to John W. and Sandra L. Heater. Current Marion County tax records show the property in the name of the Heater Living Trust, John W. Heater, trustee, and Sandra L. Heater, trustee, indicating an intervening property transfer. That deed is not in the record, nor was a deed or other authorization for Tim Heater or Ms. Heater-Suthers in the record by the time of the hearing. Jim Heater testified at hearing that years ago his parents split off a 40 acre parcel for his brother John who recently passed away, and that Ms. Heater-Suthers took over as executor. Mr. Heater testified he worked with Ms. Heater-Suthers to obtain a right-of-first refusal on the property so it could be reunited with the rest of the family farm after appraisal and purchase.

While it is not entirely clear where fee title lies, it is highly likely that some Heater family member or entity has control over the property, and family members involved so far support the current land use application. Given how far the application has come, from submission to hearing, and the likelihood the situation can be cured, the application will be considered. But, a condition of any approval will require, prior to building permit issue, submission of clear proof to the Planning Division that all owners of the property, or a purchaser of the property under executed written contract or earnest-money agreement, authorize filing this application. With this condition, MCC 17.119.020 will be satisfied.

5. Under MCC 17.119.025:

A. Applications shall include the following signatures:

1. Signatures of all owners of the subject property;
2. The signatures of the purchasers of the property under a duly executed, recorded, written contract of sale or earnest-money agreement;
3. The signatures of the lessee in possession of the property with the written consent of all the owners; or
4. The signatures of the agents of those identified in MCC 17.119.020(A), (B), or (C) when authorized in writing by those with the interests described in MCC 17.119.020(B) or (C), and all the owners of the property;
5. The signature of an authorized agent of a public agency or utility holding an easement or other right that entitles the applicant to conduct the proposed use on the subject property without the approval of the property owners; or
6. The signature of co-tenants owning at least a one-half undivided interest in the property, when the property is owned by tenants in common; provided, that the signing co-tenant provides current addresses for all co-tenants who have not signed the application so the planning division can give them notice of the decision.

B. Prima Facie Proof of Ownership. When any person signs as the owner of property or as an officer of a public or private corporation owning the property, or as an attorney in fact or agent of any owner, or when any person states that he or she is buying the property under contract, the director, planning commission, hearings officer and the board may accept these statements to be true, unless the contrary be proved, and except where otherwise in this title more definite and complete proof is required. Nothing herein shall prevent the director, planning commission, hearings officer or board from demanding proof that the signer is the owner, officer, attorney in fact, or agent.

Findings and conclusions in V(4) above are adopted here. Applicant must provide, authorizations/signatures required under MCC 17.119.025(A) along with clear proof of property ownership prior to issuance of building permits. As conditioned, MCC 17.119.025 will be satisfied.

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

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

7. *MCC 17.119.070(A)*. Under MCC 17.119.030, the hearings officer may hear and decide only those applications for conditional uses listed in MCC title 17. MCC 17.136.050(F) (3) lists a photovoltaic solar power generating facility, subject to MCC 17.120.110 as a conditional use in the EFU zone. Under MCC 17.120.110(A) (5), a photovoltaic solar power generation facility:

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

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

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

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

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

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

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

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

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

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

MCC 17.120.110

10. MCC 17.120.110 is based on ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38), minimum standards for photovoltaic facilities. An OAR 660-033-0130(5) requirement is evaluated under MCC 17.136.060(A)(1). MCC 17.120.110 provides three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on a property generally determine which scenario applies.

OAR 660-033-0130(38)(f) refers to ORS 195.300(10) in defining soil types, and ORS 195.300(10)(a) in turn refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition. MCC 136.140(D) refines the high-value farmland rule to include only those definitions that apply in the Marion County EFU zone. For approving land use applications on high-value farmland, OAR 660-033-0030(8) states that soil classes, soil ratings, or other soil designations are those in the Natural Resources Conservation Service (NCRS) Web Soil Survey. Applicant submitted an NCRS *Web Soil Survey of Marion County Area, Oregon*, report showing the subject property is made up of McAlpin silty clay loam, 0 to 3% slopes (MaAB), a prime farmland high-value soil that makes up about 71% of the subject property and non-high-value McCully clay loam, 20 to 30% slopes (McE), McCully clay loam, 50 to 70% slopes (MUG), and Waldo silty clay loam soils. At 71% high-value soils, the subject property is high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

11. Under MCC 17.120.110(B), for high-value farmland soils:
 1. A photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004;
 2. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;
 3. The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;

4. Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;
5. Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;
6. The project is not located on high-value farmland soil unless it can be demonstrated that:
 - a. Non-high-value farmland soils are not available on the subject tract; or
 - b. Siting the project on non-high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or
 - c. The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised on non-high-value farmland soils;
7. A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:
 - a. If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary;
 - b. When at least 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits, either as a single project or multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar power generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the overall land use pattern of the area will be materially altered if the overall effect of existing and potential photovoltaic solar power generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the

number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.

12. *MCC 17.120.110(B)(1)-No more than 12 acres.* Applicant states the subject photovoltaic solar power generation facility, including access, will encompass no more than 12 acres. The solar array as proposed is nearly rectangular-shaped and is in the northern portion of the subject property. Applicant's site plan shows access coming off Frazer Road SE and almost immediately into the solar array area. A turnaround must be provided as required by the Sublimity Fire District and included in the 12-acre photovoltaic facility limit. A final site plan will be submitted to the Planning Division for review and approval, and will accurately depict all components of the proposed facility and provide accurate acreage for the project. As conditioned, MCC 17.120.110(B)(1) will be met.
13. *MCC 17.120.110(B)(2)-On-site agricultural use impacts.* The subject property, including the proposed photovoltaic site has been in Christmas tree production but will be transitioning to pasture as the trees are harvested and the stumps removed. The solar facility will be in the northern portion of the property. A cleared area between the array site and the west property line looks narrow, but comparing the site plan with the assessor's map, the strip looks at least 100' wide if not more, allowing room for equipment to operate or livestock to graze. Tim Heater, Jennifer Heater-Suthers and Jim Heater have all stated that the remainder of the property can and will be effectively used for the farm enterprise. With access to the solar site immediate to the road, little land will be taken out of farm use for access ways, and no fields will be isolated or cut off from other areas. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on portions of the property not occupied by project components. MCC 17.120.110(B)(2) is met.
14. *MCC 17.120.110(B)(3)-Erosion and sedimentation control impacts on on-site agricultural productivity.* Erosion and sedimentation control are important for preventing loss of on-site farm soils and keeping the site viable for farm use. The proposed array site slopes gently to the west. No tree removal is required or approved under this application. The aerial photo with soil type overlay in the *Web Soil Survey* report shows the area where the array will be sited contains Wa and MaA soils, and both have an erosion hazard rating of slight. Applicant's erosion and sedimentation control plan states that the majority of stormwater runoff infiltrates on site but water flow is to the west to the East Fork Drift Creek. Two wetland areas are in the southeast corner of the property, well separated from the array area, and do not appear to be fed from the array site.

Although erosion hazard for the MaA and Wa soils is slight, applicant's plan includes 19 erosion and sedimentation control notes outlining erosion prevention, sedimentation control and site stabilization measures for the project. Environmental scientist, Shawn Childs of Environmental Planning Group, LLC (EPG), prepared the plan and included a qualifications summary. The plan will be upgraded as needed during construction to meet local,

state, and federal erosion control regulations. MCPW LDEP will require detailed site plans showing grading and stormwater runoff management and permanent best management practices to prevent concentrated flow of stormwater prior to building permits. LDEP also requires an Oregon Department of Environmental Quality NPDES 1200-C discharge permit. Applicant has proven that meeting erosion and sedimentation criteria is feasible, and with conditions of approval requiring submission of a more detailed final plan, LDEP review and approval of the grading and drainage plan, and NPDES 1200-C permitting, the project will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. As conditioned, MCC 17.120.110(B) (3) will be met.

15. *MCC 17.120.110(B) (4) -Soil compaction and on-site agricultural productivity.* Applicant's soil compaction plan, prepared by EPG's Shawn Childs, is included with the erosion and sediment plan. The plan must show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." The plan points out soils within the project site are moderately prone to compaction due to clay content. Soil compaction will be prevented by avoiding and minimizing equipment traffic on-site during saturated conditions, keeping traffic to the designated access road, ensuring proper tire inflation, and avoiding use of oversized equipment. Soil compaction may occur in areas where topsoil is removed and backfilled with original or compatible materials, in areas where topsoil is not removed but equipment is staged, and in trenching areas where equipment is installed and then backfilled. According to the plan, any compaction will be remedied by using plowing or subsoiling techniques and then replanting with deep-rooted vegetation where possible. Remediation will not take place when soils are saturated and mixing top and sub soils will be avoided. Remediation will not occur in areas intended to be compacted for the life of the project such as accessways, but applicant will be required to remediate those areas at the end of the project's life. With a condition of approval requiring a more detailed, site specific decompaction plan for Planning Director review and approval, MCC 17.120.110(B) (4) will be met.

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

Applicant's weed control plan, prepared by EPG ecologist Adrien Elseroad, was developed with information from the Marion County Weed Control District target weed list, Oregon's noxious weed list, and Oregon Department of Agriculture's WeedMapper. The author notes few weeds on the subject property because recent agricultural practices have included broadleaf

herbicide application and bi-annual disking. The report's table 1 lists noxious or invasive weed species known to have occurred on-site and within three miles of the subject site. None of the listed weeds are known to occur on the property, but all listed weeds have potential to occur.

The weed control plan has three components: construction BMPs, post construction site restoration, and long-term maintenance. Weeds occur more easily in disturbed soils. Applicant proposes keeping disturbed soils to a minimum. No wholesale site clearing will occur. Array supports will be driven rather than dug into the ground. BMPs will include inspecting the site for and eradicating noxious and undesirable weeds; inspecting and cleaning weeds from clothing, footwear, equipment, and supplies; and covering disturbed areas with seed and mulch as quickly as possible. The seed mix will be chosen in consultation with the Marion County Soil and Water Conservation District. A long-term maintenance agreement is required as a condition of approval. The property is in the Marion County weed control district and subject to MCC chapter 8.20. Applicant must submit a final weed mitigation and control plan to the Marion County Planning Division for review and approval. As conditioned, construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. As conditioned MCC 17.120.110(B) (5) is met.

17. *MCC 17.120.110(B) (6)-Location on high-value soils.* The subject property has about three acres of non-high-value class IV and VII soils that slope 20-70% on the western, treed, riparian, peninsular portion of the property. This portion of the property is also in a designated geologically hazardous overlay zone. Siting the project in this part of the property would significantly reduce the project's ability to operate successfully. The area where the array will be sited contains a significant amount of non-high-value Wa soils and some high-value MaA soils. The well-located siting saves the largest portion of high-value soil for the remaining farm field. MCC 17.120.110(B) (6) (b) is met.
18. *MCC 17.120.110(B) (7)-Other solar sites.* Applicant provided a map of solar sites approved and under review. The map shows no solar sites within one mile of the subject property. Applicant has proven there are fewer than 48 acres of solar facilities within one mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) (a) applies. No further action is required under this criterion.
19. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility will require the project owner to sign and record in the deed records of Marion County a document binding the project owner and project owner's successor in interest, prohibiting them from pursuing a claim for federal relief or cause of action alleging injury from farming or forest practices defined in ORS 30.930(2) and (4). A condition of approval will require the project owner to sign and record in the deed records of Marion County, a farm/forest declaratory statement binding the project's owner and successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or

forest practices defined in ORS 30.930(2) and (4). As conditioned, MCC 17.120.110(E) is satisfied.

20. Under MCC 17.120.110(F), nothing in the section shall prevent a county from requiring a bond or other security from a developer or otherwise imposing on a developer the responsibility for retiring the photovoltaic solar power generation facility. Applicant does not favor bonding but states that given the salvage value of materials and applicant's willingness to accept a condition of approval that requires applicant to be responsible for retiring the facility at the end of its useful life, no bonding is necessary. Any approval will require applicant to sign an ongoing site maintenance and decommissioning agreement binding to applicant and future owners. The document shall be recorded with the county. As conditioned, bonding under MCC 17.120.110(F) is not required.

MCC 17.136.060(A)

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

All surrounding properties are zoned EFU. Portions of the subject and some surrounding properties are wooded, but no forest practices are alleged or obvious on any of the properties. Applicant provided an aerial photo of the subject and surrounding properties with a table and narrative of uses on land within 1,000' of the subject property. The 1,000' study area is reasonable considering the land use hearing notification area, the presumed area of interest in the EFU zone, is 750' from the property boundary. Much of this property is controlled by Heater family members or entities and the solar field use and location was okayed in coordination with applicant.

Property to the south has been in Christmas trees but the property will transition to pastureland. Property west of the peninsula area is in Christmas trees and further west are lands in grass seed and oats. Land west of the solar array site is wooded and contains a riparian way. Properties to the north and northeast and east are wooded. Property to the southeast is in grass seed.

Farm practices associated with grass seed operations include seeding, spraying for pre-emergent weeds in fall and broadleaf weeds in spring, cutting and windrowing, combine harvesting, and burning stubble when allowed. Hay and grass seed production are not too dissimilar. Given the passive nature of the proposed use, it is more likely than not that the solar facility will have little impact on grass seed and hay operations in the area.

Farm practices associated with Christmas tree operations are planting, monitoring for pests and disease, spraying, shearing, harvesting and transporting trees off site. Stumps are removed and fields replanted. Given the distance of tree fields from the array and the passive nature of the proposed use, no interference with these farm practices is likely. Some Christmas tree fields, such as the subject property and the field south of the property will transition to pasture land, but the field to the south will be insulated from the solar array site by distance.

Off-site intrusion of water and sediment, and weed and rodent infestation from the site could be problems for neighboring farms. Potential farm impacts from erosion and sedimentation are addressed by applicant's erosion and sediment control plans that will mitigate impacts on and off the site. And, MCPW LDEP's civil site plan and DEQ NPDES 1200-C discharge permitting requirements also address off-site drainage issues. Weed control measures were addressed above and conditions adopted to help keep the subject and surrounding properties from succumbing to weed infestation that might increase weed control costs. A rodent pest control plan was submitted with the application and can be feasibly implemented. Applicant will also submit a farm/forest declaratory statement as a condition of approval. As conditioned, applicant has proven it is more likely than not that the proposed use will not force a significant change in, or significantly

increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.136.060(A)(1) is satisfied.

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

24. MCC 17.136.060(A)(3)-*Significant adverse impact*. The subject property is not within a sensitive groundwater or floodplain overlay zone. A portion of the property is in a geologically hazardous area overlay zone but not the array site. The whole property is within an MCCP identified peripheral big game habitat area, East Fork Drift Creek, an MCCP identified sensitive headwaters, runs through the peninsula portion of the property and two small MCCP identified wetlands are in the Southeast corner of the property. Under MCCP Fish and Wildlife Habitat policy 4:

Conflicts with wildlife (especially big game) shall be considered in land development. Development adjacent to streams, sensitive waterfowl areas and critical wildlife areas shall incorporate adequate setbacks and buffer zones.

MCC 17.113.140 requires 20' to 30' setbacks from the line of nonaquatic vegetation, or the ordinary high waterline, whichever is farthest from open waterways. There is no development proposed or approved in or within about 200' of East Fork Drift Creek riparian area or the wetlands. Wetlands are under the jurisdiction of the Oregon Division of State Lands (DSL). On site drainage appears to be away from on-site wetlands but DSL coordination can be made a condition of approval. And, applicant submitted erosion control, sedimentation and compaction plans, and Marion County Public works site grading plan and NPDES permitting will be required. MCCP identified sensitive headwaters and wetlands will be protected. Big game habitat is specifically addressed in MCCP Fish and Wildlife Policy 5:

Development density shall be controlled so that significant wildlife habitat will not be adversely affected in the County's resource zones. The standards for dwelling density in big game habitat, as identified on the habitat maps, shall be: one dwelling unit/80 acres in major habitat; one dwelling unit/40 acres in peripheral habitat. If dwellings are clustered within 200 feet of each other, these densities may be doubled.

No dwellings are requested in this application. Dwelling density standards are not applicable. The solar use is fairly passive and quiet. Sound modeling show anticipated noise at property boundaries will be from 23 to 32 dBA during daylight hours. (Equipment does not run after hours of darkness.) The MCC 8.45 daytime noise standard is 65 dBA while the

nighttime standard is 55 dBA. The peripheral big game habitat area will not be adversely affected by the proposed use.

No MCCP identified watershed areas are on the subject property. The solar panels are solidly encased, emit no airborne particulates, and leach no materials into groundwater. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality. MCC 136.060(A)(3) is met.

25. *MCC 17.136.060(A)(4)-Noise.* Solar collection panels act passively and make no noise, but inverters that convert direct current electricity to alternating current electricity, and transformers that regulate the alternating current for transfer to the electrical grid, produce noise from cooling fans. Multiple string inverters will be throughout the site. Preliminary placement is illustrated by a series of crosses across the site in applicant's appendix 8, figure 2. The one central transformer is also shown. Smaller string inverters are quieter than previously used large central inverters. All inverter noise abates as the sun goes down because electricity production declines, and stops altogether during hours of darkness. Noise measurements were modeled at property boundaries and nearest residences. Table 2 shows noise will be loudest at the north boundary at about 32 dBA, within MCC 8.45 55 and 65 dBA noise levels. Noise at the nearest residences (500' to 1,035' away), is estimated to reach only 18 to 21 dBA, well below MCC 8.45 noise limits. Applicant also agrees to a baseline ambient noise study as a condition of approval. As conditioned, it is more likely than not that noise associated with the use will have no significant adverse impact on nearby land uses. MCC 17.136.060(A)(4) is satisfied.

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

MCC 17.110.680

27. In the staff report for this conditional use case, the Planning Division determined that the subject property was described by deed (Volume 268, Page 605) in March 9, 1942, and at that time there were no other requirements to create a unit of land, so the property was legally created. But, in AR 07-019, the Planning Director found:

The property includes the majority of Government Lot 1 and a portion of the Lorenzo D. Heater Donation Land Claim described in the deed recorded in Volume 268, Page 605, dated March 9, 1942. A document recorded on Reel 270, Page 193, dated December 31, 1981, transferred a 20% interest in 40 acres of land in the 1942 deed as Lot 1; Township 8 South; Range 1 East. This lot is considered a separate legal parcel for land use purposes. A "correction of gift property" document was recorded on Reel 285, Page 524, dated July 6, 1982, with a new legal description

that described the parcel in its current configuration. At that time a Lot Line Adjustment approval was required to adjust the property lines between two separate parcels, however there is no evidence that such approval was obtained. (Emphasis added.)

The Planning Director's 2017 determination suggests the subject tract of land was not legally established and implicates 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.

The subject property has a somewhat confusing history, with many conveyances over the years. As found above, it is not yet clear how the property got into the Heater Living Trust, John and Sandra Heater, Trustees, what interest Sandra Heater still holds in the property, and who has authority to authorize the subject application. And now, given the information in the AR 07-19 file, it is unclear whether the subject property is legally created for land use purposes. A condition of approval will require applicant to submit proof to the Planning Director that the subject property is a legally created unit of land, or that it has been made so by property line adjustment or other means. As conditioned, MCC 17.110.680 can be met.

VI. Order

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

1. Prior to building permit issue, applicant shall submit proof to the Marion County Planning Division of property ownership and authorization for Kerry Solar, LLC to file and sign the subject application.
2. Prior to building permit issue, applicant to submit proof to the Planning Director that the subject property is a legally created unit of land, or that it has been made so by property line adjustment or other means.
3. Applicant shall obtain all required permits from the Marion County Building Inspection Division.
4. Prior to issuance of building permits, applicant shall provide evidence of obtaining an Oregon Department of Environmental Quality 1200-C construction

storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.

5. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final detailed stormwater erosion and sediment control and maintenance plan, and civil site plan for grading and stormwater management. Applicant shall implement the plans prior to final inspection of building permits.
6. Applicant shall submit a final detailed and site-specific, on-going weed mitigation, maintenance and control plan requiring replanting of disturbed soils with a weed-free local seed mix and agreeing to establishing a schedule of weed eradication and vegetation management activities sufficient to maintain a healthy and sustainable plant community on the project site for as long as the photovoltaic solar power generation facility remains on the property to Marion County DPW for review and approval.
7. Applicant shall submit to Marion County Planning for review and approval, a detailed and site-specific soil compaction prevention plan that will be implemented and will require minimal soil disturbance and decompaction of temporarily compacted areas due to construction and maintenance activities, and showing final decompaction of the subject site at decommissioning.
8. Applicant shall submit a signed decommissioning agreement, binding applicant or any successor, and agreeing that at the end of its usual life, the photovoltaic solar power generation facility will be retired in substantial conformance with the decommissioning plan submitted with the application, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and decompacting soils as necessary to allow farm use of the solar site.
9. Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Applicant shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.
10. Applicant shall provide proof to the Planning Division that the Sublimity Fire District has approved applicant's access and premise identification plan.
11. Prior to building permit issue, applicant shall provide proof to the Planning Division of coordination with the Oregon Department of State Lands, and that any required DSL permits have been obtained.
12. Applicant shall submit a baseline ambient noise study prior to building permit issue.
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. Applicant shall implement the rodent management plan submitted to the record.
15. 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.
16. 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 23rd day of August 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

IX. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 22nd day of August 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 7th day of August 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

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

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

Jim Heater
4672 Drift Creek Road SE
Sublimity, OR 97385

Tim Heater
4672 Drift Creek Road SE
Sublimity, OR 97385

Jennifer Heater Suthers
4672 Drift Creek Road SE
Sublimity, OR 97385

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

Agencies Notified

Planning Division (via email: gfennimore@co.marion.or.us)
(via email: lmilliman@co.marion.or.us)
Code Enforcement (via email: bdickson@co.marion.or.us)
Building Inspection (via email: twheeler@co.marion.or.us)
Assessor (via email: assessor@co.marion.or.us)
PW Engineering (via email: jrassmussen@co.marion.or.us)
1000 Friends of Oregon (via email: meriel@friends.org)

AAC Member No. 7
Dawn Olson
15056 Quall Road
Silverton, OR 97381

AAC Member No. 7
James Sinn
3168 Cascade Hwy NE
Silverton, OR 97381

Bonnie and Paul Solonika
4114 Frazer Road
Sublimity, OR 97385

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 7th day of August 2018, and that the postage thereon was prepaid.



Susan Hogg
Secretary to Hearings Officer