



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:

Department: Agenda Planning Date: Time required:

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TITLE

Issue, Description & Background

Financial Impacts:

Impacts to Department & External Agencies

Options for Consideration:

Recommendation:

List of attachments:

Presenter:

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

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THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)	Case No.	CU 18-019
)		
Application of:)	Clerk's File No.	
)		
RIVER VALLEY SOLAR, LLC ON PROPERTY)	Conditional Use	
OWNED BY NORBERT L. HEMSHORN, TRUSTEE OF)		
THE NORBERT L. HEMSHORN TRUST, AND)		
BELITA K HEMSHORN, TRUSTEE OF THE)		
BELITA K. HEMSHORN TRUST)		

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of River Valley Solar, LLC, on property owned by Norbert L. Hemshorn, Trustee of the Norbert L. Hemshorn Trust and Belita K. Hemshorn, Trustee of the Belita K. Hemshorn Trust, for a conditional use permit to establish a photovoltaic solar power generation facility on no more than 12 acres of a 14.96-acre unit of land in an EFU (Exclusive Farm Use) zone at 14585 Wilco Highway NE, Woodburn, Marion County, Oregon (T5S, R1W, S17D, tax lot 800).

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 17, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

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|----|---------------|--------------------------------------|
| 1. | Lisa Milliman | Marion County Planning Division |
| 2. | Damien Hall | Attorney for River Valley Solar, LLC |
| 3. | Troy Snyder | For River Valley Solar, LLC |

The following documents were entered into the record at hearing as exhibits:

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| Ex. 1 | April 17, 2018 amended exhibit A memorandum from Damien Hall, with attached documents |
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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 24, 2018 for applicant to submit additional information to the record. On April 19, 2018, applicant asked, in writing, to extend its open record period to July 6, 2018. The hearings officer granted the request and extended applicant's

open record period to 5:00 p.m. July 6, 2018. The following documents were submitted during the open record period:

- Ex. 2 July 6, 2018 letter from Damien Hall, with attached memorandum and supporting documents
- Ex. 3 July 6, 2018 letter from Damien Hall, with attached exhibits A-C

While reviewing exhibit 3, the hearings officer found only sheet 1 of a four-sheet erosion, sediment and soil compaction plan. The hearings officer sent applicant a letter asking for the additional sheets and extended the open record period by three days. Applicant supplied the requested information on October 31, 2018. Applicant's letter, full four-page erosion, sedimentation and soil compaction plan, and transmittal email are included in the record as exhibit 4.

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 zoned EFU. The intent of the designation and zone is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, can be approved where they do not have a significant adverse impact on farming operations in the area and all conditional use approval criteria are met.
2. The subject property is on the south side of Wilco Highway, adjacent to a railroad right-of-way and about 635' west of the Wilco Highway-Koener Road intersection. Woodburn's city limits are about 1,900' to the west. The parcel was the subject of property line adjustment case PLA 15-025, and is considered legally created for land use purposes.
3. Surrounding properties are zoned EFU and consist primarily of large parcels in agricultural use.
4. The *Soil Survey of Marion County Area, Oregon* indicates 100% of the subject property consists of high-value farm soils.
5. Applicant asks to establish 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 E as issues applicant should be aware of if the proposal is approved:

- A. Wilco Highway (SR214) access is controlled by ODOT, and an at-grade rail UPRR crossing is under ODOT Rail jurisdiction. The proposed site plan depicts the existing access being utilized for the solar array. Furthermore, the proposed use is a low-volume traffic generator, once constructed. In consideration of

the foregoing, the need to acquire ODOT & ODOT Rail permits related to access and rail crossing, respectively, is not anticipated. Nevertheless, the Applicant is advised to coordinate with those agencies to obtain formal or informal waivers.

- 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. The land use site plan depicts electrical interconnectivity on private property. If this is not the case, the Developer will need to acquire ODOT permits for any excavation work related to electrical utility interconnections in the Wilco Hwy R/W.
- D. 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.
- E. 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. A mapped drainage flow way traverses the northwest corner of the property, and does not appear to conflict with the solar array footprint. However, the flow way should be protected from erosion during all phases of construction.

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

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

Woodburn Fire District commented that applicant has demonstrated acceptable access and turnaround methods.

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

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

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

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

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

MCCP AGRICULTURAL LANDS POLICIES

2. Friends of Marion County (FOMC) comments refer to a Yamhill County Board of Commissioner's order that found 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.)

During the pendency of this case, LUBA's decision in *Yamhill Creek Solar, LLC v. Yamhill County*, LUBA No. 2018-009 (October 3, 2018), came down. In that case, a Yamhill County Zoning Ordinance (YCZO) standard required a finding that "[t]he use is consistent with those goals and policies of the Comprehensive Plan which apply to the proposed use." LUBA found that where "comprehensive plan provisions are not mandatory approval standards for a land use application, but the application must be evaluated for consistency with applicable plan provisions, that evaluation may require some weighing and balancing of competing policies directions embodied in the applicable plan provisions." *Id.* at 11.

Some MCC criteria incorporate comprehensive plan policies, such as MCC 17.138.030(A)(7), which states 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 criterion regardless of incorporating language. The criteria involved in the subject case do not incorporate MCCP policies, and FOMC does not 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 criteria, and 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 designated Primary Agriculture will be protected by EFU zoning. The subject property is designated Primary Agriculture and 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 non-farm uses on high-value farmland and seeks to ensure

allowed non-farm uses have no adverse impacts on farm uses. State and county law implement non-farm uses 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 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 MCCP agricultural lands policies are 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 this application to the hearings officer. The hearings officer may hear and decide this matter.
4. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a statutory warranty deed recorded in Marion County deed records at reel 3767, page 215, showing that the subject property was reconfigured by property line adjustment in November 2015. The resulting parcel is in the names of Norbert L. Hemshorn, Trustee of the Norbert L. Hemshorn Trust, and Belita K. Hemshorn, Trustee of the Belita K. Hemshorn Trust. On October 25, 2018, Norbert Hemshorn and Belita Hemshorn authorized River Valley Solar, LLC to apply for this conditional use and other necessary permits. River Valley Solar, LLC, could file the application. MCC 17.119.020 is satisfied.
5. Under MCC 17.119.025, a conditional use application shall include signatures of certain people, including the authorized agent of an owner. On October 25, 2018, Norbert Hemshorn and Belita Hemshorn authorized River Valley Solar, LLC to apply for this conditional use and other necessary permits on the subject property. Troy Snyder, River Valley Solar, LLC manager, signed the application for River Valley Solar, LLC. 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. At time of application, MCC 17.136.050(F)(3) listed 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, a conditionally permitted use 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. MCC 17.136 and 17.120.110 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 determine which scenario applies. The Hemshorns own the subject tax lot and no abutting property. Soils on tax lot 051W17D00800 are evaluated.

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 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 Class II, prime Woodburn silt loam, 0 to 3% slopes (WuA) soils make up 100% of soils on the property. Under MCC 17.136.140(D)(1) high-value farmland means a tract composed predominantly of Class I or II, prime, or unique soils, irrigated or not irrigated. The subject property contains 100% 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 weed 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.* The subject conditional use permit application is for a 12 acre photovoltaic solar power generation facility, though applicant expects it to actually occupy about 9.5 acres. Access to the site comes off Wilco Highway to the north, and crosses a railroad right-of-way with tracks. The access road appears to take the shortest possible route to the solar site, and includes a fire district compliant turnaround. The point of electric grid connection is shown at a power pole near green houses at the northern boundary. How the electricity gets from the array to the point of interconnection is not shown, but its

location and acreage must be accounted for on a final site plan, as all components must be included in the 12 acre photovoltaic facility size limit. Applicant shall submit a final site plan, accurately depicting all components, dimensions and acreage of the facility to the Planning Division for review and approval. The rest of the property contains greenhouses, a dwelling and outbuildings, and a treed portion. Use of these areas will not be affected. As conditioned, the photovoltaic solar power generation facility will not preclude more than 12 acres of the property from use as a commercial agricultural enterprise. MCC 17.120.110(B) (1) will be met.

13. *MCC 17.120.110(B) (2)-On-site agricultural use impacts.* The subject property contains greenhouses, a dwelling, outbuildings, a treed portion that is not cropped, and an area of farmable fields. The solar array will be in the farm field area. The non-array area can to be used for green house, woodlot, home and outbuilding uses. 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 is fairly flat, contains WuA soils and is in grass seed production. Eastside property owner, Dan Hemshorn, stated that runoff from the array site drains onto his property, and he is concerned that with no crops to absorb and slow down water, runoff will increase in a drainage system already at maximum capacity.

Applicant submitted a three-sheet erosion, sediment and soil compaction plan prepared by registered professional engineer, Mark P. Risch, and later a four-sheet plan by Erik J. Huffman, registered professional engineer. The new plan, at exhibit 4, is considered here. Sheet 1 states the nearest receiving water body is the Pudding River about 2,000' east of the subject property. Sheet 2 shows water flowing across the property northwest to southeast. Sheet 3 states at existing drainage condition 2 that property topography slopes from southwest to northeast, and at 3 that the nearest receiving body of water is Holdridge Creek, about 4,000' southeast of the subject property. Sheet 3 also states in proposed drainage note 2 that the "proposed installation area is at the south end of the property, which has the highest elevation in the property."

The subject parcel is a sort of blunt-ended wedge that tilts in a southeasterly direction as it narrows from west to east. Elevation lines on sheet 3 run across the parcel, starting at over 170' at the northwest portion of the property, and stepping down to 155' at the southeast corner of the property, inconsistent with the cited sheet 3 drainage notes. Maps, photographs and site plans show the Pudding River east of the subject property, but none show Holdridge Creek. Written comments from eastern property owner, Dan Hemshorn, state that drainage flows easterly off the subject property onto Mr. Dan Hemshorn's abutting property. The hearings officer finds the information in sheets 1, 2 and 4 is consistent with other

evidence in the record, and sheets 1, 2 and 4 are reliable evidence. The hearings officer also finds discrepancies in sheet 3 render it of little value. The best evidence in the record shows the Pudding River to the east is the nearest receiving water body and on-site water flows from northwest to south east, consistent with site topography.

Sheet 1 contains 31 standard erosion and sedimentation control notes, sheet 2 contains 14 grading and utility erosion and sediment construction notes and sheet 4 contains detailed erosion plan illustrations. The new plan adds a compost/mulch filter berm to the eastern portion of the property, consistent with the easterly water flow, and states the plan will be upgraded as needed during construction to meet local, state, and federal erosion control regulations. Prior to building permitting, MCPW LDEP will require additional detailed site plans showing grading, stormwater runoff management and permanent BMPs to prevent concentrated flow of stormwater. LDEP also requires an Oregon DEQ NPDES 1200-C discharge permit. Applicant has proven, without consideration of sheet 3, that meeting erosion and sedimentation criteria is feasible, and with conditions of approval requiring submission of a more detailed and accurate 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.* Soil compaction can hinder or prevent water infiltration, causing increased runoff and hindering root development. Applicant must show "how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil de-compaction or other appropriate practices." Applicant provided a January 2018 narrative soil compaction relief plan by registered professional engineer, Mark Risch of Beacon Civil Engineering & Land Surveying, and a new illustrated soil compaction plan by registered professional engineer, Erik J. Huffman, also of Beacon Civil Engineering & Land Surveying.

Compaction occurs in construction, vehicle travel, and material, equipment and soil staging and storage areas. Prevention, post construction, and end-of-serviceable life de-compaction is important for keeping the site's farmland healthy. The site's silt loam soils have low predisposition to compaction. Soil compaction will be measured before and after construction. The narrative plan describes four types of compaction areas that require various methods of relief:

Primary areas. Topsoil is removed in these areas, and they will be remediated using a non-inversion, agricultural subsoiler. The topsoil will be replaced with originally removed or same classification topsoil, and a disc and harrow will be used to de-compact and level the area.

Secondary areas. In these areas, no soil is removed but the area is still compacted. Remediation will be by disc and harrow de-compaction and leveling. Topsoil/subsoil mixing will be avoided.

Trench areas. These are areas of pipe, wire and conduit installation. Trenches will be backfilled with originally removed or same classification topsoil, and de-compacted to match surrounding soils.

Exception areas. Areas intended to remain compacted during the life of the facility will remain compacted.

Soil compaction will be prevented where possible by avoiding on-site traffic during moist or wet conditions, and confining traffic to the same wheel tracks. Compaction relief will be conducted in dry weather. Soil inversion will be avoided. Exposed soils will be replanted with native vegetation. One thing missing from the plan is showing how the site, including exception areas, will be remediated at decommissioning. With a condition of approval requiring applicant to submit a final, comprehensive de-compaction plan that includes de-compaction on decommissioning, and requiring applicant to follow the plan, 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) does not limit this provision to on-site impacts. On and off-site impacts are considered. Weed control is important for keeping the subject site free from noxious and undesirable weeds, and keeping it from becoming a source of infestation for other properties. Weed seeds and starts can be carried into and out of a site by air, water, equipment, clothing, and so on. The proposed solar site directly abuts on or off-site farm operations on three sides. The subject site is separated from farm property to the north by Wilco Highway and railroad rights-of-way, and a vegetative buffer between the site and the railroad tracks. Erosion, sedimentation, and compaction plans discussed above will help prevent weed transportation via runoff. Applicant also provided a weed management plan, prepared by Andrew Allison, an Ecological Land Services, Inc. senior wetland scientist. The plan aims to prevent and control noxious and undesirable weeds that are injurious to crops, livestock, and agricultural practices. The plan provides listings of noxious and undesirable weeds of concern, but the listings are not exclusive and the plan is flexible enough to respond to changing on-site conditions. No noxious weeds are currently on the subject property. Construction crew will wash and inspect equipment prior to coming onsite and before leaving the site, to reduce possible cross-contamination between work sites. Weed identification pamphlets published by the Marion County Weed Control District (MCWCD) will be available to construction crews to help monitor the site. Routine inspection will start with a pre-construction inspection, followed by weekly surveys during construction, and monthly surveys for the first 12 months after end of construction. Exposed soils are more susceptible to weed growth, so the site will not be stripped clean and after construction, exposed areas of the site will be planted to native grasses to help keep unwanted vegetation from becoming established. If the site is weed free after 12 months, inspections will be done quarterly for the life of the facility.

If noxious or undesirable weeds are found on-site, the first action will be manual removal. If hand removal is impractical, herbicide would be applied by a certified applicator. Mowing or grazing may also be employed. If herbicides are employed, glyphosate and imazapyr would be used. Both target a broad range of species, and are lower in toxicity to birds, mammals and fish. To prevent harm to desirable plant species, spot rather than broad application will be used. The monitoring portion of the plan does not trigger seeking MCWCD assistance until weed coverage exceeds five percent for noxious weeds and 20% for undesirable weeds. Twenty percent of a 12-acre site is 2.4 acres. Having a large portion of the site covered with undesirable weeds may invite off-site infestation when farming takes place just beyond the perimeter chain link fence in three directions. Requiring a 5% trigger for noxious and undesirable weeds will better protect surrounding crops, livestock and agricultural practices. With this modification of the weed management plan and a long-term maintenance agreement as conditions of approval, the subject and surrounding properties will be better protected. Applicant must submit a final weed mitigation and control plan and maintenance agreement to the Marion County Planning Division for review and approval. As conditioned, construction or maintenance activities will not result in unabated introduction or spread of noxious weeds and other undesirable weeds species, and MCC 17.120.110(B) (5) will be met.

17. *MCC 17.120.110(B) (6)-Location on high-value soils.* The subject property is 100% high-value farmland. MCC 17.120.110(B) (6) (a) is met.
18. *MCC 17.120.110(B) (7)-Other solar sites.* Applicant provided an aerial photograph annotated with distances between solar facilities, showing all are over one mile away. There is no countervailing evidence. 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 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). This will be made a condition of approval. As conditioned, MCC 17.120.110(E) will be 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. Applicant explains that decommissioning is a condition of the property lease and says, given the salvage value of materials, there is ample incentive to properly decommission the site. Applicant also accepts a condition of approval requiring applicant to be responsible for retiring the facility at the end of its useful life. A condition of any approval will require applicant to sign an ongoing site maintenance and decommissioning agreement, binding to

applicant and future owners. The document shall be recorded with the county. As conditioned, bonding under MCC 17.120.110(F) is not required.

MCC 17.136.060(A)

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

1. The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary.
2. Adequate fire protection and other rural services are or will be available when the use is established.
3. The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality.
4. Any noise associated with the use will not have a significant adverse impact on nearby land uses.
5. The use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan inventory of significant mineral and aggregate sites.

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

Applicant looked at farm uses on surrounding properties within 1,000' of the subject property. The 1,000' study area is reasonable given that the land use hearing notification area, the presumed of interest in the EFU zone, is 750' from the property boundary. Surrounding properties are zoned EFU and are mostly in farm use. The field area where the array will be sited is currently farmed in conjunction with another parcel and is in grass seed. Cane berries are planted in fields north of Wilco Highway. South of highway and railroad rights-of-way, fields are in hay and grass seed production. According to applicant, typical farm practices taking

place for these types of agricultural enterprises can include plowing, disking, burning, spraying, pruning, and hand or machine harvesting. Some of these practices may produce dust that could settle on the solar modules but applicant expressed no concern and agreed to sign and record a farm/forest declaratory statement acknowledging and accepting surrounding farm practices.

No comments on the application were received from north of the highway, which is well separated from the proposed use by distance and vegetative buffer. Several comments came from south of the highway, where neighboring properties are more connected to the solar array area. Comments relate to drainage, noise, ground and well contamination from weed control herbicides and sterilants, tax incentives for commercial use of farmland, need for the use, non-local end user, property devaluation, potential eyesore, runoff increases, site abandonment and decommissioning guarantees, and loss of prime farmland.

EFU zone uses allowed, allowed-subject-to-conditions and conditionally permitted are prescribed by the state. At time of application, photovoltaic solar power generation facilities were conditionally permitted in the Marion County EFU zone when applicable criteria were met. This provision has since been removed from the county's EFU zone, but land use laws in effect at the time applications are deemed complete apply. Placement on high-value farmland alone is not disqualifying.

Property value, tax incentive, eyesore, tax incentive, and need for the facility are not related specifically to farm uses or practices.

Site drainage is addressed in applicant's erosion, sediment and soil compaction plan, which will protect neighboring and down-flow properties from significant drainage impacts. Marion County PW will also require applicant to provide a civil site plan to the PW Engineering Section for review and approval to addresses pre- and post-construction erosion control BMPs related to stormwater runoff. An Oregon Department of Environmental Quality (DEQ) national pollutant discharge elimination system (NPDES) 1200-C erosion control permit will also be required. With these as conditions of approval, it is more likely than not that no additional stormwater discharge will occur.

Applicant submitted a weed management plan with this application and it addresses herbicide use. No noxious weeds are currently on the subject property and the site will not be wholly scraped or left bare. All exposed soils will be reseeded with native vegetation. Site inspection will be conducted weekly during construction, monthly for the first 12 months, and quarterly for the life of the facility. If noxious or undesirable weeds are found onsite, the first action will be manual removal. If hand removal is impractical, herbicide would be applied by a certified applicator. If herbicides are employed, glyphosate and imazapyr would be used. Both target a broad range of species, and are lower in toxicity to birds, mammals and fish. There will be no broad herbicide application. With a condition

requiring adherence to the weed management plan, herbicide groundwater contamination is unlikely.

The solar field will not be disturbingly loud (see V(25) below) and will have no rotating parts. Once in place, solar panels are passive collectors and generate no emissions except equipment noise which must not exceed MCC 8.45 standards. No farm uses that might be noise sensitive, such as livestock grazing, are alleged in the area. Cane berry and grass seed production are unlikely to be impacted by noise associated with the use.

Rodent infestation from the site could be problems for neighboring farms if not sufficiently addressed. A rodent pest control plan was submitted with the application that can be feasibly implemented and will be required as a condition of approval.

Site abandonment does not appear likely here. Expenses in this type of venture mostly occur upfront at time of development. Once installed, incentive to abandon would be less because there are fewer upkeep and management expenditures. Decommissioning the site, including equipment removal and property remediation, is required by applicant's property lease contract, and will be a condition of land use approval. A condition will also require applicant to sign and record an ongoing site maintenance agreement, binding on applicant and future owners.

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 Wilco Highway, a state highway. PW LDEP did not request conditions of approval and applicant stated no objections to PW LDEP engineering requirements. Woodburn Fire District commented that applicant has demonstrated acceptable access and turnaround methods. A condition of approval can require Woodburn Fire District approval of applicant's final site access and identification plan prior to building permit issue. As conditioned, 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 overlay area, and not within or adjacent to MCCP identified major or peripheral big game habitat areas or sensitive rivers, streams or headwaters. No MCCP identified wetlands or watershed areas are on the property. The property is fairly flat so slope stability is not a problem. Adhering to an approved soil erosion, sedimentation and compaction plan will be required as a condition of approval, ensuring sufficient erosion control. Solar panels are solidly encased, emit no particulates into the air, 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. As conditioned, MCC 136.060(A)(3) will be 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. According to applicant, string inverters will be used throughout the site, and the transformer will be more central. String inverters are smaller and quieter than large central inverters that are sometimes used. Inverter noise abates as the sun goes down because electricity production declines, and stops altogether during hours of darkness. Applicant notes that noise ratings for string inverters are comparable to perceived ambient noise level of a quiet rural or suburban setting at nighttime, or about 35 to 40 decibels on an A weighted scale (dBA) within five meters (just over 16'). These levels are within MCC 8.45's 55 dBA (night) and 65 dBA (day) noise limits. Because inverters do not run during hours of darkness, they have no effect on nighttime noise levels. A very rough estimate of the distance from the solar field equipment to the nearest residential building, based on a comparison of aerial photographs and measurements taken from Assessor's map 051W17D, appears to be about 130', well over 16' feet away. It is more likely than not that noise associated with the use will have no significant adverse impact on nearby land uses. MCC 17.136.060(A)(4) is satisfied.
26. *MCC 17.136.060(A)(5)-Water impounds/mineral and aggregate sites.* No MCCP identified mineral and aggregate sites or potential water impounds are on or near the subject property. MCC 17.136.060(A)(5) is satisfied.

VI. Order

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

1. Applicant shall obtain all required permits from the Marion County Building Inspection Division.
2. Prior to issuance of building permits, applicant shall provide evidence of obtaining an Oregon Department of Environmental Quality 1200-C construction storm water permit to the Planning Division and Public Works Land Development Engineering and Permits Division.
3. Prior to issuance of building permits, applicant shall submit to MCPW for review and approval, its final, accurately 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 building permit inspection.

4. Applicant shall submit its final weed mitigation, maintenance and control plan that will include disturbed soil replanting with a weed-free local seed mix, and 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, and shall implement the plan after approval.
5. Applicant shall submit to Marion County Planning for review and approval, its final, comprehensive soil compaction plan that includes de-compaction on decommissioning, to the Planning Division for review and approval, and shall follow the plan until final de-compaction of the subject site at decommissioning.
6. Applicant shall submit a signed decommissioning agreement, binding applicant or any successor, and agreeing that at the end of its usual life, the photovoltaic solar power generation facility will be retired in substantial conformance with the decommissioning plan submitted with the application, including removing all non-utility owned equipment, conduits, structures, and foundations to a depth of at least three feet below grade, and decompacting soils as necessary to allow farm use of the solar site.
7. Applicant shall sign and submit a Farm/Forest Declaratory Statement to the Planning Division. Applicant shall record the statement with the Marion County Clerk after it is reviewed and signed by the Planning Director.
8. Applicant shall provide proof to the Planning Division that the Woodburn Fire District approved applicant's final site access and premises identification plan.
9. Applicant shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that all facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed.
10. Applicant shall implement the rodent management plan submitted to the record.
11. Applicant shall provide the Planning Division proof of ODOT and ODOT Rail access coordination and approval or waiver.
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 Planning Director prior to the expiration of the variance, shall extend the running of the variance period until the Planning 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 20th day of November 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 19th day of November 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 2nd day of November 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Norbert and Bilita Hemshorn
14585 Wilco Highway NE
Woodburn, OR 97071

Damien Hall
Ball Janik, LLP
101 SW Main Street
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Portland, OR 97204

Troy Snyder
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Roger Kaye
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Salem, OR 97302

Bruce and Cindy Hemshorn
259 Workman Drive
Woodburn, OR 97071

Dan Hemshorn and Family
14350 Wilco Highway NE
Woodburn, OR 97071

Agencies Notified

Planning Division (via email: gfennimore@co.marion.or.us)
(via email: lmilliman@co.marion.or.us)
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Code Enforcement (via email: bdickson@co.marion.or.us)
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DLCD (via email: timothy.murphy@state.or.us)
AAC Member No. 6 (no members)

Shawn Suing
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Heidi Geschwill
13610 NE Boones Ferry Road
Woodburn, OR 97071

Joel Stein
Woodburn Fire District
1776 Newberg Highway
Woodburn, OR 97071

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 2nd day of November 2018, and that the postage thereon was prepaid.


Susan Hogg
Secretary to Hearings Officer