



MARION COUNTY BOARD OF COMMISSIONERS

# Board Session Agenda Review Form

Meeting date:

Department:  Agenda Planning Date:  Time required:

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Contact:  Phone:

Department Head Signature:

**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 18-020  
Application of: ) Clerk's File No.  
WILLIAMS ACRES SOLAR, LLC ON PROPERTY ) **Conditional Use**  
OWNED BY PASQUALINA VITIRITTI, TRUSTEE )

**ORDER**

**I. Nature of the Application**

This matter comes before the Marion County Hearings Officer on the application of Williams Acres Solar, LLC, on property owned by Pasqualina Vitiritti, Trustee of the Pasqualina Vitiritti Revocable Trust, for a conditional use permit to establish a photovoltaic solar power generation facility on no more than 12 acres of a 30-acre unit of land in an EFU (Exclusive Farm Use) zone at 15018 Union School Road NE, Woodburn, Marion County, Oregon (T5S, R1W, S15, tax lot 1600).

**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:

- |    |                 |  |
|----|-----------------|--|
| 1. | Lisa Milliman   | Marion County Planning Division        |
| 2. | Damien Hall     | Attorney for Williams Acres Solar, LLC |
| 3. | Jonathan Nelsen | For Williams Acres Solar, LLC          |
| 4. | Don Holt        | Opponent                               |
| 5. | Matt Butsch     | Opponent                               |

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

- Ex. 1 April 16, 2018 letter from Damien Hall, with exhibits A through G  
Ex. 2 Amended exhibit A, with attachments

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at hearing. The record was left open until May 1, 2018 for applicant and May 8, 2018 for opponents to submit additional information into the record, and until May 15, 2018 for applicant's rebuttal.

On April 19, 2018, applicant asked, in writing, to extend its open record period to July 6, 2018. The hearings officer granted the request, extending applicant's initial open record period to 5:00 p.m. July 6, 2018, opponents' open record period to 5:00 p.m. July 13, 2018, and applicant's final open record period to 5:00 p.m. July 20, 2018. Applicant agreed in writing to extend the 150 day time limit by an additional 90 days. The following documents were submitted during the open record period:

- Ex. 3 July 6, 2018 letter from Damien Hall with attached exhibits A-K
- Ex. 4 Applicant's final legal argument from Damien Hall, July 20, 2018

On October 23, 2018 the hearings officer notified applicant that some documents submitted by applicant in exhibit 3 contained photocopying errors. Applicant submitted the documents on October 24, 2018 and, in writing, extended the 150-day time limit by two days. The additional documents, an October 24, 2018 cover letter from Damien Hall, with attached exhibits A through H, were entered into the record as exhibit 5.

#### 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 in the zone are met.
2. The subject property is on the east side of Union School Road NE, about 3,900 feet north of its intersection with Wilco Highway. The property contains two dwellings built in the early 1900's, accessory and farm structures, well, and septic systems. The parcel is described in deeds as far back as March 2, 1972 and is considered legally created for land use purposes.
3. Surrounding properties are zoned EFU and consist primarily of small to medium size farm 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 array power generation facility on 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 F as issues applicant should be aware of if the proposal is approved:

- A. Driveways must meet sight distance, design, spacing, and safety standards. At 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 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 sediment capture and volume infiltration and sediment capture will be required, typically approved for these arrays as a 6' wide x 0.5' deep swale.
- C. A mapped E-W oriented dendritic seasonal drainage flow way traverses the property; however it may have been partially farmed out. Nevertheless, upstream westward flow from the adjacent property to the east should not be blocked.
- D. Anticipated excavation work within the public right-of-way for electrical utilities requires both Work-in-R/W Permits from MCPW Engineering.
- E. 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.
- F. 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.

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

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 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 requiring 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 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 criterion regardless of incorporating language. The criteria involved in this 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 will be protected by EFU (Primary Agriculture) and SA 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 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 3223, page 354, showing that the subject property was conveyed to Pasqualina Vitiritti, Trustee of the Pasqualina Vitiritti Revocable Living Trust dated September 11, 2009, on September 11, 2009. On March 7, 2018 Pasqualina Vitiritti, authorized Williams Acres Solar, LLC, to apply for this conditional use and other necessary permits. Williams Acres 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. Pasqualina Vitiritti authorized Williams Acres Solar, LLC, to apply for the subject conditional use permit on the property. Troy Snyder, Williams Acres Solar, LLC manager, signed the application for Williams Acres 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 the time, 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. 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 determine which scenario applies. Pasqualina Vitiritti owns the subject tax lot and no abutting property. Soils on tax lot 051W1501600 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 the 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 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.* The subject conditional use permit application is for a 12 acre photovoltaic solar power generation facility. The site plan has changed from the one originally submitted. The rectangular solar array site is shifted west to abut the on-site filbert orchard. As discussed in V(13) below, this configuration allows the rest of the parcel to be more effectively farmed by its lessee. Access to the site comes off Union Hill Road at the southwest corner of the property. Electric grid connection is in the same area. The access road is shorter than before, lessening its impact on the property. The site plan includes a turnaround for fire district access. All of these components are included

in the 12 acre photovoltaic facility size limit. Applicant shall submit a final site plan to the Planning Division for review and approval. The plan will accurately depict all components, dimensions and acreage of the facility. 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 a filbert orchard and farmable fields. Butsch Brothers Farms leases the farm fields as part of its agricultural enterprise. The originally proposed area and new area for the photovoltaic facility are planted to a five-year rotation of tall fescue. Matt Butsch testified that the farm fields on the subject property have been farmed in conjunction with neighboring Butsch family farmland for 35 years. According to Mr. Butsch, the original configuration would render the subject property almost unusable because it would be in the middle of their operation; it would mean shortened rows, increased headlands (equipment turning areas), and other problems. Applicant revised its site plan after the hearing and after talking with Mr. Butsch. The new plan moves the array area west to abut the existing filbert orchard. This means the farm operation will border two, rather than three sides of the solar facility, and will cause fewer equipment maneuvering problems.

Mr. Butsch also testified that the subject property contains drain tile and he was concerned that pile driving supports into the ground might damage the tile, causing on and off-site problems. Exhibit 3(F), submitted after hearing, contains a tiling management plan. The six-step plan includes tile mapping by several possible methods, importing mapping data into engineering designs, flagging tiles on the ground prior to construction, immediately repairing any construction damaged tile, rerouting tiles if needed, monitoring the property for two wet seasons and making repairs where needed. If conflicts with existing tiles are too substantial, the plan calls for retiling the entire area after the racking is in place but before the solar modules are added. The tiling plan appears well thought out and will be made a condition of any approval. As modified, 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 flat, contains WuA soils and is in grass seed production. Applicant submitted a three-sheet erosion and sedimentation control plan prepared by Erik J. Huffman, registered professional engineer. Sheet 2 of the plan shows water from the property flows northwesterly toward the Pudding River. The plan includes 31 standard erosion and sedimentation control notes on sheet 1, 14 grading and utility sediment construction notes on sheet 2, and plan detail illustrations on sheet 3. 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 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 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.* 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 March 2018 narrative soil compaction relief plan by registered professional engineer, Mark Risch and an illustrative erosion, sedimentation and soil compaction plan by registered professional engineer, Erik J. Huffman, both of Beacon Civil Engineering & Land Surveying. The March 2018 narrative was written before the planned array site was relocated, but the original and second proposed array sites are side by side, and on level ground with homogenous soils. The narrative plan applies equally to the new site.

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 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 in 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 all sides. 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, Conifer Energy Partners, LLC 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 on-site to reduce possible cross-contamination from other 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 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 onsite, 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 have lower toxicity to birds, mammals and fish. To prevent harm to desirable plant species, spot rather than broad application will be used. One portion of the plan that appears questionable is the monitoring portion that does not trigger seeking MCWCD assistance until weed coverage exceeds five percent for noxious weeds and 20% for undesirable weeds. Twenty percent of the 12-acre site is 2.4 acres. Having this much of the site covered with undesirable weeds seems to invite off-site infestation when farming takes place just beyond the perimeter chain link fence in all 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 the 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 a map of solar sites approved and under review, and an aerial photograph showing the distance in miles of the two closest solar facilities. Both are over one mile away. Applicant met its burden of proving there are no other solar facilities within one mile of the proposed solar power generation facility. MCC 17.120.110(B) (7) is met.
19. Under MCC 17.120.110(E), a condition of any approval for a photovoltaic solar power generation facility 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). Requiring a signed and recorded farm/forest declaratory statement a condition of approval satisfies MCC 17.120.110(E).
20. Under MCC 17.120.110(F), nothing in that 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 on-going 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 considering the land use hearing notification area, the presumed area of interest in the EFU zone, is 750' from the property boundary. All surrounding properties are zoned EFU and are in farm use. The Butsch farming enterprise farms the subject property (except for the orchard area) in conjunction with Butsch family holdings to the south, east and northeast, with all apparently in grass seed. Filbert orchards are north of the subject property and along the westernmost southern border. The orchard on the southern border is not adjacent to the proposed solar field area. The originally proposed area for the photovoltaic facility was on the eastern portion of the property. The subject property has been farmed by the Butsch family for 35 years and is currently on a five-year lease and planted to tall fescue. According to Matt Butsch, the original configuration would render the subject property almost unusable because it would be in the middle of his farming area, shortening rows, increasing headlands needed for turning equipment, and causing other problems. Applicant's latest site plan shows the array moved west and abutting the on-site filbert orchard, and the filbert orchard to the north owned by Senter Ohana Properties, LLC. The Senters commented on the proposal as originally submitted, stating four concerns similar to concerns expressed by others; that the proposal might set a precedence for other non-farm uses of farmland in the area; that building an access road and fencing for the site could impede farm use of the rest of the property; that the presence of the solar array and more road surface could increase



runoff and increase water from the property that already contributes to flooding on Senter Ohana properties and on Union School Road; and if the solar field became no longer useful, the site would not be maintained or removed.

EFU zone uses that are allowed, allowed-subject-to-conditions, and conditionally permitted, are proscribed by the state. At the time this application was filed, photovoltaic solar power generation facilities were conditionally permitted in the Marion County EFU zone if all applicable criteria were met. This provision has since been removed from the county's EFU zone, but in land use, laws applicable at the time applications are deemed complete apply. This proposed use is allowed to proceed and be judged on its merits. Access to the originally proposed site would require additional on-site roadway access. Access under the revised plan is shortened and will have less impact on the existing farm enterprise. And, the array will be setback 20' from the property line to accommodate field access. Solar site stormwater runoff is addressed by applicant's soil compaction and erosion control plans, which have been found adequate. Marion County Public Works (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. PW anticipates requiring a shallow drainage perimeter swale between the array and any downgradient water body or flow way to promote stormwater infiltration and sediment capture. Additionally, an Oregon Department of Environmental Quality (DEQ) national pollutant discharge elimination system (NPDES) 1200-C erosion control permit will be required. With these as conditions of approval, it is more likely than not that no additional stormwater discharge will occur. Proper on-site weed management and end-of-useful life decommissioning will be required as conditions of approval.

The plan reconfiguration helps alleviate lessee's equipment maneuvering problems and puts the farm enterprise on two, rather than three sides of the solar field. Mr. Butsch testified that the subject property contains drain tile and was concerned that driving array supports into the ground could damage tile and cause problems on and off-site. In exhibit 3(F), applicant provided a tiling management plan to address the issue. The plan includes tile mapping by several possible methods, importing mapping data to the engineering design, flagging tiles on the ground prior to construction, repairing any construction damaged tile immediately, rerouting tiles if needed, monitoring the property for two wet seasons, making repairs where needed, and, if conflicts are too substantial, retiling the entire area after racking is in place but before solar modules are added. Implementing the plan will be required as a condition of any approval. The Senters' made no argument that the proposal would interfere with filbert production or other farming on abutting or nearby Senter Ohana properties. This is consistent with the property owner allowing the array to abut the on-site filbert orchard.

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. 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 and can be feasibly implemented. Applicant must also submit a farm/forest declaratory statement as a condition of approval. As conditioned, applicant has proven it is more likely than not that the proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. MCC 17.136.060(A)(1) is satisfied.

23. *MCC 17.136.060(A)(2)-Adequate services.* Utility lines are available to the subject property. No new well or septic systems are proposed or required for the use. The solar site will be accessed from Union School Road NE, a county roadway. 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 the Monitor Fire District to sign off on a site access and identification plan for the site prior to issuance of building permits. 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, 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 flat so slope stability is not a problem. Soil erosion, sedimentation and compaction plans are required as conditions of approval. Erosion will be sufficiently controlled. The solar panels are solidly encased, emit no particulates into the air, and leach no materials into groundwater. A question about transformer oil leakage was raised at hearing. Applicant provided specifications for the type of transformer that will be used, and information on eco friendly oils that can be used in the transformer. An eco friendly oil, such as the ones shown in applicant's literature shall be used to help protect land and water resources. 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. Multiple string inverters will be throughout the site, and the transformer will be more central. String inverters are smaller and quieter than large central inverters that are sometimes used. All inverter noise abates as the sun goes down because electricity production declines, and it stops altogether during hours of darkness. In exhibit 2's exhibit A memorandum, 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'), and are within MCC 8.45's 55 dBA (night) and 65 dBA (day) noise limits. The referenced noise studies are in the record at exhibit 3. Because inverters do not run during hours of darkness, they have no affect 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 051W15, appears to be about 100' at most, but is still 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 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 implement its tiling plan.
8. 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.
9. Applicant shall provide proof to the Planning Division that the applicable fire district has approved applicant's access and premise identification plan.
10. 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.
11. Applicant shall implement the rodent management plan submitted to the record.
12. Applicant shall ensure environmentally desirable transformer fluids are used in the on-site transformer.
13. 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.
14. 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 14<sup>th</sup> 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 13<sup>th</sup> 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 29<sup>th</sup> day of October 2018.



Ann M. Gasser  
Marion County Hearings Officer

CERTIFICATE OF MAILING

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

Troy Snyder  
3519 NE 15<sup>th</sup> Street, #325  
Portland, OR 97212

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

Damien Hall  
Ball Janik LLP  
101 SW Main Street  
Suite #1100  
Portland, OR 97204

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)  
AAC Member No. 6-1 (no members)

Jonathan Nelsen  
4207 SE Woodstock Blvd. #326  
Portland, OR

Thomas and Patricia Senter  
Senter Ohana Properties, LLC  
14557 Union School Road NE  
Woodburn, OR 97071

Don Holt  
P.O. Box 848  
Mt. Angel, OR 97362

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

Matt Butsch  
15968 Union School Road NE  
Woodburn, OR 97071

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

Mike Erwert, Fire Chief  
Monitor Rural Fire  
Protection District 58  
15240 Woodburn-Monitor Road  
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 29<sup>th</sup> day of October 2018, and that the postage thereon was prepaid.

  
\_\_\_\_\_  
Susan Hogg  
Secretary to Hearings Officer