



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: November 21, 2018

Department: Public Works Agenda Planning Date: Nov. 15, 2018 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision approving Conditional Use (CU) Case 18-018/Fruitland Creek Solar, LLC.

Issue, Description & Background The Marion County Hearings Officer issued a decision on November 9, 2018, approving CU 18-018. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

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

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

List of attachments: Hearings Officer's decision.

Presenter: Joe Fennimore

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

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

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the)
Application of:)
FRUITLAND CREEK SOLAR, LLC ON PROPERTY)
OWNED BY JAMES W. OWENSBY, TRUSTEE OF)
THE JAMES W. OWENSBY REVOCABLE LIVING)
TRUST)

Case No. CU 18-018
Clerk's File No.
Conditional Use

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Fruitland Creek Solar, LLC, on property owned by James W. Owensby, Trustee of the James W. Owensby Revocable Living Trust, for a conditional use permit to establish a photovoltaic solar power generation facility on approximately 8 acres of a 13.17-acre unit of land in an SA (Special Agriculture) zone at 6025 State Street, Salem, Marion County, Oregon (T7S, R2W, S28D, tax lot 400).

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 17.137.

III. Public Hearing

A public hearing was held on this matter on April 11, 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. | Joe Fennimore | Marion County Planning Director |
| 2. | Damien Hall | Attorney for River Valley Solar, LLC |
| 3. | Troy Snyder | For River Valley Solar, LLC |
| 4. | Harold Smith | Opponent |
| 5. | Mike Whygle | Opponent |

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

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| Ex. 1 | April 9, 2018 cover letter from Damien Hall, with attached exhibits A through D |
| Ex. 2 | April 4, 2018 letter from James W. Owensby |
| Ex. 3 | Map of solar sites in Marion County as of March 21, 2018 |
| Ex. 4 | Statement in opposition by Harold Smith, Trustee |

No objections were raised to jurisdiction, conflict of interest, or to evidence or testimony presented at hearing. At hearing and in exhibit 4, Harold

Smith, Trustee of the Smith Living Trust, objected to notice, stating that the tiny print on the site plan in the file made the document unreadable, making notice insufficient, and stating the application should be denied. ORS 197.763 and MCC 17.111.030 contain state and local notice requirements. Under MCC 17.111.030(B)(8), notice of a hearing must include a statement that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and that copies can be provided at reasonable cost on request. The notice of public hearing states the "application, documents and applicable criteria are available for review at no cost and copies are available." While not word for word, essential required information is in the hearing notice. The hearings officer finds no notice issue.

The hearing was closed on April 11, 2018, but the record was left open until April 18, 2018 for opponents and until April 25, 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 applicant's request to extend its open record period to July 6, 2018, gave opponents until July 13, 2018 to submit additional information to the record, and then gave applicant until July 20, 2018 for its final submission. The following documents were submitted during the open record period:

- Ex. 5 April 16, 2018 letter from Harold Smith, Trustee, with listed attachments
- Ex. 6 Email correspondence between Gilman Fennimore and Damien Hall
- Ex. 7 June 25, 2014 Statesman Journal article about PGE solar application
- Ex. 8 April 17, 2018 exhibit A memorandum by Damien Hall with attached documents
- Ex. 9 July 6, 2018 transmittal letter from Damien Hall, with attached exhibit A memorandum and documents
- Ex. 10 July 20, 2018 final legal argument from Damien Hall

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 Special Agriculture in the MCCP and zoned SA. The intent of the designation and zoning is to promote and protect commercial agricultural operations. Non-farm uses, such as solar power generating facilities, can be approved where they do not have a significant adverse impact on farming operations in the area and meet all conditional use approval criteria.
2. The subject parcel is addressed at 6025 State Street, and is north of State Street, between 59th Avenue SE and 63rd Avenue NE, off of the old State Street right-of-way. The old State Street right-of-way is a classified local access road; a public right-of-way under county jurisdiction, but not maintained by the county. An electric transmission line easement burdens the northern portion of the property. The subject property is actively farmed and contains a dwelling and accessory farm structures. Farm dwelling

case FD84-14 approved the on-site farm dwelling. The parcel is considered a legal parcel for land use purposes.

3. Adjacent property to the west is zoned SA, is in farm use and contains MCCP-identified wetlands. Directly north, a vacant former railroad right-of-way is split zoned SA next to the subject property, and AR (Acreage Residential) on the north half. Properties north of the former railroad right-of-way, are zoned AR and contain rural residential homes. Eastern properties are zoned EFU (Exclusive Farm Use) and are in farm use. Properties to the south across old State Street, are zoned I (Industrial) and contain a solid waste hauling business. SA zoned parcels south of State Street are in farm and rural residential uses.
4. *The Soil Survey of Marion County Area, Oregon* indicates that 100% of the subject property consists of high-value farm soils.
5. Applicant proposes a photovoltaic solar power generation facility on about eight, but 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 (MCPW) Land Development and Engineering Permits Section (LDEP) provided engineering requirements A through G as issues applicant should be aware of if the proposal is approved:

- A. Driveways must meet sight distance, design, spacing, and safety standards. At time of application for building permits, an Access Permit will be required [MCC 11.10].
- 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. 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. Any excavation work within the public right-of-way for electrical utilities requires permits from MCPW Engineering.
- 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.
- F. The subject property is within the unincorporated area of Marion County and is subject to assessment of Transportation System Development Charges (SDCs) upon application for building permits, per Marion County Ordinance #00-10R.

G. The Property Owner and Developer are advised that the Old State Street alignment to which the subject property fronts is classified as a Local Access Road public right-of-way, not maintained by Marion County.

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

Marion County Building Inspection Division commented that a building permit is required for new construction.

Marion County Onsite Wastewater Management Office commented that the septic system on the property needs to be located and undisturbed, and advised applicant to call to discuss permits that may be needed.

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 SA zoning. The subject property is designated Primary Agriculture and zoned SA. 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 SA 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 3893, page 219, showing that the subject property was conveyed to James W. Owensby, Trustee of the James W. Owensby Revocable Living Trust. On March 8, 2018, James W. Owensby authorized Fruitland Creek Solar, LLC to apply for this conditional use and other necessary permits related to this application. Fruitland Creek 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 an agent authorized in writing by the property owner. On March 8, 2018, property owner James W. Owensby authorized Fruitland Creek Solar, LLC to apply for this conditional use and other necessary permits related to this application for the subject property. Troy Snyder, Fruitland Creek Solar, LLC manager, signed the application for Fruitland Creek 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 17.137.050(F)(3) listed a photovoltaic solar power generating facility, subject to MCC 17.120.110, as a conditional use in the SA 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 SA zone purpose statement:

The SA (special agriculture) zone is applied in areas characterized by small farm operations or areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. The farm operations range widely in size and include grazing of livestock, orchards, grains and grasses, Christmas trees and specialty crops. The range in size of management units presents no significant conflicts and allows optimum resource production from areas with variable terrain and soils. It is not deemed practical or necessary to the continuation of the commercial agricultural enterprise that contiguous ownerships be consolidated into large parcels suitable for large-scale management. Subdivision and planned developments, however, are not consistent with the purpose of this zone and are prohibited.

This zone allows the flexibility in management needed to obtain maximum resource production from these lands. It emphasizes farm use but forest use is allowed and protected from conflicts. The SA zone is intended to be applied in areas designated special agriculture in the Marion County Comprehensive Plan.

The SA 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.

The SA zone retains Class I through IV soils in commercial farm units comparable to those in the vicinity or in small-scale or specialty commercial farms where the land is especially suited for such farming. The SA zone is intended to be a farm zone consistent with 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 17.137 and by reference, MCC 17.120.110, are intended to carry out the purpose and intent of the SA zone for this application. Meeting these criteria ensures a proposal is in harmony with the purpose and intent of the SA 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 17.137.060(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 Owensbys own the subject tax lot and no abutting property. Soils on tax lot 072W28D00400 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 137.130(D) refines the high-value farmland rule to include only those definitions that apply in the Marion County SA 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 Amity silt loam (Am), as 7.3% of soils on the property, class IV, Bashaw clay (Ba), as 3.7%, class IV, Dayton (Da) silt loam, as 8.1%, class I, prime Willamette silt loam (WIA), as 15.6%, class II, prime Woodburn silt loam, 0 to 3% slopes (WuA), as 21.9%, and class II, Woodburn silt loam 3 to 12% slopes (WuC), as 43.4% of the property. All soils are high-value farm soils under MCC 17.137.130(D). The property is high-value farmland. MCC 17.120.110(B), (E) and (F) apply.

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

provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;

4. Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;
5. Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable 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 an approximately 8-acre (but no more than 12-acre) photovoltaic solar power generation facility. Access to the site will be from the southeast corner of the property, off of the old State Street right-of-way, the shortest route to the solar site. A fire district turnaround is included in the plan. The point of electric grid connection appears to be an off-site power pole in the public right-of-way. Points of connection are considered part of a photovoltaic solar power generating facility, and all on-site portions of the connection and its acreage must be accounted for on a final site plan, along with all other components, and must be included in the 12-acre 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 containing farm buildings, dwelling and outbuildings, and the unused portion of the farm fields will not be affected by the solar array. 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 dwelling, farm accessory structures, and an actively farmed field in a horseshoe around the structures. The property owner worked with Fruitland Solar to make sure the access and the rear portion of the property can still be grazed. The home and farm-related accessory buildings will also not be disturbed. The proposed approximately 8-acre 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 contains a variety of high-value farm soils and is currently grazed. The property slopes downward from the east, toward a partially on-site, but mostly off-site, wetland area to the west.

Applicant submitted a three-sheet erosion, sediment and soil compaction plan prepared by a registered professional engineer. Sheet 1 of the plan identifies applicant as Eola Solar, LLC rather than Fruitland Creek Solar, LLC. Sheet 1 also describes the site soil classification as mostly Dayton silt loam with a portion also consisting of Amity silt loam. Those two soils are on the property, but so are Bashaw, Willamette and two classes of

Woodburn soils. Neither Amity nor Dayton predominates, whether looking at the property as a whole or just looking at the solar array area. (See NCRS Web Soil Survey report map, and map unit legend table.)

The sheet 1 narrative description states, "THE SITE IS AN AGRICULTURAL FIELD WITH SOME BUILDINGS ON THE PROPERTY. THE SITE IS NORTH OF STATE STREET. SIMILAR AGRICULTURAL LANDS SURROUND THE PROPERTY TO THE SOUTH, WEST AND NORTH. FARM BUILDINGS AND RESIDENTIAL BUILDINGS ARE LOCATED SOUTH AND ADJACENT TO STATE STREET." The subject site is north of State Street, but not directly north; it sits north of the old State Street right-of-way. The property's buildings are not adjacent to State Street. Similar agricultural property is to the south but not directly south; it is beyond the old State Street right-of-way, two I zoned parcels that house a garbage hauling business, and the State Street right-of-way. North of the subject property, other than a vacant 45' SA zoned strip, property is zoned AR and is in residential rather than farm use. Similar agricultural lands are to the west as stated in the narrative. Not mentioned in the narrative are farmed EFU properties east of the property.

Site specific details in the plan are lacking on sheet 1, but it contains 31 standard erosion and sediment control notes that still apply. Sheet 2 confirms the site will not be stripped, that there will be no mass grading, and that excavation will be limited to the proposed entry road, and it contains 14 standard grading and utility erosion and sediment construction notes. Sheet 3 shows detailed BMP illustrations. Altogether, the plan shows effective drainage and sediment control is feasible and can be achieved with appropriate precautions. And, prior to building permit issue, MCPW LDEP will require additional detailed site plans showing grading, stormwater runoff management and permanent BMPs that will prevent concentrated flow of stormwater. An Oregon DEQ NPDES 1200-C discharge permit is also required. With conditions of approval requiring submission of an accurately detailed final erosion and sediment control plan, LDEP review and approval of a 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 hampering root development. Unnecessary soil compaction must be avoided or timely remedied. Mark Risch, registered professional engineer of Beacon Civil Engineering & Land Surveying, provided four general soil compaction notes on sheet 1 of the illustrated erosion, sediment and compaction plan, but more importantly, provided a March 2018 narrative soil compaction relief plan. The narrative soil compaction relief plan states on-site soils are 98% silt loam soils and only 2% clay soil. Silt loam soils have lower predisposition to compaction than clay soils. Compaction occurs in construction, vehicle travel, and material, equipment and soil staging and storage areas. Prevention, and post construction and end-of-serviceable-life de-compaction, are important for keeping the site's farmland healthy. Applicant's 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 measured before and after construction for comparison. 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. The plan also needs to show 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) is not limited to on-site weed impacts, so off-site impacts are also considered. Proper weed control is important for keeping the subject site free from noxious and undesirable weeds, and keeping the site from becoming a source of infestation for other properties. The proposed solar array will directly abut on or off-site farm operations. No farm operations are on the industrial property to the south. On-site agricultural operations will continue on the northern portion of the subject property. North of that is a vacant, 90' wide, former railroad right-of-way zoned SA on its lower half. Though not currently in farm use, the property must still be protected from weed infiltration. Properties east and west are zoned for and currently in agricultural use, and must also be protected.

Weed seeds and starts can be carried into and out of a site by air, water, equipment, clothing, and so on. Erosion, sedimentation, and compaction plans discussed above will help prevent weed transportation via runoff. Applicant also provided a weed management plan, prepared by senior wetland scientist, Andrew Allison, of Ecological Land Services, Inc. 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 known to be on the subject property. Construction crew will wash and inspect equipment prior to coming on-site 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 an 8-acre site is 1.6 acres. Having a large portion of the site covered with undesirable weeds could cause weed infestation on the subject and abutting farm fields. 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.* A Marion County generated solar site map shows no solar facilities within one mile of this proposed solar power generation facility. A 27-acre solar field on P (Public) zoned land was approved about a half mile from the subject site in 2014, and was discussed at hearing. Proof was later provided showing that the approval was never implemented and expired in 2017. 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 17.137.060(A)

21. Under MCC 17.137.060(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 17.137.060(A)(1)-Farm practices.* MCC 17.137.060(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 the 750' land use hearing notification area is the presumed area of interest in the SA zone. Directly north of the subject property is a long, 90' wide tax lot that is split zoned SA on the south half and AR on the north half. The property is vacant and in no apparent farm use. Properties north of that are zoned AR and in rural residential use. Abutting to the west is a 20-acre SA zoned parcel in grass seed. To the south of the subject property is the 50' wide old State Street right-of-way, two I zoned properties, and the 85' to 90' State Street right-of-way, with SA zoned farmland in hay and grass seed beyond. Directly east is an EFU zoned sod farm. 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 area farmers.

A final site drainage plan will be implemented to address erosion, sedimentation and soil compaction, and will protect neighboring and down-flow properties from significant drainage impacts. Marion County PW will also require a civil site plan for the PW Engineering Section review and approval to address 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 that shows the site will not be wholly scraped or left bare, and 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, but there will be no broad herbicide application.

Once in place, solar panels are passive collectors and generate no emissions except equipment noise that must be within MCC 8.45 noise standards. And, no noise-sensitive farm uses are alleged in the area. The property owner intends to continue grazing non-array portions of the property. Neighboring grass seed and hay operations are unlikely to be impacted by solar field noise. Rodent infestation from the site could be a problem for neighboring farms if not sufficiently addressed, but applicant provided a rodent pest control plan that can be feasibly implemented, and adherence to the plan will be required as a condition of approval.

As conditioned, 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 17.137.060(A) (1) is satisfied.

23. *MCC 17.137.060(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, though the current septic system and drain fields will need to be located and avoided. The solar site will be accessed from the old State Street right-of-way, near its easterly intersection with State Street. The old right-of-way is a local access road, which is a public right-of-way under county jurisdiction but that, by state law, cannot be maintained or improved by the county. Applicant will need to ensure the road is not further degraded during construction of the solar site. Applicant stated no objections to PW LDEP engineering requirements. Marion County Fire District 1 (MCFD1) did not comment on the application, but fire district signoff on applicant's site identification and access plan will be made a condition of approval. As conditioned, adequate services are or will be available upon development. MCC 17.137.060(A) (2) is satisfied.
24. *MCC 17.137.060(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 MSCP identified major or peripheral big game habitat areas or sensitive rivers, streams or headwaters. No watershed areas are on the property, but MSCP identified wetlands occupy a small portion of the northwest corner of the property. The on-site wetland is a small portion of a larger wetland system on the adjacent parcel. The property is fairly flat so slope stability is not a problem. Adhering to a final soil erosion, sedimentation and compaction plan will be required, as will MCPW and DEQ stormwater plans and permits. 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 137.060(A) (3) will be met.
25. *MCC 17.137.060(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. Large central inverters contain cooling fans. According to applicant, string inverters will be used throughout the site, but the transformer will be more centrally located. 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 affect on nighttime noise levels. The nearest residential dwelling is the on-site dwelling, but the nearest off-site residential building will be just north of the former railroad property. Judging from the 90'-wide former railroad property illustrated on maps and aerial photos, the nearest house is over 200' from the proposed array site; well past 16' feet. It is more likely than not that noise associated with the use will have no significant adverse impact on nearby land uses. MCC 17.137.060(A) (4) is satisfied.

26. MCC 17.137.060(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 17.137.060(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 approximately 8, but no more than 12 acres, in an SA 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, including septic related permits.
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 its grading and stormwater management civil site plan. 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, including a no more than 5% undesirable weed trigger MCWCD consultation, 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 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 Marion County Fire District 1 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. 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.
12. 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.

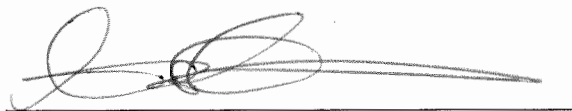
VIII. Effective Date

The application approved herein shall become effective on the 27th 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 26th 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 9th 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:

James W. Owensby
6025 State Street
Salem, OR 97317

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

Troy Snyder
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Agencies Notified

Planning Division (via email: gfennimore@co.marion.or.us)
(via email: breich@co.marion.or.us)
(via email: lmilliman@co.marion.or.us)
Code Enforcement (via email: bdickson@co.marion.or.us)
Building Inspection (via email: twheeler@co.marion.or.us)
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AAC Member No. 3-1 (no members)

Harold Smith
6255 Carver Court NE
Salem, OR 97317

Mike Whygle
6234 Carver Court NE
Salem, OR 97317

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 9th day of November 2018, and that the postage thereon was prepaid.



Susan Hogg
Secretary to Hearings Officer