



OFFICE OF COUNTY COUNSEL

PUBLIC SERVICES BUILDING

2051 KAEN ROAD | OREGON CITY, OR 97045

MEMORANDUM

TO: Board of County Commissioners

FROM: Nate Boderman, Assistant County Counsel 

DATE: January 30, 2018

RE: Jackson County LUBA Decision

**Stephen L. Madkour**  
County Counsel

**Kathleen Rastetter**  
**Chris Storey**  
**Scott C. Ciecko**  
**Alexander Gordon**  
**Amanda Keller**  
**Nathan K. Boderman**  
**Christina Thacker**  
**Shawn Lillegren**  
**Jeffrey D. Munns**  
Assistants

At the Business Meeting on November 30, 2017, the Board asked that I prepare a summary of the recent decision from the Oregon Land Use Board of Appeals (LUBA) which affects a pending application from Pacific NW Solar for a Reasons Exception to Statewide Planning Goal 3 (Agriculture) and a Conditional Use permit for the construction and operation of photovoltaic solar power generation facility on 70-80 acres of land that is zoned Exclusive Farm Use (EFU). Recall, subsequent to the Board's oral vote to approve this application on October 18, 2017, LUBA issued a decision in a case out of Jackson County that involved legal questions that were similar to those at issue in the Pacific NW Solar application.

Oregon Administrative Rule (OAR) 660-033-0130(38) stipulates that a solar power generation facilities must obtain a Goal Exception pursuant to ORS 197.732 and OAR chapter 660, division 4 if the facility would preclude a certain amount of land from use as a commercial agricultural enterprise. The solar facilities at issue in both Jackson County and now in Clackamas County exceed the thresholds under the rules, thereby triggering the need to obtain an exception to Goal 3. In *1000 Friends of Oregon v. Jackson County* (LUBA No. 2017-066), Petitioners challenged the legal theories used by the County justifying the Reasons Exception to Statewide Planning Goal 3. Many of these justifications were virtually the same as those proposed in the pending application by Pacific NW Solar.

The justification to take an exception to Statewide Planning Goal 3 common to both the Jackson County matter, and the pending application by Pacific NW Solar, are as follows:

- That there is a “demonstrated need” for the facility based on the requirements of a statewide planning goal. In both cases, the parties cited to Goal 13 (Energy Conservation) to demonstrate that counties are required to develop and permit renewable energy resources, such as solar.
- That the proposed solar site needs to be sited in close proximity to an energy substation, and that these substations should be characterized as a “resource” for purposes of meeting the OAR requirements.
- That given the feasibility requirements of these facilities to have minimal elevation change, high exposure to sunlight and close proximity to electrical distribution facilities, these sites have special features that necessitate its location in the area.
- That the solar facilities should be characterized as “industrial development” for purposes of OAR 660-004-0022(3), and that these sites provide a significant comparative advantage due to the location near an energy substation.

LUBA held that none of the justifications summarized above were sufficient to justify an exception to Statewide Planning Goal 3, for the following reasons:

- Although Goal 13 requires local governments to conserve energy, the rule contains no express mandates regarding the development of renewable energy resources. Goal 13 is therefore not a “requirement” that is sufficient to justify an exception to Goal 3.
- Since Goal 13 cannot be used to justify an exception to Goal 3, unless applicant can identify another Statewide Planning Goal that validates a demonstrated need for the proposed use, it is irrelevant whether the energy substation is a “resource,” or whether the site has special features that could otherwise support a finding in favor of the proposal.
- LUBA agreed that a solar facility could be characterized as “industrial development.” LUBA disagreed, however, that close proximity to an energy substation within an urban growth boundary is a significant comparative advantage sufficient to support a reasons exception. LUBA found that the rules require that the facility or characteristic creating the comparative advantage must also be located on “rural” land, which would eliminate any facility or characteristic located within an urban growth boundary.

This decision directly undermines many of the justifications used to support a finding in favor of granting the exception to Statewide Planning Goal 3. Staff understands that LUBA’s decision has been appealed to the Oregon Court of Appeals. As it stands, the pending application before you would face serious questions before LUBA in the event of appeal.

That is not to say that an approval by the Board is necessarily improper in this case. For one, the properties are different. The Jackson County property is high-value farmland, while the Clackamas County property is predominantly low-value farmland, Although it does not make much difference for purposes of the approval criteria, from a policy perspective, the Board has signaled general support for solar power generation, while

also expressing concern over the use of high-value farmland to accommodate the use so approving this use on low-value farmland would be a fair attempt to reconcile competing policies. Additionally, solar siting on resource land remains a novel issue, and the rules will need to be tested as these uses continue to proliferate. Finally, LUBA's decision effectively leaves no path for the approval of large-scale solar operations to be sited on EFU land. Staff does not know if that is the goal of the Department of Land Conservation and Development, but unless the statutes or administrative rules are changed, the only path forward to site these types of solar facilities on arable EFU land will be to obtain a more permissive interpretation of the relevant rules.

As it stands staff would expect that, absent further guidance from the Court of Appeals, it is more likely than not that the current proposal by Pacific NW Solar would not survive an appeal to LUBA. The most defensible position at this point would be for the Board to deny the request. As noted previously, the applicant would like the Board to proceed with the approval, understands that the decision may be subject to further challenge and has agreed to assume primary responsibility for arguing the merits of any issue before LUBA that may be implicated by the Jackson County case. Applicant believes that there are reasons to distinguish this matter from the Jackson County case and that the relevant appeals will result in a more favorable interpretation. Although denial remains the most defensible position, if the Board was inclined to approve the request, for the reasons I summarized above, it would not be improper to do so.



November 30, 2017

Board of County Commissioners  
Clackamas County

Members of the Board:

**Stephen L. Madkour**  
County Counsel

**Kathleen Rastetter**  
**Chris Storey**  
**Scott C. Ciecko**  
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**A Board Order related to a previously approved exception to a Statewide Planning Goal and Conditional Use Application**

<b>Purpose/Outcomes</b>	<i>Adopt a board order related to a previously approved land use action</i>
<b>Dollar Amount and Fiscal Impact</b>	<i>None identified</i>
<b>Funding Source</b>	<i>N/A</i>
<b>Duration</b>	<i>Indefinitely</i>
<b>Previous Board Action</b>	<i>Board of County Commissioners (“Board” or “BCC”) held a public hearing on October 18, 2017, at which time the BCC took testimony and at which time the BCC voted 3-1 to approve the application, and directed staff to draft the board order and the findings of fact, both of which are included with this report.</i>
<b>Strategic Plan Alignment</b>	<i>1. Build public trust through good government.</i>
<b>Contact Person</b>	<i>Nate Boderman, 503-655-8364</i>
<b>Contract No.</b>	<i>None</i>

**BACKGROUND:**

The applicant, Pacific NW Solar, proposed a Reasons Exception to Statewide Planning Goal 3 (Agriculture) and a Conditional Use permit for the construction and operation of photovoltaic solar power generation facility on 70-80 acres of land that is zoned Exclusive Farm Use (EFU). The facility is expected to produce as much as ten (10) megawatts of electric power.

The subject parcel is comprised predominantly of low-value farmland, but contains “arable” soils. Pursuant to the County’s Zoning and Development Ordinance (ZDO) Section 401 (EFU), photovoltaic solar power generation facilities are allowed as a Conditional Use on low-value farmland, subject to OAR 660-033-0130(38), which stipulates that if such a facility is to be sited on more than 20 acres of “arable” farmland, it must obtain a Goal Exception (pursuant to ORS 197.732 and OAR 660, Division 4).

A public hearing was held on September 11, 2017 before the Planning Commission for consideration of these applications. The Planning Commission voted unanimously (7-0) to recommend approval of the proposal.

On October 18, 2017, a public hearing was held before the Board of County Commissioners, at which time testimony and evidence were presented. At the conclusion of the public hearing, a decision was made by the Board, by the vote of 3-1, to approve the applications, subject to the conditions of approval set forth in the staff report.

The Board then directed staff to draft and order and findings consistent with its decision. A copy of the Board Order implementing the oral decision, and findings and conclusions to be adopted by the Board has been attached.

Subsequent to the Board's oral vote, the Oregon Land Use Board of Appeals (LUBA) issued a decision in a case out of Jackson County that involved similar issues. LUBA's decision calls into question the basis for the decision being made by this Board. Staff understands that LUBA's decision will be, or already has been, appealed to the Oregon Court of Appeals. Regardless, the applicant would like the Board to proceed with the approval, understands that the decision may be subject to further challenge and has agreed to assume primary responsibility for arguing the merits of any issue before LUBA that may be implicated by the Jackson County case.

**OPTIONS AND RECOMMENDATION:**

The Board may do the following:

1. Affirm its prior oral vote and approve the attached Board Order and the findings and conclusions which are attached thereto.
2. Reopen the public hearing to consider whether approval of the applicant's requests is still appropriate.
3. Decline to adopt the attached Board Order and wait for resolution of the pending appeal in the Jackson County case.

Under the circumstances, Staff recommends the Board approve the attached Board Order and the findings and conclusions which are attached thereto.

Respectfully submitted,

Nate Boderman  
Assistant County Counsel