**BEFORE THE LAND USE HEARINGS OFFICER**
**OF CLACKAMAS COUNTY, OREGON**

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| Regarding an Application for a Conditional Use | ) | **Case File No.** |
| Permit to Establish a Ten Acre Photovoltaic | ) | **Z0398-18-C** |
| Solar Power Generation Facility. | ) | **(Mountain Meadows)** |

## A. SUMMARY

1. The owner is Dennis Pikkarainen, Trustee. The applicant is Meadow Mountain Solar LLC.
2. The subject property is located at 17275 South Kildeer Road, Beavercreek, OR 97004. The legal description is T3S, R2E, Section 24, Tax Lot 400 W.M. The subject property is approximately 32 acres and is zoned TBR – Timber.
3. On October 18, 2018, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. The record was left open one week for the submission of new evidence, one additional week for responses to the new evidence, and one additional week for the applicant's final legal argument.

## B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on October 18, 2018. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, county planner Clay Glasgow discussed the staff report and recommended approval of the application.
3. Troy Snyder and Sarah Sayles testified in support of the application.

4. A number of neighbors testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for new evidence, one additional week for responses to the new evidence, and one additional week for the applicant's final legal argument.

## C. FACTS

The subject property is an approximately 32-acre parcel zoned TBR. The property is located at 17275 South Kildeer Road, Beavercreek, OR 97004. The property is roughly square shaped except for property in the central northern portion of the square in other ownership – so that the property resembles a "U". The property has a single family residence as well as accessory buildings. The property is currently used to grow Christmas trees and has a wooded area on the eastern side. The property is bordered by South Kildeer Road (Kildeer) to the south and South Mountain Meadow Road (Mountain Meadow) to the west. Properties to the west, across Mountain Meadow, are zoned EFU – Exclusive Farm Use with various sizes and uses. Properties to the south and east are zoned TBR and are generally larger parcels in timber use. Properties to the north are zoned RRFF-5 – Rural Residential Farm Forest - 5 Acre Minimum. The applicant proposes to site the solar facility in the southwestern corner of the property along Mountain Meadow to the west and Kildeer to the south. The area proposed for the solar facility is currently used for growing Christmas trees. The majority of the opponents live in rural residential subdivisions to the north of the property that are accessed by Mountain Meadow.

## D. DISCUSSION

### 1. Whether the proposed use is an allowed conditional use.

Clackamas County Zoning and Development Ordinance (ZDO) 1203.03 provides the approval criteria for conditional uses. ZDO 1203.03(A) requires that the proposed "use is listed as a conditional use in the zoning district in which the subject property is located." ZDO 406 provides for the various uses allowed in TBR zones. Table 406-1 lists "Commercial utility facilities for the purpose of generating power * * *" as a conditional use. The County has consistently treated proposed photovoltaic solar power generating facilities as "commercial utility facilities for the purpose of generating power." Opponents argue that such photovoltaic solar power generating facilities are not in fact "commercial

utility facilities for the purpose of generating power" as described in Table 406-1. According to opponents, the applicant is not a utility such as PGE or Pacific Power so the proposed facility cannot be a commercial utility. Furthermore, opponents argue that "commercial utilities for the purpose of generating power" in the TBR zone are restricted to hydroelectric facilities.

Table 406-1 provides that "commercial utility facilities for the purpose of generating power" are conditional uses that must also comply with ZDO 406.05(A)(1) & (6) and (H)(2). ZDO 406.05(H)(2) provides:

> "Commercial utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR 660, Division 4. Hydroelectric facilities shall also be subject to Section 829."

Opponents' argument is difficult to follow, but apparently because the last sentence of ZDO 406.05(H)(2) mentions hydroelectric facilities and photovoltaic solar generating facilities are not mentioned, opponents believe commercial utilities for the purpose of generating power are restricted to merely hydroelectric facilities. On the contrary, ZDO 406.05(H)(2) indicates that there is a broader class of commercial utility facilities for the purpose of generating power, of which hydroelectric facilities are one member of that class. As opposed to the other members of the class of commercial utility facilities for the purpose of generating power, hydroelectric facilities must also comply with ZDO Section 829, which not coincidentally addresses "Hydroelectric Facilities."

ZDO Chapter 401 eliminates any confusion as to whether photovoltaic solar generating facilities are commercial utilities for the purpose of generating power. Table 401-1 includes "[c]ommercial utility facilities for the purpose of generating power for public use by sale, not including wind or photovoltaic solar power generation facilities" as a conditional use on EFU land. Table 401-1 further includes "[p]hotovoltaic solar power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale, subject to OAR 660-033-0130(38)" as conditional uses. Photovoltaic solar power generation facilities are clearly one type of commercial utility for the purpose of generating power. Furthermore, there is no requirement that the facility be owned or

managed by an entity such as PGE or Pacific Power. The proposed use is an allowed conditional use in the TBR zone. ZDO 1203.03(A) is satisfied.

**2. Whether the property is suitable for the proposed use.**

ZDO 1203.03(B) requires that the "characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features." The staff report explains how the characteristics of the subject property are suitable for the proposed use. To the extent opponents challenge whether the characteristics of the subject property are suitable for the proposed use, those challenges are directed at the proposed use's impacts on other properties – not the suitability of the property itself for the proposed use. ZDO 1203.03(B) only concerns the subject property itself. Other approval criteria consider the potential effects of the proposed use on other properties. ZDO 1203.03(B) is satisfied.

**3. Whether transportation system requirements are met.**

ZDO 1203.03(C) requires that the proposed use comply "with Subsection 1007.07, and safety of the transportation system is adequate to serve the proposed use." Generally, ZDO 1007.07(B) provides that development "shall be granted only if capacity of transportation facilities is adequate or will be made adequate in a timely manner." Certain developments, such as the proposed use however, are exempt from the facilities concurrency requirement. ZDO 1007.07(B)(3) provides: "Unmanned utility facilities, such as wireless telecommunication facilities, where no employees are present except to perform periodic servicing and maintenance[.]"[1] Even if the proposed use was not exempt, the facility would only create approximately one visit per month for maintenance. Solar facilities are one of the least intensive vehicle uses available for the property, and the proposed use would easily satisfy the facilities concurrency requirements if necessary.

Under ZDO 1203.03(C), the application must also demonstrate that the safety of the transportation system is adequate to serve the proposed use. Initially, opponents argue that Mountain Meadow is a private road and the applicant should not be able to use it for the proposed use. The applicant, however, explains that the only entrance to the solar facility would be via Kildeer rather than Mountain Meadow. Kildeer is not improved to

[1] The ZDO has been recently amended. The staff report cites the previous versions of these provisions. Although the numbering has changed, the language is the same.

full county standards, but the Traffic and Engineering Department explains that it is sufficient to serve the proposed development:

> "S. Killdeer Road is classified as a rural, non-maintained local roadway. Per Clackamas County Roadway Standards, the minimum right-of-way width for a rural arterial is 48 feet. The existing right-of-way width of S Killdeer Road appears to be 40 feet, based on the County Assessor's map. Although, substandard in width, based on minimal traffic generated by a solar facility, the existing right-of-way is adequate to serve the proposed development. Because, S Killdeer Road is not maintained by the county, the applicant will be required to document the condition of the road prior to construction and repair any damage caused by construction activities. The driveway serving the solar facility will be required to provide minimum intersection sight distance. Based on very low volume local road standards, a minimum of 165 feet of sight distance is the standard. It appears feasible to provide minimum sight distance at the proposed an access point on to S Killdeer Road.
>
> "The applicant is required to provide adequate on site circulation for the parking and maneuvering of all vehicles anticipated to use the solar site in accordance with ZDO section 1015 and applicable Roadway Standards requirements. The minimum access road includes a 12-foot wide gravel surface, with turnouts every 400 feet. Where an access road is at least 20 feet wide, turnouts are not required. Designated vehicle parking spaces will be required to comply with ZDO section 1015 dimensional requirements and require a surface of screened gravel or better.
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> "Based on ZDO subsection 1007.07 B3, the use qualifies for an exemption regarding transportation facilities concurrency. The principal safety concern relates to the site driveway approach with S Killdeer Road. Based on Engineering staff's site visit, and the concurrency exemption, this proposal is able to comply with the requirements of ZDO subsection 1203.03 C." Staff Report 13 (quoting Traffic and Engineering Department October 11, 2018 Memorandum).

Once established the proposed use would have extremely minimal traffic impacts. Of greater concern, as raised by opponents, is the impact of construction on a substandard road. As the quoted portion of the memorandum states, conditions of approval are proposed that would require the applicant to document the condition of the road prior to any construction and ensure that any damage caused by construction is repaired. I also am concerned by testimony from Melissa Logan regarding children walking on Kildeer from the bus stop in an area without sidewalks. Therefore, a condition of approval requiring the

applicant to erect signs requiring contractors to drive more slowly during morning and afternoon school hours should also be required. I agree with County Engineering and the staff report that, with the proposed conditions of approval, the safety of the transportation system is adequate for the proposed use. ZDO 1203.03(C) is satisfied.

**4. Adverse impacts on the neighborhood.**

ZDO 1203.03(D) requires that the "proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located." The property is in an area of mixed uses. As discussed earlier, properties to the west are zoned EFU, properties to the south and east are zoned TBR, and properties to the north are zoned RRFF-5. The only primary use raised by opponents that is allegedly substantially limited, impaired, or precluded is rural residential use. While some opponents who live on TBR or EFU land also raised the issue of the proposed use impacting their residential use, residential use is not a primary use in either of those zones. Therefore, any impact on the residential use of those opponents does not provide a basis for denying the application.[2] Residential use, however, is a primary use in the RRFF-5 zone, so impacts to such residential uses is a valid argument. Thus, the question is whether the proposed use "will alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding [RRFF-5] properties" for residential use.

In order to answer this question, I must determine what the character of the surrounding area is. Opponents argue that the character of the surrounding area is a rural residential neighborhood on large parcels, and that seems correct. In a recent case, Neighborhood Church Z0289-16-C, October 26, 2016, I explored in depth what the test of ZDO 1203.03(D) entails. As this case is likely to be appealed no matter who prevails, I quote that analysis from Neighborhood Church.[3]

"ZDO 1203.03(D) does not require a proposed use to not have any

[2] Even if impacts on residential uses on EFU or TBR properties could be considered the impacts are essentially the same as on RRFF-5 properties.

[3] During the public hearing I discussed Neighborhood Church and my interpretation of ZDO 1203.03(D). The parties had the opportunity to address that interpretation during the open record period – which the applicant did. In case any reviewing body wishes to read that decision, it is incorporated as part of this decision.

impacts at all. The fact that a proposed use may cause inconveniences and annoyances is not enough to deny an application. The text of ZDO 1203.03(D) requires that the proposed use not alter the [rural residential character of the neighborhood] in a manner that will 'substantially limit, impair, or preclude' the residential use of the neighborhood. [Opponent] cites *Morton v. Clackamas County*, 70 Or LUBA 7 (2014) for the proper interpretation of ZDO 1203.03(D). In *Morton*, a previous Hearing Officer found that a cellular tower would not violate ZDO 1203.03(D). LUBA remanded the decision because the Hearings Officer only considered whether the tower would substantially 'preclude' the use of surrounding properties for residential use. LUBA described a 'three pronged inquiry' that must occur under ZDO 1203.03(D): whether the proposed use would: (1) substantially limit; (2) substantially impair; or (3) substantially preclude - primary uses on surrounding properties. *Id.* at 10-13.

"Although there are three prongs to the inquiry under ZDO 1203.03(D), I believe they can all be distilled down to one inquiry. 'Limit' is defined as 'to confine within bounds; set a limit to; restrict; curb.' Webster's New World Dictionary. 'Impair' is defined as 'to make worse; less, weaker, etc.; damage; reduce.' *Id.* 'Preclude' is defined as 'to make impossible.' *Id.* As LUBA held, just because a proposed use does not substantially preclude surrounding primary uses that does not mean it does not substantially limit or impair those uses. If a proposed use does substantially preclude surrounding primary uses, however, it would certainly also substantially limit or impair those uses as well. I cannot imagine a situation in which a proposed use substantially precludes a surrounding primary use but does not substantially limit or impair that use as well.

"I also cannot distinguish a difference between a proposed use that 'substantially limits' a surrounding primary use and a proposed use that 'substantially impairs' a surrounding primary use. I see no distinguishable difference between the definitions for 'limit' and 'impair.' In other words, I cannot imagine a proposed use that would substantially limit a surrounding primary use but not substantially impair that surrounding use as well, and vice versa. I think the best way of explaining the substantially limit or impair standard is that the proposed use not make the exercise of a surrounding primary use substantially worse than it was before the proposed use occurs. The substantially limit or impair standard, or as I have explained it as the make substantially worse standard is a tipping point. A proposed use is going to make the exercise of surrounding primary uses substantially worse well before a proposed use substantially precludes - or makes impossible - those surrounding primary uses. Therefore, the entire inquiry under ZDO 1203.03(D) can be distilled down into whether the proposed use would substantially limit or impair surrounding primary uses, or in other words

make the exercise of those primary uses substantially worse.[4]" Neighborhood Church 9-10.

Opponents raise a number of impacts from the proposed solar facility that would allegedly substantially limit, impair, or preclude residential use of their property. Opponents argue that noise from the solar panels would disturb neighbors in the area. Generally, the only potential sound from solar facilities would be the use of inverters which have fans for cooling. The fans only operate during the day and even when operating are only as loud as a typical air conditioner. The inverters are generally placed in the middle of the solar facility, and in this case would be at least 500 feet if not further from any other residences. Sounds similar to those of an air conditioner, even if they could be heard off-site (which is doubtful) would not even come close to making rural residential use significantly worse. In the present case, however, the applicant is not even proposing to use such inverters. Instead, the applicant plans to use string inverters which do not have fans. Therefore there would essentially not be any noise at all generated by the proposed solar facility. Either with the string inverters or standard inverters, noise from the proposed solar facility would not violate ZDO 1203.03(D).

Opponents argue that glare from the solar panels would significantly limit, impair, or preclude residential use of their properties. Initially, the solar panels are designed to absorb light rather than reflect it, and any glare that is caused is similar to that of a flat body of water. Furthermore, the solar panels are angled upwards and generally glare can only be seen from elevations significantly above the panels. Opponents submitted pictures showing glare from other solar facilities. The allegedly significantly glare does not appear to be very bright – similar to that of a pond. Even if some glare is visible from the proposed solar facility it would not be extremely bright and would only last for a small amount of time when the sun is at a certain angle. As discussed later, most of the opponents cannot see the proposed site from their houses. Even if some opponents can see the proposed site, I do not see that some glare for a small amount time (assuming opponents are even looking out their

[4] I do not think this approach is at odds with LUBA's decision in *Morton*. LUBA only decided that whether a proposed use substantially limited or substantially impaired surrounding primary uses was a lower threshold then whether the proposed use substantially precluded surrounding primary uses. LUBA had no reason to consider whether there was a difference between "substantially limit" and "substantially impair" or whether a proposed use could substantially preclude surrounding primary uses without also substantially limiting or substantially impairing those uses as well.

windows at the time) comes close to making residential use significantly worse.

It is not entirely clear how many RRFF-5 neighbors would be able to see the proposed solar facility from either their houses or other parts of their property. The proposed site is screened by large existing trees to the east and northeast. The RRFF-5 opponents are generally to the northeast, north, and northwest of the proposed site. Some opponents testified that they would be able to see the proposed solar facility from their driveways. Opponents also argue that some RRFF-5 properties would be able to see the northern portion of the proposed facility from their homes, although that is not entirely clear. A number of opponents, however, testified that even though they cannot see the proposed site from anywhere on their property, the mere fact that they would have to drive by the proposed solar facility or see it while walking their dogs would substantially limit, impair, or preclude their residential use of their property. It strains credulity to believe that merely driving or walking by a solar facility on the way to one's residence somehow makes residential use of that residence substantially worse. I do not see that it affects residential use at all. Driving is not a residential use. Walking is not a residential use. Residential use involves use of a residence. Driving or walking by a solar facility would constitute minutes or even seconds out of one's day. Even if driving or walking by a solar facility could be considered a component of residential use, I do not see that having to briefly look at a facility that one considers ugly or out of place rises even remotely to the level of making residential use significantly worse.

This result is consistent with *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998). In *Tylka*, the applicants sought conditional use approval to park a recreational vehicle (RV) on their Recreational Residential zoned property. Opponents argued that seeing the RV while driving past the property would violate a prior incarnation of ZDO 1203.03(D).[5] LUBA agreed with the County that the ZDO provision was directed at conditional uses which affected the *use* of surrounding properties rather than merely viewing the conditional use while driving. *Id.* at 29 ("Petitioners do not establish how seeing the RV campsite while driving past it substantially limits or impairs residential or vacation *use* of surrounding properties * * *." (Emphasis in original)).

Some opponents testified that they could see the proposed site from their driveways.

[5] In *Tylka*, the provision was ZDO 1203.01(D), but the language was identical to current ZDO 1203.03(D).

While this is at least an actual impact to surrounding properties, I do not see that the mere fact that one can see a solar facility from somewhere on one's property is a particularly significant effect. I do not think many people spend significant amounts of time at the end of their driveways admiring the view of a Christmas tree farm. The fact that the proposed use might result in some opponents seeing a solar facility as a part of the view from their driveways or another portion of their property hardly rises to the level of making residential use significantly worse.

Opponents testified that some RRFF-5 neighbors would have views of the proposed solar facility from their homes. The closest RRFF-5 neighbors apparently live on South Sunrise Lane (Sunrise), which runs along the north of the property. The proposed solar facility would not extend all the way to Sunrise, but it appears that the proposed solar site could be seen from Sunrise. Assuming that some of the opponents could see the proposed solar site from their homes, the question is whether that would rise to level of making residential use substantially worse. Opponents argue that merely having to see the proposed solar facility should result in denial of the application. Again, I do not see that merely having a solar facility in a portion of one's view – even from one's great room window – by itself rises to the level of making residential use substantially worse. The proposed landscaping plan would provide some buffering of the solar facility even if the facility were still visible. Exhibit B from the applicant's November 1, 2018 submission shows potential views of the proposed solar facility, and it is relatively clear that the proposed solar facility would not be the only thing the neighbors would see.[6] The proposed solar facility is less than a third of the subject property and only a small fraction of the surrounding area.

In previous cases, I have discussed that potentially a cell tower that destroyed a view of Mt. Hood or Mt. St. Helens might rise to the level of making residential use significantly worse. The proposed solar facility, however, would not block anyone's views of specific sights. The opponents' only argument is that viewing the solar facility itself would make residential use substantially worse. The County allows solar facilities as a conditional use in the TBR zone. There is no requirement that such solar facilities be totally

[6] Opponents also submitted photos showing that the proposed site could be seen from other properties. Again, it is less than clear whether this view would be from residences or somewhere else on the properties. Even assuming the photographs represent views from a residence, the proposed site hardly encompasses a large portion of the view.

screened from view. Thus, the County clearly realized that people near such a solar facility would likely be able to see the facility. Therefore, the mere fact that someone can see a solar facility from their house does not mean that their residential use has been made substantially worse. Rural residential residents do not have an unconditional right not to see a solar facility. Many of the opponents argued that the character of the neighborhood is not merely rural residential but high-end rural residential with "million dollar homes." While acknowledging that other solar facilities have been approved in less upscale areas, opponents argue that solar facilities should not be allowed in such prestigious areas as their neighborhood. I reject opponents' argument that wealthy rural residential owners have a right to better views that those of ordinary rural residential owners.

Opponents also argue that the proposed solar facility would negatively affect the property values of their "million dollar homes." While the parties dispute the effect of solar facilities on property values, it is irrelevant because property values are not an approval criterion or even a consideration under ZDO 1203.03(D). *Morton*, 70 Or LUBA at 13-14; *Tylka*, 34 Or LUBA at 29.

Opponents argue that the application must be denied under ZDO 1203.03(D) due to a recent LUBA opinion: *Yamhill Creek Solar, LLC v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2018-009, October 3, 2018). In *Yamhill Creek Solar*, the Yamhill County Planning Commission (YCPC) approved a solar facility similar to the present case as a conditional use on 12 acres of high-value farm land. The Yamhill Board of County Commissioners (YCBCC) reversed the YCPC and denied the application. The Yamhill County conditional use criteria are similar to the ZDO, and the equivalent provision to ZDO 1203.03(D) is essentially identical. The YCBCC denied the conditional use application on a number of grounds, including the equivalent provision to ZDO 1203.03(D). Opponent Winston Chang (Chang) quotes what is apparently the YCBCC's finding on this issue:

> "* * * that the proposed solar facility, at the proposed location, on high value farmland, is a character-changing use, and that the preservation of the pastoral character of the surrounding area (described above) is important for continue use of farmland for farming, as well as to enable the wine industry to continue to flourish, and for continuation of the agri-tourism business and events that rely on the existing character of the

area."[7]

The applicant argues that the provisions at issue in *Yamhill Creek Solar* are different and the decision is pending at the Court of Appeals. I do not see that it matters that the decision is pending at the Court of Appeals. LUBA's decision is controlling unless the Court of Appeals reverses the decision. As far as I am aware, the Court of Appeals has not issued a decision in that case. Therefore, *Yamhill Creek Solar* is controlling.

Opponents argue that because LUBA affirmed Yamhill County's denial and the provisions are essentially identical that I must similarly deny the present application. While I agree that the "substantially limit, impair, or preclude" language is essentially identical in the two cases, I do not agree that *Yamhill Creek Solar* requires that the present application be denied. As LUBA explained, when a local government denies an application on multiple bases, LUBA will affirm the decision as long as one the bases for denial survives all challenges. In *Yamhill Creek Solar*, LUBA stated that the strongest basis for denial was under a different approval criterion that required that the proposed "use is consistent with those goals and policies of the Comprehensive Plan that apply to the proposed use." LUBA agreed with the YCBCC's conclusion that the proposed use did not comply on balance with the goals and policies of the Yamhill County Comprehensive Plan.[8] Because LUBA agreed with the YCBCC under this approval criterion, LUBA did not address the YCBCC's findings and conclusions regarding the equivalent provision to ZDO 1203.03(D). Therefore, *Yamhill Creek Solar* is of no benefit to opponents under ZDO 1203.03(D).[9]

ZDO 1203.03(D) is satisfied.[10]

**5. Whether the proposed use satisfies the comprehensive plan.**

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[7] The record in this case is rather voluminous, but as far as I can tell no one has submitted the YCBCC's decision into the record. Presumably, Chang's quote is accurate.

[8] The YCBCC's decision was also reviewed under the highly deferential standard of review of ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 257, 243 P3d 776 (2010).

[9] I do not see that the YCBCC decision (assuming Chang's quote is accurate) is of much persuasive value either. The YCBCC was clearly having second thoughts about allowing such solar facilities in general and was particularly interested in preserving a scenic entryway to wine-country tourism as the property was on a major highway entering the area. The YCBCC apparently acted on these second thoughts by later enacting a moratorium on such solar facilities. While the Clackamas County Board of County Commissioners could presumably also enact such a moratorium, they have not currently done so.

[10] If I am wrong that the inquiry can be reduced from the three-pronged inquiry of *Morton* to determining whether the proposed use would make surrounding rural residential uses substantially worse, for the reasons expressed earlier I also conclude that the proposed use would not substantially limit surrounding rural residential uses, substantially impair surrounding rural residential use, or substantially preclude rural residential uses.

ZDO 1203.03(E) requires that the "proposal satisfies the goals and policies of the Comprehensive Plan that apply to the proposed use." Opponents identify a number of comprehensive plan goals and policies they believe the proposed use does not satisfy. The staff report and the applicant address potentially applicable goals and policies and conclude that they are satisfied.

Although opponents referenced *Yamhill Creek Solar* under ZDO 1203.03(D), they barely mention the case under ZDO 1203.03(E) – which is the equivalent provision that LUBA upheld the decision based on.[11] Although the conditional use provisions are very similar, the Yamhill County comprehensive plan goals and policies are significantly different from those in the Clackamas County Comprehensive Plan. *Yamhill Creek Solar* does not support a finding that the present application does not satisfy ZDO 1203.03(E).

As LUBA explained in *Yamhill Creek Solar*:

> "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." *Yamhill Creek Solar*, slip op 11 (citing *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992)).

The parties raise of number of potentially applicable goals and policies. The Third Goal of the Citizen Involvement Chapter provides: "Provide an opportunity for every interested citizen to participate in the formative stages and throughout the planning process." I do not see that this goal applies to the proposed use, but opponents certainly have had every opportunity to participate in this process. This goal weighs in favor of approving the application.

The parties raise a number of goals and policies from the Natural Resources and Energy Chapter:

> "Water Resources – Second Goal: Minimize erosion and hazards to life or private property.

[11] The Yamhill County provision requires the proposed use be "consistent with" applicable goals and policies of the comprehensive plan while ZDO 1203.03(E) requires that the proposed use "satisfies" such goals and policies. I am not sure that is exactly the same thing, but the parties treat ZDO 1203.03(E) similarly to how the YCBCC treated their provision.

"Water Resources – Fifth Goal: Protect and enhance wetlands as a valuable source of groundwater recharge, wildlife habitat, and stormwater drainage control.

"Water Resources Policy 2.0: Apply erosion and sediment reduction practices in all river basins to assist in maintaining water quality.

"Water Resources Policy 25.0: For areas that are outside both the Metropolitan Service District Boundary and the Portland Metropolitan Urban Growth Boundary, prevent disturbance of natural wetlands (marshes, swamps, bogs) associated with river and stream corridors.

"Energy Sources and Conservation – First Goal: Conserve energy and promote energy efficiency through source development, recycling, land use and circulation patterning, site planning, building design and public education.

"Forests – First Goal: Conserve and protect forest lands.

"Forests – Third Goal: Protect, maintain, and conserve open space, environmentally sensitive areas, wildlife habitat, scenic corridors, recreational uses, and urban buffers.

"Forests – Fourth Goal: Maintain and improve the quality of air, water and land resources.

"Forests – Fifth Goal: Create conditions that will maintain or further the growth of the wood products industry.

"Forests Policy 1.0: Protect from conflicting land uses productive forest lands and related forested areas which are environmentally sensitive or otherwise require protection (watersheds, areas subject to erosion, landslides, etc.) (see Land Use Chapter). Recognize forest producing areas through appropriate zoning.

"Forests Policy 6.1: Implement tree conservation standards in conjunction with the processing of design review, land division, and conditional use applications to minimize and regulate removal of trees and other vegetation and protection of trees during construction.

"Wildlife Habitats – First Goal: Maintain and improve fisheries and wildlife habitat to enhance opportunities for consumptive and non-consumptive uses.

"Wildlife Habitats – Second Goal: Retain and enhance wetlands and riparian habitat to provide areas for fisheries and wildlife and to promote species diversity, bank stabilization, and storm water runoff control.

"Natural Hazards Policy 2.0: Prevent development (structures, roads, cuts and fills) of landslide areas (active landslides, slumps and planar

slides as defined and mapped by the Oregon Department of Geology and Mineral Industries, DOGAMI) to avoid substantial threats to life and property except as modified by 2.1. Vegetative cover shall be maintained for stability purposes and diversion of stormwater into these areas shall be prohibited.

"Energy Sources – First Goal: Conserve energy and promote energy efficiency through source development, recycling, land use and circulation patterning, site planning, building design and public education.

"Noise and Air Quality – First Goal: Maintain an environment not disturbed by excessive levels of noise.

"Noise and Air Quality – Second Goal: Promote maintenance of an airshed in Clackamas County free from adverse effects on public health and welfare.

"Air Quality Policy 3.0: Cooperate with local, regional, state, and federal agencies and industry to maintain and/or improve local air quality."

Frankly, I do not see what most of these goals and policies have to do with ZDO 1203.03(E), which involves goals and policies that "apply to the proposed use." The proposed use is a solar facility on TBR zoned land. I do not see how water resources, wildlife habitat, natural hazard, noise or air quality goals and policies have anything to do with the proposed use. To the extent any reviewing body determines that these goals and policies apply, I agree with the applicant:

"The Facility is consistent [with] goals and policies seeking to control stormwater drainage, curtail erosion and sedimentation of waterways and wetlands, and avoid development on natural hazard areas. There are no mapped rivers, streams, wetlands, or landslides on the proposed facility sites. Nevertheless, the Applicant's Erosion, Sediment & Soil Compaction [Plan] ensures that any erosion and carrying of sediment into local waters is minimized during construction with native grasses, maintain those grasses through a Weed Mitigation Plan, and landscape the majority of the project with Christmas trees. Finally, the remainder of the property will remain in forest use such that stormwater, erosion, and sedimentation should remain unchanged." November 8, 2018 Memorandum 3 (citations omitted).

The only goals and policies cited under Chapter 3 Natural Resources and Energy that potentially appear to be applicable are the first and third Forest goals to "conserve and protect forest lands" and to "protect, maintain, and conserve open space, environmentally

sensitive areas, wildlife habitat, scenic corridors, recreational uses, and urban buffers" and the first Energy Sources and Conservation policy. Opponents argue that because ten acres would be taken out of forest use that the proposed use violates the Forest goals. When the County adopted the conditional uses allowed in the TBR zone, including the proposed use, it had to weigh the competing comprehensive plan goals and policies. Even though the solar facility is not a forest use itself, the County still allows such solar facilities. If the mere fact that a solar facility would take some forest land out of forest use were enough to run afoul of ZDO 1203.03(E) then no solar facilities could be approved on TBR zoned land. The County, however, clearly allows such uses on TBR zoned land. The County struck a balance between promoting solar energy and conserving forest land by limiting such facilities to 10 acres. The ZDO has provisions that protect open spaces, environmentally sensitive areas, wildlife habitats, scenic corridors, recreational uses, and urban buffers. None of those provisions apply to the proposed use. The County balanced such competing provisions when adopting the ZDO. The County's ZDO clearly conserves forest lands and protects other beneficial attributes. The proposed use satisfies or at least does not violate these policies.

I agree with the applicant that the proposed use satisfies the first Energy Sources and Conservation policy:

> "The Facility is also consistent with policies and goals to promote energy efficiency through source development. The Applicant testified at the hearing regarding the immense and ongoing increases in the efficiency of solar panels, and development of energy sources such as the Facility helps to promote these goals and policies." November 8, 2018 Memorandum 3.

The parties raise a number of goals and policies from the Land Use Chapter:

> "Forest – Third Goal: To conserve, protect, and enhance watersheds, wildlife and fisheries resources, agriculture, and recreational opportunities that are compatible with the primary intent of the plan designation.
>
> "Forest – Fourth Goal: To minimize wildfire hazards and risks.
>
> "Forest Policy 4.PP.2: Encourage forest-related industries.
>
> "Forest Policy 4.PP.3: Prohibit land uses that conflict with forest use.

"Forest Policy 4.PP.5: Prohibit commercial and industrial development in Forest areas."

I do not see that the third Forest Goal is particularly applicable. The fourth forest goal is satisfied because the application must comply with ZDO 406.05(A)(1)(b) which specifically requires that the proposed use not increase the risk of fires. The Forest Policies at least appear to concern the proposed use, particularly Forest Policy 4.PP.5. If commercial and industrial development is prohibited on forest land, however, then no solar facilities could be approved on TBR zoned land. Again, the County clearly allows such uses. In fact the County has a list of Commercial uses that are allowed in forest zones. ZDO Table 406-1. If Forest Policy 4.PP.5 prohibited any commercial or industrial development in forest areas then many sections of the ZDO would be in violation of the comprehensive plan. When the County specifically allows certain uses in a zone, it is safe to say the County has considered the comprehensive plan and the specific provision authorizing a certain use outweighs more general goals and policies of the comprehensive plan that would otherwise make such uses impossible to obtain. I also agree with the applicant:

"* * * the remainder of the subject property will remain in forest use; the land underneath the Facility will revert to forest use after the useful life of the Facility, and the Applicant has submitted a landscaping plan which calls for retention and planting of trees. The Facility will also not conflict with forest practices or forested areas." November 8, 2018 Memorandum 4 (citations omitted).

While the goals and policies may not weigh heavily in favor of the proposed use, the proposed use does not violate these goals and policies either.

The parties raise a number of goals and policies from the Unincorporated Communities Section of the Land Use Chapter:[12]

"Unincorporated Communities – First Goal: Provide for commercial and industrial development necessary to serve surrounding Agriculture, Forest, and Rural areas.

"Unincorporated Communities – Fourth Goal: Provide a balance of residential, commercial, and industrial uses conducive to a healthy economy for the community.

"Unincorporated Communities – Fifth Goal: Provide employment

[12] The property is in the unincorporated community of Beavercreek.

opportunities for residents of the Unincorporated Community and surrounding non-urban areas.

"Unincorporated Communities Policy 4.JJ.4: Require development to be contingent upon the ability to provide public services (e.g., school, water, fire, telephone).

"Unincorporated Communities Policy 4.JJ.7.1: Limit industrial uses to: Uses authorized under Statewide Planning Goals 3 and 4;

"Unincorporated Communities Policy 4.JJ.9: Encourage commercial and industrial uses to locate in Unincorporated Communities to provide employment opportunities to residents of the communities and the surrounding non-urban area.

"Unincorporated Communities Policy4.JJ.13: Sewerage systems shall be contained within urban growth boundaries or Unincorporated Community boundaries, and shall not be allowed to expand to land outside of such boundaries, except as provided by the Oregon Revised Statutes for abandoned or diminished mill sites."

Some of these goals and policies do not appear applicable to the proposed use.[13] To the extent these goals and policies apply to the proposed use they tend to encourage the development: First Goal – "[p]rovide for * * * industrial development[.]; Fourth Goal – "[p]rovide for a balance of * * * industrial uses conducive to a healthy economy * * *."; Policy 4.JJ.9 – "[e]ncourage commercial and industrial uses to locate in Unincorporated areas * * *."[14] One policy, however, bears greater mention. Policy 4.JJ.7.1 provides: "Limit industrial uses to: Uses authorized under Statewide Planning Goals 3 and 4[.]" Opponents argue that the proposed use violates Statewide Planning Goal 4 (Forest Lands). The proposed use, however, does not violate Goal 4 because the use is specifically allowed on forestlands.[15] Therefore, the proposed use satisfies Forest Policy 4.PP.7.1. These goals and policies are satisfied and clearly weigh in favor of approving the proposed use.

The parties raise a number of goals and policies from the Transportation System Plan Chapter:

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[13] Policy 4.JJ.4 concerns the provision of public services, but the proposed use would not have anything to do with "school, water, fire, [or] telephone." Policy 4.JJ.13 concerns sewerage systems, but the proposed use would not have a sewer system.

[14] The applicant details the extent of the economic benefit in its November 8, 2018 Memorandum.

[15] OAR 660-004-0025(4)(j) provides that allowable uses include: "Commercial utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR chapter 660, division 4[.]"

> "Transportation Policy 5.C.2: Protect neighborhoods, recreation areas, pedestrian facilities, bikeways and sensitive land uses (such as schools, daycare centers and senior centers whose users are more vulnerable to pollution) from transportation-related environmental degradation. Coordinate transportation and land use planning and use mitigation strategies, such as physical barriers and design features, to minimize transmission of air, noise and water pollution from roads to neighboring land uses."
>
> "Transportation Policy 5.F.1: Land use and transportation policies shall be integrated consistent with state law regarding preservation of farm and forest lands."

Again, I do not see what either of these policies has to do with the proposed use. The proposed use would not cause any "transportation-related environmental degradation." The proposed use would not transmit air, noise, or water pollution from roads to neighboring land uses. The proposed use has nothing to do with the integration of land use and transportation policies with the preservation of farm or forest lands. To the extent these policies are applicable, I agree with the applicant:

> "The Facility's positive effects on air quality and greenhouse gasses * * * and resulting positive effects on sensitive populations, as well as its lack of noise or water pollution make it consistent with this transportation policy. Moreover, the Facility will be essentially unmanned once constructed, with minimal effects on the County's transportation systems." November 8, 2018 Memorandum 6.

The parties raise a number of goals and policies from the Economics Chapter:

> "Economics – First Goal: Establish a broad-based, stable, and growing economy to provide employment opportunities to meet the needs of the County's residents.
>
> "Economics – Second Goal: Retain and support the expansion of existing industries and businesses.
>
> "Economics – Third Goal: Attract new industrial and commercial development that is consistent with environmental quality, community livability, and the needs of County residents."

Again, I do not see that any of these goals are applicable to the proposed use. None of these goals have anything to do with solar facilities or forest lands. These goals are no more applicable to the proposed development that they are to any other proposed development. To the extent these policies are applicable they tend to support development,

and I agree with the applicant:

> "The Facility is also consistent with these economic goals. It will create approximately 45 jobs during construction, result in approximately $3,000,000 in investment, and annual property taxes of approximately $17,500. It will also provide a steady income stream to the landowner. Furthermore, the solar industry certainly exists in Clackamas County and the Facility would result in its expansion. This expansion would be consistent with environmental quality * * * and would help to meet the needs of county residents by providing power to 500-600 homes." November 8, 2018 Memorandum 6 (citations omitted).

Opponents raised numerous comprehensive plan goals and policies. Most of those goals and policies do not apply to the proposed use of a solar facility on forest land. To the extent those goals and policies do apply they are satisfied and weigh in favor of approving the application. The goals and policies identified by the parties that do apply to the proposed use are also satisfied and weigh in favor of approving the application. Even the goals and policies that at first blush might appear to weigh against approving the application, such as "conserve and protect forestlands" and "prohibit commercial and industrial development in Forest areas" are satisfied when examined in context. Even if those goals and policies weighed in favor of denying the application, the overwhelming weight of the other goals and policies that are satisfied easily results in a weighing and balancing in favor of approving the application.

ZDO 1203.03(E) is satisfied.

**6. Whether other applicable sections are satisfied.**

ZDO 1203.03(F) requires that the "proposed use complies with any applicable requirements of the zoning district and overlay zoning district(s) in which the subject property is located, Section 800, Special Use Requirements, and Section 1000, Development Standards." ZDO 1002 pertains to the protection of natural features. Opponents argue that the proposal violates ZDO 1002, but opponents do not explain why ZDO 1002 is applicable and I do not see that it is. ZDO 1002 contains provisions regarding a number of natural features such as steep slopes, trees and wooded areas, river and stream corridors, and deer and elk winter range. None of those provisions, however, appear to be applicable to the proposed development. ZDO 1002 is satisfied.

ZDO 1003 pertains to hazards to safety. Opponents argue that ZDO 1003.02

regarding mass movement hazard areas applies to the proposed development. Opponents do not establish that the proposed site is within a mass movement hazard area. While the proposed site may be within hundreds of feet from such areas, ZDO 1003.02 only applies to areas within the mass movement hazard area – not areas near mass movement hazard areas. Opponents' arguments do not provide a basis to deny the application.

ZDO 1005 pertains to site review. Opponents argue that the site review provisions apply to the proposed use and that the proposed use does not satisfy those provisions. Opponents, however, do not explain why the site review previsions apply to the proposed solar facility, and it is not clear that they do. Even if the site provisions do apply to the proposed use, opponents only cite various purpose statements from ZDO 1005.01. Opponents do not cite any of the approval criteria from ZDO 1005.01 as applicable to the proposed development and I do not see that there are any. Opponents' arguments do not provide a basis to deny the application.

ZDO 1006 pertains to water supply, sanitary sewer, surface water, and utilities. The proposed solar facility would not have a water supply or a sanitary sewer system, so those provisions are not relevant. Opponents argue that the proposed solar facility would lead to soil erosion and flooding on neighboring properties. ZDO 1006.06 provides:

> "The following surface water management and erosion control standards apply:
>
> "A. Positive drainage and adequate conveyance of surface water shall be provided from roofs, footings, foundations, and other impervious or near-impervious surfaces to an appropriate discharge point.
>
> "B. The requirements of the surface water management regulatory authority apply. If the County is the surface water management regulatory authority, the surface water management requirements of the Clackamas County Roadway Standards apply.
>
> "C. Approval of a development shall be granted only if the applicant provides a preliminary statement of feasibility from the surface water management regulatory authority. The statement shall verify that adequate surface water management, treatment and conveyance is available to serve the development or can be made available through improvements completed by the developer or the system

owner.

> "1. The surface water management regulatory authority may require a preliminary surface water management plan and report, natural resource assessment, and buffer analysis prior to signing the preliminary statement of feasibility. * * *"

Opponents submitted voluminous evidence regarding runoff from solar panels and studies allegedly showing that the proposed solar facility would cause drainage problems on surrounding properties. ZDO 1006.06 requires that positive drainage and conveyance of surface water shall be provided. An applicant demonstrates that this can be achieved by obtaining a preliminary statement of feasibility from the appropriate surface water management regulatory authority. In the present case, the appropriate authority is the County Engineering Department. The County engineering department provided just such a statement of feasibility. That satisfies ZDO 1006.06. Furthermore, the study provided by opponents that purports to demonstrate the dangers of drainage from solar facilities is a study from North Carolina of a 31-acre facility located on steep slopes. That is clearly a much different situation than the present proposal. The proposed solar facility would be on nearly level ground and would be 10 acres. The proposed solar arrays would be installed on poles placed on the ground – there would be very little impervious surface. The applicant submitted an erosion, sediment, and soil compaction plan that explains how these issues will be managed and minimized both during and after construction. After installation, the site would be planted with native grasses. I am not persuaded by opponents' evidence that the proposed solar facility presents a danger of soil erosion or offsite flooding. I agree with the staff report and the County Engineering Department that with the proposed conditions of approval that it is feasible to provide these services. ZDO 1006 is satisfied.

Table 406-1, which lists the proposed use as a conditional use, also requires the proposed use to satisfy ZDO 406.05(A)(1 & 6) & (H)(2). ZDO 406.05(A)(6) is not relevant as it applies to land divisions. ZDO 406.05(H)(2) limits solar facilities to 10 acres, which the proposal satisfies. Therefore, the only provision at issue is ZDO 406.05(A)(1) which provides:

> "The use may be allowed provided that:
>
> "a. The proposed use will not force a significant change in, or

significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands; and

"b. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel."

Opponents argue that the proposed use will force changes in forest practices on forest lands. Initially, according to opponents the mere fact that 10 acres will be taken out of forest use (despite the fact that it is not currently being used for forest use) will cause a significant change in forest practices on forest lands by reducing the amount of forest lands available for forest uses. The applicant and the staff report address whether the proposed use would force a significant change in farm or forest practices on other agriculture or forest lands besides the 10 acres proposed for the solar facility. Opponents point to similar language regarding use in EFU zones that specifically refers to forcing changes on "surrounding" lands.[16] According to opponents, because ZDO 406.05(A)(1) does not refer to "surrounding" lands like ZDO 401.05(A)(1) does, the land proposed for the solar facility must be considered as well. While this is a plausible argument, I do not agree that ZDO 406.05(A)(1) requires consideration of whether the land proposed for a use conditionally allowed under ZDO Table 406-1 requires consideration of whether the proposed use will force a change on the land proposed for the use. Under opponents' reasoning, no solar facilities would be allowed on forest lands because the land being proposed for the solar facility would be taken out of forest use. Table 406-1 includes over 20 uses that do not involve forest use that may be approved subject to ZDO 406.05(A)(1). None of those uses could be approved if the mere fact of taking the land out of forest use for the proposed use meant that it was forcing a significant change in forest practices on forest lands. While ZDO 406.05(A)(1) could certainly be clearer, the context of ZDO 406 refutes opponents' argument.

Opponents also argue that the proposed solar facility would force a significant change in farm or forest practices on surrounding farm or forest lands. Although opponents

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[16] ZDO 401.05(A)(1) provides:
"Uses may be approved only where such uses:
"a. Will not force a significant change in accepted farm or forest practices on *surrounding* lands devoted to farm or forest use; and
"b. Will not significantly increase the cost of accepted farm or forest practices on *surrounding* lands devoted to farm or forest use." (Emphases added.)

do not specifically argue what those significant changes would be, they argue that there would be adverse impacts from rodents, pesticides, and chemical leaching.[17] The applicant has submitted a rodent mitigation plan that would prevent rodents from damaging farm or forest practices on the subject property and surrounding properties. Opponents argue that herbicides that may be used at the solar facility might harm a nearby apiary. The applicant explains that the weed mitigation plan proposes initially using hand tools to remove weeds and then spot applications by certified professionals if herbicides are needed, so there would be no drift onto surrounding properties. Furthermore, the applicant submitted a peer reviewed article explaining that the herbicides would not cause any damage to the apiary. I agree with the applicant. Finally, opponents argue that chemical leaching could migrate to other properties from the solar panels. Opponents argued that CIS compounds in solar panels can be dangerous. The applicant, however, explained that the proposed solar panels would not contain CIS.

The applicant has demonstrated that the proposed solar facility would not have any impacts on farm or forest lands, let alone any impacts that would force a significant change in or significantly increase the cost of farm or forest practices on farm or forest lands. ZDO 406.05(A)(1)(a) is satisfied.

ZDO 406.05(A)(1)(b) requires that the proposed use not will "not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." Initially, opponents argue that the proposed solar facility would be an increased fire hazard. Opponents cite to evidence that fires have occurred at various solar facilities over the years. While fires are certainly a possibility at solar facilities (as they are in most places), I am not persuaded that the mere existence of a solar facility means that there is an increased fire hazard. The County allows solar facilities in TBR zones, and opponents do not demonstrate that there is anything about this particular proposed solar facility that would make it more hazardous than any other solar facility.

Opponents also argue that the proposed facility would significantly increase the risk to fire suppression personnel. Opponent Anthony Foster (Foster) is a fireman, and he testified that solar facilities would increase the risks to any first responders at the site.

[17] Opponents also raise arguments regarding issues addressed earlier, such as noise, glare, soil erosion, drainage, etc. Those arguments are rejected for the reasons explained earlier.

Foster did not testify that the solar facility itself would be a fire risk, rather he testified that if an accident – such as a car accident – occurred at the site that it would be more dangerous to handle such an accident because the power to the solar facility cannot be turned off. Initially, I tend to agree with the applicant that ZDO 406.05(A)(1)(b) concerns risks to fire suppression personnel when they are actually suppressing fires – not when they are serving as first responders in an emergency medical technician (EMT) capacity.

Even if ZDO 406.05(A)(1)(b) extends to risks to fire suppression personnel when responding to vehicular accidents, I do not see that the proposed solar facility presents a significant risk. Mountain Meadow is a straight road, as opponents emphasize it is a private road that only serves a small rural subdivision – in other words there is not a lot of traffic, the speed limit is only 25 MPH, and the proposed facility is set well back from the road with screening and fences. While accidents are possible almost anywhere, the proposed location would seem to significantly reduce the likelihood of accidents rather than increase the likelihood. As the applicant explains:

> "* * * the Applicant has been cognizant of minimizing fire risks in numerous ways. The Applicant has submitted a landscaping plan and an updated landscaping plan, both of which propose planting Christmas trees on the northern, western, and southern sides of the project and spaced 15 feet apart. This is specifically to comply with ZDO 406.08.1.a which requires a primary fuel-break area.
>
> "The Applicant has submitted a Fire Hazard Memo which explains the additional precautions taken to minimize risks of fire and to fire suppression personnel, including a 7-foot tall perimeter fence, turnaround and perimeter roads, warning signage, compliance with electrical code and permitting, and the inert nature of the Facility materials. * * *." November 8, 2018 Memorandum 3.

Furthermore, the applicable fire protection service did not provide any comments objecting to the proposed solar facility. And again, the County allows solar facilities in TBR zones. If the mere fact that a car could crash into a solar facility would significantly increase the risk to fire suppression personnel then it would be nearly impossible to obtain approval for a solar facility. While there may be a theoretical *de minimis* risk to fire suppression personnel, I agree with the applicant that the proposed solar facility would not significantly increase risks to fire suppression personnel. ZDO 406.05(A)(1)(b) is satisfied.

All of the approval criteria are satisfied.[18]

## E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** application Z0398-18-C, with the following conditions of approval.

## F. CONDITIONS OF APPROVAL

### I. General Conditions:

1) Approval of this land use permit is based on the submitted written narrative and plan(s) dated 8/15/18. The application was deemed complete on 8/20/18. No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of approval described herein.

2) The applicant is advised to take part in a Post Land Use Transition meeting. County staff would like to offer you an opportunity to meet and discuss this decision and the conditions of approval necessary to finalize the project. The purpose of the meeting is to ensure you understand all the conditions and to identify other permits necessary to complete the project. If you like to take advantage of this meeting please contact Deana Mulder, at (503) 742-4710 or at deanam@co.clackamas.or.us.

3) **Prior to the issuance of building permits,** the applicant shall submit a statement of use to Wendi Coryell in the Clackamas County Development Agency. Wendi Coryell can be contacted at 503-742-4657, or wendicor@co.clackamas.or.us. The statement of use is used to calculate the Transportation System Development charge. A Transportation System Development Charge (TSDC) is included in the final calculation of the building permit fees for new instructional projects; this includes additions and tenant improvements that increase the number of daily trips to the site.

4) The conditional use approval is valid for four years from the date of the final written decision. If the County's final written decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four year period, the approval shall be implemented, or the approval will become void. "Implemented" means all major development permits shall be obtained and maintained for the approved conditional use, or if no major development permits are required to complete the development contemplated by the approved conditional use, "implemented" means all other necessary County development

[18] The staff report addressed approval criteria that were not challenged. I adopt and incorporate the staff report in this decision, except as earlier discussed.

permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained. A "major development permit" is:

a) A building permit for a new primary structure that was part of the conditional use approval; or
b) A permit issued by the County Engineering Division for parking lot or road improvements required by the conditional use approval.

5) This Conditional Use approval is granted subject to the above and below stated conditions. Failure to comply with any of the conditions of approval constitutes a violation of this permit and may be cause for revocation of this approval.

6) The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the county concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsibility for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated and maintained in a manner that complies with the ESA.

**II. Planning and Zoning Conditions:** Clay Glasgow, (503) 742-4520, clayg@clackamas.us

1) Development of the subject property is subject to the provisions of ZDO Sec.1203 and those other relevant codes and ordinances adopted by the Board of County Commissioners pursuant to subsec. 1001.03 of the ZDO, including, but not limited to, the County Roadway Standards, County Excavation and Grading Ordinance, and Oregon Structural Specialty Code, etc.

2) Prior to commencement of use the project owner shall sign and record in the deed records for the county a document binding the project owner and the project owner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices as defined in ORS 30.930(2) and (4).

3) At the end of the life of facility all non-utility owned equipment, conduits, structures, and foundations will be removed to a depth of at least three feet below grade.

4) If a conditional use is implemented pursuant to Subsection 1203.05 and later discontinued for a period of more than five consecutive years, the conditional use shall become void. However, in the case of a transitional shelter community, the allowed discontinuation period shall not exceed one year.

5) The applicant will provide a bond, acceptable to the County, to ensure de-commissioning of the facility upon its retirement from use.

**III. Building Code Division Conditions:** Richard Carlson, (503) 742-4769, richardcar@co.clackamas.or.us

1) All construction activities, and all changes of use (occupancy type), shall comply with applicable Oregon Specialty Codes and local ordinances. All such codes and ordinances apply to all such activities, even when permits and inspections are not required.

2) Compliance with the following conditions is required prior to the commencement of any new use or occupancy:
   a. All necessary development permits (septic, building, electrical, grading, driveways, etc.) for the property, facility, and associated buildings shall be obtained.
   b. The plans must meet the minimum structural integrity and life safety requirements of the applicable Oregon Specialty Codes.
   c. Any additional information required by the Building Codes Division, such as engineering, details, and specifications, must be provided to the Plans Examiner reviewing the project.
   d. All necessary permits and approved plans must be issued and maintained onsite as required.
   e. All required inspections, corrections, and final approval must be obtained.

**IV Engineering Division Conditions:** Kenneth Kent, (503) 742-4673, kenkenHass@clackamas.co

1) All frontage and onsite improvements shall be in compliance with *Clackamas County Roadway Standards*.

2) The applicant shall obtain a Development Permit from Clackamas County Department of Transportation and Development prior to the initiation of any construction activities associated with the project.

3) The applicant shall design and construct a minimum 12-foot wide paved driveway approach onto S Killdeer Road in conformance with Roadway Standards Drawing D500. Storm water runoff shall not be permitted to flow over the paved approach onto S Killdeer Road.

4) The applicant shall provide minimum intersection sight distance at the driveway serving the solar facility. Minimum sight distance at the proposed access point on S Killdeer Road shall be 165 feet in both directions. In addition, no plantings at maturity, retaining walls, embankments, fences or any other objects shall be allowed to obstruct

vehicular sight distance. Sight distance can be measured 14.5 feet back from the edge of pavement at a height of 3.5 feet to an object height in the center of the oncoming travel lane.

5) If the applicant chooses to gate the driveway approach serving the solar facility, the applicant shall design and construct the gate a minimum of 30 feet from the edge of pavement of S Killdeer Road.

6) The applicant shall document the condition of S Killdeer Road prior to construction. Areas of the road damaged by construction activities shall be repaired to a condition equal to or better than the existing condition.

7) The applicant shall design and construct a minimum 12-foot wide perimeter access road with turnouts approximately every 400 feet. If a minimum 20-foot wide access road is constructed, turnouts are not required. If a turnaround is necessary, it shall be designed and constructed per Standard Drawing C350 or C300. Turn and curve radii shall comply with local Fire District requirements. The perimeter access road shall comply with ZDO subsection 1015.03 C and Roadway Standards Drawing R100 in regards to structural section and the required surfacing with screened gravel or better.

8) The applicant shall provide a copy of the storm water management plan details to DTD Engineering. The storm water management plan shall comply with the requirements of Roadway Standards, Chapter 4.

9) The applicant shall provide adequate on site circulation areas for the parking and maneuvering of all vehicles anticipated to use the solar facility. A minimum 24-foot deep backing area shall be provided for each parking stall.

10) Parking spaces for the solar facility shall meet *ZDO* section 1015 dimensional requirements.

11) Prior to the issuance of a building permit or the initiation of any construction activities associated with the solar facility, the applicant shall submit to Clackamas County Engineering Office:

a) Written approval from the local Fire District for the planned access, circulation, fire lanes and water source supply. The approval shall be in the form of site and utility plans stamped and signed by the Fire Marshal.

b) A set of site improvement construction plans, for review, in conformance with *Clackamas County Roadway Standards* Section 140, to Clackamas County's Engineering Office and obtain written approval, in the form of a Development Permit.

i) The permit will be for driveway, drainage, parking and maneuvering areas, and other site improvements.

ii) The fee for the Development Permit will be calculated in accordance with the current fee structure existing at the time of the Development Permit application.

iii) The applicant shall have an Engineer, registered in the state of Oregon, design and stamp construction plans for all required improvements, or provide alternative plans acceptable to the Engineering Division.

(12) The applicant shall erect signs during construction requiring construction vehicles to abide by school zone speed limits during school hours in the morning and afternoon.

**V. Septic & Onsite Wastewater Systems Programs Conditions:** Aaron Dennis, (503) 742-4614, adennis@clackamas.us

No comments received as of this staff report.

**VI. Clackamas RFPD #1**

No comments received as of this staff report. General:

**Fire Department Apparatus Access**

1) Provide address numbering that is clearly visible from the fire apparatus access response road.

2) The inside turning radius and outside turning radius for a 20' wide road shall be not less than 28 feet and 48 feet respectively, measured from the same center point.

DATED this 3rd day of December, 2018.

Fred Wilson
Clackamas County Hearings Officer

**ENDANGERED SPECIES ACT NOTICE**

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include

decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

## APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).