

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

Regarding an Application for a Conditional Use)	Case File No.
Permit to Establish a Twelve Acre Photovoltaic)	Z0509-18-C
Solar Power Generation Facility.)	(Dryland Solar)

A. SUMMARY

1. The owners are Corey and Polly Zarkoff. The applicant is Dryland Solar LLC.
2. The subject property is located at 34035 South Highway 213, Molalla, OR 97038. The legal description is T5S, R1E, Section 24, Tax Lot 700 W.M. The subject property is approximately 55 acres and is zoned EFU – Exclusive Farm Use.
3. On December 6, 2018, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on December 6, 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. Jonathan Nelson and Damien Hall testified in support of the application.
4. Phyllis Morris and William Tomko testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

The subject property is an approximately 55-acre parcel zoned EFU. The property is located at 34035 South Highway 213, Molalla, OR 97038. The property is irregularly shaped, resembling a square barbell with a southeast end along Highway 213 and another end towards the northwest. The southeast end has historically been farmed, currently in berries. The northwest end contains wetlands along Rock Creek and is not farmed, with trees in the area. The property is an area south of the City of Molalla that is a mix of small farms with scattered rural residential homesites. The proposed solar facility would be on the southeast end close to the squeezed middle of the property.

D. DISCUSSION

Clackamas County Zoning and Development Ordinance (ZDO) 1203.03 provides the approval criteria for conditional uses. The staff report does a thorough job of explaining how all of the applicable approval criteria are satisfied. The majority of the findings in the staff report are not challenged. It would be a waste of the County's money and resources to review and repeat all of the unchallenged findings in the staff report. I have reviewed the findings in the staff report and agree with those findings. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.

Phyllis Morris (Morris) lives just to the west of the northwest end of the property, and has an approximately 60 acre hazelnut orchard on EFU land. Morris raises a number of objections to the proposed solar facility. Morris does not identify any specific approval criteria that she believes the application does not satisfy, but I will do my best to relate her arguments to any applicable approval criteria.

Morris argues that solar facilities should not be sited on EFU land. While Goal 3 (Agricultural Lands) does protect farm land, the legislature specifically made a balancing choice between protecting farm land and encouraging solar power by allowing such facilities on farm land, as long as all the requirements are satisfied. Morris' argument does not provide a basis to deny the application.

Morris argues that she is looking for more land to plant in hazelnuts. While that may be true, there is nothing in the applicable approval criteria that requires the applicant

to demonstrate that the property could not be used for other farm uses. Morris' argument does not provide a basis to deny the application.

Morris argues that the proposed solar facility would decrease her property values. Even if that is true, any effect on property values is not an applicable approval criterion or consideration. *Morton v. Clackamas County*, 70 Or LUBA 7, 13-14 (2014); *Tylka v. Clackamas County*, 34 Or LUBA 14, 29 (1998). Morris' argument does not provide a basis to deny the application.

Morris argues that the proposed solar facility would take away from the rural character of the area. 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." According to Morris, the proposed facility would detract from her rural residential lifestyle. Although the property is in an area of mixed uses, the only opponents (including Morris) also have EFU-zoned properties, and residential use is not a primary use in EFU zones.¹ Therefore, any impact on the residential use of those opponents does not provide a basis for denying the application.

Finally, Morris argues that the solar facility might result in an increase in temperature that could adversely affect her hazelnut orchard which is already at risk due to high temperatures. ZDO 401.05(1) (and also OAR 660-033-0130(5)) 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."

Morris argues that the proposed solar facility could increase temperatures in the area. Theoretically, that could force a significant change in her farm practices or significantly increase the cost of her farm practices. Morris, however, provided no evidence that the proposed facility would increase temperatures – only speculation. The applicant

¹ Even if this were a consideration, Morris would not be able to see the proposed solar facility from her house, and even if she could that would hardly rise to the level of substantially limiting, impairing, or precluding a rural residential lifestyle.

testified that research has demonstrated that temperatures do not increase and if anything slightly decrease due to the shade provided by the solar panels that keeps the ground underneath cooler and wetter. Morris' mere speculation is not more persuasive than the testimony from the applicant. ZDO 401.05(1) is satisfied.

William Tomko (Tomko) lives just to the west of the southeast end of the property. Tomko grows berries just to the west of where the proposed solar facility would be located. Tomko also has treed areas and an expensive home on his EFU-zoned property. Tomko raises a number of objections to the proposed solar facility. As with Morris, Tomko does not identify any specific approval criteria he believes the application does not satisfy, but again I will do my best to relate his arguments to any applicable approval criteria.

As with Morris, Tomko argues the proposed solar facility would interfere with the rural nature of the area and reduce his property values. While I sympathize with Tomko's concerns about the impact on his property values (it seems like a very nice house), as explained earlier that is not a consideration I can take into account.

Tomko argues that he has numerous species of wildlife on his property, and he is concerned the proposed solar facility would interfere with that wildlife. Even if that were true (and that appears to be purely speculation), there are no protected Goal 5 resources on either property, and Tomko does not provide a basis for taking wildlife into account as an approval criterion.

Finally, Tomko argues that the drainage from the subject property runs through his property into a pond on his property. According to Tomko, there is a pipe from the subject property in the area of the proposed solar facility that drains water to Tomko's pond. Tomko states that he will no longer allow the use of that pipe. 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 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. Tomko argues, however, that the proposed use could lead to flooding on his property. 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. * * *”

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. While I can certainly understand Tomko’s concerns about flooding onto his property, the applicant would be required to comply with all required conditions to ensure that this does not occur. 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.²

² To the extent Tomko argues that the proposed solar facility would significantly affect his farm use of growing berries, I agree with the staff report and the applicant that the solar facilities would have no impact on adjacent farm use because there are no impacts. The only potential impact would be surface water management, but as explained earlier, the applicant would be required to meet conditions of approval to prevent any such adverse impacts.

All of the approval criteria are satisfied.

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 Z0509-18-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 October 15, 2018. The application was deemed complete on October 16, 2018. 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'd 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) Developer to satisfy any requirements from ODOT regarding access to/frontage along Hwy 213.
- 5) 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 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.
- 6) 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.
- 7) 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) Developer/owner is responsible for retiring the facility. 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) Applicant to implement soil compaction and weed control plans, as submitted with application.

III. Building Code Division Conditions: Andy Anderson, (503) 742-8742, aanderson@clackamas.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: Ken Kent; (503) 742-4673, kenken@clackamas.us

- 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) Written approval from ODOT, in the form of a permit for access to Highway 213 and for all work in Highway 213 right-of-way shall be obtained. A paved approach shall be constructed onto Highway 213. The approach shall be 20 feet wide and extend a minimum of 20 feet from the existing edge of pavement. At a minimum the approach shall be constructed per Clackamas County Roadway Standards Drawing D500, or as required by ODOT.
- 4) The applicant shall design and construct a minimum 12-foot wide access road, with turnouts approximately every 400 feet from Highway 213 to the solar facility site. Within the site, a perimeter access road shall be constructed with turnouts approximately every 400 feet. If a minimum 20-foot wide perimeter 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 access road and perimeter access shall comply with Roadway Standards Drawing R100 in regards to structural section and the required surfacing with screened gravel or better.

- 5) 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.
- 6) 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.
- 7) Parking spaces for the solar facility shall meet *ZDO* section 1015 dimensional requirements.
- 8) 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) Written approval from ODOT in the form of a permit for access to Highway 213.
 - c) 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.

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.

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

No comments received as of this staff report/proposed use does not involve onsite septic facilities.

VI. Molalla Fire #73

Mike Penunuri, comments via e-mail dated November 1, 2018. See Exhibit #4
Generally speaking, Molalla Fire has no issues with the proposal as long as the developer provides access in accordance with Chapter 5 and Appendix "D" of the 2014 Oregon Fire Code.

VII. ODOT

ODOT has commented via telephone, regarding concerns about multiple, existing access points from the property to Highway 213. County staff expects written comment to arrive prior to hearing. ODOT will likely move to close some driveway locations here. A condition of approval is warranted directing applicant to that Agency regarding driveway/frontage issues. A state highway approach road permit from ODOT for access to the site will be required for this change of use.

DATED this 19th 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 an evaluation by the County of the applications for consistency with the ESA nor does the 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).

HEARINGS OFFICER CERTIFICATE OF MAILING

I certify that on the date set forth below I mailed a copy of the above HEARINGS OFFICER FINAL ORDER by first class mail to the following participants at the address shown:

Dryland Solar,
Conifer Energy Partners,LLC
Jonathan Nelsen
4207 SE Woodstock #326
Portland, OR 97206

Cory & Polly Zarkoff
PO Box 388
Scott Mills, OR 97375

DLCD
Tim Murphy
635 Capitol Street NE, STE 200
Salem, OR 97310-2540

Phyllis & Bill Morris
PO Box 913
Molalla, OR 97038

William Tomko
34095 S. Hwy 213
Molalla, OR 97038

Molalla Fire District #73
Mike Penunuri
PO Box 655
Molalla, OR 97038

ODOT – Region 1
Development Review
123 NW Flanders
Portland, OR 97209

The original of this decision has been filed with the Planning Division, Clackamas County Department of Transportation and Development.

DATED this 20th day of December, 2018


Michelle Salo, Permits Specialist