

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

Regarding an Application for a Conditional Use	)	<b>Case File No.</b>
Permit to Establish a Ninety Eight Acre	)	<b>Z0424-18-C</b>
Photovoltaic Solar Power Generation Facility.	)	<b>(Brightwood Solar)</b>

**A. SUMMARY**

1. The applicant is Brightwood Solar LLC. The owner is Richard Dodge, Trustee.
2. The subject property is located at 55855 East Marmot Road, Sandy, OR 97055. The legal description is T2S, R6E, Section 20, Tax Lots 100, 200, 300, 500; T2S, R6E, Section 18, Tax Lot 101; T2S, R6E, Tax Lots 900, 1100, 1300, 1400, 1600; T2S, R6E, Section 21, Tax Lots 100 and 200, W.M. The subject property is approximately 884 acres and is zoned EFU – Exclusive Farm Use and TBR – Timber.
3. On October 4, 2018, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The Hearings Officer received testimony at the public hearing about this application on October 4, 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. Sarah Sayles and Amy Berg Pickett testified in support of the application.

4. Winston Chang asked questions about the application.
5. After the conclusion of the public hearing, the record was left open for additional evidence. The dates for submission of additional evidence were eventually extended until October 22, 2018 for the submission of new evidence, until December 31, 2018 for responses to the new evidence, and January 7, 2019 for the applicant's final legal argument.

### **C. FACTS**

The subject property is an approximately 884-acre parcel zoned EFU and TBR. The property is located at 55855 East Marmot Road, Sandy, OR 97055, north of Highway 26 in the Marmot area. The subject property consists of TBR and EFU zoned areas, but the proposed solar farm would be sited on the EFU portion of the property. The property is in mixed farm and forest use, with the farming portion proposed for the solar farm currently being used for pasture/hay. The property has a home and associated outbuildings. There are protected streams on the property, but the proposed solar farm would be sited well outside the required protected areas. The property is a Goal 5 protected property for wildlife, and the applicant has submitted a wildlife habitat protection and mitigation plan. Surrounding properties are in forest use. The proposal solar farm would consist of 98-acres on non-arable land.

### **D. DISCUSSION**

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 by opponents. 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.

#### **1. ZDO 1203.03(D)**

Clackamas County Zoning and Development Ordinance (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 character of the surrounding area is timber use in the TBR zone. The primary

uses are timber uses. Previous cases have explained that the inquiry under ZDO 1203.03(D) entails whether the proposed use makes the exercise of those primary uses substantially worse. Therefore, in the present case, the question is whether the proposed solar generation facility would make timber uses substantially worse. As the staff report explains, solar farms are a passive use that has virtually no effect on surrounding properties. I do not see that there would be any impacts on timber uses from the proposed solar farm, and certainly nothing that would rise to the level of making timber uses substantially worse.

Some opponents argue that they do not want to have to see solar panels from their residences. While it is unclear whether such opponents live in TBR zones where residential use are not primary uses and therefore any potential impacts on residential use would not provide a basis to deny the application, even if there are rural residentially zoned properties that could see the proposed solar farm from their property that hardly means such rural residential uses would be substantially worse. While the aesthetic beauty of solar panels is certainly debatable, there is nothing in the ZDO specifically pertaining to how attractive the proposed facility would be. While under ZDO 1203.03(D) it is theoretically possible that a proposed use could be so unaesthetically pleasing that it could rise to the level of making primary uses in the surrounding area substantially worse, in the present case the alleged ugliness of the proposed solar panels is not even close to rising to that level. Currently, opponents potentially have a view of the subject property's pasture. The proposed solar arrays would not obstruct opponents' view of some natural wonder, merely of pastureland. While the neighbors who would be able to see the panels from their residences may prefer not to see solar panels, again I do not see that merely seeing solar panels instead of pasture comes close to the level of making residential use substantially worse. ZDO 1203.03(D) is satisfied.<sup>1</sup>

## **2. ZDO 1203.03(E)**

ZDO 1203.03(E) requires that the “proposed use is consistent with the applicable goals and policies of the Comprehensive Plan.” The staff report explains that the proposed

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<sup>1</sup> 1000 Friends of Oregon argues that the application should be denied under ZDO 1203.03(D) because the Barlow Road Historic Corridor (BRHC) runs along the subject property. The BRHC is not a zoning district or a primary use in the EFU or TBR zone, so I do not see that it is applicable to ZDO 1203.03(D). Even if it were, as the applicant explains, the BRHC is a paved road in the area as it overlaps East Marmot Road. The proposed access would be from an existing driveway, so there would be no significant development proposed in the BRHC and the character of the BRHC would not be altered.

use is consistent with numerous goals and policies of the Comprehensive Plan. The applicant's January 7, 2019 further explains that the proposed use is consistent with additional goals and policies of the Comprehensive Plan. As discussed later, these Goals and Policies appear to be more aspirational and providing guidance in drafting the specific ZDO provisions that implement the Goals and Policies. As opponents do not specifically challenge these findings, to the extent the Goals and Policies do apply, I agree with the staff report and the applicant's January 7, 2019 memorandum.

1000 Friends of Oregon (1000 Friends) argues that the proposed use violates ZDO 1203.03(E). The Comprehensive Plan contains Issues, Summary of Findings and Conclusions, Goals, and Policies. Initially, 1000 Friends cites a number of findings and conclusions that it alleges the proposed use violates. ZDO 1203.03(E), however, specifically refers to "goals and policies" – not findings and conclusions. Any arguments based on alleged lack of consistency with findings and conclusion does not provide a basis to deny the application. Furthermore, the findings and conclusions cited by 1000 Friends are merely informational statements - they do not provide any basis to measure the application against for consistency.

1000 Friends cites a number of goals and policies from the Agriculture subsection of the Natural Resources and Energy chapter of the Comprehensive Plan.<sup>2</sup> Agriculture Goals 1, 2, 4, and 5 state:

"Preserve agricultural lands.

"Maintain the agricultural economic base in Clackamas County and the State of Oregon.

"Maintain and improve the quality of air, water, and land resources.

"Conserve scenic areas, open space and wildlife habitats."

Agriculture Policy 1.0 states:

"Recognize agricultural areas through appropriate zoning. All agricultural areas shall continue unencumbered by activities/land uses unrelated to agriculture in order to insure productive farm land. Specific policies relating to land use in agricultural areas are found in the Land

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<sup>2</sup> Although 1000 Friends appears to quote goals and policies from the Comprehensive Plan, it frustratingly does not cite the actual chapter, subsection, or number of the goals or policies. I will do my best to search for the mentioned goals and policies in the Comprehensive Plan.

Use Chapter of this Plan.”

None of the quoted goals and policy are “applicable goals and policies.” The proposed use is a solar farm. The quoted goals and policy are aspirational and provide general guidance to protect farmland. This is accomplished by the specific provisions in the ZDO regarding permitted uses in EFU and other farm zones. A goal such as “preserve agricultural lands,” if taken as an applicable goal would essentially preclude any non-farm use of farmlands. The ZDO, however, provides for numerous permitted or conditionally permitted non-farm uses in farm zones. Clearly, the Board of County Commissioners (as well as state law) envisions some non-farm uses – specifically solar farms – in farm zones. Under 1000 Friends’ reasoning almost none of the conditional uses provided for in EFU zones could be allowed. The Agriculture Goals and Policy cited by 1000 Friends are not applicable to the proposed use, and even if they are the proposed use is consistent with those Goals and Policy because the ZDO balances those Goals and Policies in determining what uses may be allowed in EFU zones.

1000 Friends cites a number of goals and policies from the Wildlife Habitats and Distinctive Resource Areas subsection of the Natural Resources and Energy chapter of the Comprehensive Plan. Wildlife Habitats and Distinctive Resource Areas Goals 1 and 3 state:

“Maintain and improve fisheries and wildlife habitat to enhance opportunities for consumptive and non-consumptive uses.

“Protect the scenic landscapes and natural beauty of Clackamas County.”

Wildlife Habitats and Distinctive Resource Areas Policies 5.0 and 8.0 state:

“Minimize adverse wildlife impacts in sensitive habitat areas, including deer and elk winter range below 3,000 feet elevation, riparian areas, and wetlands.

“Protect areas of high visual sensitivity and/or unique natural areas by requiring development review for any development which would substantially alter the existing landscape, as specified in the Land Use Chapter of the Plan. The purpose is to integrate development with natural features, minimizing any adverse impacts.”

As with the Agricultural Goals and Policy, the cited Goals and Policies are aspirational and provide general guidance. As with the Agricultural Goals and Policy, the ZDO balances the goals and policies of the Comprehensive Plan. Policy 5.0 is a perfect

example, as ZDO 1002.05 (quoted later) essentially incorporates the policy as towards deer and elk winter range. As discussed later, the proposed use satisfies ZDO 1002.05. Policy 8.0 is another good example of how the ZDO incorporates the broad aspirational guidance of the Comprehensive Plan. Policy 8.0 discusses requiring development review and minimizing adverse impacts. Conditional use review requires compliance with ZDO 1203.03 – which is a development review – and 1203.03(D) requires consideration of adverse impacts. The Wildlife Habitats and Distinctive Resource Areas Goals and Policies cited by 1000 Friends are not applicable to the proposed use, and even if they are the proposed use is consistent with those Goals and Policies because the ZDO balances those Goals and Policies in determining what uses may be allowed in EFU zones.

1000 Friends cites a number of goals and policies from the Agriculture subsection of the Land Use chapter of the Comprehensive Plan. Agriculture Goals 1, 6 and 7 state:

“Preserve agricultural use of agricultural land.

“Conserve scenic and open space.

“Protect wildlife habitats.”

These Goals are essentially identical to Goals 1 and 5 from the Agriculture subsection of the Natural Resources and Energy chapter of the Comprehensive Plan discussed earlier.<sup>3</sup> 1000 Friends does not expand upon its arguments, and its arguments under these Goals are rejected for the same reasons as explained earlier.

Finally, 1000 Friends cites a number of Goals and Policies from the Open Space, Parks, and Historic Sites Chapter of the Comprehensive Plan. Goal 1 of the Open Space subsection states: “Protect the open space resources of Clackamas County.” Goal 1 of the Historic Landmarks, Districts, and Transportation Corridors subsection states: “Preserve the historical, archaeological, and cultural resources of the County.” Policy 3.0 of the Open Space subsection states:

“Protect open space resources outside the urban area through the policies of the Land Use and the Natural Resources and Energy chapters of the Plan, specifically the policies for agriculture, forestry, water resources,

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<sup>3</sup> Those Goals state:

““Preserve agricultural lands.

“Conserve scenic areas, open space and wildlife habitats.”

wildlife habitats, and distinctive resource areas.”

Policy 2.0 of the Historic Landmarks, Districts, and Transportation Corridors states:

“The County adopts the Barlow Road Historic Corridor as defined by the Barlow Road Survey Project and the Barlow Road Background Report and Management Plan as a Clackamas County Historic Corridor. All provisions of the Historic Landmarks, Historic Districts and Historic Corridors Ordinance shall apply to the designated sites and historic corridor of the Barlow Road.”

Policy 5.0 of the Historic Landmarks, Districts, and Transportation Corridors states:

“Identify conflicts by analyzing the economic, social, environmental, and energy consequences of land use actions with regard to significant historic resources.”

The Open Space Goal and Policy are both aspirational and provide general guidance for protecting open spaces. The ZDO specifically does that through the open space provisions of ZDO Chapter 1103. Even if the Goal and Policy were not aspirational, as the applicant explains – there are no open space resources at issue. The subject property is not an open space resource or subject to any open space protections. Therefore, the Open Space Goal and Policy do not apply to the proposed use.

The Historic Landmarks, Districts, and Transportation Corridors Goal and Policies, while more specific than the other aspirational goals or policies, again demonstrate that the ZDO has incorporated these directions. Goal 1 directs the County to “preserve the historical, archaeological, and cultural resources.” Policy 2.0 explains that the County created the BRHC and required the provisions of “the Historic Landmarks, Historic Districts and Historic Corridors Ordinance” to apply to the BRHC. ZDO 707.03 provides the standards and criteria for the BRHC. As discussed later, the proposed use satisfies ZDO 707.03. Finally, Policy 5.0 directs the County to conduct the “economic, social, environmental, and energy” (ESEE) analysis that the County used to develop its Goal 5 inventory. 1000 Friends argues that an ESEE analysis is necessary for approval of a conditional use because of Policy 5.0. The ESEE analysis that was required was the ESEE analysis the County conducted in determining its Goal 5 inventory. Once the inventory was conducted and a program established to protect the resources, as long as an application complies with that program (in this case ZDO 707.03) then the application does not run

afoul of the Comprehensive Plan.

The Goals and Policies mentioned by 1000 Friends are aspirational and provide general guidance and therefore do not “apply to the proposed use.” Even if a reviewing authority determines that some or all of the Goals and Policies mentioned by 1000 Friends apply to the proposed use then a balancing test would be required against the Goals and Policies cited in the staff report and by the applicant in favor of the application. The Goals and Policies mentioned by 1000 Friends are generally vague panegyrics to conserving farmlands, open space, or wildlife. The Goals and Policies cited by the staff report and the applicant are slightly more specific, for instance regarding economic development and cooperating with wildlife management agencies to enhance wildlife opportunities. While trying to balance such vague and aspirational policies against one another in relation to a specific permit application (as opposed to a comprehensive plan or zone change) strikes me as the equivalent of division by zero, to the extent it is required, I conclude that the Goals and Policies in favor of approving the application outweigh those against approving the application for the preceding reasons, as well as the reasons stated in the staff report and the applicant’s January 7, 2019 memorandum.<sup>4</sup>

ZDO 1203.03(E) is satisfied.

### **3. ZDO 1203.03(F)**

ZDO 1203.03(F) requires that the “The proposed use complies with any applicable requirements of the zoning district and any overlay zoning district(s) in which the subject property is located, Section 800, Special Use Requirements, and Section 1000, Development Standards.” ZDO 1002.05 provides:

“Development in deer and elk winter range below 3,000 feet in elevation, as identified on Comprehensive Plan Map III-2, Scenic and Distinctive Resource Areas, shall be designed to minimize adverse wildlife impacts.”

The Comprehensive Plan identifies the property as being Big Game Winter Range. The applicant has worked extensively with the Oregon Department of Fish & Wildlife

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<sup>4</sup> Although the Yamhill Board of County Commissioners determined in *Yamhill Solar* (discussed later) that a massive balancing test of sundry vague comprehensive plan policies was required, and LUBA affirmed that decision, I do not see that that *requires* all decision makers to reach the same conclusion regarding the applicability or result in balancing such types of comprehensive plan provisions.



(ODF&W) to ensure that the solar farm is designed to minimize wildlife impacts.<sup>5</sup> The applicant submitted a finalized Wildlife Habitat Protection and Mitigation Plan encompassing 104 acres that includes, among other things: reseeding with native grasses endorsed by ODF&W, establishing big game friendly fencing and gates around the solar panels areas, managing grazing in the Mitigation Area, and protecting migratory bird nests or species-specific buffers, as recommended by ODF&W. The Mitigation Plan also includes requirements for habitat protection within the solar panel area, provision of environmental awareness training for all personnel, migratory bird conservation measures, access road construction and maintenance, weed control, and waste management. Additionally, the Mitigation Plan includes ongoing monitoring by a qualified biologist and measurement of various success criteria to be submitted in periodic monitoring reports to ODF&W. A Regional Conservationist with ODF&W worked with the applicant on the revised Mitigation Plan and stated:

“The plan includes specific mitigation actions that ODF&W agrees will offset potential adverse impacts of the proposed facility, thereby meeting the intent of OAR 660-033-0130(38)(h)(F) in our interpretation.”<sup>6</sup>

1000 Friends argues that the mitigation plan is inadequate to satisfy ZDO 1002.05 and various OARs, but those arguments are based on the premise that the proposed mitigation plan was merely a narrative draft rather than an approved plan. During the open

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<sup>5</sup> The extended open record period was largely to allow the applicant to work with ODF&W to develop an acceptable wildlife mitigation plan.

<sup>6</sup> OAR 660-033-0130(38)(h)(F) requires the solar facility to both minimize adverse impacts and completely offset all unavoidable impacts, which is a more rigorous standard than ZDO 1002.05. OAR 660-033-0130(38)(h)(F) provides:

“If a proposed photovoltaic solar power generation facility is located on lands where, after site specific consultation with an Oregon Department of Fish and Wildlife biologist, it is determined that the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites or pigeon springs, the applicant shall conduct a site-specific assessment of the subject property in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist’s report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant’s site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility.”

record period, however, as previously explained, ODF&W did agree that the Mitigation Plan was sufficient to satisfy the applicable requirements. While I am not required to defer to ODF&W's conclusions, ODF&W's analysis that the Mitigation Plan is sufficient is more persuasive than 1000 Friends' objections to the earlier plan. ZDO 1002.05 and OAR 660-033-0130(38)(h)(f) are satisfied.

1000 Friends makes vague allegations that ZDO Chapters 1007 and 707 are not satisfied. As the applicant points out, those arguments are merely general inquiries rather than arguments. 1000 Friends' arguments regarding ZDO Chapter 1007 are particularly confusing if not nonexistent. The only pertinent approval criteria from ZDO Chapter 1007 require that there be adequate capacity for the proposed use and that intersection sight distance be adequate for safety. As the staff report explains, the proposed use would be unoccupied and only generate occasional maintenance visits. There is more than adequate capacity for the proposed use, and even if there were not adequate capacity, such uses are exempted from the capacity requirements. The staff report explains that there are also more than adequate sight distances for the entrance to the property. ZDO 1007 is satisfied.

ZDO Chapter 707 addresses Historic Landmark, Historic District, and Historic Corridor zoning. 1000 Friends appears to argue that the proposed use violates (presumably ZDO 707.03) because the BRHC is nearby. The staff report explains that the proposed use is not in the historic corridor and therefore ZDO 707.03 does not apply. Even if the access to the property from East Marmot Road is from a section of the road that is also part of the historic corridor, ZDO 707.03 only applies to "significant development." The only portion of the proposed use that could be considered to be in the BRHC is the access from East Marmot Road. There is already access from East Marmot Road, and minor improvements to the access hardly rise to the level of significant development. To the extent ZDO 707.03 is applicable, it is satisfied.

#### **4. Other OARs**

1000 Friends also argues that the proposed use does not comply with other OARs. According to 1000 Friends, the proposed use does not comply with OAR 660-033-0130(f)(A), (D), and (F).<sup>7</sup> As the applicant points out, OAR 660-033-0130(f) only applies

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<sup>7</sup> OAR 660-033-0130(f)(A), (D), and (F) provide:

"For high-value farmland described at ORS 195.300(10), a photovoltaic solar power generation

to high value farmland. As the applicant further explains, the subject property is “nonarable land” rather than high value farmland. OAR 660-033-0130(38) defines “nonarable land” as “land in a tract that is predominantly not cultivated and predominantly comprised of nonarable soils.” According to the applicant’s soils expert, the subject tract is made up of 64.3% nonarable soils and has no history of cultivation or irrigation. 1000 Friends does not address, let alone challenge, this calculation. 1000 Friends’ only argument is that “there will be 3 or 4 acres of arable soils within the project boundary.” This has nothing to do with whether or not the property is comprised of “nonarable soils” and certainly does not contradict the applicant’s soils expert. 1000 Friends’ argument is without merit.

## 5. Other Issues

Opponents raised a number of issues that do not pertain to any applicable approval criteria. One opponent opposes the application on the basis that the power from the solar

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facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4 or the requirements of paragraph (G) are met. The governing body or its designate must find that:

“(A) The proposed photovoltaic solar power generation facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;

“ \* \* \*

“(D) Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weed species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;

“\* \* \*

“(F) A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:

“(i) If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary.

“(ii) When at least 48 acres of photovoltaic solar power generation have been constructed or received land use approvals and obtained building permits, either as a single project or as multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar energy generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the land use pattern will be materially altered if the overall effect of existing and potential photovoltaic solar energy generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.”

farm might be used for a cannabis operation. This argument has nothing to do with any approval criteria, and in any event the power from the proposed solar farm would be sold to Portland General Electric.

1000 Friends argues that there might possibly be archeological artifacts on the property. Even if that were true (and there is no evidence that it is), that is not an applicable approval criterion for the proposed use. While there may other independent processes regarding such potential artifacts, any such arguments are not a basis to deny this application.

1000 Friends implies that there are land use violations occurring on the property. I am not aware (or is staff as far as I know) of any code violations of the property. Even if there were, 1000 Friends does not explain why that would be a basis to deny the application, and I do not see that would be.

1000 Friends argues that the application should be denied because there are other solar farm applications in Clackamas County and other counties. Again, this has nothing to do with any applicable approval criterion. Finally, 1000 Friends cites to a Yamhill County case that denied a solar farm application. In *Yamhill Creek Solar, LLC v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2018-009, October 3, 2018), the Yamhill County Board of County Commissioners (YCBCC) denied a solar farm in wine country<sup>8</sup>. While that case involved conditional use criteria similar to ZDO 1203.03, the application was denied due to specific Yamhill County comprehensive plan provisions. Furthermore, the YCBCC's decision was entitled to significant deference under ORS 197.829(1). *Yamhill Creek Solar* hardly requires a denial of the application.

All of the applicable 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 Z0424-18-C, with the following conditions of approval.

#### **F. CONDITIONS OF APPROVAL**

##### **I. General Conditions:**

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<sup>8</sup> *Yamhill Creek Solar* was recently affirmed without opinion by the court of appeals.

- 1) Approval of this land use permit is based on the submitted written narrative and plan(s) dated August 27, 2018. The application was deemed complete on August 29, 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](mailto: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](mailto: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 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](mailto: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 ODF&W approved Wildlife Habitat Protection and Mitigation Plan, Soil Compaction and Weed Control plans.

**III. Building Code Division Conditions:** Andy Anderson, (503) 742-8742, [aanderson@clackamas.us](mailto: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:** Chris Hass; (503) 742-4673

- 1) 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. To obtain the permit, submit plans prepared and stamped by an engineer registered in the state of Oregon or provide alternative plans acceptable to the Engineering Division. 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 permit will be for driveway, drainage, parking and maneuvering areas.
- 2) All onsite improvements shall be designed and stamped by an engineer registered in the State of Oregon and be in compliance with *Clackamas County Roadway Standards*. On site improvements shall include:
  - a) Adequate on site circulation for the parking and maneuvering of all vehicles anticipated to use the site in accordance with ZDO section 1015 and applicable Roadway Standards requirements.
  - b) One minimum 20 foot wide and 20 feet long paved driveway approach in conformance with Roadway Standards Drawing D500, including a culvert. The approach shall be constructed at a 90° angle to Marmot Road.
  - c) The grade of the approach shall not exceed plus or minus 5%. Stormwater runoff shall not be permitted to flow over the paved approach onto Marmot Road.
  - d) The applicant shall design and construct a minimum 12 foot wide perimeter access road centered within a minimum 20 foot wide clear zone, approximately as shown on the submitted preliminary zoning site plan. Four-foot wide compacted earthen shoulders are required. Minimum vertical clearance shall be 13.5 feet for the full length of the access road.

- e) Turn and curve radii shall comply with local Fire District requirements which require a minimum 50 foot radius for roads less than 20 feet and 40 foot radius for roads equal to or greater than 20 feet. The perimeter access road shall comply with Roadway Standards Drawing R100.
  - f) Single lane roads (less than 20 feet in width) longer than 400 feet in length shall have turnouts constructed every 400 feet or less unless otherwise approved by the local Fire Chief. The turnouts shall be a minimum of 10 feet wide and 30 feet long in conformance with Roadway Standards Drawing C350. The spacing of the turnouts may be reduced when visibility and sight distances are limited.
  - g) The private road shall be constructed with a minimum of a six inch thickness of 3/4" minus crushed, graded and compacted rock over geotextile fabric, over a compacted base and subgrade and shall be able to support an 80,000-pound fire apparatus.
  - h) Vehicle parking spaces shall comply with ZDO section 1015 dimensional requirements and shall be surfaced with screened gravel or better.
  - i) The applicant shall provide surface water management facilities that comply with the requirements found in Roadway Standards chapter four. The applicant shall also provide an erosion control plan and mitigate all surface water impacts created by the development.
- 3) The applicant shall maintain minimum intersection sight distances for the site driveway approach of 445 feet to the east and to the west measured 14.5 feet back from the edge of the travel lane at the driveway approach intersection with Marmot Road. In addition, no plantings at maturity, retaining walls, embankments, fences or any other objects shall be allowed to obstruct minimum sight distance requirements.
- 4) If the applicant chooses to gate the driveway approach, the applicant shall design and construct the gate a minimum of 30 feet (or 20 feet if approved by the local Fire District) from the north edge of the lane on Marmot Road and the gate shall either swing back into the property, away from Marmot Road, or shall slide parallel to Marmot Road.
- 5) Plans shall note that "Separate Utility Placement Permits" are required from Clackamas County Engineering when utility connections within the County right-of-way are proposed.

The engineering plans shall state that the use of public rights-of-way for construction vehicle and materials staging is not authorized by the Roadway Standards. The applicant may propose to use the public right-of-way for staging, but they will be required to submit a construction vehicle management and staging plan for review and approval by DTD Engineering before the County issues a Development Permit



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

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

**VI. Hoodland Fire #74**

Comments received dated September 19<sup>th</sup>, from Hoodland Fire. Approved, stamped site plan included. Exhibit #11.

DATED this 30th day of January, 2019.



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).