

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

Regarding an Application for a Conditional Use)	Case File No.
Permit to Establish a Ten Acre Photovoltaic)	Z0022-19-C
Solar Power Generation Facility.)	(Buckner Creek Solar)

A. SUMMARY

1. The owners are Robert Bishop and Elizabeth Bishop. The applicant is Buckner Creek Solar LLC.
2. The subject property is located at 15050 South Spangler Road, Oregon City, OR 97045. The legal description is T4S, R2E, Section 03, Tax Lot 1500, W.M. The subject property is approximately 43.72 acres and is zoned AG/F – Agriculture Forest.
3. On March 21, 2019, 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. During the open record period, the time for responding to new evidence was extended for three additional weeks due to the voluminous materials submitted by an opponent.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on March 21, 2019. 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. No one 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. The period for responding to new evidence was subsequently extended for an additional three weeks.

C. FACTS

The subject property is an approximately 43.72-acre parcel zoned AG/F. The property is located at 15050 South Spangler Road, Oregon City, OR 97045. The property is irregularly shaped with a long narrow finger extending south to a rectangular shaped portion running north to south. The southwestern portion of the property is steep and slopes down to a creek on adjoining properties. 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 south. The property is accessed via an access road to South Spangler Road to the north. Surrounding properties are zoned Exclusive Farm Use (EFU), Timber (TBR), and AG/F. Surrounding properties are in farm and forest use with scattered residential sites. The applicant proposes to site the solar facility in the central portion of the property on a flat area that is currently used for growing Christmas trees.

D. DISCUSSION

The staff report does a thorough job of explaining how all of the applicable approval criteria are satisfied. There is one opponent, Winston Chang (Chang). Chang does not challenge all of the staff report's findings regarding the approval criteria. 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. 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.” Chang argues that such photovoltaic solar power generating facilities cannot constitute “commercial utility facilities for the purpose of generating power” as described in Table 406-1. This repeats an argument Chang made in an earlier case that also involved a proposed photovoltaic solar generating facility (solar farm) on forestland. Mountain Meadows, Z0398-18-C, November 30, 2018. That case approved the proposed solar farm and was appealed to the Land Use Board of Appeals (LUBA). LUBA remanded the decision on two issues (discussed later). *York v. Clackamas County*, ___ Or LUBA ___, LUBA No. 2018-145, April 10, 2019 (*York*). In *York*, Chang and other opponents made the same argument regarding solar farms. LUBA thoroughly analyzed Chang’s arguments, rejected those arguments, and explained that solar farms were allowable conditional uses. *Id.* at 4-11. LUBA settled the matter, therefore Chang’s argument does not provide a basis to deny the application.

Therefore, 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. Chang does not specifically challenge the staff report’s findings under ZDO 1203.03(B). While ZDO 1203.03(B) is primarily concerned with the subject property itself rather than any effects on surrounding properties, LUBA noted in *York* that characteristics of the “location” of the subject property can implicate considerations offsite of the subject property. *Id.* at 13-14. The only issues that Chang raises that could be plausibly interpreted to implicate the “location” of the property pursuant to ZDO 1203.03(B) are geotechnical issues such as steep slopes and

earth movement. Those arguments are addressed in detail later under ZDO 1203.03(F). To the extent Chang's arguments implicate ZDO 1203.03(B), although there are steep slopes on a portion of the property, the proposed solar farm would not be located on the steep slopes but rather on a relatively flat area. As also explained in greater detail later, the proposed site of the solar farm is not in an area of earth movement, so there is nothing about the location of the proposed solar farm that makes the proposed use unsuitable for the subject property.

Therefore, 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) exempts: “Unmanned utility facilities, such as wireless telecommunication facilities, where no employees are present except to perform periodic servicing and maintenance[.]” 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. Chang argues that the access road to South Spangler Road is inadequate because it is less than 20 feet wide and also that the fire turnarounds are unsafe. The Department of Transportation and Development (DTD) addressed the safety of the transportation system and determined that safe access could be provided. DTD suggested numerous conditions of approval, which are incorporated in the staff report, to ensure the safety of the transportation system. Those proposed conditions of approval include: (1) that the access road be designed and constructed in accordance with County Roadway Standards – if the access road is less than 20 feet wide fire turnouts will be required in accordance with Roadway Standards Drawing C350; (2) that the fire turnouts shown on the site plan shall be designed and constructed in

accordance with Roadway Standards Drawing 350; and (3) that written approval from the local Fire District for the access road, circulation, and fire lanes must be obtained prior to initiation of any construction activities. I agree with DTD and the staff report that, with the proposed conditions of approval, the safety of the transportation system is adequate for the proposed use.

Therefore, 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.” Chang argues that the proposed solar farm would violate ZDO 1203.03(D), but his argument is not very well developed. Any adverse effects to surrounding properties under ZDO 1203.03(D) are only relevant if they affect “the primary uses allowed in the zoning district(s) in which the surrounding properties are located.” The surrounding properties are zoned EFU, TBR, and AG/F – which are all resource zones. The primary uses in those zones are farm and forest uses. Chang makes no attempt to explain how any farm or forest uses are substantially limited, impaired, or precluded under ZDO 1203.03(D).¹ The only impact Chang raises under ZDO 1203.03(D) is potential glare from the solar farm.

Initially, even if the solar farm would produce significant glare, Chang does not explain how that would substantially limit, impair, or preclude farm or forest uses – and I do not see that it would. Even if glare were a basis to deny the decision, 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 significant 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. I do not see that some glare for a small

¹ Chang does argue that farm uses are significantly affected under different, more stringent, approval standards. Those arguments are addressed later.

amount time comes close to limiting, impairing, or precluding any uses.

In *York*, LUBA explained that the inquiry under ZDO 1203.03(D) must analyze whether the proposed use substantially limits primary uses on surrounding properties and whether the proposed use substantially impairs primary uses on surrounding properties. LUBA defined “limit” as: “1. To: confine to within certain limits: fix, constitute or appoint definitely, allot, prescribe * * * 3a: to set the bounds or limits; b: to curtail or reduce in quantity or extent.” *Id.* at 18. As explained earlier, I do not see that any effects from the proposed use would alter the character of the surrounding area in any substantial manner, let alone alter the character of the area in a way that substantially limits primary uses on surrounding properties as “limit” is defined by LUBA.²

LUBA defined “impair” as: “to make worse, diminish in quantity, value, excellence or strength, do harm to: damage, lessen.” *Id.* As explained earlier, I do not see that any effects from the proposed use would alter the character of the surrounding area in any substantial manner, let alone alter the character of the area in a way that substantially impairs primary uses on surrounding properties as “impair” is defined by LUBA

Chang also argues 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), *aff’d without opinion* 295 Or App 669 (2019). 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). Chang quotes 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 continued 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

² As explained earlier, the character of the surrounding area is farm and forest resource use with scattered homesites on resource land.

area.”

Chang argues 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.³ 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).⁴

ZDO 1203.03(D) is satisfied.

5. Whether the proposed use satisfies the comprehensive plan.

ZDO 1203.03(E) requires that the “proposal satisfies the goals and policies of the Comprehensive Plan that apply to the proposed use.” Chang identifies a number of comprehensive plan goals and policies he believes the proposed use does not satisfy. The staff report and the applicant address potentially applicable goals and policies and conclude that they are satisfied. The comprehensive plan goals and policies are not independent approval criteria. As LUBA explained in *York*, a hearings officer must (1) consider all applicable goals and policies, (2) as necessary balance or weigh any conflicting or competing policy directives, and (3) reach an ultimate conclusion regarding whether or not the proposed use, given its relevant characteristics and circumstances, is consistent with

³ 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).

⁴ I do not see that the YCBCC decision 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.

the greater weight of the applicable comprehensive plan goals and policies. *York*, slip op 23-24.

Chang cites Policy 1 of the Natural Resources and Energy Chapter:

“1.0 Cooperate with the state legislature and appropriate state and federal agencies (Public Utility Commission, Geology and Mineral Industries, Forest Service, etc.) in programs to encourage alternative energy source development. Such programs will focus on (a) geothermal resources in the Cascades; (b) single building solar and wind conversion technologies; and (c) energy recoverable from solid wastes.

“1.1 Support exploration, research and development of geothermal resources consistent with environmental protection policies of this Plan. The County also will cooperate in the development of any necessary transmission facilities designed to bring such energy to local industries and residences.

“1.2 Cooperate with the State Department of Energy to undertake and evaluate studies on the specific nature and potential of the County's wind and solar energy resources.”

I agree that this is a potentially applicable policy. Chang argues that the proposed use does not satisfy the policy because the solar farm is larger than the “single building solar” technology mentioned in the policy. While the proposed use may not coincide with the specific direction for single building solar, the proposed use satisfies the policy’s direction “to encourage alternative energy source development.” While this is a vague aspirational policy, the proposed use satisfies it and certainly does not violate it. The proposed use satisfies the policies of the Natural Resources and Energy Chapter.⁵

Chang cites numerous goals and policies from the Land Use Chapter section on Forests:

“Goal One - To conserve forestlands.

“Goal Two - To protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of timber as the leading use on forestland.

“Goal Three - To conserve, protect, and enhance watersheds, wildlife and fisheries resources, agriculture, and recreational opportunities that are

⁵ The applicant cites a number of Water Resource Goals and Policies from the Natural Resources and Energy Chapter, but I do not see that a proposed solar farm on forestland has anything to do with water resources.

compatible with the primary intent of the plan designation.

“Goal 4 -To minimize wildfire hazards and risks.

“Policy 4.PP.2. - Encourage forest-related industries.

“Policy 4.PP.3. - Prohibit land uses that conflict with forest uses.

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

“Policy 4.PP.11. – The Timber (TBR) and Ag/Forest (AG/F) zoning districts implement the goals and policies of the Forest plan designation. The TBR zoning district shall be applied to areas predominantly in forest use.”

Goals one, two, and three are potentially applicable goals. Chang argues that the language of the forest goals could not be clearer in that they do not allow non-forest uses on forestland. Under Chang’s reasoning, solar farms would never be allowed on forestland despite the fact the ZDO and state law expressly allow such solar farms on forestland. I addressed this issue in Mountain Meadows stating:

“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.”

LUBA agreed with me in rejecting Chang’s per se categorical argument that any proposed conditional use on forestland that takes 10 acres out of potential forest production necessarily violates these comprehensive plan goals. Although LUBA upheld my ultimate conclusions regarding ZDO 1203.03(E), LUBA stated that just because the ZDO allows

solar farms on ten acres in forestlands does not mean that the proposed use is necessarily consistent with the forest goals to preserve forestlands. *Id.* at 22-23. LUBA further stated:

“Different proposals and circumstances may involve different ranges of applicable plan goals and policies, and the ultimate balancing and conclusion may well be very different with respect to different proposals or forest land with different characteristics. For example, a proposal to site a hydroelectric power generation facility at a location that would eliminate 10 acres of sensitive riparian habitat may not fare as well in that analysis as a more generic proposal to site a power generation facility that would occupy 10 acres of unexceptional forest land that is currently used for non-forest agricultural use.” *Id.* at 24.

In the present case, the subject property is much more like the latter described hydroelectric power generating facility. There is no sensitive (riparian or otherwise) habitat to be eliminated. The application is a generic solar farm proposal on unexceptional forestland. There is absolutely nothing exceptional about the subject property’s forestland – it is zoned for both agricultural and forest use, it is not a traditionally lucrative or productive parcel for timber, it is not part of a larger forest operation. Furthermore, it is not currently used for forest purposes, as it is in Christmas tree production, which is a farm use. ORS 215.203(2)(a). While solar farms do not categorically satisfy the forest goals and policies because they are allowed on forestland, the present application satisfies the forest goals because the proposed solar farm would be a generic solar farm located on unexceptional forestland that is not currently used for forest uses.⁶

Chang cites a number of goals and policies from the Land Use Chapter of the comprehensive plan regarding Rural Lands. According to Chang, the proposed solar farm is not consistent with those rural lands goals and policies. Those goals and policies, however, are not applicable to the proposed use on the subject property. The definition of rural lands specifically states that: “[R]ural lands are exception lands, as defined in Oregon Administrative Rules 660-004-0005(1), that are outside urban growth boundaries and Unincorporated Communities and are suitable for sparse settlement, such as small farms,

⁶ The proposed solar farm also must satisfy the more stringent requirement of ZDO 406.05(A)(1)(b) that requires that “[T]he proposed use will not significantly increase fire hazards or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.” Satisfying ZDO 406.05(A)(1)(b) would be more than enough to satisfy Forest Goal Four “[T]o minimize wildfire hazards and risks.”

woodlots, or acreage home sites, lack public facilities or have limited facilities and *are not suitable, necessary, or intended for urban, agricultural, or forest use.*” (Emphasis added.) The subject property is zoned AG/F, which is a resource zone rather than an exception area, and has primary uses of agricultural and forest uses. Therefore, the rural lands goals and policies are not applicable.⁷

Chang cites Policy 5.F.1 of the Integration of Land Use and Transportation Policies of the Transportation System Plan Chapter of the comprehensive plan:

“Land use and transportation policies shall be integrated consistent with state law regarding preservation of farm and forest lands.”

I do not see that this policy has anything to do with the proposed use. The proposed use is for a solar farm on forestland. This policy has nothing to do with solar farms. The proposed use has nothing to do with land use or transportation policies. Transportation has absolutely nothing to do with this proposed use as the proposed use is one of the most minimally intensive uses regarding vehicle trips allowed. To the extent land use policies should be integrated with state law, the ZDO is completely consistent with state law.

Chang cites two of the Economic Goals of the Economics Chapter of the comprehensive plan:

“Goal One - Establish a broad-based, stable, and growing economy to provide employment opportunities to meet the needs of the County's residents.

“Goal Three - Attract new industrial and commercial development that is consistent with environmental quality, community livability, and the needs of County residents.”

Chang argues that the proposed use does not satisfy Goals One and Three. According to Chang, the proposed use would not generate many long term jobs and would degrade environmental quality. 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 than they are to any

⁷ Even if the rural lands goals and policies did apply they would not particularly weigh against the proposed use. For instance, the first goal is “[T]o provide a buffer between urban and agricultural or forest uses.” The proposed solar farm would be more of a buffer from agricultural uses than the existing use which is agricultural with no buffer.

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 \$2.5M in investment, and increased property taxes. 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 approximately 350 homes.”

Chang cites Economic Policy 8.A.5.1:

“Encourage natural-resource-oriented industries by:

“8.A.5.1 Encouraging timberland owners to use sound timber management practices and promote a sustained harvest.”

This policy is clearly directed at the County to encourage certain practices. The County can certainly encourage practices, but specific landowners are not required to bow to such encouragement. This is not an applicable policy. Even if it was an applicable policy that was not satisfied, it is easily outweighed by all the other policies previously discussed that are satisfied.

Finally, Chang cites Economic Policy 8.B.9:

“Facilitate home occupations within the constraints of neighborhood quality, subject to standards, including:

“a. Visual compatibility with neighborhood and appropriate buffering

“b. No unsightly or distracting storage, smoke, dust, noise, etc.

“c. No excessive increase in traffic, especially truck traffic

“d. No excessive parking of vehicles on the property.”

This policy is not applicable to the proposed use. This policy is clearly directed at home occupations. The proposed use is not a home occupation.

Chang raises numerous comprehensive plan goals and policies. Many 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 forestlands” and “prohibit uses that conflict with forest uses” 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 1003.02 provides:

- “A. An engineering geologic study shall be required for development proposed on slopes of twenty (20) percent or greater. The study shall include items under subsection 1003.02B 2.
- “B. No development or grading shall be allowed in areas of land movement, slump or earth flow, and mud or debris flow, except under one of the following conditions:
 - “1. Stabilization of the identified hazardous condition based on established and proven engineering techniques which ensure protection of public and private property. Appropriate conditions of approval may be attached by the County.
 - “2. An engineering geologic study approved by the County establishing that the site is stable for the proposed use and development. The study shall include the following:
 - “a. Index map
 - “b. Project description, to include: Location; topography; drainage; vegetation; discussion of previous work; and discussion of field exploration methods.
 - “c. Site geology, to include: Site geologic map; description of bedrock and surficial materials including artificial fill; location of any faults, folds,

etc.; and structural data including bedding, jointing, and shear zones.

- “d. Discussion and analysis of any slope stability problems.
 - “e. Discussion of any offsite geologic conditions that may pose a potential hazard to the site or that may be affected by onsite development.
 - “f. Suitability of site for purposed development from geologic standpoint.
 - “g. Specific recommendations for cut slope stability, seepage and drainage control, or other design criteria to mitigate geologic hazards.
 - “h. If deemed necessary by the engineering geologist to establish whether an area to be affected by the proposed development is stable, additional studies and supportive data shall include: cross sections showing subsurface structure; graphic logs of subsurface explorations; results of laboratory test; and references.
 - “i. Signature and certification number of an engineer or engineering geologist registered in the State of Oregon.
 - “j. Additional information analyses as necessary to evaluate the site.
- “C. Vegetative cover shall be maintained or established for stability and erosion control purposes.
- “D. Diversion of storm water into these areas shall be prohibited.
- “E. The principal source of information for determining mass movement hazards is the State Department of Geology and Mineral Industries (DOGAMI) Bulletin 99 and accompanying maps. Approved site specific engineering geologic studies shall be used to identify the extent and severity of the hazardous conditions on the site, and to update the mass movement hazards data base.”

Chang argues that ZDO 1003.02 regarding mass movement hazard areas applies to the proposed development. ZDO 1003.02(A) is not applicable because the proposed site for the solar farm is not on slopes of 20 percent or greater. Chang argues that ZDO

1003.02(B) applies. According to Chang, portions of the area proposed for the solar farm are in areas of moderate land slide risk as demonstrated by DOGAMI maps. Staff explained at the public hearing merely being in an area of moderate land slide risk is not the same thing as being in an area of “land movement.” According to staff, an area of land movement is an area where a land slide or some other earth movement has already occurred – not an area where such activity *could* occur. I agree with staff that ZDO 1003.02(B) applies to areas where “land movement, slump or earth flow, and mud or debris flow” has occurred rather than where it might occur. Therefore, ZDO 1003.02(B) is not applicable.

In the alternative, if a reviewing body determines that ZDO 1003.02(B) is applicable to the proposed use, the applicant has agreed to a condition of approval requiring a geotechnical report pursuant to ZDO 1003.02(B)(2). Furthermore, the applicant has complied with ZDO 1003.02(C) because there is a thorough soil erosion, sediment, and soil compaction plan that explains how these issues will be managed. The applicant has also complied with ZDO 1003.02(D) because compliance with ZDO 1006 will require that the proposed use not divert storm water on to mass movement areas. Accordingly, if a reviewing body determines that ZDO 1003.02(B) is applicable then the following condition of approval is included:

“The applicant shall provide an engineering geologic study approved by the County establishing that the site is stable for the proposed use and development pursuant to ZDO 1003.02(B)(2).”

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. Although Chang does not cite ZDO 1006, he argues 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. * * *”

Chang 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 Chang’s 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.”

Chang argues that the proposed use will force changes in forest practices on forest lands. Initially, according to Chang 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. Chang and other opponents raised this issue in *York*. LUBA rejected Chang’s argument and held that taking the land for the solar farm out of forest use does not violate the “significant change/increase cost” test of ZDO 406.05(1)(a). *Id.* at 29-31. LUBA settled the matter, and Chang’s arguments do not provide a basis to deny the application.

Chang also argues that the potential use of Round Up type herbicides could cause cancer to horses on a farm to the west or an equine veterinary office to the north.⁸ According to Chang, the applicant would be likely to heavily rely on Round Up type herbicides which could drift onto adjoining properties. The applicant has provided a Weed Mitigation Plan explaining the various methods for controlling weeds:

“After construction is complete, weeds will be monitored on a regular basis. Hand eradication will be the primary course of action, although spraying or grazing with livestock may be utilized if it is deemed more effective over the long term. * * *”

⁸ Chang does not explain how that would violate the significant change/increase cost test, but I will assume that it would.

Chang argues that spraying is more likely to be used due to grazing being infeasible with a solar farm and the lack of water likely to lead to more weeds. Even if some spraying with Round Up type herbicides does occur, I think that any potential effect on horses is far too speculative to implicate the significant change/increase cost test. The subject property is a large property – over 43 acres. The area of potential spraying would only be a small portion of the property. Best management practices would be used for spraying as detailed in the applicant’s expert’s April 25, 2019 letter. The horse farm and veterinary office are a significant distance away from the proposed location of the solar farm. Round Up is standard pesticide that can be used on most if not all of other adjoining properties.⁹ Finally, one would think if there were actually any danger from the use of Round Up on the property that issue would be raised by the horse farm or the veterinary clinic rather than Chang who does not even live nearby. The evidence that the use of Round Up type herbicides would violate the significant change/increase cost test is de minimis at best while the evidence that it would not violate the test is overwhelming. I agree with the applicant and the staff report that the proposed use would not violate the significant change/increase cost test.

Therefore, ZDO 406.05(1)(a) is satisfied.

Chang argues that the proposed use would violate ZDO 405.05(1)(b) because the proposed solar farm would “significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.” Chang and other opponents made the same argument in *York*. In *York*, LUBA held that the comparison under ZDO 406.05(1)(b) is between the “pre-development fire hazard (Christmas tree farm) compared to the post-development fire hazard (solar facility).” *Id.* at 36. According to Chang, solar farms are inherently dangerous fire risks and risks to fire suppression personnel. Chang cites reports of fires on solar farms in California, the United Kingdom, and an undisclosed location. The applicant responds that there are many reports of fires on Christmas trees farms and that if anything fire hazards would be reduced. The applicant provided a table that demonstrates all the ways that the solar farm would be less of a fire hazard than the Christmas tree farm. I agree with the applicant’s conclusions. While there is evidence on both sides, fires on Christmas tree farms appear to be more common and

⁹ As the applicant points out, no pesticides are proposed to be used so Chang’s citations to ORS 30.939 and 30.932 are not relevant.

certainly to be more hazardous resulting in greater damage. I agree with the applicant that the proposed solar farm would not increase, let alone significantly increase, the fire hazard over that of the existing Christmas tree farm.

Chang also argues that the proposed solar farm would significantly increase the risks to fire suppression personnel because the solar panels essentially cannot be turned off and therefore represent a live danger. The applicant provides evidence explaining that with proper understanding and training regarding solar farms that fire suppression personnel would not be subject to significantly increased risks. The applicant has therefore suggested a condition of approval that the applicant offer a fire safety training course to the local fire district:

“Prior to the issuance of building permits, the applicant will offer a fire safety training for the solar farm to the RFP #1. If the offer is accepted within 30 days, the applicant will provide such training.”

I agree with the applicant that with the proposed condition of approval, the proposed solar farm would not significantly increase risks to fire suppression personnel. Therefore, ZDO 406.05(1)(b) is satisfied.

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 Z0022-19-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 1/22/19. The application was deemed complete on 1/24/19. 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 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.

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: Kaylin Hangartner, (503) 742-4707, khangartner@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) The applicant shall design and construct one minimum 20-foot wide paved driveway approach to S. Spangler Road in conformance with Roadway Standards Drawing D500. Storm water runoff shall not be permitted to flow over the paved approach onto Spangler Road.
- 4) The applicant shall submit proof of legal access to access the shared private roadway from S. Spangler Road to tax lot 01500.
- 5) The access road shall be designed and constructed in accordance with Roadway Standards Drawing R100 in regards to structural section and the required surfacing with screened gravel or better. If the access is less than 20 feet wide, fire turnouts will be required in accordance with Roadway Standards Drawing C350. If the access road is 20 feet or wider, fire turnouts are not required.
- 6) The fire turnarounds shown on the site plan in the land use proposal shall be designed and constructed to be in accordance with Roadway Standards Drawing C350.
- 7) The applicant shall provide adequate on site circulation areas for the parking and maneuvering of all vehicles anticipated to use the parking and maneuvering areas. Parking layout geometry shall be in accordance with ZDO 1015.
- 8) Parking spaces shall meet ZDO section 1015 dimensional requirements.
- 9) Minimum intersection sight distances for the site driveway approach shall be 665 feet to the east and to the west. In addition, no plantings at maturity, retaining walls, embankments, fences or any other objects shall be allowed to obstruct minimum sight distance requirements.
- 10) Positive drainage must be provided for surface water to an acceptable outfall in accordance with Roadway Standards Chapter 4. Erosion control measures shall be installed and maintained throughout the construction process.
- 11) Prior to initiation of any construction activities associated with the project, 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 plan 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.

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) If a reviewing body determines that ZDO 1003.02(B) is applicable then the following condition of approval shall apply:

“The applicant shall provide an engineering geologic study approved by the County establishing that the site is stable for the proposed use and development pursuant to ZDO 1003.02(B)(2).”

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

No comments received as of this staff report. No septic facilities planned.

VI. Clackamas RFPD#1

- 1) Prior to the issuance of building permits, the applicant will offer a fire safety training for the solar farm to the RFP #1. If the offer is accepted within 30 days, the applicant will provide such training.

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 23rd day of May, 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).