

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

Regarding an Application for a Conditional	)	<b>Case File No.</b>
Use Permit to Establish a Photovoltaic	)	<b>Z0086-20-C</b>
Solar Power Generation Facility.	)	<b>(Auburn Solar)</b>

**A. SUMMARY**

1. The applicant is Auburn Solar LLC and Connor Grogan. The owner is Schmale Hilltop Farms, LLC.
2. The subject property is located at 18191 Southeast Tickle Road, Boring, OR 97009. The legal description is T2S, R4E, Section 17, Tax Lots 1400 and 1401, W.M. The subject property is approximately 20 acres and is zoned EFU – Exclusive Farm Use.
3. On May 28, 2020, 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 May 28, 2020. 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. Connor Grogan testified in support of the application.
4. Doug Jensen and Esme Jensen testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new evidence, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and another additional week for the applicant's final legal argument. An opponent, Esme Jensen, requested that the record be left open an additional period of time. The applicant agreed to a one week extension of the first open record period.

### **C. FACTS**

The subject property is an approximately 20-acre parcel zoned EFU. The subject property is located at 18191 Southeast Tickle Road, Boring, OR 97009, at the intersection with Southeast Fosberg Road. The subject property is essentially rectangular shaped and generally flat. The subject property is in an area of EFU zoning with non-intensive farm use and production with scattered rural residential parcels. The property is currently being used for farm use and has a residence and outbuildings. The application proposes to construct a 14-acre photovoltaic solar power generation facility on the property.

### **D. DISCUSSION**

The staff report does a thorough job of explaining how all of the applicable approval criteria are satisfied. Most of the findings in the staff report are not challenged. It would be a waste of the County's money and resources to review and repeat all of the unchallenged findings in the staff report. I have reviewed the findings in the staff report and agree with those findings. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.

Initially, there is a procedural matter to address. The chairman of the applicable Community Planning Organization (CPO) – Eagle Creek Barton – sent an email to the County planner asking for additional time to comment on the application. According to the CPO chairman, the CPO did not receive notice of the May 28, 2020 public hearing until May 26, 2020. The County sent notice of the public hearing, however, on April 22, 2020 – more than a month before the public hearing. The County's mailing shows that the CPO was provided notice. A number of people received notice and participated in the public

hearing so there is no dispute that at least some notices were sent out timely.<sup>1</sup> As the CPO was included on the mailing list, under state law it is presumed that the notice was received. Even if the CPO had not received the notice until May 26, 2020, at the public hearing the record was left open for one week for the submission of new evidence, one week for submission of responses to the new evidence, and one week for the applicant's final legal argument. At the request of an opponent, the new evidence period was extended for an additional week. Therefore, the CPO had more than two weeks to submit evidence in this case. I do not see that there was any failure to provide notice, and even if there had been I do not see that the CPO's substantial rights were prejudiced.

The Jensen family owns property just to the north of the subject property. The Jensens are opposed to the proposed solar farm. Initially, the Jensens argue that the proposed solar farm is not a farm use and is inappropriate for an EFU-zoned property. Both state statutes and County ordinances expressly allow solar farms, provided they meet the applicable approval criteria, in EFU zones. The Jensens' argument does not provide a basis to deny the application.

The Jensens also argue that solar farms are unattractive and produce too much noise. Although the Jensens do not cite any County ordinances, 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 Jensens' property is also zoned EFU. The Jensens' objections – alleged unattractiveness of solar farms and noise – relate to their residential use of the property. Residential use is not a primary use in the EFU zone, so any alleged impacts on residential use are not relevant. While noise could conceivably have some impact on farm use (a primary use in the EFU zone), which the Jensens' have not alleged, the proposed solar farm would utilize string inverters which produce no more sound than that a typical residential air conditioner. I do not see that that low level of noise could have any adverse impacts on farm use. Even if visual impacts could be taken into account, I also do not see that merely having to see a solar farm raises to the level of

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<sup>1</sup> The County is required to send out notices at least 21 days before the public hearing.

substantially limiting, impairing, or precluding residential use of the property. ZDO 12030.03(D) is satisfied.<sup>2</sup>

Finally, the Jensens submitted evidence regarding a complaint filed by the applicant against Portland General Electric, the local power company. According to the Jensens this demonstrates that their electricity bills would go up if the application is approved. Initially, even if that were true that is not an applicable approval criterion. Furthermore, as the applicant explains, local electricity bills would not go up with approval of the application. If anything, bills would go down. The applicant persuasively explains that the complaint, rather than being adversarial, is necessary under state law to provide this type of solar power. In any event, the Jensen's argument does not provide a basis to deny 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 Z0086-20-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 written narrative and plan(s) originally submitted February 21, 2020 and deemed complete February 28, 2019. 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) **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

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<sup>2</sup> During the open record period, two other neighbors stated that they were opposed to the application, but they did not provide any argument in support of their position. Their arguments do not provide a basis to deny the application.

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.

- 3) 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.
- 4) 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.
- 5) 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 soil compaction and weed control plans, as submitted with application.

**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:** Sally Curran; (503) 742-4711, [scurran@clackamas.us](mailto:scurran@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 a minimum 12-foot wide paved driveway approach onto SE Tickle Creek road in conformance with Roadway Standards Drawing D500.
- 4) The applicant shall provide and maintain adequate intersection sight distance at the driveway approach intersection with SE Tickle Creek Road. Minimum intersection sight distances shall be 665 feet to the west, and 280' to the east. Sight distance shall be measured 14.5 feet back from the edge of the travel lane, at a height of 3.5 feet in the center of the driveway, extending to the center of the oncoming travel lane at height of 3.5 feet.
- 5) The applicant shall design and construct a minimum 12-foot wide access road from pave approach on to SE Tickle Creek road to the solar facility site.
- 6) Within the site, a minimum 12-foot wide perimeter access road shall be constructed with turnouts approximately every 400 feet. If a minimum 20-foot wide perimeter road is constructed, turnouts are not required. Turn and curve radii shall comply

with local Fire District requirements. The access road and perimeter access shall be consistent with Roadway Standards Drawing R100 with a surface of 6 inches of screened gravel or better.

- 7) Adequate storm drainage facilities shall be provide. A storm water management plan shall be provide and shall comply with the requirements of Roadway Standards, Chapter 4.
- 8) The applicant shall provide adequate on site circulation areas for the parking and maneuvering of all vehicles anticipated to use the solar facility. A minimum 24-foot deep backing area shall be provided for each parking stall.
- 9) Parking spaces for the solar facility shall meet *ZDO* section 1015 dimensional requirements, and Roadway Standards, Drawing P100.
- 10) Prior to the issuance of a building permit or the initiation of any construction activities associated with the solar facility, the applicant shall submit to Clackamas County Engineering Office:
  - a) Written approval from the local Fire District for the planned access, circulation, fire lanes. The approval shall be in the form of site stamped and signed by the Fire Marshal.
  - b) A set of street and site improvement construction plans, 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 minimum fee deposit is required upon submission of plans for the Development Permit. The fee will be calculated based on 8.83% of the public improvements and 5% of the onsite transportation improvements, according to the current fee schedule.

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.

DATED this 14<sup>th</sup> day of July, 2020.

  
Fred Wilson  
Clackamas County Hearings Officer

### **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 the decision (which date appears above my signature).