BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE HARRIS and PATTI HARRIS,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

BRUSH CREEK SOLAR, LLC,
Intervenor-Respondent.

LUBA No. 2018-022

FINAL OPINION
AND ORDER

Appeal from Marion County.

Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of petitioners. With him on the brief was Kelley and Kelley.

Scott A. Norris, Marion County Assistant Legal Counsel, Salem, filed a response brief and argued on behalf of respondent.

Damien R. Hall, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sara A. H. Sayles and Ball Janik LLP.

ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 09/26/2018

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal an order by the board of county commissioners that approves a conditional use permit to establish a 12-acre photovoltaic solar power generation facility on property that is zoned exclusive farm use (EFU).

FACTS

The subject property is a 15.15-acre tract designated Primary Agriculture in the Marion County Comprehensive Plan (MCCP), zoned EFU, and characterized as high-value farmland because it contains predominately class II soils according to the Natural Resources Conservation Services soil survey. The property is composed of two parcels, designated tax lots 600 and 700. Tax lot 600 comprises approximately 14.15 acres and tax lot 700 comprises approximately one acre. A portion of tax lot 600 is in current farm use. Tax lot 700 is developed with a farm-related vehicle and equipment service and repair business established as a conditional use in conjunction with farm use. Surrounding properties are zoned EFU and in farm use. Petitioners own a plant nursery on property adjacent to the subject property. An unnamed seasonal stream, a tributary to Brush Creek, runs along the eastern boundary of tax lot 600. The southern boundary of the property abuts Selah Springs Road NE.

In June 2017, the planning director approved Brush Creek Solar, LLC's (intervenor's) application for a conditional use permit. Petitioners appealed the planning director's decision to the hearings officer, and the hearings officer

issued a decision denying the application. Intervenor appealed that denial to the board of county commissioners, which remanded the matter back to the hearings officer. The hearings officer conducted a public hearing on remand and issued a decision approving the application with conditions. That approval was appealed to the board of county commissioners, which denied the appeal and adopted the hearings officer's decision as its own. This appeal followed.[1]

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the county improperly construed Marion County Rural Zoning Code (MCC) 17.119.025(A)(1), which requires that the application for a conditional use permit include "[s]ignatures of all owners of the subject property." *See* ORS 197.835(9)(a)(D) (providing that the Board shall reverse or remand a land use decision if the Board finds that the local government "[i]mproperly construed the applicable law"). The subject property is owned by Karen Klopfenstein and Walter Klopfenstein. It is undisputed that Karen Klopfenstein did not sign the application. The hearings officer imposed a condition of approval requiring Karen Klopfenstein to sign the application. Record 50 ("Before any building

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[1] At oral argument, intervenor noted that petitioners' attorney presented issues that were not included in the petition for review. We focus our review on the issues framed in the petition for review, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. OAR 661-010-0040(1) (providing that LUBA "shall not consider issues raised for the first time at oral argument").

permits may issue, applicant must submit proof via signature that property owner Karen Klopfenstein authorizes the filing of the subject application." (Condition 1)).

In their first assignment of error, petitioners argue that the application's noncompliance with MCC 17.119.025 cannot be cured by a condition of approval because MCC 17.119.060 limits the authority of the county to impose conditions of approval to those that are "necessary for the public health, safety or general welfare, or to protect persons working or residing in the area, or the protection of property or improvements in the area."

Petitioners' summary of MCC 17.119.060 is incomplete. In full, MCC 17.119.060 provides:

> "The director, planning commission or hearings officer may prescribe restrictions or limitations for the proposed conditional use but may not reduce any requirement or standard specified by this title as a condition to the use. Any reduction or change of the requirements of this title must be considered as varying this title and must be requested and viewed as such. The director, planning commission or hearings officer shall impose conditions only after it has determined that such conditions are necessary for the public health, safety or general welfare, or to protect persons working or residing in the area, or the protection of property or improvements in the area. The director, planning commission or hearings officer may prescribe such conditions it deems necessary to fulfill the purpose and intent of this title."

Petitioners fail to acknowledge that MCC 17.119.060 permits the hearings officer to impose conditions the hearings officer "deems necessary to fulfill the

purpose and intent of this title."[2] We agree with intervenor that MCC 17.119.025 can be satisfied by a condition imposed under MCC 17.119.060 requiring Karen Klopfenstein to sign the application.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the county improperly construed MCC 17.136.060(A)(3), which applies to all conditional uses in the EFU zone and provides: "The use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality." The hearings officer found:

> "The subject property is not within a sensitive groundwater overlay (SGO) zone and no water use is anticipated. Neighbors note wildlife species in the area, but the site is not within or near an MCCP identified major or peripheral big game habitat area. MCC 17.110.835 shows that MCCP identified big game and wildlife habitat areas are the county's concern and what must be considered in evaluating this criterion. No MCCP identified watershed areas are on or near the subject property though appellants and others note that the adjacent unnamed creek drains into Brush Creek and eventually into the Pudding River watershed. Even though the property is not within an MCCP identified sensitive watershed, as noted above, applicant's drainage and sedimentation plan, with [Marion County] DPW

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[2] Petitioners do not argue under the first assignment of error that the hearings officer failed to deem Condition 1 "necessary." Condition 1 is preceded by a statement: "The following conditions of approval are necessary for public health, safety and welfare * * *." Record 50. We do not understand petitioners to argue that that statement limited the conditions that the hearings officer could otherwise impose under MCC 17.119.060.

> [Department of Public Works] oversight of drainage, runoff attenuation and NPDES [National Pollution Discharge Elimination System] permitting, watershed concerns are addressed. The unnamed creek may overflow during the wet season, but the subject property is not in or near an MCCP identified floodplain area. Supporting materials in the record show the solar panels are solidly encased and emit no particulates and leach no materials that will seep into area groundwater. The solar array site is sloping, but applicant submitted stormwater and erosion control plans that show adequate containment is possible, and final plans will be reviewed by DPW as a condition of approval. Applicant has proven that, with conditions, there will be no significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality, and MCC 136.060 (A) (3) will be met." Record 47.

MCC 17.110.835, cited in the above-quoted passage, is titled "Fish and wildlife habitats," and provides:

> "The impact of land use actions regulated by this title on fish and wildlife habitat identified in the [MCCP] shall be evaluated and the proposal modified or conditioned as necessary to minimize potential adverse impacts and to preserve the existing resource."

Petitioners argue that the county erred in interpreting the environmental impacts inquiry under MCC 17.136.060(A)(3) as limited to resources identified in the MCCP. Petitioners observe that, unlike MCC 17.136.060(A)(5), which specifically refers to significant adverse impacts on "potential water impoundments *identified in the Comprehensive Plan*," and "significant conflicts with operations *included in the Comprehensive Plan inventory* of significant mineral and aggregate sites," the requirement that a conditional use not have significant adverse impacts on the natural resources listed in MCC

17.136.060(A)(3) does not refer to resources identified in the comprehensive plan. (Emphases added.)

Intervenor responds, and we agree, that the county's findings are not actually limited to natural resources identified in the comprehensive plan. Instead, the county's findings demonstrate that it considered potential adverse impacts from the solar facility on the natural resources on the subject property—regardless of whether those resources are identified in the comprehensive plan—including impacts on the seasonal creek, connected watershed, groundwater, and soil and slope stability. In other words, the hearings officer apparently did not interpret MCC 17.136.060(A)(3), as petitioners argue, to be limited to resources identified in the comprehensive plan.

Moreover, because the board of county commissioners adopted the hearings officer's decision as its own, the hearings officer's interpretation of MCC 17.136.060(A)(3) is entitled to the deference due to a governing body's interpretation of local land use legislation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA is required to accept a local government's interpretation of its land development code that is plausible and not inconsistent with the express language of provisions at issue or purposes or policies underpinning them); *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995) (where a governing body adopts a decision as its own, interpretations of local provisions contained in the decision are afforded the

same deference as a governing body's own interpretations).[3] Even if the county had interpreted MCC 17.136.060(A)(3) in the way that petitioners argue, petitioners have not demonstrated that the county's interpretation and application of MCC 17.136.060(A)(3) is implausible or inconsistent with the express language of that provision or purposes or policies underlying that provision.

The second assignment of error is denied.

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[3] ORS 197.829(1) provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Former MCC 17.120.110 (2013) governed photovoltaic solar power generating facilities as a conditional use.[4] MCC 17.120.110 implemented ORS 215.283(2)(g), ORS 215.447, and Land Conservation and Development Commission (LCDC) rules at OAR 660-033-0130(38). Much of MCC 17.120.110, including the provisions at issue in this appeal, was adopted verbatim from OAR 660-033-0130(38). Although the parties' arguments in this appeal focus on the local code, we note that LUBA cannot affirm interpretations of local code provisions implementing state statutes, goals, or rules that are contrary to those statutes, goals, or rules. ORS 197.829(1)(d); *see* n 3; *see also Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den* 315 Or 271 (1992) (while counties may enact more restrictive criteria than ORS 215.283(2) imposes for permitting the uses described in that statute, counties may not apply criteria that are inconsistent with or less restrictive than the statutory standards). Intervenor concedes that the county's interpretations of local code provisions that implement OAR 660-033-0130(38) are not entitled to a deferential standard of review. Intervenor's Response Brief 10, 23, 28, 34. Accordingly, we review petitioners' challenges regarding the county's

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[4] The board of county commissioners issued its final order in this case on February 28, 2018. On March 21, 2018, the county amended the MCC to "repeal the [solar] use entirely from the EFU and SA [special agriculture] zones." Marion County Ordinance No. 1387. References in this opinion to MCC 17.12.110 are to the repealed 2013 version.

application of MCC 17.120.110 to determine whether the county correctly interpreted those provisions.

In the third and fourth assignments of error, petitioners argue that the county improperly construed MCC 17.120.110(B)(3), which provided:

> "The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval."

Petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(3) by approving the application without physically attaching an approved erosion control plan to the decision as a condition of approval. Petitioners further argue that the county's finding that the solar power facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property is not supported by substantial evidence in the record.

Intervenor submitted a detailed erosion and sedimentation control plan prepared by an Oregon-registered professional engineer and land surveyor. Record 91–93. According to that plan, excavation will occur only on the proposed entry/access road and any topsoil stripped from that area will be stockpiled in a stable location and covered with plastic sheeting or straw mulch with sediment fences placed around the pile. The erosion and sedimentation

plan requires intervenor to meet Oregon Department of Environmental Quality (DEQ) and NPDES discharge permit standards and requirements.

In addition to the erosion and sedimentation control plan, a county public works employee provided testimony during the hearing that, prior to building permits being issued, intervenor would be required to provide a civil site plan to a public works engineer for review and approval that would address pre- and post-construction erosion control best management practices for stormwater runoff. Public works anticipated that stormwater attenuation would be required because the site slopes toward a seasonal drainage tributary to Brush Creek. Record 37.

The hearings officer found:

> "Any approval will be conditioned on implementing [intervenor's] stormwater, grading and drainage plans as reviewed and approved by Public Works, and requiring NPDES 1200-C permitting requirements to be met. As conditioned, the presence of the photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property, and MCC 17.120.110(B)(3) will be met." Record 37–38.

The hearings officer imposed a condition of approval requiring intervenor to submit to public works for review and approval its final stormwater erosion and sediment control plan and civil site plans for grading and stormwater management prior to issuance of building permits. Record 50.

Petitioners argue that the imposed condition indicates that the hearings officer "concede[d]" that the erosion plan as submitted is "inadequate" and

that, since MCC 17.120.110(B)(3) required an approved plan be "attached to the decision," the decision is inconsistent with MCC 17.120.110(B)(3). Petition for Review 9. Petitioners argue that the hearings officer lacked authority to approve the use based on a condition that the final erosion control measures and engineering requirements be approved by public works before building permits issue.

Intervenor responds, and we agree, that the hearings officer did not err in finding that development of the solar facility will "not result in unnecessary soil erosion or loss" based on its review of intervenor's submitted erosion and sediment control plan and county review processes included as conditions of approval. MCC 17.120.110(B)(3). That conclusion is supported by substantial evidence in the record, including intervenor's detailed and professionally prepared soil erosion and sediment control plans and statements from public works regarding public works review and approval processes. Record 91–93, 779–80. The issue then reduces to whether the county erred by failing to physically "attach" the erosion and sediment control plan to the decision as a "condition of approval."

MCC 17.120.110(B)(3) (and OAR 660-033-0130(38)(f)(B)) state that the provision "*may* be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual," and "[t]he approved plan *shall* be attached to the decision *as a condition of approval*." (Emphases added.) We interpret that provision to allow an applicant

and the county the option of relying on a qualified soil and erosion control plan to satisfy the provision and, if that option is followed, by imposing a condition of approval that requires compliance with the approved plan. The phrase "attached to the decision as a condition of approval" is a term of art that does not mean that the plan must be physically attached to the decision. Moreover, if the county does not elect to follow that option, *i.e.*, establishes compliance by some means other than by approving a soil and erosion control plan, the obligation to impose a condition requiring compliance with an approved plan does not apply.

In this case, the hearings officer did not approve the submitted soil and erosion control plans submitted by intervenor. Instead, the hearings officer found compliance with MCC 17.120.110(B)(3) by concluding, based on review of the submitted erosion control plans, and future review and approval of a final soil and erosion plan by county public works, in conjunction with DEQ/NPDES permitting requirements, that MCC 17.120.110(B)(3) "will be met." Record 38. The hearings officer accordingly imposed Conditions of Approval 3 and 5, which respectively require that, prior to building permit issuance, intervenor shall obtain DEQ/NPDES permits and further submit to public works for review and approval the final stormwater erosion and sediment control plan, along with civil site plans for grading and stormwater management. Record 50.

Petitioners do not argue in this appeal that finding that compliance with MCC 17.120.110(B)(3) "will be met" in the manner required by the conditioned approval impermissibly defers a finding of compliance with that provision, and we do not consider that issue. Petitioners argue only that the county erred in failing to "attach" the approved plan to the decision "as a condition of approval." However, as explained, the requirement to attach the approved plan to the decision as a condition of approval applies only if the county exercises the option of establishing compliance with MCC 17.120.110(B)(3) by approving the submitted soil and erosion plan, which option the hearings officer did not exercise. Accordingly, petitioners' arguments under the third and fourth assignments of error do not provide a basis for reversal or remand.

The third and fourth assignments of error are denied.

TENTH AND ELEVENTH ASSIGNMENTS OF ERROR

In the tenth and eleventh assignments of error, petitioners argue that that county violated MCC 17.120.110(B)(4) and (5) by approving the application without attaching an approved soil compaction plan and weed abatement plan as conditions of approval.

MCC 17.120.110(B)(4) and (5) provided:

> "(4) Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary

soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;

"(5) Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds 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[.]"

Intervenor submitted soil compaction and weed control plans. The hearings officer reviewed and ultimately approved those plans, with one modification not relevant here. The hearings officer then adopted Conditions of Approval 6 and 8, which require implementation of those approved plans (as modified by the hearings officer). Record 50. Intervenor argues that the county effectively incorporated those plans into its decision and conditions of approval. We agree. The hearings officer extensively reviewed and incorporated those plans into the decision and conditioned approval on compliance with those specific plans. That is sufficient to satisfy the requirement that the plans "attach" to the decision as conditions of approval. Record 38–48, 50.

The tenth and eleventh assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioners argue that the county's findings of compliance with MCC 17.136.060(A)(2) are inadequate and not

supported by substantial evidence in the record. MCC 17.136.060(A)(2) applies to all conditional uses in the EFU zone and provides: "Adequate fire protection and other rural services are, or will be, available when the use is established." The hearings officer found:

> "Utility lines are available to the subject property. No new well or septic systems are proposed. According to the MCCP Rural Transportation System Plan (RTSP) Appendix B, Selah Springs Road is, in the area of the subject property, a two-lane local road with 1' gravel shoulders and a 20' paved travel surface, in a 40' right-of-way that is in good condition and operates at a level of service A. DPW LDEP [Land Development and Engineering Permits Section] noted that the county right-of-way standard for a local road is 60'. LDEP requested, and [intervenor] agreed to, a tax lot 600 property frontage half-width dedication to accommodate roadway improvements for the site. LDEP anticipates a 10' dedication would be required. DPW will also require grading and stormwater management plans and NPDES permitting that can be made conditions of approval. The Silverton Fire District [SFD] commented it is concerned about access to and around the site. A condition can be included in any approval requiring SFD to sign off on a site access plan for the site prior to issuing building permits. With conditions requiring right-of-way dedication, drainage control and fire district regulation compliance, adequate services are or will be available upon development. MCC 17.13[6].060(A)(2) is satisfied." Record 47.

Petitioners argue that the findings do not establish that adequate fire, police, and stormwater control are or will be available when the use is established and there is no evidence in the record that those rural services are or will be available.

With respect to stormwater control, intervenor responds that "stormwater control" is not a "rural service" for purposes of MCC 17.136.060(A)(2).

Instead, intervenor argues that the county requires a stormwater management plan only as part of the building permit process. We agree that "stormwater control" is not a "rural service" that is provided by the county in the same manner as fire protection services, for purposes of MCC 17.136.060(A)(2). Thus, the county was not required to find that stormwater control is or will be available to satisfy MCC 17.136.060(A)(2).

With respect to fire protection, in response to the county's request for comments on the application, the fire district stated that it "has only a concern with access to and around the site. The site will need to meet our access requirements in case of an emergency at the site." Record 783. The county's findings of adequate services refer to that comment. The hearings officer reasoned that a condition of approval requiring proof of access acceptable to the fire district would ensure adequate fire protection. Condition 12 provides: "Applicant shall provide proof to the Marion County Planning Division that [the fire district] has approved applicant's access and premise identification plan." Record 51. While the county's finding and reasoning could have been clearer, it is sufficient to support the decision. The email from the fire district regarding the fire district's "only" concern is evidence upon which a reasonable person would rely to conclude that adequate fire protection will be available when the use is established as conditioned to remedy the fire district's sole concern regarding access.

With respect to police services, petitioners argue that "[p]olice protection is certainly a rural service similar to fire protection." Petition for Review 11. Intervenor responds that MCC 17.136.060(A)(2) does not require findings that "specifically call out police services." Intervenor's Response Brief 21. Neither party provides a definition of "rural services," and the hearings officer did not interpret that phrase. The hearings officer's finding regarding adequate rural services, quoted in full above, does not address police services at all or indicate whether such services are within the scope of "rural services" for purposes of MCC 17.136.060(A)(2).

In the absence of a county code interpretation that is adequate for review, LUBA may interpret the code provision in the first instance. ORS 197.829(2). We do not interpret MCC 17.136.060(A)(2) in the first instance in this case; however, we observe that MCC 17.136.060(A)(2) applies to all conditional uses in the EFU zone. It may be that police services are not particularly important for a solar facility use. Nevertheless, the adequacy of police services may be an important consideration for other conditional uses in the EFU zone and we are not prepared to say in the first instance that police services are not "rural services" as a matter of law.

Intervenor argues that, even if MCC 17.136.060(A)(2) requires a finding regarding the adequacy of police services, the record includes an email from a code enforcement officer at the Marion County Sheriff's office stating that the subject property has no code enforcement issues and that evidence "clearly

supports" a finding that police services are adequate pursuant to ORS 197.835(11)(b).[5] Record 789. We disagree with intervenor that the email at Record 789 constitutes sufficient evidence to affirm the decision under ORS 197.835(11)(b).

We agree with petitioners that the county's decision regarding rural services is deficient because it provides no explanation or interpretation that MCC 17.136.060(A)(2) does not require findings regarding adequacy of police services and contains no finding of adequate police services. We agree with petitioners that error warrants a remand.

On remand, the hearings officer must explain whether police services are a "rural service" that requires a finding under MCC 17.136.060(A)(2) and, if such a finding is required, then the hearings officer must determine whether adequate police services are or will be available.

The fifth assignment of error is sustained, in part.

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[5] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to receive adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

In the sixth and seventh assignments of error, petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(1), which implemented OAR 660-033-0130(38) and provided:

> "A photovoltaic solar power generation 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 004."

The hearings officer found:

> "Tax lot 700 is developed and unavailable for farm use. Applicant's site plan shows a silver of what may be cultivated land on the eastern side of the property outside the fenced facility area. The site plan is an initial plan and does not provide exact detail; it overlays the subject property, but the vicinity map and site data box show an incorrect property address, and property lines look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area moves east and envelopes the silver of what may be cultivated land. That area also appears to be made up of non-high-value Wapato soils. The area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use.
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> "Appellants also argue that the additional 10' of right-of-way requested by [DPW] will take more land out of farm use, but it appears any right-of-way dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use.
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> "A more exacting site plan will be required as a condition of any approval, but from the evidence in the record as a whole, it is more likely than not that the photovoltaic solar power generation facility will not preclude more than 12 acres from use as a commercial agricultural enterprise. No goal 3 exception is required. MCC 17.120.110(B)(1) is met." Record 36–37.

Condition of Approval 13 provides:

> "Applicant shall submit a detailed final site plan accurately depicting the proposed use and demonstrating that facility components take no more than 12 acres out of potential commercial agricultural production. Development shall significantly conform to the site plan. Minor variations are permitted upon review and approval of the Planning Director, but no deviation from the 12-acre standard is allowed." Record 51.

Petitioners argue that, because the county approved a 12-acre solar facility *and* required a roadway dedication on the subject property, the approval necessarily will preclude more than 12 acres from use as a commercial agricultural enterprise. Petitioners further argue that the county's finding that the solar facility will not preclude more than 12 acres from use as a commercial agricultural enterprise is not supported by substantial evidence.

Intervenor responds that the 12-acre limitation in MCC 17.120.110(B)(1) applies only to "facility components." That is so, intervenor argues, because MCC 17.120.110(A)(5) defines "photovoltaic solar power generation facility" as "an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity." Intervenor points out that MCC 17.120.110(A)(5), like OAR 660-033-0130(38)(e), defines "photovoltaic solar power generation facility" as including "new or expanded *private* roads constructed to serve the photovoltaic solar power generation facility," and argues that the definition does not include *public* roadway dedications. (Emphasis added.)

The hearings officer found that "any right-of-way dedication would come from land already included in the 12-acre fenced area and would not take land from farm agricultural enterprise use," and relied on that finding to conclude that the 12-acre limitation was met. Record 37. Intervenor did not cross-appeal to challenge that finding. Thus, even if, as intervenor agues, the 12-acre limitation in MCC 17.120.110(B)(1) does not include public right-of-way dedications, a point which we do not decide, the 12-acre area that the county approved for the solar facility in this matter does include the area required to be dedicated for public right-of-way.

Intervenor argues that intervenor's application, statements, and site plan constitute substantial evidence that the solar facility will be limited to 12 acres. Intervenor's Response Brief 27 ("Specifically, the County finds that any dedication area appears to overlap that project area depicted on the site plan. Rec 36–37. This finding is supported by substantial evidence in the form of the approved site plan. Rec 36–37."). We agree that petitioners have not demonstrated that that finding is erroneous or unsupported by substantial evidence.

The sixth and seventh assignments of error are denied.

EIGHTH AND NINTH ASSIGNMENT OF ERROR

In the eight and ninth assignments of error, petitioners argue that the county's decision improperly construes MCC 17.120.110(B)(2), which provided:

> "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."

The hearings officer found:

> "On-site agricultural use impacts. The current agricultural enterprise takes place on the 12 acres where the solar facility is proposed. Of the remaining land, tax lot 700 is subject to CU 16-014[6] and is not in nonfarm use, and the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property. The proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. MCC 17.120.110(B)(2) is met." Record 37.

While the argument is not entirely clear or well-developed, we understand petitioners to argue that the proposed 12-acre facility will create a "small or isolated" piece of property between the solar facility perimeter fence and the riparian area that is currently cultivated as part of the farm use on tax lot 600. We will refer to that area as the "stranded land."

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[6] Conditional use case CU 16-014 permitted a farm-related vehicle and equipment service and repair business as a commercial activity in conjunction with farm use.

Intervenor responds first that the site plan in the record is conceptual and subject to refinement as part of the building process and, therefore, petitioners have not accurately identified any "stranded land." We reject that argument. In response to the seventh assignment of error, intervenor argued, and we agreed, that the site plan is substantial evidence of the location and size of the proposed solar facility. Intervenor cannot have it both ways.

As petitioners imply in their argument, the hearings officer's finding of compliance with MCC 17.120.110(B)(1)—that the solar facility will not preclude more than 12 acres from use as a commercial agricultural enterprise relate to the alleged onsite agriculture impacts. Intervenor asserts that those findings relate only to MCC 17.120.110(B)(1). However, intervenor also relies on the hearings officer's findings of compliance with MCC 17.120.110(B)(1) as support for intervenor's argument that the hearings officer properly concluded that the proposed solar facility also complies with MCC 17.120.110(B)(2). We conclude that those findings are interrelated.

The hearings officer found that the location of the proposed facility fence lines in the site plan do not correspond to on-the-ground property lines. The hearings officer observed that intervenor's site plan "shows a sliver of what may be cultivated land on the eastern side of the property outside the fenced facility area." Record 36. However, the hearings officer also found that the property lines "look offset to the west and north. If the overlay lines are repositioned over what appears to be the subject property, the fenced area

moves east and envelopes the sliver of what may be cultivated land." Record 36.

We understand the hearings officer's findings, when read together, to find that the solar facility will not create an isolated strip of cultivated land between the proposed solar facility fence line and the riparian area to the east, because the site plan overlay lines were offset to the north and west, and once the site plan overlay lines are properly repositioned, the apparently stranded land adjacent to the riparian area is within the 12-acre facility area. Our inquiry does not end there, however. Petitioners argue, and we agree that, as a matter of simple arithmetic, some portion of the 14.15-acre tax lot 600 will remain outside the 12-acre solar facility.

Intervenor responds that the balance of the subject property does not contain agricultural operations. Intervenor emphasizes the hearings officer's findings that "the portion of tax lot 600 not included in the solar facility contains non-high value Wapato soils and riparian vegetation and a portion of the intermittent stream that runs on the subject property, " and that "[t]he area excluded by solar development is not part of the current agricultural enterprise and its exclusion from the solar field does not preclude agricultural enterprise use." Record 37, 36. Intervenor asserts that, while not specifically addressed in the county's findings, the record contains evidence that the facility extends to the western property boundary, the portion of the property outside the facility footprint to the east is comprised of sloping land and creek bed, and no small or

isolated strip of farmable land is created. Intervenor relies on Record 738–39, which is intervenor's final rebuttal argument in a letter to the hearings officer that states, in part:

> "The proposed solar farm is limited to 12 acres. The 12-acre footprint includes the area enclosed within the project fence as well as the access drive. The balance of the property is comprised of: (a) land unsuitable for commercial agricultural use, such as the area that is wooded and contains a stream, and (b) *a small amount of land that is not wooded and is not precluded from commercial agricultural use*." Record 738 (emphasis added).

The rebuttal letter does not constitute evidence that clearly supports a conclusion that the solar facility will not create "small or isolated pieces of property that are more difficult to farm." The rebuttal letter provides no evidence to support a finding that the facility extends to the western property boundary or that the entire portion of the property outside the facility footprint lies to the east of the facility and is comprised of uncultivatable land. Indeed, the rebuttal letter specifically states that a small amount of land will remain available for commercial agricultural use but does not identify the size or location of that land.

The hearings officer did not find that that the solar facility will not create "small or isolated pieces of property that are more difficult to farm" or that the entire remaining 2.15 acres on tax lot 600 are unfarmable or are otherwise excluded from "agricultural operations conducted on any portion of the subject property not occupied by project components." MCC 17.120.110(B)(2). It may be that substantial evidence in the record supports such findings and

conclusions. However, LUBA will not make those findings and conclusions in the first instance on this record. We disagree with intervenor that the evidence in the record "clearly supports the decision" so as to avoid remand under ORS 197.835(11)(b). *See* n 5. Remand is necessary for the hearings officer to make further findings regarding compliance with MCC 17.120.110(B)(2).

The eighth and ninth assignments of error are sustained.

The county's decision is remanded.