BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WESTON YORK, KEITH KEYLOCK,
RICK THOMAS, ANTHONY FOSTER,
and WINSTON CHANG,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

MOUNTAIN MEADOW SOLAR, LLC,
Intervenor-Respondent.

LUBA No. 2018-145

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Clackamas County.

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

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

REMANDED 04/10/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving a 10-acre solar power generation facility.

MOTION TO INTERVENE

Mountain Meadow Solar, LLC (intervenor), the applicant below, filed a motion to intervene on the side of the respondent. No party opposes the motion and it is allowed.

FACTS

The subject property is a 32-acre parcel zoned Timber (TBR), a county zone that implements Statewide Planning Goal 4 (Forest Land) and that allows both farm and forest uses. The property is developed with a single-family dwelling and accessory buildings. Most of the property is currently used to grow Christmas trees, which is a farm use allowed in the TBR zone. The property is bordered on the south by South Kildeer Road and on the west by South Mountain Meadow Road. Properties to the west are zoned for exclusive farm use (EFU), and properties to the south and east are zoned TBR. Property to the north is zoned Rural Residential Farm Forest-5 Acre Minimum (RRFF-5), and largely developed with single-family dwellings.

Intervenor applied to the county to develop a 10-acre solar power generation facility (the facility) in the southwest corner of the subject property, in an area currently used to cultivate Christmas trees. As explained below, the

TBR zone allows "[c]ommercial utility facilities for the purpose of generating power" as a conditional use, so long as the utility facility does "not preclude more than 10 acres from use as a commercial forest operation." On October 18, 2018, the hearings officer held a hearing at which petitioners, neighbors in the adjoining RRFF-5-zoned area, appeared in opposition. On December 3, 2018, the hearings officer issued the county's decision approving the application, with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Clackamas County Zoning and Development Ordinance (ZDO) Table 406-1 lists as a conditional use in the TBR zone "[c]ommercial utility facilities for the purpose of generating power," subject to standards at ZDO 406.05(A)(1), (6) and (H)(2). ZDO 406.05(H)(2) provides:

> "Commercial utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR 660, Division 4. Hydroelectric facilities shall also be subject to Section 829."

Petitioners argue that the hearings officer improperly construed ZDO 406.05(H)(2) in concluding that a solar power generation facility is a "[c]ommercial utility facilit[y] for the purpose of generating power." The term "[c]ommercial utility facility[y]" is not defined in the ZDO. Petitioners do not dispute that, on its face, a solar power generation facility would appear to fall within the scope of the use category "[c]ommercial utility facilit[y] for the purpose of generating power." However, according to petitioners, context

provided by the county's EFU zone at ZDO 401 indicates that that phrase "[c]ommercial utility facilit[y] for the purpose of generating power" for purposes of the TBR zone does not include solar power generation facilities. According to petitioners, ZDO 401 demonstrates that when the county intends to expressly list solar power facilities as a type of "[c]ommercial utility facilit[y]," the county knows how to do so.

ZDO Table 401-1 lists the conditional uses allowed in the county EFU zone, and specifically excludes from the category of "[c]ommercial utility facilities for the purpose of generating power for public use by sale" two categories of power generation facilities: "wind or photovoltaic solar power generation facilities," which are separately listed as conditional uses in the EFU zone, subject to different approval standards based on different state administrative rules.[1] By contrast, petitioners argue, ZDO Table 406-1 does not

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[1] ZDO Table 401-1 lists among the utilities allowed as conditional uses in the EFU zone the following:

> "Commercial utility facilities for the purpose of generating power for public use by sale, not including wind or photovoltaic solar power generation facilities."
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> "Wind power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale, subject to OAR 660-033-0130(37)."
>
> "Photovoltaic solar power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale, subject to OAR 660-033-0130(38)."

separately list solar power facilities or mention solar power facilities at all. Petitioners argue that the express omission of solar power facilities from ZDO Table 406-1, combined with the context provided by ZDO Table 401-1, demonstrates that the county made a deliberate choice to exclude solar power facilities from the scope of "commercial utility facilities" allowed on lands zoned TBR.

We review the hearings officer's interpretation of ZDO 406.05(H)(2) to determine whether it "[i]mproperly construe[s] the applicable law," without the deferential standard of review afforded to interpretations by the local decision making body. ORS 197.835(9)(a)(D); *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). The hearings officer cited the context provided by ZDO Table 401-1 to reach the opposite conclusion that petitioners urge: that the express exclusion of solar power generation facilities from "[c]ommercial utility facilities" on EFU lands indicates that, absent an express exclusion, solar power generation facilities fall within the scope of that use category. Record 3-4. We agree with the hearings officer. The context provided by ZDO Table 401-1 does not suggest that the county drafters of the ZDO intended to exclude solar power facilities from the scope of "[c]ommercial utility facilities" allowed in the TBR zone. The relevant language and the scheme of both ZDO Table 401-1 and ZDO Table 406-1 directly implement the requirements of two administrative rules

governing farm and forest lands: OAR 660-0033-0120, Table 1,[2] and OAR 660-006-0025(4)(j).[3] The reason that ZDO Table 401-1 excludes and separately lists solar power facilities from other "commercial utility facilities" is because the administrative rule that ZDO Table 401-1 implements subjects solar power facilities on EFU lands to elaborate standards at OAR 660-033-0130(38) that

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[2] OAR 660-033-0120, Table 1, which was promulgated in more or less its current form in 2011, lists the utility facilities allowed in the EFU zone, including:

> "Commercial utility facilities for the purpose of generating power for public use by sale, not including wind power generation facilities or photovoltaic solar power generation facilities," subject to standards at OAR 660-033-0130(17) or (22).
>
> "Wind power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale," subject to standards at OAR 660-033-0130(37).
>
> "Photovoltaic solar power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale," subject to standards at OAR 660-033-0130(38).

[3] OAR 660-006-0025(4)(j), which was promulgated in more or less its current form in 2000, authorizes on forest lands, subject to additional standards at OAR 660-006-0025(5):

> "Commercial utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR chapter 660, division 4[.]"

apply only to solar power facilities located on farm land.[4] Thus, the fact that ZDO Table 401-1 excludes and separately lists solar power generation facilities from the use category of "[c]ommercial utility facility[y]" is a direct result of the administrative scheme that ZDO Table 401-1 implements. Given this larger context, ZDO Table 401-1 does not support petitioners' argument that in setting out only a single general use category for "[c]ommercial utility facilities," the drafters of ZDO Table 406-1 intended to exclude solar power facilities from the scope of that use category.

Similarly, the relevant language of ZDO 406-1 mirrors the language and structure of OAR 660-006-0025(4)(j), which allows on forest lands "[c]ommercial utility facilities for the purpose of generating power," subject only to a 10-acre limit. Unlike the rules and statutes governing agricultural land, the administrative rules that govern forest lands do not distinguish between different types of commercial power generation facilities, or subject different facility types to different standards. Petitioners do not argue, and cite no reason to conclude, that in promulgating OAR 660-006-0025(4)(j) the Land Conservation and Development Commission (LCDC) intended to exclude solar power facilities from the scope of commercial power generation facilities allowed on forest lands. We note that all power generation facilities allowed under OAR 660-006-

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[4] Similarly, wind power generation facilities are separately listed in ZDO Table 401-1 because wind facilities are subject to a distinct set of standards at OAR 660-033-0130(37).

0025(4)(j) are limited to 10 acres in size, which suggests that LCDC believed that that general limitation was sufficient to protect forest lands from inappropriate development of power generation facilities on forest lands, without separate approval standards for different types of power generation facilities.

Nonetheless, petitioners note that ZDO Table 406-1 specifies that "[h]ydroelectric facilities shall also be subject to Section 829," which is language that is not derived from OAR 660-006-0025(4)(j). Petitioners argue that this additional language suggests that the drafters of ZDO Table 406-1 intended to allow on forest lands only power generation facilities with small footprints that do not require removing many trees, such as a hydroelectric dam that is built on or near a stream. Petitioners also suggest that other types of power generation facilities that are closely related to forest operations, such as a biomass facility that utilizes biomass from forest operations, might be allowed under the general use category of "[c]ommercial utility facilities." However, petitioners contend that the reference to hydroelectric facilities evinces an intent to limit the scope of "[c]ommercial utility facilities" to small-footprint or otherwise forest-compatible power generation facilities, and to exclude power generation facilities such as solar arrays that require removal of up to 10 acres of trees.

We disagree with petitioners that the code language — noting that hydroelectric facilities are also subject to standards at ZDO 829 — carries the implication that the county intended to exclude other types of power generation facilities such as solar power facilities from the scope of "commercial utility

facilities." That cross-reference also does not suggest an intent to limit power generation facilities to small-footprint or otherwise forest-compatible power generation facilities. ZDO Table 406-1 imposes the same 10-acre limitation on all types of facilities, and would allow a 10-acre hydroelectric facility or a 10-acre biomass facility, which would necessarily require the removal of many trees within that 10-acre area, the same as a 10-acre solar power generation facility.

Finally, petitioners note that ZDO 406 is intended to implement the "policies of the Comprehensive Plan for Forest and Agriculture areas," and argue that nothing in the Clackamas County Comprehensive Plan (CCCP) mentions or suggests that solar power generation facilities are permissible on forest lands. ZDO 406.01. To the contrary, petitioners argue, the comprehensive plan includes policies stating that it is county policy to "[p]rohibit land uses that conflict with forest use," and "[p]rohibit commercial and industrial development in Forest areas." Forest Policy 4.PP.3 and 4.PP.5, respectively. Petitioners argue that the context provided by these comprehensive plan policies suggests that the drafters of ZDO Table 406-1 intended to prohibit from forest lands commercial development such as solar power generation facilities.

The hearings officer rejected similar arguments made below regarding consistency with county comprehensive plan policies protecting forest land from incompatible uses, noting that that broad argument, accepted at face value, would mean that none of the commercial and industrial uses listed in ZDO Table 406-1 as allowed uses in the TBR zone could be allowed:

> "If commercial and industrial development is prohibited on forest land, however, then no solar facilities could be approved on TBR zoned land. Again, the County clearly allows such uses. In fact the County has a list of Commercial uses that are allowed in forest zones. ZDO Table 406- 1. If Forest Policy 4.PP.5 prohibited any commercial or industrial development in forest areas then many sections of the ZDO would be in violation of the comprehensive plan. When the County specifically allows certain uses in a zone, it is safe to say the County has considered the comprehensive plan and the specific provision authorizing a certain use outweighs more general goals and policies of the comprehensive plan that would otherwise make such uses impossible to obtain." Record 17.

We agree with the hearings officer that petitioners' arguments based on Forest Policies 4.PP.3 and 4.PP.5 do not demonstrate that ZDO Table 406-1 must be interpreted to prohibit solar power generation facilities or other commercial uses as a conditional use in the TBR zone.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ZDO 1203.03(B) is a conditional use permit approval standard requiring a finding that the "characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features." A staff report adopted by the hearings officer evaluated each of the six factors listed in ZDO 1203.03(B) and concluded that the subject property is suitable for the proposed facility. Opponents argued to the hearings officer that with respect to "location" the proposed solar power generation facility is unsuitable due to its proximity to and alleged impacts on nearby residential properties. The hearings officer rejected that argument,

concluding that impacts on surrounding properties are addressed under a different conditional use permit standard, and that ZDO 1203.03(B) is exclusively focused on whether the characteristics of the subject property render it suitable for the proposed use.[5]

On appeal, petitioners do not dispute that ZDO 1203.03(B) is focused on the characteristics of the subject property, but argue that evaluating whether the subject property is suitable considering its "location" necessarily requires some evaluation of the subject property's relationship to surrounding lands. Petitioners note that the application itself, in addressing the "location" factor, evaluated the subject property's proximity to external resources such as utility interconnection points and an electrical sub-station. Accordingly, petitioners argue, the hearings officer erred in categorically dismissing all arguments regarding proximity to residential uses as legitimate considerations under the "location" factor.

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[5] The hearings officer's decision states:

> "The staff report explains how the characteristics of the subject property are suitable for the proposed use. To the extent opponents challenge whether the characteristics of the subject property are suitable for the proposed use, those challenges are directed at the proposed use's impacts on other properties—not the suitability of the property itself for the proposed use. ZDO 1203.03(B) only concerns the subject property itself. Other approval criteria consider the potential effects of the proposed use on other properties. ZDO 1203.03(B) is satisfied." Record 4.

Intervenor agrees with petitioners that the "location" factor requires evaluation of the subject property's relationship with surrounding lands, and notes that the staff report adopted by the hearings officer includes an evaluation of the surrounding area under ZDO 1203.03(B). Record 1238. However, intervenor argues, and we agree, that petitioners have not demonstrated that the hearings officer erred in concluding that ZDO 1203.03(B), including the "location" factor, is not concerned with the external impacts of the proposed use on uses on surrounding lands.

Other conditional use permit standards, discussed below, explicitly address such impacts. ZDO 1203.03(B) is focused on whether the characteristics of the subject property render it suitable for the proposed use. As far as petitioners have established, all the issues that the opponents raised under the "location" factor of ZDO 1203.03(B) concern impacts of the proposed facility on nearby residential uses. The hearings officer did not err in concluding that such testimony is not germane to ZDO 1203.03(B), and accordingly, the hearings officer's findings are not inadequate for failing to address that testimony under the heading of ZDO 1203.03(B).

Petitioners also argue that the hearings officer erred in failing to consider the neighbors' testimony directed at the "topography" element of ZDO 1203.03(B), to the effect that slopes on the property, combined with removal of the existing Christmas trees in the 10-acre site, could increase stormwater runoff onto adjoining properties. However, again, that argument goes to alleged impacts

on nearby properties, not to the suitability of the subject property *for the proposed use*, which is the analysis ZDO 1203.03(B) required. Petitioners' arguments under the second assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ZDO 1203.03(D) requires a finding that the proposed conditional 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." As we discuss below, the hearings officer adopted a finding, at Record 12 n 10, that concluded that the proposed facility would not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the residential use of the RRFF-5-zoned properties to the north.[6] In his analysis of whether ZDO 1203.03(D) was met, the hearings officer concluded that the

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[6] In doing so, the hearings officer noted that in *Morton v. Clackamas County*, 70 Or LUBA 7 (2014), LUBA only decided that whether a proposed use substantially limited or substantially impaired surrounding primary uses was a lower threshold than whether the proposed use would substantially "preclude" primary uses on surrounding properties, and remanded the decision for the hearings officer to also evaluate whether the proposed use would substantially "limit" or "impair" primary uses on surrounding properties. Record 8 n 4. We agree with the hearings officer's understanding of the holding in *Morton* on that point.

proposed use does not "substantially preclude" surrounding residential uses. Record 8 n 4. Petitioners do not dispute that finding.

In his analysis of whether ZDO 1203.03(D) was met, the hearings officer concluded that the three elements of ZDO 1203.03(D) can be distilled into a single inquiry based on the more rigorous "limit" or "impair" prongs.[7] The

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[7] The hearings officer quoted an earlier decision by the same hearings officer explaining his understanding of ZDO 1203.03(D).

> "'Although there are three prongs to the inquiry under ZDO 1203.03(D), I believe they can all be distilled down to one inquiry. * * * As LUBA held [in *Morton*], just because a proposed use does not substantially preclude surrounding primary uses that does not mean it does not substantially limit or impair those uses. If a proposed use does substantially preclude surrounding primary uses, however, it would certainly also substantially limit or impair those uses as well. I cannot imagine a situation in which a proposed use substantially precludes a surrounding primary use but does not substantially limit or impair that use as well.
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> "'I also cannot distinguish a difference between a proposed use that 'substantially limits' a surrounding primary use and a proposed use that 'substantially impairs' a surrounding primary use. I see no distinguishable difference between the definitions for 'limit' and 'impair.' In other words, I cannot imagine a proposed use that would substantially limit a surrounding primary use but not substantially impair that surrounding use as well, and vice versa. I think the best way of explaining the substantially limit or impair standard is that the proposed use not make the exercise of a surrounding primary use substantially worse than it was before the proposed use occurs. The substantially limit or impair standard, or as I have explained it as the make substantially worse standard is a tipping point. A proposed use is going to make the exercise of surrounding primary uses substantially worse well before a proposed use substantially

hearings officer also found no meaningful difference between "substantially limit" and "substantially impair," and distilled those two elements into a single inquiry, which the hearings officer paraphrased as an inquiry into whether the proposed use would make the exercise of a surrounding primary use "substantially worse" than it was before the proposed use occurs. *See* n 7. The hearings officer applied that understanding of ZDO 1203.03(D) in evaluating the evidence regarding compliance with that standard.

On appeal, petitioners argue that the hearings officer misconstrued ZDO 1203.03(D) in several ways. First, we understand petitioners to contend that ZDO 1203.03(D) actually contains four distinct elements, each one of which must be addressed. We understand petitioners to argue that the hearings officer must determine initially that the proposed use will not "alter the character" of the surrounding area. Petitioners contend that the findings are inadequate because the hearings officer failed to address this threshold element.

Intervenor responds, and we agree, that the hearings officer did not err in failing to independently address whether the proposed use "alter[s] the character"

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precludes - or makes impossible - those surrounding primary uses. Therefore, the entire inquiry under ZDO 1203.03(D) can be distilled down into whether the proposed use would substantially limit or impair surrounding primary uses, or in other words make the exercise of those primary uses substantially worse.'" Record 7-8 (quoting the hearings officer's earlier decision described as "Neighborhood Church Z0298-16-C, October 26, 2016") (footnote omitted).

of the surrounding area. As the hearings officer observed, ZDO 1203.03(D) does not prohibit alteration of the character of the surrounding area, only alterations "in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary use[.]" As ZDO 1203.03(D) is structured, if the hearings officer concludes that the proposed use does not substantially limit, impair or preclude the primary uses of the surrounding area, there is no need to address whether it has "alter[ed] the character" of the surrounding area in some other manner. For example, we understand petitioners to argue that even if the proposed facility does not substantially limit, impair or preclude the primary residential uses in the RRFF-5-zoned area to the north, the proposed facility nonetheless fails to comply with ZDO 1203.03(D) if it alters the "rural" character of the area. However, altering the rural character of the surrounding area would not run afoul of ZDO 1203.03(D) unless that alteration *also* "substantially limits, impairs or precludes" the primary uses in the area. The hearings officer did not err in focusing on that predicate inquiry.

We also understand petitioners to argue that the hearings officer erred in failing to separately inquire into whether the proposed use substantially (1) limits, or (2) impairs primary uses on surrounding lands, and collapsing those elements into a single "substantially worse" inquiry. Intervenor responds by pointing to the hearings officer's finding at Record 12 n 10 that states that the proposed use will not "substantially limit, impair or preclude" surrounding residential uses, and faults petitioners for failing to challenge that finding.

We do not fault petitioners for failing to challenge the conclusory finding at Record 12 n 10, when the balance of the nearly six pages of findings that the hearings officer adopted clearly demonstrate that the hearings officer collapsed the inquiry into a single, "substantially worse" inquiry.

On the merits of petitioners' challenge, we agree with petitioners. The hearings officer's findings set out the dictionary definitions for "limit" and "impair." Record 7. The dictionary definition of "limit" is "**1:** to: CONFINE to or 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." *Webster's Third New Int'l Dictionary* 1312 (unabridged ed 2002). The definition of "impair" is "to make worse: diminish in quantity, value, excellence or strength: do harm to: DAMAGE, LESSEN." *Id.* at 1131. The two words have different meanings, are not generally considered to be synonyms, and the hearings officer's conclusion that there is "no distinguishable difference between the definitions for 'limit' and 'impair'" fails to acknowledge those different meanings. Record 8. Moreover, when the LDO uses two different terms in the same provision, it is presumed that the enacting body intends two different meanings. *Scott v. State Farm Mutual Auto. Ins.*, 345 Or 146, 155, 190 P3d 372 (2008).

We also agree with petitioners that the hearings officer erred in reducing the inquiry required under ZDO 1203.03(D) to a single inquiry into whether the proposed use makes the residential use of nearby properties "substantially

worse." There is no language in ZDO 1203.03(D) that supports this interpretation of the separate words "limits, [or] impairs." Remand is required for the hearings officer to correctly apply the analysis required by ZDO 1203.03(D).

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

ZDO 1203.03(E) requires that the "proposed use is consistent with the applicable goals and policies of the Comprehensive Plan." During the proceedings below, petitioners cited a number of comprehensive plan policies that they argued applied to the proposed solar facility, and further that the proposed facility did not satisfy those applicable policies. The hearings officer found that only some of the cited plan policies were applicable, and that the proposal satisfied all policies he deemed applicable.

On appeal, petitioners argue that the hearings officer's findings are erroneous, in two respects. The first concerns findings on CCCP, Chapter 3 (Natural Resources and Energy), Forests – First Goal and Third Goal, which are to "conserve and protect forest lands" and "protect, maintain, and conserve open space, environmentally sensitive areas, wildlife habitat, scenic corridors, recreational uses, and urban buffers," respectively. The hearings officer found these goals to be applicable, but rejected arguments that the proposal did not satisfy these goals simply because the proposal would take 10 acres of forest land

out of potential forest use.[8] If removing 10 acres of forest land from potential forest use were sufficient to reject a conditional use permit application for solar facility, the hearings officer reasoned, then no solar facilities could ever be approved on forest land.

The hearings officer reached a similar conclusion regarding CCCP, Chapter 4, Policy 4.JJ.7.1, a policy concerning unincorporated communities that states county policy is to "limit industrial uses to: Uses authorized under Statewide Planning Goals 3 and 4[.]" The hearings officer concluded that because

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[8] The hearings officer's findings state, in relevant part:

> "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." Record 16.

the solar facility is a type of "commercial utility facility" that state law allows on forest lands the proposal satisfies CCCP Policy 4.JJ.7.1.[9]

The common flaw with both of these findings, petitioners argue, is that it effectively renders these applicable plan policies nullities. The correct approach, petitioners argue, is to engage in a "balancing approach" to balance the tensions in competing plan policy directions. *See Waker Associates v. Clackamas County*, 111 Or App 189, 826 P2d 20 (1992) (in denying a conditional use application for a golf course on EFU-zoned land subject to code standards that require consistency with applicable comprehensive plan goals and policies, the hearings officer errs in focusing on a single plan policy to preserve agricultural land, but instead must consider all applicable plan goals and policies and engage in a balancing or weighing process of any competing policy directions as a decisional necessity).

Intervenor responds that the hearings officer did in fact weigh and balance all applicable plan goals and policies and found that "the overwhelming weight

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[9] The hearings officer's findings state, as relevant:

> "Policy 4.JJ.7.1 provides: 'Limit industrial uses to: Uses authorized under Statewide Planning Goals 3 and 4[.]' Opponents argue that the proposed use violates Statewide Planning Goal 4 (Forest Lands). The proposed use, however, does not violate Goal 4 because the use is specifically allowed on forestlands. Therefore, the proposed use satisfies Forest Policy 4.[JJ].7.1. These goals and policies are satisfied and clearly weigh in favor of approving the proposed use." Record 18 (footnote quoting OAR 660-004-0025(4)(j) omitted).

of the other goals and policies that are satisfied easily results in a weighing and balancing in favor of approving the application."[10] Record 20. Intervenor argues that *Waker Associates* requires the hearings officer to consider and balance all applicable comprehensive policies. *Welch v. City of Portland*, 28 Or LUBA 439, 447 (1994). Because the hearings officer clearly did so, intervenor argues that petitioners' challenges to these two specific findings do not provide a basis for reversal or remand.

We generally agree with intervenors. In the findings quoted at n 9, citing Record 18, the hearings officer (correctly) rejects a categorical, *per se* argument that any proposed conditional use on forest land that takes 10 acres out of potential forest production necessarily violates the comprehensive plan goals

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[10] The hearings officer adopted eight pages of findings addressing ZDO 1203.03(E), and ultimately concluded:

> "Opponents raised numerous comprehensive plan goals and policies. Most 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 and protect forestlands' and 'prohibit commercial and industrial development in Forest areas' 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." Record 20.

requiring the protection of forest lands. The hearings officer then (incorrectly) counters with an equally categorical argument that because the ZDO allows power generation facilities on 10 acres in forest land that the proposed 10-acre solar facility necessarily is consistent with the plan policies requiring protection of forest lands, reasoning that the drafters of the ZDO have — in choosing to allow such facilities on forest lands — already conducted all the balancing with forest land plan policies that is required. However, the hearings officer's conclusion does not logically follow. The drafters of the ZDO did not make the proposed use a permitted use outright on forest land. If they had, the hearings officer's categorical conclusion might be correct. Rather, the drafters chose to make the proposed use a conditional use, thus subjecting applicants for that conditional use to the requirement to demonstrate that the proposed use satisfies applicable CCCP goals and policies. That suggests that at least some conditional use permits for uses allowed in the ZDO on forest lands will not gain approval, based on inconsistency with applicable CCCP goals and policies, as applied to particular facts and development proposals.

As *Waker Associates* counsels, where the applicant must demonstrate that a code-permitted use is consistent with applicable comprehensive plan goals and policies, the 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 the greater

weight of the applicable comprehensive plan goals and policies. 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 uses.

However, the hearings officer's categorical approach, expressed in the findings quoted at n 9, appears to be harmless error, because as intervenor notes the hearings officer considered all applicable comprehensive plan goals and policies, and did engage in a balancing and weighing process, reaching the ultimate conclusion that the overwhelming weight of the applicable goals and policies favor the proposal. Petitioners do not acknowledge or challenge those findings. Accordingly, petitioners' challenges to the findings quoted herein at n 9 do not provide a basis for reversal or remand.

As to petitioners' challenges to the finding regarding CCCP, Policy 4.JJ.7.1, quoted herein at n 9, that policy limits industrial uses to uses authorized under Statewide Planning Goal 4. The hearings officer correctly concluded that because the administrative rule implementing Goal 4 allows solar power generation facilities on forest lands, the proposal is consistent with CCCP Policy

4.JJ.7.1. The hearings officer's finding on this point is not a categorical reliance on the fact that the ZDO potentially allows such facilities on forest lands, but directly responsive to the language of CCCP Policy 4.JJ.7.1, which refers to the uses authorized under Statewide Planning Goals 3 and 4.

Finally, petitioners argue that the hearings officer considered and relied upon certain comprehensive plan goal language to support the proposal, while omitting language from the goal that in fact undercuts that support. Specifically, the hearings officer initially quoted in full CCCP, Chapter 4 (Land Use), to "[p]rovide for commercial and industrial development necessary to serve surrounding Agriculture, Forest, and Rural areas." Record 17. However, later in the analysis the hearings officer provided only a partial quote ("First Goal – '[p]rovide for * * * industrial development'") and found that to the extent the First Goal, among others, apply to the proposed use "they tend to encourage the development." Record 18. Petitioners argue that this finding ignores the full language of the First Goal, which clearly encourages only commercial and industrial uses that are "necessary to serve surrounding Agriculture, Forest and Rural areas."

Intervenor responds that the hearings officer did not ignore the full language of the First Goal, which is quoted in full on the previous page, but for brevity quoted only a portion in a summary conclusion that cites several plan policies that, like the First Goal, are generally supportive of appropriate development in rural areas. While the findings do not address the "necessary to

serve surrounding Agriculture, Forest and Rural areas" language, intervenor argues that there is undisputed evidence in the record that electricity produced by the facility will serve the surrounding area.

We agree with intervenor that the hearings officer's findings regarding the First Goal are not inadequate. The hearings officer expressed doubt that the First Goal, among others cited in that portion of the decision, applies at all to the proposed use for purposes of ZDO 1203.03(E). The hearings officer ultimately concluded that, even if all the comprehensive plan goals and policies discussed are applicable, the overwhelming balance and weight of the goals and policies considered weigh in the proposal's favor. As discussed above, petitioners have not challenged that ultimate conclusion, or identified any analytical flaw suggesting that that conclusion might change even if consideration of the language of the First Goal in full does not support the proposal. Absent a challenge to those findings, petitioners have not demonstrated a basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

ZDO 406.05(A)(1) requires a finding that "[t]he 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."[11] For shorthand, we refer to this standard as the "significant change/increase cost" test.

The hearings officer found, and petitioners do not dispute, that the proposed facility will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands located to the east, west and south of the subject property. However, petitioners argued below and again on appeal that the proposed facility will force significant changes in farm and forest practices on the subject property itself, which is zoned TBR, by converting 10 acres of the subject property from a farm use (Christmas trees) to a solar power generation facility.

The hearings officer rejected that argument below, concluding that ZDO 406.05(A)(1) does not require evaluation of whether the proposed use will force

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[11] ZDO 406.05(A)(1) implements OAR 660-006-0025(5), which provides in relevant part:

> "A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:
>
> "(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;
>
> "(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel[.]"

a significant change, or significantly increase the cost of, farm or forest practices on the portion of the subject property that will be physically occupied by the proposed use.[12]

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[12] The hearings officer's decision states, in relevant part:

> "Opponents argue that the proposed use will force changes in forest practices on forest lands. Initially, according to opponents 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. The applicant and the staff report address whether the proposed use would force a significant change in farm or forest practices on other agriculture or forest lands besides the 10 acres proposed for the solar facility. Opponents point to similar language regarding use in EFU zones that specifically refers to forcing changes on 'surrounding' lands. According to opponents, because ZDO 406.05(A)(1) does not refer to 'surrounding' lands like ZDO 401.05(A)(l) does, the land proposed for the solar facility must be considered as well. While this is a plausible argument, I do not agree that ZDO 406.05(A)(l) requires consideration of whether the land proposed for a use conditionally allowed under ZDO Table 406-1 requires consideration of whether the proposed use will force a change on the land proposed for the use. Under opponents' reasoning, no solar facilities would be allowed on forest lands because the land being proposed for the solar facility would be taken out of forest use. Table 406-1 includes over 20 uses that do not involve forest use that may be approved subject to ZDO 406.05(A)(l). None of those uses could be approved if the mere fact of taking the land out of forest use for the proposed use meant that it was forcing a significant change in forest practices on forest lands. While ZDO 406.05(A)(l) could certainly be clearer, the context of ZDO 406 refutes opponents' argument." Record 23 (footnote omitted).

On appeal, petitioners argue that ZDO 406.05(A)(1), unlike its cognate applicable in the county EFU zone that implements ORS 215.296(1), does not limit the "significant change/increase cost" evaluation to "surrounding lands."[13] Consequently, petitioners argue, the" significant change/increase cost" test in ZDO 406.05(A)(1) applies equally to farm or forest operations on the subject property, and therefore the hearings officer erred in rejecting petitioners' arguments that conversion of 10 acres of the subject property from a farm use to a non-farm and non-forest use represents a significant change in farm operations on the subject property.

We partially agree with petitioners. Unlike the version of the "significant change/increase cost" test applicable in the EFU zone, ZDO 406.05(A)(1) and OAR 660-006-0025(5) do not limit the scope of the test to "surrounding lands." *See Comden v. Coos County*, 56 Or LUBA 214 (2008) (because the version of the "significant change/increase cost" test that applies on forest lands is worded

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[13] ZDO 401.05(A)(1) applies a similar test to conditional uses in the county EFU zone, based on ORS 215.296(1), providing:

> "1. Uses may be approved only where such uses:
>
> "a. Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and
>
> "b. Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

differently than the version that applies on EFU lands, a county does not err in failing to follow all the analytical requirements of ORS 215.296(1) and county implementing codes). Because LCDC chose not to focus the scope of the "significant change/increase cost" test on forest lands on "surrounding lands," we can easily infer that LCDC intended for counties to evaluate the impacts of the non-resource use on farm or forest practices on at least *the remainder* of the forest-zoned parcel or tract on which the non-resource use will be located.[14] However, it does not logically follow that, as petitioners argue, LCDC also intended for counties to evaluate the impacts on farm or forest practices on the portion of the parcel or tract that is physically occupied by footprint of the non-resource use. As the hearings officer found, and intervenor argues, for most if not all of the many non-resource uses that OAR 660-006-0025 allows on forest lands, the allowed non-resource use would necessarily occupy the full footprint of the development site, in this case, the 10-acre site authorized by OAR 660-006-0025(4)(j). Few if any farm or forest practices could possibly occur on such a fully occupied footprint. We do not believe that LCDC would authorize a large number of non-resource uses on forest lands, yet intend to adopt a strict version of the "significant change/increase cost" test, under which almost none of the

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[14] Petitioners do not raise any issues in this case regarding changes to or increased costs imposed on practices associated with the Christmas tree farm located on the remainder of the subject property.

authorized uses could possibly be approved.[15] *See also Tilla-Bay Farms, Inc. v. Tillamook County*, ___ Or LUBA ___ (LUBA No. 2015-115, March 14, 2019) (slip op at 24-25) (rejecting petitioners' argument that a right of way for electrical transmission lines that would remove 36 aces from commercial forest production violated the "significant change/increase" test) (citing *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015)).

Petitioners dispute that applying ZDO 406.05(A)(1) and OAR 660-006-0025(5) to the footprint of the non-resource use would necessarily preclude approval of all or nearly all non-resource uses on forest land. Petitioners note that some of the non-resource uses authorized on forest lands under ZDO 406 and OAR 660-006-0025(4), for example, a communications tower, occupy only a relatively small footprint of land. We understand petitioners to argue that the hearings officer could engage in a "balancing or weighing process," in the manner described in *Waker Associates*, to weigh the amount of land lost to farm or forest use against whatever considerations favor the proposed non-resource use, and allow only those non-resource uses on forest land whose value outweighs the amount of land lost to potential farm or forest production. Petitioners also suggest that an applicant can boost the odds of approval under

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[15] For similar reasons, we have previously rejected a county's attempt to apply ORS 215.296(1) to the site occupied by a proposed non-resource use (a public park) on farm land. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

petitioners' preferred approach, by shrinking the size of the non-resource use, for example by proposing only a one-acre solar power generation facility.

The balancing test described in *Waker Associates* applies in the context of code standards that require a finding of consistency with applicable comprehensive goals and policies, an inquiry whose nature often requires resolution of conflicting policy directives. Neither ZDO 406.05(A)(1) nor OAR 660-006-0025(5) requires evaluation of comprehensive goals or policies, or a discretionary weighing and resolution of policy conflicts, and we decline petitioners' invitation to extend *Waker Associates* outside its proper context. LCDC has already determined that up to 10 acres of forest land may be occupied by a power generation facility, and we see no evidence in OAR 660-006-0025(5) or elsewhere that LCDC intended that counties approve or deny applications for power generation facilities based on the amount of land the facility will occupy, so long as the utility facility does not preclude more than 10 acres from use as a commercial forest operation and otherwise complies with all applicable criteria. We decline to read ZDO 406.05(A)(1) or OAR 660-006-0025(5) to impose the additional requirement that the applicant justify the amount of land occupied by the non-resource use, as part of demonstrating that the use will not result in significant change or increased costs on farm or forest practices.

Finally, petitioners argue that the hearings officer must consider under ZDO 406.05(A) whether the proposed solar facility, which has an estimated lifespan of 30 years, will result in compaction of soils from the posts driven into

the ground to support the solar panels. In addressing soil issues under other criteria, the hearings officer relied upon the applicant's erosion, sediment and soil compaction plan, which proposes measures for soil de-compaction after the facility is removed in 30 years.[16] Petitioners argue that that plan is inadequate to ensure that the soil remains productive for future farm and forest uses after the facility is removed.

Intervenor responds that ZDO 406.05(A) does not require a finding that a proposed non-resource facility will preserve soils underlying the facility for future farm or forest use. We agree with intervenor. Many, if not most, of the non-resource uses allowed on forest lands under ZDO 406 and OAR 660-006-0025 are permanent structures, and nothing in any code or rule language cited to us suggests that the county or LCDC is concerned with avoiding or remediating soil compaction under permanent structures allowed on forest land. Further, we note that for purposes of solar power generation facilities located on EFU land, LCDC has adopted regulations that are designed to prevent and remediate soil compaction. OAR 660-033-0130(38)(h)(C). However, LCDC has not chosen to adopt any similar regulations with respect to solar power generation facilities (or any other non-resource use) authorized on forest land under OAR 660-006-0025.

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[16] A condition of approval requires removal of structures and foundations to a depth of three feet below grade at the end of the life of the facility. Record 27.

We see no basis to read an implicit requirement to that effect into the OAR 660-006-0025(5) "significant change/increase cost" test.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

As noted, ZDO 406.05(A)(1) and OAR 660-006-0025(5)(b) require a finding that "[t]he proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel[.]"

A. Significantly Increase Fire Hazard

Petitioners submitted testimony that the proposed facility would significantly increase fire hazard, compared to the existing conditions of growing Christmas trees, due to the introduction of new potential fire sources (inverters, fans, transmission lines, etc.), and new fuel sources (planting of unirrigated native or local vegetation underneath the solar panels). Petitioners also cited instances of fires involving solar facilities. The hearings officer rejected those arguments, finding no reason to believe that the proposed solar facility would be any more hazardous than any other solar facility:

> "ZDO 406.05(A)(l)(b) requires that the proposed use not will 'not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.' Initially, opponents argue that the proposed solar facility would be an increased fire hazard. Opponents cite to evidence that fires have occurred at various solar facilities over the years. While fires are certainly a possibility at solar facilities (as they are in most places), I am not persuaded that the mere existence of a solar facility

means that there is an increased fire hazard. The County allows solar facilities in TBR zones, and opponents do not demonstrate that there is anything about this particular proposed solar facility that would make it more hazardous than any other solar facility." Record 24.

On appeal, petitioners challenge that finding, arguing that the proper comparison for purposes of assessing whether there is significantly increased risk of fire hazard is to compare the proposed facility with the preexisting farm or forest conditions, not to compare the proposed solar facility to other solar facilities.

Intervenor responds that the hearings officer properly rejected anecdotal concerns about increased fire risks from a solar facility, and properly concluded that simply because solar facilities (like any structure) can be involved in a fire does not mean that there is any particular increased risk from such facilities. Further, intervenor argues that if comparison with preexisting conditions is required, it is likely that the proposed facility presents less fire risk than would the preexisting Christmas tree plantings or any other similarly combustible farm crop or timber planting.

We agree with petitioners that the question under ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b) is not whether the proposed solar facility presents significantly increased fire hazard compared to other solar facilities, over and above the level of fire hazard inherent in a typical solar facility. ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b) require a comparison of some kind in order to determine whether the proposed use represents a significant *increase* in fire hazard. Whatever risk of fire hazard presented by the proposed use, that risk must be compared to a baseline or referent of some kind. But that

comparison is largely meaningless if the proposed use is compared, essentially, to itself. The answer to that question would almost always be that the proposed use presents no increased risk. We agree with petitioners that the most meaningful comparison for purposes of ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b) is the pre-development fire hazard (Christmas tree farm) compared to the post-development fire hazard (solar facility). Intervenor might be correct that in the present case the post-development solar facility fire hazard is no greater or actually less compared to the pre-development Christmas tree farm operation fire hazard, but there is no evidence or findings on that point, or any findings making a meaningful comparison or evaluation of increased fire hazard. Only if such a comparison is made can the hearings officer determine whether any increase in fire hazard is "significant." Accordingly, we agree with petitioners that remand is necessary to adopt new findings, supported by substantial evidence, that conduct an appropriate evaluation of fire hazard.

B. Significantly Increase Risk to Fire Suppression Personnel

Petitioners challenge the hearings officer's finding that the proposed facility will not significantly increase risk to fire suppression personnel.

The opposition testimony on this point included the testimony of one of the petitioners, Anthony Foster (Foster), a fireman, who stated in part that solar panel arrays cannot be de-energized as long as they are exposed to sunlight and that they represent risk of potentially fatal electrical shock to fire suppression personnel responding to emergencies or fire events on the property. Record

1225-26. The hearings officer adopted findings addressing Foster's testimony.[17] However, petitioners argue that the findings do not address the most important

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[17] The hearings officer's findings state, in relevant part:

> "Opponents also argue that the proposed facility would significantly increase the risk to fire suppression personnel. Opponent Anthony Foster (Foster) is a fireman, and he testified that solar facilities would increase the risks to any first responders at the site.
>
> "Foster did not testify that the solar facility itself would be a fire risk, rather he testified that if an accident-such as a car accident-occurred at the site that it would be more dangerous to handle such an accident because the power to the solar facility cannot be turned off. Initially, I tend to agree with the applicant that ZDO 406.05(A)(l)(b) concerns risks to fire suppression personnel when they are actually suppressing fires-not when they are serving as first responders in an emergency medical technician (EMT) capacity.
>
> "Even if ZDO 406.05(A)(l)(b) extends to risks to fire suppression personnel when responding to vehicular accidents, I do not see that the proposed solar facility presents a significant risk. Mountain Meadow is a straight road, as opponents emphasize it is a private road that only serves a small rural subdivision-in other words there is not a lot of traffic, the speed limit is only 25 MPH, and the proposed facility is set well back from the road with screening and fences. While accidents are possible almost anywhere, the proposed location would seem to significantly reduce the likelihood of accidents rather than increase the likelihood. As the applicant explains:
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> > "'* * * the Applicant has been cognizant of minimizing fire risks in numerous ways. The Applicant has submitted a landscaping plan and an updated landscaping plan, both of which propose planting Christmas trees on the northern, western, and southern sides of the project and spaced 15 feet

aspect of Foster's testimony regarding the risk of electrical shock, but instead focus almost exclusively on rejecting as unlikely one of the scenarios Foster presented for calling first responders to the site: a medical or fire emergency involving a car crashing down the embankment into the solar panels.

Intervenor responds initially that the hearings officer correctly limited his review to testimony and evidence regarding fire suppression personnel, which is the express subject of this portion of ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b), and disregarded arguments about first responders called to the site to respond to a medical emergency, for example. We agree with intervenor and the

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> apart. This is specifically to comply with ZDO 406.08.l.a which requires a primary fuel-break area.
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> "'The Applicant has submitted a Fire Hazard Memo which explains the additional precautions taken to minimize risks of fire and to fire suppression personnel, including a 7-foot tall perimeter fence, turnaround and perimeter roads, warning signage, compliance with electrical code and permitting, and the inert nature of the Facility materials. * * *.' November 8, 2018 Memorandum 3.
>
> "Furthermore, the applicable fire protection service did not provide any comments objecting to the proposed solar facility. And again, the County allows solar facilities in TBR zones. If the mere fact that a car could crash into a solar facility would significantly increase the risk to fire suppression personnel then it would be nearly impossible to obtain approval for a solar facility. While there may be a theoretical *de minimis* risk to fire suppression personnel, I agree with the applicant that the proposed solar facility would not significantly increase risks to fire suppression personnel. ZDO 406.05(A)(l)(b) is satisfied." Record 24-25.

hearings officer that the focus of ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b) is increased risk to fire suppression personnel in their role in fighting fires, not in their role as responders to emergencies other than fires.

Intervenor also argues that despite the failure to address Foster's testimony regarding increased risk of electrical shock to fire suppression personnel, the hearings officer's findings that the proposed facility will not significantly increase risk to fire suppression personnel are adequate and supported by substantial evidence.

However, whether the solar facility represents an increased risk of electrical shock to fire suppression personnel appears to be a legitimate issue regarding compliance with ZDO 406.05(A)(l)(b) and OAR 660-006-0025(5)(b). Adequate findings must generally address legitimate issues raised below regarding compliance with approval criteria. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). Intervenor cites to no evidence in the record on the issue of electrical shock other than Foster's. Intervenor does not dispute that Foster, a fireman who holds the rank of lieutenant, is fairly regarded as an expert on this issue. As the findings note, the local fire district submitted no comments in response to the notice of the application, from which the hearings officer inferred that the fire district had no concerns about the proposal. However, that is a weak inference to rely upon to reject Foster's direct testimony regarding increased risk of electrical shock, even if the findings had addressed that testimony.

In addition, the hearings officer relied upon the applicant's Fire Hazard Memo, at Record 1224. However, as petitioners note the Fire Hazard Memo is unsigned and its author unknown. A portion of the Fire Hazard Memo suggests that in the event of a fire the Fire Marshal can disconnect the solar facility from the electrical grid, but even so that does not respond to Foster's testimony that even if the solar facility is disconnected from the electrical grid, the panels themselves remain energized and potentially dangerous. Record 1225. Absent greater evidentiary clarity on this point, we agree with petitioners that the Fire Hazard Memo does not provide substantial evidence to support the decision on this point, or overcome the absence of findings addressing the issue of increased risk of electrical shock.[18]

We conclude that remand is warranted on this issue for the hearings officer to adopt adequate findings supported by substantial evidence.

The sixth assignment of error is sustained, in part.

SEVENTH ASSIGNMENT OF ERROR

As noted, a power generation facility on forest land permitted pursuant to ZDO 406.05(H)(2) and OAR 660-006-0025(4)(j) shall not preclude more than 10

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[18] ORS 197.835(11)(b) authorizes LUBA to affirm a decision notwithstanding absent or inadequate findings on compliance with approval criteria, if the parties cite us to evidence in the record that "clearly supports" the decision on that issue. Intervenor does not invoke ORS 197.835(11)(b), but even if it had, for the reasons discussed in the text the evidence cited to us is insufficient to affirm the decision on this point.

acres from use as a commercial forest operation. The application proposed a 10-acre facility, and the hearings officer clearly understood he was reviewing a 10-acre facility and imposing a condition of approval limiting the facility to the one described in narratives and site plans dated August 15, 2018. Record 26. However, petitioners cite to statements in the record that they argue describe the proposed facility as up to 12 acres in size. Record 838 and 1368. Petitioners argue that the hearings officer erred in approving a facility that may be larger than 10 acres.

Intervenor responds that no issue was raised below that the facility exceeded 10 acres, and thus the issue presented in this assignment of error is waived, pursuant to ORS 197.763(1).[19] On the merits, intervenor disputes that the approved facility exceeds 10 acres.

The petition for review claims that this issue was preserved at Record 3, 18, 54, 201 and 1368. At oral argument, petitioners mentioned more record

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[19] ORS 197.835(3) limits LUBA's scope of review is limited to issues raised during the proceedings below, pursuant to ORS 197.763(1). ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

citations. We have examined the record citations petitioners provided, and agree with intervenor that none shows that this issue was "raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.763(1). One of the record cites provided by petitioners, Record 1368, even acknowledges that reference to a "12-acre" site is inaccurate ("the application project title/description is incorrect, listing the size of the facility at 12 acres"). Petitioners have not demonstrated that any party raised an issue regarding the size of the facility that a reasonable decision-maker would have recognized as an issue requiring response.

Even if the issue had been raised below, and thus was not waived, we agree with intervenor that petitioners have not demonstrated that the hearings officer approved a solar facility that exceeds 10 acres in size. Intervenor, as the applicant, bears the burden of establishing that all approval criteria are satisfied and, thus, that the proposed power generating facility does not preclude more than 10 acres from use as a commercial forest operation. However, petitioners bear the burden on appeal to establish a basis for reversal or remand. The application proposed, and the hearings officer clearly intended to approve, a 10-acre facility. Despite some apparently erroneous references to a 12-acre

facility,[20] the only statement in the record cited to us suggesting that the facility approved here might exceed 10 acres in size is the Erosion, Sediment & Soil Compaction Plan at Record 838, which includes a statement that the "Total Disturbed Area = 11.30 acres." Intervenor argues that this total of disturbed soil area includes fuel break areas and visual buffer areas, which will be planted in Christmas trees, around the perimeter of the 10-acre facility, and thus, the development does not preclude more than 10 acres from use as a commercial forest operation. As far as we can tell, intervenor is correct. Petitioners have not demonstrated that the hearings officer approved a facility that precludes more than 10 acres from use as a commercial forest operation.

The seventh assignment of error is denied.

The county's decision is remanded.

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[20] As far as we can tell, most of the references to 12-acre solar facilities in the record are to solar facilities allowed on EFU lands, which depending on soil quality can be subject to a 12-acre maximum size. As noted, the application materials included at least one reference to a 12-acre facility, but this apparently was regarded by the parties below as a mistaken reference.