BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2019-081

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Sean T. Malone, Eugene, filed the petition for review and a reply brief. Charles W. Woodward IV, Eugene, argued on behalf of petitioners.

Nathan K. Boderman, Assistant County Counsel, and Caleb Huegel, Certified Law Student, Oregon City, filed the response brief. Caleb Huegel argued on behalf of respondent.

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

AFFIRMED 01/09/2020

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

FACTS

This is the second time this solar facility dispute has been before LUBA. We previously remanded a hearings officer's approval of the solar facility conditional use permit (CUP) in *York v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2018-145, Apr 10, 2019) (*York I*). We reiterate the facts from that decision.

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 Killdeer 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.

The applicant, Mountain Meadow Solar, LLC (Mountain Meadow), applied to the county to develop a 10-acre solar power generation facility in the

southwest corner of the subject property, in an area currently used to cultivate Christmas trees. 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. Petitioners appealed that approval in *York I*. We remanded the approval on two bases explained below under the first and second assignments of error.

On remand, after a public hearing, the hearings officer again approved the solar facility CUP. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Clackamas County Zoning and Development Ordinance (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." In *York I*, we agreed with petitioners that the hearings officer erred in reducing the inquiry required under ZDO 1203.03(D) into a single inquiry whether the

proposed use makes the residential use of nearby properties "substantially worse." *York I*, ___ Or LUBA at ___ (slip op at 18–19).

On remand, the hearings officer observed that the subject property is in an area of mixed use—namely farm, forest, and large-parcel rural residential uses. The hearings officer noted that some owners of surrounding resource lands opposed the solar facility CUP application; however, "they did not make any arguments as to how the proposed use would substantially limit, impair, or preclude any primary uses on resource lands." Record 5 n 2.[1] The hearings officer concluded that "the pertinent question is whether the proposed solar facility would alter the character of the mixed-use area in a way that would substantially limit or impair residential uses on surrounding RRFF-5 properties." Record 5.

The primary impacts from the solar facility that opponents argued would substantially limit or impair residential uses included noise, glare, and adverse visual impacts. The hearings officer separately analyzed "substantially limit" and "substantially impair" and concluded that the solar use will not alter the character of the mixed-use area in a way that would substantially limit or impair primary residential uses on surrounding RRFF-5 properties.

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[1] The record in this appeal includes two volumes with separate pagination. All citations in this opinion are to Volume I.

A. Substantially Impair

Petitioners argue that the hearings officer erred by deciding that the glare from the solar panels will not substantially impair the surrounding rural residential uses. Most of the residences of opponents who own RRFF-5-zoned land are located to the north, northeast, and northwest of the subject property. The hearings officer observed that that the proposed solar facility site is screened by existing large trees on the east and northeast parts of the subject property. Record 7. The hearings officer found that most of the opponents cannot see the proposed site from their houses.

Petitioners argue that the record shows that residents of at least seven homes would have direct views of the proposed solar facility from their property. Petitioners cite to Record 381–82, which includes an aerial photo of the proposed solar facility site and surrounding properties. The county responds, and we agree, that evidence does not conclusively establish that surrounding residents have direct views of the solar facility site. Viewing the evidence in the record as a whole, including the evidence petitioners cite, we conclude that the record contains evidence upon which a reasonable person would rely to conclude that it is not clear how many neighbors would be able to see the proposed solar facility from their houses or other parts of their property. ORS 197.835(9)(a)(C); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) ("Substantial evidence exists to support a finding of fact when the record, viewed as a whole,

would permit a reasonable person to make that finding." (citing *Younger v. City of Portland*, 305 Or 346, 351–52, 752 P2d 262 (1988))).

To the extent that the solar facility is visible from a residential use, the hearings officer found that the glare is not significant either in intensity or duration. The hearings officer found that "solar panels are designed to absorb light rather than reflect it, and any glare that is caused is similar to that of a flat body of water." Record 6. The hearings officer concluded that some glare for a small amount of time does not substantially impair residential use of surrounding properties. Record 7.

Petitioners argue that the hearings officer's findings regarding glare are not supported by substantial evidence. Petitioners assert that the only evidence of the amount of glare produced by a solar facility that the hearings officer cited are low-resolution photographs.

The county responds by citing extensive evidence in the record to support the hearings officer's findings. We have reviewed that evidence and conclude that the record contains evidence upon which a reasonable person would rely to conclude that any glare from the solar facility will not substantially impair the surrounding residential uses. The county argues, and we agree, that petitioners' substantial evidence challenge reduces to a disagreement with the hearings officer's assessment of the evidence and conclusions and provides no basis for reversal or remand.

B. Scope of Residential Use

Petitioners make the same interpretive argument under the substantially impair and substantially limit prongs of ZDO 1203.03(D). We address those arguments together. Petitioners argue that the use of rural residential property includes the rural character of the surrounding area, including the viewshed. Petitioners argue that the hearings officer erred by narrowly characterizing residential use to activities within a residence, and not including viewing the solar facility from portions of residential property outside the residence or driving, cycling, or walking past the solar facility. As we understand it, petitioners argue that the visual impact of the solar facility substantially impairs the surrounding residential uses because a solar facility is out of character with the surrounding area.

Petitioners' argument is somewhat circular and misinterprets the appropriate inquiry. In *York I*, petitioners argued that even if the proposed facility does not substantially limit, impair or preclude the primary residential uses in the RRFF-5-zoned area, the proposed solar facility nonetheless fails to comply with ZDO 1203.03(D) because it alters the "rural" character of the area. We rejected that argument and explained:

> "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." *York I*, ___ Or LUBA at ___ (slip op at 17).

Petitioners attempt to revive that same argument in this appeal and we again reject it.

With respect to visual impacts, the hearings officer found that passing by the solar facility on the way to a residence does not limit residential use because driving and walking are not residential uses. The hearings officer found that "[t]he proposed solar facility would only be a small fraction of the areas visible to the RRFF-5 opponents" and would not substantially limit their residential uses. Record 13. Petitioners argue that the hearings officer misconstrued the scope of the inquiry.

First, we conclude that the hearings officer correctly limited the focus of residential use to actual residential use of the property. Detached single-family dwellings are the primary residential use allowed in the RRFF-5-zoned property. ZDO Table 316-1. We agree with the county that the use and occupancy of the dwelling structure is the primary use. Thus, the hearings officer did not misinterpret the scope of the primary residential use in applying ZDO 1203.03(D).

Second, the hearings officer made an alternative finding that "(e)ven if driving or walking by a solar facility could be considered a component of residential use, I do not see that having to briefly look at a facility that one considers ugly or out of place rises even remotely to the level of making residential use substantially worse." Record 7. Petitioners complain that the

hearings officer thereby expressed a personal aesthetic opinion, but petitioners do not provide an argument that undermines that alternative finding in a manner that provides a basis for remand.

C. Resource-Zoned Surrounding Properties

Petitioners argue that the hearings officer erred by not analyzing whether the solar facility "substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed" in the TBR and EFU zoning districts in the area surrounding the subject property. Petition for Review 16; ZDO 1203.03(D). The county responds, and we agree, the issue raised in *York I* under ZDO 1203.03(D) was whether the solar facility "substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed" on the surrounding RRFF-5 zoned land. While respondent does not cite *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), respondent's argument falls squarely within the *Beck* waiver doctrine, which is that, in order to preserve an issue on appeal, the issue must be raised at all stages in the appeal proceedings where it can be raised. Failure to raise the issue during the first appeal proceedings precludes LUBA's review of that issue. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012), *aff'd in part, rev'd and rem'd in part*, 256 Or App 91, 301 P3d 920, *rev den*, 353 Or 867 (2013). The only ZDO 1203.03(D) issue on remand is whether the solar facility "substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed" on the RRFF-5 zoned land. Petitioners' argument that the hearings officer failed to

analyze the impacts of the solar facility on the primary uses allowed on properties zoned TBR and EFU is waived and, thus, provides no basis for remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

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[.]" In *York I*, we explained that, for purposes of determining whether the proposed use will significantly increase fire hazard or risk to fire suppression personnel, the hearings officer must compare the fire hazard and risks posed by the existing Christmas tree farm use to those posed by the proposed solar use. *York I*, ___ Or LUBA at ___ (slip op at 36). In the initial decision on appeal in *York I*, the hearings officer did not make any findings regarding the existing risks to fire suppression personnel or evaluate and compare increased risks to fire suppression personnel that would result from changing the use to solar. Thus, we agreed with petitioners that remand was necessary for the county to conduct an appropriate evaluation of fire hazard and risk to fire suppression personnel.

A. Fire Hazard

The hearings officer found on remand that the solar facility will not significantly increase fire hazard compared to the existing Christmas tree farm. Record 16. Petitioners emphasized that a solar facility has the potential to ignite fires because it contains electrical components. The hearings officer accepted that

fact but found that the actual risk of solar facility ignition is not significant. The hearings officer quoted a German study that found that the risk of ignition from electrical wires in solar facilities "is negligible under normal circumstances." Record 15. Based on fire incidents reported in both petitioners' and the applicant's submitted evidence, the hearings officer found that fires on both Christmas tree farms and solar facilities are most often caused by external ignition sources, such as wildfires and lightning strikes. The hearings officer observed that solar facility components are mostly made of silica and generally not combustible while Christmas trees are extremely combustible. The hearings officer reasoned that, even if solar facilities are slightly more likely to catch on fire, the intensity of the fire would be less than on a Christmas tree farm.[2] Petitioners do not challenge those findings and conclusions.

B. Risk to Fire Suppression Personnel

The hearings officer found on remand that the solar facility will not significantly increase risk to fire suppression personnel compared to the existing Christmas tree farm. Petitioners emphasized that solar panels cannot be completely de-energized when exposed to sunlight and thus pose a potentially fatal risk of electrical shock to fire suppression personnel. Petitioners cited and

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[2] The hearings officer also observed that certain activities on Christmas tree farms, such as trimming and harvesting involve the use of power tools, which could be a source of ignition. However, the hearings officer did not rely on that observation in the decision.

submitted studies that discuss the potential risk of electrocution and measures to mitigate those risks.

The hearings officer acknowledged that potential risk, but observed:

> "Despite opponents' comprehensive internet search regarding any solar panel fires anywhere in the world at any time, they cannot point to one single fire suppression person who suffered any type of injury whatsoever, let alone any significant injury, from responding to a solar panel fire—let alone due to the fact that solar panels cannot be completely de-energized.
>
> "* * * * *
>
> "While there is a theoretical risk from the solar panels that cannot be de-energized, absent any evidence whatsoever of any injury anytime anywhere, I do not see how that risk could be considered significant." Record 17–18 (footnote omitted).

Petitioners argue that the hearings officer's decision that the solar facility will not significantly increase risk to fire suppression personnel is not supported by substantial evidence. Petitioners argue that the absence of evidence of actual injury to fire suppression personnel from electrified solar panels does not overcome the affirmative evidence in the record that solar panels pose a potentially fatal risk. Petitioners cite three cases to support the proposition that the absence of evidence cannot support a finding that the applicant has satisfied an applicable criterion. We discuss those three cases immediately below.

The applicant carries the burden of proof to establish that applicable criteria are satisfied, regardless of whether the criteria requires the applicant to prove a positive or negative. *Columbia Riverkeeper v. Columbia County*, ___ Or

LUBA ___ (LUBA No 2018-020, Dec 27, 2018) provides an example of proving a positive: the applicant was required to establish that the proposed uses are "compatible with other adjacent uses." To carry its burden, the applicant was required to provide evidence and examples that demonstrate compatibility. Instead of identifying aspects or impacts of the proposed uses in the context of other adjacent uses, the county found that that potential adverse impacts of the proposed uses will be similar to the impacts of the existing industrial uses that are compatible with adjacent agricultural uses. However, there was no evidence in the record to support the county's finding that the impacts are similar. Instead, the county relied on the absence of evidence that the impacts would be different. We remanded after concluding that the absence of evidence that the impacts would be different is not evidence that the impacts would be similar.

DLCD v. Curry County, 33 Or LUBA 728 (1997), provides an example of proving a negative: the applicant was required to establish that the subject property *is not* "[o]ther forested lands that maintain soil, air, water and fish and wildlife resources." A negative claim can be disproved by a positive example. For example, the claim that the subject property is *not* land that maintains wildlife resources can be disproved by affirmative evidence such as a wildlife biologist's report that the subject property contains habitat or other resources that support wildlife and that wildlife use the property.

A negative claim can be proved by negative evidence—that is evidence that suggests that something is missing. Negative evidence could be a wildlife

biologist's report that demonstrates that the subject property does not support wildlife and no wildlife have been observed on the property.

A reasonable conclusion that something is missing requires an adequate search. There is a difference between evidence of absence (*e.g.*, the record contains affirmative observations that the subject property does not support wildlife) and absence of evidence (*e.g.*, the record contains no evidence that observations of wildlife have been made on the subject property). The evidentiary issue to support a negative claim with negative evidence is whether adequate research or observations have been made so that the negative evidence is evidence upon which a reasonable person would rely. In this sense, the evidence of absence may be substantial evidence while the absence of evidence would not be.

In *DLCD*, the county improperly relied on the absence of evidence that the subject property is necessary to allow forest operations or maintain soil, air, water and fish and wildlife resources on adjacent or nearby properties. We concluded that the absence of evidence did not support a finding that the subject property did not contain the enumerated resources. Rather, we remanded for the county to determine whether the subject property contains the enumerated resources. In other words, the record lacked any evidence that adequate research or observations had been made so that the county could determine that the subject property did not contain the enumerated resources.

Wetherell v. Douglas County, 51 Or LUBA 699, *aff'd*, 209 Or App 1, 146 P3d 343 (2006), provides another example of proving a negative: the applicant was required to establish that the portion of the subject property on which a nonfarm dwelling was proposed to be located is "generally unsuitable land for the production of farm crops." In other words, that the portion of the property *is not* generally suitable for production of farm crops. The record demonstrated that the portion of the property upon which the nonfarm dwelling would be located had been part of a commercial vineyard for 30 years and that grape vines were present on the property. The county relied on the absence of evidence that the vines located on the portion of the property upon which the nonfarm dwelling would be located had produced grapes. We remanded because there was no evidence in the record that that portion had not produced grapes. In other words, the record lacked any evidence that adequate research or observations had been made so that the county could determine that the grape vines on the relevant portion of the prior vineyard had not produced grapes.

In this case, Mountain Meadow is required to prove a negative—to establish that the solar facility *will not* significantly increase risks to fire suppression personnel. The hearings officer relied on both positive and negative evidence in finding that criterion was satisfied. For positive evidence, the hearings officer compared safety measures required for the solar facility with those required for the Christmas tree farm and concluded that the safety measures for the solar facility exceed those measures for a Christmas tree farm. For

example, the solar facility is required to provide fire breaks, emergency vehicle turnarounds, and water supply, and is required to obtain written approval from the local fire district for planned access, circulation, fire lanes, and water supply. A Christmas tree farm is not required to provide those fire-safety protection measures. The hearings officer concluded that difference reduced the risk to fire suppression personnel, even though electrical equipment is present on a solar facility and not on a Christmas tree farm. We conclude that comparison is positive evidence upon which a reasonable person would rely.

For negative evidence, the hearings officer observed that the record contained exhaustive evidence of fires involving solar panels and tree farms. The hearings officer concluded that such extensive research would have included examples of injury to fire suppression personnel from electrified solar panels, if that risk were actual instead of theoretical. The hearings officer did not simply rely on the *absence of evidence* of injury to fire suppression personnel from the electrified solar panel. Instead, the hearings officer relied on the *evidence of absence*—the record contains extensive observations of fires involving solar panels but does not contain any evidence of incidents of injury to fire suppression personnel from the electrified solar panel. We conclude that the record contained adequate research and observations so that the negative evidence is evidence upon which a reasonable person would rely.

Petitioners cite *Chang v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-061, Sept 30, 2019), which also involved a solar facility on resource-

zoned land that is currently used for growing Christmas trees. In *Chang*, the petitioners argued that the solar facility significantly increased risk to fire suppression personnel because the solar panels cannot be turned off. The hearings officer did not make any findings regarding the existing risks to fire suppression personnel from the Christmas tree farm, or any findings meaningfully evaluating and comparing increased risks to fire suppression personnel from siting the solar facility. We observed that the uncontroverted evidence in the record demonstrated that solar power generation equipment poses a "substantial and unique safety risk to fire suppression personnel." *Id.* at ___ (slip op at 13). The hearings officer concluded that the solar facility poses significant increased risks to fire suppression personnel but that with a condition of approval requiring the applicant to offer fire safety training to the local rural fire protection district the solar facility would not significantly increase risks to fire suppression personnel.

Petitioners argue that the remand record in this case contains the same studies that were in the record in *Chang*, plus additional testimony establishing the risk to fire suppression personnel. Petitioners observe that there is no additional contrary evidence presented in this case. Petitioners argue that this case should be remanded consistent with our reasoning in *Chang*.

Respondent responds that this case is distinguishable from *Chang* in two ways. First, the hearings officer in *Chang* found that the solar facility may cause significant increased risk to fire suppression personnel and imposed a condition of approval to mitigate that risk to a level that was not significant. Differently, in

this case, the hearings officer found that the solar facility does not significantly increase the risk to fire suppression personnel. Second, the hearings officer in *Chang* failed to compare risks to fire suppression personnel from the Christmas tree farm use with the risks to fire suppression personnel from the solar facility use. Differently, in this case, the hearings officer found that the intensity of the fire in a solar facility would be less than on a Christmas tree farm and that the solar facility includes greater fire-safety measures than a Christmas tree farm. The hearings officer relied on those findings to support his conclusion that the solar facility does not increase the risk to fire suppression personnel.

We agree with respondent that while the evidence in this case is like the evidence presented in *Chang*, the hearings officer's findings and reasoning are distinct. *Chang* does not control the analysis or disposition of this appeal.

Finally, petitioners argue that the hearings officer misconstrued the standard in ZDO 406.05(A)(1) because that standard only requires significantly increased "risk," which is the *possibility of* harm to fire suppression personnel. According to petitioners, the hearings officer imposed a higher standard akin to certainty of increased harm. Petitioners mischaracterize the hearings officer's analysis and their argument provides no basis for remand.[3]

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[3] The hearings officer found:

> "The bottom line is that I just do not think that the risk from solar panels that cannot be de-energized is significant. While fighting fires can certainly be dangerous—either at a Christmas tree farm or

The second assignment of error is denied.

The county's decision is affirmed.

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at a solar facility—I do not think there is a significantly greater risk in fighting fires at a solar facility. The applicant has provided an extensive chart detailing measures that minimize such risks. Although opponents also provide a chart, I find the applicant's arguments more persuasive. While there is a theoretical risk from the solar panels that cannot be de-energized, absent any evidence whatsoever of any injury anytime anywhere, I do not see how that risk could be considered significant." Rec 18 (footnote omitted).