

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

3  
4                   BLACKWELL CREEK SOLAR LLC,  
5                                 *Petitioner,*

6  
7                                 vs.

8  
9                   JACKSON COUNTY,  
10                                *Respondent.*

11  
12                               LUBA No. 2021-114

13  
14                               FINAL OPINION  
15                               AND ORDER

16  
17                   Appeal from Jackson County.

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19                   Nikesh Patel filed a petition for review and argued on behalf of the  
20 petitioner. Also on the brief was Damien R. Hall.

21  
22                   No appearance by Jackson County.

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

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27                               REMANDED                               03/16/2022

28  
29                   You are entitled to judicial review of this Order. Judicial review is  
30 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county hearings officer’s decision approving with conditions an application for a 10-acre photovoltaic solar power generation facility.

**FACTS**

The approximately 85-acre subject property is located east of Gold Hill, Oregon, on Blackwell Road and is zoned Woodland Resource (WR). Petitioner applied for a conditional use permit to develop a 10-acre photovoltaic solar power generation facility on the subject property. County planning staff approved the application. A neighbor filed a local appeal. A county hearings officer held a *de novo* hearing and approved the application with conditions. This appeal followed.

**ASSIGNMENT OF ERROR**

We begin by explaining the applicable law. As stated above, the subject property is zoned WR. The county’s WR zone implements Statewide Planning Goal 4 (Forest Lands) and allows both farm and forest uses.<sup>1</sup> Forest lands are

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<sup>1</sup> Goal 4 is

“To conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

1 protected for forest uses under Goal 4 and implementing regulations adopted by  
2 Land Conservation and Development Commission (LCDC). OAR 660-006-  
3 0025(4)(j) provides that the county may allow “Commercial utility facilities for  
4 the purpose of generating power. A power generation facility shall not preclude  
5 more than 10 acres from use as a commercial forest operation unless an exception  
6 is taken pursuant to OAR chapter 660, division 4.” That rule is implemented in  
7 Jackson County Land Development Ordinance (LDO) 4.3.9(A), which provides  
8 “Utility Facilities for Power Generation [OAR 660-006-0025(4)(j) and (5)] A  
9 power generation facility shall not preclude more than 10 acres from use as a  
10 commercial forest operation unless an exception is taken pursuant to OAR 660,  
11 Division 4.” (Brackets in original.)

12 The photovoltaic panels are structures subject to LCDC’s fire-siting  
13 standards for dwellings and structures in a forest zone. OAR 660-006-0035(3)  
14 provides:

15 “The owners of the dwellings and structures shall maintain a  
16 primary fuel-free break area surrounding all structures and clear and  
17 maintain a secondary fuel-free break area on land surrounding the  
18 dwelling that is owned or controlled by the owner in accordance  
19 with the provisions in ‘Recommended Fire Siting Standards for  
20 Dwellings and Structures and Fire Safety Design Standards for  
21 Roads’ dated March 1, 1991, and published by the Oregon  
22 Department of Forestry.”

23 LDO 8.7.1(B) implements OAR 660-006-0035 and provides, in part:

24 “1) *Primary Fuelbreak*

25 “The goal within the primary fuelbreak is to remove fuels that will

1 produce flame lengths in excess of one (1) foot. A minimum 50- foot  
2 primary fuelbreak is required for all lands identified as a wildfire  
3 hazard. Vegetation within the primary fuelbreak may include grass  
4 maintained at less than six (6) inches in height and low fuel volume,  
5 fire resistant shrubs. Highly combustible shrubbery, such as juniper,  
6 is prohibited. Trees will be horizontally spaced with more than 15  
7 feet between the trunks, and will be pruned to remove branches that  
8 are dead or that are less than 10 vertical feet above the ground. A 10  
9 foot clearance between branches and stove pipes or chimney outlets  
10 must be maintained. Deciduous tree branches must be no closer than  
11 10 feet from the roof; evergreen branches must be no closer the 25  
12 feet from the roof. Accumulated leaves, needles, limbs and other  
13 dead vegetation must be removed. Flammable groundcover  
14 materials (e.g., bark mulch) may not be used in landscaping within  
15 12 inches of buildings. Firewood piles, slash piles, and woodsheds  
16 will be placed at least 30 feet from all structures.”

17 “2) *Secondary Fuelbreak*

18 “The goal of the secondary fuelbreak is to reduce fuels so that the  
19 overall intensity of a wildfire will be lessened and the likelihood of  
20 crown fires and crowning is reduced. A minimum 50 foot secondary  
21 fuelbreak is required which extends in all directions around the  
22 primary fuelbreak. An additional 50 feet, for a total of 100 feet, will  
23 be added to the secondary fuelbreak when the natural slope of the  
24 area within 100 feet of the proposed structure exceeds 20 percent.  
25 This additional 50 feet will be added to the area below and to each  
26 side of the proposed structure. Trees will be spaced with more than  
27 15 horizontal feet between the trunks, and will be pruned to remove  
28 branches that are dead or that are less than 10 vertical feet above the  
29 ground. Ornamental and fruit trees are excluded from the spacing  
30 standards, provided they are kept green and free of dead material.  
31 Small trees and brush growing underneath larger trees should be  
32 removed. Dead plant material must be removed, which includes  
33 pruning dead branches from trees and shrubs. Understory vegetation  
34 may include grass or groundcover maintained at less than 12 inches  
35 in height and low fuel volume, fire resistant shrubs (see the User ’s  
36 Guide for drought and fire resistant landscape materials).”

1           Petitioner submitted an unscaled site plan and revised site plan that  
2 proposes an approximately 10-acre solar facility inside a fenced area surrounded  
3 on all sides by a 100-foot fuel break. Record 53, 25. In evaluating the overall size  
4 and impact of the proposed solar facility, the hearings officer found:

5           “Here, the photovoltaic facility is proposed to be no larger than 10  
6 acres. The Staff Report contained a definition of photovoltaic  
7 facility from OAR 660-033-0130(38)(f). That definition is in the  
8 portion of the OARs governing Agricultural Lands, and is thus not  
9 strictly applicable to uses on Forest Lands, but it is a useful  
10 description for determining the scope of the facility. The Hearings  
11 Officer concludes that the 10-acre size limit will include the  
12 photovoltaic facility itself, which will be all the facilities within the  
13 security fencing area on the revised site plan, and the 100-foot  
14 cleared setback area around the fenced facility because that clearing  
15 will preclude commercial forestry operations. The revised site plan  
16 may also require a narrow, cleared area to install electrical cable  
17 connection systems to the nearest transmission pole. To the extent  
18 permanent clearing is required for that connection area on the  
19 Property, that will also be part of the 10-acre size limit. The revised  
20 site plan is not fully dimensioned, and Applicant agreed to a  
21 condition of approval dimensioning a revised site plan prior to  
22 building permits in order to show the above-described 10-acre limit  
23 area. The Hearing Officer concludes that this is a feasible condition  
24 of approval.” Record 6 (internal footnotes omitted).<sup>2</sup>

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<sup>2</sup> OAR 660-033-0130(38)(f) provides, in part:

“‘Photovoltaic solar power generation facility’ includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also

1 The hearings officer’s decision includes a condition of approval that requires  
2 petitioner to submit a revised site plan showing compliance with the 10-acre size  
3 limit that includes the fuelbreak. Record 20.

4 In a sole assignment of error, petitioner argues that the hearings officer’s  
5 finding that the required 100-foot fuel break around the fenced facility will be a  
6 cleared area that precludes commercial forestry operations improperly construes  
7 OAR 660-006-0025(4)(j), LDO 4.3.9(A), and LDO 8.7.1(B). Petitioner argues  
8 that the hearings officer misconstrued the applicable law by concluding that LDO  
9 8.7.1(B) requires a “cleared setback” that would preclude commercial forestry  
10 operations. According to petitioner, the restrictions in LDO 8.7.1(B)  
11 “unambiguously allow[] for the growing and harvesting of trees in the 100-foot  
12 fuelbreak” and, thus, permit commercial forestry operations within the fuelbreak  
13 area. Petition for Review 11. In support of that argument, petitioner cites OAR  
14 660-006-0005(8), which defines “Forest Operation” as “any commercial activity  
15 relating to the growing or harvesting or any forest tree species as defined in ORS  
16 527.620(6).” ORS 527.620(6) defines “Forest tree species” as “any tree species  
17 capable of producing logs, fiber or other wood materials suitable for the

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include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. \* \* \*

1 production of lumber, sheeting, pulp, firewood or other commercial forest  
2 products \* \* \*.” Petitioner emphasizes that LDO 8.7.1(B) allows trees within the  
3 fuelbreak area that are horizontally spaced with more than 15 feet between the  
4 trunks.

5 Petitioner further argues that the hearings officer’s fuelbreak finding is  
6 conclusory and insufficient because it lacks any explanation or discussion of  
7 evidence or legal standards on which the hearings officer based their conclusion  
8 that the 100-foot fuel break precludes use of that area as a commercial forestry  
9 operation. Finally, petitioner argues that the challenged finding is not based on  
10 substantial evidence in the record because the record contains no evidence that  
11 the 100-foot fuelbreak is proposed to be cleared of vegetation or otherwise  
12 precluded from use as a commercial forestry operation.

13 We conclude that the hearings officer’s interpretation of LDO 8.7.1(B) in  
14 context of the 10-acre limitation in OAR 660-006-0025(4)(j) and LDO 4.3.9(A)  
15 is inadequate for our review. *Elenes v. Deschutes County*, 78 Or LUBA 483  
16 (2018). The critical issue is whether the fuelbreak standard precludes use of the  
17 fuelbreak area as a commercial forest operation. That inquiry requires an  
18 interpretation of “preclude” and “use as a commercial forest operation” based on  
19 evidence of what types of activities may occur within the fuelbreak area under  
20 LDO 8.7.1(B). That inquiry is fact specific. Accordingly, we remand the decision  
21 instead of making our own determination in the first instance based on the limited  
22 record before us.

1           In remanding, we note that we agree with petitioner that LDO 8.7.1(B)  
2 does not require a “cleared setback,” if “cleared” means completely devoid of  
3 vegetation. LDO 8.7.1(B) allows some vegetation to be grown and maintained in  
4 the fuelbreak area. However, the findings do not explain what the hearings officer  
5 means by “cleared setback” and petitioner has not directed us to any evidence  
6 that compels a conclusion the fuelbreak area can be used as a commercial forest  
7 operation as a matter of law.<sup>3</sup> It may be that the hearings officer implicitly  
8 reasoned that the fuelbreak standard requires fuel reduction to such an extent that  
9 the area cannot be used for commercial forest operations. In remanding, we also  
10 note that, as the applicant for a conditional use on forest land, petitioner bears the  
11 ultimate burden to demonstrate compliance with the applicable standards. In the  
12 context of this appeal, that includes demonstrating that compliance with the  
13 fuelbreak standard will not preclude commercial forest operation activities in the  
14 fuelbreak area.

15           The county’s decision is remanded.

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<sup>3</sup> We observe that petitioner argues only that the fuelbreak area can be used for growing and harvesting forest tree species and not for some other type of commercial forest operations.