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

SILVER CREEK SOLAR, LLC,
Petitioner,

vs.

MARION COUNTY,
Respondent.

LUBA No. 2023-045

FINAL OPINION
AND ORDER

Appeal from Marion County.

Damien R. Hall filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief were Nikesh J. Patel and Dunn Carney LLP.

Cody W. Walterman filed the respondent's brief and argued on behalf of respondent.

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

AFFIRMED 09/21/2023

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

Petitioner appeals a board of commissioners decision denying petitioner's application for a conditional use permit to develop a 10-acre photovoltaic solar power facility on land zoned for farm and forest uses.

BACKGROUND

The subject property is approximately 30.31 acres, zoned Farm/Timber (FT), and planted with Christmas trees.[1] Petitioner applied for a conditional use permit to develop a 10-acre photovoltaic solar power facility pursuant to Marion County Code (MCC) 17.139.050(F)(3), which is set out and discussed further below. The planning division recommended that the hearings officer deny the application. The hearings officer held a hearing and issued an order denying the application. Petitioner appealed to the board of commissioners, which adopted the hearings officer's decision and denied the application. This appeal followed.

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[1] The FT zoned is a mixed agricultural/forest zone. As we discuss later in this opinion, OAR 660-006-0050(1) provides that counties "may establish agriculture/forest zones in accordance with both [Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands)], and OAR chapter 660, divisions 6 and 33." The findings explain:

> "The FT (Farm/Timber) Zone is intended to be applied in areas where the soils are suitable for farm or forest uses as defined in the [Statewide Planning Goal 4 (Forest Lands)], and where the existing land use pattern is a mixture of agricultural ownerships, forest management units and some acreage homesites. The FT zone allows flexibility in management needed to obtain maximum resource production for these lands." Record 30.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The first and second assignments of error present interrelated legal issues and we address them together.

Lands zoned for resource use pursuant to Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) are generally conserved for resource uses. In the first assignment of error, petitioner argues that the county misconstrued the law by applying certain Land Conservation and Development Commission (LCDC) rules that apply to proposals for solar facilities on high-value farmland to petitioner's proposed solar facility that is allowed in forest zones. Relatedly, in the second assignment of error, petitioner argues that the county erred by applying inapplicable standards that are not set out in the MCC.

OAR 660-006-0025(4)(j) implements Goal 4, and provides that counties *may* allow on forest lands commercial solar power generating facilities that do not preclude more than 10 acres from use as a commercial forest operation.[2]

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[2] OAR 660-006-0025(5) provides:

> "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;

MCC 17.139.050(F)(3) implements OAR 660-006-0025(4)(j) and allows as a conditional use in the FT zone:

> "Utility facilities for the purpose of generating power. A power generation facility shall not preclude more than:
>
> "a. Ten acres from use as a commercial forest operation unless an exception is taken pursuant to OAR Chapter 660, Division 004.
>
> "b. Twelve acres from use as a commercial agricultural enterprise on high-value farmland unless an exception is taken pursuant to OAR Chapter 660, Division 004.
>
> "c. Twenty acres from use as a commercial agricultural enterprise on farmland that is not high-value unless an exception is taken pursuant to ORS 197.732 and OAR Chapter 660, Division 004."

Petitioner argued to the county that, pursuant to MCC 17.130.050(F)(3), its application is for a use conditionally allowed in the FT zone and that the county should approve the application because petitioner satisfied the conditional use criteria in MCC 17.139.060(A).

> "(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
>
> "(c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner that recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (m), (s), (t) and (w) of this rule."

The board concluded that the criteria in MCC 17.139.050(F)(3) and MCC 17.139.060(A) were satisfied or could be satisfied with conditions of approval. Record 31-33.[3] However, the board found that satisfying those criteria is insufficient to establish a solar power generation facility on the subject property because the subject property is high-value farmland. Record 33. The board concluded that OAR 660-033-0130(38) applies directly to the application and that petitioner had "not provided sufficient evidence to satisfy the criteria required by OAR 660-033-0130(38)." Record 37.

The board reasoned that MCC 17.139.050 provides that a conditional use must satisfy "the criteria in MCC 17.139.060(A) *and any additional criteria, requirements and standards specified for the use*." (Emphasis added.) OAR 660-033-0130(38)(h) contains criteria that "must be satisfied in order to approve a photovoltaic solar power generation facility *on high-value farmland* described at ORS 195.300(10)." (Emphasis added.) ORS 195.300(10)(a), in turn, defines "[h]igh-value farmland as described in ORS 215.710 that is land in an exclusive farm use zone *or a mixed farm and forest zone*[.]" (Emphasis added.) As relevant here, ORS 215.710 defines "high-value farmland" by soil type. It is undisputed that the subject property includes high-value farmland as defined in ORS

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[3] All references to the Record in this decision are to the Second Amended Record.

195.300(10) and ORS 215.710 based on soil type. The board concluded that OAR 660-033-0130(38) is an applicable approval criterion.

The decision explains that MCC 17.139.050(F)(3) predates the adoption of OAR 660-033-0130(38). Record 34. Therefore, MCC 17.139.050(F)(3) allowed solar facilities in the FT zone without imposing the OAR 660-033-0130(38) criterion. Solar facilities in the FT zone were, however, subject to conditional use standards in *former* MCC 17.120.110 prior to its repeal.[4]

The decision explains that former MCC 17.120.110 previously allowed solar facilities on high-value farmland consistent with OAR 660-033-0130(38):

> "[Former] MCC 17.120.110 was based on ORS 215.283(2)(g) as fleshed out in OAR 660-033-0130(38) and provided minimum standards for photovoltaic facilities.
>
> "[Former] MCC 17.120.110 provided three solar power generation facility siting scenarios: siting on high-value farmland, arable lands, and nonarable lands. Soil types on the subject property determined which scenario applies. OAR 660-033-0130(38)(f) refers to ORS 215.710, the basis for the OAR 660-033-0020(8)(a) high-value farmland definition. Former MCC 17.120.110 included criteria for high-value farmland soils in subsections (B), (E), and (F).
>
> "Specifically included in former MCC 17.120.110 for high-value farmland soils were criteria requiring that the proposed photovoltaic solar power facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject

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[4] The county repealed MCC 17.120.110 in Ordinance 1387 (2018), which amended MCC 17.137 to preclude solar facilities in the county's exclusive farm use and special agricultural zones. Ordinance 1387 did not preclude any use in the FT zone.

property not occupied by project components. Additional criteria included an analysis regarding soil erosion, soil compaction, unabated introduction or spread of noxious weeds.

"Former MCC 17.120.110 did not specifically reference zones: it addressed high-value farmland.

"Criteria included in former MCC 17.120.110(B) read in relevant part:

> "6. The project is not located on high-value farmland soil unless it can be demonstrated that:
>
> > "a. Non-high-value farmland soils are not available on the subject tract; or
> >
> > "b. Siting the project on non-high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or
> >
> > "c. The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised on non-high-value farmland soils."

"Former MCC 17.120.110 required an applicant meet the criteria regarding agricultural use impacts for issuance of a conditional use permit for a photovoltaic array. Without the criteria of MCC 17.120.110, a photovoltaic solar power generation facility cannot be approved in Marion County on high-value soils." Record 35-36.

The board reasoned that because the subject property is high-value farmland, even in the absence of former MCC 17.120.110, OAR 660-033-0130(38) applies directly and concluded that petitioner had not demonstrated that those criteria are satisfied. Record 36-37.

Petitioner contends that the county misconstrued the law and violated ORS 215.416(8)(a) by applying the standards in OAR 660-033-0130(38). ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

However, where a county fails to implement an administrative rule, ORS 197.646(3) provides that the rule applies directly until the county amends its code to implement the rule. ORS 197.646(3); *White v. Lane County*, 68 Or LUBA 423 (2013).[5]

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[5] ORS 197.646 provides:

> "(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.
>
> "(2)(a) The Department of Land Conservation and Development shall notify local governments when a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals requires changes to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan.

After the county repealed MCC 17.120.110, the MCC does not include provisions that implement OAR 660-033-0130(38) for proposals for solar facilities on high-value farmland. Hence, pursuant to ORS 197.646(3), OAR 660-033-0130(38) applies directly, notwithstanding ORS 215.416(8).

Petitioner argues that OAR 660-006-0050 allows counties to apply *either* farm or forest standards—but not both—to uses allowed in the FT zone. We reject petitioner's interpretation of OAR 660-006-0050.

OAR 660-006-0050 provides:

> "(b) The Land Conservation and Development Commission shall establish, by rule, the time period within which an acknowledged comprehensive plan, an acknowledged regional framework plan and land use regulations implementing either plan must be in compliance with:
>
> "(A) A new requirement in a land use statute, if the legislation does not specify a time period for compliance; and
>
> "(B) A new requirement in a land use planning goal or rule adopted by the commission.
>
> "(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."

> "(1) Governing bodies may establish agriculture/forest zones in accordance with both Goals 3 and 4, and OAR chapter 660, divisions 6 and 33.
>
> "(2) Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR chapter 660, division 6 or 33 standards *for siting a dwelling* in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.
>
> "(3) Dwellings and related structures authorized under section (2), where the predominant use is forestry, shall be subject to the requirements of OAR 660-006-0029 and 660-006-0035." (Emphasis added.)

Petitioner argues that, under OAR 660-006-0050(2), the county may not apply both agricultural land standards and forest land standards to the same use. According to petitioner, because solar facilities are authorized on forest land by OAR 660-006-0025(4)(j) as implemented by MCC 17.139.050(F)(3), and the MCC does not apply any other regulations to the proposed solar use in the FT zone, the county may apply only forest zone standards to the that use in the FT zone and may not apply farmland standards in OAR 660-033-0130(38). Petition for Review 12-13.

The county responds that the FT zone consists of both farmland and forest land and is subject to standards for both. The county argues that OAR 660-006-0050 allows the county to apply either farm or forest criteria. The county responds that, because the subject property is currently used for Christmas tree

production, which is a farm use, the county must apply farm standards to the application for the development of solar power generation facility.

The parties' dispute requires us to interpret OAR 660-006-0050 and OAR 660-033-0130(38).

> "'When interpreting an administrative rule, we seek to divine the intent of the rule's drafters, employing essentially the same framework that we employ when interpreting a statute. Under that analytical framework, we consider the text of the rule in its regulatory and statutory context.' *Noble v. Dept. of Fish and Wildlife*, 355 Or 435, 448, 326 P3d 589 (2014) (internal citation omitted) (citing *State v. Hogevoll*, 348 Or 104, 109, 228 P3d 569 (2010)). 'In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply to the court.' *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (citing *Dept. of Human Services v. J.R.F.*, 351 Or 570, 579, 273 P3d 87 (2012), and *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997))." *Schaefer v. Oregon Aviation Board*, 312 Or App 316, 336-37 (2021).

Whenever possible, we construe statutes and administrative rules to be consistent with one another so that, if possible, we may give effect to all. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

ORS 215.283(2)(g) permits counties to authorize on land zoned for exclusive farm use:

> "Commercial utility facilities for the purpose of generating power for public use by sale. If the area zoned for exclusive farm use is high-value farmland, a photovoltaic solar power generation facility may be established as a commercial utility facility as provided in

ORS 215.447. A renewable energy facility as defined in ORS 215.446 may be established as a commercial utility facility."

In enacting Ordinance 1387, the county exercised its discretion to not allow solar facilities to be developed on land zoned for exclusive farm use. However, Ordinance 1387 did not repeal MCC 17.139.050(F)(3). Accordingly, that use is still permitted in the FT zone. The question presented is whether the county erred by applying OAR 660-033-0130(38) to petitioner's application to develop a solar facility in the FT zone on high-value farmland.

A. Text

At the outset, we reject the county's assertion that OAR 660-006-0050(2) permits the county to make a case-by-case determination about which criteria apply to the siting of a solar facility in the FT zone based on the predominate use of the tract at the time of the application. OAR 660-006-0050(2) directs the county to apply either forest or farm standards *for the siting of a dwelling* in a mixed-use zone "based on the predominant use of the tract on January 1, 1993." The rule does not similarly require or permit the county to refer to the predominate use of the property to determine which criteria apply to uses other than dwellings. If LCDC had intended counties to make a predominate use determination for uses other than dwellings, then the rule would have so provided.

Petitioner argues that the phrase "subject to the requirements of the applicable section" in OAR 660-006-0050(2) means that, if the use is allowed in forest zones under OAR 660-006-0025, then the county may apply only the

requirements in that section. According to petitioner, OAR 660-006-0050(2) allows three sets of uses in the FT zone: (1) uses allowed by ORS 215; (2) uses allowed in forest zones by OAR 660-006-0025; and (3) forest dwellings allowed by OAR 660-006-0027. Petition for Review 12. We understand petitioner to argue that because the rule uses the singular term "section," and not the plural "sections," any particular use that is allowed by ORS 215 or OAR 660-006-0025 may be subject only to either farm or forest criteria respectively.

We conclude that the rule text is ambiguous. If a use is authorized in ORS Chapter 215 and in OAR 660-006-0025, requirements of both sections may apply under OAR 660-006-0050(2) because both sections are "applicable" to the use. That interpretation is supported by the second sentence in OAR 660-006-0050(2) which requires that the county apply "*either* OAR chapter 660, division 6 *or* 33 standards" for siting a dwelling based on the predominate use of the tract. If LCDC had intended to also dichotomize applicable regulations for uses other than dwellings, then the rule would have so provided. As we explain above, ORS 215.283(2)(g) authorizes the county to allow solar facilities on farmland and OAR 660-006-0025(4)(j) authorizes the county to allow solar facilities on forest land. Accordingly, both OAR chapter 660, division 6 and division 33 standards contain "the requirements of the applicable section."

B. Context

Petitioner argues that OAR 660-006-0025(5)(a) provides useful context for interpreting OAR 660-006-0050. OAR 660-006-0025(5)(a) provides:

> "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[.]"

Petitioner points out that the county implements OAR 660-006-0025(5)(a) in MCC 17.139.060(A)(1) and argues that "it is clear that the County imported the proposed use classification and conditional use standards in the FT zone from OAR Chapter 660, Division 6 (forest standards)." Petition for Review 16. However, petitioner does not otherwise explain why, after the county repealed former MCC 17.120.110, OAR 660-033-0130(38) does not apply directly to the county's decision. The fact that the county elected to retain the MCC standards that implement standards in OAR 660-006-0025 does not assist us in determining whether the county was required to apply OAR 660-033-0130(38) to the proposed solar use.

C. Legislative History

Petitioner explains that LCDC adopted OAR 660-006-0050 in 1990 in response to the Supreme Court's decision in *1000 Friends of Oregon v. LCDC*, 305 Or 384, 752 P2d 271 (1988) (*Oregon Forest Industries*). In that case, the petitioner appealed LCDC's decision acknowledging Lane County's comprehensive rural land use plan as being in compliance with the statewide land use goals. The central question in that appeal was whether the Lane County plan

properly allowed some types of dwellings on lands zoned for forest uses. In its plan, Lane County zoned large portions of the county as forest land and established two types of forest zones, non-impacted forest lands and impacted forest lands.

The plan permitted "woodlot dwellings" on impacted forest lands.[6] "Woodlot dwellings" were permitted by state statute in exclusive farm use zones, but were not permitted forest uses. ORS 215.213(2)(a) and (b) (1987). The court reasoned that a plan which allows for farm uses on forest lands does not comply with Goal 4. The court reasoned:

> "If land is designated as Goal 4 land, all non-excepted uses must meet the requirements of Goal 4. Where there are mixed uses so closely or rationally connected that it is impractical to divide the land into exclusive Goal 3 or Goal 4 zones, the parties do not contest LCDC's decision that a mixed designation can be given to the zone as a whole. However, within such a mixed-use zone, and within an exclusive zone of either type, individual parcels cannot meet one goal merely by having a use corresponding to another goal." *Oregon Forest Industries*, 305 Or at 401-02.

Petitioner explains that LCDC adopted OAR 660-006-0050 in 1990 in response to the Supreme Court's decision in *Oregon Forest Industries*. Petitioner

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[6] The court explained that the term "woodlot" was used to describe "a small area where the landowner occasionally harvests trees for personal consumption or for sale as wood and not as a forest product. * * * [A]s a legal term woodlots were not viewed by the legislature to be forest uses as well as farm uses." *Oregon Forest Industries*, 305 Or at 398-99.

quotes a portion of the fiscal impact statement for the rule adoption, which states, in part:

> "[T]hese amendments will replace existing imprecise standards in Goals 3 and 4, which were the source of much litigation, with more precise, clear standards. These new standards should save time and money by counties in the administration of the land use program by reducing the potential to litigate current unclear goal and rule language. * * * [T]he new restrictions on the development of primary lands will be offset by the designation of secondary lands and the additional development allowed on those lands." Record 79.

Petitioner argues that history supports petitioner's interpretation of OAR 660-006-0050(2) as requiring counties to apply either farm or forest standards to uses allowed in a mixed-use zone.

This referenced legislative history is incomplete and inconclusive. *Oregon Forest Industries* did not concern the application of farm and forest standards to a use that is permitted in both farm and forest regulations. Instead, the court simply held that LCDC incorrectly acknowledged the county's comprehensive plan as consistent with Goal 4 because the county's plan permitted non-forest uses in forest zones and the only explanation was that those uses were allowed on farmland. Accordingly, *Oregon Forest Industries* does not aid petitioner.

The portion of the LCDC rulemaking purpose statement that petitioner relies upon is in a paragraph that discusses different regulations for "primary lands" and "secondary lands," but petitioner does not explain the relevance of those terms, if any, in relation to OAR 660-006-0050(2).

The legislative history petitioner offers does not support petitioner's interpretation of OAR 660-006-0050.

D. We must give effect to all relevant statutes and administrative rules.

Again, ORS 174.010 provides, in part, "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." OAR 660-033-0130(38)(h) contains criteria that "*must* be satisfied in order to approve a photovoltaic solar power generation facility on high-value farmland." (Emphasis added.) The county's interpretation of OAR 660-006-0050(2) and OAR 660-033-0130(38)(h) gives effect to those provisions and is not in conflict with the text, context, or legislative history of OAR 660-006-0050(2).

In the first assignment of error, petitioner argues that the county misconstrued the law by applying standards applicable to uses allowed in exclusive farm use zones to a proposed use that is allowed in a forest zone. In the second assignment of error, petitioner argues that the county erred by applying standards that are inapplicable to the proposed use and which are not set out in the MCC. For reasons explained above, we conclude that the county did not err in applying OAR 660-033-0130(38).

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues in the alternative that, even if OAR 660-033-0130(38) applies in the FT zone, the application of the agriculture minimum standards for uses under OAR 660-033-0130 to land other than that zoned for exclusive farm use exceeds LCDC's legislatively delegated authority.

An agency cannot adopt rules that exceed the agency's statutory authority or that are inconsistent with applicable statutes. ORS 183.400(4)(b); *DeBates v. Yamhill County*, 32 Or LUBA 276, 282 (1997).

In ORS 197.040, the legislature delegated rulemaking authority to LCDC to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197." It is well established that the legislature had delegated to LCDC broad regulatory authority, including "protecting high-value farmland through regulations that restrict uses that otherwise would be permissible." *Lane County. v. LCDC*, 325 Or 569, 581, 942 P2d 278 (1997).

OAR 660-033-0130(38) refers to and incorporates statutory definitions of "high-value farmland" in ORS 195.300(10) and ORS 215.710. Those statutes evidence a legislative intent to protect high-value farmland by reference to soil types in *both* exclusive farm use zones *and* mixed farm and forest zones. We conclude that LCDC did not exceed its statutory authority by adopting regulations that apply to high-value farmland in a mixed-use zone.

The third assignment of error is denied.

The county's decision is affirmed.