

1                   BEFORE THE LAND USE BOARD OF APPEALS

2                   OF THE STATE OF OREGON

3  
4                   1000 FRIENDS OF OREGON,

5                   *Petitioner,*

6  
7                   vs.

8  
9                   JACKSON COUNTY,

10                  *Respondent,*

11  
12                  and

13  
14                  OR SOLAR 7, LLC,

15                  *Intervenor-Respondent.*

16  
17                  LUBA No. 2017-066

18  
19                  ORDER

20       **MOTION TO INTERVENE**

21           OR Solar 7, LLC (intervenor), the applicant below, moves to intervene  
22 on the side of respondent. No party opposes the motion, and it is granted.

23       **MOTION TO APPEAR AS AMICUS**

24           On September 15, 2017, the Oregon Solar Industries Association filed a  
25 motion to appear as amicus in this appeal, pursuant to OAR 661-010-0052.<sup>1</sup>

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<sup>1</sup> OAR 661-010-0052(1) provides, in relevant part:

“A person or organization may appear as amicus only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of

1 The motion is accompanied by the proposed amicus brief, in support of the  
2 county's decision.

3 Amicus states that it is a trade association founded in 1981 to promote  
4 solar energy, and that some of its members are utility scale solar developers  
5 active in Jackson County. Amicus argues that its participation will  
6 significantly aid LUBA's review, because amicus has access to knowledge  
7 regarding the nature of the solar industry in Oregon, and the regulatory  
8 environment for solar energy.

9 We agree with amicus that the participation of a trade organization may  
10 aid the Board's review of this appeal. The 14-day period for filing objections  
11 to the motion to appear as amicus has not expired, so we grant the motion to  
12 appear as amicus, subject to reconsideration if objections are filed.

### 13 **MOTION TO STRIKE**

14 The petition for review was filed on August 25, 2017. Appendix 2 to the  
15 petition for review is a copy of a memorandum from the assistant director of  
16 the Oregon Department of Energy (DOE) to a staff person at the Oregon  
17 Department of Land Conservation and Development (DLCD), dated July 10,  
18 2017. The DOE memorandum "explains the current opinion of the Oregon  
19 Department of Energy" on the topic of "the applicability of reliance" on  
20 Statewide Planning Goal 13 (Energy) as "justification for approval" of an

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relevant issues would be significantly aided by participation of the  
amicus. \* \* \*

1 exception to Statewide Planning Goal 3 (Agricultural Land) to site solar energy  
2 facilities on agricultural land. Petition for Review, Appendix 2, p. 1. The  
3 memorandum expresses an understanding of Goal 13 and the exception process  
4 that is at odds with the views expressed in the county decision at issue in this  
5 appeal. Attached to the memorandum is an excerpt from a 2009 DOE order  
6 that the memorandum references. In the petition for review, petitioner requests  
7 that LUBA take judicial notice of the memorandum and its attached order,  
8 pursuant to ORS 40.090(2), as an “official act” of a state executive  
9 department.<sup>2</sup> The petition for review briefly cites the memorandum, among  
10 other sources, to provide additional support for petitioner’s argument that Goal  
11 13 does not justify a Goal 3 exception for renewable energy development.  
12 Petition for Review 13.

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<sup>2</sup> ORS 40.090 provides, in relevant part:

“Law judicially noticed is defined as:

“(1) The decisional, constitutional and public statutory law of Oregon, the United States, any federally recognized American Indian tribal government and any state, territory or other jurisdiction of the United States.

“(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.”

1           Intervenor moves to strike Appendix 2 and its attached order excerpt,  
2   arguing that the memorandum does not qualify as an “official act” of a state  
3   agency for purposes of ORS 40.090(2), but is simply an interagency  
4   communication. Because the memorandum does not constitute a DOE decision  
5   or affirmative “action” of any kind, intervenor argues that it does not qualify  
6   for judicial notice as an official act of the agency.

7           Petitioner replies that the memorandum expresses DOE’s official opinion  
8   on whether Goal 13 justifies approval of a Goal 3 exception for solar energy on  
9   farmland, and that such a memorandum is analogous to an Attorney General  
10   opinion. Petitioner also contends that the DOE memorandum is similar to the  
11   internal agency management directive for water quality permits that LUBA  
12   took judicial notice of in *Tualatin Riverkeepers v. ODEQ*, 55 OR LUBA 688  
13   (2007).

14          We disagree with petitioner that the DOE memorandum is an “official  
15   act” of DOE subject to judicial notice. The memorandum is not similar to  
16   Attorney General opinions, which are authoritative analyses of state law  
17   published by the state attorney general as guidance to all agencies and citizens.  
18   Nor is it similar to the agency management directive at issue in *Tualatin*  
19   *Riverkeepers*, which provided internal agency guidance on the issuance of the  
20   agency’s water quality permits. The DOE memorandum expresses an opinion  
21   on whether Goal 13 justifies an exception to Goal 3 to allow farmland to be  
22   used for a solar array, but notes that DOE is concerned with application of Goal

1 13 only in the context of proposals over which the Energy Facility Siting  
2 Council (EFSC) has jurisdiction. The memorandum states that DOE “does not  
3 take a position on any goal exception process for non-EFSC jurisdictional  
4 energy facilities.” In other words, the memorandum expresses an interpretation  
5 of law as applied to a matter that the author of the memorandum admits is not  
6 within the agency’s authority or jurisdiction. Whatever the scope of an  
7 “official act” of an agency, we believe that the act must concern matters within  
8 the agency’s authority or jurisdiction to be subject to judicial notice under ORS  
9 40.090(2). Petitioner’s motion for judicial notice is denied. The Board will not  
10 consider Appendix 2 to the petition for review, or its attached order, for any  
11 purpose in this appeal.

12 Dated this 22nd day of September, 2017.  
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17 Tod A. Bassham  
18 Board Member