

BAKER CITY-COUNTY PLANNING DEPARTMENT



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Staff Report for a Plan Amendment to the Baker County Planning Commission for Revisions to Chapter 760 of the Baker County Zoning Ordinance – County Case No. PA-23-232

Report Date: December 22, 2023

Report Prepared by: Tara Micka, Senior Planner

Hearing Date: January 3, 2024

- I. **PURPOSE & CONTEXT:** The Planning Commission will consider an amendment to Chapter 760 of the Baker County Zoning Ordinance. Chapter 760 regulates solar power generation facilities. The Planning Commission will make a recommendation to the Board of Commissioners and the Board of Commissioners will make the final decision on this proposal.
- II. **BACKGROUND:** Two changes are proposed to Chapter 760 that would impact Utility-Scale Solar Generation Facilities, which are defined as solar power generation facilities which produce power to be sold and used for public consumption. The changes are:

- Adding language to Section 760.03.E.4.b so that it reads (changes included in bold):
*No portion of a Utility-Scale Solar Power Generation Facility shall be located within 1,320 feet of an existing dwelling unless an Affidavit of Consent has been signed by all property owners with an existing dwelling within 1,320 feet of the facility. This Affidavit of Consent shall be recorded by deed in the Baker County Clerk’s Office. **Utility-Scale Solar Power Generation Facilities seeking to locate on properties designated as Commercial Industrial (CI) on the Comprehensive Land Use Zoning Maps are exempt from the requirements of this section.***
- Adding language in Section 760.03.E.4.d so that it reads (changes included in bold):
The proposed language states: *No portion of a Utility-Scale Solar Power Generation Facility shall be located within 1 mile of an existing airport or airstrip **currently registered with the Federal Aviation Administration or, if located within 1 mile, must demonstrate that the proposed Utility-Scale Solar Power Generation Facility either (i) does not exceed the Federal Aviation Administration’s Notice Criteria or (ii) has received a Determination of No Hazard to Aviation.***

III. **APPLICABLE CRITERIA & FINDINGS**

Legislative land use decisions must comply with the statewide planning goals, applicable provisions of the Baker County Comprehensive Plan and the provisions in Chapter 260 and Section 115.08 of the Baker County Zoning Ordinance. The following goals, rules, plan policies, and ordinance text are the criteria applicable to review of the proposal:

BAKER COUNTY ZONING ORDINANCE (BCZO)

Chapter 115 Decision-Making Procedures

Section 115.08 Type IV Procedure

F. *Decision-making considerations. The recommendation by the Planning Commission and the decision by the Board of Commissioners shall be based on consideration of the following factors:*

1. *The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statute Chapter 197;*
2. *Any federal or state statutes or regulations found applicable;*
3. *Any applicable Comprehensive Plan policies; and*
4. *Any applicable provisions of the County's implementing Ordinances.*

Recommended Findings: This report and Planning Commission/Board of Commissioners hearings will ensure that the applicable Statewide Planning Goals and Guidelines outlined in ORS 197 are satisfied. Any federal or state statutes or regulations found applicable to this application are included in this staff report, along with applicable Comprehensive Plan policies and provisions of the Baker County Zoning Ordinance.

Conclusion: Based on the findings above, the criteria **are/are not** met.

Chapter 260 – Map, Text and Plan Amendments

Section 260.02 – Authorization to Initiate Amendments. An amendment to the text of this Ordinance or Comprehensive Land Use Plan, or to the zoning map or Comprehensive Land Use Plan Map may be initiated by the Board of Commissioners, or Planning Commission, or by application of a property owner.

Recommended Findings: This amendment to the text of the Zoning Ordinance was initiated by application from Durkee Solar LLC and property owner Thomas Bludworth.

Conclusion: Based on the findings above, the criteria **are/are not** met.

Section 260.04 - Legislative Text and Zoning Map Amendments. These amendments shall be reviewed by means of a Type IV procedure, as governed by Section 115.07.

A. *Definition: A Legislative Amendment is one that applies broadly and thus, requires the Board of Commissioners, to approve the change. By this definition, all amendments to the text of this Ordinance are legislative in nature, with the exception of typographical errors. Modifications of the zoning map that affect a class of property owners as opposed to a single property owner are also legislative in nature.*

B. *Process: Legislative Text and Zoning Map Amendments shall be undertaken by means of a Type IV procedure, as governed by Section 115.08 of this Ordinance and the approval criteria in Section 260.07(A).*

Recommended Findings: The proposed revisions to the Zoning Ordinance are legislative and are undertaken in accordance with the Type IV procedure set forth in BCZO Sections 115.08 and 260.07(A). No zoning map amendments are proposed.

Conclusion: Based on the findings above, the criteria **are/are not** met.

Section 260.07 – Approval Criteria

A. *Legislative Text and Zoning Map Amendments. The Board of Commissioners may approve Legislative Text and Zoning Map Amendments upon findings that the proposed amendment complies with the following approval Criteria:*

1. *The amendment complies with all applicable policies of the Comprehensive Plan; and*
2. *The amendment does not create a conflict with other provisions of this ordinance or other ordinances or regulations.*

Recommended Findings: The amendment is evaluated for consistency with the applicable policies of the Comprehensive Plan beginning on page 3 of this report. No conflicts with other provisions of this ordinance or other ordinances or regulations have been identified.

Conclusion: Based on the findings above, the criteria **are/are not** met.

All applicable policies from the Baker County Comprehensive Plan are included below and addressed as follows:

THE BAKER COUNTY COMPREHENSIVE PLAN

GOAL 1: CITIZEN INVOLVEMENT – *To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.*

Excerpt from the Baker County Comprehensive Land Use Plan:

B. Public Meeting Policies. *The county governing body finds and declares that:*

1. *All meetings or hearings in the county involving land use planning and zoning actions or decisions shall be open, public meetings.*
2. *The Planning Commission, hearings officer, or any other commission or committee having land use planning and zoning functions, advisory or otherwise, shall take necessary action calculated to notify the public of the time and place and purpose of its meetings. Such action shall include making the required information available to a newspaper of general circulation in the county.*

Recommended Findings: On December 13, 2023, notice of the proposed amendment was mailed to owners of property in, or within 0.25 miles of, the Commercial-Industrial zone, along with property owners of any existing airport or airstrip listed in Goal 12 of the Baker County Comprehensive Plan. The mailing list included 122 property owners. On December 14, 2023, notice of the proposed amendment was provided to agencies and County departments that may have an interest in the decision. Information regarding the application and hearings process was posted on the Planning Department webpage.

The Planning Commission will hold a public hearing on January 3, 2024, to consider public testimony and make a recommendation to the Board of Commissioners. Notice of the meeting will be published in the Baker City Herald and Hells Canyon Journal.

The Baker County Board of Commissioners will hold at least two public hearings on this proposal. These hearings will provide an additional opportunity for citizens to be involved in the proposed revisions and adoption process. These hearings are tentatively scheduled for Wednesday, January 17 and Wednesday, February 7, 2024.

Conclusion: Based on the findings above, the intent of Goal 1 **is/is not** satisfied.

GOAL 2: LAND USE PLANNING – *To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.*

Recommended Findings: The land use planning process for amending the Zoning Ordinance is included in Zoning Ordinance Chapter 260. The Comprehensive Plan includes this description of the Commercial Industrial zone in the Goal 2 section on page 17: *“Refers to a mixed zone that accommodates the blending of uses already existing and for which an exception is proposed.”*

Excerpt for the Comprehensive Plan:

II. EXISTING COMMERCIAL-INDUSTRIAL (C-I). *Only one area of Baker County, containing approximately 456 acres, is zoned Commercial Industrial.*

A. Durkee

Portions of Sections 20, 21, 28 and 29 of Township 11 South, Range 43 East W.M. This area consists of approximately 456 acres of II-VI soils. Dispersed throughout this area are two transportation terminals, a spur of the railroad mainline, a service station, a mobile home park, restaurant, school facilities, a church and numerous single family dwellings. Durkee developed as a railroad station for the transport of cattle and mineral ore. The construction of Interstate 84 during the late 1960s helped the area survive the termination of railroad service. The site was a platted townsite, but has never been incorporated.

The area provides support facilities to both the motoring public using Interstate 84 and the cement industrial facility located 12 miles to the south. From 1974 to 1986, this area was zoned A-2, which allowed agricultural and non-agricultural uses. It was acknowledged as a Commercial/Industrial Zone in 1986. The justification for the exception was based upon the nature of development already existing in the area. The newest development along Vandecar Road lies north of the freeway. In part, this has resulted from a shifting emphasis from rail transport to freeway transport; in part, from past economic development for non-farm uses onto far less productive soils to the north than the irrigated valley bottom surrounding the platted townsite.

The developability of this area is limited by a lack of a community water and sewer supplies, as well as its distance from other urban centers. Future development may occur as a result of extractive activities in the area.

After the original Comprehensive Plan was written, a small portion of Commercial-Industrial zoned property was added to the zoning map, which currently includes three tax lots located south of Sawmill Cutoff Lane and Pine Town Lane southeast of Halfway, Oregon. The properties are identified as Tax Lots 800, 802 & 803 in Section 21A of Township 8 South, Range 46 East, W.M., Baker County, Oregon (Refs. 13543, 17522 & 17523). A small portion of Tax Lot 800 is zoned Exclusive Farm Use and was added to the property via a property line adjustment (PLA-18-009), recorded on April 16, 2019, with the Baker County Clerk's Office.

Conclusion: Based on the findings above, the intent of Goal 2 **is/is not** satisfied.

GOAL 3: AGRICULTURAL LANDS— *To preserve and maintain agricultural lands.*

GOAL 4: FOREST LANDS— *To conserve forest lands for forest uses.*

Recommended Findings: The portion of this proposal related to obtaining a homeowner's consent within 1,320 feet of a proposed utility-scale generation facility is specific to Commercial Industrial zoned land, therefore Goals 3 and 4 are not applicable.

The second portion of this proposal relates to existing airports or airstrips within Baker County. There is a list of recognized helicopter landing sites and private/personal use airstrips in the *Aviation System* section of Goal 12 of the Comprehensive Plan. The four inventoried airstrips in Baker County that are listed as not registered with the Oregon State Aeronautics Department (now Oregon Department of Aviation) are all located on property zoned Exclusive Farm Use (EFU). Of the six airstrips listed as registered with the Oregon State Aeronautics Department, four are zoned EFU, one is zoned both Residential/Commercial and Industrial (City Limits of Unity, Oregon), and the last is zoned Commercial Industrial. Six of the eight listed helicopter-landing sites are located within Baker County (two are located within adjacent counties); two of these six are included in the airstrips listed above. The four remaining helicopter-landing sites are zoned EFU, Residential-Limited (RL - within City Limits of Sumpter, Oregon), General Commercial (CG – within City Limits of Baker City), and Airport Development Zone (ADZ – Baker City Municipal Airport).

Conclusion: Based on the findings above, Goal 3 and Goal 4 **are/are not** applicable.

GOAL 5: OPEN SPACES, SCENIC AND HISTORIC AREAS, AND NATURAL RESOURCES – *To conserve open space and protect natural and scenic resources.*

Excerpt from the Baker County Comprehensive Land Use Plan:

III. Energy Sources

A. Energy Sources Inventory – *Energy Sources include ... solar radiation*

- 4. Solar Power** – *The low density of development in Baker County does not justify immediate concern for protecting solar access. The county notes an increasing interest in the utilization of solar power but identifies no conflicts with this resource.*

Recommended Findings: This proposal has no foreseen effect on existing open spaces, scenic or historic areas, and natural resources identified within the inventory of the Comprehensive Plan.

Conclusion: Based on the findings above, the intent of Goal 5 **is/is not** satisfied.

GOAL 10: HOUSING – *To provide for the housing needs of the citizens of the county.*

Excerpt from the Baker County Comprehensive Land Use Plan:

III. HOUSING GOAL POLICIES

The county governing body declares that lands shall be made available for a variety of housing needs in the county, which variety shall include:

- 1. The need to accommodate the several income levels of the citizens.*
- 2. The need to reduce transportation costs to and from places of employment.*
- 3. The need to support and maintain agricultural, industrial, commercial, mining and processing, and tourist and recreational use of land.*

Recommended Findings: This proposal will not affect the opportunity for any Baker County citizen to apply for a dwelling, where this use is permitted, as outlined in the Baker County Zoning Ordinance.

Conclusion: Based on the findings above, the intent of Goal 10 **is/is not** satisfied.

GOAL 12: TRANSPORTATION – *To provide and encourage a safe, convenient and economic transportation system.*

Excerpt from the Baker County Comprehensive Land Use Plan:

F. Aviation System

3. Local Aviation System Information

- a. Baker's Municipal Airport is owned by the City of Baker. General Aviation Facilities are available. There are two fixed base operators with aircraft and services available. Since the airport was established prior to 1947, it is exempt from registration with the Aeronautics Division, Oregon Department of Transportation.*
- b. Financial Information: Revenues come from fuel taxes, landing fees, hanger and building leases, and farm lease income.*
- c. Air Service Information: There are two fixed base operators offering various flight services. Each have a 5 year, renewable lease with the City of Baker.*
- d. Helicopter Service: There are three companies offering helicopter evacuation or ambulance service in Baker County. Requests for helicopter service from the U.S. Forest Service for emergencies must be routed through the Baker County Sheriff's office. Helicopter Field Landings are done at the discretion of the pilots. These are the recognized landing sites throughout Baker County:*
 - i. St. Elizabeth Hospital – Baker*
 - ii. Old Fairgrounds – Sumpter*
 - iii. Boundary Guard Station – 3 miles east of Granite*
 - iv. Unity Airport*
 - v. Baker Airport*
 - vi. Halfway Airport (Pine)*
 - vii. Oxbow Idaho Power – emergencies only*
 - viii. Boulder Park Resort*
- e. Private/Personal Use Airstrips in Baker County:*
 - i. Registered with Oregon State Aeronautics Department*
 - a) Ellingson's strip at Halfway*
 - b) Ellingson's strip at Unity*
 - c) Charles Jensen – Haines*
 - d) Roger Leonnig – Muddy Creek*
 - e) Idaho Power – Oxbow*
 - f) John Tragis – Richland*
 - ii. Inventoried Non-Registered Airstrips in Baker County*
 - a) Fred Phillips – Keating*
 - b) Phil Stevenson – Rock Creek Road*
 - c) Dave Blatchford – Brown Lane*
 - d) Homer Clark – Pocahontas Road*

The county governing body finds that:

- 3. The City and County of Baker have adopted an "Airport Master Plan, Baker Municipal Airport, December 1978". Such airport is considered to be an economic alternative mode of transportation in the county. Improvements and expansion of the airport are underway as a cooperative function of local, state and federal government.*

The County has adopted an Airport Development Zone that limits construction and uses within the area. Furthermore, an Airport Overlay Zone has been adopted to limit uses in approach areas of the airport. Height limitations and restrictions on uses producing

interference to aircraft were included in the original Airport Zoning Ordinance of 1975 and whose restrictions are still in effect. These planning documents for the Baker Airport have been reviewed and approved by the Aeronautics Division of the State Department of Transportation.

GOAL XII TRANSPORTATION POLICIES:

- c. Lands surrounding the airport shall be protected from development that is incompatible with the airport.*

Recommended Findings: The proposal seeks to modify the chapter of the Baker County Zoning Ordinance that regulates solar power generation facilities by adding to the existing language so that utility-scale solar power generation facilities may be located within 1 mile of an existing airport or airstrips that is either currently registered with the Federal Aviation Administration, or, if located within 1 mile, must demonstrate that the proposed utility-scale solar power generation facility either (i) does not exceed the Federal Aviation Administration’s Notice Criteria or (ii) has received a determination of No Hazard to Aviation.

At the time of an application for development of a utility-scale solar power generation facility in Baker County, the applicant will be required to obtain a Conditional Use Permit from Baker County prior to installation of the facility. During this process, certain landowners will be sent notice of application providing an opportunity to comment, which may include owners of the aviation systems listed above.

All of the current property owners of the helicopter landing sites, the Baker City Municipal Airport, and airstrips listed above were sent notification of this proposal on December 13, 2023. Notice was also sent to individual hangar owners at the Baker City Municipal Airport. At the time this report was written, no comments were received from any of these property owners.

Conclusion: Based on the findings above, the intent of Goal 12 **is/is not** satisfied.

GOAL 13: ENERGY CONSERVATION

Excerpt from the Baker County Comprehensive Land Use Plan:

GOAL XIII ENERGY CONSERVATION POLICIES

The county governing body declares that:

- 1. Potential energy producing sites shall be protected from irreversible loss and encouraged to be developed.*

Recommended Findings: This proposal is specific to utility-scale solar power generation facilities, which produces energy (power).

Conclusion: Based on the findings above, the intent of Goal 13 **is/is not** satisfied.

Other federal or state statutes:

The applicant states, *“Section 760.03 E.4.b. This section violates the state statutory requirements of ORS 215.416(8)(a) which provides that approval or denial of permits must be based on “standards and criteria”. The “affidavit of consent” condition, particularly in the Commercial Industrial zone, reduces the review process to the subjective discretion (or lack of response) from neighboring landowners who have a dwelling within 1,320 feet of a Utility-Scale Solar Power Generation Facility.”*

“Section 760.03 E.4.d. The FAA already requires that construction projects such as Utility-Scale Solar Power Generation Facilities submit information about the project to determine if additional notification or coordination is required. Clarification to the Ordinance would help to avoid any conflicts of law” (Exhibit B).

IV. SUMMARY CONCLUSIONS & PLANNING COMMISSION RECOMMENDATION

The proposed revisions to the Baker County Zoning Ordinance contained within PA-23-232 may be allowed if the request is determined to be consistent with all applicable statewide planning goals, applicable policies of Baker County Comprehensive Plan and Baker County Zoning Ordinance Chapter 260. As summarized herein, this staff report for PA-23-232 **HAS/HAS NOT** demonstrated that the proposed revisions meet all of the applicable review criteria and development standards.

Therefore, based on the information contained in Sections I through III of this report, and the above review criteria, findings of fact and conclusions and public testimony received, the Baker County Planning Commission recommends **APPROVAL/DENIAL** of the proposed revisions to the Baker County Board of Commissioners.

Dated this _____ day of _____, 2024

Baker County Planning Commission

Chair

EXHIBITS

- A. Draft Baker County Zoning Ordinance Amendments
- B. Application

Exhibit A – Draft Baker County Zoning Ordinance Amendments
Underlined text shows language proposed to be added to the Ordinance

Chapter 760 - SOLAR POWER GENERATION FACILITY

760.03 Uses. There are four categories of *solar power generation facilities* and accessory uses permitted, as described below:

- A. **Accessory Uses.** The installation and use of a solar power generation facility is an outright permitted use in any zone when located:
 - 1. On a residential structure in a zone in which residential structures are an allowed use unless subsection (c) of this Section applies; or
 - 2. On a commercial structure in any zone in which commercial structures are an allowed use unless subsection (c) of this Section applies.
 - 3. If the residential or commercial structure is designated as any of the following, the provisions of 760.02(A) do not apply:
 - a. A federally or locally designated historic building or landmark, or is located in a federally or locally designated historic district.
 - b. A conservation landmark designated by the County because of the historic, cultural, archaeological, architectural or similar merit of the landmark.
 - c. Located in an area designated as a significant scenic resource *unless* the material used must be designated as anti-reflective or eleven percent or less reflective.

- B. ***Small-Scale Solar Power Generation Facilities.*** A solar power generation facility which produces power to be used for non-commercial purposes and is not located within the Exclusive Farm Use or Timber Grazing zone. *Small-scale solar power generation facilities* may generate up to 150% of the expected annual energy need for the primary use.

- C. ***Commercial Solar Power Generation Facilities.*** A solar power generation facility which produces power to be used to power commercial developments, uses, structures or businesses located on the same parcel or tract as the *solar power generation facility* and is not located within the Exclusive Farm Use or Timber Grazing zone. Net-metering is permitted with *commercial solar power generation facilities* if it does not exceed 150% of the average expected annual energy production.

- D. ***Utility-Scale Solar Power Generation Facilities.*** A solar power generation facility which produces power to be sold and used for public consumption.

- E. **Types of Procedures**
 - 1. Permits for accessory uses described in 760.02(A) will follow the Type I procedure provisions of Section 115.05 as long as the installation of a solar power generation facility can be accomplished without increasing the footprint of the residential or commercial structure or the peak height of the portion of the roof on which the system is installed,

and the solar power generation facility would be mounted so that the plane of the system is parallel to the slope of the roof.

- a. No Planning Department fees are to be charged for processing the permit, regardless of whether a Type I procedure can be used. Building Department fees may still apply.
 - b. Extensive surveys, including but not limited to, vegetation surveys, contour maps and elevation drawings, may not be required.
2. A *Small-Scale or Commercial Solar Power Generation Facility* measuring less than 3 acres, accessory to and providing power to a primary use on property within the same ownership, and with net-metering not exceeding 150% of the average expected annual energy production, may be permitted when authorized in accordance with the Type I procedure provisions of Section 115.05. A *Small-Scale or Commercial Solar Power Generation Facility* may be located in any zone subject to the following siting requirements and standards:
- a. On or accessory to a residential structure which has been permitted or has been identified as a pre-existing, non-conforming structure; or
 - b. On or accessory to a commercial structure which has been permitted or has been identified as a pre-existing, non-conforming structure; and
 - c. Sited in rear- or side-yards and measuring no more than 15 feet in height; and
 - d. Sited in a location which meets all applicable setback requirements set forth in *Chapter 340 – Development Standards (Setback Requirements) for All Zones*.
 - e. Where feasible, electrical cables and transmission lines shall be placed underground.
3. A *Small-Scale or Commercial Solar Power Generation Facility* measuring more than 3 acres, and with net-metering not exceeding 150% of the average expected annual energy production, may be permitted when authorized in accordance with the Type III procedure provisions of Section 115.07.
4. A *Utility-Scale Solar Power Generation Facility* may be permitted when authorized through a Conditional Use Permit, and in accordance with the Type III procedure provisions of Section 115.07. A *Utility-Scale Solar Power Generation Facility* may be located in any zone subject to the following siting requirements and standards:
- a. No portion of a *Utility-Scale Solar Power Generation Facility* shall be within 1,320 feet of:
 - i. Properties designated on the Comprehensive Land Use Zoning Maps as residential (those zoned Rural Residential (RR-5) or Recreation Residential (RR-2) only), or
 - ii. The city limits of an incorporated city, unless a resolution specifically supporting placement of a *solar power generation facility* within 1,320 feet of the city limits has been passed by the city council of that city.
 - b. No portion of a *Utility-Scale Solar Power Generation Facility* shall be located within 1,320 feet of an existing dwelling unless an Affidavit of Consent has been signed by all property owners with an existing dwelling within 1,320 feet of the facility. This

Affidavit of Consent shall be recorded by deed in the Baker County Clerk's Office. Utility-Scale Solar Power Generation Facilities seeking to locate on properties designated as Commercial Industrial (CI) on the Comprehensive Land Use Zoning Maps are exempt from the requirements of this section.

- c. All *Utility-Scale Solar Power Generation Facilities* shall meet setback requirements set forth in *Chapter 340 – Development Standards (Setback Requirements) for All Zones*.
 - d. No portion of a *Utility-Scale Solar Power Generation Facility* shall be located within 1 mile of an existing airport or airstrip currently registered with the Federal Aviation Administration or, if located within 1 mile, must demonstrate that the proposed Utility-Scale Solar Power Generation Facility either (i) does not exceed the Federal Aviation Administration's Notice Criteria or (ii) has received a Determination of No Hazard to Aviation.
 - e. Where feasible, electrical cables and transmission lines shall be placed underground.
- F. Permit Expiration Dates and Extensions. *Solar Power Generation Facilities* shall be subject to permit expiration periods and extension requirements set forth in Chapter 220 of this Ordinance.

Exhibit B - Application



December 1, 2023

VIA EMAIL hkerns@bakercountyor.gov
Holly Kerns, Planning Director
1995 Third Street, Suite 131
Baker City, OR 97814

RE: Baker County Zoning Ordinance, Revised Amendment Application

Dear Ms. Kerns:

Pursuant to the application for Zoning Ordinance Text Amendment dated October 27, 2023, which the Baker City Planning Department deemed complete on November 20, 2023, Durkee Solar, LLC c/o Heelstone Development, LLC (the "Applicant") would like to modify its application.

The Applicant wishes to withdraw its previously submitted Narrative for Zoning Ordinance Text Amendment Application and to replace it with the attached, updated Narrative for Zoning Ordinance Text Amendment.

Thank you for your time and consideration. We look forward to working with you.

Sincerely,

Whitney St Charles
Development Manager

**NARRATIVE FOR
ZONING ORDINANCE TEXT AMENDMENT APPLICATION**

I. INTRODUCTION

Durkee Solar, LLC (the “**Applicant**”) requests two (2) amendments to Chapter 760 of the Baker County Zoning Ordinance (the “**Ordinance**”):

1. Modify Section 760.03 E.4.b. requiring an Affidavit of Consent from property owners within 1,320 feet of a Utility-Scale Solar Power Generation Facility to exempt properties located in the Commercial Industrial (CI) zone from this requirement.
2. Modify Section 760.03 E.4.d. to clarify the reference to “airport or airstrip” shall apply only to airports and airstrips currently registered with the Federal Aviation Administration.

Applicant submits this written narrative as required under Section 115.08B.2.e. of the Ordinance. The Planning Commission and the Board of Commissioners are required to utilize a Type IV Procedure when considering Applicant’s requested amendments. In the following Narrative, Applicant will first provide general rationale for the requested amendments and then provide a brief analysis of the Ordinance’s four approval criteria factors under Section 115.08 F.

II. RATIONALE FOR AMENDMENTS

- A. Requested Amendment #1:** Applicant requests that Section 760.03 E.4.b. of the Ordinance be modified to include the following italicized and bold text:

No portion of a Utility-Scale Solar Power Generation Facility shall be located within 1,320 feet of an existing dwelling unless an Affidavit of Consent has been signed by all property owners with an existing dwelling within 1,320 feet of the facility. This Affidavit of Consent shall be recorded by deed in the Baker County Clerk’s Office. ***Utility-Scale Solar Power Generation Facilities seeking to locate on properties designated as Commercial Industrial (CI) on the Comprehensive Land Use Zoning Maps are exempt from the requirements of this section.***

Justification for Request #1:

The current language in Section 760.03 E.4.b.: (i) is unnecessary for Commercial Industrial (CI) because neighboring property owners are already protected by the Ordinance’s Type III conditional use approval process, (ii) is not required by any Oregon land-use statutes or regulations and is contrary to Oregon law, (iii) restricts the individual property rights of landowners by placing



unchecked power in the hands of adjacent property owners, and (iv) is an unduly burdensome process.

(i) **Section 760.03 E.4.b. is unnecessary for Commercial Industrial (CI) properties because neighboring property owners are already significantly protected by the Type III, Conditional Use, approval process.**

1. A Utility-Scale Solar Power Generation Facility is already subject to extensive site design requirements under Chapter 760 of the Ordinance. These requirements ensure development in Baker County minimizes any potential adverse impacts on neighboring properties. These requirements have been specifically outlined by the Baker County Planning Commission and are subject to technical review in each application by the County's Planning Department.
2. Neighboring property owners and all Baker County citizens already have significant opportunities to participate in the approval process for Utility-Scale Solar Power Generation Facilities through the Type III approval process (Section 115.07 of the Ordinance). The Type III process requires the following to facilitate public awareness and participation:
 - a. A Public Hearing before the Planning Commission.
 - b. Circulation of written Notices prior to public hearings:
 - i. Mailed Notice from the County to (i) neighboring property owners, (ii) any affected government agency, and (iii) individuals or organizations who have previously requested such notice.
 - ii. Publishing Notice of the hearing in the newspaper of general circulation.
 - iii. Public availability of the staff report and the complete application file.
3. As such, like all Type III approvals, neighboring property owners will be provided notice and an opportunity to provide input during the Conditional Use Permit consideration process for a Utility-Scale Solar Power Generation Facility.
4. Furthermore, property owners with an existing dwelling in proximity to a Commercial Industrial (CI) zone are already aware or should be aware of the nature of the zoning classification of such property and the potential land use activities which may occur.
5. The Commercial Industrial (CI) zone specifically allows for other higher intensity uses than Utility-Scale Solar Power Generation Facilities without a similar Affidavit of Consent requirement. Some examples include Truck Terminals, closed manufacturing facilities, and Wrecking Yards.



(ii) **Section 760.03 E.4.b. is not required by any Oregon land-use statutes or regulations and is contrary to Oregon law.**

1. Oregon law has no land-use statute or regulation that requires an applicant for a land-use permit for Utility-Scale Solar Power Generation Facilities to include Affidavits of Consent.
2. In fact, the requirement of an “affidavit of consent” from neighboring landowners violates the state statutory requirement of ORS 215.416(8)(a) which provides that approval or denial of permits must be based on “standards and criteria”.
3. Oregon courts have also made it clear that the “standards and criteria” are specifically intended “to promote fair and consistent treatment of participants; to endure that government acts for a public purpose and not on a whim or corrupt motivation.”¹
4. Applicant has worked in over 100 local communities developing solar projects throughout the United States, and it has never encountered this type of requirement. Section 760.03 E.4.b. of the Ordinance is unprecedented and leaves a private landowner at the mercy of its neighbors.

(iii) **Section 760.03 E.4.b. Restricts individual property rights of landowners by placing unchecked power in the hands of adjacent property owners.**

1. Section 760.03 E.4.b. as currently written, creates a scenario where a lone unwilling, unresponsive, or vindictive neighbor can fundamentally impede another landowner’s private property rights to pursue a project that is otherwise legal and permissible.
2. This section renders the Ordinance’s objective criteria for considering permits for a Utility-Scale Solar Power Generation Facility in Commercial Industrial (CI) zones entirely irrelevant. It also takes away the authority of the County Planning Commission to recommend and approve these projects.
3. Requiring an applicant to obtain affidavits of consent reduces the entire permitting process to the whim and subjective discretion of neighboring landowners who have a dwelling within 1,320 feet of a proposed Utility-Scale Solar Power Generation Facility. As outlined above, this is contrary to Oregon state law.
4. Allowing the issuance of a permit and land use approval to hinge upon a group of affidavits of consent is tantamount to the Ordinance taking away a landowner’s private property rights without the benefit of due process.

¹*Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Com.*, 16 Or App 63, 69–72, 517 P2d 289 (1973).



(iv) **Section 760.03 E.4.b. is an unduly burdensome process.**

1. Even if Section 760.03 E.4.b. was permissible under Oregon law, it is unduly burdensome and in actual practice would be highly impractical, if not impossible.
2. Practical limitations include:
 - a. physically locating dozens of neighboring property owners, who may or may not even be residents of Baker County, to obtain sworn affidavits and signatures;
 - b. confirming these property owners understand the technical and legally significant terminology contained in the affidavits; and
 - c. ensuring proper execution of the affidavits with appropriate signatures and notarization.
3. Even for the most thorough and committed applicants, the process could be never-ending.
4. Further, the effects of recording any affidavit of consent documents could also have wildly disparate (and permanent) impacts on the title record of individual properties that agree to provide them. Recording affidavits of consent will place permanent encumbrances on the neighboring properties that may result in a decline, or possibly even the total loss, in the marketability of that property's title.

B. Requested Amendment #2: Applicant requests that Section 760.03 E.4.d. of the Ordinance be modified to include the following italicized and bold text:

- d. No portion of a Utility-Scale Solar Power Generation Facility shall be located within 1 mile of an existing airport or airstrip *currently registered with the Federal Aviation Administration or, if located within 1 mile, must demonstrate that the proposed Utility-Scale Solar Power Generation Facility either (i) does not exceed the Federal Aviation Administration's Notice Criteria or (ii) has received a Determination of No Hazard to Aviation.*



Justification for Request #2:

Currently, Section 760.03 E.4.d. of the Ordinance prohibits locating Utility-Scale Solar Power Generation Facilities near “airstrips”. “Airstrips” is not a defined term within the Ordinance. Applicant’s proposed amendment provides clarity and is consistent with federal regulations.

Further, the proposed amendment allows the Ordinance to avoid a conflict of law. Utility-Scale Solar Power Generation Facilities are already required to submit information to the FAA to determine whether further notification or coordination is required prior to construction. It creates a regulatory inconsistency if Utility-Scale Solar Power Generation Facilities that have already been approved as nonhazardous by the FAA face additional restrictions.



III. APPLICABLE APPROVAL CRITERIA FACTORS:

Section 115.08 F of the Ordinance requires that the recommendation by the Planning Commission and the decision by the Board of Commissioners be based on consideration of the following four approval criteria factors (NOTE, the factors as they appear in the Ordinance are copied below in bold italics and followed by the Applicant's responses):

1. The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statute Chapter 197;

By removing inefficient barriers to the permitting process for Utility-Scale Solar Power Generation Facilities, the proposed amendments will help to advance Goal 13: Energy Conservation as currently promulgated under ORS Chapter 197.

2. Any federal or state statutes or regulations found applicable;

Section 760.03 E.4.b.

This section violates the state statutory requirements of ORS 215.416(8)(a) which provides that approval or denial of permits must be based on "standards and criteria". The "affidavit of consent" condition, particularly in the Commercial Industrial zone, reduces the review process to the subjective discretion (or lack of response) from neighboring landowners who have a dwelling within 1,320 feet of a Utility-Scale Solar Power Generation Facility.

Section 760.03 E.4.d.

The FAA already requires that construction projects such as Utility-Scale Solar Power Generation Facilities submit information about the project to determine if additional notification or coordination is required. Clarification to the Ordinance would help to avoid any conflicts of law.

3. Any applicable Comprehensive Plan policies;

The proposed amendments will help to further and facilitate Comprehensive Plan Goal XIII *Energy Conservation Policies*, specifically number 1: Potential energy producing sites shall be protected from irreversible loss and ***encouraged to be developed*** (emphasis added). These amendments will help to ensure efficiency in the Utility-Scale Solar Power Generation Facility permitting process and help to advance this goal.

4. Any applicable provisions of the County's implementing Ordinances.

Section 760.03 E.4.b.

In addition to the failure to meet the "standards and criteria" requirements, the "affidavit of consent" is vague and has practical problems with respect to the requirement that they be "recorded by deed in the Baker County Clerk's office." The ordinance specifies the affidavit is to be recorded and could become a cloud on the permittee's property or the dwelling owner's property.



Section 760.03 E.4.d.

Applicant is not aware of any applicable provisions of the County's implementing Ordinances.

IV. CONCLUSION

The Ordinance's Sections 760.03 E.4.b. and Section 760.03 E.4.d. should be amended based upon the above justifications of both practical rationale and the Ordinance's applicable Approval Criteria Factors.