KITTITAS COUNTY, WASHINGTON

IN RE: CU 15-0006 (CUP)

OneEnergy Iron Horse Solar Farm

Applicant's Legal Response to Appellants' Legal Memorandum Regarding Conditional Use Permit Application

A. INTRODUCTION

The appellants' legal argument does not accurately reflect the legal framework for reviewing a conditional permit application in a fashion that harmonizes the policy framework of the Growth Management Act ("GMA") and local comprehensive plan provisions with CUP criteria. Similar to the SEPA appeal, the appellants offer nothing to demonstrate why this location is particularly sensitive or unique (as compared to any other agricultural location in Kittitas County), or why or how this small solar facility will cause provable deleterious impacts on the ability of these landowners to engage in farming. It is of little relevance that a small portion of the supporting landowner's property will be converted to a solar farm (which is not a permanent conversion like a residential subdivision or many other uses). The GMA policies, reflected in the locally adopted Comprehensive Plan provisions, are fundamentally directed at halting the permanent and costly (in terms of public services and infrastructure) conversions of agricultural lands to sprawling low density residential subdivisions. RCW 36.70A.011(2).

If the question is whether farm land will be converted to a solar farm for the life of the facility, the answer is obviously yes. However, that is precisely what was anticipated by the Board of County Commissioners' decision to allow this land use and other non-farming land uses as a conditionally approved use ("CUP").

If such a use is in conflict with farming uses because it causes subjectively judged visual change, then that impact exists anywhere in the AG-20 zone, and it is an impact of any land use other than farming. The appellants state that this is the "wrong location for the proposed project." The only thing that differentiates this location from any other location is that this location has drawn opposition. That is not the deciding factor, and must be rejected.

B. THE PROPOSED SOLAR FACILITY COMPLIES WITH THE LEGAL STANDARDS FOR APPROVAL OF A CONDITIONAL USE PERMIT

The appellants' CUP legal memorandum gets off to a shaky start, framing its legal argument with the wrong legal standard. Appellants cite and quote *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007), a case involving a *rezone*, not a special use or conditional use permit. Even post-GMA law is clear that to achieve a site-specific rezone, consistency with and implementation of the locally adopted comprehensive plan is necessary. Teeing off of the rezoning requirements, on page 5 of their memorandum, appellants state: "The reason for Applicants disagreement with this legal proposition is apparent -- the project proposal is inconsistent with the adopted comprehensive plan and GMA directives with respect to rural character."

OneEnergy stands by its evaluation of the GMA and comprehensive plan policy provisions contained in its Supplemental Materials (Index, Ex. 46) and entirely concurs with the County CDS Staff Report's analysis, both of which reflect the application of the correct legal standard, not the misapplication of the rezone standard. In responding to the appellants' misapplication of the comprehensive plan policy provisions, OneEnergy emphasizes that OneEnergy has in fact addressed the Project's "consistency" with GMA and comprehensive plan policies. The County has independently found the Project to be consistent with these provisions as well. OneEnergy does not reiterate that evaluation here.

This permit application is not for a rezone, and the legal standard for review and approval of a special use permit or conditional use permit[1] differs from the law applicable to rezones, and is far more nuanced. This is for the simple reason that local governments cannot designate uses conditionally allowed within zoning districts while reserving unfettered discretion to deny those uses under general planning standards in a fashion that undercuts any semblance of predictability required by law in the implementation and administration of local permitting. The Staff Report

[1] "Conditional uses ('special uses,' 'unclassified uses,' 'special exceptions') were designed to be limited departures from self-executing zoning for those rare uses which may or may not be compatible depending upon the specific qualities of surroundings, site, and site development.... Detailed regulatory conditions to avoid adverse impact and compensate for demands on public facilities have been judicially embraced." Settle, Richard L., *Washington Land Use and Environmental Law and Practice* at 65 (1983).

issued in this matter strikes precisely the correct balance, recognizing that opposition to a specific project in one place that implicates no greater or different impacts than approval at another location (*e.g.*, Osprey project) is not controlling in the approval or denial of a particular project. Allowing the successful navigation of the CUP process to boil down to whether a project is opposed is an unlawful and irrational means of administering local land use planning and zoning, undercutting essential rights to an objective and predictable process.

Washington courts have consistently held that where specific zoning regulations conflict with more general comprehensive plans, the zoning regulations guide. *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004), *as amended* (Feb. 24, 2004); *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 188, 4 P.3d 115 (2000); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874, 947 P.2d 1208 (1997); *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994); *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988). Comprehensive plans are not intended to be used to make specific land use decisions. *Mount Vernon*, 133 Wn.2d at 874.

Post-GMA comprehensive plans derive their substantive power from the GMA's consistency requirement. RCW 36.70B.040; *see also* Ronda Larson, *The End of an Era: Suburban Village Aversion in Citizens for Mount Vernon v. City of Mount Vernon*, 74 Wash. L. Rev. 367, 378-79 (1999). This requirement obligates local governments to make development regulations consistent with the comprehensive plan. *Id.* Therefore, any incorporation of the GMA or comprehensive plans in local zoning regulations is likely redundant, given that any local development regulation is already required to be and is therefore presumptively consistent with both the GMA and the respective county comprehensive plan.

Just as the GMA is not intended to serve as a tool to invalidate specific local land use decisions, neither are comprehensive plans. In *Citizens for Mount Vernon*, the Washington Supreme Court held that a comprehensive plan is only a guide, not a legal imperative; thus, when zoning regulations and the plan conflict, the plan must yield. 133 Wn.2d at 873. There, the court upheld the permitting of a commercial planned unit development, a permitted use under the local zoning regulations. *Id.* at 872. Opponents argued the project was, however, inconsistent with the county's comprehensive plan, and the superior court, acting in its appellate function under LUPA, agreed. *Id.* at 865.

The Washington Supreme Court later affirmed that decision, holding the project was in fact inconsistent with *local* zoning regulations, but in doing so, it emphasized,

> [s]ince a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

Id. at 873-74 (citations omitted).

While the general law prohibits the use of comprehensive plans to override zoning controls, where zoning codes themselves include criteria that require an examination of GMA and comprehensive plan provisions, the issue is more complex, and the law is more nuanced. In addition to fairly conventional CUP review criteria, KCC 17.60A.015(7) adds the following criteria for uses outside the Urban Growth Areas, requiring that the use:

A. Is consistent with the intent, goals, policies, and objectives of the Kittitas County Comprehensive Plan, including the policies of Chapter 8, Rural and Resource Lands;
B. Preserves "rural character" as defined in the Growth Management Act (RCW 36.70A.030(15));
C. Requires only rural governmental services; and
D. Does not compromise the long term viability of designated resource lands.

RCW 36.70A.030(15) defines "rural character" as follows: "'Rural character' refers to patterns of land use and development established by a county in the rural element of its comprehensive plan." Hence, this language largely sends the applicant back to the comprehensive plan to evaluate "consistency." This section of the GMA then lists a series of elements for local consideration in determining areas of counties that are defined by and demonstrate listed rural attributes. This list of attributes guides GMA planning. It is not a list of regulatory requirements for the authorization or denial of permits.

In its Supplemental Materials (Index, Ex. 46), at pages 2-7, OneEnergy provides its analysis of the GMA and comprehensive plan policies, demonstrating that the Project is indeed "consistent" with these policy provisions. The CDS Staff Report, at pages 2-5 and pages 15-16,

also analyzes the policies, and finds consistency with these provisions. The locally applied GMA and comprehensive plan provisions call for the consideration of "compatibility" and "consistency" to inform the application of the CUP criteria. They do not call for or require "compliance" with these policy provisions, nor do these provisions require an applicant to show how a project will "implement" the policies. "Compliance" and "implementation" of general planning policies are antithetical to administration of CUP criteria. In fact, in RCW 36.70A.011, the legislature found that "to retain and enhance the job base in rural areas, rural counties must have flexibility to create opportunities for business development." In its zoning ordinance, codified at KCC 17.15.030, Kittitas County has provided wide latitude for permitting non-farming land uses, authorized by a CUP. (*See also*, Index, Ex. 46, pp. 1 - 2; 7 - 10).

The Washington Court of Appeals addressed the interplay of policies and plan consistency with CUP criteria in *Lakeside Industries*. In *Lakeside*, the court reconciled seemingly contradictory principles in a county comprehensive plan and local zoning code. A developer applied for a special use permit to build an asphalt manufacturing and recycling center in an agricultural zone. 119 Wn. App. at 891-92. The area was subject to a comprehensive "sub-area plan," under which special land uses were required to be compatible with the "Agricultural/Pastoral Character" of the area. *Id.* at 891. A hearing examiner approved the permit, but county commissioners later reversed the decision, finding the project inconsistent with the general purposes of the sub-area plan. *Id.* at 891-93.

The appellate court reversed, explaining that though the sub-area plan did "prohibit new large scale, commercial development, it also recognize[d] existing commercial activities and . . . allow[ed] for new mining operations" and "accessory uses." *Id.* at 897. Further, the court noted the plan "specifically identifie[d the mine at issue] as an official mineral resource" within the valley. *Id.* Thus, "the plan, together with the zoning code, specifically allows asphalt production if the project qualifies for a special use permit." *Id.*

The *Lakeside* court found that the board of county commissioners wrongly "invoke[d] the plan's general purpose statements to overrule the specific authority granted by the zoning code . . . ." *Id.* at 897-98. That decision "violate[d] the rule that specific zoning laws control over general purpose growth management statements, and fails to provide meaningful standards for review of a county decision to deny a permit." *Id.* (citing *Sunderland Family Treatment Servs. v. City of*

Pasco, 127 Wn.2d 782, 797 (1995)). The county, in opposition, contended it had the authority to "consider special use permits on a case-by-case basis," citing the sub-area plan's requirement that the county evaluate all special uses to determine their compatibility with the agricultural and pastoral nature of the area. *Id.* at 898. The court rejected this argument as "simply another way of allowing [the county] to reject a specifically allowed special use . . . by invoking the general purpose statement underlying the sub-area plan." *Id.* Moreover, "a case-by-case approval procedure would provide no fixed standards for an applicant or a reviewing court." *Id.*[2]

Lakeside is important in several respects. First, it provides an example of how comprehensive plan language, even where generally prohibitive, is read to be consistent with local rules if those rules expressly permit a specific special or conditional use. Second, the court's verbiage, referring to the "specifically allowed special use" conveys that special, or conditional, uses are not the exception, but rather are allowed (or allowable) uses that likely require certain conditioning to proactively address any potential disruption of existing uses by surrounding landowners. Lastly, the court rejected the county's "case-by-case" special use permitting scheme in favor of a more standardized approach. Kittitas County has a history of finding that solar energy facilities meet the County's CUP criteria, including findings of consistency with GMA and comprehensive plan policies. If the Osprey project was "consistent"

[2] In *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006), in an entirely different regulatory setting, the court sustained the county's code provisions requiring "compliance" with certain specific comprehensive plan provisions, as well as "all applicable federal, state, regional, and Thurston County laws or plans." *Id.* at 765. The wireless facility at issue was reviewed under a locally-adopted code intended to establish local standards for facilities regulated under the Federal Telecommunications Act, 47 U.S.C. § 332. The comprehensive plan policies were adopted to inform local decisions regarding whether a "gap" in service existed, and whether a wireless provider should be allowed to "fill" that gap, balancing a number of factors, including "'substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, [and] traffic conditions, ...'" *Cingular Wireless*, 131 Wn. App. at 763 (citation omitted). Under an "overriding public benefit" test uniquely applicable to wireless towers in the local code, the court upheld county findings that the facility failed to demonstrate that a site with less impact on a dense residential neighborhood, where the facility "loomed" and impeded views, was not available. *Id.* at 766-67. It is noteworthy that the *Cingular Wireless* case has limited applicability due to its unique factual and legal setting. It is particularly immaterial given that on March 30, 2006, the U.S. District Court for the Western District of Washington found that the County's denial of the special use permit "violates the Federal Telecommunications Act," rendering the decision reversed and preempted by federal law. *Cingular Wireless, LLC v. Thurston County*, 425 F. Supp. 2d 1193, 1196 (2006). The federal court ordered Thurston County to approve the special use permit. *Id.*

with these policy provisions, there is nothing about the Iron Horse Project that materially differentiates those findings of consistency.

A "case-by-case" application of policy directives, unbridled by precedent and objectivity, is inappropriate. This is so because if this solar facility does not meet the GMA and comprehensive plan provisions due to its appearance, and where there are no attributes materially distinguishing it from any other locations (other than the presence of opponents), then the County's legislative determination that solar facilities are allowable by a CUP vanishes. Moreover, a similar fate exists for the long list of conditionally allowed land uses authorized by the BOCC to ensure a vibrant rural economy, pursuant to the authority and latitude established by the legislature in the GMA.

C. CONCLUSION

OneEnergy's CUP application satisfies the criteria in the Kittitas County Code for approval of a CUP to build, own and operate the small Iron Horse solar facility. Appropriately applied to inform the application of the CUP criteria, the Project is consistent with the County's comprehensive plan policies that establish the framework for adoption and administration of the AG-20 zone. The Hearing Examiner need not decide whether or not the GMA and comprehensive plan policies are in conflict with the CUP criteria, nor is the Hearing Examiner called on to determine whether these policies are legally applied in the County's zoning ordinance. The CDS Staff Report strikes the right balance, confirming that the Project is "consistent" with these policies, and recommending approval of this land use, subject to conditions.

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