

KITTITAS COUNTY
LAND USE HEARING EXAMINER

In Re:)
) **CU 15-00006**
IRON HORSE SOLAR FARM)
) **SAVE OUR FARMS MEMORANDUM**
) **ON CONDITIONAL USE PERMIT**
) **APPLICATION**
_____)

I. INTRODUCTION

This is a highly controversial project. OneEnergy Development LLC (“OneEnergy” or “Applicant”) has proposed a 47.5 acre solar farm within the heart of prime farm land. This is at least OneEnergy’s second proposal for a solar farm in the valley.¹ The impacts on adjacent farmlands and residences are significant.

This matter comes before you with two primary components: (1) an administrative appeal of the State Environmental Policy Act (SEPA) threshold determination and issuance of a Mitigated Determination of Nonsignificance (MDNS); and (2) a conditional use permit application for authorization of a Major Alternative Energy Facility within the Agriculture 20 (A-20) zoning district. There is virtually unanimous opposition to the project proposal from farmers and neighboring property owners within the vicinity of the project.

Kittitas County has classified solar farms as “major alternative energy facilities” with use authorization subject to a conditional use permit process. Very specific standards and guidelines have been developed with respect to the review of conditional use permit applications within the

¹ OneEnergy submitted a conditional use permit application for a project known as Osprey Solar Farm on September 26, 2014. (CU-13-00004). The project proposed construction and operation of a 13.6 acre photovoltaic solar powered generation facility on approximately 112 acres. The application had little impact on adjoining properties and virtually no adverse comments or testimony. Hearing Examiner issued an approval recommendation on April 15, 2015. The project has not been developed in accordance with the permit authorization.

rural area with particular consideration given to (1) consistency with the goals, policies and objectives of the Kittitas County Comprehensive Plan; and (2) mandates of the Growth Management Act (GMA) regarding preservation of “rural character”. These special requirements supplement common standards set forth in KCC 17.60A.015 requiring determinations that the proposed use is not injurious to the character of the surrounding neighborhood; there is not an unreasonably detrimental impact to the economic welfare; the proposed use is adequately serviced by existing facilities; material impacts of the development are mitigated whether environmental or otherwise; the use is compatible with existing neighboring land uses; and the use is consistent with the intent and character of the applicable zoning district. An applicant has the burden of establishing each of the required elements in order to support its proposed project. A failure to meet any one element is determinative.

The concept of a “conditional use” is that certain uses may not be appropriate at all locations. The review process focuses upon the particular use at a specific location with site considerations and surrounding environment being significant components of the analysis. Public comment is entitled to “substantial weight” and of particular significance in this proceeding. The opposition is unanimous and significant in scope and content. This is simply the wrong location for the proposed project.

II. APPLICABLE ZONING AND DEVELOPMENT STANDARDS

1. Applicable Zoning and Development Standards. The project site is located in an area of prime farmland and historic farm operations. Kittitas Valley is known as one of the world’s premier hay producing regions. The Clerf family has farmed these lands for more than 100 years. Preservation of farms and rural character is of utmost significance. The subject property is located within the Agriculture 20 (A-20) zoning district. The purpose and intent of the A-20 zoning district is stated as follows:

The Agriculture (A-20) zone is an area wherein farming, ranching and rural lifestyles are dominant characteristics. The intent of this zoning classification is to preserve fertile farm land from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture.

KCC 17.29.010. A solar farm is being proposed as a “major alternative energy facility”. KCC 17.61.010(9). A major alternative energy facility may be considered in the Agriculture 20 (A-20) zoning district as a conditional use. KCC 17.61.020(4)(b).

The grant or denial of a special or conditional use is adjudicative in nature. *Development Services of America v. City of Seattle*, 138 Wn.2d 107, 115 (1999) (affirming denial of conditional use permit). Kittitas County has adopted standards and criteria for conditional use permit applications. See KCC 17.60A.015. An applicant has the burden to establish the following requirements:

- (1). *The proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood.*
- (2). *Proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that*
 - (A) *The proposed use will be adequately serviced by existing facilities such as highways, roads, police and fire protection, irrigation and drainage structures, refuse disposal, water and sewers, and schools; or*
 - (B) *The applicant shall provide such facilities; or*
 - (C) *The proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.*
- (3). *The proposed use complies with relevant development standards and criteria for approval set forth in this title or other applicable provisions of Kittitas County Code.*
- (4). *The proposed use will mitigate material impacts of the development, whether environmental or otherwise.*
- (5). *The proposed use will ensure compatibility with existing neighboring land uses.*

- (6). *The proposed use is consistent with the intent and character of the zoning district in which it is located.*
- (7). *For conditional uses outside of Urban Growth Areas, the proposed use:*
 - A. *Is consistent with the 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 government services; and*
 - D. *Does not compromise the long term viability of designated resource lands.*

Each of these elements must be established for issuance of a conditional use permit. Where the zoning code establishes specific standards, the applicant bears the burden of proof. *Sunderland v. City of Pasco*, 127 Wn.2d 782, 796-97 (1995).

(a) Compliance with Comprehensive Plan and GMA. The conditional use permit review criteria adds two significant components: (1) a finding and determination of compliance with goals, policies and objectives of the Kittitas County Comprehensive Plan; and (2) assurance that “rural character” is defined by the Growth Management Act is preserved. Applicant has contended that these ordinance requirements are not controlling with respect to permit review and determinations:

This response to comprehensive plan provisions is intended to address comments submitted to the County. However, while the Comprehensive Plan sheds light on County policies, and inform the County’s decisions made in its land use regulations, OER does not agree that comprehensive plan policies control over adopted County Code provisions.

Although this project is not obligated to directly meet the GMA’s requirements regarding development in rural areas,

the Project is consistent with the GMA's definition of rural character.²

Applicant is incorrect in its legal interpretation of ordinance provisions. The courts have set forth the well-established rule as follows:

The KCC (Kittitas County Code) explicitly requires that a site-specific rezone application be compatible with the comprehensive plan. ... *If a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning code and the comprehensive plan.*

Woods v. Kittitas County, 162 Wn.2d 597, 614 (2007); and *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 770 (2006). 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.

(b) Compliance With “Rural Character” Requirements Of GMA. KCC 17.60A.015 adds a second significant component to the review - conditional uses must preserve “rural character” as defined by Growth Management Act – RCW 36.70A.030(15). GMA defines “rural character” is defined as follows:

“Rural character refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(c) That provide visual landscapes that are traditionally found in rural areas and communities;

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

² Iron Horse CUP application, Supplemental Materials 3-4 (July 14, 2016).

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(f) That generally do not require the extension of urban governmental services; and

(g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

The statutory definition of “rural character” is supplemented by comprehensive plan directives which define “rural character” as follows:

- Open space and visual and natural landscape predominate over the built environment,
- Opportunities exist for transitional rural lifestyle and rural based economies,
- Spaces and development are compatible with wildlife habitat,
- Undeveloped land is not converted to development of sprawl and low density,
- Activities generally do not require extension of urban governmental services, and
- Land use is consistent with protection of surface and groundwater flows and recharge/discharge areas.

Kittitas County Comprehensive Plan 8-2. “Rural development” is permitted ... at levels that are consistent with the preservation of rural character and the requirements of the rural environment.” Kittitas County Comprehensive Plan 8-2.

Since these requirements are determined in the context of a specific permit application, a generalized assumption that all potential “conditional uses” are appropriate and consistent with the “rural character” is incorrect and a misapplication of the law.³ A conditional use application is adjudicative in nature and may be denied, approved or conditionally approved.

³ Kittitas County Staff Report argues that the “...most compelling argument with respect to whether the proposed solar farm is rural in character and a compatible use ...” is the fact that it is referenced as a conditional use in the county code. *Kittitas County Staff Report* – 3. This argument displays a lack of understanding of the concept of conditional use permit and the site specific character of such application.

(c) Community Comment is to Be Given Substantial Weight In Consideration of a Conditional Use Permit. While a conditional use permit may not be denied *solely on community displeasure*, it is recognized that community input and comment is an appropriate and significant element in review of conditional use permit applications. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756 (2006)(holding that Hearing Examiner properly denied a conditional use permit upon findings regarding adverse aesthetic impacts and incompatibility with neighborhood character). The governing rule was set forth in *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 797 (1995):

[w]hile the opposition of the community *may be given substantial weight* it cannot alone justify a local land use decision.”

The courts have subsequently reaffirmed this rule. See e.g., *Concrete Nor-West v. Western Washington Growth Management Hearings Bd.*, 185 Wn. App. 745, 759 (2015). Testimony provided by neighbors opposing the conditional use permit is entitled to *substantial weight* when considering the application. These views are particularly compelling on matters related to impacts on the “character of the surrounding neighborhood; impacts on economic welfare; material impacts of the development on farm operations; and compatibility with existing neighborhood.

2. Application Does Not Comply With Comprehensive Plan Goals, Policies and Objectives.

The Kittitas County Comprehensive Plan designates the subject property as Rural Working Land. Uses within this designation generally encourage farming, ranching and storage of agricultural products, and some commercial and industrial uses compatible with rural environment and supporting agriculture and/or forest activities.

Kittitas County has established goals, policies, and objectives (GPOs) to guide activities within rural working lands. The following GPOs are applicable in the consideration of this application:

GPO 8.1 – Rural lands are characterized by a lower level of services; mixed residential, agricultural and open space uses; *broad visual landscapes* and parcels of varying sizes, a variety of housing types in small unincorporated communities.

GPO 8.3 – The County shall promote the retention of its overall character by establishing zoning classifications that preserved rural character identified to Kittitas County.

GPO 8.4 – Development in rural areas is subject to agricultural and forestry activities that may take place as a right on adjacent properties.

GPO 8.8 – A certain level of mixed use uses in rural areas and rural service centers is acceptable and may include limited commercial, service, and rural industrial uses.

GPO 8.11 – Policies will reflect a “right to farm” in agricultural lands.

GPO 8.15 – Uses common in rural areas of Kittitas County enhancing rural character, such as agriculture uses in Lower Kittitas and rural residential uses and recreation uses in Upper Kittitas shall be protected from activities which encumber them.

GPO 8.15 – Give preference to land uses in Rural designated areas that are related to agriculture, rural residential development, tourism, outdoor recreation, and other open space activities.

GPO 8.17 – Land use development within the Rural area that is not compatible with Kittitas County rural character or agricultural activities as defined in RCW 90.58.065(2)(a) will not be allowed.

GPO 8.21B – Functional separation and setbacks found necessary for protection of water resources, *rural character and/or visual compatibility with surrounding rural areas shall be required* where development is proposed. The first sentence of this policy shall not apply to agriculture activities as defined in RCW 90.58.065(2)(a).

GPO 8.44 - Growth and development in rural lands will be planned to minimize impacts upon adjacent natural resource lands.

Kittitas County Comprehensive Plan also provides guidance with respect to location and approval of utility facilities.

GPO 6.7 – Decisions made by Kittitas County regarding utility facilities will be made in a manner consistent with and complimentary to regional demands and resources.

GPO 6.8 – Additions to and improvements of utility facilities will be allowed to occur at a time and in a manner sufficient to serve growth.

GPO 6.10 – *Community input should be solicited prior to county approval of utility facilities, which may significantly impact the surrounding community.*

GPO 6.22 – To review the placement and appropriateness of utilities.

GPO 6.23 – Kittitas County reserves the right to review all applications for utilities placed within or through the County for consistency with local policies, laws, custom and culture.

Comprehensive plan provisions have been implemented through adoption of the zoning ordinance. KCC 17.29.010 sets forth the “purpose and intent” of the Agriculture-20 (A-20) zoning district as follows:

The agriculture (A-20) zone is an area wherein farming, ranching and rural lifestyles are dominant characteristics. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engage in agriculture.

There can be no serious question that the zoning and comprehensive plan directive is to preserve fertile farm ground and to protect the rights and traditions of those engaged in agriculture.

The project proposal converts prime farmland to a major alternative energy facility. The proposal is visually and esthetically inconsistent with the adjoining properties; dominates over the natural landscape and farm lands; introduces adverse impacts to farm operations; and is inconsistent with wildlife habitat. The decision making process balances industrial proposals within the rural lands against a commitment to farming and preservation of the rural character of the area. And significantly, the project will have direct impact on traditional farming on adjacent properties.

3. Project Proposal is Not Consistent With “Rural Character” Requirements Contained in GMA.

KCC 17.60A.015(7) specifically requires that a conditional use proposed outside of Urban Growth Areas (UGAs) preserve the “rural character” as defined in the Growth Management Act (RCW 36.70A.030(15)). In applying the guidelines related to “rural character” the following observations are applicable.

To begin, the county code does not require a designated or recognized scenic vista as a prerequisite for protection of “rural character.”

GPO 2.15 “The development of resource based industries and processing should be encouraged in all areas of Kittitas County. When such uses are located in rural and resource lands, criteria shall be developed to ensure the protection of these lands to ensure compatibility with rural character. Consider adding a definition for “resource based industry” to the definitions in Title 17, Zoning.”

This project does not ensure rural character in relation to aesthetics. OER states that they are “fully compatible with the rural character of the Kittitas Valley as proven by the compliance with RCW 36.70A.030.” We respectfully disagree. In fact, it is the opposite:

(15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

Comment:

This project dominates over the natural landscape and vegetation, in fact, the vegetation will be mostly dried out, seasonally started grasses and weeds for most of the summer. The square footage of the project area covers nearly all the land in the project zone and is unlike any other project in the valley, including greenhouses, hay barns, etc.

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

Comment:

This in no way fosters rural lifestyles and the proposed use is detrimental to rural-based economies by eliminating the activities related these areas for seed and fertilizer suppliers, equipment manufacturers, farm product applicators, fuel providers, hay brokers, etc. The gain in property tax to the county for the solar panel arrays will be offset by the decrease in these other rural-related

industries. No one will be living or working on the site, so no local jobs will be generated, except possibly during the construction phase. The energy that will be generated will provide higher cost energy to the public.

(c) That provide visual landscapes that are traditionally found in rural areas and communities;

Comment:

This will be detrimental to the visual landscape and is obviously not going to provide a rural visual landscape. This is not traditional in any way, shape or form.

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

Comment:

Fencing off the area will prevent the abundant wildlife that currently calls this farmland its home from accessing the site for food or shelter, whether or not the wildlife is endangered or rare.

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

Comment:

This project does not reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. It converts it into a massive industrial area.

(f) That generally do not require the extension of urban governmental services; and

(g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

Comment:

The natural surface flows evident in the occasional flooding will be altered, but as yet we are not told

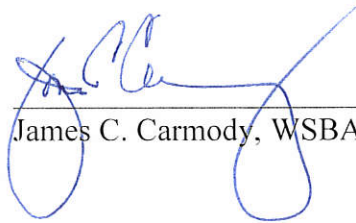
how. This project will have roadways that will change the natural surface flow.

CONCLUSION

Save Our Farms contemplates provision of extensive and personal testimony with respect to this unique farm community and impacts of the proposed project. There can be no serious question with respect to the character and historic traditions of these prime farmlands. Those traditions and environments are intended to be protected by the specific directives of a zoning ordinance, comprehensive plan and statutory directives. We respectfully request that the conditional use permit application for the solar farm be denied at this location.

Dated this 22nd day of September, 2016.

MEYER, FLUEGGE & TENNEY, P.S.
Attorneys for Petitioners



James C. Carmody, WSBA 5205

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 22 day of September, 2016.



Deborah Girard, Legal Assistant

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