

**KITTITAS COUNTY  
LAND USE HEARING EXAMINER**

<b>IN THE MATTER OF</b>	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW AND</b>
CU-19-00003	)	<b>DECISION</b>
Westside Solar	)	

THIS MATTER having come on for hearing in front of the Kittitas County Hearing Examiner on January 23, 2020, the Hearing Examiner having taken evidence hereby submits the following Recommended Findings of Fact, Conclusions of Law and Decision:

**I. FINDINGS OF FACT**

1. The proposed project is a 5MW Solar Power Production Facility (SPPF). The project site includes 6 parcels, totaling 46.3 acres in an Agriculture 5 zone. The project is located in the Solar Overlay Zone 2, which permits Solar Power Production Facilities with a Conditional Use Permit under KCC 17.61C.050. Solar Power Production Facilities are an allowed use within designated solar overlay zones. The solar overlay zones were established to discourage SPPF development on prime agriculture lands.
  
2. Site Information:

Total Property Size:	46.3 Acres
Number of Lots:	6
Domestic Water:	2 Wells (proposal does not include any use of wells)
Sewage Disposal:	No facilities onsite
Power/Electricity:	PSE
Fire Protection:	Fire District 7 (Cle Elum)
Irrigation District:	KRD
  
3. Site Characteristics:

North:	Privately owned land, the Palouse to Cascades State Park Trail and some residential uses
South:	Privately owned land, primarily residential uses
East:	Privately owned land, some agricultural and residential uses
West:	Privately owned land, primarily residential uses
  
4. Access: The site is accessed from Westside Road, approximately .68 miles south west of the city of South Cle Elum.
  
5. The Comprehensive Plan land use designation is Rural Residential and the zoning designation is Agriculture 5.
  
6. The project is within Solar Overlay Zone 2, which allows SPPF uses with a Conditional Use Permit.

7. A conditional use permit application for the Westside Solar SPPF (CU-19-00003) was submitted to Kittitas County Community Development Services department on October 22, 2019. The application was deemed complete on November 14, 2019. The site was posted in accordance with KCC 15A.03.110 on November 21, 2019.
8. A notice of application for the Westside Solar SPPF Conditional Use Permit (CU-19-00003) was mailed and/or emailed to adjacent landowners located within 5,280 feet (1 mile) of any portion of the boundary of the proposal's tax parcels and applicable agencies. Notice was given to and published in the official newspaper of record for Kittitas County, and notice was posted to the Kittitas County Website on December 4, 2019, all in conformance with the Kittitas County Project Permit Application Process (Title 15A).
9. A SEPA Checklist was submitted with the conditional use application and processed concurrently using the Optional DNS process under WAC 197-11-355. During the combined comment period environmental concerns were raised by public agencies as well as private citizens and neighbors. CDS has considered these comments and found potential environmental risks can be mitigated with the proposed project. Following the concurrent comment period, CDS issued a Mitigated Determination of NonSignificance on January 2, 2020. The appeal period for the SEPA MDNS concluded on January 17, 2020. No appeals were filed.
10. The proposal is consistent with some goals and policies of the Kittitas County Comprehensive Plan (RR-G9, RR-P4, RR-P19, RR-P26, U-P5, U-P6, and U-P23) and is inconsistent with others (RR-G7, RR-P9, RR-14, RP-15, RR-P18, RR-P21, RR-G19, RR-G21 and RR-P26).
11. Road Standards and access requirements are subject to the standards outlined in Kittitas County Code Title 12.
12. The following agencies provided comments during the comment period:
  - 12.1 Washington State Department of Archeology and Historic Preservation (DAHP)
  - 12.2 Washington State Department of Natural Resources
  - 12.3 Washington State Department of Health
  - 12.4 Washington State Department of Fish and Wildlife
  - 12.5 Washington State Department of Ecology
  - 12.6 Washington State Parks and Recreation Committee
  - 12.7 Bonneville Power Administration
  - 12.8 Kittitas County Health Department
  - 12.9 Kittitas County Public Works.
13. CDS received several public comments from neighbors and interested parties. The following individuals submitted comment during the comment period:
  - 13.1 Gary Lohman
  - 13.2 Robert Bator
  - 13.3 Susan Black
  - 13.4 Debbie Hofferber
  - 13.5 Rick Hofferber

- 13.6 Fred and Virginia Becker
  - 13.7 Melvin and Deborah Kuhlman
  - 13.8 Caroline and Gary Kurtz
  - 13.9 Lori Nevin
  - 13.10 Robbie Schuette
  - 13.11 Robert and Teresa Van Lone
  - 13.12 Mary Ann Hingst
  - 13.13 Ray and Bunny Rogalski.
14. The proposal is generally consistent with the goals and policies of the Kittitas County Comprehensive Plan.
  15. This proposal can be consistent with the provisions of KCC Title 14, Buildings and Construction as conditioned.
  16. This proposal is not consistent with the provisions of KCC Title 17.61C, Solar Power Production Facilities.
  17. This proposal is not consistent with the provisions of KCC 17.60A, Conditional Uses. The proposal can meet the criteria of KCC 17.60A.015 (7).
  18. CDS performed a critical areas review of the property. Two (2) wetlands exist on the project site. A critical areas report was submitted by the applicant which provided an analysis of the critical areas on the project site. CDS utilized this critical areas report combined with applicable comments to establish appropriate mitigation measure to ensure any ecological impacts are mitigated in this determination.
  19. Applicable agencies, adjacent property owners, and interested parties were given the opportunity to review this proposal. All comments are on file and available for public review. Due to the volume of comments received, CDS staff developed a comment matrix which provides a summary of the comments submitted, applicant responses, and staff responses. All comment submittals can be found in their entirety in Exhibits 23-44.
  20. Consistency with the provisions of KCC 17.60A, Conditional Uses: KCC 17.60A.015 provides the following review criteria to be considered in a conditional use analysis:
    - 20.1. 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.
      - 20.1.1 Applicant Response: "The State of Washington has enacted ambitious policies in support of renewable energy generation in the state. On May 7, 2019, Governor Jay Inslee signed the Clean Energy Transformation Act ("CETA"). CETA requires all electric utilities in Washington to transition to carbon-neutral electricity by 2030 and to 100-percent carbon-free electricity by 2045. This Project has executed a Power Purchase Agreement with Puget Sound Energy to help the utility achieve its clean energy goals.

- 20.1.2 In addition to supporting the clean energy initiatives of Washington, the Project promotes several benefits for the local community, including without limitation, creating temporary construction jobs and increasing tax revenue. The benefit to the local community is not just clean energy, but real tangible benefits in the shape of jobs and increased property tax revenue. These real benefits come at little to no cost to Kittitas County. This Project will not put any additional strain on the community's infrastructure or resources. No new schools, roads or other infrastructure are needed by Kittitas County.
- 20.1.3 Site screening methods, including fencing and planting of native vegetation, have been proposed in the application to mitigate visual impacts in accordance with KCC 17.61C.090(1). However, as set forth below, these are not sufficient, as proposed. Additionally, no potential safety or public health issues are anticipated. SPPF uses have been identified by the State of Washington as essential to carbon-neutral goals and therefore are "essential or desirable to the public convenience." The proposed site has been identified through the Solar Power Production Facilities Overlay Map as an appropriate location for SPPF uses with a conditional use permit.
- 20.1.4 The Hearing Examiner finds that while the proposed use may be essential or desirable to the public convenience, there is insufficient evidence supplied by the applicant to support the applicant's burden of proof that the proposed use is "not detrimental or injurious . . . to the character of the surrounding neighborhood".
- 20.1.5 The Hearing Examiner finds that there is sufficient evidence that the use would not be detrimental or injurious to public health, peace or safety, however, there is substantial evidence to support the Hearing Examiner's finding that the proposed use is detrimental and/or injurious to the character of the surrounding neighborhood.
- 20.1.6 In order to make this finding, the Hearing Examiner was required to seek definitions of "character" and "neighborhood." Neither term are defined in the Kittitas County Code.
- 20.1.7 Turning to the Merriam-Webster online dictionary, the relevant definition of "character" is "main or essential nature, especially as strongly marked in serving to distinguish." The example provided in the dictionary is "excess sewage gradually changed the character of the lake." Accordingly, the Hearing Examiner is required to find what features of the main or essential nature make up the surrounding neighborhood.
- 20.1.8 Turning to the definition of "neighborhood", Merriam-Webster defines two potentially relevant definitions. The first is "the quality or state of being neighbors: proximity." The second most relevant definition is "a section lived in by neighbors and usually having distinguishing characteristics." The example provided is "lived in a quiet neighborhood."

- 20.1.9 The applicant has failed to satisfy its burden of proof that the proposed use is not detrimental or injurious to the character of the surrounding neighborhood.
- 20.1.10 The character of the surrounding neighborhood is rural, residential and agricultural uses. The proposed use is detrimental to these uses because of the SPPF's visibility to other properties. If the use could be adequately shielded year-round, with appropriate natural vegetation, from the surrounding properties, the "detriment" or "injury" to the character of the adjoining neighborhood could be adequately mitigated.
- 20.1.11 The overwhelming testimony from the public related to the negative and detrimental impact is the view of the solar facility, rather than the view of natural vegetation.
- 20.1.12 The applicant's submission of evidence to prove this criteria is not adequate. The applicant simply states that the use would mostly be shielded from view. However, substantial public testimony supports the finding that much of the foliage surrounding the property is not evergreen, but is instead leafy trees, which do not block the view from the Fall through Spring. Furthermore, removal of the solar facility in 30 to 40 years is in no way evidence that supports this criteria.
- 20.1.13 The Hearing Examiner would note that the Kittitas County Code does not quantify the degree of detriment or injury necessary under this criteria. In other words, the Kittitas County Code does not require "substantial" or "material" detriment or injury. The quantity of harm to the character of the surrounding "neighborhood" is not set forth in the code.
- 20.1.14 The Hearing Examiner recognizes there is a significant question about whether or not this conditional use permit criteria could ever be satisfied for any SPPF in a rural setting where human habitation is the "neighborhood" and views of the facility cannot be adequately shielded.
- 20.1.15 The Hearing Examiner finds that the applicant did not provide insufficient proof that the detrimental and injurious qualities of the use are adequately mitigated (i.e., "that the view of the site is shielded, year-round, from adjacent public and private properties").
- 20.2. The 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:
  - 20.2.1 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
  - 20.2.2 The applicant shall provide such facilities; or

- 20.2.3 The proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.
- 20.2.4 The proposal should not have any notable impact on public services and facilities. The proposed use is adequately serviced by existing facilities. There is no evidence that any significant impacts would be added to public facilities or services that would require mitigation.
- 20.2.5 The Hearing Examiner finds that this Conditional Use Permit criteria has been proven by the applicant.
- 20.3 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.
  - 20.3.1 Although applicant simply provided conclusory statements to demonstrate compliance in the applicant's narrative, the Hearing Examiner finds that after review of the application and file materials, the proposed use can comply with relevant development standards as set forth in the Kittitas County Code.
- 20.4. The proposed use will mitigate material impacts of the development, whether environmental or otherwise.
  - 20.4.1 For the reasons set forth in Findings 20.1.1 through 20.1.15, the Hearing Examiner finds that the applicant's failed to prove that this proposed use will mitigate material impacts of the development. The primary impact that will not be mitigated is the view of this Solar Power Production Facility (SPPF) from the adjoining public and private properties. The Hearing Examiner accepts that mitigation is not required to absolutely remove the adverse impact. However, again the applicant has failed to provide substantial evidence that the proposed mitigation measures, as set forth in the application materials, including the MDNS, are adequate in mitigating the adverse visual impacts.
- 21. The proposed use will ensure compatibility with existing neighboring land uses.
  - 21.1 The Hearing examiner finds for the reasons stated above in findings 20.1.1 through 20.1.15 and 20.4.1 this proposed use does not insure compatibility with existing neighboring planned uses. The Hearing Examiner specifically finds that this is only related to the visual impacts. If those visual impacts could be successfully mitigated year-round, from the first day of operation, then the conditional use criteria could be satisfied. The reasoning would be that all anyone would see would be natural vegetation and not the SPPF.
- 22. The proposed use is consistent with the intent and character of the zoning district in which it is located.
  - 22.1 Because the zoning district has a solar overlay which permits a SPPF upon obtaining a conditional use permit, then Hearing Examiner must find that the proposed use can

be consistent with the underlying zoning, so long as a conditional use permit can be obtained.

23. For conditional uses outside of Urban Growth Areas, the proposed use:
  - 23.1 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;
  - 23.2 Preserves “rural character” as defined in the Growth Management Act;
  - 23.3 Requires only rural government services; and
  - 23.4 Does not compromise the long term viability of designated resource lands.
  - 23.5 The proposed use is generally consistent with this criteria.
24. Other than visual impacts, SPPFs are compatible to other rural land uses. SPPFs preserve the rural character of the land and further protect it for years to come. The Project contains limited impervious surfaces and is otherwise similar to agricultural uses seen on rural land. The Project requires no additional county services and thus preserves the appropriate rural service levels in the area.
  - 24.1 Based upon the evidence submitted applicant, the Hearing Examiner can make a finding that this use would preserve the overall “rural character” of Kittitas County, that it would require only rural government services, and that it does not compromise the “long-term” viability of resource lands. Again, the Code does not provide a definition of what “long-term” means. Additionally, as set forth above, the Hearing Examiner finds that the proposed use is generally consistent with the intent, goals, policies and objectives of the Kittitas County Comprehensive Plan. However, there are portions of the Kittitas County Comprehensive Plan in which the proposed use is not consistent.
25. Kittitas County Code 17.61C.100 outlines specific review criteria that must be met for SPPF approval:
  - 25.1 The proposed SPPF is consistent with the conditional use permit review criteria contained in KCC 17.60.015.
    - 25.1.1 As stated above, the applicant is failed to prove that the proposed SPPF is consistent with all the conditional use permit criteria contained in KCC 17.60.015.
  - 25.2 The proposed SPPF is in compliance with the Kittitas County Critical Areas Ordinance (KCC Title 17A) and Shoreline Master Program (KCC Title 17B), and Voluntary Stewardship Program (VSP).
    - 25.2.1 The project, as can be conditioned, would be consistent with the Kittitas County Critical Areas Ordinance and Voluntary Stewardship Program. The

project site is not in a shoreline designation and in turn, consistency with the Shoreline Master Program is not applicable.

26. Environmental impacts including but not limited to wildlife habitat, migration routes and critical areas can be mitigated. If the project is found to have potential environmental impacts, the applicant could provide sufficient mitigation strategies to the satisfaction of Kittitas County.
  - 26.1 A critical areas study from a third-party consultant was submitted by the applicant identifying several critical areas at the project site. CDS reviewed the study and consulted the Washington State Department of Ecology and the Washington State Department of Fish and Wildlife to better understand the potential environmental impacts associated with this project. As potentially conditioned, the project impacts could be mitigated to ensure all ecological impacts are addressed appropriately.
27. The proposed SPPF is in compliance with the Storm Water Management Standards of KCC 12.06.
  - 27.1 A Storm Water Management Plan was submitted with the application materials in compliance with KCC 12.06. Kittitas County Public Works stated in a comment letter that the project will not require a stormwater plan.
28. CDS conducted an administrative critical areas review in accordance with KCC 17A and found two wetlands on the project site. After consultation with the Washington State Department of Ecology, appropriate buffer thresholds were identified to ensure protection of the wetlands.
29. Any future buildings must be consistent with International Building Codes. As proposed the project does not include any structures. The project proposes an eight (8) foot screening fence that would require a building permit.
30. An open record public hearing after due legal notice was held on January 23, 2020.
31. Admitted into the record were the following Exhibits:
  - 31.1 Exhibit 1. Pre-Application;
  - 31.2 Exhibit 2. Application;
  - 31.3 Exhibit 3. Submission Email;
  - 31.4 Exhibit 4. Submittal Letter;
  - 31.5 Exhibit 5. Compliance Narrative;
  - 31.6 Exhibit 6. Project Narrative;
  - 31.7 Exhibit 7. Heelstone History;
  - 31.8 Exhibit 8. SEPA Checklist;
  - 31.9 Exhibit 9. Property Legal Description;
  - 31.10 Exhibit 10. Site Plans;



- 31.11 Exhibit 11. Site Development Plan;
- 31.12 Exhibit 12. Redacted Purchase Option;
- 31.13 Exhibit 13. Critical Areas Report;
- 31.14 Exhibit 14. Decommissioning Plan;
- 31.15 Exhibit 15. Noxious Weed Management Plan;
- 31.16 Exhibit 16. Preliminary Stormwater Plan;
- 31.17 Exhibit 17. Water Rights Retention Plan;
- 31.18 Exhibit 18. CDS Staff Maps;
- 31.19 Exhibit 19. Deemed Complete;
- 31.20 Exhibit 20. Affidavit of Posting;
- 31.21 Exhibit 21. Notice of Application;
- 31.22 Exhibit 22. Affidavit of Mailing and Publication;
- 31.23 Exhibit 23. DAHP Comment;
- 31.24 Exhibit 24. DNR Comment;
- 31.25 Exhibit 25. DOH Comment;
- 31.26 Exhibit 26. KC Public Health Comment;
- 31.27 Exhibit 27. KC Public Works Comment;
- 31.28 Exhibit 28. BPA Comment;
- 31.29 Exhibit 29. Ecology Comment;
- 31.30 Exhibit 30. WDFW Comment;
- 31.31 Exhibit 31. Washington State Parks Comment;
- 31.32 Exhibit 32. Gary Lohman Comment;
- 31.33 Exhibit 33. Robert Bator Comment;
- 31.34 Exhibit 34. Susan Black Comment;
- 31.35 Exhibit 35. Debbie Hofferber Comment;
- 31.36 Exhibit 36. Rick Hofferber Comment;
- 31.37 Exhibit 37. Fred and Virginia Becker Comment;
- 31.38 Exhibit 38. Melvin and Deborah Kuhlman Comment;
- 31.39 Exhibit 39. Caroline and Gary Kurtz Comment;
- 31.40 Exhibit 40. Lori Nevin Comment;
- 31.41 Exhibit 41. Robbie Schuette Comment;
- 31.42 Exhibit 42. Robert and Teresa Van Lone Comment;
- 31.43 Exhibit 43. Mary Ann Hingst Comment;

- 31.44 Exhibit 44. Ray and Bunny Rogalski Comment;
- 31.45 Exhibit 45. Transmittal of Comments to Applicant;
- 31.46 Exhibit 46. Applicant Comment Response Matrix;
- 31.47 Exhibit 47. Applicant Comment Response Narrative;
- 31.48 Exhibit 48. MDNS;
- 31.49 Exhibit 49. Notice of SEPA Action;
- 31.50 Exhibit 50. CDS Comment Matrix;
- 31.51 Exhibit 51. Archeological Investigations Northwest Comment Response Letter;
- 31.52 Exhibit 52. Ecology and Environmental, Inc. Comment Response Letter;
- 31.53 Exhibit 53. Updated Noxious Weed Plan;
- 31.54 Exhibit 54. Tracy Van Lone Communication;
- 31.55 Exhibit 55. DAHP Communication;
- 31.56 Exhibit 56. Lori Nevin Communication;
- 31.57 Exhibit 57. Mel Kuhlman Communication;
- 31.58 Exhibit 58. Heelstone Communication;
- 31.59 Exhibit 59. Returned NOA Mailers;
- 31.60 Exhibit 60. Staff Report.
- 31.61 Exhibit 61. Staff Powerpoint presentation.
- 31.62 Exhibit 62. January 16,2020 James Carmody Letter
- 31.63 Exhibit 63. Richard Allen Letter
- 31.64 Exhibit 64. KC Response Letter
- 31.65 Exhibit 65. HE Continuance Denial
- 31.66 Exhibit 66. Updated Staff Report
- 31.67 Exhibit 67. DAHP Letter
- 31.68 Exhibit 68. 1/23/20 Applicant Revised Site Plan
- 31.69 Exhibit 69. WDFW Email
- 31.70 Exhibit 70. KC Solar Ordinance
- 31.71 Exhibit 71. Applicant PowerPoint presentation
- 31.72 Exhibit 72. 8 photographs from Mel Kuhlman
- 31.73 Exhibit 73. Letters submitted by Mel Kuhlman
- 31.74 Exhibit 74. Lori Nevin written comments
- 31.75 Exhibit 75. Teresa Van Lone December 18, 2019 letter
- 31.76 Exhibit 76. Materials from Teresa Van Lone submitted in a plastic roll.

- 31.77 Exhibit 77. Letters and photographs from Gary Kurtz
  - 31.78 Exhibit 78. Not received.
  - 31.79 Exhibit 79. Not received.
  - 31.80 Exhibit 80. James Carmody written comments
  - 31.81 Exhibit 81. Photograph of property submitted by Chuck DePue.
32. Appearing and testifying on behalf of the applicant was Rachel Donahue. Ms. Donahue testified that she was an agent authorized to appear and speak on behalf of the property owner and applicant. Ms. Donahue indicated the project size had been reduced from utilizing 26 areas for SPPF units to 16 acres. Ms. Donahue indicated she was compliant with all the proposed conditions of approval. Her testimony was consistent with the application materials that had been submitted.
33. Testifying from the public were the following individuals:
- 33.1 Mel Kuhlman
  - 33.2 Lori Nevin
  - 33.3 Teresa Van Lone
  - 33.4 Gary Kurtz
  - 33.5 Caoinhe Dunn
  - 33.6 Carolyn Kurtz
  - 33.7 James Carmody
  - 33.8 Chuck DePue
34. The Hearing Examiner notes that when the applicant was given an opportunity to present rebuttal testimony to the significant testimony in opposition to the project, but in rebuttal only, stated that the pond was manmade as set forth in the SEPA checklist.
35. Based upon the testimony at the open record public hearing, it is clear that this property has, in the past (possibly greater than 20 years ago) been used as farm land. There is irrigation water available to the parcels of property proposed for this SPPF.
36. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

## **II. CONCLUSIONS OF LAW**

- 1. The Hearing Examiner has been granted authority to render this decision.
- 2. Public use and interest would be served by approval of this proposal.
- 3. The proposal is generally consistent with the goals and policies of the Kittitas County Comprehensive Plan.
- 4. This proposal can be consistent with the provisions of KCC Title 14, Buildings and Construction as conditioned.

5. This proposal is not consistent with the provisions of KCC Title 17.61C, Solar Power Production Facilities.
6. This proposal is not consistent with the provisions of KCC 17.60A, Conditional Uses, but can meet the criteria of KCC 17.60A.015 (7).
7. This proposal can be consistent with the provisions of KCC 17A, Critical Areas..
8. This proposal can be consistent with KCC 20, Fire Life and Safety.
9. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

### III. DECISION

Based on the above Findings of Fact and Conclusions of Law, Westside Solar SPPF CU-19-00003 is hereby **DENIED**.

Dated this 4<sup>th</sup> day of February, 2020.

KITTITAS COUNTY HEARING EXAMINER



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Andrew L. Kottkamp

This Decision is subject to appeal pursuant to the Kittitas County Code and the Revised Code of Washington.