

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ONE ENERGY DEVELOPMENT, LLC,)	No. 36240-0-III
)	
Plaintiff,)	
)	
IRON HORSE SOLAR, LLC,)	
)	
Appellant,)	
)	
v.)	
)	UNPUBLISHED OPINION
KITTITAS COUNTY, a municipal)	
corporation; and KITTITAS COUNTY)	
BOARD OF COMMISSIONERS; and)	
WILLIAM HANSON, an individual; and)	
“SAVE OUR FARMS! SAY NO TO)	
IRON HORSE!”; and CRAIG CLERF and)	
PATRICIA CLERF, husband and wife,)	
)	
Respondents.)	

PENNELL, A.C.J. — Under Kittitas County’s zoning code, a solar farm project can be developed in certain agricultural areas if approved through a conditional use permit (CUP). The code lists several criteria for CUP approval, including, as relevant here, a condition that a project preserve “rural character” as that term is defined in the Growth Management Act (GMA), chapter 36.70A RCW. In the GMA, rural character refers to areas where open space, the natural landscape, and vegetation predominate over the built environment.

One Energy Development, LLC applied to Kittitas County for a CUP in hopes of constructing a large solar farm. A hearing officer initially recommended approval, but the Kittitas County Board of Commissioners (Commissioners) disagreed and voted against the CUP by a tally of 2-1. In making this decision, the Commissioners specified that the solar project was inconsistent with the GMA's definition of rural character because, on the parcels of land at issue in the CUP application, open space, the natural landscape, and vegetation would not predominate over the built environment.

The Commissioners' CUP analysis took too narrow a view of what it means for open space to predominate over the built environment. The GMA's rural character definition refers to patterns of development within the rural element of a county's comprehensive land use plan. It is not limited to a particular parcel or project site. Because the Commissioners' CUP denial was predicated on an erroneous legal determination, this matter must be remanded for further proceedings.

BACKGROUND

One Energy Development, LLC and Iron Horse Solar, LLC¹ sought to construct a solar photovoltaic project (Project) on farmland owned by William Hanson in Kittitas County, Washington. At the time it was proposed, the Project would have been the

¹ One Energy has sold its interests to Iron Horse, leaving Iron Horse the sole real party in interest to this appeal.

largest solar facility in Washington, covering 47.5 acres of a 67.8 acre, 4-parcel property. The Project's proposed site was within Kittitas County's agriculture (A-20) zone. Zone A-20 "is an area wherein farming, ranching and rural life styles are dominant characteristics." KITTITAS COUNTY CODE (KCC) 17.29.010. The intent of the A-20 zoning "classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture." *Id.* At the time of the Project's CUP application, such a solar project was categorized as a major alternative energy facility and allowed in an A-20 zoning area only as a conditional use. Former KCC 17.61.010(9) (2001), .KCC 17.61.020(4)(b).

Kittitas County sets forth the following criteria that must be met for approval of a CUP:

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. 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
 - 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 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));^[2]*
 - C. Requires only rural government services; and
 - D. Does not compromise the long term viability of designated resource lands.

KCC 17.60A.015 (emphasis added).

The GMA provision incorporated into Kittitas County’s CUP standard (KCC 17.60A.015(7)(B) quoted above) defines “rural character” as a pattern of land use and development where, among other things, “open space, the natural landscape, and vegetation predominate over the built environment.” RCW 36.70A.030(16)(a).

Iron Horse’s CUP application went before a Kittitas County hearing examiner for an open record public hearing, pursuant to former KCC 15A.01.040(4)(d) (2014)

² The GMA’s rural character definition is currently codified at RCW 36.70A.030(16).

and KCC 15A.02.060.³ The hearing examiner admitted numerous exhibits into the record, considered evidence, testimony and arguments presented by interested parties regarding the SEPA determination and CUP application. Ultimately, the hearing examiner issued a lengthy written decision, recommending⁴ approval of the CUP. The written decision included 44 recommended conditions of approval.⁵

The Commissioners took up the hearing officer's recommended findings and conclusions through a closed record hearing process, pursuant to former KCC 15A.01.040(3)(a) (2014). The Commissioners' hearings were held over two days: December 20, 2016 and January 10, 2017.

During the December 20 hearing, Commissioner Obie O'Brien and Commissioner Paul Jewell questioned the county's staff representative about environmental details of the Project. Commissioner Laura Osiadacz then moved on to a "bigger topic" that caused her the most concern. Clerk's Papers (CP) at 271. Commissioner Osiadacz questioned

³ The hearing examiner also considered an appeal of a mitigated determination of nonsignificance under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The SEPA appeal was denied and not pursued further.

⁴ At the time of the hearings in this case, Kittitas County limited the hearing examiner's role to providing recommendations on the issuance of a CUP. Former KCC 15A.01.040(4)(d). Under the relevant code provision, the Commissioners were responsible for considering the hearing examiner's recommendations and making a final decision for the county. Former KCC 15A.01.040(3)(a) (2014).

⁵ The recommended conditions of approval were in addition to the mitigation conditions included in the mitigated determination of nonsignificance.

whether the Project was consistent with preservation of rural character as defined in the GMA. Pointing to the GMA's rural character definition recited above, Commissioner Osiadacz expressed concern that the Project would not result in open space predominating over the built environment since "62.5 percent of the property being use[d] for this project is going to be built on." *Id.* Commissioner Osiadacz voiced concern that the Project's large size would "take away from our agricultural lands and really take away from the character of our community." *Id.* at 279. The matter was then continued to January.

During the January 10, 2017 proceeding, Commissioner Osiadacz and Commissioner O'Brien both focused on the issue of whether the Project was consistent with rural character, as required for a CUP. Both commissioners stated that the rural character requirement was not met, but they differed as to their reasoning. Commissioner Osiadacz continued to express concern over the Project site and the fact that over one-half of the property would be covered by development. Commissioner Osiadacz indicated that if she were to take a broader view of what it meant for open space to predominate over the built environment, her analysis of the CUP application would be different.⁶

⁶ Specifically, Commissioner Osiadacz stated that if she were to consider the entirety of Mr. Hanson's property, 450 acres, instead of the 67.8 acres at issue, the development would be "under that 50 percent mark" and "there would be no way based on code that I could vote against this." CP at 342.

Commissioner O'Brien did take a broader view of what it meant for open space to predominate over the built environment. He explained that the rural character assessment should be made by looking to neighboring properties, not just a project site. Nevertheless, even with this broader view, Commissioner O'Brien explained that the Project was incompatible with the rural character of A-20 zoned land. Given the size of the Project, Commissioner O'Brien commented that the solar farm site would "stick[] out like a missing tooth in a smile." *Id.* at 336.

Commissioner Jewell agreed with Commissioner O'Brien that the rural character assessment goes to "the general landscape within the general area, not special to the individual parcel that's been considered for the project." *Id.* at 343. However, Commissioner Jewell disagreed with the disposition recommended by his fellow commissioners. Commissioner Jewell reasoned that because a major alternative energy facility, such as a solar farm, can be granted a CUP in an A-20 zone, the only question was whether the impact of such a facility on a surrounding rural community can be adequately mitigated. If impacts can be mitigated, rural character is maintained as a matter of law and the CUP must be granted.

After each commissioner clarified their disagreement over the rural character standard, Commissioner O'Brien moved to deny the CUP application. Commissioner Osiadacz seconded the motion. A discussion ensued, during which Commissioner

O'Brien explained that Iron Horse's Project was "not compatible with [existing farming] uses and with the neighborhood." *Id.* at 353. Commissioner Osiadacz stated she wished to deny the CUP based on her previous comments and what it means for the built environment to predominate over open space. Commissioner Jewell then voiced a dissenting opinion. He expressed concern over whether the Commissioners' decision would not be supportable through written findings. After calling for a formal vote, the CUP was denied, 2-1.

The Commissioners subsequently issued a five-page written decision in resolution form. For ease of reference, a copy of the decision, *id.* at 10-14, is appended to this opinion. The decision contains two sets of numbered paragraphs, the first numbered 1-12 and the second numbered 1-4. The first set of paragraphs are presented as findings of fact and conclusions of law, and consist of uncontroverted procedural facts leading up to the Commissioners' decision. The second set of numbered paragraphs addresses the contested issue of whether the CUP should be granted. Paragraph 1 cites to the GMA's rural character definition (former RCW 36.70A.030(15) (2005)), and states that, if the Project were approved "[o]pen space, the natural landscape, and vegetation **would not predominate** over the built environment on the subject parcels." *Id.* at 14. Paragraphs 2-3 of the second set of numbered paragraphs state, without

elaboration, that the proposed Project fails to comport with the requirements of KCC 17.60A.015(1), KCC 17.60A.015(5), and KCC 17.60A.015(7)(B).

Iron Horse Solar subsequently sought review in Kittitas County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court issued a memorandum decision denying relief. Iron Horse now appeals to this court.

ANALYSIS

Standard of review

Local land use decisions are reviewed under LUPA. RCW 36.70C.020(2). When assessing the merits of a LUPA appeal, we stand in the same position as the superior court and review the administrative record. *King County Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013). A party appealing a land use decision bears the burden of meeting one of the six statutory standards for relief. RCW 36.70C.130(1). Iron Horse seeks relief under three of the applicable standards: RCW 36.70C.130(1)(b) (“The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.”); RCW 36.70C.130(1)(c) (“The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.”); and RCW 36.70C.130(1)(d) (“The land use decision is a clearly erroneous application of the law to the facts.”).

Under the standards cited by Iron Horse, questions of law are reviewed de novo and factual determinations are reviewed for substantial evidence. *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). We defer to factual determinations made by the highest administrative body exercising fact-finding authority. *Id.* In this case, the Commissioners were the highest (and only) fact-finding authority. Former KCC 15A.01.040(3)(a). When it comes to review under RCW 36.70C.130(1)(d), a land use decision will be rejected as clearly erroneous if “we are left with a definite and firm conviction that a mistake has been committed.” *Cingular Wireless*, 131 Wn. App. at 768.

The legal question of the rural character definition

Under the circumstances relevant to this case, Kittitas County’s CUP provision requires an assessment of whether a proposed conditional use would be consistent with preservation of “rural character” as defined in the GMA.

The GMA defines “rural character” as:

[T]he 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:

(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 groundwater and surface water recharge and discharge areas.

RCW 36.70A.030(16).

Rules of statutory interpretation guide our analysis of the GMA’s rural character definition.⁷ The “fundamental objective” of statutory interpretation “is to ascertain and carry out the [l]egislature’s intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The primary resource for this endeavor is the language used by the legislature. But words must not be viewed in isolation. Instead, “meaning is discerned from all that the [l]egislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* at 11.

Viewing RCW 36.70A.030(16) in context, it is apparent that the question of whether open space will predominate over the built environment must be considered in the context of patterns of development within “the rural element” of the county’s

⁷ As previously stated, our review of legal issues is de novo. Because the GMA is a state statute, not a local ordinance, local expertise is not relevant to our interpretation. *City of Federal Way v. Town & Country Real Estate*, 161 Wn. App. 17, 37-38, 252 P.3d 382 (2011).

“comprehensive plan.” This is a broad standard, and for good reason. The GMA was written to address county-wide planning issues, not specific land use determinations. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997). The GMA affords counties the flexibility to include a variety of densities within the rural element of their comprehensive plans. RCW 36.70A.070(5)(b). Given this circumstance, the question of whether open space predominates over the built environment cannot be viewed from a myopic perspective, specific to one piece of property or a particular project. Although an individual land use decision can properly take into account larger goals set by the GMA and a county’s comprehensive plan, *see Cingular Wireless*, 131 Wn. App. at 770-72, this individualized context does not alter the meaning of the GMA’s statutory terminology.

It bears emphasis that, under the Kittitas County Code, the GMA’s rural character assessment is only one of several general standards governing CUP approval. In addition to preserving rural character as defined by the GMA, a CUP applicant must also establish that a proposed project is “not detrimental or injurious . . . to the character of the surrounding neighborhood” and “will ensure compatibility with existing neighboring land uses.” KCC 17.60A.015(1), (5). Such considerations are, by definition, highly localized, though not necessarily confined to a particular project site. Local considerations are important to ensuring that a zoning decision is compatible with

the goals of the GMA and a county's comprehensive plan. But they are not the same thing as the broader⁸ GMA rural character inquiry.

The Commissioners' decision

In the discussions leading up to the CUP decision, the Commissioners debated the appropriate interpretation of the GMA's rural character definition. Commissioner Jewell and Commissioner O'Brien advanced an interpretation of rural character fairly consistent with our analysis. But Commissioner Osiadacz articulated a different, narrower view that is inconsistent with the interpretation set forth above. Because the adverse CUP decision turned solely on the votes of Commissioner O'Brien and Commissioner Osiadacz, the ultimate legality of the Commissioners' decision turns on whether it was premised on the narrow interpretation advanced by Commissioner Osiadacz.

⁸ Not all components of the GMA's rural character definition are necessarily broader than the neighborhood considerations set forth at KCC 17.60A.015(1) and (5). The GMA's "predominate," or density, inquiry is only one of seven components of the rural character definition. RCW 36.70A.030(16)(a). Several of the components can involve highly localized considerations. For example, a small development could be functionally incompatible with a jurisdiction's rural character if it would impair fish and wildlife habitat. RCW 36.70A.030(16)(d). Or a relatively small structure could be visually incompatible with rural character if it marred the appearance of the rural landscape. RCW 36.70A.030(16)(c). When it comes to the functional and visual components of the rural character definition (as opposed to the density component), "rural character is perceived at relatively close quarters (e.g., within the view shed, 'just up the road,' or across the fence line)." *Vashon-Maury v. King County*, No. 95-3-0008, 1995 WL 903209 at *47, 1995 GMHB LEXIS 428 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Final Decision and Order Oct. 23, 1995).

Our review begins with the Commissioners’ written decision. Because the Kittitas County Code requires the Commissioners’ decision to include written findings, we scrutinize the findings under the same standard applicable to judicial findings. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994). This standard requires that written findings must go beyond the “[s]tatements of the positions of the parties and a summary of the evidence presented.” *Id.* at 36. Instead, adequate findings must also illuminate the decision-maker’s reasoning process. *Id.* Findings are not necessary as to every controverted fact, *In re Detention of LaBelle*, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986), but they must be “sufficiently specific to permit meaningful review.” *Id.* at 218. In the land use context, findings should also be sufficiently detailed to provide guidance to a proposed developer. *Kenart & Assoc. v. Skagit County*, 37 Wn. App. 295, 303, 680 P.2d 439 (1984).

The only portion of the Commissioners’ decision addressing the controverted issue of whether to issue a CUP is the second set of numbered paragraphs. Paragraphs 2-4 of this set of paragraphs are nothing more than legal conclusions, specifying that the Project failed to meet the requirements of KCC 17.60A.015(1), (5), and (7)(B). As such, they cannot be fairly characterized as findings. The only portion of the Commissioners’ decision that can be interpreted as a finding of a controverted fact is the first paragraph.

It states:

1. Open space, the natural landscape, and vegetation **would not predominate** over the built environment on the subject parcels if the proposal were approved in this location (**RCW 36.70A.030(15)**).

CP at 14.

This finding reflects Commissioner Osiadacz’s view that rural character must be judged according to the parcels of land at issue in a CUP application. As previously stated, this assessment is too narrow. Because the sole finding in support of the Commissioners’ legal conclusions reflects a misinterpretation of the governing law, the written decision is not sufficient to withstand appellate scrutiny.

In apparent recognition of the deficiencies with the Commissioners’ written decision, the county urges us to supplement the written decision with oral “statements in the record.” *Labelle*, 107 Wn.2d at 219. If statements from Commissioner O’Brien and Commissioner Osiadacz indicated that reasons other than the density of the Project site prompted the vote against the CUP, then the county’s position might have weight. After all, as documented by the superior court, there are numerous facts in the record that could support denial of the CUP based on KCC 17.60A.015(1), (5), and (7)(B).

The county’s suggested approach is ultimately unhelpful because the Commissioners’ oral comments underscore the concern raised by the written decision. Commissioner Osiadacz went out of her way to make clear that her vote against the CUP

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turned on the fact that over one-half of the Project site would be covered by development instead of open space. Commissioner Osiadacz also made plain that if she had taken a broader geographic view of what it meant for open space to “predominate” over the built environment, her vote would be different.

Commissioner Osiadacz’s transparency as to the reasons for her CUP decision deserves great credit. Commissioner Osiadacz knew she held a minority perspective of how to view the GMA’s rural character definition. She also knew she held the deciding vote on Iron Horse’s CUP application. By candidly clarifying the fact that her vote on the CUP application turned on her assessment of the rural character definition, Commissioner Osiadacz ensured Iron Horse would receive meaningful consideration on appeal, should her assessment turn out to be incorrect. That is what happened and it is the way our justice system should work. Because Commissioner Osiadacz’s assessment of the rural character definition turned out to be inconsistent with our interpretation, the current CUP decision cannot stand.

Applicable remedy

Appellate remedies for an adverse land use decision include reversal or remand for modification or further proceedings. RCW 36.70C.140. Iron Horse requests we reverse the Commissioners’ decision and remand with instructions to adopt the findings and conclusions proposed by the Kittitas County hearing examiner. This position lacks legal

support. The hearing examiner never made any legal findings. Pursuant to the terms of the applicable county code, former KCC 15A.01.040(4)(d), the hearing examiner merely made “recommendations” that the Commissioners were free to adopt or reject. *See Marantha Mining v. Pierce County*, 59 Wn. App. 795, 800-01, 801 P.2d 985 (1990). Although we will sometimes reverse an adverse land use decision with instructions to grant specific relief, doing so is an extreme remedy. We will only direct specific relief when it is apparent that remand for further proceedings would be “pointless.” *Id.* at 805.

Here, we have no reason to believe remand would be pointless. The legal error giving rise to this decision was prompted by a good-faith dispute over the meaning of a technical statutory term. There was no misconduct or bad faith. As set forth by the competing analyses provided by the hearing examiner and the superior court, the facts in the record could have supported either approval or denial of the CUP. The appropriate remedy is therefore to remand for further proceedings without instructions as to a particular disposition.

CONCLUSION

This matter is remanded for reconsideration of Iron Horse’s CUP application, pursuant to the rural character definition set forth in this opinion. The Commissioners’ decision on reconsideration shall include written findings of fact that are sufficiently

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detailed to permit meaningful review by Iron Horse and by the judiciary, should there be any further appellate review.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Pennell, A.C.J.

I CONCUR:



Siddoway, J.

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APPENDIX

**BOARD OF COUNTY COMMISSIONERS
COUNTY OF KITTITAS
STATE OF WASHINGTON**

**CONDITIONAL USE PERMIT
DENIAL**

IRON HORSE SOLAR FARM CONDITIONAL USE PERMIT (CU-15-00006)

RESOLUTION

NO. 2017- 022

WHEREAS, according to Kittitas County Code Title 15A, relating to Hearings and Title 17.60A Conditional Uses, an open record hearing was held by the Kittitas County Hearing Examiner on October 20, 2016, for the purpose of considering a conditional use permit known as Iron Horse Solar Farm CU-15-00006 and described as follows:

The construction and operation of a 47.5acre photovoltaic solar power generation facility on approximately 68 acres in the Agriculture 20 zone. The subject property is accessed off Caribou Road and located approximately 1 mile east of the City of Kittitas at 320 South Caribou Road, in a portion of Section 01, T17N, R19E, WM in Kittitas County, bearing Assessor's map numbers 17-19-01000-0023, 17-19-01000-0028, 17-19-01000-0042, and 17-19-01000-0043. Proponent: OneEnergy Development LLC authorized agent for Bill Hanson, landowner.

WHEREAS, public testimony was heard, in favor of and against the proposal; and,

WHEREAS, due notice of the hearing had been given as required by law, and the necessary inquiry has been made into the public interest to be served by such use; and,

WHEREAS, the Hearing Examiner recommended approval of said proposed conditional use; and,

WHEREAS, a closed record public hearing was held by the Board of County Commissioners on December 20, 2016 and January 10, 2016 to consider the Hearing Examiner's recommendation on this matter; and,

WHEREAS, the Kittitas County Board of Commissioners make the following FINDINGS OF FACT and CONCLUSIONS AT LAW concerning said proposed conditional use:

1. OneEnergy Development LLC authorized agent for Bill Hanson, landowner, submitted a conditional use application for a Major Alternative Energy Facility on approximately 68 acres.

The subject property is zoned Agriculture 20. This “Utility” (KCC 17.61.010{1}) is subcategorized as a major alternative energy facility (KCC 17.61.010{9}), and as such requires approval of a conditional use for the zone 17.61.020(4)(b).

2. This proposal is located approximately 1 mile east of the City of Kittitas at 320 South Caribou Road, in a portion of Section 01, T17N, R19E, WM in Kittitas County, bearing Assessor’s map numbers 17-19-01000-0023, 17-19-01000-0028, 17-19-01000-0042, and 17-19-01000-0043. Access as proposed is provided for via an existing permit with Kittitas County.
3. The Kittitas County Comprehensive Plan’s Land Use Element designates the subject property as Rural Working and the zoning for this proposal is Agriculture 20.
4. Kittitas County Code provides under Chapter 17.60A.015 provides review criteria for conditional use permits which states that:

The Director or Board, upon receiving a properly filed application or petition, may permit and authorize a conditional use when the following requirements have been met:

- 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) 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
 - 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 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 government services; and
 - d) Does not compromise the long term viability of designated resource lands.
5. The Washington State Growth Management Act mandates the county to develop a comprehensive plan, and that within that plan a Rural Element be devised which "include measures that apply to rural development and protect the rural character of the area as established by the County." These measures must be used to control rural development, assure visual compatibility of rural development with surrounding areas, reduce sprawl and protect against conflict with the use of agricultural, forest and mineral resource lands (RCW 36.70A.070). "Rural Character" is defined in the Act thus:

"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;
 - (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 groundwater and surface water recharge and discharge areas.
6. The conditional use permit application was submitted to Community Development Services (CDS) on November 12th, 2015. On December 17th, 2015 the application was deemed incomplete following a mandated pre-application meeting between county staff and representatives of the applicant. Materials required at that time included a transportation concurrency application. On March 3rd, 2016 revised project materials were submitted by the applicant who included the required information as well as an updated narrative and SEPA checklist. The application was deemed complete on May 12th, 2016. The Notice of Application for the conditional use permit was issued on May 23rd, 2016. This notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners and other interested parties. The last day to submit written comments with regard to the proposal

was on June 7th, 2016.

7. Kittitas County acted as the lead agency for the SEPA Environmental Checklist and threshold determination. As per WAC 197-11-355 and KCC 15A.04.010 the county utilized the optional DNS process. Notice was given that the County was expecting to issue a Determination of Non-Significance, and that the notice of application comment period (14 days) may be the only opportunity to provide comment on the environmental impacts of the proposal.
8. The SEPA checklist was reviewed by staff in conjunction with the project narrative. On June 27th, 2016 the application was placed on hold by the applicant and review was temporarily suspended. On July 15th, 2016 the applicant requested that review continue and submitted supplemental documentation with respect to comments received.
9. After a detailed review of the SEPA checklist, the project narrative, supplemental submission, and proposed mitigation measures the SEPA official determined that there would be no significant adverse environmental impacts under the provisions of WAC 197-11-350. A Mitigated Determination of Non-Significance (MDNS) was issued for this project on August 10th, 2016.
10. The appeal period for the SEPA determination ended on August 24th, 2016 at 5:00 p.m. A timely appeal was filed with the BOCC on August 24th, 2016 by "Save Our Farms! Say No to Iron Horse". The appeal was heard before the Kittitas County Hearing Examiner on Thursday October 20th, 2016. The Hearing Examiner issued a decision on November 8th, 2016 which, based on listed findings, held *that* "...the August 10, 2016 SEPA determination by the responsible official in the above referenced matter is affirmed in every respect".
11. The Hearing Examiner open record public hearing for the SEPA appeal and the Conditional Use Permit was held on October 20th, 2016. Representatives of the applicant presented materials and testified at the hearing. Members of the public testified. On November 9th, 2016, the Kittitas County Hearing Examiner returned a recommendation that the Iron Horse Solar Farm Conditional Use Permit (CU-15-00006) be approved with the staff recommended conditions plus an additional two conditions.
12. The Board of County Commissioners conducted a closed record meeting on December 20th, 2016 and continued the meeting to January 10th, 2017 for the purpose of considering the Iron Solar Farm Conditional Permit (CU-15-00006). A motion was made and seconded that the conditional use permit be denied; the motion carried on a vote of 2-1 with the following conclusions:

NOW THEREFORE, BE IT HEREBY RESOLVED that the Kittitas County Board of Commissioners hereby deny the approval of the **Iron Horse Solar Farm Conditional Use Permit (CU-15-00006)** and adopt the above Findings of Fact, and Conclusions of Law.

1. Open space, the natural landscape, and vegetation **would not predominate** over the built environment on the subject parcels if the proposal were approved in this location (RCW 36.70A.030(15)).
2. The proposed use in the proposed location is **not** essential or desirable to the public convenience and is detrimental or injurious to the public health, peace, or safety, or to the character of the surrounding neighborhood (KCC 17.60A.015(1))
3. The proposed use in the proposed location **would not** ensure compatibility with existing neighboring land uses (KCC 17.60A.015(5)).
4. The Proposed use in the proposed location **does not** preserve the "rural character" as defined in the Growth Management Act (RCW 36.70A.030(15)) (KCC 17.60A.015(7)(B)).

DATED this 7th day of February, 2017 at Ellensburg, Washington.

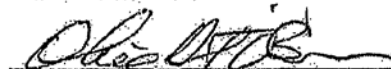
BOARD OF COUNTY COMMISSIONERS
KITITAS COUNTY, WASHINGTON

OPPOSED

Paul Jewell, Chairman



Laura Osiadacz, Vice Chairman



Obie O'Brien, Commissioner

APPROVED AS TO FORM:

Greg Zempel WSBA #19125

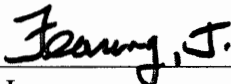



Julie A Kjorsvik

No. 36240-0-III

FEARING, J. (dissenting) — Ample facts support the findings and conclusions of the Kittitas County Board of Commissioners regardless of on what theory a commissioner relied in denying the application of a conditional use permit. Therefore, I would affirm the trial court's denial of Iron Horse Solar's LUPA petition. The trial court penned a thorough and thoughtful decision when denying the petition, and I adopt that decision as my dissent. Attached is a copy of the trial court's decision.

I DISSENT:



Fearing, J.

FILED
NOV 3 0 2017
VAL BARSCHAW, CLERK
KITTTAS COUNTY WASHINGTON

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2
3
4 **IN THE SUPERIOR COURT OF WASHINGTON**
5 **KITTITAS COUNTY**

6 ONE ENERGY DEVELOPMENT LLC; and
7 IRON HORSE SOLAR LLC ,

Cause No. 17-2-00075-5

8 Plaintiffs,

9 vs.

MEMORANDUM DECISION

10 KITTITAS COUNTY, a municipal
11 corporation; and KITTITAS COUNTY
12 BOARD OF COMMISSIONERS; and
13 "SAVE OUR FARMS! SAY NO TO IRON
14 HORSE!; and CRAIG CLERF AND
PATRICIA CLERF, husband and wife

Defendants.

15
16 **INTRODUCTION**

17
18 Oral argument on Petitioner's Land Use Petition Act
19 (LUPA) appeal occurred on September 7, 2017. Timothy McMahon
20 appeared for the plaintiffs. Kenneth Harper appeared for the
21 Defendant Kittitas County and the Kittitas County Board of
22 Commissioners. James Carmody appeared for Defendants Save our
23 Farms and Craig and Patricia Clerf. After hearing all arguments,
24 the Court took the matter under advisement in order to review the
25 record and the pleadings submitted by all parties. The Court has
26 reviewed the voluminous hearing records, state statutes, county
27 code provisions, court cases, and all arguments presented.
28
29

1
2 **DISCUSSION**
3

4 **1. Factual Background** At issue is the granting or denial
5 of a Conditional Use Permit for property owned by William Hanson,
6 located east of the town of Kittitas on four flat parcels of land
7 in the center of the Kittitas Valley, in the midst of farmland.
8 Currently the land is used for farming a rotation of crops,
9 including timothy hay and alfalfa. The soil is productive and
10 the adjacent and nearby neighbors are also engaged in farming.
11 The property owner proposed to lease his property to One Energy
12 Development LLC and to convert the farmland into a 47.5 acre
13 solar PV facility in an area which is zoned there and all around
14 it as Agriculture 20 (A-20). The project is named the Iron Horse
15 Solar LLC project. The land use designation for the property and
16 the surrounding properties is Rural Working Land.
17
18

19 The Kittitas County Code provides that a solar farm--which
20 is designated by the County code in KCC 17.61.010(9) as a "major
21 alternative energy facility"--is allowed in the A-20 zoning area
22 only as a conditional use. KCC 17.61.020(4)(b).¹ Thus, in order
23 to operate in this A-20 area, this solar PV facility must first
24
25

26
27 ¹ The term Solar Farm is used both in the Kittitas County Code and in the
28 application for conditional use permit. However, the facility involved is not
29 a farm. It is a facility that is non-agricultural and industrial in nature.

1 be granted a conditional use permit for this particular property
2 by the Kittitas County Board of Commissioners.

3 During the ongoing application process for approval of the
4 facility, One Energy had to also abide by the Kittitas County
5 SEPA process as well. The SEPA review and the project permit
6 review were consolidated into one procedure, pursuant to KCC
7 15A.01.010. The SEPA issues went before a Hearing Examiner, who
8 conducted an open record adjudicative hearing on October 20,
9 2016. Public comment and testimony and submission of evidence
10 were taken at this hearing. The Hearing Examiner's job was both
11 to decide the merits of the administrative appeal of the State
12 Environmental Policy Act threshold determination and issuance of
13 the Mitigated Determination of Nonsignificance (MDNS), and to
14 make a recommendation to the Board of County Commissioners about
15 the issuance of the conditional use permit (CUP).
16

17
18 The Hearing Examiner did do this. It denied the SEPA
19 appeal, affirming the MDNS, and it also recommended that the BOCC
20 approve the CUP application with conditions. The proposal had
21 engendered considerable public interest, particularly among
22 adjacent and other nearby landowners, and they participated as
23 allowed by providing letters, testimony, and various documents
24 for consideration.
25

26 After the decision and recommendation of the Hearing
27
28
29

1 Examiner, the Board of County Commissioners held a closed record
2 hearing pursuant to KCC 15A.01.040(3)(a) to make a decision as to
3 the granting of the conditional use permit. The closed record
4 hearing meant that the commissioners were given the full
5 administrative record available to the Hearing Examiner, and were
6 able to discuss their questions and opinions about the various
7 issues presented, to deliberate, and eventually to issue a
8 written decision in the form of Resolution 2017-022, dated
9 February 7, 2017. The Commissioners, by a vote of two to one,
10 denied the Iron Horse project conditional use permit application.
11

12 In Resolution 2017-022, the commissioners listed the
13 following substantive statements:
14

15 "1. Open space, the natural landscape, and vegetation would
16 not predominate over the built environment on the subject parcels
17 if the proposal were approved in this location. (RCW
18 36.70A.030(15)
19

20 2. The proposed use in the proposed location is not
21 essential or desirable to the public convenience and is
22 detrimental or injurious to the public health, peace, or safety,
23 or to the character of the surrounding neighborhood. (KCC
24 17.60A.015(1))
25

26 3. The proposed use in the proposed location would not
27 ensure compatibility with existing neighboring land uses. (KCC
28
29

1 17.60A.015(5).

2 4. The proposed use in the proposed location does not
3 preserve the "rural character" as defined in the Growth
4 Management Act. (RCW 36.70A.030(15)) KCC 17.60A.015(7)(B)).
5

6
7
8 This appeal timely followed on February 23, 2017 with the
9 filing of the Land Use Petition.
10

11
12
13
14 **2. Standard of Review:** The Land Use Petition Act, LUPA,
15 provides the exclusive means for judicial review of a land use
16 decision (with some exceptions). *Woods v. Kittitas County*, 162
17 Wn. 2d 597 (2007)

18 RCW 36.70C.130 sets forth the standards for granting relief
19 in a LUPA appeal. The court may grant relief only if the party
20 seeking relief has carried the burden of establishing that one of
21 the six standards set forth in RCW 36.70C.130(1) has been met.
22 The standards are as follows:
23

- 24 (a) The body or officer that made the land use decision
25 engaged in unlawful procedure or failed to follow a
26 prescribed process, unless the error was harmless;
27 (b) The land use decision is an erroneous interpretation
28 of the law, after allowing for such deference
29 as is due the construction of the law by a local
jurisdiction with expertise;
(c) The land use decision is not supported by evidence that
is substantial when viewed in light of the whole record

before the court;

- 1 (d)The land use decision is a clearly erroneous
2 application of the law to the facts;
3 (e)The land use decision is outside the authority or
4 jurisdiction of the body or officer making the
5 decision; or
6 (f)The land use decision violates the constitutional
7 rights of the party seeking relief.

8 RCW 36.70C.130(1).

9 One Energy, in its brief, argues that it can establish five
10 out of the six standards, (a) through (e). The court will
11 discuss each in this decision.

12 Deference must be given to the decisions and factual
13 determinations of the local decision making authority. In this
14 case, the BOCC enacted in KCC 15A.01.040 (4)(d) a model in which
15 the Hearing Examiner shall make only recommendations to the BOCC
16 regarding the granting of conditional use permits. Decision
17 making authority over the granting of conditional use permits is
18 retained by the BOCC in the code. This reviewing court, thus,
19 must give substantial deference to the decisions of the BOCC, not
20 to the Hearing Examiner, which makes findings and decisions
21 regarding SEPA, but not the decision regarding conditional use
22 permits. Evidence, and all logical inferences from that
23 evidence, are viewed in the light most favorable to the party
24 that prevailed in front of the BOCC—in this case the defendants.
25

26
27 Plaintiff did not cite persuasive authority which would
28 support giving that deference to the Hearing Examiner because of
29

1 a perceived or real deficiency in the Findings of Fact found by
2 the legal decision maker, and this Court declines to find that
3 the Hearing Examiner was the highest fact finder in this case.
4

5 For the reasons set forth below, this Court finds that the
6 plaintiff has not established any of the standards necessary to
7 overrule the determination of the Board of County Commissioners.
8

9
10
11
12 **3. Analysis:**

13 Analysis of plaintiff's Statement of Issues is organized
14 around specific LUPA standards of review.
15

16 **I. THIS LAND USE DECISION WAS NOT OUTSIDE THE AUTHORITY OR**
17 **THE JURISDICTION OF THE KITTITAS COUNTY BOARD OF COMMISSIONERS**
18 **UNDER RCW 36.70C.130(1)(e).**
19

20
21 One Energy argues as part of standard (1)(e) that the BOCC
22 acted outside of its authority by disregarding the Hearing
23 Examiner's findings. This Court disagrees.
24

25 The Board's role in the conditional use permit process is to
26 determine whether the applicant has met the requirements of the
27 conditional use using KCC 17.60A.015 Review criteria. The
28 Hearing examiner did not have the authority to permit and
29

1 authorize a conditional use.

2 The plaintiffs have not carried a burden of proving that the
3 land use decision was outside the authority or jurisdiction of
4 the body making the decision: in this case, the Kittitas County
5 Board of County Commissioners. As both petitioner and defendant
6 indicate, the SEPA review and the CUP review were consolidated
7 into one hearing, so that the public and the parties and all
8 interested persons could present testimony or submit evidence at
9 one time for consideration of the various land use decisions by
10 the various land use decision makers.

11
12 Nevertheless, as noted earlier, the Kittitas County Board of
13 Commissioners retained decision making authority with regard to
14 the granting or denial of Conditional use permits in KCC
15 15A.01.040 (4)(d). The code provisions regarding this procedure
16 are set out in the relevant parts of KCC 15A.01.040:
17

18 **"3. Board of County Commissioners.** In addition to its
19 legislative responsibilities under KCC Title 15B, the
20 board shall review and act on the following subjects
pursuant to this title:

- 21 a. Recommendations of the Hearing Examiner or Planning
22 Commission. Decision-making process by the board shall
23 consist of a public meeting or meetings wherein the
24 board reviews the written record transmitted from the
25 Hearing Examiner for Quasi judicial matters and the
26 Planning Commission for Legislative matters and issues
27 a written decision in resolution or ordinance form.
During such meeting(s), appropriate county staff will
28 present the record to the board, providing information
29 as necessary to ensure county code compliance. No new
comment or information will be allowed by the board
during the decision-making process.
- b. Appeals of administrative SEPA actions regarding an
action without an underlying permit.

- 1 c. Open record appeal of administrative SEPA actions
2 when the board of county commissioners hears the
3 appeal of the associated administrative permit
4 decision.
- 5 d. Appeal of administrative determinations such as short
6 plats, variances, and code interpretations.
- 7 e. Shoreline substantial development permits that are
8 included in consolidated permit applications that are
9 subject to Board review and action.
- 10 f. Review and provide initial local County approval,
11 denial, or approval with conditions for shoreline
12 conditional use permits and shoreline variances that
13 are in consolidated permits applications that are
14 subject to Board review and action.

15 **4. Hearing Examiner - Recommendation.** The Hearing
16 Examiner shall review and make recommendations to the
17 board of county commissioners on the following
18 applications and subjects:

- 19 a. All Quasi judicial review processes including:
20 i. applications for preliminary plats
21 ii. Rezone applications.
- 22 b. Other actions requested or remanded by the board of
23 county commissioners.
- 24 c. Development agreements.
- 25 d. Conditional use permits pursuant to the zoning code,
26 KCC Title 17
- 27 e. In the case of an open record appeal of
28 administrative SEPA actions when the Hearing Examiner
29 makes a recommendation to the board of county
commissioners on the underlying permit, the Hearing
Examiner shall decide the SEPA appeal.

Integration of the hearings by statute, for purposes of
taking evidence, does not equate to mandating the rubber stamping
of the Hearing Examiner's recommendation. This court has found
no case law requiring the BOCC to "engage with the findings and
conclusions produced by the Hearing Examiner," or to "refute,

1 challenge, or reply to" the explanations of the Hearing Examiner.

2 Moreover, the decision facing the Hearing Examiner regarding
3 the SEPA appeal involved a different decision with different
4 considerations than the decision facing the Commissioners. As
5 defendants point out, the SEPA review of the MDNS is a threshold
6 determination and does not bind any decision maker on a challenge
7 to the conditional use permit.

8 The Commissioners were the only decision makers who did have
9 authority or jurisdiction to make this land use decision.
10 Standard (1)(e) has not been met.
11

12
13 **II. THE BOARD OF COUNTY COMMISSIONERS DID NOT FAIL TO**
14 **FOLLOW THEIR PRESCRIBED PROCESS IN MAKING THEIR LAND USE**
15 **DETERMINATION UNDER RCW 36.70C.130(1)(a).**
16

17
18 The actual procedure that was followed involved an open
19 public hearing, the submission of testimony and evidence, and the
20 following consideration of all of the record of the open hearing
21 at the commissioner's closed hearing. This procedure tracked the
22 requirements set out in the code provision above. The plaintiff
23 has not identified any procedural errors in the process
24 undertaken in this case up to the point of the issuance of the
25 Resolution 2017-022.
26

27 One Energy argues that the Findings of Fact in the
28 Resolution are substantively insufficient, to the extent that
29

1 there were essentially **no findings** of any substantive fact, which
2 they then argue is a failure to follow KCC 15A.06.020, and thus
3 a violation of Standard (1)(a). They argue that this failure to
4 make findings means that deference must be given to the Hearing
5 Examiner, which was the highest previous entity that made
6 specific findings, so that the Hearing Examiner became the
7 highest level finder of fact.

8
9 The defendant from Save our Farms counters that a finding of
10 facts is indeed set forth in Resolution 1017-022, that the
11 findings, even if conclusory, are sufficient as a matter of law
12 to show the bases upon which the commissioners made their
13 decision. The defendant adds that they were supported by
14 substantial evidence (which will be taken up in another
15 argument).

16
17 The defendant Kittitas County likewise argues that even if
18 findings lack specificity or are conclusory, appellate review may
19 proceed where the record of the oral decision enables the
20 appellate court to review the decision making process. It argues
21 that in this case, the oral record was extensive and clear as to
22 the final factors upon which the commissioners based their
23 decision. They also apparently argue that the actual criteria
24 for conditional use permit review involve subjective general
25 criteria which would not be conducive to empirical facts and thus
26 are admittedly not so detailed as the hearing examiner's facts,
27 though they are at least legally sufficient. While it is true
28
29

1 that the criteria are by nature general and to an extent,
2 subjective, the court believes more specific findings are
3 possible, desirable, and preferable in such a situation.

4 However, although the court notes deficiencies in the
5 findings, this court disagrees with the plaintiff and ultimately
6 agrees with the defendant that the findings made were legally
7 sufficient.
8

9
10 The findings are embodied in Resolution 2017-022. As
11 plaintiff points out, the bulk of the facts are procedural facts
12 and recitations of the laws/code provisions/definitions which the
13 Commissioners had to consider. The last four statements of the
14 resolution, quoted above, which are characterized by the
15 plaintiff as conclusions of law, are in reality both findings and
16 conclusions. They are the only substantive factual statements
17 listed, and constitute the ultimate reasons that the County
18 commissioners gave to explain their denial of the conditional use
19 permit.
20

21
22 This Court finds these are marginally sufficient as findings
23 of fact. They lack detail and any citation to the record itself.
24 However, broad as they are, they are sufficiently specific to
25 permit the Court to review the record and understand the
26 decision. The oral record of the Commissioners' deliberations
27 and decision was extensive, and the voluminous record as a whole
28
29

1 does allow this Court to review the decision for sufficiency of
2 evidence. A common sense reading of "findings" requirements here
3 should prevail. Although the Court was tempted to remand the
4 case to the Board of Commissioners to set out facts with greater
5 specificity, the Court is able to understand the reasoning of the
6 commissioners without so requiring. Thus it would be a pointless
7 gesture to send the matter back for improved findings, and the
8 Court is not inclined to engage in a pointless gesture.
9

10
11 Therefore, plaintiffs have not shown that the Commissioners
12 failed to follow the prescribed process as in Standard (1) (a).
13

14 **III. The Resolution 2017-022 is not an erroneous interpretation**
15 **of law under RCW 36.70C.130 (1) (b).**
16

17
18 The Board found in Finding Number 4, that "the proposed use
19 in the proposed location does not preserve the rural character as
20 defined in the Growth Management Act, RCW 36.70A.030(15) and KCC
21 17.60A.015 (7) (B)." Resolution 2017-022. The definition for
22 rural character referenced in the County Code from the RCW is:
23

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

- 27 (a) In which open space, the natural landscape, and
28 vegetation predominate over the built environment;
29 (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;

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

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

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

4 (g) That are consistent with the protection of natural
5 surface water flows and groundwater and surface water recharge
and discharge areas." RCW 36.70A.030(16).

6
7 This standard must be reviewed after allowing for such
8 deference as is due the construction of a law by a local
9 jurisdiction with expertise. In this case, the Board is the
10 local decision maker and the Board is also the source of the
11 ordinance that sets out the permit criteria, referencing this
12 RCW. The Board is the governing legislative body in a largely
13 rural county, which has considerable experience in discussing and
14 determining rural character. And the Board is singly tasked with
15 deciding the issuance of Conditional Use Permits, and thus must
16 deal with these standards and definitions on a regular basis.
17 Some deference is due to the Kittitas County Commissioners on
18 this issue. But even if deference was not due, the Court finds
19 that the Board did not misinterpret the law.
20

21
22 Plaintiffs contend that the commissioners misapplied the
23 "rural character" provision of the Kittitas County Code
24 provision. They cite to the fact that two solar farms have
25 already been approved, and neither was appealed with respect to
26 conformance with the rural element of the comprehensive plan.
27 The argument appears to be that the very inclusion of solar farms
28
29

1 as a conditional use in the A-20 zone declares that solar
2 facilities are consistent with rural character.

3 However, conditional uses are not the same as permitted
4 uses. Conditional uses are uses that would not be allowed in
5 specific zones unless the proponent applicant of the particular
6 use can demonstrate to the satisfaction of the finder of fact
7 that there is compliance with each of the conditional use permit
8 criteria at that particular site. Solar farms are only allowed
9 in A-20 as a conditional use. Therefore, each individual solar
10 farm must meet every one of the criteria for a conditional use in
11 a site specific review and evaluation before it can be granted a
12 conditional use permit. Preserving rural character is one of the
13 conditions that must be met, and the burden of showing that it
14 does so at this specific site rests with the applicant proponent
15 of the solar farm.
16
17

18 There is nothing inconsistent about a finding that major
19 alternative energy facilities may but also may not preserve rural
20 character as it applies to a specific project in a specific
21 place, even in the same zoning. One component of rural character
22 refers to "patterns of land use and development established by a
23 county in the rural element of its comprehensive plan: (a) in
24 which open space, the natural landscape, and vegetation
25 predominate over the built environment." There could be an almost
26 infinite number of configurations of project and siting that
27 could yield vastly different results from each other.
28
29

1 Additionally, since compliance with the Comprehensive Plan
2 is made part of the local conditions which must be met for a
3 conditional use permit, the applicant is mandated to show
4 compliance with the Comprehensive Plan. *Cingular Wireless, LLC*,
5 131 Wn. App. 756 (2006). This court finds it is not error for
6 the Commissioners to consider rural character as it is discussed
7 in the comprehensive plan during the site specific analysis. The
8 definition in the Growth Management Act at RCW 36.70A.030 is:
9

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

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

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

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

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

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

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

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

30
31
32 It is not an erroneous interpretation of law, specifically rural
33 character, to consider whether a massive industrial project of
34 this nature, encompassing 47.5 acres, eight feet high with large
35 mechanized racks to follow the sun, set in the middle of treeless
36 productive farm fields preserves rural character, interferes with
37 visual compatibility of the surrounding area, or contains a built
38
39

1 environment which predominates over the natural landscape.

2 Plaintiffs point out that this facility of 47.5 acres is but
3 a small percentage of agricultural land in Kittitas County. The
4 court finds that this is true and would be relevant to an issue
5 of whether overall agriculture production in the valley is
6 threatened by the project. However, in discussing rural
7 character, the relevant criteria for the Commissioners in KCC
8 17.60A.015 were:
9

- 10 1. "The proposed use is essential or desirable to the
11 public convenience and not detrimental or injurious to
12 the public health, peace, or safety or to the
13 character of the surrounding neighborhood. ...
- 14 5. The proposed use will ensure compatibility with
15 existing neighboring land uses.
- 16 6. The proposed use is consistent with the intent and
17 character of the zoning district in which it is located.
- 18 7. For conditional uses outside of Urban Growth Areas,
19 the proposed use:
 - 20 A. Is consistent with the intent, goals, policies, and
21 objectives of the Kittitas County Comprehensive Plan,
22 including the policies of Chapter 8, Rural and
23 Resource Lands;
 - 24 B. Preserves "rural character" as defined in the Growth
25 Management Act (RCW 36.70A.020(15));
 - 26 C. Requires only rural government services; and
 - 27 D. Does not compromise the long term viability of
28 designated resource lands. "

29 The relevant inquiry is the effect on the character of the
"surrounding neighborhood" and not necessarily the entire county.
The plaintiffs' suggestion that the built environment be compared
to all agricultural land in the county is misplaced.

1 It would be illogical to determine whether the built
2 environment predominates over open space, natural landscape and
3 vegetation by considering and comparing the footprint of a
4 development of any sort to all the agricultural land in a county.
5 Under that analysis, a square mile of skyscrapers in the middle
6 of one hundred square miles of farm fields would not qualify as
7 predominating over the natural landscape. Yet it would clearly
8 not be in keeping with rural character. This is obviously not the
9 intent of the zoning codes, the Growth Management Act provisions,
10 or twenty plus years of other land use decisions. In determining
11 what the "built environment" factor means, this Court has found
12 no case setting out firmly the parameters of this inquiry, either
13 with regard to which land is to be used for comparison to the
14 built environment, or to what percentage should be considered
15 dispositive. We are left with a common sense analysis.

16
17
18 The plaintiff has not shown that the Commissioners engaged
19 in an erroneous interpretation of the law surrounding rural
20 character, under Factor 1)(b).
21
22
23
24

25 **IV. The Resolution is supported by substantial evidence in light**
26 **of the entire record, pursuant to RCW 36.70C.130(1)(c).**
27
28
29

1 Plaintiff claims under the Standard for Granting Relief, RCW
2 36.70C.130(1)(c), that the resolution was not supported by
3 evidence that is substantial when viewed in light of the whole
4 record before the court. This is a sufficiency of evidence
5 claim. Plaintiff has specifically objected in this capacity to
6 **Finding 2, The proposed use in the proposed location is not**
7 *essential or desirable to the public convenience, and is*
8 *detrimental or injurious to the public health, peace, or safety,*
9 *or to the character of the surrounding neighborhood, and also to*
10 **Finding 3, The proposed use in the proposed location would not**
11 *ensure compatibility with existing neighboring land uses.*
12
13
14

15 The legal standard on any claim of sufficiency of evidence
16 for the commissioners' findings under this provision is for the
17 reviewing court to consider all evidence and reasonable
18 inferences "in the light most favorable to the party who
19 prevailed in the highest forum that exercised fact-finding
20 authority." *Cingular Wireless, LLC v. Thurston County*, 131 Wn.
21 App. 756 (2006)
22

23 Plaintiff contends again in this section that the fact-
24 finder is the Hearing Examiner. In fact, however, as in previous
25 issue discussions, the fact-finder entitled to the inference is
26 the Board of County Commissioners. The Board's role in the
27 conditional use permit process is to determine whether the
28 applicant has met the requirements of the conditional use using
29

1 KCC 17.60A.015 Review criteria. The Hearing examiner did not
2 have that authority to permit and authorize a conditional use.
3 The Board in that instance does not exercise appellate
4 jurisdiction but original jurisdiction.
5

6 Under the substantial evidence standard, there must be a
7 sufficient quantum of evidence in the record to persuade a
8 reasonable person that the declared premise is true. *Phoenix*
9 *Development, Inc. v. City of Woodinville*, 171 Wn. 2d 820 (2011).
10 In addition, the court reserves credibility determinations for
11 the fact finder and does not review them on appeal. *J.L.*
12 *Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1 (2004).
13
14

15 It is worth noting that the following analysis has nothing
16 whatever to do with the views of the Court itself as to the
17 beneficial nature of solar projects in general or this project in
18 particular. All parties need to remember that this Court, as a
19 reviewing appellate court cannot substitute its own judgment for
20 the judgment of the Kittitas County Commissioners. It was for
21 the commissioners to determine whether the review criteria under
22 KCC 17.60A.015 for a conditional use permit were met. It is
23 possible for there to be substantial evidence on BOTH sides of
24 any issue. It is for the finder of fact, in this case the BOCC,
25 to weigh the evidence and decide the matter. The Court will
26 uphold the decision under this prong if it is supported by
27
28
29

1 substantial evidence when viewed in light of the whole record.

2 It is also worth noting that more detailed and comprehensive
3 findings from the commissioners would have assisted all parties
4 and the court greatly in considering this appeal. However,
5 having found that they are sufficiently specific to at least
6 enable the court to consider the nature and amount of evidence
7 that supports them, the court will discuss each one here.
8
9

10 *Regarding Finding 2:* In reviewing the evidence in the
11 record, and taking that evidence in the light most favorable to
12 the defendants, this Court finds there is substantial and
13 sufficient evidence for the commissioners to find the proposed
14 solar facility is not essential or desirable to the public
15 convenience, and that it is detrimental or injurious to the
16 character of the surrounding neighborhood.
17

18 There was no evidence this Court could find in the record
19 that the facility was in fact essential to the public
20 convenience. The plaintiff instead focused on desirability.
21 There was much discussion of the beneficial nature of clean,
22 renewable energy. Both the proponents of the site and most of
23 the opponents of the site agreed in general with the beneficial
24 nature of clean energy in the abstract. However there was no
25 testimony to the need for placement of this project at this
26 location, other than an assertion that the energy would be sold
27 to PSE, which entity provides some, though not all, of the
28
29

1 electricity in the Kittitas Valley. Evidence of the project's
2 desirability was countered by much discussion from opponents
3 about the better suitability of land in other locations in the
4 county for the purpose of a solar farm. Although there was
5 testimony in the record as to potential property tax revenue and
6 a projected amount of clean energy that could be added to the
7 local power grid, the commissioners were not compelled to declare
8 it desirable when weighed against the rest of the testimony in
9 the record.
10

11 The solar project was described by proponents as the largest
12 solar farm in the State of Washington. Opponents to the
13 facility were concerned with the aesthetics of thousands of steel
14 racks of panels, up to eight feet high, which are supported by
15 steel pillars, driven 6 to 8 feet into the ground throughout 47.5
16 acres of prime growing land, as well as accompanied by boxes and
17 instruments of electrical equipment. Local persons were concerned
18 with the sixty acre parcels being surrounded by a huge chain link
19 fence, eight feet high with strands of barbed wire at the top,
20 and there were many comparisons with heavy industry or prisons.
21 The impact on the view from the surrounding neighborhood at this
22 flat mid-valley location is undeniable. The Commissioners were
23 entitled to consider the aesthetics of such a facility. There
24 was testimony from a local realtor about property values
25 diminishing. The commissioners were entitled to believe this
26 testimony over the assertions of the plaintiff that studies from
27
28
29

1 some eastern states show no change in property values around
2 solar farms. Neighbors were concerned with potential issues with
3 weeds in a sensitive timothy hay-growing area, and there was
4 testimony about spraying. Taken in the light most favorable to
5 the county, the Commissioners were entitled to consider this
6 testimony about the difficulties with weed control and to weigh
7 that over the plaintiff's testimony about weeds. There were
8 assertions about glare, about noise, and about the impact to
9 wildlife from neighbors who have seen wildlife on that particular
10 property, which commissioners were entitled to believe despite
11 the SEPA findings.
12

13 There were pages of letters, maps, and photographs
14 discussing the local opposition to the siting of the solar
15 facility. There was testimony from numerous nearby landowners as
16 to the character of the surrounding area, and to the potential
17 impact of this clearly non-agricultural, heavily industrial
18 property use to the people of this particular area. It was
19 undisputed that the character of the surrounding area is
20 farmland. The site itself is prime farmland and has been farmed
21 for years. Plaintiffs suggest without evidence that this is true
22 of all A-20 property, and that the opposition was not site
23 specific; this Court finds that the opposition to the project was
24 completely site specific. The character of every parcel of A-20
25 land is not before the court. Only this set of parcels is before
26 the Court, and this neighborhood. Considering all facts and
27
28
29

1 inferences in the light most favorable to the Commissioners, a
2 fair minded person could make the finding that the proposed use
3 in the proposed location is not desirable to the public
4 convenience, and is detrimental to the character of the
5 surrounding neighborhood. There was substantial evidence in the
6 record as a whole to support the finding.
7

8
9 This holding is consistent with the holding in *Cingular*
10 *Wireless, LLC v. Thurston County*, 131 Wn. App. 756 (2006), in
11 which the Court found that the testimony of area residents amply
12 demonstrated that a cell tower would adversely impact views of
13 Mt. Rainier and open vistas of rural farmland. In noting that no
14 other structures pierced the natural skyline in that area, the
15 court held that the record contained sufficient evidence of
16 incompatibility with neighborhood character and adverse aesthetic
17 impacts to support the hearing examiner's decision in that case.
18

19
20 In this court's review, however, there is not substantial
21 evidence sufficient to show that the project is detrimental or
22 injurious to the public health, peace, or safety. The complaints
23 about the facility involved the nature of the area and its effect
24 on nearby farmers. Despite questions about the potential for
25 broken panels to leach harmful chemicals into the soil, there was
26 not sufficient evidence produced that this was a likely event.
27 The court will strike that portion of Finding and Conclusion 2.
28
29

1
2
3 *Regarding Finding 3:* Some opposition to the project
4 declared the site to have incompatibility with existing
5 neighboring land uses. Plaintiffs argued in their submission to
6 the County that the solar farm would have no impact on the
7 ability of neighboring farmers to continue to farm. The
8 testimony and discussion concerning special problems of weed
9 control around timothy hay were most germane to this finding.
10 There were also concerns expressed in the record regarding water
11 control. Although the aesthetic issues relevant to Finding 2 do
12 not impact the ability of neighbors to farm, the evidence, taken
13 in the light most favorable to the Commissioners, is marginally
14 sufficient for the Commissioners to make the finding and
15 conclusion that the proposed use does not ensure compatibility
16 with neighboring land uses.
17
18
19

20 The plaintiff's contention that *J.L. Storedahl & sons, Inc.*
21 *v. Clark County* (143 Wn.app. 920 (2008) and *Lakeside Industries*
22 *v. Thurston County* (119 Wn. App. 886 (2004) require the adoption
23 of the Hearing Examiner's facts is incorrect. In both *Storedahl*
24 and *Lakeside* the Board of Commissioners sat as an appellate body.
25 In *Storedahl*, the Board did not follow legislatively established
26 re-zone criteria for the review of the rezone. In *Lakeside* the
27 Hearing Examiner had the authority to make the actual decision
28
29

1 and the Board heard the appeal.

2 Plaintiff has not shown insufficient evidence under Factor
3 (1)(c).
4
5

6 **V. Resolution 2017-022 is not a clearly erroneous application of**
7 **Kittitas County's conditional use permit criteria from KCC**
8 **17.60A.015, as listed in standard RCW 36.70C.130(1)(d).**
9

10 Plaintiff contends that the discussion which the
11 Commissioners indulged in regarding the general suitability of
12 solar facilities in the A-20 zone showed that they erroneously
13 relied upon the precedential effect of their decision. Plaintiff
14 correctly points out that the comprehensive plan and ensuing
15 development regulations should not be revisited during a project
16 review.
17

18 A finding is clearly erroneous under subsection (d) when,
19 although there is evidence to support it, the reviewing court on
20 the record is left with the definite and firm conviction that a
21 mistake has been committed. *Norway Hill Pres. & Prot. Association*
22 *v. King County Council*, 87 Wn. 2d 267 (1976)
23

24 The commissioners did express reservations about siting such
25 a facility in the A-20 designation. However, it is also clear
26 from the oral record when Commissioner Jewell pointed it out,
27 that they knew they could not make their decision on this case
28 based on a rethinking of conditional uses in A-20 generally. The
29

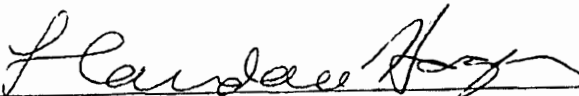
1 Court is satisfied that the commissioners were analyzing this
2 particular project at this particular site rather than changing
3 the conditional use criteria when making the findings that they
4 made. The Court is not left with a definite and firm conviction
5 that plaintiff's alleged mistake was committed.
6

7
8 This determination is made despite the later moratorium
9 placed on the future siting of solar PV facilities. It appears
10 that the commissioners realized the question of suitability for
11 large scale solar energy facilities to be placed in an A-20 zone
12 is a matter that the commissioners must take up outside any
13 particular project review.
14
15
16

17 **CONCLUSION**

18 For the above stated reasons, the Board of County
19 Commissioner's decision to deny One Energy Development and Iron
20 Horse Solar the conditional use permit in Resolution 2017-022 is
21 upheld. The plaintiff has failed to establish that any of the six
22 standards set forth in RCW 36.70C.130(1) have been met.
23

24 Dated this 30th day of November, 2017.
25

26
27 
28 Judge Hooper
29