Testimony to EFSEC regarding TUUSSO Energy, LLC Columbia Solar Photovoltaic Project
December 12, 2017

Good evening,

My name is Paul Jewell, I am a Kittitas County Commissioner and Chairman of the Kittitas County Board of Commissioners. I am speaking to you tonight on behalf of the Board.

I have three points for your consideration this evening:

My first point is regarding the applicants request for expedited review. It is Kittitas County’s position that this application does not meet the requirements necessary to qualify for the 180-day expedited review process.

RCW 80.50.075 – Expedited processing of applications states in part that the council may grant an applicant expedited processing of an application for certification upon a finding that the project is found under RCW 80.50.090(2) to be consistent and in compliance with the city, county, or regional land use plans or zoning ordinances.

Kittitas County enacted a six month moratorium on all new applications for solar developments in unincorporated areas on March 13th of this year via Ordinance 2017-002. The moratorium was then extended through Ordinance 2017-004 on July 18 for an additional six months.

At the time the application was submitted by TUUSSO, October 16, 2017, moratorium on all new applications was and remains in effect. A moratorium was and is the local land use plan and zoning ordinance in effect. Therefore, it is not possible for the council to make a finding that the application is consistent and compliant with county regulations as required by law.

The request for expedited processing must be denied.

The second item I have for your consideration is the recent Superior Court decision in the case One Energy Development LLC and Iron Horse Solar LLC vs. Kittitas County et al.

This case was about Kittitas County’s denial of a conditional use permit for a 47.5 Acre solar photovoltaic project on high quality irrigated farmland.

The permit was denied by the Board on the basis that the proposed land use, a large-scale industrial facility which was presented as the largest energy producing solar facility in the state at the time, was not compatible with the rural character of the area.

In the decision, the court found that the County had substantial discretion in determining the facilities effect on the character of the surrounding neighborhood and whether it met standards established in our development regulations and our comprehensive plan.
In this case, an application very similar to the one before you today, it was found that the proposed facility did not meet our requirements for maintaining rural character and the permit was denied.

My third and final point for your consideration is the County’s value statement regarding the siting of solar photovoltaic projects in rural areas.

This value statement was considered and approved by the Board of County Commissioners in Resolution 2017-192. The resolution was developed from a recommendation by the county’s solar facility siting citizen advisory committee which was formed and is working hard to develop recommended development regulations for the siting and construction of these types of facilities in the county. The committee has not yet completed its work, we hope it will soon, but it has agreed on some key principles that I present to you this evening. Those principles are:

1. High quality agricultural land in Kittitas County is a limited resource and should be protected.
2. Commercial solar facilities may be allowed on high quality irrigated land, but only subject to the highest level of review and scrutiny, and with the requirement for an Alternatives Analysis that considers whether the proposed use can be reasonably accommodated on lands other than high quality irrigated agricultural land.
3. Reasonable and economically-viable alternatives do exist in Kittitas County for commercial solar facilities on lands other than high quality irrigated agricultural land.
4. Conditions should be required for commercial solar facilities to mitigate impacts to surrounding properties.

I have copies of the moratorium ordinances, the Superior Court decision, and the resolution to submit for the record.

Thank you.
BOARD OF COUNTY COMMISSIONERS
COUNTY OF KITTITAS
STATE OF WASHINGTON

Ordinance No. 2017-004

An Ordinance Extending a Moratorium on Accepting Applications for Solar Projects That Qualify As Major Alternative Energy Facilities within Kittitas County

WHEREAS, Strong interest has developed in the creation of solar projects within Kittitas County and its agricultural areas; and

WHEREAS, Agricultural industry provides a large portion of the economic base within Kittitas County; and

WHEREAS, Major alternative energy facilities include hydroelectric plant, solar farm, or wind farm as indicated within KCC 17.61.010(9); and

WHEREAS, Concern has been expressed in public hearings and public comments that solar projects that qualify as major alternative energy facilities are planned for lands used for agriculture; and

WHEREAS, RCW 36.70A.390 allows adoption of a moratorium on land use activities for sixty (60) days without holding a public hearing; and

WHEREAS, On January 10, 2017, the Board of County Commissioners unanimously called for an immediate moratorium on all applications for solar projects that qualify as major alternative energy facilities; and

WHEREAS, A public hearing must be held within sixty (60) days of the moratorium's enactment and findings of fact must be made to support the action; and

WHEREAS, After due notice the Board of Commissioners held a public hearing on March 9, 2017 at 6 p.m. where public testimony was received in regards to the moratorium; and

WHEREAS, After consideration of the staff report, public comment, and evidence submitted, the Board ordered that all applications for solar projects that qualify as major alternative energy facilities not be accepted for (6) months from January 10, 2017; and
Ordinance 2017-001
July 18, 2017

WHEREAS, According to RCW 36.70A.390, a moratorium may be effective for up to one (1) year when a work plan is developed for related studies; and

WHEREAS, A work plan has been developed and is attached as Exhibit "A"; and

WHEREAS, After due notice the Board of Commissioners held a public hearing on July 10, 2017 at 6 p.m. where public testimony was received regarding the moratorium; and

WHEREAS, After consideration of the staff report and work plan, public comment, and evidence submitted, the Board decided that the moratorium for solar projects that qualify as major alternative energy facilities shall be extended for an additional six months.

NOW THE BOARD FINDS:

1. A potentially high number of proponents for solar farms have shown interest in the development of solar energy facilities within the Kittitas County valley.
2. Large numbers of large solar energy facilities may have an impact upon the agricultural activity within the valley, which is a prime industry within the County.
3. The Board desires standards and/or criteria for the placement of such facilities.
4. A work plan has been developed for adoption of such standards and/or criteria within one year of placement of the moratorium. The work plan is attached as Exhibit "A".

NOW, THEREFORE, BE IT HEREBY ORDERED, that the moratorium on applications for solar projects that qualify as major alternative energy facilities shall continue for one (1) year from January 10, 2017.

ADOPTED this 18th day of July, 2017.

BOARD OF COUNTY COMMISSIONERS
KITTITAS COUNTY, WASHINGTON

ABSENT

Paul Jewell, Chairman

Laura Ostadecz, Vice-Chairman

Obie O'Brien, Commissioner
Ordinance 2017-004
July 18, 2017

ATTEST
CLERK OF THE BOARD

APPROVED AS TO FORM:

______________________________
Neil Caulkins,
Deputy Prosecuting Attorney
Exhibit "A":
Solar Moratorium Work Plan
<table>
<thead>
<tr>
<th>Task</th>
<th>Target Date</th>
<th>Notes</th>
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<tr>
<td>Staff Review</td>
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<tr>
<td>Staff review of existing Comprehensive</td>
<td>July 18, 2017</td>
<td>In progress</td>
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<td>Plan &amp; development regulations</td>
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<td>Staff review of potential siting criteria</td>
<td>July 18, 2017</td>
<td>In progress</td>
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<td>and regulations (other jurisdictions)</td>
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<td>Staff meetings w/ industry representatives</td>
<td>July 18, 2017</td>
<td>5/5 meeting w/ Puget Sound Energy</td>
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<td>6/27 meeting w/ Origis Energy</td>
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<td>Citizen Advisory Committee Meetings</td>
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<tr>
<td>Form Citizen Advisory Committee</td>
<td>August 1, 2017</td>
<td>Issue press release, accept applications, appoint committee</td>
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<td>Meeting #1</td>
<td>August 15, 2017</td>
<td>Agenda:</td>
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<td>Meet w/ industry representatives and</td>
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<td>• Present issues</td>
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<td>concerned citizen groups</td>
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<td>• Industry presentation</td>
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<td>o Industry criteria for siting/areas that aren't feasible</td>
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<td>Meeting Goals:</td>
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<td>• Building common ground for future discussions</td>
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<td>• Identify areas of needed study</td>
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<td>Meeting #2</td>
<td>September 5, 2017</td>
<td>Agenda:</td>
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<td></td>
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<td>• Review study information to date</td>
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<td>• Discussion of siting criteria and development regulations</td>
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<td>• Consider draft regulations</td>
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<td>• Provide direction for studies, data collection, mapping,</td>
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<td>draft regulations</td>
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<td>Task</td>
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<td>• Review Community Open House feedback</td>
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<td>• Review draft regulations</td>
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<td>Meeting Goal:</td>
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<td></td>
<td>• Review and revise draft regulations</td>
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<td>Inventory, Studies, Analysis</td>
<td>Inventory of existing conditions</td>
<td>August 2017</td>
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<td>Studies identified by working group and industry representatives</td>
<td>August-October 2017</td>
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<td>Analysis of study information</td>
<td>August-October 2017</td>
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<td>Community Open House</td>
<td>Receive community input regarding issues and study information to date</td>
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<td>Draft Regulations</td>
<td>Finalize draft regulations</td>
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<td>Public Review and Comment on Draft Regulations</td>
<td>Publish Draft Regulations for Comment</td>
<td>November-December 2017</td>
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<td>Planning Commission Hearing</td>
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<td>November 14, 2017</td>
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<td>SEPA</td>
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<td>BOCC Hearing</td>
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<td>December 19, 2017</td>
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<td>Solar Moratorium Work Plan Timeline</td>
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<td>Citizen Advisory Committee Meetings</td>
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<td>BOCC Hearing</td>
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An Ordinance Enacting a Six Month Moratorium on Accepting Proposals for Solar Projects That Qualify As Large Scale Alternative Energy Systems within the Kittitas County

WHEREAS, Strong interest has developed in the creation of solar projects within the Kittitas County and its agricultural areas; and

WHEREAS, Agricultural industry provides a large portion of the economic base within Kittitas County; and

WHEREAS, Major Alternative Energy Facilities include hydroelectric plant, solar farm, or wind farm as indicated within KCC 17.61.010(9)

WHEREAS, Concern has been expressed in public hearing and public comment that solar projects that would qualify as major alternative energy facilities are planned for lands used for agriculture; and

WHEREAS, Kittitas County is in the process of updating its current Comprehensive Plan and development regulations; and

WHEREAS, Advisory groups meeting on issues in the update of the Plan have expressed interest and concern over the rising number of major alternative energy facilities siting regarding solar power; and

WHEREAS, The update of the Comprehensive Plan and implementing regulations is expected to occur in 2017.

WHEREAS, RCW 36.70A.390 allows adoption of a moratorium on land use activities for sixty (60) days without holding a public hearing; and

WHEREAS, The Board of County Commissioners at a specific hearing to hear a conditional use permit request involving the establishment of a solar farm denied the request, and unanimously called for an immediate moratorium on all applications involving major alternative energy systems; and
WHEREAS, Public hearing must be held within sixty (60) days of the moratorium's enactment and findings of fact must be made to support the action. A moratorium may last six (6) months and be extended for up to one (1) year when accompanied by a work plan for moratorium research; and

WHEREAS, A resolution on the requested moratorium was passed and signed by the Board of County Commissioners on Tuesday, February 7, 2017 requesting the moratorium for sixty (60) days from January 10, 2017; and

WHEREAS, Notice of public hearing was made in the official newspaper of the County on February 23, 2017 and March 2, 2017 and posted on the County website on February 23, 2017; and

WHEREAS, After due notice a public hearing was held on March 9, 2017 at 6 p.m. where public testimony was received by the Board in regards to the proposal; and

WHEREAS, After consideration of evidence presented, received public comment and the staff report, the Board can make a decision regarding the moratorium.

NOW THE BOARD FINDS:

1. The Kittitas County Comprehensive Plan is being updated and planned for adoption by August of 2017.
2. A potentially high number of proponents for solar farms have shown interest in the development of solar energy systems within the Kittitas County valley.
3. Large numbers of large solar energy systems may have an impact upon the agricultural activity within the valley, which is a prime industry within the County.
4. The Board desires standards and/or criteria for the placement of such facilities.
5. Such siting criteria will be placed within the Comprehensive Plan objectives and policies in several of its elements.
6. Deciding such criteria at this time supersedes and undermines the development of the Comprehensive Plan.

NOW, THEREFORE, BE IT HEREBY ORDERED, that all application for solar projects that would qualify as major alternative energy systems not be accepted for application for (6) months from January 10, 2017 or until the Comprehensive Plan and the implementing regulations for the County are adopted by the Board of County Commissioners.

ADOPTED this 13th day of March, 2017.
BOARD OF COUNTY COMMISSIONERS
KITTITAS COUNTY, WASHINGTON

Paul Jewell, Chairman
Laura Osiadacz, Vice-Chairman
Obie O'Brien, Commissioner

APPROVED AS TO FORM:

Neil Caukkins,
Deputy Prosecuting Attorney
A RESOLUTION RECOMMENDING KITITAS COUNTY VALUES REGARDING PLACEMENT OF SOLAR FACILITIES BE CONSIDERED DURING EFSEC REVIEW OF TUUSSO ENERGY, LLC COLUMBIA SOLAR PHOTOVOLTAIC PROJECT

WHEREAS, On January 10, 2017, the Board of County Commissioners unanimously called for an immediate moratorium on all applications for solar projects that qualify as major alternative energy facilities; and

WHEREAS, According to RCW 36.70A.390, a moratorium may be effective for up to one (1) year when a work plan is developed for related studies; and

WHEREAS, A work plan has been developed that calls for a citizen advisory committee to assist in the process of developing standards and/or criteria for siting these projects; and

WHEREAS, On August 15, 2017, the Board of Commissioners formed the Solar Facilities Citizen Advisory Committee; and

WHEREAS, The Solar Facilities Citizen Advisory Committee has met five times and conducted one community open house for the purposes of gathering information and making recommendations regarding standards and/or criteria for siting of solar facilities that qualify as major alternative energy systems in Kittitas County;

WHEREAS, During these meetings, the Solar Facilities Citizen Advisory Committee has agreed on the following values:

1. High-quality irrigated agricultural land in Kittitas County is a limited resource, and should be protected.
2. Commercial solar facilities may be allowed on high-quality irrigated agricultural land, but only subject to the highest level of review and scrutiny, and with the requirement for an Alternatives Analysis that considers whether the proposed use can be reasonably accommodated on lands other than high-quality irrigated agriculture land. "Alternatives Analysis" means a study prepared by an applicant for a Solar Power Production Facilities (SPPF) that demonstrates why a particular Tier 3 (high-quality agriculture land) site is justified and why other Tier 1 or Tier 2 (not high-quality agriculture land) areas cannot reasonably accommodate the proposed SPPF. Economic factors may be considered along with other relevant factors in determining
that the use cannot reasonably be accommodated in other areas. Under this test, the following questions must be answered:

a. Does the property meet the criteria for Tier 1 or Tier 2 designation?

b. Can the proposed SPPF be reasonable accommodated on other Tier 1 or Tier 2 properties?

c. Can the proposed SPPF be reasonably accommodated on Tier 3 land that is already irrevocably committed to uses other than irrigated agriculture?

d. Can the proposed use be reasonably accommodated inside an urban growth area? If not, why not?

3. Reasonable and economically-viable alternatives do exist in Kittitas County for commercial solar facilities on lands other than high-quality irrigated agricultural land.

4. Conditions should be required for commercial solar facilities to mitigate impacts on surrounding properties; and

WHEREAS, TUUSSO Energy, LLC has submitted an application to the Energy Facility Site Evaluation Council (EFSEC) to develop, construct, and operate the Columbia Solar Photovoltaic Project, which would consist of five sites near Ellensburg with a combined maximum generating capacity of 25 megawatts; and

WHEREAS: The Board of County Commissioners request that EFSEC consider the values recommended by the Solar Facilities Citizen Advisory Committee during consideration of the TUUSSO applications.

NOW, THEREFORE, BE IT RESOLVED, that the Board of County Commissioners recommends that EFSEC consider the following values when considering the TUUSSO Energy, LLC Columbia Solar Photovoltaic Project: 1) High-quality irrigated agricultural land in Kittitas County is a limited resource, and should be protected; 2) Commercial solar facilities may be allowed on high-quality irrigated agricultural land, but only subject to the highest level of review and scrutiny, and with the requirement for an Alternatives Analysis that considers whether the proposed use can be reasonably accommodated on lands other than high-quality irrigated agriculture land; 3) Reasonable and economically-viable alternatives do exist in Kittitas County for commercial solar facilities on lands other than high-quality irrigated agricultural land; and 4) Conditions should be required for commercial solar facilities to mitigate impacts on surrounding properties.

ADOPTED this __________ day of ______________, 2017

BOARD OF COUNTY COMMISSIONERS
KITTITAS COUNTY, WASHINGTON

[Signature]
Paul Jewell, Chairman
Laura Osiadacz, Vice-Chairman

Obie O'Brien, Commissioner

APPROVED AS TO FORM:

Neil Caulkins,
Deputy Prosecuting Attorney
IN THE SUPERIOR COURT OF WASHINGTON
KITTITAS COUNTY

ONE ENERGY DEVELOPMENT LLC; and
IRON HORSE SOLAR LLC,

Plaintiffs,

vs.

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

Defendants.

Cause No. 17-2-00075-5

MEMORANDUM DECISION

INTRODUCTION

Oral argument on Petitioner’s Land Use Petition Act
(LUPA) appeal occurred on September 7, 2017. Timothy McMahon
appeared for the plaintiffs. Kenneth Harper appeared for the
Defendant Kittitas County and the Kittitas County Board of
Commissioners. James Carmody appeared for Defendants Save our
Farms and Craig and Patricia Clerf. After hearing all arguments,
the Court took the matter under advisement in order to review the
record and the pleadings submitted by all parties. The Court has
reviewed the voluminous hearing records, state statutes, county
code provisions, court cases, and all arguments presented.
1. **Factual Background** At issue is the granting or denial of a Conditional Use Permit for property owned by William Hanson, located east of the town of Kittitas on four flat parcels of land in the center of the Kittitas Valley, in the midst of farmland. Currently the land is used for farming a rotation of crops, including timothy hay and alfalfa. The soil is productive and the adjacent and nearby neighbors are also engaged in farming. The property owner proposed to lease his property to One Energy Development LLC and to convert the farmland into a 47.5 acre solar PV facility in an area which is zoned there and all around it as Agriculture 20 (A-20). The project is named the Iron Horse Solar LLC project. The land use designation for the property and the surrounding properties is Rural Working Land.

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

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1 The term Solar Farm is used both in the Kittitas County Code and in the application for conditional use permit. However, the facility involved is not a farm. It is a facility that is non-agricultural and industrial in nature.
be granted a conditional use permit for this particular property
by the Kittitas County Board of Commissioners.

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

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

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

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

"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)).

This appeal timely followed on February 23, 2017 with the filing of the Land Use Petition.


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

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference 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;
(d) The land use decision is a clearly erroneous application of the law to the facts;
(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

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

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

Plaintiff did not cite persuasive authority which would support giving that deference to the Hearing Examiner because of
a perceived or real deficiency in the Findings of Fact found by
the legal decision maker, and this Court declines to find that
the Hearing Examiner was the highest fact finder in this case.

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

3. **Analysis:**

Analysis of plaintiff’s Statement of Issues is organized
around specific LUPA standards of review.

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

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

The Board’s role in the conditional use permit process is to
determine whether the applicant has met the requirements of the
conditional use using KCC 17.60A.015 Review criteria. The
Hearing examiner did not have the authority to permit and
authorize a conditional use.

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

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

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

a. Recommendations of the Hearing Examiner or Planning Commission. Decision-making process by the board shall consist of a public meeting or meetings wherein the board reviews the written record transmitted from the Hearing Examiner for quasi-judicial matters and the Planning Commission for legislative matters and issues a written decision in resolution or ordinance form. During such meeting(s), appropriate county staff will present the record to the board, providing information 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."
c. Open record appeal of administrative SEPA actions when the board of county commissioners hears the appeal of the associated administrative permit decision.

d. Appeal of administrative determinations such as short plats, variances, and code interpretations.

e. Shoreline substantial development permits that are included in consolidated permit applications that are subject to Board review and action.

f. Review and provide initial local County approval, denial, or approval with conditions for shoreline conditional use permits and shoreline variances that are in consolidated permits applications that are subject to Board review and action.

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

a. All Quasi judicial review processes including:

   i. applications for preliminary plats

   ii. Rezone applications.

b. Other actions requested or remanded by the board of county commissioners.


d. Conditional use permits pursuant to the zoning code, KCC Title 17

e. In the case of an open record appeal of administrative SEPA actions when the Hearing Examiner 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,
challenge, or reply to" the explanations of the Hearing Examiner.

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

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

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

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

One Energy argues that the Findings of Fact in the
Resolution are substantively insufficient, to the extent that
there were essentially no findings of any substantive fact, which they then argue is a failure to follow KCC 15A.06.020, and thus a violation of Standard (1)(a). They argue that this failure to make findings means that deference must be given to the Hearing Examiner, which was the highest previous entity that made specific findings, so that the Hearing Examiner became the highest level finder of fact.

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

The defendant Kittitas County likewise argues that even if findings lack specificity or are conclusory, appellate review may proceed where the record of the oral decision enables the appellate court to review the decision making process. It argues that in this case, the oral record was extensive and clear as to the final factors upon which the commissioners based their decision. They also apparently argue that the actual criteria for conditional use permit review involve subjective general criteria which would not be conducive to empirical facts and thus are admittedly not so detailed as the hearing examiner's facts, though they are at least legally sufficient. While it is true
that the criteria are by nature general and to an extent, subjective, the court believes more specific findings are possible, desirable, and preferable in such a situation.

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

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

This Court finds these are marginally sufficient as findings of fact. They lack detail and any citation to the record itself. However, broad as they are, they are sufficiently specific to permit the Court to review the record and understand the decision. The oral record of the Commissioners' deliberations and decision was extensive, and the voluminous record as a whole
does allow this Court to review the decision for sufficiency of

evidence. A common sense reading of "findings" requirements here

should prevail. Although the Court was tempted to remand the
case to the Board of Commissioners to set out facts with greater

specificity, the Court is able to understand the reasoning of the
commissioners without so requiring. Thus it would be a pointless
gesture to send the matter back for improved findings, and the
Court is not inclined to engage in a pointless gesture.

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

III. The Resolution 2017-022 is not an erroneous interpretation

of law under RCW 36.70C.130 (1)(b).

The Board found in Finding Number 4, that "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) and KCC

17.60A.015 (7)(B)." Resolution 2017-022. The definition for

rural character referenced in the County Code from the RCW is:

"(16) "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.” RCW 36.70A.030(16).

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

Plaintiffs contend that the commissioners misapplied the “rural character” provision of the Kittitas County Code provision. They cite to the fact that two solar farms have already been approved, and neither was appealed with respect to conformance with the rural element of the comprehensive plan. The argument appears to be that the very inclusion of solar farms
as a conditional use in the A-20 zone declares that solar
facilities are consistent with rural character.

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

There is nothing inconsistent about a finding that major
alternative energy facilities may but also may not preserve rural
character as it applies to a specific project in a specific
place, even in the same zoning. One component of rural character
refers to “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.” There could be an almost
infinite number of configurations of project and siting that
could yield vastly different results from each other.
Additionally, since compliance with the Comprehensive Plan is made part of the local conditions which must be met for a conditional use permit, the applicant is mandated to show compliance with the Comprehensive Plan. *Cingular Wireless, LLC*, 131 Wn. App. 756 (2006). This court finds it is not error for the Commissioners to consider rural character as it is discussed in the comprehensive plan during the site specific analysis. The definition in the Growth Management Act at RCW 36.70A.030 is:

"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.

It is not an erroneous interpretation of law, specifically rural character, to consider whether a massive industrial project of this nature, encompassing 47.5 acres, eight feet high with large mechanized racks to follow the sun, set in the middle of treeless productive farm fields preserves rural character, interferes with visual compatibility of the surrounding area, or contains a built
environment which predominates over the natural landscape.

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

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."

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."

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

The plaintiff has not shown that the Commissioners engaged in an erroneous interpretation of the law surrounding rural character, under Factor 1)(b).

IV. The Resolution is supported by substantial evidence in light of the entire record, pursuant to RCW 36.70C.130(1)(c).
Plaintiff claims under the Standard for Granting Relief, RCW 36.70C.130(1)(c), that the resolution was not supported by evidence that is substantial when viewed in light of the whole record before the court. This is a sufficiency of evidence claim. Plaintiff has specifically objected in this capacity to

**Finding 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, and also to*

**Finding 3.** *The proposed use in the proposed location would not ensure compatibility with existing neighboring land uses.*

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

Plaintiff contends again in this section that the fact-finder is the Hearing Examiner. In fact, however, as in previous issue discussions, the fact-finder entitled to the inference is the Board of County Commissioners. The Board’s role in the conditional use permit process is to determine whether the applicant has met the requirements of the conditional use using
KCC 17.60A.015 Review criteria. The Hearing examiner did not have that authority to permit and authorize a conditional use. The Board in that instance does not exercise appellate jurisdiction but original jurisdiction.

Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. Phoenix Development, Inc. v. City of Woodinville, 171 Wn. 2d 820 (2011).

In addition, the court reserves credibility determinations for the fact finder and does not review them on appeal. J.L. Storedahl & Sons, Inc. v. Cowlitz County, 125 Wn. App. 1 (2004).

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

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

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

There was no evidence this Court could find in the record that the facility was in fact essential to the public convenience. The plaintiff instead focused on desirability. There was much discussion of the beneficial nature of clean, renewable energy. Both the proponents of the site and most of the opponents of the site agreed in general with the beneficial nature of clean energy in the abstract. However there was no testimony to the need for placement of this project at this location, other than an assertion that the energy would be sold to PSE, which entity provides some, though not all, of the
electricity in the Kittitas Valley. Evidence of the project’s desirability was countered by much discussion from opponents about the better suitability of land in other locations in the county for the purpose of a solar farm. Although there was testimony in the record as to potential property tax revenue and a projected amount of clean energy that could be added to the local power grid, the commissioners were not compelled to declare it desirable when weighed against the rest of the testimony in the record.

The solar project was described by proponents as the largest solar farm in the State of Washington. Opponents to the facility were concerned with the aesthetics of thousands of steel racks of panels, up to eight feet high, which are supported by steel pillars, driven 6 to 8 feet into the ground throughout 47.5 acres of prime growing land, as well as accompanied by boxes and instruments of electrical equipment. Local persons were concerned with the sixty acre parcels being surrounded by a huge chain link fence, eight feet high with strands of barbed wire at the top, and there were many comparisons with heavy industry or prisons. The impact on the view from the surrounding neighborhood at this flat mid-valley location is undeniable. The Commissioners were entitled to consider the aesthetics of such a facility. There was testimony from a local realtor about property values diminishing. The commissioners were entitled to believe this testimony over the assertions of the plaintiff that studies from
some eastern states show no change in property values around solar farms. Neighbors were concerned with potential issues with weeds in a sensitive timothy hay-growing area, and there was testimony about spraying. Taken in the light most favorable to the county, the Commissioners were entitled to consider this testimony about the difficulties with weed control and to weigh that over the plaintiff’s testimony about weeds. There were assertions about glare, about noise, and about the impact to wildlife from neighbors who have seen wildlife on that particular property, which commissioners were entitled to believe despite the SEPA findings.

There were pages of letters, maps, and photographs discussing the local opposition to the siting of the solar facility. There was testimony from numerous nearby landowners as to the character of the surrounding area, and to the potential impact of this clearly non-agricultural, heavily industrial property use to the people of this particular area. It was undisputed that the character of the surrounding area is farmland. The site itself is prime farmland and has been farmed for years. Plaintiffs suggest without evidence that this is true of all A-20 property, and that the opposition was not site specific; this Court finds that the opposition to the project was completely site specific. The character of every parcel of A-20 land is not before the court. Only this set of parcels is before the Court, and this neighborhood. Considering all facts and
inferences in the light most favorable to the Commissioners, a
fair minded person could make the finding that the proposed use
in the proposed location is not desirable to the public
convenience, and is detrimental to the character of the
surrounding neighborhood. There was substantial evidence in the
record as a whole to support the finding.

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

In this court’s review, however, there is not substantial
evidence sufficient to show that the project is detrimental or
injurious to the public health, peace, or safety. The complaints
about the facility involved the nature of the area and its effect
on nearby farmers. Despite questions about the potential for
broken panels to leach harmful chemicals into the soil, there was
not sufficient evidence produced that this was a likely event.
The court will strike that portion of Finding and Conclusion 2.
Regarding Finding 3: Some opposition to the project declared the site to have incompatibility with existing neighboring land uses. Plaintiffs argued in their submission to the County that the solar farm would have no impact on the ability of neighboring farmers to continue to farm. The testimony and discussion concerning special problems of weed control around timothy hay were most germane to this finding. There were also concerns expressed in the record regarding water control. Although the aesthetic issues relevant to Finding 2 do not impact the ability of neighbors to farm, the evidence, taken in the light most favorable to the Commissioners, is marginally sufficient for the Commissioners to make the finding and conclusion that the proposed use does not ensure compatibility with neighboring land uses.

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

Plaintiff has not shown insufficient evidence under Factor (1)(c).

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

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

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

The commissioners did express reservations about siting such a facility in the A-20 designation. However, it is also clear from the oral record when Commissioner Jewell pointed it out, that they knew they could not make their decision on this case based on a rethinking of conditional uses in A-20 generally. The
Court is satisfied that the commissioners were analyzing this particular project at this particular site rather than changing the conditional use criteria when making the findings that they made. The Court is not left with a definite and firm conviction that plaintiff's alleged mistake was committed.

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

CONCLUSION

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

Dated this 30th day of November, 2017.

[Signature]
Judge Hooper