

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Docket No. EF-210747

Council Order No. 881

Aurora Solar, LLC for Badger
Mountain Solar Energy Project,
Applicant

ORDER FINDING PROJECT
INCONSISTENT WITH LAND
USE REGULATIONS

BACKGROUND

Synopsis. *Aurora Solar, LLC, submitted an application to the Energy Facility Site Evaluation Council (EFSEC or Council) on October 7, 2021 for site certification of the proposed Badger Mountain Solar Energy Project site in Douglas County. Prior to October 7, 2021, the Douglas County Board of Commissioners passed an ordinance modifying its zoning regulations. Under the new regulations, the project is in an area where such a project is prohibited because of the new requirements that such facilities not be within seven miles of a city, town or airport boundary (including the outer overlay zone of Pangborn Airport), and not be within seven miles from habitat associated with sensitive, candidate, threatened or endangered plants or wildlife. The Applicant concedes that the project is not consistent with land use regulations. Because the proposed site sits within the seven mile zone from those boundaries, the Council has determined the proposed project was not consistent with current Douglas County land use and zoning regulations at the time the application was filed. RCW 80.50.090(2). The Council will schedule an adjudicative proceeding to consider whether to submit a recommendation to the Governor to preempt the local land use and zoning rules.*

- 1 **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on October 7, 2021 by Aurora Solar, LLC (the Applicant) to construct and operate Badger Mountain Solar Energy Project (the Facility), a solar photovoltaic (PV) project with an optional battery storage system. The Facility would be located in unincorporated Douglas County approximately 3.5 miles east of the East Wenatchee city limit boundary and south of Badger Mountain Road (the Site). The Facility would have a maximum generating capacity of 200 megawatts (MW) with an optional 200 MW battery energy storage system.

- 2 **Land Use Consistency Hearing.** RCW 80.50.090(2) requires EFSEC to “conduct a public hearing to determine whether or not a proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” On October 11, 2021, EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled a virtual hearing by Microsoft Teams or by telephone participation for 5:30 p.m. on Wednesday, November 17, 2021.¹
- 3 On November 17, 2021, the Council conducted a virtual land use consistency hearing, to hear testimony regarding whether the Facility was consistent and in compliance with Douglas County’s local land use provisions. The following EFSEC members were present at the March 16, 2021, hearing: Kate Kelly (Department of Commerce), Mike Livingston (Department of Fish and Wildlife), Leonard “Lenny” Young (Department of Natural Resources), and Stacey Brewster (Utilities and Transportation Commission). Kathleen Drew, EFSEC Chair, presided over the hearing.
- 4 Assistant Attorney General Megan Sallomi, Counsel for the Environment, was present for the land use consistency hearing.
- 5 Timothy McMahan, Stoel Rives Law Firm, represented the Applicant and spoke on the Applicant’s behalf. The Council also heard testimony from: Kirk Bromley, an owner of land within the Facility site; Mickey Fleming of the Chelan-Douglas Land Trust; Will Meehey, a resident of Badger Heights, a development just below the proposed Site; and Pat Doneen, a landowner in Douglas County.
- 6 *Applicant’s Description of Proposed Facility.* Badger Mountain Solar Energy Project, a proposed 200-megawatt solar photovoltaic energy generation facility with an optional 200-megawatt battery energy storage system is to be located in unincorporated Douglas County. The project would be located approximately 3.5 miles east of the East Wenatchee city limit boundary and south of Badger Mountain Road.

According to the application, the proposed solar project would be located partially within the county’s Rural Resource 20 (RR-20) zoning district, and partly within the county’s

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The Council sent this Notice to all interested persons on the mailing list for the Facility including landowners within one mile, state and county agencies, Washington Tribes, Washington State Attorney General, fisheries, Douglas county commissioners, and organizations concerned about the environment. Further, the Council posted this Notice in English and Spanish on its public website, distributed the Notice to local libraries, and purchased advertisement in The Columbia Basin Herald, Wenatchee World and Empire Press, the local daily newspapers of general circulation.

Dryland Agriculture (A-D) zoning district. Application for Site Certification, Attachment D: Land Use Consistency Review at Sec. 2.3.1 and Sec. 2.4.1.

- 7 The twenty-three parcels on which the Facility will be located will together constitute the “Facility Parcels.” The owners of the parcels are listed in a table in Part 1, Section A4 of the initial application. The owners are: Bromley Brothers; Kirk Bromley; Noreen Bromley Darling; Jeffrey Dane and Kellen Keane; State of Washington; The Badger Mt. FLP; Donna Marleen Witten; and Marleen Witten. The Applicant has executed or is pursuing options to lease with the landowners for adequate acreage to accommodate the Facility long-term.
- 8 The Board of County Commissioners for Douglas County (Commissioners) adopted Douglas County Ordinance TLS 21-17-47B, which became effective on July 20, 2021 and remains effective for twelve months unless renewed. The Commissioners determined that in light of a number of inquiries relating to the development of solar and wind farms in unincorporated Douglas County that interim controls needed to be in place to protect the health, safety and general welfare of the county’s residents and property. At a public hearing on October 6, 2020, the Commissioners repealed an ordinance placing a moratorium on wind and solar energy farms and replaced it with amended zoning code sections.
- 9 Ordinance TLS-21-17-47B allows energy generation facilities, including solar projects, to be built in zones designated as A-D and RR-20. The ordinance also states, however, that wind and solar energy generation facilities cannot be located within seven miles from an Urban Growth Area boundary, city or town limit boundary, municipal airport boundary, and Pangborn Airport boundary and Pangborn Airport outer overlay zone boundary. In addition, such facilities cannot be located within seven miles of “habitat associated with sensitive, candidate, threatened or endangered plants or wildlife as identified on state and federal lists.”
- 10 The proposed project lies within the 7 mile buffer from the East Wenatchee City limits, the East Wenatchee Urban Growth Area boundary, the Pangborn Airport Boundary and the Pangborn Airport outer overlay zone boundary. See Figure A-7 in Attachment A of the initial application. In addition, the Applicant asserts that all of unincorporated Douglas County lies within 7 miles of habitat as described in the ordinance. As such, the Applicant agrees that the site is not consistent with current land use regulations but would like to proceed with the application and is not seeking an expedited process.

DISCUSSION

I. Land Use Consistency Determination

- 11 The purpose of the land use hearing is “to determine whether at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances.”² In this order, the Council will refer to land use plans and zoning ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land use consistency.”
- 12 The Council’s evaluation of land use consistency is not dispositive of the Application and a determination of land use consistency is neither an endorsement nor an approval of the Project.³ The evaluation pertains only to the general siting of categories of uses, taking into account only the Site (in this case, the Sites) and not the Project’s construction and operational conditions.
- 13 Whether a particular project will actually create on- or off-site impacts (including impacts to the environment) is considered separately through the State Environmental Policy Act (SEPA) process, during the Council’s adjudication (if applicable), through the environmental permitting processes (if applicable), and through other Council processes (if applicable).⁴ The Council’s ultimate recommendation to the Governor will be made after full and thorough consideration of all relevant issues.
- 14 To be eligible for expedited review, EFSEC must find that the project is “consistent and in compliance with city, county, or regional land use plans or zoning ordinances,” RCW 80.50.075(1), as determined at a public land use hearing, RCW 80.50.090(2). A project meets this initial standard so long as it “can be permitted either outright or conditionally.”⁵ Whether applicable conditional use criteria are in fact met is a question for later EFSEC proceedings,⁶ after which EFSEC may recommend and impose conditions of approval in the Site Certification Agreement (SCA).

2 WAC 463-26-050.

3 In re Whistling Ridge Energy Project, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council’s further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), see also RCW 80.50.110(2) and WAC 463-28-020. If they are preempted, the Council will include in any proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.

4 RCW 80.50.090(3), RCW 80.50.040(9), (12), WAC 463-30, WAC 463-47, WAC 463-76, WAC 463-78.

5 In re Columbia Solar Project, Docket No. EF-170823, Council Order – Expedited Processing, ¶ 35 (April 17, 2018).

6 Id., ¶ 36.

- 15 The EFSEC process contemplates that the Applicant will coordinate with Douglas County to attempt to determine whether the project would be consistent and compliant with the jurisdiction’s land use provisions.⁷ If through these discussions Douglas County had determined the project is indeed consistent and compliant with its land use provisions, it could have provided, and the applicant could have presented to the Council, a certificate attesting to that fact. Such a certificate provides prima facie proof of consistency and compliance with County land use plans and zoning ordinances.⁸
- 16 **Definitions of “Land Use Plan” and “Zoning Ordinances.”** The term “land use plan” is defined by statute as a “comprehensive plan or land use element thereof adopted ... pursuant to” one of the listed planning statutes.⁹ EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area’s development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.¹⁰ Comprehensive plan elements and provisions that do not meet this definition are outside of the scope of the Council’s present land use consistency analysis. The term “zoning ordinance” is defined by statute as an ordinance “regulating the use of land and adopted pursuant to” one of the listed planning statutes.¹¹ EFSEC has interpreted this definition as referring to those ordinances that regulate land use by creating districts and restricting uses in the districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses. Ordinances that do not meet this definition are outside of the scope of the Council’s present land use consistency analysis.
- 17 EFSEC has defined the phrase “consistent and in compliance” based on settled principles of land use law: “Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency.”¹²
- 18 **Proof of non-consistency and non-compliance.** EFSEC accepts the Applicant’s concession that the project is not consistent or compliant with Douglas County land use provisions.
- 19 Even when a project is non-compliant with local land use provisions, the governor, upon recommendation from the council, may preempt land use plans and zoning

7 WAC 463-26-090.

8 Id.

9 RCW 80.50.020(14).

10 In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

11 RCW 80.50.020(22).

12 Whistling Ridge Order at 10 n 15.

regulations to authorize the siting of an energy facility.¹³ In such cases, the council will conduct an adjudication to consider whether to recommend that the state preempt local plans or regulations that would prohibit the site.¹⁴

FINDINGS OF FACT

- 20 (1) On October 7, 2021, Aurora Solar LLC submitted an application for site certification to construct and operate Badger Mountain Solar Energy Project (the Facility), a solar photovoltaic project with an optional battery storage system, on 4,399 leased acres in Douglas County, Washington.
- 21 (2) On November 17, 2021, the Council convened a virtual land use consistency hearing, pursuant to due and proper notice. The Council received testimony from the Applicant’s attorney. The Council also heard testimony from: Kirk Bromley, an owner of land within the Facility site; Mickey Fleming of the Chelan-Douglas Land Trust; Will Meehey, a resident of Badger Heights, a development just below the proposed Site; and Pat Doneen, a landowner in Douglas County.
- 22 (3) The Site is located in unincorporated Douglas County, Washington. The Site is located within 7 miles of the East Wenatchee City Limits, the East Wenatchee Urban Growth Area boundary, the Pangborn Airport Boundary and the Pangborn Airport outer overlay zone boundary.

CONCLUSIONS OF LAW

- 23 (1) The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.075 and WAC chapter 463-43.
- 24 (2) The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
- 25 (3) Under Douglas County Code (DCC), the Facility meets the definition of an “energy generating facility.”
- 26 (4) The Facility Site is on land zoned as A-D or RR-20, meaning it is zoned for dryland agriculture and rural resource uses. Energy facilities as a primary use are permitted outright in the A-D and RR-20 districts or zones, but subject to buffers imposed by DCC Section 18.16.355. DCC Section 18.40.020(T), DCC Section

13 RCW 80.50.110 and *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council and Christine O. Gregoire, Governor of the State of Washington*, 165 Wash.2d 275, 285-86 (2008).

14 WAC 463-29-060

18.31.020(T) (effective July 20, 2021).

- 27 (5) Facilities with energy generation as a primary use must “be located at least 7 miles from an urban growth area boundary, or city/town limits boundary, municipal airport boundary, Pangborn Airport boundary and Pangborn Airport outer overlay zone boundary.” DCC Section 18.16.355(B). In addition, such facilities must “be located 7 miles from habitat associated with sensitive, candidate, threatened or endangered plants or wildlife as identified on state and federal list.” DCC Section 18.16.355(C).
- 28 (6) The site is not in compliance with Douglas County’s applicable zoning ordinances in effect as of the date of the application.
- 29 (7) Pursuant to WAC 463-28-060 and 070, the matter will be scheduled for an adjudication to consider whether the council should recommend to the governor that the state preempt Douglas County’s land use plans, zoning ordinances, or other development regulations for the site or portions of the site for the proposed facility, and if so, to determine conditions to be included in a draft certification agreement that consider local governmental or community interests affected by the construction or operation of the alternative energy resource and the purposes of the ordinances to be preempted pursuant to RCW [80.50.110\(2\)](#).

ORDER

THE COUNCIL ORDERS:

- 30 (1) Aurora Solar LLC’s application is not consistent with local land use and zoning regulations. The matter shall be set for an adjudication to consider whether to recommend preemption of Douglas County’s land use and zoning regulations. The adjudication may be held concurrent with, or separate from the adjudication held under RCW 80.50.090(3).

DATED at Olympia, Washington, and effective March 13, 2022.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL


KATHLEEN DREW, Chair