

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application
No. 2022-____
Docket No. EF-220356

Council Order No. ____

HOHI bn, LLC, for the Hop Hill Solar
Storage Project, Applicant

**ORDER FINDING PROJECT
INCONSISTENT WITH LAND
USE REGULATIONS**

BACKGROUND

Synopsis. *HOHI bn, LLC, submitted an application to the Energy Facility Site Evaluation Council (EFSEC or Council) on December 22, 2022, for site certification of the proposed Hop Hill Solar Storage Project site in unincorporated Benton County. On December 21, 2021, Benton County Board of County Commissioners adopted Ordinance Amendment (OA) 2021-004, which removed “solar power generator facility, major” from the list of uses allowed with a conditional use permit (CUP) in the Growth Management Act Agricultural District (GMAAD). The project does not comply with land use regulations after the adoption of OA 2021-004. Because the proposed site would be a solar power generator facility, major, within the GMAAD zone, the Council has determined the proposed project was not consistent with current Benton County land use and zoning regulations at the time the application for site certification was filed with EFSEC. Revised Code of Washington (RCW) 80.50.020(3); 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 plans and zoning rules.*

- 1 **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on December 22, 2022, by HOHI bn, LLC (the Applicant) to construct and operate Hop Hill Solar and Storage Project (the Project), a solar photovoltaic (PV) project with a battery storage system, located in unincorporated Benton County. The Project would be an up-to 500-megawatt (MW) solar photovoltaic (PV) generation facility coupled with an up-to 500-MW battery energy storage system (BESS), as well as related interconnection and ancillary support infrastructure.
- 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 February 10, 2023,

EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled a partially in-person and virtual hearing by Microsoft Teams or by telephone participation for 5:00 p.m. on Thursday, February 23, 2023.¹

- 3 On February 23, 2023, the Council conducted a hybrid in-person/virtual land use consistency hearing, to hear testimony regarding whether the Project was consistent and in compliance with Benton County's local land use provisions. The following EFSEC members were present at the February 23, 2023, hearing: Kate Kelly, (Department of Commerce), Mike Livingston (Department of Fish and Wildlife), Stacey Brewster (Department of Utilities and Transportation Commission), Leonard "Lenny" Young (Department of Natural Resources), Kathleen Drew, EFSEC Chair, presided over the hearing. Also present was Paul Krupin, representing Benton County.
- 4 Tim McMahan, Attorney, represented the Applicant and spoke on the Applicant's behalf. Chris Wissel-Tyson, Vice President, Development with HOHI bn, LLC, also spoke on the Applicant' behalf. The Council also heard testimony from: Michelle Cooke, Benton County Planning Manager, and Russell Walker, Operating Engineers Local 302.
- 5 **Applicant's Description of Proposed Facility - Hop Hill Solar Storage Project.** The Project would be a solar photovoltaic (PV) project with a battery storage system, located in unincorporated Benton County. The Project would be an up-to 500-megawatt (MW) solar photovoltaic (PV) generation facility coupled with an up to 500-MW battery energy storage system (BESS), as well as related interconnection and ancillary support infrastructure. The Siting Area would encompass approximately 22,020 acres within the boundaries of 58 assessor parcels.
- 6 The Project would be located entirely on land within the Benton County GMAAD zone. *Application for Site Certification, Section C: Site Summary, p. 5.*
- 7 The fifty-eight parcels on which the Project will be located will together constitute the Project Siting Area. The owners of the parcels are listed in a table in Attachment B: Parcels and Legal Descriptions of the initial application. The owners are: Elmer C Anderson Inc.; Robert Ranch 5+1 LLC; Sportfisher Partnership, Elmer C Anderson Inc. & Anderson Rattlesnake Farms General Partnership, Zircle Four Feathers Vineyards LLC, Anderson Jr. Henry & Grote et. al., Anderson Family Holdings LLC, Anderson Rattlesnake Farms, and

¹ The Council sent this Notice to all interested persons on the mailing list for the Facility including landowners within one mile and to all subscribers to EFSEC's general minutes and agenda list. 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 Tri-City Herald and the Corvallis Gazette Times, the local daily newspapers of general circulation.

Wautoma Energy LLC, The Applicant has executed or is pursuing a Lease or Easement Option Agreements with each identified property owner within the Siting Area. *Application for Site Certification, A,3: Property Owner, p. 1; Application for Site Certification, Attachment B.*

8 The Board of County Commissioners for Benton County (Commissioners) adopted Benton County Ordinance Amendment (OA) 2021-004, on December 21, 2021. OA 2021-004 removed the CUP option for commercial solar power generator facility, major from the GMAAD. The purpose of the removal of the CUP option for commercial solar power generator facility, major was to 1) protect long-term commercially agricultural lands, 2) limit incompatible & non-agricultural uses, 3) conserve critical areas & habitat, 4) protect visual resources, and 5) protect rural character. *Board of Benton County Commissioner's Regular Board Meeting (2021, December 21).*

9 The Applicant is not seeking an expedited process.

10 **DISCUSSION**

11 **Land Use Consistency Determination**

12 Subsequent to the informational public hearing, the council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances on the date of the application. RCW 80.50.090(2).

13 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.”

14 **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.³ 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.⁴ 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

² WAC 463-26-050(2).

³ RCW 80.50.020(14).

⁴ *In re Northern Tier Pipeline*, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

- statutes.⁵ 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.
- 15 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.”⁶
- 16 The requirements of “consistent and in compliance” in RCW 80.50.090(2) are conjunctive, that is to say that both requirements need to be met. Applicant’s argument that, “RCW 80.50.090 requires consideration of whether the solar facility was in compliance with the zoning code at the time of the application for site certification *or* consistent with and in compliance with the comprehensive plan” is not found within the plain and clear language within the RCW and would artificially broaden the scope of the code. (Emphasis added). *Energy Facility Site Evaluation Council (2023, February 23). Hop Hill Solar Project Land Use Consistency Hearing, p. 7.* This interpretation of RCW 80.50.090 is not found persuasive.
- 17 "Application" means any request for approval of a particular site or sites filed in accordance with the procedures established pursuant to RCW 80.50.020.
- 18 **Proof of non-compliance.** The project is not compliant with Benton County land use provisions as of December 22, 2022, the date it filed its application for site certification with EFSEC. Because the proposed site would be a solar power generator facility, major, within the GMAAD zone, the Council has determined the proposed project was not in compliance with current Benton County zoning regulations at the time the application was filed.
- 19 The application contemplated in RCW 80.50.090(2) is the application with EFSEC, not the CUP application with Benton County.
- 20 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 regulations to authorize the siting of an energy facility.⁷ 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.⁸

5 RCW 80.50.020(22).

6 *In re Whistling Ridge Energy Project*, Council Order No. 868 at 10 n 15 (October 6, 2011)..

7 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).

8 WAC 463-29-060

FINDINGS OF FACT

1. On December 22, 2022, HOHI bn, LLC, submitted an application for site certification to construct and operate Hop Hill Solar Storage Project (the Project), a solar photovoltaic project with an optional battery storage system, on 22,020 leased acres in Benton County, Washington.
2. Project would be an up-to 500-megawatt (MW) solar photovoltaic (PV) generation facility coupled with an up-to 500-MW battery energy storage system (BESS), as well as related interconnection and ancillary support infrastructure.
3. On February 23, 2023, the Council conducted a hybrid in-person/virtual land use consistency hearing, to hear testimony regarding whether the Project was consistent and in compliance with Benton County's local land use provisions.
4. The Project would be located in unincorporated Benton County, Washington. The Project would be located entirely on land within the Benton County Growth Management Act Agricultural District (GMAAD). The primary land use of the parcels of the Project site would be for solar power generators, but also the following supporting components: Project collector substation, overhead 230-kilovolt (kV) / 500-kV generation-tie transmission line (gen-tie line), operations and maintenance (O&M) structure, associated Project access roads, and perimeter fencing.
5. On December 21, 2021, the Board of County Commissioners for Benton County adopted Benton County Ordinance Amendment (OA) 2021-004. OA 2021-004 removed the conditional use permit (CUP) option for commercial solar power generator facility, major, from the GMAAD.

CONCLUSIONS OF LAW

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.
2. The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
3. "Solar Power Generator Facility, Major" means the use of solar panels to convert sunlight directly or indirectly into electricity. Solar power generators consist of solar panels, charge controllers, inverters, working fluid system, and storage batteries. Major facilities are those that are developed as the primary land use for a parcel on which it is located and does not meet the siting criteria for a minor facility in BCC 11.03.010(168). Benton County Code

(BCC)11.03.010(167).

4. "Solar Power Generator Facility, Minor" means the use of solar panels to convert sunlight directly or indirectly into electricity. Solar power generators consist of solar panels, charge controllers, inverters, working fluid system, and storage batteries. Minor facilities are those that are sited on the power beneficiary's premises, are intended primarily to offset part or all of the beneficiary's requirements for electricity/gas, and are secondary or accessory to the beneficiary's use of the premises. BCC 11.03.010(168).
5. As the primary land use for the Project site would be for solar power generation and not primarily to offset part or all of the Applicant's requirement for electricity, the Project is a solar power generator facility, major, as defined in BCC 11.03.010(167).
6. Effective December 21, 2021, solar power generator facilities, major, may not apply for a conditional use permit for lands contained within the GMAAD. Benton County Ordinance Amendment (OA) 2021-004.
7. As the Applicant filed the application for site certification with EFSEC on December 22, 2022, after the effective date for OA 2021-004 on December 21, 2021, the Project site is not in compliance with Benton County's applicable zoning ordinances.
8. As the application has failed the "in compliance" prong of the conjunctive "consistent and in compliance" requirement in RCW 80.50.090(2), analysis of the "consistent" prong is not ripe at this stage of the proceeding.
9. Applicant's CUP application with Benton County is not before the Council. Benton County's denial of the CUP application is not probative as to whether or not the Project was in compliance with Benton County's applicable zoning ordinances at the time it filed its site certification application with EFSEC in December 2022. It is unclear from the record if that CUP application denial contained independent appeal rights or if those rights were exercised. Notwithstanding if any appeal was or was not pursued, the Council does not have the jurisdiction to determine the appropriateness of Benton County's denial of the Applicant's December 2021 CUP application.
10. 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 Benton 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

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RCW 80.50.110(2).



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ORDER

THE COUNCIL ORDERS:

HOHI bn, LLC's, application is not in compliance with local zoning regulations. The matter shall be set for adjudication, concurrent with the general adjudication required by RCW 80.50.090(4), to consider whether to recommend preemption of Benton County's land use plans and zoning regulations. If the environmental impact of the proposed facility is determined by the EFSEC responsible official to be non-significant or if the facility's impacts will be mitigated to a non-significant level, the Council may limit the topic of the general adjudicative proceeding required by RCW 80.50.090(4) to whether any land use plans or zoning ordinances with which the proposed site is determined to be inconsistent should be preempted.

DATED at Olympia, Washington, and effective _____.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

KATHLEEN DREW, Chair