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July 24, 2017

Carlotta Hecker
Chairwoman, Board of Adjustment
2825, 3rd Avenue North
4th Floor
Billings, MT 59102

RE: ***Request for Board of Adjustment Appeal of Permit PLN-17-00345***

Dear Ms. Hecker:

I am writing on behalf of Karen Kosiarek and other similarly situated land owners residing or owning lots within Lone Eagle Subdivision negatively impacted by the City-County Planning Division's issuance of Zoning Compliance Permit #PLN-17-00345 to MT Sun, LLC. The permit allows the applicant to develop an 80 megawatt photovoltaic solar power generation facility comprising 460 acres and occupying two separate portions of Montana School Trust Land and adjacent privately owned land, all located near Alkali Creek. The affected School Trust Land parcels are zoned A-1 Agricultural Open Space.

The proposed solar power generation facility is not an allowed use within an A-1 Agricultural Open Space Zoning District and is therefore subject to Yellowstone County's special review zoning procedures. The County's definition of A-1 Agricultural-Open Space defines such districts as:

A district to protect and preserve agricultural lands for the performance of a wide range of agricultural functions. The intent is to limit the scattered intrusion of uses not compatible with an agricultural environment; to encourage agricultural pursuits and protect environmental concerns.

Within the content of one of its scoping letters the Montana Department of Natural Resources described the proposed solar power generation facility as having track mounted photovoltaic panels not exceeding 10' feet in height and provided "an example of how the panels would generally look" as set forth in Exhibit A. Given the County's description of the agricultural land use protections intended by an A-1 Agricultural Open Space designation, it is patently obvious that this proposed industrial facility comprising

both a substation and untold numbers of track mounted solar panels is not compatible with agricultural open space uses.

The Board of Adjustment should accept this appeal on its merits and set a hearing because the Planning Department improperly processed the original application as an allowable use in reliance upon its mistaken internal interpretation of the nature of the proposed land use and with apparent ignorance of the status of the entity proposing the development. The Planning Department overlooked controlling definitions and other internal interpretation directives found within the Unified Billings Zoning Code (hereafter "BC"), resulting in processing of the application as an allowable use, and thus circumventing the necessity for special review by the County Zoning Commission, an opportunity for public notice and participation, and a final determination by the County Commission. The Planning Department effectively processed the application in secret and with no public scrutiny. Because of this secrecy, Ms. Kosiarek and other Lone Eagle Subdivision landowners had no notice of the Planning Department's permit determination or their individual right of redress to appeal the determination to the Board of Adjustment.

In formulating its permit issuance determination the Planning Department reviewer was required to consider whether the proposed facility is a compatible use of land that would maintain a desirable living environment, stabilize and protect residential harmony and promote profitable business use. BC§27-301. The Planning Department did not consider these factors. Instead, the Planning Department gave a green light to a sprawling industrial power generation facility that would remove hundreds of acres of agricultural land from grazing or cultivated production, prevent agricultural pursuits, and obliterate practical open space considerations, all contrary to the express purpose of A-1 Agricultural-Open Space lands. Along the way the Planning Department surreptitiously skipped the safeguards of special review with permit issuance by a planning assistant, without public input before or public notice after its issuance after, and then when discovered and challenged by Ms. Kosiarek, told her that her appeal was untimely, and then unilaterally dismissed her right to appeal the permit determination to the Board of Adjustment without any delegated or actual authority to deny her appeal right as untimely or unfounded.

I. MS. KOSIAREK HAS STANDING TO APPEAL

Ms. Kosiarek acquired land in 2016 located at Geocode 03-1032-09-3-15-15-0000, consisting of a 16.174 acre lot located within Lone Eagle Subdivision. Ms. Kosiarek's land abuts and shares a common boundary line with a portion of the proposed facility identified as disturbance area C (comprised of 166 acres). See map attached to Ex. A. Ms. Kosiarek's land is surrounded by the four separate proposed development disturbance areas, as are all landowners of Lone Eagle Subdivision. See Lone Eagle Subdivision boundary outline on map at page 2, Ex. A.

Ms. Kosiarek and all landowners within Lone Eagle Subdivision have been harmed and aggrieved by the Planning Department's actions in issuing the permit. These aggrieved parties were then further harmed by Mr. Friday's refusal to process Ms. Kosiarek's written appeal letter dated May 12, 2017. See Ex. B. Upon its receipt, Mr. Friday instead performed an informal

review of the “administrative decision of the Planning Division” in its issuance of the permit. The provisions of MCA§76-2-226 (1) expressly authorize Ms. Kosiarek to pursue this appeal as an aggrieved person directly to the Board of Adjustment. Mr. Friday was compelled by the same statute to “transmit to the Board in a timely manner all papers constituting the record upon which the action appealed was taken” after he received Ms. Kosiarek’s appeal. See MCA§76-2-226 (2). Instead of informing the Board of Adjustment of this review and appeal request and transmitting the record, Mr. Friday unilaterally deemed the appeal untimely and substantively unfounded. By doing so, Mr. Friday then circumvented an automatic stay of the permit issuance causing further harm to Ms. Kosiarek and other adversely affected parties. See MCA§76-2-226 (3) and BC§27-1510(d). Thus, Ms. Kosiarek has standing and is a proper party to this appeal.

II. MS. KOSIAREK HAS NOT EXHAUSTED HER APPEAL RIGHT AND IT WAS TIMELY INVOKED

The record on appeal to the Board of Adjustment is void of any evidence of actual or constructive notice given by the Yellowstone County Planning Department to Ms. Kosiarek, or to other aggrieved landowners in Lone Eagle Subdivision of its issuance of the permit to the applicant. As explained by Ms. Kosiarek to Mr. Friday in her May 12th letter, she first learned of the Planning Department’s permit issuance on May 4, 2017 after receiving a copy from the Planning Department in response to her public records request. She then timely requested review of the decision just eight days later. Mr. Friday then informed Ms. Kosiarek that any appeal to the Board of Adjustment had to be filed within 30 days of the decision date and “an administrative appeal to the County Board of Adjustment is out of time.” See second paragraph of Friday June 2, 2017 response letter at Ex. C. This is a misstatement of state law and Board of Adjustment rules. The provisions of MCA§76-2-226 (1) merely required Ms. Kosiarek to pursue this appeal “within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment, a notice of appeal specifying the grounds of the appeal.” She did just that.

Mr. Friday improperly interpreted the provisions of Article 27 within the Billings Zoning Code addressing the rules of the Board of Adjustment. The only rule on point found within Article 27 is set forth at BC§27-1510(c), which states:

Hearing, appeals, notices. Appeals to the county board of adjustment may be taken by any person aggrieved or by any office, department or bureau of the county affected by any decisions of the administrative officer. Such appeal shall be taken within a reasonable time, not to exceed thirty (30) days, by filing a notice of appeal specifying the grounds thereof with the officer from whom the appeal is taken and with the county board of adjustment. The officer from whom the appeal is taken shall forthwith transmit to the board all papers constituting the record upon which the action appealed was taken.

The county board of adjustment shall fix a reasonable time for the hearing of appeal, not to exceed thirty (30) days, give public notice thereof, as well as due notice to the parties in interest, and render a decision within a reasonable time not

to exceed ten (10) days thereafter. At the hearing any party may appear in person, by agent or attorney. (Emphasis added)

Mr. Friday is mistaken because the appeal provisions of Article 27 within the Billings Zoning Code are silent as to any triggering mechanism from which Ms. Kosiarek or other aggrieved persons or entities should begin to count the 30-day period from which an appeal could be taken of the Planning Department's permit issuance. There is no "computation of time" or other directive found within Article 27. How was Ms. Kosiarek to even know that she was an aggrieved person with a right appeal the permit determination to the Board of Adjustment if she had no notice of the determination at the time it was issued by the Planning Department?

A practical and reasonable triggering mechanism for appeal would be when Ms. Kosiarek first had actual or constructive notice of the determination and became "aggrieved" as contemplated in BC§27-1510(c). Ms. Kosiarek became "aggrieved" of the County's actions once she learned of the Planning Department's mistake when receiving a copy of the permit issuance on May 4, 2017. She then pursued her appeal in writing within a reasonable time (eight days later) as contemplated by Board of Adjustment rules. Upon his receipt of the appeal letter, Mr. Friday had only one course to follow in compliance with Board of Adjustment rules; he or the zoning coordinator under his Department's authority was to then transmit the appeal record to the Board of Adjustment in furtherance of the administration of the Billings Zoning Code. See BC§27-1602. This did not happen.

Mr. Friday has no authority to issue an administrative denial of Ms. Kosiarek's appeal. He cited no rule or statute vesting him with this internal review authority in his June 6th response letter. If Mr. Friday was acting as a "zoning coordinator," within the Planning Department, he did not have authority to make a final determination regarding the propriety of the use permit or the appeal expiration period. BC§27-1602 states as follows:

The zoning coordinator shall not have authority to act in any final reviewing capacity and any questions as to interpretation or enforcement shall be determined by the appropriate board, commission or department, unless such authority is specifically allowed in a chapter.

But, Mr. Friday did just that. He was informed by Ms. Kosiarek that she was an aggrieved party who did not have notice of the permit determination until May 4, 2017 and then wrote requesting Planning Division review on May 12, 2017, or just eight days after having actual notice of the decision of the Planning Department, and then he, Mr. Friday acted in a final reviewing capacity to deny the review request on substantive grounds and informed her that her right to an appeal to the Board of Adjustment had timed out. In the absence of some statute or Board of Adjustment rule delegating authority to the Director of Planning and Community Services Department to act in this quasi-judicial/administrative manner, Mr. Friday exceeded his authority.

If the Planning Department properly processed the application under special review by referral to the County Zoning Commission then public notice and an opportunity to participate would have been preserved. Under special review processing the Planning Department would

have given at least 15-days' notice of the hearing to consider the application in the newspaper and would have mailed notices to property owners within three hundred (300) feet of the exterior boundaries of the proposed 80 megawatt photovoltaic solar power generation facility. See BC§27-1509(c).

III. THE PHOTOVOLTAIC SOLAR POWER GENERATION INDUSTRIAL FACILITY IS NOT "AN ALLOWED USE" IN A-1 AGRICULTURAL-OPENS SPACE AND THE APPLICATION IS SUBJECT TO SPECIAL REVIEW

In reaching its February 14, 2017 determination that the solar farm is an allowed use under the Unified Billings Zoning Code a planning assistant within the Planning Department selectively parsed language from the residential zoning regulations set forth in BC§27-305 to arrive at her determination. Though not discernible on the face of the February 14, 2017 determination letter or within the brief application form comments authored by the planning assistant, it has been confirmed by Mr. Wyeth in his June 2nd letter that the "allowable use" determination was premised on an application of the use matrix set forth at BC§ 27-305. This Section expressly relates to allowable uses within residential areas. The use matrix table indicates that a "station only" for a public service installation for utilities is allowed. It is acknowledged that within BC§27-305, under the "Titles and Description of Industries Column," the description "Utility, (Public Service Installation)" appears. However, there is no definition of what constitutes a "station" within the residential use matrix or applicable residential zoning codes. The Planning Assistant and Mr. Friday instead mistakenly adopted the definition of a "Utility, Public" found at BC§27-201 as a controlling definition for a "station" to process this industrial solar power generation facility application. This term is defined as:

A private business organization performing some public service and subject to special governmental regulations or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include, but are not limited to, water supply, electric power, gas and transportation for persons and freight.

Thus, Mr. Friday adopts the definition of a term used to describe a business entity allegedly "performing some public service" pulled from the general definition section of the zoning regulations instead of properly focusing his review on the nature of the proposed land use by the applicant entity. The nature of the proposed land use by the applicant entity upon lands located within the A-1 Agricultural Open Space Zoning District must guide the Planning Department's application review process and dictate the ultimate zoning determination.

The "Utility, Public" definition is not applicable in discerning the definition of a "station" as a proposed allowed or special review or prohibited land use, but rather is instructive only in defining the nature of an entity that owns or is proposing to develop such a "station." Even if the Board of Adjustment gives credence to the flawed processing in this context, the proposed facility is not a "Utility, Public" as that term is used in the Unified Billings Code. Rather, the record reviewed by the Planning Department reveals that MTSun, LLC is not a public utility

because it is not “performing some public service(s) . . . that are paid for directly by the recipients thereof.” Rather, the applicant MTSun, LLC is a limited liability company and proposes to use Montana School Trust Land to generate photovoltaic electric energy for sale directly to a public utility (Northwestern Energy) and would be paid by Northwestern Energy directly, not by the end consumer. The true public utility in this case does not own, lease, or have any control over the proposed solar facility or the vendor entity. The true public utility is not the applicant. The true public utility will not play any role in installing, operating or maintaining this facility. It will only buy the power, and in turn provide the utility services to customers who pay for the power directly to the public utility, not to the applicant MT Sun, LLC. If the Planning Department’s interpretation has any credence, then similar private vendors generating electrical power from any other conceivable natural resource such as nuclear, gas, oil, or coal with intention of selling electricity to an actual public utility entity could make the same argument of an allowable use within the A-1 Agricultural Open Space Zoning District without special review conditions or notice to the public.

Mr. Friday gives no explanation why the Planning Department failed to utilize the allowable use matrix found at BC§27-306 relating to Commercial and Industrial Zones and more germane definitions of electrical generation as adopted by Yellowstone County in this Section. BC §27-306 is a use matrix covering all industries that may operate in commercial and industrial zones. Within the “Titles and Description of Industries Column,” of the use matrix chart in BC §27-306, at row 49, the description “Electric, Gas and Sanitary Services” appears. Such services would include “[p]roduction, manufacture, and generation, electric or gas.” The County’s use chart then indicates that such a use, in this case electric generation, is allowed only in the two industrial zones identified as “Controlled Industrial” and “Heavy Industrial”. Such electric or gas energy production or generation use is not an allowed use in any of the five remaining commercial zones and would trigger special review in both of the “Controlled Industrial” and “Heavy Industrial” zones. The County’s treatment of proposed electrical services land use even within its commercial zones mandates that installation of an 80 megawatt photovoltaic solar power generation facility comprising 460 acres sprawled over parcels located within a more restrictive A-1 Agricultural Open Space District must be given greater scrutiny than that afforded by the Planning Department with its issuance of Permit #PLN-17-00345.

The manner in which the Planning Department is required to process use permits for commercial wireless communications facilities and commercial radio antennas and support structures, further illustrates why the Planning Department’s application of the residential use matrix makes no sense. In general, when such utility uses are proposed in agricultural areas, special review or at least an optional special hearing with public notice is triggered. See BC§27-620(d)(2) (a-d) and BC§27-621(d)(2) (a-d), respectively. When new wireless communications facilities are proposed they are expressly subject to special review. In each instance special review ensures that the applicant provides minimal safeguards to mitigate adverse impacts to the public for these commercial uses which may include setbacks, fencing, buffers, landscaping, and colorization of infrastructure to reduce visual disturbance. No such safeguards were applied by the Planning Department in its issuance of Zoning Compliance Permit #PLN-17-00345.

At the very least, the treatment of electric generation services should invoke special review interpretation by the Planning Department. At BC§27-201 the Planning Department is given guidance to utilize dictionary definitions where specific words used within the zoning codes are not defined therein. In this Section "Agriculture" is defined as:

The use of land for agricultural purposes, including farming, dairying, pasturage agriculture, grazing land, animal and poultry husbandry, horticulture, floriculture, viticulture, including all uses customarily incidental thereto but not including any agriculture industry or business such as commercial feed lots, animal hospitals, food processing plants, fur farms or similar uses.

Instead of looking to common dictionary definitions for the term "solar farm" or "solar photovoltaic, substation" as used by MTSun, LLC on its application form, the Planning Department misapplied other definitions out of context resulting in an improper avoidance of special review. In contravention of the stated purpose and intent of A-1 Agricultural Open Space districts to "protect and preserve agricultural lands for the performance of a wide range of agricultural functions" the Planning Department has applied a less stringent review process for a photovoltaic electric generating facility occupying agricultural zoned land than it would otherwise apply under the BC§27-305 use matrix directive of utilizing a special review process for placement of a livestock auction yard or rodeo/roping arena on the same ground. There would be numerous allowable land use absurdities that may be illustrated and drawn from the Planning Department's misapplied interpretations of this application. These absurdities will be presented directly to the Board of Adjustment in a public hearing setting for its consideration of the application and eventual consideration by the Zoning Commission and County Commission with public notice and participation.

Mr. Friday speaking as the Director of the Yellowstone County Planning and Community Service Department paints Ms. Kosiarek's appeal to the Board of Adjustment as futile by invoking the position that state law "allows public agencies to use public lands contrary to local zoning as long as the public agency holds a public forum through the local Board of Adjustment." These statutes exist, but they do not relieve the Planning Department from complying with Yellowstone County's Unified Billings Code Zoning Regulations in the manner it determines whether the proposed industrial land use should be permitted in the A-1 Agricultural Open Space Zoning District.

The Planning Department's allowed use determination and permit issuance sets a dangerous precedent for the future placement of other industrial power generation facilities within the agricultural lands of Yellowstone County. Incompatible land uses should not be approved by the Planning Department without public notice or participation in the permitting process. Yellowstone County's zoning regulations for each zone "shall be minimum regulations and shall apply uniformly to each class or type of structure or land ..." unless expressly exempted. They are said to be "minimum requirements for the protection of the public health, safety, comfort, prosperity and welfare." See BC§27-103. The record on appeal to the Board of Adjustment is silent as to any measures offered by the applicant or required by the Planning Department to mitigate adverse impacts of the proposed 80 megawatt photovoltaic solar power

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generation facility. The permit application presented by MTSun, LLC to the Planning Department warrants greater scrutiny on appeal. This proposed industrial power generation facility is not compatible with agricultural open space land uses and the permit should be denied.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By


G. Andy Adamek

Enclosures

cc: Karen Kosiarek
Richard Cebull
Lone Eagle Estates Homeowners Assoc.
Wyeth Friday, Director, Planning and Community Services Department

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
Southern Land Office



STEVE BULLOCK, GOVERNOR

STATE OF MONTANA

PHONE: (406) 247-4400
FAX: (406) 247-4410

1371 RIMTOP DRIVE
BILLINGS, MT 59105

18 April 2017

Dear Interested Party:

The Montana Department of Natural Resources and Conservation (DNRC) Southern Land Office has recently entered into an Option to Lease on portions of two sections of school Trust land northwest of Billings for the potential development of a utility scale photovoltaic (PV) solar power generation facility. The Trust land included in the project is described as a portion of Sections 8 and 10, T1N, R25E and is generally located along Alkali Creek Road, east of Highway 3 and shown on the attached map. A change from previous versions is the inclusion of private land on the north side of Alkali Creek Road. The proponent is proposing to install track mounted photovoltaic panels that rotate on a single axis to follow the direction of the sun to maximize power production. The proposed panel locations are shown on the attached map. The panels, once mounted, will not exceed 10' in height. An example of how the panels would generally look is shown below:



Prior to the execution of the Lease, the Southern Land Office must complete an Environmental Assessment (EA) for the proposed project. The Southern Land Office (SLO) is contacting you as a part of the scoping process for the completion of the Environmental Assessment. We will be collecting written comments on the proposed solar development and they **will be accepted until 5 p.m. MDT on Friday, 19 May 2017** and can be sent to AlkaliCreekSolar@mt.gov or if you to send them via USPS, they can be sent to:

Alkali Creek Solar Comments
c/o Jeff Bollman, Area Planner
DNRC Southern Land Office
1371 Rimtop Drive
Billings, MT 59105

If you have questions, please contact Jeff Bollman at jbollman@mt.gov or (406) 247-4404.

Sincerely,

A handwritten signature in blue ink that reads "Jeff Bollman".

Jeff Bollman, AICP
Area Planner





**This is the original map which was provided by DNRC. It now indicates the boundary for all filings of the Lone Eagle Subdivision.

From the **KAREN KOSIAREK**
Desk of:

Wyeth Friday
Planning & Community Services Director
2825 3rd Avenue North
4th Floor
Billings, MT 59101

VIA ELECTRONIC MAIL TO: fridayw@ci.billings.mt.us

Subject: Request for Appeal of Permit PLN-17-00345,
COS 2074 Yellowstone County, Tax ID# X00416, X00417

Dear Mr. Friday:

I am writing to request that the Planning Division review the zoning decision made for the above-captioned properties as outlined in a 14 February 2017 letter from Jeannette Vieg of the Billings Planning & Community Services Department to MTSun, LLC of Sandy, Utah. I obtained a copy of the letter from the Department on 4 May 2017 after filing a public request.

The Department's 14 February 2017 letter is in response to a permit application filed by MTSun LLC regarding their proposed 370-acre solar farm development on State Land managed by the Montana Department of Natural Resources and Conservation (DNRC). MTSun is seeking to install, per the permit application, a "substation/maintenance shop – only one" and "Solar PV, substation". Based on the documents attached to the permit application and other documents obtained from DNRC, MTSun is planning to build a substation as well to install solar panels, approximately 10-ft high, covering approximately the entire 370 acres of State Land.¹ DNRC has begun an Environmental Assessment process regarding this development which will be ongoing over the next several months.

The properties in question are zoned Agricultural Open (A1). Ms. Vieg's approval letter states simply "Solar Photo-Voltaic Facilities are an allowed use in this zoning district." It gives no supporting information for that conclusion nor cites to any governmental authority or historical precedent in supporting her conclusion. I spoke via telephone to Ms. Nicole

¹ MTSun is also planning to install solar panels on another approximately 340 acres of nearby private land outside of the Jurisdictional Area of Yellowstone County.



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Cromwell of the Department on 9 May 2017 about the letter, and she informed me that the decision was based on a reading of the Billings Code of Ordinances §27-201 and §27-305.

The former section contains definitions, including a definition of “utility, public” which the Department believes applies to the solar project. The latter section, entitled “District regulations: Residential uses” encompasses agricultural uses and includes a table stipulating which uses are allowed in certain zoning districts, which require special review and which are seemingly not allowed (designated by blanks in the table cells). The table includes two entries for “Utilities (Public Service Installations):” upon which it appears the Department is basing its decision. The first applies to “Station only”, and in Agricultural – Open, this is shown as an allowed use. The second entry in the table pertaining to Utilities (Public Service Installations)” is for “Storage Yard” and for Agricultural – Open, this is shown as requiring special review.

Therefore, it appears based on the 14 February 2017 letter that the Department is equating 370 acres of solar panels to a utility substation. This logic is faulty, as there is no equivalence between the two. A utility substation is typically a relatively small pad-mounted set of structures covering several hundred square feet to a few square acres at most. The picture below shows a solar substation in the foreground with rows of solar panels behind it. A substation is not at all the same as 370 continuous acres of shiny solar panels.

Based on these facts, the Department cannot unilaterally conclude that 370 acres of solar panels can be substituted in the Code for “utility station” and that the project can be simply administratively approved. That is not only a sloppy interpretation of the Code but is a gross



Image: S&C Electric Company (sandc.com)

misuse of the trust placed in the Department by the citizens of the County. This is an issue that requires more thorough review and public input. Even if one concluded that these solar panels were more akin to a public utility storage yard, that in itself would trigger the need for special review and a public hearing.

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This large solar farm is clearly an industrial facility. Its presence in an agriculturally zoned area, immediately adjacent to other properties (including mine) that are zoned residential is a significant issue that should not be allowed to be administratively approved without public discourse. This requires special review, public deliberations and input from the Zoning Commission. The Department's 14 February 2017 letter essentially creates a de facto change in land use without the appropriate public process and is an egregious overstep of the Department's authority. It also creates a negative and dangerous precedent for land use decisions in the County of Yellowstone.

I respectfully appeal the Department's determination regarding Permit PLN-17-00345 that "Solar Photo-Voltaic Facilities are an allowed use in this zoning district" and request that you require a special review of the permit application with the appropriate public notice, comment period and public hearing.

Respectfully,

Karen Kosiarek, P.E.
Yellowstone County Resident and Property Owner

Copy to: Jeff Bollman, Area Planner, DNRC Southern Land Office
Steve Wade, Esq., Browning, Kaleczyc, Berry & Hoven, P.C.



CITY-COUNTY PLANNING DIVISION

"SERVING BILLINGS, BROADVIEW AND YELLOWSTONE COUNTY"

PLANNING & COMMUNITY SERVICES DEPARTMENT

2825 3RD AVENUE NORTH, 4TH FLOOR

BILLINGS, MONTANA 59101

PHONE: (406)247-8676 FAX: (406) 657-8327



Karen Kosiarek
PO BOX 911
Billings, MT 59103

June 2, 2017

RE: Request for Appeal of Permit PLN-17-00345, COS 2074 Yellowstone County, Tax ID# X00416, X00417

Dear Ms. Kosiarek,

Thank you for your recent letter regarding the Planning Division's approval of a Zoning Compliance Permit for the proposed solar power development on state owned land and private land north and west of the City of Billings, MT.

Administrative decisions of the Planning Division staff in regards to the interpretation or enforcement of zoning regulations, can be reviewed by myself as Planning Director. The code requires an administrative appeal to the County Board of Adjustment be accomplished within 30 days of the decision date. An administrative appeal to the County Board of Adjustment is out of time, however I will respond to your questions regarding the administrative decision of February 14, 2017, to approve PLN-17-00345 for the proposed solar power development.

The determination that solar power development is an allowed use in the Agriculture Open-Space (A-1) zone was made by reviewing the regulation definitions (Sec. 27-201) and the allowed use matrix (Sec. 27-305) adopted by the County. The County first adopted and applied zoning district regulations in November 1973. The code was unified with the City of Billings zoning code in 1997. The definition and use matrix regarding Public Utilities as an allowed use in the A-1 has not changed since 1973.

Here is the definition of a Public Utility as that term is used within the adopted zoning regulations:

UTILITY, PUBLIC: *A private business organization performing some public service and subject to special governmental regulations or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include, but are not limited to, water supply, electric power, gas and transportation for persons and freight.*

The definition is broad and not limited to the listed types of utility services. The definition does not limit the activity of the public utility – it simply defines the term as applied within the zoning code.



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The zoning code implements the allowed and prohibited uses within each district through a use matrix adopted in Section 27-305 for all agriculture and residential zoning districts. The matrix lists "Utilities – Public Service Installations" and identifies 2 separate categories for this use. The 2 categories are: "Station Only" and "Storage Yard". These terms are not defined. Terms not defined within the zoning regulations shall have their common meaning or as defined in a dictionary (Sec. 27-201). The common meaning of a "station only" within the context of a public utility would be a power generating station, a water or waste water treatment station, a power sub-station, a railway station or a bus station. The common meaning of a "storage yard" within the context of a public utility would be an area where equipment and supplies are stored that are necessary for the maintenance and service of a station. A storage yard is not required where a station is located.

The use matrix lists "Station Only" as an allowed use only within the A-1 zoning district and as a special review use in all other agricultural or residential zoning districts. A "Storage Yard" is listed as a special review use only within the A-1 zoning district. There are other uses listed in 27-305 that are also an allowed use within the A-1 district, such as veterinary clinics with boarding, commercial greenhouses, commercial stables, commercial kennels, cemeteries and blacksmiths. The A-1 zoning district requires a minimum lot area of 10 acres for each dwelling so lots in this zoning district are very low density. The lots in the Lone Eagle Subdivision range from 10 acres to over 18 acres and many have been developed with single family dwellings.

I have affirmed the Planning Division staff, Jeannette Vieg and Nicole Cromwell, have correctly interpreted and applied the zoning regulations for the proposed solar power development as a "Public Utility Station", an allowed use within the A-1 zone. The state is the public agency who owns and manages these land

You have requested also the Planning Division require the developer and the state Department of Natural Resources & Conservation (DNRC) to go through a special review approval for the proposed project as a "Storage Yard". This would be an incorrect interpretation of the plain meaning of the term "storage yard". It does not appear the developer intends to maintain any type of storage yard on the site. Maintenance equipment and supplies will be brought to the site as necessary. I cannot require a special review application where the code does not require such an application for a proposed use.

I also want to make you aware of a provision of state law at 76-2-401 & 402 that allows public agencies to use public lands contrary to local zoning as long as the public agency holds a public forum through the local Board of Adjustment. While a Zoning Compliance Permit was issued for the project and the DNRC has not pursued this option, the DNRC may exercise this option for its property at any time for any use that might be contrary to local zoning regulations. In this process, the County Board of Adjustment is required to hold a hearing but cannot place any conditions on the project or stop the project from proceeding.

I have spoken with the agent for the DNRC, Planner Jeff Bollman, who manages the state school trust lands in this area of Montana. The DNRC is the lessor of the land for the solar power development project. As required by state law, an Environmental Assessment (EA) is underway to

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RE: Request for Appeal of Permit PLN-17-00345, COS 2074 Yellowstone County, Tax ID# X00416, X00417

determine any potential impacts from the proposed project. Those impacts to be studied include any potential effects on of adjacent residential and agricultural land uses. I strongly encourage you to participate in the public review of this important environmental document and testify or provide written comment on the EA and its findings. Mr. Bollman may be reached at 406-247-4404 or by email at jbollman@mt.gov.

Mr. Bollman has informed me a draft of the EA will likely be issued in June and released for public comment. A second public meeting will be held after the draft is released for public comment.

Again, thank you for taking the time to inquire on the proper interpretation of the Unified Zoning Regulations regarding this proposed solar power project. I believe the Planning Division staff have made the correct interpretation regarding the proposed use.

Please let me know if you have further questions.

Sincerely,



Wyeth Friday, AICP, Director
Planning and Community Services Department

CC: Dan Schwarz, Chief Deputy County Attorney
Jeff Bollman, Planner, Southern Land Office, DNRC
Ros Rocco Vrba, MTSun, LLC
File