



County of Yellowstone Board of Adjustment

CANCELLATION NOTICE-Thursday, December 14, 2017, 4:00 p.m.

**Miller Building, 1st Floor Conference Room
2825 3rd Avenue North, Billings, Montana**

NOTICE: The December 14, 2017 Yellowstone County Board of Adjustment meeting is cancelled to the lack of agenda items. The next meeting will be held as legally announced and advertised.

Approval of Minutes: October 12, 2017. The approval of minutes is delayed until the next scheduled YC Board of Adjustment meeting.

Announcement: The Planning and Community Services Office will be closed on Monday, December 25, 2017 to observe the Christmas Day Holiday and on Monday, January 1, 2018 to observe New Year's Day.

County Board of Adjustment-Cancellation Notice

Meeting Date: 12/14/2017

Information

Subject

Approval of Minutes: October 12, 2017. The approval of minutes is delayed until the next scheduled YC Board of Adjustment meeting.

Attachments

YBOAminutes_2017_10_12__DRAFT

**Yellowstone County Board of Adjustment
Meeting Minutes, October 12, 2017
DRAFT-To be approved at the next scheduled meeting**



The County Board of Adjustment met on Thursday, October 12, 2017 in the 1st Floor Conference Room, of the Miller Building located at 2925 3rd Avenue North. Chairperson Hecker called the meeting to order at 4:00 p.m.

| Name | Title | 01/14/2016 | 02/11/2016 | 05/12/2016 | 06/09/2016 | 10/13/2016 | 11/10/2016 | 04/13/2017 | 10/12/2017 | | |
|------------------------|---------------|------------|------------|------------|------------|------------|------------|------------|------------|--|--|
| Bruce Reiersen | Board member | E | - | 1 | 1 | E | 1 | 1 | 1 | | |
| Blaine Poppler | Board member | 1 | - | E | 1 | 1 | E | 1 | 1 | | |
| Carlotta Hecker | Chairperson | 1 | - | E | E | 1 | 1 | 1 | 1 | | |
| Robert Bailey | Vice Chairman | E | - | 1 | 1 | E | E | 1 | 1 | | |
| Troy Boucher | Board member | | | | | | | | 1 | | |

Chairman Hecker introduced the County Zoning Commission members and staff in attendance: Monica Plecker, Planning Division Manager; Dan Schwarz, Yellowstone County Chief Deputy Attorney; Tammy Deines, Planning Clerk

Others in Attendance: G. Andrew (Andy) Adamek, Browning Kaleczyc Berry & Hoven P.C.; Jon & Penny Haynes; Mike Ferguson, Billings Gazette; Tamie J Faw; Darlene Vanderloos; Bill Vanderloos; Phil Taylor; Greg Kosiarek, Karen Kosiarek; Rick & Linda Cebull; Jeff Rice; Jim Hertz; Paul Miron; Jim Baker, Jeff Bollman, DNRC; Paul & D’Anne Holley; Robert Hurd; Jason Foster; Brad Finn

Public Comments

As a point of order, Chairperson Hecker announced the Public Comment portion of the meeting will be held after the public hearing is closed.

Approval of Minutes April 13, 2017

Motion

Board member Boucher made a motion and Board member Poppler seconded the motion to approve the April 13, 2017 meeting minutes as submitted. The motion passed with a unanimous voice vote.

Disclosure of Conflict of Interest: There were no disclosures of conflict of interest.

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Disclosure of Exparte Communication

There were no disclosures of exparte communication from the Board. The letters below were received and emailed and distributed as hard copies by Staff to the members of the Board.

- October 10, 2017, letter from Jack Ramirez, Manager, Yellowstone Farms, LLC in support of Karen Kosiarek's appeal.
- October 10, 2017, letter DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.

PUBLIC HEARINGS:

Planning Division Manager Monica Plecker reviewed the procedures for public hearing and stated the Board will open a public hearing and allow public comment this evening. She reviewed the hearing and presentation processes for the meeting and the special procedural considerations for administrative appeals.

SPECIAL PROCEDURAL CONSIDERATIONS FOR ADMINISTRATIVE APPEALS

The administrative appeal is different than a request for variance. An administrative appeal decision will determine the correct interpretation of the code or requirement as written. The appellant is the party who brings the disagreement with staff interpretation to the Board. There are 2 parties of equal standing at an administrative appeal proceeding – the Planning Division and the appellant. Surrounding property owners will be notified and may testify as well. Each party – staff and the appellant – may bring in experts to testify in favor of their interpretation or to support their interpretation of the code.

The public hearing procedure should follow the same basic procedure as variance public hearings, but you should have each party (staff and appellant) present their "case" including any expert testimony before opening the hearing to the public. The parties will not have the right to cross examine persons who testify. Only the Board members may ask questions of persons who are testifying. The Chair may allow any party to provide additional testimony. The Zoning Coordinator will assemble the complete administrative record – all documents and correspondence between the parties – for the Board and this will be provided to the Board in advance of the hearing.

The options for Board action on appeal are as follows:

- Reverse in whole or in part the staff interpretation
- Affirm in whole or in part the staff interpretation
- Modify the order, requirement, decision or determination

The concurring vote of three (3) members of the board shall be necessary to reverse any order, requirement, decision or determination of any administrative official.

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The code sections concerning administrative appeals are Sections 27-1510 (d), (e) and (f). The appeal will determine not just the correct interpretation for the appellant's specific case, but for any future party. This is NOT a variance from the code, it is determining the correct interpretation of the code. The Board decision will become the official interpretation for all County zoning districts where the requirement or regulation applies.

Chairman Hecker acknowledged Planning Division Manager Monica Plecker, who gave the staff report and presented the Statement of Facts, Findings, and Staff Recommendation below.

ZONING COMPLIANCE PERMIT

Section 27-623

A Zoning Compliance Permit is only required for properties that are located outside the limits of the City of Billings but within the Unincorporated Jurisdictional Area. No change of land use may be made; or no building or other structure shall be erected, moved, enlarged, rebuilt, added to, or structurally altered without first having received a Zoning Compliance Permit issued by the Zoning Coordinator or his/her designee, who shall determine that the permit is issued in compliance with the regulations set forth in this Resolution/Ordinance. The review of a Zoning Compliance Permit application shall be limited only to a review of the applicable zoning regulations and shall not constitute a review of compliance with any applicable building codes.

STATEMENT OF FACTS *(Exhibits are included in the staff report)

On February 11, 2017, MTSun L.L.C. requested a zoning compliance permit from the City-County Planning Division. ***Staff Report Exhibit 1 – Application.** MTSun wanted to place solar panels on approximately 369 acres within the County's Zoning Jurisdiction. There are additional panels proposed for lands outside of the zoning jurisdiction. The land within the County's zoning jurisdiction is owned by the State of Montana. Because the land is owned by the State, the County cannot force the State to comply with its zoning regulations.

On February 14, 2017, the Division granted the permit. ***Staff Report Exhibit 2 – Permit.** The Division found that MTSun's proposed solar panels complied with the Agricultural Open zoning designation of the land. The Division did not find a special review was required for the proposed solar panels. The Division did not provide the permit to anyone other than MTSun. No one had requested a copy of the permit.

On May 5, 2017, Karen Kosiarek requested a copy of the permit. ***Staff Report Exhibit 3 – Request for Public Records.** Kosiarek owns land that abuts MTSun's proposed solar project. On May 5, 2017, the Division provided Kosiarek with a copy of the permit. **Staff Report Exhibit 4 – Response Letter.**

On May 12, 2017, Kosiarek requested the decision of the Division to grant a permit to MTSun be appealed to the Yellowstone County Board of Adjustment. ***Staff Report Exhibit 5 – Appeal Letter.** Kosiarek explained why she believed MTSun's proposed solar project did not comply with the Agricultural Open zoning designation of the land and requested the Division initiate a special review process for the solar project.

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On June 2, 2017, Wyeth Friday, the Director of the Planning and Community Services Department, advised Kosiarek that her appeal of the City-County Planning Division's decision to the Board was not timely. ***Staff Report Exhibit 6 – Appeal Response Letter.** Friday explained why the Division believed MTSun's proposed solar project did comply with the Agricultural Open zoning designation of the land and that even if the solar project did not comply that the State could ignore the County's zoning regulations as state statute allows public lands to be used for uses contrary to zoning.

On May 5, 2017, Karen Kosiarek requested a copy of the permit. ***Staff Report Exhibit 3 – Request for Public Records.** Kosiarek owns land that abuts MTSun's proposed solar project. On May 5, 2017, the Division provided Kosiarek with a copy of the permit. ***Staff Report Exhibit 4 – Response Letter.**

On May 12, 2017, Kosiarek requested the decision of the Division to grant a permit to MTSun be appealed to the Yellowstone County Board of Adjustment. ***Staff Report Exhibit 5 – Appeal Letter.** Kosiarek explained why she believed MTSun's proposed solar project did not comply with the Agricultural Open zoning designation of the land and requested the Division initiate a special review process for the solar project.

On June 2, 2017, Wyeth Friday, the Director of the Planning and Community Services Department, advised Kosiarek that her appeal of the City-County Planning Division's decision to the Board was not timely. ***Staff Report Exhibit 6 – Appeal Response Letter.** Friday explained why the Division believed MTSun's proposed solar project did comply with the Agricultural Open zoning designation of the land and that even if the solar project did not comply that the State could ignore the County's zoning regulations as state statute allows public lands to be used for uses contrary to zoning.

FINDINGS

Section 27-305 states that Utilities (Public Service Installations), Stations Only, are allowable.

According to the zoning code "Utility, public" 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."

Utilities are an allowed use on land zoned Agricultural Open. Section 27-305 of the Yellowstone County Zoning Regulations. A special review is not required for utilities on land zoned as Agricultural Open. Utilities are defined in Section 27-200 of the Yellowstone County Zoning Regulations. The State's land at issue is zoned Agricultural Open. The proposed solar panels on

the State's land are utilities. The solar panels would produce electricity. The solar panels on the State's land are an allowed use.

Storage areas are only an allowed use on land zoned Agricultural Open with a special review. Section 27-305 of the Yellowstone County Zoning Regulations. The Yellowstone County Zoning Regulations do not define storage area. The general definition of a storage area

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is found in The Illustrated Book of Development Definitions. “Outdoor Storage: The keeping, in an unenclosed area, of any goods, junk material, merchandise, or vehicles in the same place for more than 24 hours.”

The State’s land at issue is zoned Agricultural Open. The proposed solar panels on the State’s land are not items being stored. The solar panels would be items used to produce electricity. The solar panels on the State’s land are not a use that requires a special review.

Agency’s interpretation of its regulations should be given deference. *McGee v. State, Dep’t of Pub. Health & Human Servs.*, 2017 MT 166, ¶ 12, 388 Mont. 129, 132, 398 P.3d 245, 247 (2017). Only if its interpretation is plainly inconsistent with the spirit of the regulation or lies outside the range of reasonable interpretation should deference be denied to the agency’s interpretation.

The Planning Division’s interpretation of Yellowstone County’s Zoning Regulations that solar panels are an allowed use on land zoned Agricultural Open is not plainly inconsistent with the spirit of the Regulations and lies within the range of reasonable interpretation permitted by the wording of the Regulations.

RECOMMENDATION

The Planning Division has determined the term Photo Voltaic facility to appropriately fit the zoning code definition of a Utility. Specifically, the definition says, “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 request from MTSun LLC for use of a solar power generation facility substantially meets the definition provided by the zoning code and what is identified as an allowable use according to Section 27-305.

The Planning Division requests the County Board of Adjustment affirm in whole the staff’s interpretation of the Zoning Code requirements.

Discussion

Chairperson Hecker called for discussion and question from the members of the Board.

Board member Poppler: asked for clarification on the ownership for this property.

Ms. Plecker stated she does not know who owns the privately held properties. The lands in question that are zoned are all a part of the State trust.

Board member Boucher: pointed out there is no specific reference to power generation in the determinations and asked if there is anything in the Code other than this section dealing with power generation of some sort. Ms. Plecker stated that the section of the table of allowed uses for Ag-Open zoning for utilities is the only place it references electrical generation. Board member Boucher asked if it would be a permitted use if the applicant changed the source of energy from generating electrical power to a hydrocarbon nature power such as natural gas. Ms. Plecker stated it would be permitted as a utility. She presented a photo of more a conventional power generation plant and explained when zoning came to be in 1973, a lot of the

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more industrial sites for power generation and utilities were already in place and are zoned for more industrial uses. In this case, the definition is a broad and scale is not a consideration. She continued and said even though this looks different than the conventional plant, Planning Staff decided it is allowable. Board member Boucher commented on the Code's consideration of the need to allow for distribution of utilities for the benefit of the public including a substation or pumping station. Ms. Plecker stated transmission is important but given the definition it does not make the distinction between generation and transfer of power.

Board member Poppler: pointed out that transmission and distribution lines require a special review under the zoning regulations. Ms. Plecker said the Zoning Compliance request is for the placement of the solar panels and did not include a request for plans transmission lines.

Board member Hecker: commented on the language pointing to the provider serving the public. She asks if a conflict exists as MTSun will produce the electricity and sell it to Northwest Energy, who will in turn sell it to the public. Ms. Plecker said the end user is the public and often times there are private corporations that serve the public. She noted she took this project midstream as she was not employed with the City when the Zoning Clarification was approved and issued. She stated Yellowstone County Attorney Dan Schwarz and Jeff Bollman, DNRC are in the audience this evening. Mr. Bollman submitted a letter to the Board of Adjustment dated October 10, 2017, letter from DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.

Chairperson Hecker called for presentation by the appellant.

Andy Adamek, 800 N Last Chance Gulch, Suite 101, Helena Montana

Mr. Adamek thanked staff and the Board for convening on this matter and stated the issue of timeliness is a non-issue as this hearing is being held. He responded to Board member's Boucher's question regarding power generation from other facilities such as gas, and coal. He stated that under the Planning Department's determination; an electrical generation plant, whether it be photovoltaic, natural gas, coal fire carbon, or nuclear, would be an allowed use in the A-1 zoning that does not require a special review.

He responded to Board member Poppler's question and stated Unified Code Section 305 allows transmission and distribution lines and does not require special review. This is applicable to electric and accessory structures for transmission.

Mr. Adamek answered Chairperson Hecker's question as to whether this utility is considered public. He stated they feel that MTSun is not a public utility as defined by staff as the definition does not describe the use or the activity but the entity. He said they believe the Planning

Department is incorrect as the power generated on the State land will not be sold to the public but an entity that sells to the public, i.e., NorthWestern Energy.

Mr. Adamek continued and stated the images of the solar farm in today's staff presentation

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were not presented by the applicant to staff and not relied upon by Ms. Vieg and Mr. Friday in their determination but they may be instructive. He stated this is an industrial generation utility plant with the use of solar panels. Mr. Adamek said he does not know where the station and maintenance shop will be installed and he referred to the posted aerial map. He said the issue is not whether a station may be installed but the use of photo voltaic solar panels. He feels staff has “stretched” the definitions in the Zoning Code, as the code may be dated. He gave the example of the lack of reference to power generation within and A-1 or the residential classifications in Section 305, and pointed out it is denoted only in Section 306 when dealing with commercial or industrial areas. The station is an allowed use as it transmits energy to residential, agricultural, and light commercial uses in the A-1 district. There are two substations in this area. Section 306 deals with industrial zones and districts. Electric and natural gas generation is permitted only with special review. He spoke to the differences between power generation and transmission, and the difference between a power utility and a station. He referred to page 1710 of the Zoning Code, Article 27-Sec 306, "...production, manufacture, generation of electric or gas" is only allowed in Controlled Industrial and Heavy Industrial zoning under a special review. Mr. Adamek stated the Planning Division is allowing this permit to be issued for a voltaic generation facility without special review.

He pointed out Staff Report Exhibit 1 –Zoning Compliance Application submitted on February 11, 2017; stamped as received February 13, 2017; and approved on February 14, 2017; with a signature of approval on page 2 of the application. He voiced concern that an Associate Planner, who within a day, approved the permit with no mitigation factors, no special review, and no image of the total acreage or station or warehouse provided. Mr. Adamek stated they are asking for more robust review consistent with the zoning codes without stretching definitions that do not apply. The determination on the permit is four lines of text referring to Section 305. A station and maintenance facility have been proposed along with a generating facility. He referenced the code and read the statement defining A-1 zoning as a district to protect and preserve agricultural lands for the performance of a wide range of agricultural functions. The intent is to limit scattered intrusion of uses not compatible with an agricultural environment to encourage agricultural pursuits and protect environmental concerns. He asked how this serves this purpose or function and stated this will prevent any further agricultural uses on the State lands that are currently used for grazing. Mr. Adamek commented this room is full of people this evening who thought they were purchasing land in an A-1 zoning district with the understanding it would not be high density use and never dreamed they would be looking at a high volume facility for power generation in their back or front yard or adjacent to their property. Mr. Adamek encouraged the Board to look at Section 306 and ask why this should not come under special review to provide a more robust review with a written record for the reasoning for the decision, and has the Zoning Commission’s recommendation to the Board of County Commissioners. He stated this is too large of a decision for a single associate planner.

Board Discussion

Board member Boucher: clarified and stated it is the appellant’s assertion that this use of a photo voltaic facility is not a permitted use in A-1 zoning. He said the special review process

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would require approval of a zone change prior to this request. Mr. Adamek replied it is the applicant's prerogative to publically state this is not an allowed use. He feels they are going to proceed with this application and are going to go to Statute which says the local regulations do not mean anything. Section 306 deals with generation and requires special review.

Board member Poppler: pointed out Mr. Adamek chose to read the summary paragraph describing A-1 zoning which does not identify residential development and asked if this will be subjected to the Montana Facility Siting Act. Mr. Adamek said he will not comment in this setting as this application is subject to Public Service Commission's rate determination and environmental assessment as it pertains to State Lands.

Board member Bailey: asked Mr. Adamek about his viewpoint of the State's process and noted the DNRC October 25, 2017 neighborhood meeting held for comments on this application. Mr. Adamek deferred this question to Ms. Kosiarek as he did not attend this meeting.

Board member Reierson: asked for comment on the value of the land and noted the information on the DNRC value of funds that could be generated. Mr. Adamek stated it is not the function of the Zoning Code to facilitate the highest and best revenue off of state trust lands. He said he is not here to make an economic argument as to whether a photovoltaic facility is the highest and best use of State lands. He can discuss how it will affect property owner's property but not addressed by zoning.

Karen Kosiarek, Appellant, PO Box 911, Billings, Montana

Ms. Kosiarek introduced herself, her husband, and her son Daniel. She commented on the photo of the solar panels presented during the staff report and said the photo may not be accurate as the proposed MTSun panels will be 10-feet off of the ground. Ms. Kosiarek gave some background as to how she came to this appeal process. In 2016, the Kosiareks purchased their lot in Lone Eagle Subdivision and paid a premium knowing it was adjacent to state trust lands. In the Spring of 2016, they received an invitational letter for neighborhood meeting at the Rod and Gun Club. Mr. Bollman, DNRC, announced the neighborhood meeting is a purely informational meeting to make residents aware of the upcoming proposed project. In April 2017, the Kosiareks received another letter and they put their building plans on hold. Ms. Kosiarek began to research the project; contacted Planning Division staff; and received a copy of the Zoning Compliance permit through a records request. She spoke with Jeff Bollman, DNRC, who told her the issue is resolved as the County felt the solar farm is a compatible use. She stated she was outraged as her observation of the permit was Planning Staff gave no thought into this process and the issues. She voiced frustration with the record as there are seemingly two versions of the zoning clarification letter dated February 14, 2017. The letter she received 6-months ago is not the same as the copy of the February 14, 2017 letter included in the meeting packet. The second version

includes an additional statement which said the entire facility could be surrounded with electrified fence. She emphatically stated they are concerned as they could share a property line with a solar facility surrounded with electrical fencing and they have a seven-year-old son.

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(For the record, the Planning Clerk marked Exhibit #1-February 14, 2017 letter to MTSun LLC from Planning & Community Services Department, received by Ms. Kosiarek,.)

Board Discussion

Chairperson Hecker: asked Ms. Kosiarek if she has read the definition of Section 305 and to state her interpretation. Ms. Kosiarek stated this is not a station but a power generation facility. A \$110 million mega electrical facility, which in her opinion, clearly does not meet the definition in the code for Agricultural Open Space Zoning.

*The Board took a moment to clarify the exhibits provided in the meeting packet.

Board member Poppler: asked for more information on MTSun LLC. Ms. Kosiarek stated MTSun is a Utah based company who approached DNRC with a request for development on State land that is close to an existing substation. The request for proposal was structured and put out by DNRC, titled "Request for Commercial Lease". She believes they are being funded by an overseas company at this point.

Chairperson Hecker called for Proponents of the appeal of administrative decision wishing to address the interpretation made by the Planning Department.

Penny Haynes, 5035 Alkali Creek Road, Billings, Montana

Ms. Haynes distributed a letter to the Board and she said lives across the road from the proposed project. Ms. Haynes feels the Planning Department's interpretation is incorrect as they purchased their land knowing they would live across from State agricultural land forever. They did not know someone would undermine this and stretch the definition of agricultural land to include this proposal. She asked if the Board would like to get up every morning and look at this facility? She continued and the State of Montana has advised property owners to watch properties carefully as once changed it cannot returned to its agricultural use. Ms. Haynes said these facilities belong in the country where it is not a glaring scar on the property and not an agricultural use.

Chairperson Hecker cautioned and asked that the testimonies are related to whether the Planning Staff misinterpreted the zoning code and not aesthetics which may be addressed during the Public Comment portion of the meeting.

Richard Cebull, 4269 Lone Eagle Drive, Billings, Montana

Mr. Cebull is president of the Homeowners' Association. Mr. Cebull stated 90% of the persons in this area are in agreement with Ms. Kosiarek's appeal and have the same position.

Bill Vanderloos, 4700 Lone Eagle Drive, Billings, Montana

Mr. Vanderloos pointed out these sections of code were-written in 1973 and these types of generating facilities did not exist. He said this is a new process and should require a special review. He asked how can staff make this decision as this is new process?

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Penny Haynes, 5035 Alkali Creek Road, Billings, Montana

Ms. Haynes asked if site visits were made by staff and if so, when the photos in the staff report were taken. She said they were taken in February as there is snow in the photo. She clarified and asked if staff made a site visit when making a decision to grant a permit. Chairperson said she is aware of other instances when staff makes site visits.

Per advisement of Yellowstone county Chief Deputy Attorney Dan Schwarz, and there were no other persons wishing to speak as a proponent of the appeal of administrative decision, Chairperson Hecker closed this portion of testimony and called for Opponents of the appeal. Rebuttal will follow.

Jeff Bollman, Montana Dept. Natural Resources and Conservation, 1371 Rimtop Drive, Billings, Montana

Mr. Bollman is speaking in favor of affirming the Planning Department's determination. He provided the Board with a report prior to the meeting giving background on trust lands.

He stated it is a misnomer that State lands will remain agricultural property as it is DNRC's fiduciary duty to manage the lands for the best benefit of the trust. When development is proposed adjacent to trust lands, property owners need to realize the use may change to get the highest and best use from the property. As part of the process for MTSun LLC and this project, DNRC issued a request for proposal for a commercial use as this use is not allowed under an agricultural lease. Commercial leases are used for anything that is *not* agricultural, mining, oil and gas, or forestry. The RFP was not specific to a solar project, and it could have been wind energy, solar, a Cabelas store or a Walmart store. The Land Board approved the lease option and lease for the property. As part of the response, MTSun LLC submitted a request for a Zoning Clarification from the Planning Department asking if this is an allowed use. In March of 2016, the Planning Department issued the Zoning Clarification stating this is an allowed use within the A-1 zone. He said DNRC has relied on the County's determination that this is a permitted use and MTSun LLC has spent time, energy and money pursuing this project including addressing the Public Service Commission on the term of contracts for power generation from this facility. Part of the environmental review process includes the reclamation process, as the site will be reclaimed after lease expires in 30 years. He referred to the photo of the solar panels and said MTSun does not intend to strip the site of the vegetation but will drill the foundation pieces and it could allow some grazing of the land. He pointed out that this land is not appropriate for cultivated agriculture. Mr. Bollman stated DNRC urges the Board to uphold the Administrative Decision of the Planning Department.

(For the record, the Planning Clerk marked Exhibit #3, Zoning Clarification Request, Project # PLN-16-00925, Issue Date: 3/17/2016., Planning & Community Services Department).

Board member Boucher: asked for clarification of the timeline for submitting the Zoning Clarification. Mr. Bollman explained MTSun requested a zoning clarification in addition to the permit. The Zoning Clarification was needed to respond to the RFP. The Planning Department

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issued the Zoning Clarification in March of 2016. At that time no site plan was provided and only the use was considered.

Board member Bailey: noted Director Friday's letter to Ms. Kosiarek dated June 2, 2017. In this letter, Mr. Friday notes the provision of State law allowing the State to use State lands for uses contrary to zoning as long as a public hearing is held to receive comments. Board member Bailey asked if the State is going to function aside from the Board's action today. Mr. Bollman replied he is not in a position to answer this. It is possible for the appellant to appeal the decision to District Court, DNRC and the applicant MTSun LLC could go through zone change and special review process, or the State could invoke the Land Use Contrary to zoning and submit to the Planning Department for a hearing for public comment. DNRC is working on developing a draft Environmental Impact Statement which will have a 30-day public comment period and an open house will be held to obtain comments. MTSun LLC has been working with the PSC to determine pricing guidelines.

Chairperson Hecker: asked if Jeff Bollman was part of making the determination with the Planning Staff. Mr. Bollman stated there were Zoning Clarifications issued stating this is an allowed use and there was no reason to question the basis for the Planning Department's approval. He was not involved in these discussions and this was a requirement by DNRC for MTSun LLC as a part of their application.

Board member Bailey: commented it appears the State is invoking the State law as the letter states the public scoping process concluded on May 19, 2017 and a neighborhood meeting on October 25, 2016. Jeff Bollman explained this is a part of the environmental review process and not the statutory right to invoke land use contrary to zoning. They have not submitted an application to the Planning Department for Land Use Contrary to Zoning. The initial meeting in October was to inform the neighbors of the approved lease option and that MTSun LLC contractors will be on the property. Due to the location, they wanted to be prudent and provide the neighborhood as to what is going on with the property. They have committed to another public meeting when there is a draft EIS and site plan.

Board member Boucher: asked about the RFP for commercial use. Jeff Bollman stated the RFP was for land in Section 8 and Section 10. Board member Boucher asked if there is a comment period for the commercial use? Jeff Bollman stated they are not required to notify neighbors of the RFP but it is legally advertised. The open neighborhood meeting was held to obtain public comments. Board member Boucher asked what constitutes a determination for a commercial use. Mr. Bollman stated most of the RFPs are generated by applicants. It is difficult to determine a particular use but it is often driven by developers who are considering locations for substations and topography. He noted another RFP for a parcel located west of Skyview High School for another solar facility that did not go forward.

Chairperson Hecker called for Rebuttal and cautioned Mr. Adamek to comment on the issue at hand, being the Planning Department's interpretation of the zoning code.

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Andy Adamek, 800 N Last Chance Gulch, Suite 101, Helena, Montana

Mr. Adamek stated the highest and best use of property should not be a part of determination of Zoning Code Section 305 or Section 306, and the questions of whether the land use conforms with local regulation is not being addressed today. Mr. Adamek said apparently there were opinion letters or copies of the Zoning Clarification letters provided before the permit was issued that should be a part of the record. He asked about the introduction of the RFP issued March 15, 2016 which he downloaded from the internet; and Mr. Bollman verified the document.

He stated the DNRC RFP is relevant as Section 5.1(d) of the RFP states that any lease awarded the use of property must comply with State and Local laws and regulations and it is the sole responsibility of the proposer to ensure the proposed use meets the requirements of the section. He argued that the State statute for Land Use Contrary to Zoning should not be a part of this discussion due to this requirement, and the consideration is whether this application is in compliance with local zoning regulations. If the reasoning of the Planning Staff is accepted, it is possible that today they are discussing a photo voltaic facility and tomorrow it may be natural gas. He continued and said A-1 zoning allows residential use special reviews are required for churches, convents, art galleries, public parking lots, museums, auction yards, or roping arenas but this use does not require a special review. He stated photo voltaic generating facility is not a station or substation. A substation is allowed as it delivers what is generated to them.

Mr. Adamek thanked the Board for reading through the packet and appeal letter. He stressed the importance of diving into the details to understand this appeal and he asked that the appellants be allowed a special review of this proposal or determine this is not an allowed use and reverse the determination.

Board member Poppler: asked for clarification of the relief requested. Mr. Adamek is asking the Board to overturn the Planning Department's decision and decide the permit is not an allowed use.

Board member Reimann: stated he is confused with Mr. Adamek's statement that there are letters that supposedly existed and why he would bring up something that he does not have in his possession. Mr. Adamek concurred and said he is unsure why the letters were not provided with Ms. Kosiarek's records request.

(For the record, the Planning Clerk marked Exhibit #2, Montana department of Natural Resources and Conservation, March 15, 2016, "Request for Proposals for Commercial Leas of State Land").

Planning Division Manager Monica Plecker stated she does not have letters referred to in her working file. She distinguished between a Zoning Compliance Permit and a Zoning Clarification. The application for Appeal of the Administrative Decision submitted was to appeal the Zoning Compliance Permit (Pln-17-00345). This is a separate type of request to

address an approval of a specific project proposal whereas a Zoning Clarification different type of request for a general statement concerning a use.

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Board member Bailey: asked about the two different letters dated February 14, 2017 provided by Planning Assistant Jeannette Vieg. Ms. Plecker stated from her understanding, MTSun requested further clarification about electric fencing which generated the additional paragraph in the second Zoning Compliance permit.

Andy Adamek asked that the letters be read into the record. Ms. Plecker stated the difference between the letter included in the staff report and the one Ms. Kosiarek received is the statement on the fencing. She read aloud the highlighted text below.

RE: Yellowstone County, Tax ID# X00416, X00417 and COS 2074 Parcel 1A2 Tax ID# D07005B PLN-17-00345

The property located in Area A & Area B 3916 Alkali Creek Rd., Tax ID# X00417 and the property located in Area C Tax ID# X00416 is within our Jurisdictional Area of Yellowstone County and is located in an Agriculture Open (A-1) zoning district. Solar Photo-Voltaic Facilities is an allowed use in the A-1 zoning district. Section 27-604 of the Unified Zoning regulations regarding the fence shall be constructed with allowed materials found within the Unified Zoning Regulations;**(g) Material exception--Barbed wire or electric fence. In the Billings City Limits, no barbed wire or electrical fencing shall be permitted in any residential zoning district. Barbed wire and electrically charged fencing is allowed in the A-1 and A-S districts within Yellowstone County. When electrically charged fences are used in an A-1 or A-S district, such fences shall be posted with warning signs or fluorescent markings at intervals not to exceed one hundred fifty (150) feet, where such fences are adjacent to public rights-of-way.** The property located at Area D C/S 2074 Parcel 1A2 AMD., is located within Yellowstone County outside of our jurisdictional boundary. Therefore, there may be county ordinances and regulations that apply. You are encouraged to call Yellowstone Public Works if you are planning to develop property beyond our jurisdictional boundary. You may reach Yellowstone County Works Department at 406-256-2735. Certain building, plumbing, mechanical and electrical permits will be required, from the State of Montana, Building Codes Division. You may reach them at 406-841-2040 or <http://bsd.dli.mt.gov/bc/bsindex.asp>

Mr. Adamek stated he was referring to the letters noted by Jeff Bollman, DNRC.

(For the record, the Planning Clerk marked Exhibit #3, Zoning Clarification Request, PLN-16-00925, marked Exhibit #3. (PLN-16-00925). The only reason the additional language is relevant is the requirement for a warning sign on the fence which is the only mitigating factor.

At 5:51 pm, Chairperson Hecker closed the public hearing portion of this meeting and asked for consideration by the Board.

Ms. Plecker clarified and stated the purpose the testimony for the public hearing is specifically for the interpretation of the zoning and the Zoning Compliance permit. Because some of the

things we assume the public wishes to hear are not relevant to the zoning, such as view shed or determination of property values. These concerns will be heard during the Public Comment portion of the meeting after the Board has made its decision.

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Board Discussion

Board member Poppler: said he finds the differences between the definitions of a station and a generating plant problematic. A station appears to be an allowed use. However, a generating plant is referenced in the other portion of the allowed uses for commercial zonings. He stated he finds it difficult to call this a station.

Board member Bailey: agreed with Board member Poppler's comments. He said as a Board member, it is alarming that all the information was not provided in the meeting packet and to have members of the public bring in additional documents that should have been part of the record.

Board member Riemann: commented on the difficulty of interpreting the Planning Staff's interpretation as he does not have all of the background they had at the time of the decision. He asked how to decide they made the right decision, when looking at the same statutes. This is different than what this Board normally deals with and he is trying to come to grips with the testimony and the interpretation of the verbiage.

Board member Boucher: after careful review of the information he has come to the conclusion that Sec. 27-305 was erroneously applied for this particular use. Even though the Code is 40+ years old, the authors of the Code were fairly specific on how they wanted to preserve and protect agricultural uses which allows residential use within that zoning from controlled industrial and heavy industrial uses. The question is this particular use is an allowed as use. This facility generates electricity; is a substantial facility for commercial use; and wholesales electrical power to a retailer who will subsequently deliver it through substations to residential and commercial customers. In his view, the Planning Department's decision should be overturned so the permit can allow the use of the substation but not the Solar Photo Voltaic Facility. Chairperson Hecker pointed out the fact the substation and photo voltaic facility have to be considered together as one cannot operate without the other. Board member Boucher stated the permit should be denied as a whole. Board member Bailey asked for County Attorney Schwartz' opinion.

Dan Schwarz, Yellowstone County Chief Deputy Attorney clarified his role and said this is the Board's decision. His role is to represent the Board in any further appeals, actions, and proceedings after this Board makes the decision.

Chairperson Hecker: stated this is a difficult decision. She said if this use is appropriate the energy would be sold directly to the public from MTSun, and in this case, it is sold to NorthWestern Energy. It would not be a benefit to have a substation and/or a shop. She feels this should be a reversed decision.

Chairperson Hecker called for a motion.

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Motion

Board member Boucher made a motion and Board member Bailey seconded the motion to overturn Permit PLN-17-00345 in its entirety, reverse the administrative decision and declare the solar voltaic facility as not an allowed use.

| Name | Title | FAVOR | AGAINST | ABSTAIN |
|-----------------------|----------------------|--------------|----------------|----------------|
| Board member Reiersen | Board member | 1 | - | - |
| Board member Poppler | Board member | 1 | - | - |
| Board member Hecker | Chairperson | 1 | - | - |
| Board member Bailey | Vice Chairperson | 1 | - | - |
| Board member Boucher | Board member Boucher | 1 | | |

The Appellant’s Appeal of the Administrative Decision is affirmed. The administrative decision for Zoning Compliance Permit PLN-17-00345 is overturned with a 5 members in favor and 0 (noone) opposed. Motion carries with unanimous voice vote.

Public Comment Period

Chairperson Hecker opened the Public Comment Period and asked of comments. There were none. Chairperson Hecker thanked all who attended and participated in this hearing.

Other Business/Announcements

- **City/County Board training October 18, 2017, Billings Community Center, 4:00-6:00 p.m. Ethics Training.** This Board is invited to attend. Presentations will be given by representative s of the Yellowstone County and City Legal Departments, and Dan Clark, Local Government Center.
- **Board member Riemann** announced he will be resigning as a Board member as he is moving out of state. Staff asked that he submit a formal letter of resignation to the BOCC office.

Other Business/Announcements, (continued)

- **Announcement: The November 9, 2017** Yellowstone County Board of Adjustment meeting is cancelled due to a lack of applications. The next meeting will be held as legally announced and advertised.

Adjournment: Adjourned 6:05 pm.

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DRAFT-To be approved by motion of the Board at the next legally and announced Yellowstone County Board of Adjustment meeting. (Tammy Deines, Planning Clerk (406-247-8610))

ATTACHMENTS:

1. Staff Report with referenced Exhibits** Handwritten numbering on these pages is for clerical identification purposes only. TLD

- Aerial Image
- Exhibit 1 Application
- Exhibit 2 Permit
- Exhibit 3 Request for Public Records
- Exhibit 4 Appeal Letter
- Exhibit 5 Appeal Response Letter
- Exhibit 6 Board Letter
- Exhibit 7 Public Hearing Notice

2. Meeting Exhibit #1 Planning & Community Services Department Zoning Compliance Letter, dated February 14, 2017 to MTSun LLC from Jeannette Vieg, Planning Assistant
3. Meeting Exhibit #2-Request for Proposal for Commercial Lease of State Trust Land, Alkali Creek Commercial Lease, Montana Department of Natural Resources and Conservation, March 15, 2016
4. Meeting Exhibit #3-City/County Planning Division, Zoning Clarification Request, PLN-16-00095, Issue Date: March 17, 2016
5. October 10, 2017 Letter from Jack Ramirez, Manager, Yellowstone Farms, LLC in support of Karen Kosiarek's appeal.
6. October 10, 2017 letter DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.
7. City/County Planning October 12, 2017 Yellowstone County Board of Adjustment meeting sign-in sheet
8. Yellowstone County Board of Adjustment Meeting Agenda, Thursday, October 12, 2017