

Solar Array/Local Government: Federal Court Addresses Alleged Rights Violation Due to Construction



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The United States District Court of Oregon ("Court") addressed in an April 14th Opinion an action alleging violation of rights stemming from construction of a solar energy array. See *Kristine Yates v. U.S. Envtl. Prot. Agency*, 2020 WL 1867384 (D. Or. Apr. 14, 2020).

The action was filed by an adjacent property owner.

Plaintiff Kristine Yates ("Plaintiff") lives on Exclusive Farm Use (EFU) land in Silverton Oregon. Defendant Silverton Solar, LLC (Silverton Solar) applied for a Conditional Use Permit to install a 12-acre solar array on the property adjacent to the Plaintiff's property. The adjacent property was also zoned EFU. The Marion County Code allowed this type of solar array as a conditional use in an EFU zone.

Marion County granted Silver Solar's application on January 19, 2016.

Construction of the solar array began in the summer of 2017. The Plaintiff alleged she did not receive notice of the plan to construct the array. The construction allegedly interfered with her use and enjoyment of the property. Further, the Plaintiff alleged that the construction caused flooding on her property.

Plaintiff filed an action in November of 2017. The Court dismissed various claims against all defendants except Marion County. The remaining claims were negligence per se, procedural due process, nuisance, and trespass.

Marion County filed a Motion for Summary Judgment in regards to all claims.

The Court first addressed the claims of negligence per se and procedural due process. Plaintiff asserted Marion County committed negligence per se and violated her due process rights by failing to notify her of the plan to construct the solar array.

Marion County acknowledged that it failed to notify her of the plan to construct a solar array. It further acknowledged that it approved the permit application without providing notice in a hearing. However, it asserted this was permitted under state law and the County code. If any person statutorily entitled to notice was provided notice of the decision and opportunity to appeal it there was no violation. It provided evidence that notice of the decision to Plaintiff was mailed. Plaintiff, however, asserted that she was not provided the opportunity to appeal because notice was not received.

To demonstrate negligence per se, the Court stated that Plaintiff must allege that:

1. defendants violated a statute;
2. that Plaintiff was injured as a result of that violation;
3. that Plaintiff was a member of the class of persons meant to be protected by the statute; and
4. that the injury Plaintiff suffered is of a type that the statute was enacted to prevent.

The applicable statute required Marion County to mail notice of the decisions. However, the statute did not include an actual notice requirement. Instead, it required that Marion County provide an opportunity for Plaintiff to file an appeal. Since the mailed notice explained Plaintiff could file appeal of the decision, the Court held that Marion County complied with this requirement. Therefore, Marion County was entitled to summary judgment for that claim.

The Court stated procedural due process requires that:

1. a person deprived of property
2. be given an opportunity to be heard
3. at a meaningful time and in a meaningful manner.

The Court held that Plaintiff's due process claim also failed as a matter of law. This was based on Marion County's undisputed compliance with notice provisions. Plaintiff could not demonstrate that Marion County's actions deprived her of a property interest protected by due process.

The Court also addressed the trespass and nuisance claims.

Marion County asserted it was not responsible for any alleged tortious conduct by those involved in the construction process. No evidence could be provided that it took any action causing trespass or nuisance.

Plaintiff responded that by issuing the conditional use permit for the solar array, Marion County assumed inspection responsibility for the construction process. This allegedly allowed the tortious conduct to occur.

The Court stated that, in general, nuisance and trespass require an action by the defendant, or at least actions by a party for which defendant is responsible. The Court found that the Plaintiff provided no evidence to demonstrate that Marion County was responsible for the construction workers' actions. It reasoned that the conditional use permit did not give Marion County control over the workers. The permit simply provided that Marion County would conduct a final building inspection. It conducted such and passed the building.

Additionally, the Court also agreed that neither soil compaction nor the drainage ditch violated the required 20-foot setback. This was due to the fact that neither were defined as a structure.

Plaintiff's property was downhill from the adjacent property. Thus, water naturally flowed onto the Plaintiff's property. These facts led the Court to hold that any runoff or flooding did not constitute water trespass.

Finally, Plaintiff asserted that the construction violated a requirement that the developed portion of the site be at least 55 feet from the farmed property. This assertion was based on the site improvement plan map that designated a 55-foot shade buffer. However, the Court determined since the shade buffer was not required by code, Marion County had no ability to require or enforce it. Therefore, the Court granted Marion County's motion for summary judgment on each of those claims.

Marion County's Motion for Summary Judgement was granted.

A copy of the decision can be downloaded [here](#).