

IN RE: PETITION FOR SPECIAL EXCEPTION*		BEFORE THE
(2938 Hernwood Road)		
2nd Election District	*	OFFICE OF
4 th Council District		
Chris C. Morsberger	*	ADMINISTRATIVE HEARINGS
<i>Legal Owner</i>		
	*	FOR BALTIMORE COUNTY
Chaberton, LLC		
<i>Contract Purchaser</i>	*	Case No. 2020-0031-X
Petitioners		

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of a Petition for Special Exception filed on behalf of Chris Morsberger, legal owner, and Chaberton LLC, contract purchaser (“Petitioners”) for the property located at 2938 Hernwood Rd., Woodstock (the “Property”). The Special Exception Petition was filed to grant relief for a solar facility pursuant to the Baltimore County Zoning Regulations (“BCZR”) §4F-102.

Due to the COVID-19 pandemic, a public WebEx hearing was conducted virtually in lieu of an in-person hearing. The Petition was properly advertised and posted. Ryan Boswell, Development Manager with Chaberton, LLC (“Chaberton”) attended the hearing in support of the Petition along with Piero ‘Pete’ Mellits, PE of Century Engineering who prepared and sealed a site plan (the “Site Plan”). (Pet. Exs. 1, 2). Jason Vettori, Esquire of Smith, Gildea & Schmidt, LLC represented the Petitioners. Several Protestants, neighbors and interested citizens attended and/or testified at the hearing as set forth below.

ZAC comments were received from the Department of Plan (“DOP”) and the Department of Environmental Protection and Sustainability (“DEPS”) which agencies did not oppose the requested relief.

FINDINGS OF FACT

The Property is 88,771 acres +/- of which 10.21 acres is proposed as the Special Exception area for the proposed solar facility. Of the total acreage, 51.8 acres are forested and 35 acres will remain in a Forest Conservation Easement. It is improved with a single family home owned and occupied by the Petitioner, Chris Morsberger. The Property is zoned Agricultural (RC 2).

Ryan Boswell was the first witness to testify for the Petitioners. His duties at Chaberton include design, permitting and preconstruction issues of solar facilities. Chaberton is a local company which is affiliated with Greenbacker Capital and Greenbacker Renewal Energy Company which owns 100 solar facilities. Mr. Boswell testified that the Property was selected as an ideal site for a solar facility because it was already cleared farm land, involved no grading and was located near a BGE power grid. Mr. Morsberger had been using the proposed Special Exception area as a pasture for his own horses. Mr. Boswell explained that the proposed project will be a 2 megawatt, ground mounted, single axis tracking facility with solar photovoltaic (PV) modules. The PV modules have an antireflective coating. The panels will face east in the morning and west in the evening, rotating with the sun throughout the day to absorb the maximum amount of solar rays which are then converted into energy and transmitted to the BGE power grid.

Mr. Boswell explained that an application was submitted to BGE and conditionally approved to connect the solar facility to the BGE grid. (Pet. Ex. 4). BGE agreed to extend an underground feeder from the overhead line and connect it to the solar facility. The Federal Aviation Administration (“FAA”) conducted an aeronautical study of the proposed project and determined that the proposed solar facility will not exceed obstruction standards and would not be a hazard to air navigation, and no lighting would be necessary for aviation safety. (Pet. Ex.

10). Chaberton also applied to the Maryland Community Solar Program and anticipates this solar facility will begin operating in May of 2022. (Pet. Ex. 5). Subscribers to the Maryland Community Solar Program save on the cost of their electric bills. For a 2 mg AC current facility, electricity would be supplied to 550 households.

Pete Mellits, PE of Century Engineering was accepted as an expert in civil engineering, in BCZR, and in the Baltimore County Development Regulations. (Pet. Ex. 8). Mr. Mellits prepared and sealed the Site Plan (Pet. Ex. 1) and a redlined Site Plan (the “Redlined Site Plan”) (Pet. Ex. 2). Mr. Mellits testified that he is familiar with the Property and the surrounding area. He described the Special Exception area of 10.21 acres as an open pasture which has existing access via a gravel farm road off Sharon Hill Farm Rd. The topography has gentle slopes of 1-5% with the perimeter slopes of 5%-15%. He testified that the soil type is ‘B’ and that it drains well.

The changes made to the Redlined Site Plan are reflected in Notes 24-28. (Pet. Ex. 2). Preliminarily, Century Engineering’s landscape team identified the forest stand and specimen trees. No tree clearing is needed for the solar facility other than 3 specimen trees. DEPS approved a Forest Conservation Variance to remove 3 specimen trees which are noted on the Redlined Plan. (Pet. Ex. 12). Applying the factors in BCC, §33-6-116(d) and (e), DEPS described the trees as a 30-inch diameter tulip poplar, a 34-inch American sycamore which are both in excellent condition, and a 38-inch boxelder in poor condition. The Redlined Site Plan reveals that both the 38-inch boxelder and the 30-inch tulip poplar are located in the middle of the proposed solar array and therefore would need to be removed. In regard to the 34-inch sycamore tree, the Redlined Site Plan shows that only the proposed fence will be installed on top of the critical root zone of that tree. Given that it was determined by DEPS to be in excellent condition, inquiry was made of Mr. Mellits as to whether that tree could remain. Mr. Mellits explained that its proximity

to the solar panels will cast shadows and prevent or hinder sun absorption. Because this project received limited exemption approval under BCC, §32-6-104(b)(8) (Pet. Ex. 13), the decision of DEPS to approve the removal of specimen trees is binding here under BBC, §32-6-116(i). Notwithstanding the DEPS approval, Mr. Mellits testified that the Petitioners desire to retain the sycamore tree, if possible, and will work to reposition the panels. Additionally, when questioned about the impact on critical root zone of specimen tree #7 which is to remain, Mr. Boswell clarified that the rack system allows the solar panel to cantilever over the critical root zone without impacting it.

In regard to the requirements in BCZR, §4F-104. Mr. Mellits opined that the solar facility is not encumbered by an agricultural preservation easement, an environmental preservation easement, or a rural legacy easement, or located in a Baltimore County historic district or on a property that is listed on the Baltimore County Final Landmarks List. (BCZR, §4F-104.A.1 and 2). While there are 35 of the 88 total acres on the Property which is proposed to remain in a Forest Conservation Easement, the solar facility and Special Exception area are not. (BCZR, §4F-104.A.3). The Forest Conservation Easement will be established at the grading permit stage. The Redlined Site Plan shows that the aboveground components of the solar facility, including solar collector panels, inverters, and similar equipment, will all be set back a minimum of 50 feet from the tract boundary. (BCZR, §4F-104.A.4). Mr. Mellits testified that the height of the solar panels fully extended will be between 9-13 ft. in height depending on the topography of the panel. (BCZR, §4F-104.A.5).

In regard to a landscaped buffer for adjacent residentially used property and from Sharon Hill Farm Rd., Mr. Mellits opined that the Redlined Site Plan shows the proposed landscape buffer on the property boundaries for owners James and Lisa Deramus (2940 Hernwood Rd.)

and George and Linda Chenowith (2936 Hernwood Rd.). Both the Deramus and Chenowith families provided written letters of support for the proposed use. (Pet. Ex. 3). Along Sharon Hill Farm Rd., there is an additional landscape buffer to fill in an area which is visible from that road. (Pet. Ex. 2). (BCZR, §4F-104.A.6). He added that neither Sharon Hill Farm Rd. nor Hernwood Rd. are scenic routes or scenic views. Mr. Mellits also testified that a 7 ft., black vinyl coated fence, without any barbed wire, will be installed between the landscape buffer and the solar facility. (BCZR, §4F-104.A.6). One entrance gate is shown on the Redlined Site Plan facing Sharon Hill Farm Rd. On behalf of Chaberton, Mr. Boswell agreed that as a condition of the Order, a sign will be installed on the gate access providing the name, address and phone number of the owner and operator of the solar facility.

In regard to the Special Exception factors, Mr. Mellits opined that the solar facility will not be detrimental to the health, safety or general welfare of the locality involved and stated that other than the solar panels which are ground mounted and will be removed at the end of the lease term, there are no impervious surfaces or lighting to be installed. The proposed use will not create congestion in roads, streets or alleys therein or tend to overcrowd the land and cause undue concentration of population because there is at most 2 trips to the solar facility per month for maintenance. This is not a use which will generate people coming to the site and the solar facility will be unoccupied. The use will not create a potential hazard from fire, panic or other danger as all electrical equipment is sealed and does not emit heat. The solar facility will not interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements as it will have its own storm water management facilities in accordance with both State and County regulations. At 13 ft. maximum height and separated from residential properties, the solar facility will not cast shadows or block air flow and

therefore will not interfere with adequate light and air. Mr. Mellits opined that the proposed solar facility is consistent with the purposes of the property's zoning classification and not in any way inconsistent with the spirit and intent of BCZR, 4F as it is specifically permitted by special exception in an RC2 zone. The solar facility is also consistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations and as noted the soil type is 'B' and drains well. There is no impermeable surface which will increase water flow. Indeed, rain water running off the panels is soaked into the grass beneath it. Additionally, storm water management facilities will also be installed as approved during permitting. Lastly, he testified that the use will not be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2 Zone as environmental resources are being protected, there are no wetlands or floodplains within the Special Exception area and the use will comply with the Forest Conservation regulation. He added that no chemicals or pesticides will be used. Rain water cleans the solar panels.

The final witness to testify for the Petitioner was Stephen Barrett of Barrett Energy Resources Group in Concord, MA who was admitted as an expert witness in glare analysis. (Pet. Ex. 7). Mr. Barrett has been admitted as an expert witness in other cases involving solar facilities. Toward that end, he prepared a glare study report using computer software known as GlareGauge which is accepted by the U.S. Federal Aviation Administration, and is now considered the industry standard. (Pet. Ex. 9). Mr. Barrett was involved in the development of the model tool which became part of the 2013 FAA Guidance document for solar projects at airports and is now applied to uses which have the potential for glare in residential communities. The program only considers the solar array, the movement of the sun and the position of observers; it does not take into account

terrain, vegetation, or other structures which might obstruct the observer's view. *Id.* The program determines the path of the sun throughout the year.

Mr. Barrett testified that the FAA glare model includes a 3-step process which he analyzed in this case. The first step is to identify the receptors (adjacent properties, roads, motor vehicles) where glare from the proposed solar panels could potentially reflect the sun's rays. Without considering terrain, vegetation or structures, he located 10 receptors – 8 receptors were residential locations and 2 were field viewpoints. (Pet. Ex. 11). The selection of receptor sites was from Google Earth and the focus was on potential glare from locations due to sun rising in the east and setting in the west, while recognizing that the panels will be rotating. Mr. Barrett discovered that none of the 10 receptors have the potential for glare. He opined that the single axis tracking system effectively eliminates potential glare even when the panel is perpendicular to the sun. He attributes this to the sun's rays being reflected back toward the sun and not toward any receptor on the ground. He emphasized that this step is not the same as being able to observe the solar panels. He is concerned only with whether glare is produced from a selected location as glare is a function of where the sun is in the sky in relation to the time of year. As a result of his report, Mr. Barrett was able to opine that there will be no glare produced from the proposed solar facility here. (BCZR, §4F-104.A.8).

Cathy Wolfson, 8434 Dogwood Rd., Windsor Mill, asked questions in regard to controlling weeds in the Special Exception area. Mr. Boswell responded that a pollinator-friendly habitat which is a combination of grass and flowering plants will control the weeds growth so that no pollutants or chemicals will be used. She also inquired as to the lease term to which Mr. Boswell responded that a typical solar facility lease is 20 years but may have 5 year extensions, and runs with the land to any successor owner. Mr. Mellits responded to her question about the Forest

Conservation Easement stating that all trees within the Easement will remain and that an agreement will be executed with the County and recorded in Land Records. In regard to maintaining and/or replacing trees as necessary which are proposed to be planted as the Landscape Buffer, Mr. Mellits stated that a Landscape Plan will require maintenance and/or replacement of the trees to be planted. Ms. Wolfson added that the proposed solar facility here is in addition to the mega solar facility to be installed at the nearby Hernwood Landfill.

Carl Oakman, II, 7902 Dogwood Rd., Windsor Mill is the President of the Greater Patapsco Community Association (“GPCA”) whose boundaries include an 18.7 square mile area. On behalf of the GPCA, Mr. Oakman pointed out that the GPCA has 24 % of Councilmanic District 4’s solar facilities within its boundaries. Laurie Donnelly, 3130 Hernwood Rd. confirmed her questions that the use of the pollinator habitat will preclude the use of chemicals and pesticides.

Maribeth Diemer, 10625 St. Paul Ave., Woodstock lives less than 2 miles from the Hernwood Landfill site. Ms. Diemer is the Treasurer of the GPCA and testified that Councilmanic District 4 has 10 solar facilities within 65 square miles, and within the GPCA 18.7 square mile territory area which includes 1,600 homes, solar facilities are contained within 4.6 miles. Ms. Diemer advocated for a change in the law which would prevent the accumulation of solar facilities within District 4. She also questioned whether the Department of Natural Resources was required to study how close the proposed solar facility is to Patapsco State Park. She questioned how much of the energy produced by the solar facilities is committed to residents rather than to businesses. Ms. Diemer also requested that construction traffic for the solar facility use Marriottsville Rd. before proceeding to Hernwood Rd. as a condition in the Order.

Austin Cohen, 3004 Hernwood Rd. asked questions about the total time for construction to which Mr. Boswell responded that it typically takes 6 months and 20-30 workers who will work

during day light hours. Mr. Boswell clarified for Mr. Cohen that BGE was adding 3 poles for this project and that the total voltage was 13.2 kw. Mr. Boswell also added that the manufacturer warranty for the solar panels is 25 years (lease term) but that they have been shown to be productive for up to 40 years.

DECISION

On July 17, 2017, the County Council enacted Bill 37-17 permitting solar facilities by special exception in certain zones, including RC6. BCZR, §4F-102.A. The County Council imposed limits on the number of facilities per councilmanic district (*i.e.* 10 per district), and on the maximum area for each facility (*i.e.* the amount of acreage that produces no more than 2 megawatts alternating current (AC) of electricity). BCZR, §4F-102.B.1 and 2.

In addition to the special exception factors, there are 10 requirements set forth in BCZR, §4F-104.A:

1. The land on which a solar facility is proposed may not be encumbered by an agricultural preservation easement, an environmental preservation easement, or a rural legacy easement.
2. The land on which a solar facility is proposed may not be located in a Baltimore County historic district or on a property that is listed on the Baltimore County Final Landmarks List.
3. The portion of land on which a solar facility is proposed may not be in a forest conservation easement, or be in a designated conservancy area in an RC 4 or RC 6 Zone.
4. Aboveground components of the solar facility, including solar collector panels, inverters, and similar equipment, must be set back a minimum of 50 feet from the tract boundary. This setback does not apply to the installation of the associated landscaping, security fencing, wiring, or power lines.
5. A structure may not exceed 20 feet in height.
6. A landscaping buffer shall be provided around the perimeter of any portion of a solar facility that is visible from an adjacent residentially used property or a public street. Screening of state and

local scenic routes and scenic views is required in accordance with the Baltimore County Landscape Manual.

7. Security fencing shall be provided between the landscaping buffer and the solar facility.

8. A solar collector panel or combination of solar collector panels shall be designed and located in an arrangement that minimizes glare or reflection onto adjacent properties and adjacent roadways, and does not interfere with traffic or create a safety hazard.

9. A petitioner shall comply with the plan requirements of § 33-3-108 of the County Code.

10. In granting a special exception, the Administrative Law Judge, or Board of Appeals on appeal, may impose conditions or restrictions on the solar facility use as necessary to protect the environment and scenic views, and to lessen the impact of the facility on the health, safety, and general welfare of surrounding residential properties and communities, taking into account such factors as the topography of adjacent land, the presence of natural forest buffers, and proximity of streams and wetlands.

There are also provisions regarding maintenance of the facilities:

§ 4F-106. - Maintenance.

A. All parties having a lease or ownership interest in a solar facility are responsible for the maintenance of the facility.

B. Maintenance shall include painting, structural repairs, landscape buffers and vegetation under and around solar panel structures, and integrity of security measures. Access to the facility shall be maintained in a manner acceptable to the Fire Department. The owner, operator, or lessee are responsible for the cost of maintaining the facility and any access roads.

C. Appropriate vegetation is permitted under and around the solar collector panels, and the tract may be used for accessory agricultural purposes, including grazing of livestock, apiculture, and similar uses.

D. The provisions on this section shall be enforced in accordance with Article 3, Title 6 of the County Code.

A solar facility which has reached the end of its useful life must be removed in accordance with §4F-107.

In order to grant a request for a special exception under BCZR, §502.1, it must appear that the use for which the special exception is requested will not:

- A. Be detrimental to the health, safety or general welfare of the locality involved;
- B. Tend to create congestion in roads, streets or alleys therein;
- C. Create a potential hazard from fire, panic or other danger;
- D. Tend to overcrowd land and cause undue concentration of population;
- E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
- F. Interfere with adequate light and air;
- G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;
- H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor
- I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 Zone.

In *Schultz v. Pritts*, 291 Md. 1, 22-23, 432 A.2d at 1331 (1981), the Court of Appeals held that “the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and therefore should be denied, is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.”

The Court of Appeals in *People’s Counsel for Baltimore County v. Loyola College in Md.* 406 Md. 54, 106, 956 A.2d 166 (2008) upheld that longstanding *Shultz* analysis, explaining that a special exception use has “certain [inherent] adverse effects....[which] are likely to occur”. In its analysis, the *Loyola* Court observed that “[t]he special exception adds flexibility to a

comprehensive legislative zoning scheme by serving as a ‘middle ground’ between permitted use and prohibited uses in a particular zone.” *Id.*, 406 Md. at 71, 956 A.2d at 176 (2008).

The *Schultz* and *Loyola* Courts, and more recently in *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 285 (2017) have expressly recognized that “[a] special exception is presumed to be in the interest of the general welfare, and therefore a special exception enjoys a presumption of validity.” (See also *Loyola*, 406 Md. at 84, 88; 105 *Schultz*, 291 Md. at 11). Based on this standard, once an applicant puts on its *prima facie* evidence in support of a special exception, the opponents must then “set forth sufficient evidence to indicate that the proposed [use] would have any adverse effects above and beyond those inherently associated with such use under the *Schultz* standard.” *Attar*, 451 Md. at 287. (See *Montgomery County v. Butler*, 417 Md.271, 276-77 (2010) (opponent must show “non-inherent adverse effects” to “undercut the presumption of compatibility enjoyed by a proposed special exception use”). (See also, *Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties*, 453 Md. 516, 543 (2017) (“there is a presumption that the [special exception] use is in the interest of the general welfare, a presumption that may only be overcome by probative evidence of unique adverse effects”).

As set forth above in BCZR, §4F-102.A, solar facilities are only permitted by special exception under the factors set forth in BCZR §502.1. Without repeating the evidence set forth above, the testimony of Mr. Mellits confirmed each of the requirements in BCZR, §4F-102.A.1-7 as well as each of the Special Exception factors in BCZR, §502.1. In addition, both he and Mr. Boswell addressed all questions asked as to the Article 4F and Special Exception requirements. Mr. Barrett’s opinion and Glare Report that the proposed solar facility will produce no glare to the adjacent homes as required in in BCZR, §4F-102.A.8 was uncontroverted.

Based on the evidence presented, I find that the proposed solar facility here meets all of the requirements in BCZR, Article 4F and BCZR, §502.1 will be granted. The testimony and opposition by neighbors and interested citizens primarily concerned the concentration of solar facilities within the 4th Councilmanic District. As explained, any changes to Article 4F would need to be enacted by the County Council and the undersigned has no authority to change what the law requires. BCZR, §4F-102.B.2 permits no more than 10 solar facilities per councilmanic district. As such, until the limit of 10 solar facilities is reached in Councilmanic District 4, or the law is changed, building permits for approved solar facilities can be issued.

THEREFORE, IT IS ORDERED this 7th day of **October 2021**, by this Administrative Law Judge, that the Petition for Special Exception to grant relief for a solar facility pursuant to the Baltimore County Zoning Regulations (“BCZR”) §4F-102 as set forth on the Redlined Site Plan (Pet. Ex. 2), be, and it is hereby, **GRANTED**.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at this time is at its own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioners would be required to return the subject property to its original condition.
2. Petitioners must comply with the DOP and DEPS comments, a copy of which are attached hereto and made a part thereof.
3. The Redlined Site Plan shall be incorporated into and made a part of this Opinion and Order.
4. Petitioners shall submit for approval to Baltimore County Landscape Architect, a Landscape Plan for the Property demonstrating appropriate screening and vegetation is provided along adjacent public streets, as well as from the adjacent residentially used properties as required by BCZR, §4F-104.A.6. The Landscape Plan shall include an agreement that the owner of the solar facility shall be required to maintain and/or replace as necessary all trees, shrubs and/or vegetation planted within the Landscape Buffer as shown on the Redlined Site Plan.

5. Petitioners shall install a 7 ft. high black vinyl, chain link security fence between the Landscape Buffer and the solar facility as required by BCZR, §4F-104.A.7. Attached to the entrance gate of the fence, in a conspicuous place, shall be placed a sign with the current contact information (name, address, telephone number, website and email address) of the owner and the operator of the solar facility.

6. Prior to the issuance of a building permit, Petitioners must satisfy the environmental regulations set forth in BCC, §33-3-108 pertaining to the protection of water quality, streams, wetlands and floodplains and obtain approval of the Site Plan from DEPS as required by BCC, §33-3-108, as required by BCZR, §4F-104.A.9.

7. All construction traffic for the solar facility shall use Marriottsville Rd. before proceeding onto Hernwood Rd.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.



MAUREEN E. MURPHY
Administrative Law Judge
for Baltimore County

MEM/dlm