

IN RE: PETITION FOR SPECIAL EXCEPTION * BEFORE THE
(5298 Frye Road) * OFFICE OF
4th Election District * ADMINISTRATIVE HEARINGS
3rd Council District
Woodensburg Land & Cattle Co., LLC * FOR BALTIMORE COUNTY
Legal Owner
SGC Power, LLC * Case No. 2017-0107-X
Lessee
Petitioners *

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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 Woodensburg Land & Cattle Co., LLC, legal owner and SGC Power, LLC, lessee (“Petitioners”). The Petition for Special Exception pursuant to Section 4E-102 of the Baltimore County Zoning Regulations (“BCZR”) seeks approval for a solar facility.

Glenn Elseroad and landscape architect Stacy McArthur appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioners. Several citizens, represented by G. Macy Nelson, Esq. attended the hearing and opposed the request. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”), the Bureau of Development Plans Review (“DPR”) and the Department of Environmental Protection and Sustainability (“DEPS”). None of the receiving agencies opposed the request.

The subject property is approximately 19.68 acres and zoned RC-2. The property is located on Hanover Pike (Md. Route 130), which is a designated Baltimore County scenic route. Petitioners propose to construct a solar facility on the property, a use permitted by special exception in the RC-2 zone.

Special Exception

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use.

Petitioners presented four witnesses in their case. First was Stacy McArthur, a landscape architect accepted as an expert. Ms. McArthur described the site plan and testified the property is approximately 19.6 acres in size. She testified there are no flood plains on the site and that a wetlands delineation (as shown on the site plan) was approved by Baltimore County. She testified no trees would be removed from the site and indicated the site slopes gradually upward from Hanover Pike. Ms. McArthur stated a schematic landscape plan has not yet been approved by Baltimore County, although she explained such plans are normally approved later in the process at the time of permit application.

In response to questions on cross examination Ms. McArthur conceded the proposed landscaping will not block the view into the site although she believed the view of the panels would be softened. Ms. McArthur testified that in her opinion there is not a stream in the area where the solar panels would be located, even though an engineer in a prior case prepared a plan for the site showing an intermittent stream and buffer. Prot. Ex. No. 1.

Jack Copus, a partner in the entity that would lease this site, was the next witness. Mr. Copus explained he has been involved in the solar industry since 2008 and since that time has

worked on approximately 100 solar array projects. He testified SGC Power (lessee) has completed over 140 projects in 26 states. Mr. Corpus described the various elements of the solar facility and stated the panels would be fixed and that no lights would be installed on the property. The witness testified the lessee has received conditional approval from BGE for a 1.75Mw solar facility, and that at least 51% of the power generated would be sold/distributed to low-income customers.

The next witness was owner Glenn Elseroad. Mr. Elseroad and his wife own more than 500 acres of agricultural land in Baltimore County, 355 of which are protected by an agricultural easement preservation program. He testified this property has been in his family since 1923, although his grandfather sold portions of the land (including the subject property) in 1951. Mr. Elseroad testified he “re-acquired” the subject property in 2010. He stated the subject property was farmed until last year, but that the small size of the tract makes it unprofitable to farm.

The final witness in Petitioners’ case was Henry Leskinen, who was accepted as an expert ecologist. Mr. Leskinen testified he performed wetland and forest stand delineations for the site. He testified there is a wetland area on the eastern property boundary, but he opined that it did not continue into the area between the solar arrays. Mr. Leskinen described the area between the proposed solar arrays as a broad swale with upland grasses. He opined this was a “best management practice” that assisted in removing sediment from fields which were farmed. In response to a question on cross examination the witness conceded there are streams on the property, but he noted that none of the panels would be in environmentally sensitive areas. The witness also conceded several of the proposed panels would be located within the swale.

As noted by several of the Protestants (and conceded by Ms. McArthur), Petitioners will not be able to screen or enclose the panels in such a fashion that would prevent them from being seen by immediate neighbors or from motorists on Hanover Pike. But the law does not require

that; the zoning regulations specify only that “screening of…scenic routes and scenic views” be provided in accordance with the Baltimore County landscape manual. BCZR §4E-104.A.6. A condition will be added below to ensure this requirement is satisfied.

I am sympathetic to the concerns expressed by the community, and agree the proposed solar panels will be incongruous with the pastoral rural setting along a scenic roadway. But I cannot deny the petition on that basis. That is because a large field of solar panels will have a similar negative impact wherever it is located in an RC-2 zone along a scenic roadway. Indeed, nearly all of the previous solar facility cases in Baltimore County have involved property zoned RC-2, and several have also been proposed on scenic roadways.

In those cases, like this case, nearby residents stated they would be able to see the panels from their homes, and that the rolling nature or topography of the farm fields would prevent the petitioner from screening the project. In other words, these negative impacts are inherent in the operation of a solar facility in a rural area. *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”). In a more recent special exception case Maryland’s highest court reached the same conclusion, although it employed slightly different language. *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”).

The County Council expressly permitted solar facilities in rural areas (including RC-2 zones) and along scenic routes, provided certain landscaping requirements are satisfied. Indeed, most special exception uses are regarded as “potentially troublesome because of noise, traffic,

congestion....” *Butler*, 417 Md. at 297. As such, I believe the petition should be granted, subject to the conditions noted below which will help to “lessen the impact of the facility on the health, safety and general welfare of surrounding residential properties.” BCZR §4E-104.A.10.

As noted in the Memorandum submitted by Petitioners, the use of solar and other renewable energy alternatives is encouraged by the State of Maryland. In a recent case (applicable only to solar facilities which require a Certificate of Public Convenience and Necessity (CPCN) from the Public Service Commission (PSC)) the court of special appeals held that the State’s interest in the area was so strong that county zoning ordinances governing the location of such facilities were impliedly preempted by state law. *Washington County v. Perennial Solar, LLC*, --- A.3d ----2018 WL 5993859 (Nov. 15, 2018). While that case is not directly controlling here, it does show the strong public policy preference for these facilities which I believe only strengthens in the circumstances of this case the presumption of appropriateness associated with this use.

THEREFORE, IT IS ORDERED this 5th day of **December, 2018**, by this Administrative Law Judge, that the Petition for Special Exception pursuant to Section 4E-102 of the BCZR for a Solar Facility, be and 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 their 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 ZAC comments of the Bureau of DPR, DOP & DEPS, copies of which are attached.
3. No signage or lighting shall be installed at the site in connection with the solar facility.
4. No deliveries to or maintenance of the solar facility shall occur between the hours of 6:00 PM – 7:00 AM.

5. Petitioners must submit for approval by Baltimore County a landscape plan which satisfies the requirements set forth in the Landscape Manual and BCZR §4E-104.A.6.
6. Any expansion, enlargement and/or relocation of the solar facility as shown on the green lined site plan admitted herein as Petitioners' Ex. 10 shall require a public hearing before the OAH.

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

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/sln