

IN RE: PETITION FOR SPECIAL EXCEPTION	*	BEFORE THE
(20450 Middletown Road)		
6 th Election District	*	OFFICE OF
3 rd Council District		
David William Matthews	*	ADMINISTRATIVE HEARINGS
<i>Legal Owner</i>		
Bluefin Origination 2 LLC	*	FOR BALTIMORE COUNTY
<i>Lessee</i>		
Petitioners	*	Case No. 2017-0108-X

* * * * *

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 David William Matthews, legal owner and Bluefin Origination 2, LLC, lessee (“Petitioners”). The Petition for Special Exception pursuant to Section 4E-102 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) seeks approval to operate a solar facility at the subject property.

Jeffrey S. Webber and Parker Sloan with Cypress Creek Renewables, Tim Dertebaugh, Brian Conlon, and David L. Martin, L.A. with Martin & Phillips Design Associates, Inc., the firm that prepared the site plan, appeared in support of the petition. Christopher D. Mudd, Esq. and Patricia A. Malone, Esq. represented the Petitioners. Numerous citizens attended the hearing to express opposition to the request. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) and the Bureau of Development Plans Review (“DPR”). Neither agency opposed the requests.

The subject property is approximately 70.979 acres and is split-zoned RC-2, RC-4, RC-5 and RC-8. The property is on Middletown Road, which is designated as a scenic route. The property was previously a farm, although with the exception of a small area there are no farming activities at the property presently. Petitioners propose to utilize 18.73 acres of the tract for a solar

facility. Petitioners would install between 8,500 to 9,000 solar panels, which would generate approximately 1.9 Mw of AC electricity.

The Lessee's zoning manager, Parker Sloane, testified his company is one of the largest solar providers in the United States, with projects in 12 states. Mr. Sloane testified the panels will be approximately 9 to 10 ft. in height and will rotate throughout the day to face the sun, although he noted the movement would be imperceptible. Like other solar proposals in Baltimore County, this facility would be unmanned and the operator will perform routine inspections 1 to 2 times per year.

Mr. Sloan stated the company had an alert system that would provide immediate notification of any problem or malfunction at the site. The witness testified his company used an "industry standard tool" and determined that there will be no concern with glare from the panels. Mr. Sloane indicated that only the inverter would generate noise, which he likened to a hair dryer. But given its location on the site he stated no noise at all would be heard from outside the property boundaries. In response to questions on cross-examination, Mr. Sloane testified Cypress Creek has completed over 200 projects since 2006, and that based on reports of appraisers hired by the company they have determined solar facilities do not have an adverse impact upon property values.

Many of the citizens had questions concerning the safety of the panels, and to address these issues the Petitioners presented testimony from Jeff Webber, an engineer employed by Cypress Creek. Mr. Webber, who was accepted as an expert, described the different types of silicon used in solar panels, and the attributes of each. He testified silicon is not a hazardous material and that the modules and the racks in which they are located are made of sand, aluminum, copper wire and steel. Mr. Webber stated only the transformer could "leak", and that if that occurred only mineral oil would be discharged. He said there was only an "extremely small risk" such a leak would

occur, and he said the hardwired monitoring system would alert the company immediately if that happened.

With regard to safety, Mr. Webber testified if the electric grid went down, the solar facility would immediately shut down. The witness stated the inverter would shut off within 2 seconds in such a scenario, and that while the panels would continue to function there would not be a current of electricity flowing and there would be no danger of electrocution. In response to questions on cross examination, Mr. Webber conceded economics drives how a facility is designed. He said while it might be possible (i.e., through use of higher efficiency panels) to generate 1.9Mw of electricity on less than 18 acres, the company would incur higher costs in doing so, which would make the project less profitable and/or economically unfeasible.

The final witness was David Martin, a registered landscape architect accepted as an expert. Mr. Martin prepared both the site plan (Exhibit 1) and the schematic landscape plan (Exhibit 8) for the project. He described the project and reviewed each of the requirements of B.C.Z.R. Article 4E, which he stated Petitioners satisfied. Mr. Martin opined the use proposed was “benign,” and he testified Petitioners satisfied all requirements for a special exception. He also indicated that in connection with a zoning case (No. 2000-0342-SPH) involving this property - - - which permitted the construction of a dwelling on an undersized parcel, environmental buffers were provided to Baltimore County to protect the water and forest resources on the site.

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.

Mr. Martin opined Petitioners satisfied the requirements of B.C.Z.R. § 502.1 and applicable case law, which under *Attar* and similar cases established a *prima facie* case entitling them to the special exception. While the neighbors expressed many valid concerns with the facility, the issues they identified are inherent in the operation of a solar facility. As such, I do not believe that testimony can rebut the presumption provided by Maryland law that special exception uses are in the public interest.

Having said that, I believe the community raised one issue in particular which warrants further discussion; i.e., the size of the special exception area. The law states that the “maximum area permitted for a single solar facility is the amount of acreage that produces no more than two megawatts . . . of electricity.” B.C.Z.R. §102.A.1. Based on Mr. Webber’s testimony, there appears to be numerous variables involved in determining the appropriate size and design of a solar facility. As the witness noted, economics is certainly an important consideration. These facilities are operated by for-profit ventures, and Petitioners are entitled to maximize the return they receive on their land and investments.

But in this scenario, they must do so in keeping with the above-quoted provision. Similar solar facilities have been approved in several recent cases. What follows is the case #, special exception area and electricity generated:

- 2018-0047 (9 acres; 2Mw)**
- 2018-0052 (6.4 acres; 1Mw)**
- 2018-0072 (6 acres; 840Kw)**
- 2018-0078 (9.8 acres; 2Mw)**
- 2018-0095 (16 acres; 2Mw)**

While the community opposed the request in each of the above cases (with the exception of No. 2018-0095, which was unopposed), this is the first case in which this issue has arisen. Each of the Petitioners in the above cases was (like Petitioner here) a for-profit entity, which means it is safe to assume the projects proposed were economically viable. I certainly understand there are a variety of factors which inform the design and layout of a solar facility, but based on the foregoing I believe a 13 acre special exception area would be sufficient to allow for the production of 2Mw of electricity, and such a restriction will be included below.

THEREFORE, IT IS ORDERED this 22nd day of **January, 2018**, by this Administrative Law Judge, that the Petition for Special Exception pursuant to Section 4E-102 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) 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 submit for approval by Baltimore County a landscape plan for the site demonstrating, among other things, appropriate screening and vegetation is provided along the scenic route, as required, by the Landscape Manual.
3. Petitioners shall install a fence of sufficient height which will, per the electric code, prevent the need for barbed wire.
4. No weed killers or herbicides shall be used to control weed or grass growth at the facility.

5. Prior to issuance of permits, Petitioners must satisfy the environmental regulations set forth in Article 33 of the Baltimore County Code, pertaining to the protection of water quality, streams, wetlands and floodplains.
6. No trees shall be removed from the special exception area shown on the site plan in connection with the construction and/or operation of the solar facility.
7. Petitioners shall within 30 days of the date hereof submit to the OAH a redlined site plan showing a “special exception area” for the solar facility of no more than 13 acres.

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