

**IN RE: PETITIONS FOR SPECIAL  
EXCEPTION AND VARIANCE  
(Hanover Road)  
4<sup>th</sup> Election District  
3<sup>rd</sup> Council District  
Donald E. & Kathleen Lippy  
*Legal Owners*  
New Source Generation, LLC  
*Lessee*  
**Petitioners****

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BEFORE THE  
OFFICE OF  
ADMINISTRATIVE HEARINGS  
FOR BALTIMORE COUNTY  
**Case No. 2018-0052-XA**

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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Exception and Variance filed for property located on Hanover Road in northwest Baltimore County, not far from the Carroll County line. The Petitions were filed on behalf of Donald E. and Kathleen Lippy, legal owners of the subject property and New Source Generation, LLC, lessee. The Special Exception petition seeks approval for a solar facility. The Petition for Variance seeks to approve a minimum setback of 35 ft. in lieu of the 50 ft. setback imposed by Article 4E of the B.C.Z.R. A site plan was marked as Petitioners’ Exhibit 2.

Appearing at the hearing in support of the petitions were Ken Donithan, Donald Lippy and professional land surveyor John Lemmerman. Lawrence E. Schmidt, Esq. represented Petitioners. The Hanover Road Community Association, represented by Mike McCann, Esq. opposed the request. The Petition was advertised and posted as required by the B.C.Z.R. A substantive Zoning Advisory Committee (ZAC) comment was received from the Department of Planning (DOP). That agency did not oppose the request.

The subject property is approximately 6.454 acres in size and is zoned RC 2. The property is unimproved and is currently in agricultural use. Petitioners propose to install solar panels on the property which would generate approximately one megawatt of electricity. Mr. Donithan testified

at least 60% of the power generated would be used by the Lippy brothers in their farming operations in Baltimore and Carroll Counties.

Mr. Donithan testified Petitioners have obtained conditional approval from both the PSC and BGE pursuant to the community solar energy program adopted by the State of Maryland. Baltimore County has approved a final landscape plan for the project (Exhibit 6) and there will be enhanced screening along both road frontages. The facility will also be enclosed by a security fence.

#### 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.

Based on the testimony of Messrs. Donithan and Lemmerman, and mindful of the presumption supplied by Maryland case law, I believe Petitioners are entitled to the special exception. Both witnesses stressed the project would not generate traffic or noise and the facility will for the most part be monitored remotely. Mr. Donithan testified that after construction the only regular visits to the property would be for mowing the grass. Protestant did not call any witnesses in its case and did not submit any documents or other evidence which would refute or undermine in any way the testimony and evidence presented by Petitioners. As such, the special exception will be granted.

## VARIANCE

A variance request involves a two-step process, summarized as follows:

1. It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
2. If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Cromwell v. Ward*, 102 Md. App. 691 (1995).

John Lemmerman, a professional surveyor accepted as an expert, testified the property has a unique “L” shape and is bordered by agricultural properties protected by State easements. As such I agree with his opinion the property is unique. If the B.C.Z.R. were strictly interpreted Petitioners would suffer a practical difficulty since they would be unable to complete the proposed solar facility.

Finally, I find that the variance can be granted in harmony with the spirit and intent of the B.C.Z.R., and in such manner as to grant relief without injury to the public health, safety, and general welfare. This is demonstrated by the lack of Baltimore County opposition. In addition, only one variance is sought and the relief requested is in my opinion modest, especially considering there will be enhanced landscaping along the road frontages that will mitigate the impact of the reduced setback (i.e., 35 feet in lieu of the required 50 feet).

## LEGAL ISSUES

Protestant’s counsel contends the petition should be dismissed since it was filed in violation of B.C.Z.R. §500.12, which concerns “subsequent petitions” after the denial of a petition for special exception. While it is true the previous petition for special exception (in Case No. 2016-0335-SPHX) was denied by the Board of Appeals, a petition for judicial review was filed and that matter is pending in the circuit court. As such, there has not been a final order denying

the earlier petition, which in my opinion renders B.C.Z.R. §500.12 inapplicable. In addition, the earlier petition sought to operate a “public utility” at the site while the special exception in this case is for a “solar facility.”

Even if this were not the case, I also believe that provision should not bar the Petitioners from seeking relief in this case. Section 500.12 is in my opinion meant to address a scenario where a litigant files successive petitions for special exception involving the same use and the same property after a final denial of his initial request.

In that sense I agree with Petitioners’ counsel that Section 500.12 is akin to a *res judicata* provision, and should be given a similar interpretation. This regulation appears to have been enacted in 1959, at which time Maryland law held that decisions of administrative bodies were not entitled to preclusive effect. *Seminary Galleria, LLC v. Dulaney Valley Improv. Ass’n., Inc.*, 192 Md. App. 719, 735-36 (2010). In this case specific legislation (Bill 37-17) was enacted by the County Council in June 2017, permitting solar facilities in the rural zones by special exception. A change in law will overcome a *res judicata* defense, and for similar reasons I believe it makes Section 500.12 inapplicable. In addition, it would be inequitable to require Petitioners to wait 18 months before seeking approval for a solar facility, especially since the law itself caps (at ten) the number of such facilities permitted in any council district, which makes time of the essence.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this **13<sup>th</sup>** day of **October, 2017**, that the Petition for Special Exception to approve a solar facility be and is hereby GRANTED; and

IT IS FURTHER ORDERED that the Petition for Variance pursuant to the Baltimore County Zoning Regulations (B.C.Z.R.) to approve a minimum setback of 35 ft. from the tract

boundary in lieu of the 50 ft. solar facility setback required by Article 4E of the B.C.Z.R., be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon 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 comment of the DOP dated September 13, 2017, a copy of which is attached.

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

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Signed  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County

JEB/sln