

IN THE MATTER OF : BEFORE THE
POWER52 ENERGY SOLUTIONS, LLC : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 18-013C

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DECISION AND ORDER

On August 13 and September 5, 2018, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Power52 Energy Solutions, LLC (Petitioner) for a Commercial Solar Facility in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, pursuant to §§ 131.0.B.5 and 131.0.N.52 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Coale, Esq., represented Petitioner. Dino La Fiandra, Esq., represented John R. Streaker, Gwen Streaker, Greg Streaker, and South Polk Enterprises but withdrew his appearance before or during the commencement of the September 5, 2018 continuation hearing. Robert Vogel, Jason Jannati, Tom O'Toole, Chip Horman, Jack Faulkner, JG Warfield, Teresa Stonesifer, and Peggy Stover-Catha testified in support of the petition. No one appeared to testify in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Amended Conditional Use Plan, May 2018 (CUP #2)
2. 2nd Amended Conditional Use Plan, September 4, 2018, as Revised at hearing (Final CUP)
3. A-C. Scenic Road viewshed analysis , Henryton Road
4. Howard County Scenic Roads Inventory, Henryton Road

FINDINGS OF FACT

Based upon the preponderance of evidence, I find the following facts:

1. Property Identification. The 72.7-acre subject property is located in the 3rd Election District and is bisected by Old Frederick Road and Henryton Road. It is referenced as Tax Map 0010, Grid 0019, Parcel 18, and known as 1755 Henryton Road (the Property). Map 1 shows the Property's external lot lines in red. The Property is farmed, except for a residential use on a portion on the northern section of the Property.



Map 1

2. Vicinal Properties. Adjoining properties to the north, south and west are zoned RR-DEO and are each improved with a single-family detached dwelling.

3. Roads. Sand Hill Road has two travel lanes and about 20 paving feet. DPZ estimates sight distance as more than 500 in both directions. The posted speed limit is 30MPH. There is no traffic data for Sand Hill Road.

4. Water and Sewer Service. The Property is served by private well and septic facilities.

5. General Plan. PlanHOWARD 2030 identifies the Property as “Low Density” on the Designated Place Types Map, according to the TSR. The PlanHOWARD 2030 Functional Road Classification Map identifies Sand Hill Road as a Minor Collector.

6. The Proposed Conditional Use. The proposed 27.1-acre Conditional Use Site (CUS) is the light area shown on Map 1. The CUS is located on the southern portion of the Property, on the south side of Old Frederick Road and to the east of Sand Hill Road. The CUS has a low elevation of about 550 feet at the southernmost lot line and rises to an elevation of about 608 feet at the north lot line. A line of trees and vegetation runs along the easterly lot and southerly lot lines. DPZ staff identifies a stream within a floodplain just south of the Property.

Petitioner proposes a 3.4 MW DC Commercial Solar Facility comprising 14,982 solar panels. The facility will use single axis track design, which allows the solar panels to follow the path of the sun to reduce the impact of glare and maximize electricity generation. The Final Conditional Use Plan (FCUP) introduced as Petitioner Exhibit (PE) 2 shows the extent of the proposed solar panels and equipment. The proposed solar panels are about 8.5 feet in height. Details of these panels are called out on the FCUP. Two inverter pads on the south side of the internal maintenance road will convert solar power generated from DC to AC power for export to a utility grid. The facility would operate 24 hours a day, seven days a week, collectively solar

energy passively and converting it into electricity. There will about 2-3 maintenance visits to the facility per year through an access driveway off Sand Hill Road. Parking spaces and vehicle turnarounds are proposed next to the inverters.

Proposed Fencing and Landscaping. The FCUP shows a Type “D” landscape buffer around the external perimeter of the solar panels/equipment area. As revised, the FCUP also shows an eight-foot high board-on-board wood privacy fence along all but the southern perimeter of the facility. An eight-foot chain link fence is proposed along the southern lot line. All fencing will be topped by a three-strand barb wire security system. All conditional use fencing sits 50 feet from all lot lines, between the proposed landscaping and equipment.

The FCUP also contains several notes intended to respond to protestant concerns. These include General Note 10, which proposes one residential light post at the proposed entrance gate on Sand Hill Road, fence and gate details, and a note that “at the time of planting evergreens shall be 6’ from ground to top.”

7. Petitioner witness Jason Jannati presented an overview of the engineering and electricity-generating proposed solar energy facilities. He also discussed the technical aspects of the solar panel’s design to reduce glare, as analyzed in the glare study submitted with the petition. The proposed use will not generate any discernable noise.

8. Project Engineer Robert Vogel testified about the revised landscaping, increased setbacks from Lot 1, and the fencing shown on the FCUP. These revisions, including the board-on-board fencing and a 100+-foot setback from Lot 1, were made to accommodate the concerns of immediate neighbors.

9. Mr. Vogel further testified about the required visual impact analysis for the Henryton Road viewshed. Henryton Road is a scenic road on the Howard County Scenic Roads Inventory. PE3.B is an aerial perspective of two vantage points from Henryton Road at or near its intersection with Old Frederick Road. PE3.C shows the viewshed at this intersection with the proposed landscaping and fencing, which Mr. Vogel testified would not harm the scenic characteristics of the view of or from Henryton Road.¹ As Mr. Vogel testified, the proposed landscaping and fencing would minimize or greatly soften the view of the facility from Henryton Road. PE3.C also shows the strong visual presence of a cell tower in the distance and telephones poles and lines along Henryton and Old Frederick Roads.

10. Several area residents testified in support of the petition, including Tom O'Toole, Chip Horman, Jack Faulkner, JG Warfield, and Teresa Stonesifer. In their view, the facility would not cause a permanent change to the agricultural use of the Property. Some residents testified to the positive impact of solar facilities.

11. Chip Horman, the property owner, testified that Power52 is contracting with him to maintain the CUS, including mowing the area.

12. Peggy Stover-Catha testified to the need to include additional standards on the use, based on PlanHOWARD2030.

¹ In 2016, CB 59-2016 (ZRA 164) amended the Commercial Solar Facility conditional use standards to include a substantially revised subsection ".1" to provide objective standards to gauge the "harm" to/from a commercial solar facility. The Hearing Examiner drafted this language.

CONCLUSIONS OF LAW

I. A Background Issue – Fencing Setbacks

The conditional use plan submitted with the petition identified a 50-foot setback for all solar panels and equipment. The TSR's evaluation of the petition for compliance with HCZR § 131.0.N.52.b states the petition complies with this standard because "all solar panels and equipment are located at least 50 feet from all property lines." The proposed fencing on the east and southern CUS lot lines is shown as less than 50 feet. Mr. Vogel testified the fencing complies with HCZR § 128.0.A.9, which regulates the setback requirements for fences.

Petitioner and DPZ staff misapply the HCZR. In accordance with HCZR § 131.0.1.D.1, Compliance with Specific Requirements for a Conditional Use," "[a] Conditional Use shall comply with the requirements for the specific use given in Section 131.0.N. Variances may not be granted to the requirements of Section 131.0.N except for modifications or expansions of existing Conditional Uses in accordance with Section 131.0.D.4 below." HCZR § 131.0.N.52.b imposes a 50-foot setback from all property lines on all Commercial Solar Facility "structure and uses." Per HCZR 103.0, a "structure" is "[a]nything constructed or built." A "use" is either "a. Any purpose for which a structure or a tract of land may be designed, arranged, intended, maintained or occupied; or b. Any activity, occupation, business or operation carried on, or intended to be carried on, in a structure, or on a tract of land."

For the Commercial Solar Facility conditional use category, then, a fence is a structure and part of the use. All fencing therefore must be located 50 feet from all lot lines. During the hearing, the Hearing Examiner twice referenced her BA 15-014C Reconsideration Order denying a

commercial solar facility conditional use by petitioner Constellation Solar MC, LLC, wherein Mr. Coale represented a neighbor in opposition to the petition, including her Hearing Examiner Rule 10.4 post-hearing request to DPZ to review the setbacks (including fencing) shown on the plans. Page 10 of that Reconsideration Order states “DPZ issued a TSR addendum confirming the substandard setback for fences in the two locations of concern.” Consequently, per the Hearing Examiner’s directive in this petition, the FCUP shows Petitioner’s hand-drawn revision noting a 50-foot fence setback from the eastern and southern lot lines.

II. General Criteria for Conditional Uses (Section 131.0.B)

HCZR §§ 131.0.B.1-3 requires the Hearing Authority to evaluate whether the proposed Conditional Use will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located through the application of three standards: harmony with the General Plan, intensity of use, and atypical adverse impacts.

A. Harmony and Intensity of Use

§ 131.0.B.1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

The TSR concludes there are no specific policies in the Plan related to the proposed use.

§ 131.0.B.2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.

The proposed Commercial Solar Facility will be located on a 27.1-acre portion of the 72.7-acre Property. A Commercial Solar Facility is a low intensity use. It would be located on a Major Collector, which is appropriate for a site accessed infrequently. Given the relatively small

percentage of the Conditional Use Site relative to the Property, the nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use is appropriate for the site. The petition complies with § 131.0.B.2.

B. Adverse Impacts

Unlike HCZR §§ 131.0.B.1 and B.2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six tests: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, (d) access, (e) impact on environmentally sensitive area; and (f) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an RR-DEO District. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md.

54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Hearing Examiner concludes Petitioner has met its burden of presenting sufficient evidence to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a commercial solar facility in an RR-DEO district.

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

The objective of this standard is to test the routine operational characteristics of a proposed conditional use. One residential light post is proposed at the entrance. There is no evidence of any atypical noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions, in compliance with § 131.0.B.3.a.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

No walls are proposed. All fencing shall be set back 50 feet from lots lines. The FCUP shows eight-foot high board-on-board wood privacy fencing along all but the southern perimeter of the facility. An eight-foot chain link fence is proposed along the southern lot line. The fencing and the proposed Type D landscaping along the perimeter will buffer the views of the solar panels and inverters. The location of these structures, together with existing and proposed landscaping, will not hinder or discourage the development and/or use of adjacent land and structures more

at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts. The petition complies with § 131.0.B.3.b.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The HCZR do not impose specific parking requirements on the use. The FCUP shows two parking areas next to the inverters and an internal maintenance driveway, which the Hearing Examiner finds are appropriately located based on the proposed fencing and landscaping. No loading or refuse area is proposed. The petition complies with § 131.0.B.3.c.

d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

The TSR estimates the sight distance at the Sand Hill Road entrance as more than 500 in both directions. Given the limited number of maintenance visits to the site, the ingress/egress will provide safe access and no acceleration and deceleration lanes appear necessary. No shared driveways are proposed. The petition complies with § 131.0.B.3.d.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

DPZ staff identifies a stream within a floodplain just south of the Property and CUS. The TSR concludes there is little potential for the use to impact the stream from this distance. The petition complies with § 131.0.B.3.e.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

According to the TSR, there is an historic single-family detached dwelling (HO-927) on adjoining Lot 1 to the west. Petitioner revised the CUP such that the FCUP increases the setback from the common lot lines to about 100 feet. The FCUP shows an eight-foot high board-on-board wood privacy fence along this area and Type D landscaping with six-foot high evergreens at planting. The petition complies with § 131.0.B.3.f.

III. Specific Criteria for a Commercial Solar Facility (§ 131.0.N.52)

A Conditional Use may be granted in the RC or RR District for a commercial solar facility, provided that:

a. The maximum size of a solar facility shall be 75 acres notwithstanding the size of the parcel. The parcel on which the commercial solar facility is proposed must be a minimum of 10 acres in size.

The proposed solar facility conditional use site is 27.1 acres, in compliance with § 131.0.N.52.a.

b. All structures and uses must meet a minimum 50 foot setback from all property lines.

All solar facility equipment, fencing, parking, and driveways will be set back 50 feet or more from lot lines. The petition complies with § 131.0.N.52.b.

c. No structure or use may be more than 20 feet in height.

The fencing with barbed wire will about 8-12 feet in height. The solar panels are about 8.5 feet high. The inverter heights are not readily indicated, but these structures are general low rise. The petition complies with § 131.0.N.52.c.

d. A 'Type D' landscaping buffer must be provided around the perimeter of the proposed commercial solar facility unless the Hearing Authority determines that an alternative buffer is sufficient.

The Final Conditional Use Plan shows a Type D landscape buffer around the perimeter.

The petition complies with § 131.0.N.52.d.

e. All security fencing must be located between the landscaping buffer and the commercial solar facility.

The Final Conditional Use Plan shows all fencing located between the landscape buffer and the commercial solar facility. The petition complies with § 131.0.N.52.e.

f. The systems shall comply with all applicable local, state, and federal laws and provisions.

The petition states the systems will comply with all applicable local, state, and federal laws and provisions. The petition complies with § 131.0.N.52.f.

g. A commercial solar facility that is no longer used shall be removed from the site within one year of the date that the use ceases.

The petition states the Petitioner shall remove the commercial solar facility from the site within one year of the date that the use ceases. The petition complies with § 131.0.N.52.g.

h. The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the commercial solar facility. The applicant shall provide the Hearing Authority with details regarding maintenance and access for the site.

Power52 has contracted with property owner Chip Horman to maintain the physical conditional use site, including mowing the area. The petition complies with § 131.0.N.52.h.

i. A solar collector or combination of solar collectors shall be designed and located to avoid glare or reflection onto adjacent properties and adjacent roadways and shall not interfere with traffic or create a safety hazard. The petitioner shall include a glare study with the Conditional Use petition.

The petition includes a glare study. Jason Jannati testified about the design and functionality of the solar panel collectors, as set forth in the above Findings of Fact. The Hearing Examiner concludes the solar collectors will be designed and located to avoid glare or reflection

onto adjacent properties and adjacent roadways and shall not interfere with traffic or create a safety hazard. The petition complies with § 131.0.N.52.i.

j. The applicant shall agree to register all solar collectors with the Department of Fire and Rescue Services. The registration shall include a map of the solar facility noting the location of the solar collectors and the panel disconnect.

Petitioner agrees to this standard. The petition complies with § 131.0.N.52.j.

k. Tree removal shall be minimized and reforestation shall be done in accordance with Section 16.1026 of the Howard County Code.

No removal of trees is proposed. The petition complies with § 131.0.N.52.k.

I. Scenic Views

(1) The applicant shall demonstrate that the solar facility does not harm the scenic characteristics of the view of or from:

- A. A public park;**
- B. A national or state designated scenic byway;**
- C. A road listed in the Scenic Roads Inventory adopted under Section 16.1403 of the Howard County Code; or**
- D. A historic structure as defined in Section 16.601 of the Howard County Code.**

(2) Visual Impact Analysis Required to Demonstrate Minimal Impact to or from Scenic Views

A. The Conditional Use petition shall include a visual impact analysis mapping all viewshed impacts and any proposed mitigation. This analysis shall include mapped visual impact assessments of all important or critical viewpoints or elevations from which the solar facility can be seen from a fixed vantage point. For purposes of this subsection, A viewshed is a topographically defined area including all critical observation points from which the solar facility is viewed.

B. If the visual impact assessment as mapped particularly interferes with and compromises critical observation points within the viewshed that warrant viewshed protection, the petitioner shall mitigate the view through additional landscaping or other forms of mitigation, including reconfiguration of the solar panels, or as may be required by the Hearing Authority.

C. Fencing along road frontage or the perimeters of the commercial solar facility site where the fencing would be visible shall be constructed of a material and design consistent with the character of the roadway or area.

D. The petition shall include a landscape plan.

PE3 is a visual impact analysis of the critical view toward Henryton Road, a scenic road. The petition includes a landscape plan showing a Type D landscape perimeter and an eight-foot high wood board-on-board fence along Old Frederik Road. The Hearing Examiner concludes these features of the proposed commercial solar facility will ensure that no harm to or from this section of Henryton Road will ensue. The petition complies with § 131.0.N.52.I.

m. The Howard County Agricultural Land Preservation Board shall review any Conditional Use petition which proposes to build a new commercial solar facility on parcels which are in the Agricultural Land Preservation Program prior to approval by the Hearing Authority in the following manner:

- (1) Prior to scheduling and convening a presubmission community meeting pursuant to Howard County Zoning Regulations Section 131.0.f.1, the petitioner shall submit a proposed Conditional Use Plan for a commercial solar facility on a parcel or parcels in the Agricultural Land Preservation Program to the Howard County Agricultural Land Preservation Board for advisory review as to whether the siting of the commercial solar facility on the parcel or parcels supports the primary agricultural purpose of the easement property or is an ancillary business which supports the economic viability of the farm.**
- (2) The materials submitted for review shall include, at a minimum, a copy of the Agricultural Land Preservation Program easement, a copy of the Howard County Soil Conservation and Water Quality Plan, and a copy of the proposed Conditional Use Plan.**
- (3) The Board's advisory review shall be in writing**
- (4) The petitioner shall make the Board's advisory review available at the presubmission community meeting.**
- (5) The Department of Planning and Zoning's Technical Staff Report on the petition shall include an evaluation of and a recommendation on the Board's advisory review of the petition and shall include as attachments the Board's advisory review and a copy of the Agricultural Preservation Easement.**

Neither the Property nor the Conditional Use Site is encumbered with an ALPP easement.

This standard does not apply.

n. Subject to Section 106 of these regulations, the property on which an approved commercial solar facility is located is eligible to be a sending parcel provided that one density right is retained for the conditional use until the commercial solar facility is removed.

The Property is not a density sending parcel. This standard does not apply.

ORDER

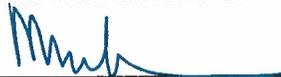
Based upon the foregoing, it is this **16th day of October 2018**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Power52 Energy Solutions, LLC for a Commercial Solar Facility in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, is hereby **GRANTED**;

Provided, however, that;

1. The Commercial Solar Facility conditional use shall be conducted in conformance with, and shall apply only to the petition as submitted and as shown on the Final Conditional Use Plan dated September 4, 2018, and not to any other activities, uses, or structures on the Property.
2. Petitioner shall comply with all conditional use standards.
3. The Site Development Plan, or its equivalent, shall include a note containing all conditions of approval.
3. Petitioner shall comply with all federal, state, and local laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.