

IN THE MATTER OF	:	BEFORE THE
Chaberton Solar Lime	:	HOWARD COUNTY
Kiln, LLC	:	BOARD OF APPEALS
PETITIONER	:	HEARING EXAMINER
	:	BA Case No. 21-040C

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DECISION AND ORDER

On March 17, 2022, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the Petition of Chaberton Solar Lime Kiln, LLC (Petitioner) for a Conditional Use for a Solar Collector Facility, Commercial Ground-Mount, in the RR-DEO (Rural Residential) (Density Exchange Option) Zoning District, filed pursuant to Section 131.0.N.52 of the Howard County Zoning Regulations.

Petitioner certified to compliance with the notice, posting, and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Andrew Robinson, Esquire represented the Petitioner. Piero "Pete" Mellits (Engineer) and Ryan Boswell (Petitioner) testified in support of the Petition. No one testified in opposition to the Petition.

Petitioner introduced into evidence the following exhibits:

1. Revised Conditional Use Plan (January 14, 2022). Sheets 1-4 of 4

2. Holly House Farm Historical Exhibit
3. Waters-Fulton Store and Post Office Historical Exhibit

FINDINGS OF FACT

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification. The approximately 28.2-acre Subject Property is located on the south side of Lime Kiln Road, west of the intersection with Md. Rt. 216. It is located in the 5th Election District, identified as Tax Map 46, Grid 01, Parcel 102, known as 11959 Lime Kiln Road, Fulton (the Property). It is part of a larger approximately 56.329-acre property which is farmland.

2. Property Description. The irregularly shaped property is roughly rectangular. The Property is not within the Agricultural Land Preservation Program. A stream traverses a heavily wooded area in the southwest portion of the Property. The proposed Solar Collector Facility does not encroach on this environmental feature. The highest elevation on the Subject Property is approximately 446 feet in the northeast corner adjacent to Lime Kiln Road and descending to an elevation of 334 feet at the southeast boundary.

3. Vicinal Properties. The Subject Property is surrounded on all sides by land in the RR-DEO Zoning District which is improved with single-family detached dwellings and open space.

4. Roads. Lime Kiln Road has two travel lanes within a 40-foot right-of-way. The speed limit is 30 miles per hour on Lime Kiln Road. Annual Average Daily Traffic count data is not available for this portion of Lime Kiln Road.

5. Water and Sewer Service. The Property is not located within the

Metropolitan District or the Planned Service Area for Water and Sewer.

6. General Plan. PlanHOWARD 2030 designates the Property as Low Density on the Designated Place Types Map. Lime Kiln Road is designated a Minor Collector on the PlanHOWARD 2030 Functional Road Classification Map.

7. Zoning History. The Department of Planning and Zoning does not have a record of any prior Zoning Petitions for the Property.

8. The Requested Conditional Use. The Petitioner proposes a 28.2-acre Solar Collector Facility, Commercial Ground-Mount, consisting of a 10.6-acre operational area within a 12.9-acre fenced area. The facility will utilize single axis tracking design that allows the solar panels to follow the path of the sun. This design reduces the impact of glare and maximizes electricity generation. A 'Type D' or equivalent landscape buffer is proposed along the perimeter of the Conditional Use area and a seven-foot security fence is proposed between the landscaping and the Solar Collector Facility.

The 2 MW DC Facility will utilize 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 proposed solar panels are approximately 13 feet in height and will be facing east in the a.m., rotating with the sun, to be facing west in the p.m. The Facility will operate 24 hours a day, seven days a week, collecting solar energy passively and converting it into electricity.

9. Technical Staff Report. The TSR concluded that the Conditional Use proposal is in compliance with the Howard County Zoning Regulations (HCZR) for a Solar Collector Facility, Commercial Ground-Mount.

10. Agency Comments.

Department of Planning and Zoning, Development Engineering Division: On December 1, 2021 this Division noted no objection, finding: (1) no adverse engineering impact on adjacent properties, (2) all improvements must comply with current Howard County design criteria including APFO (Adequate Public Facilities Ordinance) requirements and stormwater management, and (3) the driveway and parking shall be paved. The Revised Conditional Use Plan, Sheet 3, provides that the driveway and parking shall be paved up to the switchgear as required.

Department of Planning and Zoning, Alternative Compliance: 10 feet of clearance is required between the solar panels and the fence. Revised Conditional Use Plan, Sheet 3, provides 16 feet of clearance between the solar panels and the fence, and around the entire perimeter of the solar field.

Department of Recreation and Parks and Resource Conservation Division: Neither have comments.

Department of Fire and Rescue Services: The Fire Department has no objection to the proposed Conditional Use however the Petitioner must meet all solar facility requirements regarding access, signage etc prior to the issuance of permits.

Department of Planning and Zoning, Division of Land Development: The Division of Land Development reviewed the Petition and offered advisory comments, which will be evaluated during the Site Development Plan review process, which are incorporated by reference into this Decision. (December 13, 2021) Comment 1.a. notes that Specimen Trees must be shown with their Critical Root Zones to evaluate the level of disturbance and that Alternative

Compliance may be needed for Specimen Tree removal. The Revised Conditional Use Plan clarifies that no Specimen Trees will be removed and shows the Specimen Trees with their Critical Root Zone.

CONCLUSIONS OF LAW

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

Sections 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 impact.

A. Harmony and Intensity of Use

Section 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 proposed use is in harmony with Policy 4.12 which encourages energy sustainability and renewable energy source:

Policy 4.12 – Develop an energy plan that prepares for different future energy scenarios, examines options for various kinds of future energy sustainability, promotes conservation and renewable resources, and sets targets to reduce greenhouse gases.

Section 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 Property is 56.329 acres and the proposed Solar Collector Facility Conditional Use area is 28.2 acres, which complies with the 10-acre minimum and 75-acre maximum parcel size. Additionally, the Facility complies with all required bulk regulations and dimensional Conditional Use criteria. Access is proposed from Lime Kiln Road, which is a

Minor Collector and can accommodate the infrequent number of vehicles associated with the proposed use.

The nature and intensity of the use, the size of the Property in relation to the use, and the location of the site respect to streets giving access to the site are such that the overall intensity and scale of the use is appropriate.

B. Adverse Impacts (Section 131.0.B.3)

Unlike HCZR Sections 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 neighborhood is measured under Section 131.0.B.3's six, off-site "adverse effect" criteria: (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.

Inherent in the assessment of a proposed Conditional Use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RR-DEO Zoning District but whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *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*, 107 Md. App. 1, 666 A.2d 1253 (1995). For the reasons stated below, and as conditioned, Petitioner has met its burden of presenting sufficient evidence under HCZR Section 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Commercial Ground Mounted Solar Collector Facility in a RR-DEO Zoning District.

Section 131.0.B.3. 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 Solar Collector Facility will utilize single axis tracking design, which allows the solar panels to follow the path of the sun. The panels track the sun, and any reflective glare will be returned towards the sun; the panels are designed to absorb the sunlight. This design reduces the impact of glare and maximizes electricity generation. The panels used in the instant Petition also contain an anti-reflective coating, therefore there should be no glare-related impacts to residential properties or motorists.

There is no evidence of atypical adverse effects such as noise, dust, fumes, odors, vibrations, increased lighting, hazards or other physical conditions that would be greater at the Subject Property than generally elsewhere in the RR-DEO Zoning District.

Section 131.0.B.3.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.

All solar collectors, equipment, and fences comply with the 20-foot height limit and 50-foot setback requirement in Sec 131.0.N.52.

The Petitioner is proposing a 'Type D' or equivalent buffer along the perimeter of the Conditional Use area. The Petitioner is not proposing landscaping on portions of the western

and northern boundaries as the existing topography and dense vegetation mitigate any visual impact of the Solar Collector Facility on adjacent property to the west and north.

The location, nature and height of the structures and landscaping will not hinder or discourage the development or use of adjacent land and structures more at the Property than generally elsewhere in the RR-DEO Zoning District.

Section 131.0.B.3.c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be approximately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

There is no parking requirement for a Solar Collector Facility, Commercial Ground-Mount, in the Zoning Regulations. However, the Petitioner is providing a 15-foot by 41-foot paved access drive with vehicle parking/turnaround areas that can accommodate the infrequent maintenance vehicle trips associated with Solar Collector Facilities. The 'Type D' or equivalent landscape buffer will screen the parking area and driveway from adjacent properties and public rights-of-way. No refuse areas are proposed.

Section 131.0.B.3.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.

Precise sight distance measurements can only be determined by a detailed Sight Distance Analysis, which is typically conducted during Site Development Plan review. The estimated site distance on Lime Kiln Road is over 375 feet to the west and 400 feet to the east. According to the American Association of State Highway and Transportation Officials (AASHTO) guidelines, based on an estimated stopping sight distance of 200 feet for a car going 30 miles per hour, the proposed access point on Lime Kiln Road appears to provide

safe access with adequate stopping sight distance. The access driveway will not be shared with any other properties.

Section 131.0.B.3.e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

Environmentally sensitive areas in the vicinity consist of steep slopes, wetlands, and a stream that traverses the southwest portion of the Property. The Solar Collector Facility does not encroach into the stream/environmental buffers/setbacks required in the Subdivision and Land Development Regulations, however, any disturbance to environmental features will be confirmed by the Environmental Concept Plan. Therefore, the proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere in the RR-DEO Zoning District.

Section 131.0.B.3.f. The proposed use will not have a greater potential for diminishing the Character and significance of historic sites in the vicinity than elsewhere.

There are several historic sites within the vicinity of the Property, (1) Holly House Farm (HO-419) and (2) Waters-Fulton Store and Post Office (HO-985). Holly House Farm is located approximately 3,500 feet from the Property and Waters-Fulton Store and Post Office is located approximately 2,000 feet from the Property. Both properties will be screened from the proposed Solar Collector Facility by dense vegetation and residences.

Therefore, distance and visibility will diminish or eliminate any impact of the proposed use on the historic properties, and the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere in the RR-DEO Zoning District.

2. Specific Criteria for Solar Collector Facility, Commercial Ground-Mount Use (Section 131.0.N.52)

A Conditional Use may be granted in the B-1, B-2, CE, M-1, M-2, PEC,

POR, RC, or RR District for a Solar Collector Facility, Commercial Ground-Mount, provided that:

a. The parcel on which the commercial ground-mount solar collector facility is proposed must be a minimum of 10 acres in size. The maximum size of a commercial ground-mount solar collector facility shall be 75 acres notwithstanding the size of the parcel. However, on parcels which are in the Agricultural Land Preservation Program, the maximum size shall be 16 acres or 20% of the property, whichever is less.

However, a Ground Mount Solar Collector Facility on an Agricultural Preservation Parcel can be increased to a maximum of 34% of the parcel by the Hearing Authority if the hearing authority finds that the use shall not interfere with farming operations or limit future farming production. The hearing authority shall consider the following:

- (1) a. At least 60% of the acreage outside of the ground mount solar collector facility area is viable for a farm operation, inclusive of farm buildings needed for the farm operation; and***
- b. The remaining soils capability are more than 50% USDA Classes I-III and more than 66% USDA Classes I-IV or;***
- (2) The additional acreage above the allowable 20% for the CSF is unsuitable for farming.***

The Property is not an Agricultural Preservation Property. The Property is 56.329 acres and the proposed Conditional Use area is 28.2 acres. Therefore, the proposed use meets this criterion, in compliance with Section 131.0.N.52.a.

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

All solar collectors and equipment exceed the required 50-foot setback from all external property lines, all in compliance with Section 131.0.N.52.b.

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

The solar panels are approximately 13 feet tall; the fencing is 7 feet in height

and no other structure or use exceeds 20 feet in height, in compliance with Section 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.

A Type 'D' or equivalent landscape buffer is proposed along the perimeter of the Conditional Use area, except for the northern and western boundaries which are buffered by existing topography and dense vegetation. The western boundary also contains a Forest Conservation Easement which protects this forested buffer area. The proposed landscaping buffer is in compliance with Section 131.0.N.52.d.

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

A 7-foot chain link security fence is provided between the landscape buffer and the Solar Collector Facility. Since the fence exceeds 6-feet it is required to meet setback requirements and complies with the 50-foot setback area, all in compliance with Section 131.0.N.52.e.

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

The Petitioner stated the systems will comply with all applicable local, state, and federal laws and provisions, in compliance with Section 131.0.N.52.f.

g. A commercial ground-mount solar collector facility that is no longer used shall be removed from the site within 6 months of the date that the use ceases. The property owner shall secure this obligation by maintaining a bond, escrow, or other form of security, in an amount equal to the estimated future cost of removal, that is acceptable to the director of finance.

Petitioner stated that it shall remove the Solar Collector Facility, Commercial Ground-Mount, from the Property within six months of the date that the use ceases, in compliance with Section 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.

The Petitioner agrees to comply with this criterion, in compliance with

Section 131.0.N.52.h.

i. 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.

The Petitioner agrees to comply with this criterion, in compliance with

Section 131.0.N.52.i.

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

Petitioner agrees to comply with Section 16.1026 of Howard County Code, which will be reviewed at Site Development Plan, in compliance with Section 131.0.N.52.k. Please note that this criterion improperly references a nonexistent section of the Howard County Code. Section 16.1206 is the correct reference.

k. 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 areas.**
- D. The petition shall include a landscape plan.**

The proposed Solar Collector Facility is not visible from a national or state designated scenic byway, public park, scenic road or historic structure therefore a Visual Impact Analysis is not required. This Petition complies with Section 131.0.N.52.k.

I. The Howard County Agricultural Preservation Board shall review any Conditional Use petition which proposes to build a new commercial ground mount solar collector facility on parcels which are in the Agricultural Land Preservation Program prior to approval by the Hearing Authority, using a two-step review process, 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 concept plan for a commercial ground mount solar collector facility on a parcel or parcels in the Agricultural Land Preservation Program to the Howard County Agricultural Preservation Board for advisory review as to whether the siting of the commercial ground mount solar collector 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.**

(a) Preliminary Review- the Agricultural Preservation Board shall conduct a preliminary review of a concept plan to review the placement of the proposed facility and the remaining soil capability. The materials submitted for the preliminary review shall include, at a minimum, a letter signed by the property owner requesting the commercial ground-mount solar collector facility, a concept plan depicting proposed locations for the facility and a soil classification analysis, consistent with the provisions of the agricultural preservation board's commercial solar facilities policy. The concept plan should show at least two potential placements of the facility on the property to allow the Agricultural Preservation Board an opportunity to advise on the best placement of the solar facility to minimize negative impacts on the farming operation.

(b) Final Review- the materials submitted for final 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 final concept plan.

(2) The Board's advisory review shall be in writing.

(3) The petitioner shall make the Board's advisory review available at the presubmission community meeting.

(4) 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.

The Subject Property is not in the Agricultural Land Preservation Program

(ALPP) and therefore this criterion does not apply.

m. 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.

This criterion does not apply as the Property is not a density sending parcel.

n. Regulations for solar collector facility, commercial ground-mount.

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 or applicant shall provide to the Department of Planning and Zoning a glare study or other certification or assurance acceptable to the department that the solar collectors are designed, manufactured, and will be installed:

- a. To eliminate glare;***
- b. To ensure that glare will not be reflected onto nearby buildings or roadways; or***
- c. With anti-reflective coatings or light-trapping technologies.***

The Solar Collector Facility will utilize single axis tracking design, which allows the panels to move with the sun and be synchronized to reduce glare on surrounding properties. Also, the panels will have an antireflective coating to further reduce the possibility of light reflection.

o. For ground mount solar collector facilities on agriculture preservation parcels, the area used for the ground-mount solar collectors must also be used for pollinator or native grass habitats, grazing for livestock such as sheep, crop production under or directly adjacent to the installation such as edible landscape barriers or tree crops, or other agricultural or ecologically enhancing alternative that the applicant proposes and the Hearing Authority finds to be harmonious with the purposes of the Agricultural Land Preservation Program.

The Petitioner will restore the area inside the fence surrounding the Solar Collector Facility with pollinator friendly landscaping consisting of low-growing plant material which will be maintained quarterly.

ORDER

Based upon the foregoing, it is this 5th day of April 2022, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Chaberton, LLC for a Solar Collector Facility, Commercial Ground-Mount, in an RR-DEO (Rural Residential)(Density Exchange Option) Zoning District, Tax Map 46, Grid 01, Parcel 102, identified as 11959 Lime Kiln Road, Fulton, Maryland, be and is hereby **GRANTED;**

Provided, however, that:

1. The Solar Collector Facility, Commercial Ground-Mount Conditional Use shall be conducted in conformance with the Petition as submitted and as shown on the Revised Conditional Use Plan dated January 14, 2022, 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.
4. The systems shall comply with all applicable local, state, and federal laws and provisions.
5. Any Solar Collector Facility that is no longer used shall be removed by the Property owner from the Property within six months of the date that the use ceases.
6. 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 Solar Collector Facility. The Petitioner shall provide the Hearing Authority with details regarding maintenance and access for the Subject Property.
7. The Petitioner shall register all solar collectors with the Department of Fire and Rescue Services. This registration shall include a map of the Solar Collector Facility

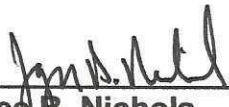
noting the Rescue Services and the location of the solar collectors and the panel disconnect.

8. Tree removal shall be minimized, and reforestation shall be done in accordance with Section 16.1206 of the Howard County Code.

9. All required landscaping shall be provided within 6 months of installation of the solar panels.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Joyce B. Nichols

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.