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| IN THE MATTER OF | : | BEFORE THE |
| **CONSTELLATION SOLAR MARYLAND MC, LLC** | : | HOWARD COUNTY |
| | : | BOARD OF APPEALS |
| Petitioner | | |
| | : | HEARING EXAMINER |
| | : | BA Case No. 15-014C<br>RECONSIDERATION ORDER |

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**ORDER**

On August 20, 2015, Constellation Solar Maryland, MC, LLC through counsel Jennifer R. Busse, Esquire, submitted a request for reconsideration of and a hearing on the Hearing Examiner's August 11, 2015 decision and order in Board of Appeals Case No. BA 15-014C, which petition for a Commercial Solar Facility in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, filed pursuant to Section 131.0.N.52 of the Howard County Zoning Regulations (HCZR) was denied based on findings and facts set forth therein. Jennifer Busse and John Gontrum, Esquires, represented petitioner Constellation Solar Maryland, MC, LLC (Petitioner). Thomas G. Coale, Esquire, represented opponent John Kreider. The Hearing Examiner stayed the time to appeal the decision and order pending issuance of this reconsideration order.

**Hearing Examiner Rules of Procedure 11.1, 11.4 & 11.5**

Hearing Examiner Rule of Procedure 11.1 authorizes a party to a case to request the Hearing Examiner's reconsideration of the decision in the case. Rule 11.4 empowers the Hearing Examiner, at her discretion, to hold a hearing on the request for reconsideration and

prohibits her from considering new or additional evidence at any hearing unless the evidence could not reasonably have been presented at the original hearing. Pursuant to Rule 11.5, the Hearing Examiner will revise a decision only upon a finding of mistake of fact or mistake of law.

On September 28, 2015, the Hearing Examiner held a discretionary hearing on the request, explaining its sole purpose was to provide an in-depth verbal response to the issues raised in the request for reconsideration, which would be memorialized in a concise written order. The Hearing Examiner declined Petitioner's request to hear new and additional evidence "that could not have been reasonably presented" at the July 6, 2015 hearing, finding none.

Unfortunately, the discretionary hearing recordation application did not record. Because the hearing was not a due process evidentiary hearing (it could have been convened as a work session), the Hearing Examiner queried the parties to the case as to whether they wanted the hearing to be reconvened and recorded, with the Hearing Examiner repeating her verbal responses, the alternative being that the written reconsideration decision and order would contain the response. Hearing no timely objection, this reconsideration order is issued.

## DISCUSSION

### I.
### THE CASE OF THE "MISSING DOCUMENTS"

As set forth in the Preliminary Matters section of the July 6, 2015 decision and order (the D&O), procedural due process countenanced against the Hearing Examiner using in her evaluation of the petition several Petitioner documents provided electronically to the DPZ reviewer preparing the TSR and which were not included in the master file or forwarded to the

Hearing Examiner before the hearing.[1] These documents included several images depicting views of the proposed use from a point along Frederick Road (the "scenic road visuals") and a sight distance analysis/traffic study. The third document was a June 18, 2015 letter to the reviewer from Petitioner's landscape architect Randall Hughes. This letter provides information about the proposed petition's compliance with four of the thirteen specific Commercial Solar Facility conditional use standards: structure heights (§ 130.0.52.d); maintenance (§ 131.0.52.i); glare (§ 131.0.52.j) and; no harm to the scenic characteristics of the view to or from a scenic road (§ 131.0.52.m.(3)).

Beyond this procedural due process bar, HCZR § 131.0.F.2.f proscribed both their submission to the DPZ reviewer for use in the drafting of the TSR and their consideration by the Hearing Examiner in evaluating the petition.

> After a petition for a Conditional Use has been determined to be officially accepted by the Department of Planning and Zoning and a hearing date has been scheduled, the petition materials shall not be revised or replaced prior to the hearing. The technical staff report shall be based upon the materials in the petition at the time of acceptance. Supplemental materials may only be presented in testimony to the Hearing Authority.

By operation of HCZR § 131.0.F.2.f, then, Petitioner must have supplemented the petition with any additional materials to the DPZ reviewer preparing the TSR within a brief window of time.

What happened instead was this. Petitioner submitted the petition on April 14, 2015. The June 18, 2015 TSR indicates DPZ accepted the petition on April 14, 2015. Part 6 of the

[1] These documents are posted on the County Council/Hearing Examiner calendar for September 28, 2015. http://cc.howardcountymd.gov/Calendar/ModuleID/609/ItemID/1507/mctl/EventDetails

petition summary statement, so noted in the D&O, contained only this conclusory statement: "The proposed site development for the solar facility is in conformance with the requirements of Section 131.0.N.52, Solar Facility, Commercial, items a. thru .m." On May 5, 2015, DPZ notified Petitioner of the hearing date, July 6, 2015. Petitioner therefore had about 22 days between April 14 and May 5 to supplement the petition or modify the plan for consideration in the TSR. Beyond this timeframe, HCZR § 131.0.F.2.f compelled Petitioner to introduce all supplemental documents at the hearing through testimony—a witness introducing them into evidence—subject to the Hearing Examiner Rules of Procedure.

In mid-June, barely days before the TSR was to be posted, the DPZ reviewer preparing the TSR could not find in the petition or plan Petitioner's statement of compliance with the specific standards for the solar facility conditional use. The TSR posting deadline looming, the reviewer emailed Petitioner's counsel several times between June 16 and June 18, 2015, requesting a response to the missing criteria or instructions as to where he could find it.[2]

> **From:** Hartner, John E [mailto:jehartner@howardcountymd.gov]
> **Sent:** Monday, June 15, 2015 11:20 AM
> **To:** Busse, Jennifer R.
> **Subject:** BA-15-014C (Constellation Solar Farm)
> Ms. Busse:
> I could not find a response in your petition for BA-15-014C (Constellation Solar Farm) for several of the criterion associated with Section 131.0.N.52 of the Zoning Regulations. I was able to infer responses to several of the criterion listed in Section 131.0.N.52 of the Zoning Regulations based on the pre-submission meeting and the Conditional Use Plan, but was unable to find anything that addressed the ones below:
> (1) No structure or use may be more than 20 feet in height.
> (2) 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

[2] Signatory information in the body of the emails is eliminated for brevity.

(3) 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.
(4) 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.
(5) Tree removal shall be minimized and reforestation shall be done in accordance with Section 16.1206 of the County Code.
(6) The applicant shall demonstrate that the solar facility does not harm the scenic characteristics of the view of or from:
(I) A public park
(II) A national or state designated scenic byway
(IV) A historic structure as defined in § 16.601 of the County Code.
Please send me a response at your earliest convenience either addressing the above criterion or telling me where to find the responses in your submittal. Otherwise, I will just state in my Staff Report that no response was given and the Petitioner should address those criterion at the Hearing. Thank you in advance for your help with this.

**From:** Busse, Jennifer R. [mailto:jbusse@wtplaw.com]
**Sent:** Tuesday, June 16, 2015 11:56 AM
**To:** Hartner, John E
**Subject:** RE: BA-15-014C (Constellation Solar Farm)
Hi there J.J. and thanks so much for reaching out!
When is good for you to talk – I just left you a voicemail too.
I can talk today from 2:30 on or tomorrow from 9-12 – anytime in those slots work for you?
**From:** Hartner, John E [mailto:jehartner@howardcountymd.gov]
**Sent:** Tuesday, June 16, 2015 3:19 PM
**To:** Busse, Jennifer R
**Subject:** RE: BA-15-014C (Constellation Solar Farm)
Jen:
I am planning to complete my Staff Report in the next couple of days so that it can be posted to the web 2 weeks prior to the hearing, so the sooner you can get this information to me the better. If you are unable to get the information to me before my Staff Report is complete, I will just indicate that you will provide the information at the hearing. I will email you and let you know before I forward my Staff Report to the Director for signature approval. Thank you again for your help!

**From:** Busse, Jennifer R. [mailto:jbusse@wtplaw.com]
**Sent:** Wednesday, June 17, 2015 11:23 AM
**To:** Hartner, John E
**Cc:** Blaine Linkous (blinkous@WBCM.com)
**Subject:** RE: BA-15-014C (Constellation Solar Farm)
Thanks JJ – I've asked Blaine with WBCM to reach out to you directly on the scenic issue and I'm pushing Conti to get me documentation on:
1) any lightpoles are higher than the inverters, etc.
2) landscaping and related maintenance
3) glare

**From:** Hartner, John E
**Sent:** Wednesday, June 17, 2015 11:53 AM
**To:** 'Busse, Jennifer R.'
**Cc:** Blaine Linkous (blinkous@WBCM.com)
**Subject:** RE: BA-15-014C (Constellation Solar Farm)
Thank you, Jen. I think that obtaining a supplement that addresses how the proposal will mitigate any harm to the scenic characteristics or view from Old Frederick Road is most important at this point. While it would be helpful to address the other issues, they are relatively minor and may be addressed at the hearing if need be. I plan to send the Staff Report up for signature approval by the end of the day so that it can be posted to the web by the Monday deadline. Thanks again for all your help.

**From:** "Hartner, John E" <jehartner@howardcountymd.gov>
**Date:** June 18, 2015 at 11:38:00 AM EDT
**To:** "Busse, Jennifer R." <jbusse@wtplaw.com>
**Cc:** "Blaine Linkous (blinkous@WBCM.com)" <blinkous@WBCM.com>
**Subject: RE: BA-15-014C (Constellation Solar Farm)**
Jen:
I am forwarding my staff report to the Director for review and approval and I have not yet received a supplement from Mr. Linkous addressing the scenic roads issues. I held the report as long as I could before forwarding it, but it must be reviewed, signed, forwarded to the Hearing Examiner, and posted online by Monday, June 21. In my staff report I indicated that the criterion related to scenic roads was not addressed in the Petition, and the Petitioner should be prepared to address it at the hearing on July 6. Thanks again for your help!

**From:** Randall Hughes [mailto:rhughes@WBCM.com]
**Sent:** Thursday, June 18, 2015 1:15 PM
**To:** Hartner, John E
**Cc:** jbusse@wtplaw.com; Blaine Linkous; Sean O'Hagan (sohagan@conticorp.com)
**Subject:** FW: BA-15-014C (Constellation Solar Farm)
JJ,
As we discussed on the phone before lunch today please find attached a letter which I believe addresses all the points you needed. I also included the renderings we did for the SDP submission on the scenic road issue which I referenced in the letter. Let me know if you need anything else.

As these email exchanges make plain, Petitioner had already prepared and submitted to another DPZ division the very scenic road renderings sent to the reviewer in the "Zoning" division only on June 18, 2015, the day DPZ issued the TSR. Randall Hughes so remarked in his June 18, 2015 email to the DPZ reviewer, "I also included the renderings we did for the SDP submission on the scenic road issue which I referenced in the letter." The D&O observed Petitioner had likewise prepared traffic and glare studies for "DPZ," according to witness

testimony, at about the same time it submitted the conditional use petition. Petitioner witness Blaine Linkous testified to having produced a May 2015 sight distance/traffic study document and submitting it to another DPZ division. Although the May 28, 2015 date of this document suggests it was prepared too late to be submitted as a supplement, it could have been introduced, potentially, as an exhibit at the hearing, subject to the Hearing Examiner Rules of Procedure. Petitioner had similarly prepared a glare study for "DPZ" review.

HCZR § 131.0.F.2.f is a zoning text amendment to the 2013 comprehensive zoning process. The full legislative history of and the Hearing Examiner's interpretation of this provision is examined in Board of Appeals Case No. 13-024C (decided March 5, 2014). That D&O explained as follows. [3]

> In the Hearing Examiner's view, subparagraph f., as enacted, was intended not to disrupt this Conditional Use process through a "reboot" [requiring petitioners who revise petitions and plans to start the process all over] but to solve a particular problem – curtailing the practice of petitioners modifying or revising a petition or plan after the Department of Planning and Zoning issued its technical staff report. Subparagraph f. as enacted also provides some level of certainty to persons and associations interested in the petition, in that they no longer have to review the petition file before the hearing to see if the petition or plan has been modified. At its core, then, subparagraph .f strengthens the underlying constitutional due process notice mandate in administrative hearings.

HCZR § 131.0.F.2.f gives legislative form to procedural due process notice rights. It gives notice to petitioners to submit the "best petition" and insists that conditional use petition TSRs be issued based only on what had been submitted by a certain time.

In 2015, the county legislature amended Howard County Code (HCC) § 16.801(c)(7) (in

[3] All Hearing Examiner decisions and orders may be accessed through the County Council website by clicking on the Hearing Examiner quick link in the far right column of the Council's home page.

italics below) through CB6-2015 (effective May 4, 2015) to require in pertinent part conditional use TSRs to be made available two weeks before a hearing.

> Other zoning changes. The Department of Planning and Zoning shall receive all petitions related to zoning matters, such as conditional uses, variances, and nonconforming uses. The Department shall accept and review these applications and petitions and shall transmit them to the Hearing Examiner for the Board of Appeals. For all petitions related to variances in nonresidential districts, conditional uses, and extension, enlargement, or alteration of nonconforming uses, the Department shall prepare findings and recommendations in a technical staff report and shall submit the petitions, findings and recommendations to the Hearing Examiner for the Board of Appeals. *The technical staff report shall be made available to the Hearing Examiner and the general public at least two weeks prior to any required public meeting or hearing. If the Hearing Examiner approves a petition subject to an amendment or modification of the petition and the approval is appealed to the Board of Appeals, the Department will prepare and submit to the Board its findings and recommendations concerning the amendment or modification in a technical staff report. The technical staff report shall be made available to the Board of Appeals and the general public at least two weeks prior to any required public meeting or hearing.*

HCZR § 131.0.F.2.f and HCC § 16.801(c)(7) are "companion" administrative, procedural due process laws. They evince a legislative intent to bring greater predictability and transparency to the conditional use hearing process. That did not happen in this case.

Petitioner tactically elected not to submit the missing documents with the petition, not to submit them as timely petition supplements and not to introduce them at the July 6, 2015 hearing. While the Hearing Examiner acknowledges the reviewer's diligence in requesting documentation to support the petition and prepare the TSR, HCZR § 131.0.F.2.f, as a matter of law, obliged him to evaluate the petition and issue the June 18, 2015 TSR based on what Petitioner had submitted when DPZ accepted the petition and before the Hearing Examiner had scheduled the hearing.

## II.
## ALLEGED MISTAKES OF FACT OR LAW IN THE HEARING EXAMINER'S EVALUATION OF THE PETITION'S COMPLIANCE WITH HCZR §§ 131.0.N.52.c, .j & .m.(3).

### Burden of Proof

HCZR § 131.0.g. The applicant for a conditional use shall have the burden of proof, which shall be by a preponderance of the evidence and which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the hearing authority or are required to meet any provisions of these regulations.

### A. Petitioner's Alleged Mistake of Fact as to Compliance with § 131.0.N.52.c

c. 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.

Petitioner alleges mistake as to the D&O's determination that neither the Amended Plan nor the Landscape Plan call out the width of the proposed Type D landscape buffer clearly. In Petitioner's view, the county and the petitioner are entitled to relay upon the seal on the plan for the dimensions and the scale of the plan as the primary source.

Petitioner was on notice of the inadequacy of the landscape buffer width as early as May 5, 2015, through DPZ's waiver comments. The TSR referenced these comments in the Zoning History section of the TSR.

Waiver comment #16. "[A] 15' wide landscape buffer is insufficient; it must be a minimum of 20' wide per Page 24 of the Howard County Landscape Manual. The width may also be required to be *GREATER* than 20' feet depending on any conditions set forth in the BA case. ALSO: relocate the proposed driveway based on required changes in the landscape buffer" (italized emphasis added.)

On receiving the June 18, 2015 TSR, Petitioner revised the conditional use plan (the Amended Plan) showing a Type D landscape buffer and introduced it and a landscape plan as exhibits at the hearing. On a Hearing Examiner Rule 10.4 post-hearing request to DPZ to review the setbacks shown on the plans, DPZ issued a TSR addendum confirming the substandard setback for fences in the two locations of concern. In its comments on the addendum, Petitioner "apologize[d] for the oversight and has confirmed the requirements can be satisfied without creating a need to substantively revise the proposal."

A conditional use plan and where warranted, a landscape plan, must represent the proposed use accurately. Plans must illustrate compliance with the specific standards of the proposed conditional use straightforwardly, with all applicable county regulations, including landscape buffer widths and other information, and with the conditional use plan requirements set out in Paragraph 5 of the petition form checklist plainly shown. Standard operating procedure. Petitioners may imply/infer nothing on a plan; a plan is an objective representation. Information is shown or it is not. The presence of a seal on a plan does not negate the requirement that all information necessary for the proper evaluation of the petition accurately appears on the plan. Despite DLD's early alert to Petitioner of the inadequate buffer width, neither the Amended Plan nor the Landscape Plan indicated that the error had been corrected by visually demonstrating compliance on the plans.

Critically, the D&O's evaluation of the proposed landscape buffer under HCZR § 131.0.52.c was linked inextricably to the evaluation of the petition's compliance with §

131.0.52.m.(3) (the no harm to/from scenic road views standard). As discussed in the D&O, the Landscape Manual recommends that landscaped edges be planted *within* HCZR setbacks, which in this case was 50 feet. DLD advised Petitioner in its waiver comments that the landscape buffer width may be required to be greater than 20' feet depending on any conditions set forth in the "BA" case. Absent sufficient evidence as to the petition's compliance with the "no harm" to the view to/from the scenic road criterion, the Hearing Examiner's conclusion that she could not reckon whether even a 20-foot width outside the 50-foot setback was sufficient, was not a mistake of fact. The Hearing Examiner was not persuaded on all questions of fact about the relation between the landscape buffer width and its relation to the no harm to/from scenic road views standard.

**B. Petitioner's Alleged Mistake of Fact or Law as to Compliance with § 131.0.N.52.j**

> j. 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.

Petitioner alleges the Hearing Examiner's determination that she could not make a definitive conclusion as to compliance with this standard misrelies in part on "speculative testimony by lay witnesses" about glare. In support of this alleged error, Petitioner analogizes the lay testimony in this case to the high court's explanation in in *Ray v. Mayor & City Council of Balt.*, 430 Md. 74, 59 A.3d 545 (2013) that "lay testimony equated to speculation, and expert testimony was required where a protestant alleged a detrimental impact on property value from a proposed development."

This claim misrepresents the D&O's reasoning. The Hearing Examiner made no definitive conclusion about compliance with § 131.0.N.52.j for the sole reason that Petitioner witnesses predicated their testimony about avoidance of glare or reflection onto adjacent property on an improper assumption, that the avoidance of glare onto "adjacent" property applied only to adjoining or abutting property--rights-of way.

The claim of error also incorrectly hinges on the *Ray* court's conclusions about speculative lay witness testimony. In that case, the court's exclusion of speculative lay witness testimony about property values had a narrow evidentiary focus, proof of special injury (aggrievement) to support Appellant Benn Ray's standing to take an appeal from a zoning decision. The exclusion of speculative lay testimony about real estate values as it relates to appellate jurisdictional standing questions has no legal bearing on this case. The hearing in this case was an original jurisdiction proceeding. Hearing Examiner Rule 9.1 conferred party status on every lay witness, those persons who testified in opposition to the petition.

Rule 9.1 has further relevance to Petitioner's claims about lay testimony. It instructs the Hearing Examiner to "consider and give appropriate weight to any relevant evidence as is commonly accepted by reasonable and prudent persons in the conduct of their affairs." Lay testimony—testimony by non-experts—is admissible in conditional use petition hearings, with the relative weight of that testimony for the Hearing Examiner to decide. The D&O attests to the Hearing Examiner's decision in this case to assign no weight to opposition testimony about glare. Perhaps a different decision might have been reached about the evidentiary weight of

lay testimony going to the glare standard had a glare study applicable to adjacent properties actually been in evidence.

Petitioner also asserts error because the TSR found the proposal satisfied this standard. As a first matter, TSRs are recommendations, not agency decisions and are due no deference. More than this, the TSR by action of HCZR § 131.0.F.2.f, was to have evaluated the petition for compliance with HCZR § 131.0.N.52.j based only on the petition and plan. The TSR's review of this standard was mostly an impermissible recitation of language from one of the "missing documents," the June 18, 2015 letter. "A supplement to the petition states that the glazed surface of the panels will be oriented toward Old Frederick Road and the intersection of Old Frederick Road and Route 32, where there is a difference in elevation of between 5.75 feet and 24 feet. This difference in elevation, coupled with the slight upward angle of the panel would direct glare away from any adjacent roadways or properties. Additionally, in general, photovoltaic panels are designed to have low reflectivity." Randall Hughes, Petitioner's landscape architect, repeated this same information about solar glare in the June 18, 2015 letter almost verbatim in his testimony.

Petitioner further contends the D&O did not evaluate compliance with a second requirement, that there be no glare interference with traffic and safety. The Hearing Examiner indeed declined to evaluate it in the D&O, being unable to make a definitive conclusion as to whether the solar collectors were designed and located to avoid glare or reflection onto adjacent properties. HCZR § 131.0.N.52.j is a two-part test, both of which must be satisfied: "[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" (emphasis added.) Quasi-judicial economy prompted the Hearing Examiner to stop the analysis where Petitioner failed its burden of proof on part one of the test.

Petitioner also alleges "there were documents made available to staff pertaining to the issue, but not considered because of untimely forwarding by staff to the Hearing Examiner." Documents may have been made available to "staff" but no glare study appears to have been provided to the DPZ Zoning division reviewer within the timeframe prescribed by HCZR § 131.0.F.2.f, based on the request for same in the reviewer's June 15, 2015 email to Petitioner counsel.

Hearing Examiner Rule 7.4 must also be considered.

> Pre-submission of Technical Reports. Any petitioner or proponent wishing to submit a technical report or other similar documentary evidence to the hearing examiner must file a copy of the report with the clerk at least thirty (30) days prior to the date of the initial hearing. Any opponent or respondent wishing to submit a report or other similar documentary evidence to the hearing examiner must file a copy of the report with the clerk and send one copy to the petitioner at least ten (10) days prior to the date of the initial hearing. If technical reports are filed late, the hearing examiner may postpone the hearing to allow the other parties time to review the report, or take any other course of action as determined by the hearing examiner. Even if the report or other documentation is timely filed, the hearing examiner may postpone the hearing and require additional copies of the material for technical staff review.

Because any glare study was not submitted with the petition or timely submitted to the DPZ reviewer, Rule 7.4 obliged Petitioner to file it (and all other technical reports) with the office of the Hearing Examiner 30 days before the July 6, 2015 hearing, and if filed late, subject to a

postponed hearing on the Hearing Examiner's initiative. (It is this Hearing Examiner's consistent policy to postpone hearings upon receipt of a late filed technical report.) Petitioner undoubtedly submitted a glare study to DPZ in response to DPZ concerns and some DPZ staffer appeared to have been satisfied with the analysis. But DPZ does not approve a proposed solar facility conditional use, the Hearing Authority (the Hearing Examiner and the Board of Appeals) does, after a due process evidentiary hearing. Petitioner made tactical decisions not to file the glare study technical report 30 days before the hearing and not to file it late (less than 30 days before the hearing or at the hearing itself.) Petitioner ultimately decided not to file it at all.

**C. Petitioner's Alleged Mistake of Fact and Law as to Compliance with § 131.0.N.52.m.(3)**

> .m.(3). The applicant shall demonstrate that the solar facility does not harm the scenic characteristics of the view of or from a road listed in the scenic roads inventory adopted under §16.1403 of the County Code.

The DPZ reviewer's June 17, 2015 email to Petitioner counsel alerted Petitioner to the importance of a supplement addressing the petition's compliance with this standard. By email of June 18, 2015, landscape architect Randall Hughes submitted renderings done for the SDP submission on the scenic road issue, as referenced in the June 18, 2015 "missing document" letter. Again, HCZR § 131.0.F.2.f proscribed the TSR's use of the "scenic view visuals" and the June 18, 3015 letter when evaluating compliance with this standard.

Petitioner alleges mistake of law with respect to the D&O's conclusions going to compliance with this standard due to an "incomplete analysis of the standard which must be utilized per the Maryland Courts relating to how to interpret whether the proposal harms the

scenic characteristics of the view to or from Old Frederick Road." The standard Petitioner leans on for this claim is the *Schultz v. Pritts* test. *Schultz v. Pritts,* 291 Md. 1, 432 A.2d 1319 (1981). The request for reconsideration does not tell us what this test is, only that it be grafted onto the statutory criteria and that the correct application of the test does not require an applicant to demonstrate a proposed facility on a scenic road would not harm the applicable scenic road views.

The *Schultz v. Pritts* test, like the *Ray* court's exclusion of speculative lay testimony about real estate values, has no legal application to the evaluation of a conditional use petition's compliance with specific conditional use standards, here HCZR §§ 131.0.N.52.a-.m. HCZR § 131.0.D.a *mandates* compliance with the requirements for the specific use given in § 131.0.N. The D&O provides an extensive analysis of Petitioner's burden of proof and persuasion with respect to HCZR § 131.0.N.52.m.(3). What evidence Petitioner did present at the hearing did not demonstrate that the proposed solar facility would not harm the scenic characteristics of the view to or from Frederick Road.

Lastly, as with all the "missing documents" and those other documents "made available to staff pertaining to the issue, but not considered because of untimely forwarding by staff to the Hearing Examiner," Petitioner could have introduced the scenic view visuals at the July 6, 2015 hearing. At that very hearing, Petitioner tacked most, if not all, of these visuals onto boards placed along the hearing room walls and provided the Hearing Examiner with 17x11

copies. Petitioner made the tactical decision not to introduce every one of these visuals into evidence.

**D. Testing the Proposed Use for Adverse Impacts, Regulatory and Common Law**

We now consider the proper application of the *Schultz v. Pritts* adverse impacts test to the petition. The *Schultz v. Pritts* standard tests for *atypical or noninherent* adverse impacts generated by a proposed special exception, which in Howard County is termed a conditional use. Conditional use zoning 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 when testing for adverse impacts is not whether a proposed use would have adverse effects in the zoning district where it might be allowed. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects 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).

In Howard County, *Schultz v. Pritts* testing for atypical adverse impacts operates through —is grafted onto—the six standards contained in HCZR § 131.0.B.3:

> 3. *The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses.* In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:
> 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.

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.
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.
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.

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

(Emphasis added.)

The D&O did not analyze the evidence for compliance with HCZR § 131.0.B.3 because Petitioner failed its burden of proof and persuasion as to compliance with the specific conditional use category standards. A petition that fails to comply with specific use standards cannot comply with this adverse impacts testing.

Furthermore, the Petitioner witness who testified about adverse impacts applied the wrong common law test. Blaine Linkous opined the use would have less impact than the existing farm use and because forest areas on the Property would not be disturbed or counted toward afforestation requirements during the development process and there are no adjacent

property owners on the south and north sides of the Facility Site. (Finding of Fact #15.) This adverse impacts assessment was a comparative analysis of the existing permitted use and the proposed use, which is the "*Gowl*" adverse impact from *Gowl v. Atlantic Richfield Co.*, 27 Md.App. 410, 341 A.2d 832 (1975). *Schultz v. Pritts* rejected this test.

> In Gowl, the Court of Special Appeals reversed a Board of Appeals' decision denying a requested special exception use on the ground of traffic. There that Court stated that the proper standard by which to determine whether a requested special exception use should be denied on the ground of traffic is a comparison between the traffic problems that might arise under the requested special exception use and those that might arise under a permitted use. It held that when "the potential volume of traffic under the requested use would appear to be no greater than that which would arise from permitted uses," the requested special exception use must be granted. Gowl, 27 Md.App. at 417- 18, 341 A.2d at 836. We do not agree.
>
> The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Schultz v. Pritts, 291 Md. at 10-11, 432 A.2d at 1325. On redirect, Mr. Linkous opined the petition would not cause some of the atypical adverse impacts in HCZR § 131.0.B.3. This was not persuasive testimony.

**ORDER**

Based upon the foregoing, it is this **20th day of October 2015,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That Constellation Solar Maryland MC, LLC's request for reconsideration is hereby **DENIED**.

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 calendar 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.