

IN THE MATTER OF	:	BEFORE THE
POWER 52 FOUNDATION	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	Case No. BA 18-030C
:.....		

DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) met on November 20, 2019 to hear and deliberate the petition of Power 52 Foundation (Petitioner), for a conditional use for a Commercial Solar Facility. The petition is filed pursuant to Sections 130.0.B. and 131.0.N.52 of the Howard County Zoning Regulations (the “Zoning Regulations”).

Board members James Howard, Neveen Kurtom, John Lederer, Steven Hunt and William Santos participated in the hearing. Board member James Howard presided over the hearing and deliberation of the case. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The notice of the hearing was advertised and the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The hearing was conducted in accordance with Section 2.209 of the Board’s Rules of Procedure. The Howard County Charter, the Howard County Code, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the Department of Planning and Zoning’s Technical Staff Report (“TSR”) recommendation of conditional use approval dated May 24, 2019, the Howard County Agricultural Land Preservation Board (“ALPB”) Administrator’s staff report to the ALPB recommendation and comments of conditional use approval dated June 18,

2018, the ALPB meeting minutes of June 18, 2018, the General Plan for Howard County, the General Plan of Highways, and the conditional use petition and plan were incorporated into the record by reference.

The Petitioner was represented by counsel, Christopher M. DeCarlo.

The following persons testified in favor of the petition: Robert Vogel, Rob Wallace, Teresa Stonesifer, Eric Stonesifer, Ruth Alice White, Wilson McManus and Samantha Dixon.

The following persons testified in opposition to the petition: Theodore “Ted” Mariani, Dan O’Leary and Therese Myers.

The following person testified in favor of the petition during the Petitioner’s rebuttal case: Robert Vogel.

The Petitioner offered, and the Board accepted, the following documents into evidence:

Petitioner’s Exhibits

1. Copy of Amended Conditional Use Plan dated November 2019; and
2. Conditional Use Plan depicting sectional views for visual impact analysis.

As a preliminary matter, during the hearing the Petitioner submitted an amended conditional use plan to the Board dated November 2019. The conditional use area was amended to include the existing shared driveway from Frederick Road. In accordance with Sections 2.202(b) and (c) of the Board’s Rules of Procedure, the Board determined that the changes to the Plan were not substantive and did not require remand to DPZ for further recommendations.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The 97.11-acre subject property is zoned R-C (Rural Conservation – Density Exchange Option) Overlay. The property is in the 3rd Election District on the south side of Frederick Road approximately 1,400 feet west of MD Route 32. It is identified as Tax Map 15, Grid 10, Parcels 74 and 258 and known as 12855 Frederick Road, West Friendship, Maryland (the Property).

2. The Property is owned by Triple Creek Farm Properties LLC. The Property consists of a farm and multiple agricultural buildings. The site's elevation rises from 490 feet in the northwest corner to 570 feet at the center-west portion of the site. As the site extends southward, the elevation drops to 420 feet.

3. Vicinal properties to the south, east and west are similarly zoned RC-DEO and improved with single-family residences and farms. The vicinal property to the north is zoned RC-DEO and R-SI and improved with single-family residences.

4. Frederick Road is classified as a Minor Arterial and a scenic road. It has two lanes and a 40-foot pavement within an 80-foot wide right-of-way. The speed limit is 45 miles per hour. The estimated sight distance from the driveway is over 500 feet in both directions.

5. The Property is served by private well and septic and not within the Metropolitan District and the Planned Service Area for water and sewer.

6. The Property is designated "Rural Resource" on the Designated Place Types Map of PlanHoward 2030.

7. The Petitioner proposes a Commercial Solar Facility with a 27.23-acre operational area. The facility will utilize single axis tracking design which allows the solar panels to follow the path of the sun. This design reduces the impact of glare and maximizes electricity generation. The Petitioner estimates that there will be two visits to the facility per month for maintenance. A 'Type D' landscaping buffer and six-foot fence are proposed along the perimeter of the site.

8. Howard County Agricultural Land Preservation Board (ALPB) Review: In October 2016, the Howard County Council approved legislation to amend the Zoning Regulations to allow Commercial Solar Facilities (CSF) of up to 75 acres on properties in the Agricultural Land Preservation Program (ALPP). Council Bill 59-2016 required the ALPB to provide advisory comments for Conditional Use Petitions for CSFs prior to submission to the County. The ALPB's recommendation is based on whether a proposal meets the following criteria, as set forth in Section 131 of the Howard County Zoning Regulations:

1. "The siting of the CSF on the parcel or parcels is an ancillary business which supports the economic viability of the farm, or
2. The siting of the CSF on the parcel or parcels supports the primary agricultural purpose of the easement."

In its recently created Commercial Solar Facilities policy, the ALPB developed standards of review to determine if each proposal meets one or both of the aforementioned criteria. Pursuant to the policy, the Board will apply the following standards to the CSF Conditional Use Petition Criteria:

1. In determining if the CSF is ancillary to the primary farming operation, the commercial solar operation area must be equal to or less than 34% of the Property's size. The commercial solar operational area is defined as the entire area of the CSF (including any equipment, spacing, structures or other uses that support the CSF) and any new roads that must be constructed in order to access the CSF. Existing roads being used to access the new facility are not included within the 34% operational area (i.e. existing dirt, gravel, or paved farm lanes).
2. In determining if the siting of the CSF supports the primary agricultural purpose of the Property, the portion not included in the commercial solar operational area must have a soils capability of more than 50% USDA Classes I-III and more than 66% USDA Classes I-IV.

Other standards the ALPB may consider include:

1. If possible, the prescribed landscape buffer should be placed within the 50-foot conditional use setback. Landscaping should only be required alongside public road frontage, and not along sidelines or the Property's interior. When present, existing vegetation should be used as a landscaped buffer (i.e. hedgerows, fencerows, trees, shrubs, etc.).
2. Placement of the commercial solar operational area will minimize impact on existing environmental features (for example: Green Infrastructure Network, streams, wetlands, etc.).
3. In general, the commercial solar operational area should maintain the integrity and spirit of the Agricultural Land Preservation Program.

Staff Analysis:

The applicant presented a preliminary proposal to the Board at their September 25, 2017 meeting because they didn't have the necessary submission materials prepared to request formal approval. The applicant wanted to get feedback from the Board prior to investing time and money into the required Conditional Use Plan. The proposal met the Board's criteria, and after being assured that the Stonesifer family intended to continue their beef cattle operation, the Board provided positive feedback regarding the design of the CSF.

The initial plan was that the applicant would return to the Board at their next meeting for a formal recommendation to the Hearing Authority. There were some issues that prevented the applicant from being able to proceed, and, in the interim, a new solar company, Power 52 Energy, has become Triple Creek's representative.

The applicant has provided revised documentation that their proposal meets the two primary standards. The requested lease area is 27.54 acres, which is approximately 28% of the property size, well under the 34% maximum. Regarding the soils capability of the land not included in the solar operational area, the Howard County Soil Conservation District calculated that 62.8% would be

USDA Classes I-III, and 71.3% would be Classes I-IV. These percentages exceed the minimum requirements of the ALPB policy of 50% Classes I-III and 66% Classes I-IV.

Staff Recommendation:

Staff recommends approval based on consistency with the ALPB CSF policy.

9. The Howard County Agricultural Land Preservation Board (ALPB) and State Agricultural Preservation Advisory Board (SAPAB): On June 18, 2018 after testimony and exhibits, the ALPB recommended approval of the conditional use. The Board advised that the fence should be moved closer to the solar panels to provide more room for pasture and that should a buffer reduction result, it would have minimal impact due to lack of visibility from neighboring properties. The Board recommended approval and requested that there be as little buffering as possible except around neighboring homes.

10. Robert Vogel, a registered engineer, testified that he and his firm prepared the plan for the commercial solar facility conditional use. Mr. Vogel testified that Policy 4.12 of the Howard County General Plan 2030 encourages energy sustainability and renewable energy sources such as solar energy. Mr. Vogel stated the Howard County Council approved Council Bill (CB59-2016) to amend the Zoning Regulations to allow Commercial Solar Facilities of up to 75 acres on properties in the Agricultural Land Preservation Program ("ALPP"). The Property is zoned RC-DEO and is in the Agricultural Land Preservation Program. Mr. Vogel stated that the area of the project is approximately 97 acres and meets the 10-acre minimum required under the specific conditional use criteria. Mr. Vogel stated that the area of the solar operational area is approximately 27 acres, which is roughly 28% of the Property size. Mr. Vogel said there will be approximately two to three trips per month to the facility for maintenance purposes. Mr. Vogel testified that there will be no adverse impacts from the facility since it will utilize single axis pivoting design which is effective at reducing

glare on adjacent properties. The Amended Conditional Use plan provides grass parking for maintenance vehicles on site. Mr. Vogel said that there is 550 feet of sight distance looking in both directions from the access drive and that the ingress/egress drive will provide safe access with adequate sight distance to the site. Mr. Vogel said that there will be no adverse impacts to the environment or any historic sites by the proposed solar facility. Mr. Vogel testified that visual impact analysis (Petitioner's Exhibit No. 2) demonstrates that the proposed solar facility will have minimal impact to or from scenic views or nearby residences. The Amended Conditional Use plans further notes that all structures and uses meet the minimum 50 foot setback from all property lines and that no structures will exceed 20 feet in height. Mr. Vogel stated that a 'Type D' landscaping buffer will be provided along the perimeter of the conditional use area and a 6-foot tall chain link fence with barbed wire at the top will be provided between the landscaping and solar facility. Lastly, Mr. Vogel commented that the Howard County Land Preservation Board recommended approval of the proposed commercial solar facility.

11. Rob Wallace testified in support of the petition and stated that he is the Chief Executive Officer of Power 52 Foundation. Mr. Wallace said he has been working the last 12 years with renewable energy resources such as solar power. Mr. Wallace explained that Triple Creek Farm's proximity to an existing BGE grid makes this an ideal location for a solar energy facility. The proposed facility will provide the community solar energy. Mr. Wallace stated that the proposed facility will utilize single axis tracking design which allows the solar panels to follow the path of the sun. The facility is designed so as to avoid glare on adjacent properties or roadways. Mr. Wallace stated that a glare study was performed for the proposed facility and the study demonstrated that the facility was designed so as to avoid glare or reflection on adjacent properties. Mr. Wallace said that maintenance visits to the site will be minimal per year and that the facility can be monitored

remotely. Lastly, Mr. Wallace said that the facility will be registered with the Department of Fire & Rescue Services.

12. Teresa Stonesifer resides at 12865 Frederick Road, West Friendship. She testified that she is the owner of the 200 year-old Triple Creek Farm. Ms. Stonesifer stated that the State of Maryland took part of the farm property for MD Route 32. Ms. Stonesifer said that by providing renewable energy the proposed solar facility will help support the farm financially and allow the farm use to continue. Ms. Stonesifer testified that none of the opponents to the proposed conditional use at the hearing live in close proximity to the farm.

13. Eric Stonesifer resides at 12875 Frederick Road, West Friendship. Mr. Stonesifer testified that his home is the first house on the right side of the shared driveway that will provide access to the facility. Mr. Stonesifer supports the proposed conditional use petition.

14. Ruth Alice White resides at 8945 Footed Ridge, Columbia. Ms. White testified in support of the proposed conditional use. Ms. White testified that farms are struggling due to climate change and that she supports community solar energy projects in Howard County as benefitting citizens throughout the County.

15. Wilson McManus resides at 2050 Mt. View Road, Marriottsville. Mr. McManus testified in support of the petition. Mr. McManus commended Howard County for allowing limited solar facilities which “farm the sun” to be placed on Agriculture Preservation Properties. Mr. McManus said that the solar facility will help sustain the farm economically and protect farmland in Howard County.

16. Samantha Dixon resides at 12971 Frederick Road, West Friendship. Ms. Dixon testified that she is in support of the conditional use petition.

17. Ted Mariani resides at 16649 Ed Warfield Road, Woodbine, Maryland. Mr. Mariani stated that he was testifying on behalf of Concerned Citizens of Western Howard County ("CCWHC") and as an individual in opposition to the conditional use petition. Mr. Mariani testified that placing commercial solar facilities on land that is in the Howard County Agriculture Land Preservation Program should not be permitted. Mr. Mariani said that a commercial solar facility is not an agricultural endeavor and that the agriculture preservation easement on the Property precludes industrial or commercial development on the site.

18. Dan O'Leary resides at 12832 Highland Road, Highland, Maryland. Mr. O'Leary testified that he is opposed to the proposed conditional use. Mr. O'Leary said that there has been no review of the easement on the Property by the Agricultural Preservation Board. Mr. O'Leary asserts that since the Property was placed into the Agricultural Land Preservation Program in 1989, it is subject to 1989 zoning law.

19. Therese Myers resides at 5421 Broadwater Lane, Clarksville, Maryland. Ms. Myers opposes the placement of a Commercial Solar Facility on land that is in the Agricultural Land Preservation Program. Ms. Myers said that the Property receives tax credits for being in the Agricultural Land Preservation Program and that the easement on the Property precludes it from being developed commercially. Ms. Myers stated that her review of SDAT records for the Property reveal the conditional use area totaling 92.380 acres and not 97.11 acres as stated in the TSR. Ms. Myers also contends that one of the parcels on which the commercial solar facility is proposed does not meet the minimum 10-acre size requirement.

20. Robert Vogel testified in rebuttal that a surveyor out of his office calculated the gross acreage of the Property. Mr. Vogel said that the gross acreage calculation is based upon boundary survey work by a registered surveyor utilizing deed plotting and Howard County GIS. Mr. Vogel

opined that in his professional opinion the numbers from his surveyor are accurate.

21. Dan O’Leary motioned for dismissal of the case at the close of Petitioner’s presentation and prior to Opposition’s presentation. Mr. O’Leary argued that, as a matter of law, the Petitioner failed to meet its burden of proof that it met all the conditional use criteria for a Commercial Solar Facility. The Board found otherwise and denied his motion. Mr. O’Leary also contended that the Petitioner was subverting the intent of the Agriculture Preservation Easement on the Property by not conforming to the law in effect when the easement was granted in 1989. The Board did not consider this issue because it was not before the Board and since it does not have jurisdiction over the interpretation and/or enforceability of Land Preservation Easements. The Board’s jurisdiction is limited to that which has been granted by the Howard County Council in Section 16.301 *et seq.* of the Howard County Code.

Howard County Zoning Regulations – The Petition must comply with the following applicable Regulations:

- § 131.0.B – General Standards Required for Approval; and
- § 131.0.N.52 – Specific Conditional Use Criteria for Solar Facility, Commercial.

Maryland’s Common Law - *Schultz v. Pritts* and its Progeny

Maryland law requires the Board to apply the *Schultz* test when evaluating the Petition – a two-part test (or standard) that “lurks” within each individual factor the Board must consider under the Regulations. *People’s Counsel for Baltimore Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 68-69 (2008) (citations omitted) (explaining *Schultz v. Pritts*, 291 Md. 1 (1981)). First, a conditional use is presumed to be “in the interest of the general welfare, and therefore, valid.” *Loyola Coll.*, 406 Md. at 84 (citations and internal quotation marks omitted). Second, the favorable presumption incorporates

the inherent adverse effects of the use. *Id.* at 79 (citations omitted).¹ *Schultz* “essentially adds language to statutory factors to be considered in evaluating proposed [conditional uses.]” *Id.* at 69 (citations omitted).

Once a conditional use complies with the applicable zoning regulations, notwithstanding even “severe” inherent adverse effects, it cannot be denied without evidence of adverse effects that are “above and beyond those inherently associated with [the use]” *Mossberg v. Montgomery Co.*, 107 Md. App. 1, 9 (1995); *see also Schultz*, 291 Md. at 22-23; *Loyola Coll.*, 406 Md. at 90, 99. The *Schultz* presumption can only be overcome with “strong and substantial” evidence of “detrimental effects above and beyond the inherent ones ordinarily associated with such uses.” *Loyola Coll.*, 406 Md. at 85 (emphasis added) (citing *Anderson v. Sawyer*, 23 Md. App. 612, 625 (1974)).

CONCLUSIONS OF LAW

Based upon the evidence presented to the Board in this case, and upon the Board’s review of the evidence, the Board makes the following Conclusions of Law:

A. General Criteria for Conditional Uses (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. Section 131.0.B.1.**

The proposed Commercial Solar Facility is in harmony with the Howard County General Plan (PlanHoward 2030) Policy 4.12 which encourages energy sustainability and renewable energy sources. Policy 4.12 specifically supports the development of renewable energy resources such as solar and in pertinent part states:

¹ The *Schultz* test is consistent with the Regulations, which presume a conditional use is “generally appropriate and compatible in the specified zoning districts” and require a finding that a conditional use does not have any “adverse effects above and beyond those ordinarily associated with such uses.” Regulations, §§ 131.0.A, 131.0.B.3.

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.

Accordingly, the conditional use plan is in harmony with the land uses and policies in the General Plan.

- 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. Section 131.0.B.2.**

The proposed 27.23-acre solar facility will comprise approximately 28% of the 97.11-acre Property and exceeds the 10-acre lot size requirement. The facility will comply with all required bulk regulations and dimensional conditional use criteria. The proposed use will generate two visits per month by maintenance personnel. The Property fronts Frederick Road, which is a Minor Arterial road. This is a low intensity use that is appropriate for the site and surrounding community.

- 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. Section 131.0.B.3.**

Unlike Section 131.0.B.1, which tests the proposed use's harmony or compatibility with the General Plan, and Section 131.0.B.2, which tests certain on-site aspects of the proposed use relative to the subject property, Section 131.0.B.3 measures the use's off-site compatibility with the neighborhood under six "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) impact on vicinal environmentally sensitive areas; and (f) impact on vicinal historic sites. 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 has determined to be inherent in the use. Thus, the

question in the matter before the Board is not whether the proposed use would have adverse effects in an RR zoning district. The proper question is 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 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). The *Schultz* adverse impact test, a non-inherent, off-site impact analysis, narrowly focuses on the locality of the specific proposal.

- 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 proposed commercial solar facility at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with the use. The Petitioner will be utilizing single axis tracking design, which will ensure that there will be no glare impacts on adjacent properties or roadways. Furthermore, the use will not produce dust, fumes, odors, lighting, vibrations or other hazards which would be discernible from abutting and vicinal properties.

- 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.**

The area of the conditional use is 27.23 acres in size. The conditional use area will be enclosed with a fence 6-foot in height with landscaping installed between the fencing and the property line so that the solar panels and the fencing are adequately screened from the view of vicinal properties and the roadways. The solar panels and equipment comply with the 20-foot height limit

and 50-foot setback requirement set forth in Section 131.0.N.52. A ‘Type D’ landscape buffer is proposed along the perimeter of the operational areas to screen the solar facility from the public rights-of-way and adjacent properties. Therefore, the location, nature and height of fences, solar panels and proposed landscaping will not hinder or discourage the development or use of adjacent land and structures more at the Property than 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 impact on adjacent properties.**

There is no specific parking requirement for a Commercial Solar Conditional Use. However, there is a proposed parking area on the Plan that will be adequate to accommodate maintenance vehicles. The ‘Type D’ landscape buffer will screen parking areas and driveways from the public rights-of way and adjacent properties. The Petitioner is not proposing the installation of any refuse storage area or dumpster pad.

- 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 driveway providing access to the conditional use site is shared with two adjacent residential properties. The minimal visits to the site will not adversely impact the convenience or safety of shared use of the driveway. The estimated sight distance from the driveway is over 550 feet in both directions. According to the American Association of State Highway and Transportation Official (“AASHTO”) guidelines, based on an estimated stopping sight distance of 360 feet for a car

going 45 miles-per-hour, the proposed access point on Frederick Road should provide safe access. As such, the Board concludes that the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions.

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

The TSR notes that the only environmentally sensitive areas in the vicinity are streams located to the west and north/east of the proposed solar facility. The solar panels will be located over 200 feet from the streams and exceed the buffer requirements set forth in the Howard County Subdivision and Land Development Regulations. Therefore, the proposed solar panels will not have a more significant 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.**

There are no historic sites within 1,000 feet of the proposed solar panels and no historic resources will be impacted. Therefore, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

B. Conditional Use Criteria for Solar Facility, Commercial (Section 131.0.N.52.)

- 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 area of the proposed conditional use is 27.23 acres and located on a 97.11-acre parcel.

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

All solar panels and equipment meet the required 50-foot setback from all property lines.

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

No structures exceed 20 feet in height.

- 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' landscape buffer is proposed along the perimeter of the conditional use area.

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

A six-foot chain link security fence is provided between the landscape buffer and the commercial solar facility.

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

All systems will comply with applicable local, state, and federal laws.

- 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.**

Petitioner agrees to comply with this criterion.

- h. The premises shall be maintained at all times in a clean and orderly condition, include 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.**

Petitioner agrees to comply with this criterion and will maintain the site in a clean and orderly fashion.

- 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 glare study conducted by Barrett Energy Resources was submitted with the Conditional

Use petition. The Petitioner will be utilizing single axis tracking design, which will ensure that there will be no glare impacts on adjacent properties or roadways. Axis tracking design allows the panels to move and be synchronized so that they do not reflect glare surrounding properties.

- 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.**

The Petitioner agrees to comply with this criterion.

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

Tree removal will be minimized and reforestation will be provided in accordance with Section 16.1026 of the Howard County Code.

l. 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.**

The TSR at p. 6 states “Frederick Road is listed as a Scenic Road and a historic site is located approximately 1,500 feet to the west. The Petitioner submitted a Visual Impact Analysis depicting the view from near the historic site and six observation points along Frederick Road. The Visual Impact Analysis concluded that the proposed panels are not visible from the historic site or observation points #1 through #4 along Frederick Road due to the existing terrain. The proposed panels are fully obscured from location #5 by existing vegetation in the stream buffer and existing terrain. Visibility from Frederick Road east of #5, including observation point #6, is over 1,000 feet from the site and the proposed panels will be screened by the ‘Type D’ vegetative buffer as shown on the Conditional Use Plan. Therefore, the proposal is unlikely to harm the scenic characteristics of the view from Frederick Road or any historic structure. The Board agrees with DPZ’s evaluation and conclusions and finds the Petitioner in compliance with criterion 131.0.N.52.1.

- 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 view of the petition and shall include as attachments the Board's advisory review and a copy of the Agricultural Preservation Easement.**

The Property was placed in the Howard County Agricultural Land Preservation Program (ALPP) in 1989. The Conditional Use plan was reviewed by the Agricultural Land Preservation Board (ALPB) on June 18, 2018. The ALPP Administrator's staff report is described, above. The ALPB developed standards for review of CSF's. The ALPB determined that, as a matter of law, if the size of the CSF was 34% or less of the farming operation, it is ancillary. These standards have also established that, as a matter of law, if the remaining portion of the farm operation has a soils capability of more than 50% USDA Classes I-III and more than 66% USDA

I-IV, the CSF supports the primary agricultural purpose of the property. Robert Vogel testified that the size of the CSF is 28% of the Property size and the Howard County Soil Conservation District calculated that 62.8% would be USDA Classes I-III, and 71.3% would be Classes I-IV. These percentages exceed the minimum requirements of the ALPB policy of 50% Classes I-III and 66% Classes I-IV. The Board concludes that the Property is in the Agricultural Land Preservation Program and the petition complies with criterion 131.0.N.52.m.

- 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.**

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

C. CONCLUSION

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard, the Board concludes that the instant petition complies with Sections 131.0.B (General Standards) and 131.0.N.52 (Specific Criteria) of the Zoning Regulations.

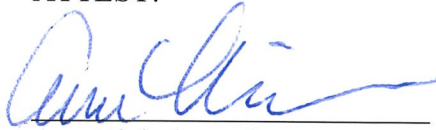
ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 14 day of April, 2020, by the Howard County Board of Appeals, ORDERED:

That the Petition and Amended Conditional Use Plan dated November 2019 (Petitioner’s Exhibit No. 1) of Power 52 Foundation for a Conditional Use for a Commercial Solar Facility in a RC-DEO (Rural Conservation – Density Exchange Option) Overlay Zoning District is **GRANTED**, subject to the following condition:

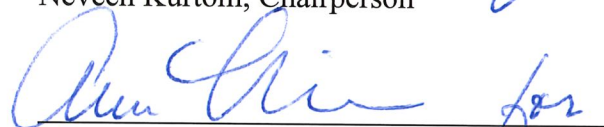
1. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.

ATTEST:


Ann Nicholson, Secretary

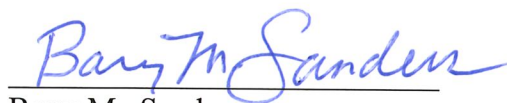
HOWARD COUNTY BOARD OF APPEALS

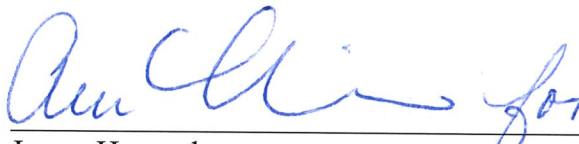
 for
Neeven Kurtom, Chairperson

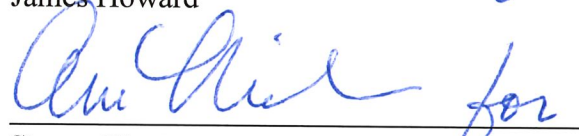
 for
William Santos, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
GARY W. KUC

COUNTY SOLICITOR


Barry M. Sanders
Assistant County Solicitor

 for
James Howard

 for
Steven Hunt

_____ Term Expired 12/31/19 _____
*John Lederer

*Board member John Lederer's term serving on the Board of Appeals expired prior to issuance of this Amended Decision and Order. On 1/1/20 Gene Ryan replaced John Lederer on the Board. Gene Ryan did not participate in this Amended Decision and Order.