

IN THE MATTER OF : BEFORE THE
BITH ENERGY, INC. : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
 : HEARING EXAMINER
 : BA Case No. 13-012C

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DECISION AND ORDER

On June 6, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Bith Energy, Inc. (Petitioner) for a Commercial Solar Facility in an RC-DEO (Rural Residential: Density Exchange Option) Zoning District, pursuant to Section 131.N.11 of the Howard County Zoning Regulations (the "Zoning Regulations").

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

Thomas Meachum, Esquire, represented Petitioner. Robert D. Wallace and Peter Stone testified on behalf of Petitioner. Michael Luzius also testified, but no in opposition to the petition.

At the outset of the hearing, Petitioner agreed with the technical staff report (TSR), with the exception of the TSR's recommendation that Type "D" landscaping be installed along Perimeters 2 and 4.

FINDINGS OF FACT

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

1. Property Identification. The subject property is located in the 3rd Election District on the west side of Route 32 about 3,100 feet south of MD 144. It is referenced as Tax Map 15, Grid 16, Parcel 90 and is also known as 2800 Nixons Farm Road (the Property).

2. Property Description. The 109.82-acre Property fronts about 1,000 feet on the west side of MD 32 and about 1,500 feet on the south side of the private road identified as Nixons Farm Lane. It is improved with a structure used as a banquet facility sited about 1,500 feet from the front property line and multiple outbuildings near this facility. Per Waiver Petition WP-13-018, DPZ approved the approximately ten-acre Phase I of the commercial solar facility on the southeast side of the Property.

A tree line and meandering stream run along the Property frontage. A gated asphalt driveway in the northeast corner provides access and leads to a parking area west of the banquet facility. Large farm fields take up the Property's east and west sections. The banquet facility is sited on the highest elevation and the land drops in elevation to the east and south. Lines of trees run along the western, eastern and southern property perimeters.

3. Vicinal Properties. Adjoining properties to the north, south and west are zoned RC-DEO. The 26.71-acre Parcel 18 to the north is improved with a single-family detached dwelling and barn. Parcel 267, Lots 1 and 2 are each improved with a single-family detached dwelling. The western 89.97-acre Parcel 7 is heavily wooded and encumbered with an Agricultural Preservation Easement. Also to the west is the Howard County owned, 136.7-acre preservation

Parcel D designated as West Friendship Park.

To the southwest, the 98.054-acre Parcel 42, Lot PAR A, is the wooded Fox Valley Estate Homeowner's Association. To the south is the 8.8-acre Parcel 35 improved with a single-family detached dwelling and outbuilding. To the east is the 6.12-acre Parcel 25 preservation parcel owned by the Howard County Department of Public Works. On the southeast side is the 7.14-acre Parcel 160 improved with a historic single-family detached dwelling and several outbuildings. Across MD 32, to the east, are multiple lots, some of which are unimproved and others improved with single-family detached dwellings.

4. Roads. MD 32 has two travel lanes, and about a 30-ft. paving width within a variable ROW. The posted speed limit is 55 MPH. According to Howard County GIS traffic data, the traffic volume on MD 32 south of MD 144 was 31,025 average daily trips as of May 2006.

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

6. General Plan. PlanHOWARD 2030 identifies the Property as Rural West on the Designated Place Types Map. The PlanHOWARD2030 Functional Road Classification Map identifies MD 32 as a principal Arterial Road.

7. Zoning History. In 2012, the Department of Planning and Zoning granted Nixon's Solar Farm, Phase I, wavier petition WP-13-018 for a 2 megawatts alternating current (MWAC) Commercial Solar Facility (the Facility) on ten acres of the Property.

In 2013, The County Council amended the Zoning Regulations through Zoning Regulations Amendment ZAR 142, which added "Commercial Solar Facility" as a conditional use category in the RC and RR zoning. Petitioner proposed the amendment.

8. The Proposed Conditional Use. Petitioner proposes to increase the 10-acre footprint of the 2 megawatt alternating current (MWAC) Facility with a 40-acre expansion on the western and northeastern portions of the Property. The Facility would operate 24 hours a day, seven days a week, collectively solar energy passively and converting it into electricity. The proposed solar panels are no more than 12 feet in height and the electricity generated will be transmitted through underground cables. There are no employees. The owners use two standard size trucks.

The Conditional Use Plan depicts four separate, 10-acre solar array groups in two areas. Each group is served by a small inverter pad with a 20-foot light pole.¹ The first area is a 400'-wide by 1,900'-deep fenced area to the west of the existing single-family dwelling on the Property. The second is a 1,100-foot wide by 900-foot deep fenced area to the east of the dwelling. According to the petition and Conditional Use Plan, all structures and uses will maintain a 50-foot setback from all property lines.

A Type "D" landscaping buffer is proposed along the north and south sides of the property. A Type "B" buffer is proposed is proposed on the far south and entire west sides of the conditional use area. The land adjacent to the "B" perimeters is undeveloped land encumbered with a preservation easement in heavy woods and vegetative cover.

9. Robert D. Wallace presented an overview of the engineering and electricity-generating proposed solar energy facilities.

10. Peter Stone testified that the proposed Type "B" landscaping buffer would meet

¹ Inverter pads convert solar power generated from DC to AC power for export to a utility grid.

specific conditional use category standards owing to distance, existing and proposed vegetation.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

I. General Criteria for Conditional Uses (Section 131.B)

1. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. 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; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

A Commercial Solar Facility is low intensity use and therefore compatible with surrounding RC zoned properties. It would be located on a principal arterial road, which is appropriate for a site accessed infrequently when employees twice yearly check the panels for cleanliness and mow the lawn about 8 times a years. The existing and proposed landscaping will screen and buffer the use and the use will meet the required 50-foot setback requirements.

2. Adverse Effect. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under

Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an RC District. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a cemetery in a RC district.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The proposed use will not generate anything out of the ordinary for the use. The Hearing Examiner therefore concludes that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The proposed Facility will comprise four solar array areas in two groups. Each area will be enclosed by a fence no greater than 8 feet in height. Landscaping will screen the Facility from adjoining properties and roadways. The Hearing Examiner therefore concludes the location, nature and height of structures and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

There is no specific parking requirement for a Commercial Solar Facility. Employees will visit the site twice a year to inspect the arrays and the Conditional Use Site will be mowed about 8 times a year. Consequently, the existing parking pad on the west side of the residence will provide adequate parking and screened.

d. Access. 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.

The existing ingress/egress will likely continue to provide safe access with adequate sight distance, based on actual conditions.

II. Specific Criteria for Commercial Solar Facility (Section 131.N.59)

A Conditional use may be granted in the RC or RR Zoning Districts for a commercial solar facility, provided that:

(1) The land on which the commercial solar facility is proposed may not be in the Agricultural Land Preservation Program and it may not be encumbered by any Environmental Preservation Easements.

The proposed Facility location is not in the Agricultural Land Preservation Program nor is it encumbered by an Environmental Preservation Easement, in accordance with Section 131.N.59.(1)

(2) 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 Property is about 110 acres and the proposed Facility is about 50 acres, in accordance with Section 131.N.59.(2).

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

The Facility is at least 50 feet from all property lines, in accordance with Section 131.N.59.(3).

(4) No structure or use may be more than 20 feet in height.

The tallest proposed structures are the four light poles, one of which would be located at each of the four inverter pads, in accordance with Section 131.N.59.(4).

5) A "Type D" landscaping buffer must be provided around the perimeter of the proposed commercial solar facility unless the hearing Authority determines that an alternative buffer is sufficient.

The Conditional Use Plan proposes a Type "D" landscaping buffer along the north and south sides of the property. A Type "B" buffer is proposed on the far south and entire west sides of the conditional uses area. The TSR recommends a Type "D" buffer along the northern half of the eastern lot line along 32 to preserve the area's rural character and along the western lot line to ensure the scenic view to and from the park. The Hearing Examiner credits Mr. Stone's testimony that "B" buffers are adequate when combined with existing landscaping. The petition accords with Section 131.N.59.(5).

(6) All security fencing must be located between the landscaping buffer and the commercial solar facility.

The Conditional Use Plan depicts security fencing between the landscaping buffer and the commercial solar facility, in accordance with Section 131.N.59.(6).

(7) The systems shall comply with all applicable local, state, and federal laws and provisions.

The petition states the Facility will comply with all applicable local, state, and federal laws and provisions, in accordance with Section 131.N.59.(7).

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

The petition states Petitioner understands this requirement, in accordance with Section 131.N.59.(8).

(9) 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.

Employees will visit the site twice yearly to check panel cleanliness and 8 times yearly for lawn cares. The Petition states trees will be checked at each site visit. The petition accords with Section 131.N.59.(9).

(10) 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 Petition states minimal glare will be generated because the solar panels absorb the solar irradiance by design and any glare would be absorbed by landscaping, replanting and trees, in accordance with Section 131.N.59.(10).

(11) 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 petition states Petitioner agrees to this requirement and notes the Public Service Commission has approved the proposal, in accordance with Section 131.N.59.(11).

(12) Tree removal shall be minimized and reforestation shall be done in accordance with Section 16.1206 of the County Code.

The petition states no woods or forest will be removed, except isolated trees, in accordance with Section 131.N.59.(12).

(13) 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.

(III) A road listed in the scenic roads inventory adopted under §16.1403 of the County Code; or

(IV) A historic structure as defined in § 16.601 of the County Code.

The TSR disagrees with the petition statement that there is no park, scenic byway, listed County scenic road or historic structure with any view issues. It notes a public park some 270-300 feet from the western perimeter of the Property, where a Type "B" landscape buffer is proposed and suggests that a Type "D" may be more appropriate. Having credited the testimony of Mr. Stone about the adequacy of the "B" buffer to protect the view to/from this park, and based on the Hearing Examiner's site visit (which included a visit to the park), the Hearing Examiner believes a Type "B" buffer will suffice.

The TSR further notes the presence of the Milton Shipley house (Historic Sites Inventory HO645). However, the TSR recognizes, as does the petition, that the house is not open to the public and obscured by a berm and existing trees. The Hearing Examiner concludes Petitioner has met its burden that the Facility will not harm the scenic view to/from this house. The petition accords with Section 131.N.59.(13).

ORDER

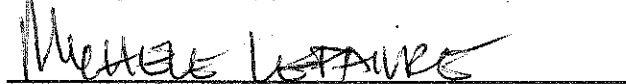
Based upon the foregoing, it is this 24th day of June 2013, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Bith Energy, Inc. for a Commercial Solar Facility in an RC-DEO (Rural Residential: Density Exchange Option) Zoning District, is hereby **GRANTED**;

Provided, however, that;

1. The conditional use shall be conducted in conformance with, shall apply only to the Conditional Use Plan and petition submitted on March 27, 2013 and not to any other activities, uses, or structures on the Property.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFavre

Date Mailed _____

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