

IN THE MATTER OF	:	BEFORE THE
OneEnergy Development, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 19-008C

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.....
DECISION AND ORDER

On September 24, 2020, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the Petition of OneEnergy Development, LLC (Petitioner) for a Conditional Use for a Commercial Solar Facility in the RC (Rural Conservation) DEO (Density Exchange Option) Zoning District, filed pursuant to Section 131.0.N.52 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the notice, posting, and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Thomas G. Coale, Esquire represented the Petitioner and Peter Hershey, Esquire and Mark Gabler, Esquire represented the Protestants, Concerned Citizens of Howard County, Inc., Theodore Mariani, and Daniel O'Leary.

PRELIMINARY MATTER

On September 18, 2020, after business hours, Protestants attorneys attempted to file a Memorandum of Law. This Memorandum did not have a Certificate of Service in violation of both the Maryland Rules of Procedure and the Rules of Procedure of the Howard County Board of Appeals Hearing Examiner, Rule 7.5, nor did Protestants attorneys provide a copy to Petitioners attorney. By email dated September 22, 2020, Protestants attorneys were notified by the Office of the Hearing Examiner that Hearing Examiner Rule 7.5 requires that preliminary matters be

addressed by motion to the Hearing Examiner with accompanying certification that a copy was provided to all persons known to have an interest in the case, including but not limited to the Petitioner, the property owner, the administrative agency, or any other person entitled to written notification under Section 2.203 of the Board's Rules. The certification must state "any person interested in responding to this motion must file a written response with the hearing examiner within fifteen days of the date that the motion was filed".

By the same email Protestants attorneys were advised the Hearing Examiner Rule 6.4 requires that Protestants attorneys must give the hearing examiner written notification of the names and addresses they are representing prior to the hearing. Protestants attorneys were also advised that while the attorneys may examine witnesses, their clients could not examine witnesses, however they could testify in their individual capacity.

By email dated September 22, 2020, Respondents attorneys attempted to again file their Memorandum of Law, this time with a limited certificate of service, still deficient under Hearing Examiner Rule 7.5 as the Certificate of Service did not provide notice of the statutory response time as required. No attempt was made to comply with Rule 6.5 by providing the names and addresses of their clients. Protestants attorneys further stated "Also, just to clarify, other than our submission of the Memorandum on behalf of the protestants, Rich & Henderson will not appear for the hearing to question witnesses."

By email dated September 22, 2020, Petitioners attorney filed a motion to dismiss arguing the violation of Hearing Examiner Rule 10.3, which enables the hearing examiner to request legal memoranda from the parties to assist the hearing examiner in her decision, but not authorizing the *sua sponte* filing of memoranda of law. Petitioners attorney also noted the violation of hearing Examiner Rule 7.5 which establishes that responses are permitted within fifteen days of filing a motion. Protestants Memorandum of Law was attempted to be filed 2 days prior to the hearing, not giving Petitioner its statutory response time.

By email dated September 22, 2020 the Office of the Hearing Examiner notified all counsel that the motion to dismiss would be heard as a preliminary matter immediately prior to the scheduled evidentiary hearing on September 24, 2020. Protestants attorneys failed to appear and Petitioners attorney argued its motion to dismiss.

Your Examiner finds Protestants Memorandum of Law to have been initially filed in violation of the Maryland Rules of Procedure and of the Rules of Procedure, Howard County Board of Appeals Hearing Examiner Rule 7.5 by failing to provide the required certificate of service. The attempt to refile the Memorandum of Law was also in violation of Rule 7.5 as it was not timely, thus preventing Petitioner its statutory response time. Protestants attorneys are also in violation of Rule 6.5 by their failure to provide a written list of their clients in this matter along with their names and addresses to the Hearing Examiner prior to the hearing despite being expressly asked to do so. For these violations Protestants Memorandum of Law cannot be accepted and it is not necessary to address Petitioners argument regarding Rule 10.3 and the authority to file memoranda of law *sua sponte*.

EVIDENTIARY HEARING

Robert Vogel, Tim Ahrens, and Ronald Warfield testified in support of the Petition. Theodore Mariani testified that he was in favor of upholding the strict compliance of the intent of the laws governing Commercial Solar Facility's in agricultural areas and that he felt that the instant Petition was in compliance with these laws. Daniel O'Leary, when offered the opportunity to testify, declined to speak.

Petitioner introduced into evidence the following exhibit:

1. Mr. Warfield's written testimony with accompanying historic photos

FINDINGS OF FACT

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

1. Property Identification. The 144.1-acre subject property is located on the west side of Sykesville Road (MD 32), immediately north of Day Road and north of I-70. It is located in the 3rd Election District, identified as Tax Map 009, Grid 003, Parcel 94, also known as 700 Sykesville Road (the Property).
2. Property Description. The Conditional Use area is roughly rectangular in shape and is comprised of 20.45 acres (19.91 acres for the area within the fencing and .54 acre for the access road). The majority of the Property is a farm, including multiple agricultural buildings and a communication tower. The Property was placed within the Agricultural Land Preservation Program (HO-85-04-E) in 1985 by Samuel and Ethel Warfield. A stream and wetland area are located on the southern portion of the site. The proposed Solar Facility does not encroach on any of these environmental features. The highest elevation on the subject property is approximately 570 feet at the northwest corner descending to an elevation of approximately 460 feet at the southwest corner.
3. Vicinal Properties. To the north, west and south of the subject Property are single family detached dwellings and farms in the RC (Rural Conservation) DEO (Density Exchange Option) Zoning District. To the east is the MD 32 right-of-way in the RC/RR-DEO (Rural Residential/ Rural Conservation) (Density Exchange Option) Zoning District.
4. Roads. MD 32 has two lanes and a 55-foot pavement width within a 180-foot wide right of way and is an Intermediate Arterial road. The speed limit is 50 miles per hour. As of 2019, MD 32 had a daily traffic count of 23,563 AADT according to the Maryland Department of Transportation.
5. Water and Sewer Service. The Property is not located within the Metropolitan District or the Planned Service Area for Water and Sewer.

6. General Plan. PlanHOWARD 2030 designates the Property as Rural Resource on the Designated Place Types Map. MD 32 is depicted as an Intermediate Arterial on the PlanHOWARD 2030 Functional Road Classification Map.

7. Zoning History.

Case No. BA-01-044C&V

Request: Conditional Use and Variance for a Communication Tower

Action: Approved

8. The Requested Conditional Use. The proposed 20.45-acre Commercial Solar Facility site is located in the southwest quadrant of the 144.1-acre farm along its western boundary as shown on the Revised Conditional Use Plan (June 2019).

Petitioner is requesting approval of a 19.91-acre operational area. The 2 MW DC Facility will utilize single axis track design which allows the solar panels to follow the path of the sun to reduce the impact of glare and maximize electricity generation. The proposed solar panels are approximately 10 feet in height and will be facing east in the a.m., rotating with the sun, to be facing west in the p.m. The Facility will operate 24 hours a day, seven days a week, collecting solar energy passively and converting it into electricity. Petitioner estimates that there will be two visits to the facility per month for maintenance.

Proposed Fencing and Landscaping. The Revised Conditional Use Plan (June, 2019) shows a Type 'D' landscape buffer along the northern, western, southern, and a small portion of the eastern perimeter of the facility. Sheet 3 of 3 provides details of the 8 feet in height woven wire fabric security fence around the entire perimeter of the Facility to be located interior to the Type 'D' and alternative buffer. All fencing will sit a minimum of 50 feet and a maximum of 75 feet from the Property lot lines, erected between the proposed landscaping and equipment.

Petitioner is requesting an alternative buffer along the northern and southern portions of the eastern perimeter of the proposed Facility due to the location of the existing vegetation along

this boundary. Petitioners Viewshed depicts that the existing vegetation will be greater to or more protective than a Type "D" buffer along these portions of the eastern perimeter of the use.

9. Technical Staff Report. The TSR recommends approval of the instant request for Commercial Solar Facility Conditional Use with the caveat that all required landscaping shall be provided within 6 months of the installation of the solar panels.

10. Agency Comments.

Department of Planning and Zoning, Division of Land Development: On March 25, 2019 this Division noted no objection, finding: (1) all development must be in accordance with forest conservation requirements and the existing agricultural preservation easement and (2) all landscaping and plant species must be adequate to provide the necessary screening from adjacent property.

Health Department: There are no wells or sewage disposal systems shown serving the house. The proposed underground BGE line runs near where those components may be located. The Health Department will review any conflicts with existing wells or sewage disposal system components during the building permit review process (April 8, 2019).

11. 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 on a maximum of 75 acres on properties in the ALPP. Council Bill 59-2016 requires 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 property."

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 operational 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 Petitioner has provided documentation that his proposal meets the two primary standards. The total requested lease area is 19.35 acres, which is approximately 13.5% of the property size, below the 34% maximum. Regarding the soils capability of the land not included in the solar operational area, the petitioner's engineer (Robert Vogel) calculated that 91.3% would be USDA Classes I-III and 98.2% would be Classes I-IV. These percentages exceed the minimum requirements of the ALPB policy of 50% Classes I-III.

Mr. Warfield has leased his tillable land (115 acres) for over 20 year to Pete Clark of Edgewood Farm on a yearly basis. The remainder of the land is either woods or wetlands. Mr. Clark rotates between corn and soybean. The area proposed for the Commercial Solar Facility has been planted with hay, timothy and orchard grass. Mr. Clark will continue to crop the land minus the conditional use area. Mr. Warfield will continue to farm the land as his family has done for over 85 years. The lease from the Commercial Solar Facility is needed to sustain the economic viability of the farm.

Staff Recommendation:

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

12. Howard County Agricultural Preservation Board (APB) and State Agricultural Preservation Advisory Board (APAB):

On October 1, 2018, after testimony and exhibits, the APB and the APAB recommended approval of the Conditional Use of a Commercial Solar Facility, finding as follows:

The applicant has provided documentation that the proposal meets those two primary standards (supra). Included in the staff packet are the aerial maps, protected lands map, the soils maps, the APB policy, the request from Mr. Warfield, the larger scale maps from Mr. Vogel, the soils classification analysis map and the draft conditional use plan. From all that documentation provided, it is determined that the requested lease area is 19.35 acres which is approximately 13.5% of the property and is below the 34% max. Regarding the soils capability of the land that is not included in the operation area, Mr. Vogel has calculated that 91.3% would be Classes I-III and that 98.2% would be Classes I-IV, which exceeds the minimum requirement of 50%. Mr. Warfield stated that he has leased this land to Pete Clark for over 20 years. Mr. Clark has planted a corn and soybean rotation during that time. Mr. Warfield has no plans to alter his lease agreement with Mr. Clark for the continuation of the crop farming. Ms. Levy's recommendation is for approval based on consistency with the ALPB policy.

BURDEN OF PROOF

The Court of Appeals of Maryland has frequently expressed the applicable standards for judicial review of the grant or denial of a Conditional Use. The Conditional Use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The Conditional Use is a valid zoning mechanism that delegates to an administrative body a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating this presumption. The legislative body has statutorily determined that a Conditional Use is compatible in a particular zoning district absent specific facts adduced to the contrary at a particular location. The duties given the hearing body 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 Zoning Plan.

The Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the zoning body that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.

The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the zoning body to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a Conditional Use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel &

Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974). These standards dictate that if a requested Conditional Use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

The appropriate standard to be used in determining whether a requested Conditional Use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Conditional Use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974). Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995)

CONCLUSIONS OF LAW

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

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

A. Harmony and Intensity of Use

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

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

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

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

The proposed 19.91-acre solar facility comprises approximately 13.8% of the 144-acre Property and exceeds the ten-acre minimum lot size requirement and is less than 75 acres, the maximum allowable size. Additionally, the facility complies with all required bulk regulations and dimensional Conditional Use criteria. The facility will only generate two visits per month by maintenance personnel.

MD 32 is an Intermediate Arterial and appropriate for the type and infrequent number of vehicles typically associated with the proposed use.

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

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

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

and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed Conditional Use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RC-DEO Zoning District but whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery*, 107 Md. App. 1, 666 A.2d 1253 (1995). For the reasons stated below, and as conditioned, Petitioner has met its burden of presenting sufficient evidence under HCZR Section 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Commercial Solar Facility Conditional Use in the RC-DEO Zoning District.

Section 131.0.B.3. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

Petitioner provided a Glare Study conducted by Forge Solar which concluded that any glare related impacts to residential or motorist receptors are mitigated by the single axis tracking design of the solar panels.

There is no evidence of atypical adverse effects such as noise, dust, fumes, odors, vibrations, increased lighting, hazards or other physical conditions that would be greater at the subject site than generally elsewhere.

Section 131.0.B.3.b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

The proposed solar facility will be more than 100 feet from adjacent residential uses. All solar panels, equipment, and fences comply with the 20-foot height limit and 50-foot setback requirement in Section 131.0.N.52. A Type "D" landscape buffer consisting of a double row of offset evergreen trees planted at 10-foot intervals and deciduous trees planted at 60 feet on center is proposed along the perimeter of the operational area to screen the solar facility from the public rights-of-way and adjacent properties. The Conditional Use Plan indicates the Petitioner is requesting relief from the Type 'D' buffer along portions of the eastern boundary of the conditional use area, where existing vegetation provides some screening. Petitioners Viewshed exhibits demonstrate that the existing vegetation is superior to the Type 'D' buffer, rendering the addition of the Type 'D' buffer in that area duplicitious.

The location, nature and height of the structures and landscaping will not hinder or discourage the development or use of adjacent land and structures more at the Property than generally elsewhere in the same or similar zoning districts.

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

There is no specific parking requirement for a Commercial Solar Facility. The proposed private access road will provide sufficient area for the parking of the maintenance vehicle. The

Type 'D' landscape buffer will screen any parking from the public right-of-way and adjacent properties. Nor refuse area is proposed.

Section 131.0.B.3.d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

Precise sight distance measurements can only be determined by a detailed sight distance analysis, which is typically conducted during Site Development Plan review. The estimated site distance on MD 32 is over 500 feet in both directions. According to the American Association of State Highway and Transportation Officials (AASHTO) guidelines, based on an estimated stopping sight distance of 425 feet for a car going 50 miles per hour, the proposed access point on MD 32 appears to provide safe access with adequate stopping sight distance.

MD 32 is an Intermediate Arterial. To verify sight distance for Intermediate Arterials, AASHTO recommends an intersection sight distance analysis, which will be evaluated during Site Development Plan review.

The driveway is shared with an adjacent residential property. The minimal maintenance visits will not adversely impact the convenience or safety of the shared use of the driveway.

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

An environmentally sensitive stream/wetland area is located on the Property to the south of the proposed solar facility. The solar facility does not encroach into this sensitive area. The site is also in Agricultural Preservation. The solar panels are located over 500 feet from the stream/wetland area, exceeding the 100-foot and 25-foot buffer requirements in the Subdivision and Land Development Regulations. The Agricultural Land Preservation Board has issued a memo (dated October 1, 2018) recommending approval based on consistency with ALPB CSF policy. The proposed use will not have a greater impact than elsewhere in the zoning district.

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

There are no historic sites within 2,000 feet of the proposed Commercial Solar Facility. Therefore, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

2. Specific Criteria for Commercial Solar Facility Use (Section 131.0.N.52)

A Conditional Use may be granted in the RC or RR Zoning District for a Commercial Solar Facility, provided that:

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

The proposed Solar Facility is 19.91 acres and is located on a 144.1-acre parcel, in compliance with Section 131.0.N.52.a.

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

All structures and uses are located at least 50 feet from all external property lines, in compliance with Section 131.0.N.52.b.

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

The solar panels are approximately 10 feet tall; the fencing is 8 feet in height and no other structure or use exceeds 20 feet in height, in compliance with Section 131.0.N.52.c.

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

A Type 'D' buffer consisting of a double row of offset evergreen trees planted at 10-foot intervals and deciduous trees planted at 60 feet on center along the north, south and west perimeter of the conditional use area are shown on the Revised Conditional Use Plan (June, 2019) This Plan also shows the deletion of the Type 'D' buffer along the northern and southern part of the eastern perimeter. The existing vegetation in these two areas will be superior to the Type 'D' buffer. The proposed landscaping buffer is in compliance with Section 131.0.N.62.d.

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

An 8-foot woven wire fabric security fence is provided between the landscape buffer and the Commercial Solar Facility. Since the fence exceeds 6-feet it is required to meet setback requires and complies with the 50-foot setback area, all in compliance with Section 131.0.N.52.e.

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

The Petition states the systems will comply with all applicable local, state, and federal laws and provisions.

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

The Petition states that the Petitioner shall remove the Commercial Solar Facility from the site within one year of the date that the use ceases, in compliance with Section 131.0.N.52.g.

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

The Petitioner testified as to the contracts for the maintenance of the Property and access to the site and agrees to comply with this criterion, in compliance with Section 131.0.N.52.h.

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

The Facility will utilize single axis design, which allows the panels to move with the sun and be synchronized to reduce glare on surrounding properties. The Petitioner submitted a Glare Study conducted by Forge Solar, which analyzed potential glare from thirteen nearby locations. The Study did not show evidence of glare onto any of the receptor sites. Your Examiner concludes that the solar collectors will be designed and located to avoid glare or reflection onto adjacent properties and shall not interfere with traffic or create a safety hazard, in compliance with Section 131.0.N.52.i.

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

The Petitioner agrees to comply with these criteria, in compliance with Section 131.0.N.52.j.

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

Petitioner agrees to comply with Section 16.1026 of Howard County Code, which will be reviewed at Site Development Plan, in compliance with Section 131.0.N.52.k.

I. Scenic Views

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

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

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

- A. The Conditional Use petition shall include a visual impact analysis mapping all viewshed impacts and any proposed mitigation. This analysis shall include mapped visual impact assessments of all important or critical viewpoints or elevations from which the solar facility can be seen from a fixed vantage point. For purposes of this subsection. A viewshed is a topographically defined area including all critical observation points from which the solar facility is viewed.**
- B. If the visual impact assessment as mapped particularly interferes with and compromises critical observation points within the viewshed that warrant viewshed protection, the petitioner shall mitigate the view through additional landscaping or other forms of mitigation, including reconfiguration of the solar panels, or as may be required by the Hearing Authority.**
- C. Fencing along road frontage or the perimeters of the commercial solar facility site where the fencing would be visible shall be constructed of a material and design consistent with the character of the roadway or areas.**
- D. The petition shall include a landscape plan.**

The proposed Commercial Solar Facility is not located on, or visible from, any scenic views and therefore this criterion is not applicable.

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

The Property was placed in the Howard County Agricultural Preservation Program (ALPP) in 1985. The Conditional Use Plan was reviewed by the Agricultural Preservation Board (APB) on October 1, 2018. The ALPP Administrator's staff report is described, *supra*. DPZ concurred with the APB, The Petition is in compliance with Sec. 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.

ORDER

Based upon the foregoing, it is this 5th day of October, 2020, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of OneEnergy Development, LLC for a Commercial Solar Facility in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, is hereby **GRANTED;**

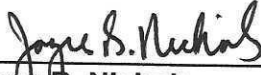
Provided, however, that:

1. The Commercial Solar Facility conditional use shall be conducted in conformance with and shall only to the petition as submitted and as shown on the Revised Conditional Use Plan dated June, 2019, and not to any other activities uses, or structures on the Property.
2. Petitioner shall comply with all conditional use standards.
3. The Site Development Plan, or its equivalent, shall include a note containing all conditions of approval.
3. Petitioner shall comply with all federal, state, and local laws and regulations.
4. The systems shall comply with all applicable local, state, and federal laws and provisions
5. Any commercial solar facility that is no longer used shall be removed by the property owner from the site within one year of the date that the use ceases.
6. The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the commercial solar facility.
7. The Petitioner shall register all solar collectors with the Department of Fire and Rescue Services. The registration shall include a map of the solar facility noting the Rescue Services. The registration shall include a map of the solar facility noting the location of the solar collectors and the panel disconnect.
8. Tree removal shall be minimized, and reforestation shall be done in accordance with Section 16.1026 of the Howard County Code.

9. All required landscaping shall be provided within 6 months of installation of the solar panels.
- The Approved Conditional Use Plan is Revised Conditional Use Plan (June, 2019)

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Joyce B. Nichols

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