

IN THE MATTER OF  
DAVID WILLIAM MATHEWS - Legal Owner  
BLUEFIN ORIGINATION 2, LLC - Lessee  
20450 Middletown Road  
Freeland, MD 21053

RE: Petition for a Solar Facility

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. 17-108-X

\* \* \* \* \*

**OPINION**

This case comes before the Board on appeal of the final decision of the Administrative Law Judge (“ALJ”) in which the ALJ granted a Petition for a Solar Facility by Opinion and Order dated January 22, 2018. Protestants, Freeland Legacy Alliance, Inc., Richard and Rhonda Ryan, Jeanne Bowman, Scott Dykes, Beverly and Salvatore Scavone, Theresa and Christopher Norton, Kathleen and Christopher Marciniak, Christine Pignateri, Laverne Poe, Diana Householder, Betty Lou Holmes, Therese Sassler, Paul Hoeckel, Beverly Kram, Rhonda and William Rollins, Ed and Debra Myslinski, Matthew Myslinski, Michael Myslinski, Lynne Jones, Debbie Frank, Patricia Trump, Kathleen Pieper, Lisa Arthur, and Robin Arrington (collectively the “Protestants”) filed an appeal.

A *de novo* hearing was held before this Board on July 12, October 16, and October 25, 2018. The Petitioners, David William Mathews and Bluefin Origination 2, LLC (the “Petitioners”) were represented by Christopher D. Mudd, Esquire, Patricia A. Malone, Esquire and Venable, LLP. The Protestants were represented by H. Barnes Mowell, Esquire. People’s Counsel also participated in the hearing. A public deliberation was held on January 24, 2019.

**Factual Background**

The subject property is located at 20450 Middletown Road and consists of 71 acres+/- on the south side of Middletown Road, east of Flintstone Road (the “Property”). It is split-zoned

RC2, RC4, RC5 and RC8. Middletown Road is a designated scenic route. The Property was previously a farm but no farming activities presently take place there. The Petitioners are proposing to use 16.71 acres for a solar facility on a cleared area of the Property pursuant to Baltimore County Zoning Regulations (“BCZR”), Article 4F.<sup>1</sup> The solar facility will generate 1.9 Mw of AC electricity. The remaining acreage of the Property (35.7 acres+/-) is wooded and is subject to a Forest Buffer Easement and Forest Conservation Easement recorded in Land Records at Liber 12794, folio 716. (Pet. Ex. 2).

#### Solar Facilities Law

On July 17, 2017, the County Council enacted Bill 37-17 permitting solar facilities by special exception in certain zones, including RC2, RC4, RC5, and RC8. BCZR, §4F-102.A. The County Council imposed limits on the number of facilities per councilmanic district (*i.e.* 10 per district), and on the maximum area for each facility (*i.e.* the amount of acreage that produces no more than 2 megawatts alternating current (AC) of electricity). (BCZR, §4F-102.B.1 and 2.)

In addition to the special exception factors, there are 10 requirements set forth in BCZR, §4F-104.A:

1. The land on which a solar facility is proposed may not be encumbered by an agricultural preservation easement, an environmental preservation easement, or a rural legacy easement.
2. The land on which a solar facility is proposed may not be located in a Baltimore County historic district or on a property that is listed on the Baltimore County Final Landmarks List.
3. The portion of land on which a solar facility is proposed may not be in a forest conservation easement, or be in a designated conservancy area in an RC 4 or RC 6 Zone.
4. Above ground components of the solar facility, including solar collector panels, inverters, and similar equipment, must be set back a minimum of 50 feet from the tract boundary. This setback

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<sup>1</sup> The Petition filed before ALJ requested an area of 18.73 acres for the solar facility.

does not apply to the installation of the associated landscaping, security fencing, wiring, or power lines.

5. A structure may not exceed 20 feet in height.

6. A landscaping buffer shall be provided around the perimeter of any portion of a solar facility that is visible from an adjacent residentially used property or a public street. Screening of state and local scenic routes and scenic views is required in accordance with the Baltimore County Landscape Manual.

7. Security fencing shall be provided between the landscaping buffer and the solar facility.

8. A solar collector panel or combination of solar collector panels shall be designed and located in an arrangement that minimizes glare or reflection onto adjacent properties and adjacent roadways, and does not interfere with traffic or create a safety hazard.

9. A petitioner shall comply with the plan requirements of § 33-3-108 of the County Code.

10. In granting a special exception, the Administrative Law Judge, or Board of Appeals on appeal, may impose conditions or restrictions on the solar facility use as necessary to protect the environment and scenic views, and to lessen the impact of the facility on the health, safety, and general welfare of surrounding residential properties and communities, taking into account such factors as the topography of adjacent land, the presence of natural forest buffers, and proximity of streams and wetlands.

There are also provisions regarding maintenance of the facilities:

§ 4F-106. - Maintenance.

A. All parties having a lease or ownership interest in a solar facility are responsible for the maintenance of the facility.

B. Maintenance shall include painting, structural repairs, landscape buffers and vegetation under and around solar panel structures, and integrity of security measures. Access to the facility shall be maintained in a manner acceptable to the Fire Department. The owner, operator, or lessee are responsible for the cost of maintaining the facility and any access roads.

In the matter of: David Mathews - Legal Owner

Bluefin Origination 2, LLC - Lessee

Case No: 17-108-X

C. Appropriate vegetation is permitted under and around the solar collector panels, and the tract may be used for accessory agricultural purposes, including grazing of livestock, apiculture, and similar uses.

D. The provisions on this section shall be enforced in accordance with Article 3, Title 6 of the County Code.

A solar facility which has reached the end of its useful life must be removed in accordance with

§4F-107 which states:

§ 4F-107. - Abandonment; removal.

- A. A solar facility that has reached the end of its useful life or has been abandoned shall be removed. The owner or operator shall physically remove the installation no more than 150 days after the date of discontinued operations. The owner or operator shall notify the County by certified mail of the proposed date of discontinued operations and plans for removal.
- B. Removal shall consist of the:
  1. Physical removal of all solar energy systems, structures, equipment, security barriers and transmission lines from the site;
  2. Disposal of all solid and hazardous waste in accordance with local, state, and federal waste disposal regulations; and
  3. Stabilization or revegetation of the site as necessary to minimize erosion.
- C. If the owner or operator fails to remove the facility within 150 days of abandonment, the County retains the right to enter and remove the facility. As a condition of special exception approval, the petitioner and landowner agree to allow entry to remove an abandoned facility.
- D. The Code Official may issue a citation to the owner or operator for removal of a solar facility if:
  1. The Code Official determines that the solar facility has not been in actual and continuous use for 12 consecutive months;
  2. The owner or operator failed to correct an unsafe or hazardous condition or failed to maintain the solar facility under Section 4F-106 within the time prescribed in a correction notice issued by the Code Official; or
  3. The owner or operator has failed to remove the solar facility in accordance with Paragraph C.

In order to grant a request for a special exception under BCZR, §502.1, it must appear that the use for which the special exception is requested will not:

- A. Be detrimental to the health, safety or general welfare of the locality involved;
- B. Tend to create congestion in roads, streets or alleys therein;
- C. Create a potential hazard from fire, panic or other danger;
- D. Tend to overcrowd land and cause undue concentration of population;
- E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
- F. Interfere with adequate light and air;
- G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;
- H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor
- I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 Zone.

In *Schultz v. Pritts*, 291 Md. 1, 22-23, 432 A.2d at 1331 (1981), the Court of Appeals held that “the appropriate standard to be used in determining whether a requested special exception 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 at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.”

The Court of Appeals in *People’s Counsel for Baltimore County v. Loyola College in Md.* 406 Md. 54, 106, 956 A.2d 166 (2008) upheld that longstanding *Shultz* analysis, explaining that a special exception use has “certain [inherent] adverse effects...[which] are likely to occur”. In its analysis, the *Loyola* Court observed that “[t]he special exception adds flexibility to a comprehensive legislative zoning scheme by serving as a ‘middle ground’ between permitted use and prohibited uses in a particular zone.” *Id.*, 406 Md. at 71, 956 A.2d at 176 (2008).

The *Schultz* and *Loyola* Courts, and more recently in *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 285 (2017) have expressly recognized that “[a] special exception is presumed to be in

the interest of the general welfare, and therefore a special exception enjoys a presumption of validity.” (See also *Loyola*, 406 Md. at 84, 88; 105 *Schultz*, 291 Md. at 11). Based on this standard, once an applicant puts on its *prima facie* evidence in support of a special exception, the opponents must then “set forth sufficient evidence to indicate that the proposed [use] would have any adverse effects above and beyond those inherently associated with such use under the *Schultz* standard.” *Attar*, 451 Md. at 287. (See *Montgomery County v. Butler*, 417 Md.271, 276-77 (2010) (opponent must show “non-inherent adverse effects” to “undercut the presumption of compatibility enjoyed by a proposed special exception use”). (See also, *Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties*, 453 Md. 516, 543 (2017) (“there is a presumption that the [special exception] use is in the interest of the general welfare, a presumption that may only be overcome by probative evidence of unique adverse effects”).

#### Motions to Dismiss

##### 1. Timeliness of Petition Filing.

The Protestants argued in their Post Hearing Memorandum that the Petition should be dismissed because it was filed on October 17, 2016 and Bill 37-17 applied retroactively to petitions filed after October 18, 2016. However, it is undisputed that an Amended Petition was filed after October 18, 2016. As a result, we find that the Amended Petition satisfies the October 18, 2016 filing date and the Motion to Dismiss is denied.

##### 2. Failure to File a Cross-appeal.

In his Post Hearing Memorandum, People’s Counsel argues that Petitioner failed to appeal the ALJ’s Order dated January 22, 2018, which conditioned the approval of the special exception on the submittal of a redlined plan with a special exception area of 13 acres. Protestants filed a Motion for Reconsideration of the Order and in response, Petitioner submitted a redlined

plan showing a special exception area of 12.99 acres +/- . Thereafter, the Protestants appealed both the Opinion and Order, and the Order denying the Motion for Reconsideration.

All issues appealed are heard by this Board *de novo*. (*Halle Co. v. Crofton Civic Ass'n*, 339 Md. 131, 141-45 (1995). *Daihl v. County Board of Appeal*, 258 Md.157, 161-64 (1970)). The Protestants did not exclude any specific issues in their appeal. Accordingly, the entirety of the ALJ's Opinion and Order was heard before this Board including the size of the special exception area, and a cross appeal was not required.

3. Plan Compliance with BCC, §33-3-108(c).

At the close of the Petitioner's case in chief, Protestants, through counsel, orally moved to dismiss the case on the basis that Article 4F-104.A.9 requires the Site Plan to comply with BCC, §33-3-108, but the Site Plan failed to list some of the items require in Subsection 33-3-108(c)1-18. We deny this Motion to Dismiss for the reasons set forth below.

Evidence

The Petitioner had several witnesses who testified on its behalf in the merits of the case:

1. Parker Sloan – Cypress Creek.

Parker Sloan is the zoning and outreach manager for Cypress Creek Renewables located in Ashville, NC. (Pet. Ex. 1). Bluefin Origination 2, LLC is a wholly-owned subsidiary of Cypress Creek Renewables. Cypress Creek owns and operates 250 solar facility projects nationwide.

Mr. Sloan works with local governments and communities to advocate for the construction of solar facilities. He explained that the facility proposed to be constructed in this case is ground-mounted with steel poles and the solar panels rotate on a system which tracks the sun. The solar panels will be installed on aluminum racks in a north/south direction to maximize

collection of the sun's rays which are then converted into energy through an inverter. The energy from the inverter is then directed to a grid connected to the existing distribution power lines along Middletown Rd. Mr. Sloan testified that this facility will generate 1.9 megawatts of alternating current (AC).

Mr. Sloan identified three (3) main criteria for prospective, solar facility properties: (1) existing power lines with a capacity for connection to the solar panel facility; (2) flat, cleared land; and (3) a property owner who is willing to enter into a long term lease.

A site plan for the proposed facility showed that the solar panel array will encompass 13 acres (the "Site Plan"). (Pet. Ex. 2). The requested special exception area would consume 16.71 acres. Mr. Sloan explained that the minimum spacing between the rows of panels must be between 12-14 ft. If that spacing were further narrowed, it would create shading and reduced the amount of electricity produced.

The facility will be placed on the highest point on the Property. The height of the structure is 9 ft. The maximum height of the panels when tilted toward the sun will not exceed 11ft. The motor, connected to underground wiring, will rotate the solar panels. The sound of the motor equates to a hairdryer on low speed. Additionally, 2 or 3 utility poles will be erected near the existing power lines along Middletown Rd. to connect the electricity generated from the new facility to the existing transformer.

A Schematic Landscape Plan was prepared and accompanied the Petition for Special Exception. (Pet. Exs. 6, 7). The installation of the solar facility in this case will not require grading or clearing of land as that area has already been cleared. A security fence (without barbed wire), measuring 7 ft. in height will surround the Property. A row of evergreen trees exists along Middletown Rd. No trees or existing vegetation will be removed; however, additional deciduous



trees will be planted in accordance with the direction of the Baltimore County Landscape Architect.

Approximately 8 times per year, maintenance of the solar panel facility will take place including lawn mowing. A water truck will be used to clean the panels. At the end of the lease term, the solar facility will be removed and the holes filled in, restoring the ground.

As to the special exception factors, Mr. Sloan testified that it will not be detrimental to the health, safety or general welfare of the locality. He explained that any aesthetic complaints are inherent in solar facilities. (BCZR, §502.1.A). There is little to no noise generated day or night. The movement of the tracking system is very slow. Existing deciduous trees and those to be planted, will block the view of the facility from Middletown Rd.

Mr. Sloan further stated that the facility will not create congestion in the roads, streets or alleys as there is minimal traffic generated by this use, other than periodic maintenance. (BCZR, §502.1.B). Additionally, the facility will not create a fire hazard or other danger. (BCZR, §502.1.C). There are no flammable materials contained within the parts of the solar facility. The closest fire station is on Middletown Rd. (Pet. Ex. 3A). The security fence will keep out trespassers and animals. An alarm system on the facility is monitored remotely by the Petitioner such that, if the facility is not operating properly, an alarm will sound and it can be shut down.

Because this use does not generate traffic or attract people, there is no overcrowding of the land or undue concentration of population. (BCZR, §502.1.D). Likewise, Mr. Sloan confirmed that there is no impact from this use on adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements. (BCZR, §502.1.E).

Finally, Mr. Sloan testified that the facility will not be detrimental to the environmental or natural resources of the Property or vicinity, including forests, streams, wetlands aquifers and floodplains. (BCZR, §502.1.I). The solar facility will not be located in the designated and recorded forest conservation area or forest buffers. The special exception area is the cleared area which was previously used for farming. There is no permanent disturbance of the soil because, after removal of the poles supporting the solar facility, the land may be used for farming or other purposes.

Mr. Sloan stated that there is nothing unique about this Property or this solar facility as compared to other similarly situated properties within the RC zones. He said that this particular location does not cause any adverse impacts which are not already inherent in solar facilities.

2. David Martin – Landscape Architect.

David Martin, a landscape architect with Daft, McCune and Walker, was admitted as an expert in the area of landscape architecture and land planning. (Pet. Ex. 4). Mr. Martin prepared a Schematic Landscape Plan based on information he obtained from the Baltimore County GIS System. (Pet. Exs. 6 and 7). Cypress Creek provided Mr. Martin with the layout of the solar facility. The metes and bound description of the 16.71 acre special exception area was also provided to him. (Pet. Ex. 5).

Mr. Martin testified that he superimposed onto the Landscape Plan, the Minor Subdivision Plan which was approved by the County on May 24, 2000. (Pet. Ex. 2). The Minor Subdivision Plan delineated the wetlands and created the forest buffer easement and forest conservation easement. Mr. Martin explained that the terrain slopes and drains from the highest point at Middletown Rd. to the farm pond.

Mr. Martin testified that the proposed solar facility met each of the requirements set forth in BCZR, §4F-104.A. First, the Property is not encumbered by an agricultural preservation easement, environmental easement or rural legacy easement. (§4F-104.A.1). Second, the Property is not located in a Baltimore County historic district or on the Baltimore County Final Landmarks List. (§4F-104.A.2). Third, the solar facility proposed will not be located in the forest conservation easement or in a designated conservancy area in an RC4 or RC6 zone. (Pet. Exs. 2, 6 and 7). (§4F-104.A.3). Fourth, the aboveground components of the solar facility, including the solar collector panels, inverters and similar equipment will be set back a minimum of 50 feet from the tract boundary. (Pet. Exs. 2, 6 and 7). (§4F-104.A.4). Fifth, the solar facility will not exceed 20' in height. (§4F-104.A.5).

With regard to the landscape buffer requirement, photographs of the existing evergreen trees were provided. (Pet. Ex. 11 a –v). He opined that these existing evergreen trees along Middletown Rd. provide a natural and effective screen of the facility. Baltimore County representative, Wally Lippencott, reviewed the Landscape Plan and the photos of the Property. Mr. Lippencott requested that, along Middletown Rd., the Petitioner plant a sub-canopy of deciduous trees, such as maples and oaks. Mr. Martin explained that the screening of Middletown Rd. will be in compliance with that required for scenic routes and views in accordance with the Baltimore County Landscape Manual. (§4F-104.A.6). With regard to the security fence, Mr. Martin reiterated Mr. Sloan's testimony that a 7 ft. security fence with no barbed wire will be installed around the perimeter of the Property. (§4F-104.A.7).

Mr. Martin also opined that the Site Plan complied with the plan requirements in BCC, §33-3-108. (§4F-104.A.9). Mr. Martin explained that, in his experience, the Petitioner must first obtain special exception relief before the Department of Environmental Protection and

Sustainability (“EPS”) will review the plan for the requirements listed in Section 33-3-108(c). The Zoning Advisory Committee (“ZAC”) comments recommended approval of the Site Plan. (Pet. Ex. 12).

Mr. Martin also testified about the remaining special exceptions factors and in doing so, he opined that the solar facility use meets all of the factors. He described this use as “benign” in that it is not permanent. Said another way, it was Mr. Martin’s opinion that there were no adverse effects above and beyond those which are inherent with solar facility use.

As to BCZR, §502.1.F, given that the maximum height of the solar panels when tilted toward the sun is 11 ft., and the facility will be installed in the clear field of the Property away from neighboring residences as shown on Pet. Exh. 2, Mr. Martin testified that it would not interfere with adequate light or air.

Mr. Martin testified that solar facilities are consistent with the purpose of the RC zones and with the spirit and intent of the BCZR under §502.1.G, in that the use supports farming; it helps the farmer generate income and does not interfere with agricultural production because the soil type will remain the same after the removal of the facility as it is now. (BCZR, §502.1.G). Mr. Martin pointed out that Northern Baltimore County is primarily designated as Agricultural Priority Preservation Area.

With regard to impermeable surface and vegetative retention provisions of §502.1.H, and the environmental and natural resources of the site under BCZR, §502.1.I, Mr. Martin highlighted that no impermeable surface exists underneath the solar panels. Rain water which falls onto the panels will be absorbed into the ground. The spacing between the rows of panels is designed to allow rainwater to penetrate into the ground. Thus, there is no concentration of storm water flowing into streams as there is when water flows onto pavement. Additionally, the solar facility

will not be located in the designated forest buffer easement or forest conservation easement on the Property. (Pet. Ex. 2).

In summary, Mr. Martin opined that there are no adverse effects from this use above and beyond those inherent in solar facilities.

3. Thomas Cleveland – Glare Study.

The Petitioner contracted with Thomas Cleveland, an employee of Advanced Energy Corporation,<sup>2</sup> to conduct a study on whether the proposed solar facility panels will produce glare from the sun's rays. (§4F-104.A.8). Mr. Cleveland prepared a glare study using computer software which is widely used in the industry. (Pet. Ex. 15). The computer software considers the topography of the land and any obstructions but excludes existing trees.

In the 20 glare studies Mr. Cleveland has conducted, typically he finds glare is produced by solar panels. However, in this study, no glare will be produced because the proposed design of the tracking system causes the panels to continuously move while tracking the sun. As a result, in his opinion, no glare of low or high intensity will be created.

**Protestants' Case.**

The Protestants opposed this case for a number of reasons. These reasons include: a) visibility of facility from the property; b) the environmental impacts of run-off from the steep slopes on the property; c) dissatisfaction with the solar bill and related regulations concerning the maintenance and dismantling of the facility; and d) the negative impact to the agricultural industry. The Protestants called several witnesses.

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<sup>2</sup> Advanced Energy Corporation is not associated with or owned by either Cypress Creek or Bluefin Origination 2, LLC.

1. Lois Jean Bowman.

Lois Jean Bowman lives at 2709 Flintstone Rd. which is adjacent to the Property. (Pet. Ex. 2). Ms. Bowman testified that her family, the Dykes, owned the Property prior to 2005. It was originally 70 acres. She was quite familiar with the Property in that she lived there, farmed it and used it for hunting. In later years, the Dykes leased the land to Arthur and Joan Tracy for farming. She said the cleared area where the solar facility is proposed to be installed provided a good yield of crops depending on the weather.

Sometime in the 1970s, Ms. Bowman's father and brothers dug the farm pond which is located near Margaret Jones Curtis' property (2705 Flintstone Rd.). On May 24, 2000, Ms. Bowman's brother, Warren Scott Dykes, received approval for a Minor Subdivision Plan (PAI #00030M) for his own house which sits on 2 acres of land. In 2001, her family placed 40 acres in a forest conservation easement and the forest buffers delineated on the Site Plan were created and recorded in the Land Records. (Pet. Ex. 2). The streams on and surrounding the Property were also surveyed at that time.

In 2005, Ms. Bowman sold the Property for approximately \$400,000.00 to the uncle of Petitioner, William Mathews. The sale did not restrict the use to agriculture. Ms. Bowman testified that she also declined to put the Property into rural conservation. The farmhouse has been vacant since the sale. Ms. Bowman admitted that she researched the cost of installing solar panels on her own home but it was not feasible. In the winter, she will have a direct view of the solar facility. In the summer, the forest buffer easement will block her view.

2. John Altmeyer.

John Altmeyer lives at 21722 Orwig Rd., Freeland, MD 21053 which is at least 3 ½ miles away from the Property. He is a retired building inspector who worked for Baltimore County for

32 years. He was not offered as an expert in this case. Mr. Altmeyer calculated slope percentages for 3 areas on the Property using a topographical map provided to him by Protestant Lynne Jones. (Prot. Ex. 5). That map was a photocopy of the original Site Plan (later changed) obtained by Ms. Jones at the ALJ hearing. Mr. Altmeyer admitted that it was not to scale and that at least one of his handwritten calculations was not correct.

Relying on Maryland Department of Environment (“MDE”) Stormwater Design Guidance for Solar Panel Installations (Prot. Ex. 6), Mr. Altmeyer testified that, in his opinion, if a slope is  $\geq 5\%$  -  $\leq 10\%$ , the Petitioner would need “level spreaders” to catch the water runoff from the solar panels. He stated that if the slope is more than 10%, a full engineering study would have to be conducted and submitted to EPS. Mr. Altmeyer expressed his concern that the Site Plan does not show any stormwater management facilities. Without such controls, he believes that the water runoff will negatively affect Dykes Creek and Prettyboy Reservoir.

3. Lynne Jones.

Lynne Jones lives at 815 State Church Rd., Parkton, MD. Her home is a 150 acre farm where her family has lived for 7 generations beginning in 1745. Ms. Jones testified individually and as President of Sparks-Glencoe Community Planning Council (“Sparks-Glencoe Council”). Sparks-Glencoe Council has 400 members and its boundaries run in a heart-shaped pattern from Hunt Valley in the south, to the Harford County/Baltimore County line in the east, to the Carroll County/Baltimore County line in the west. The northern boundary is the top of the heart-shape figure as shown on the boundary map. (Pet. Ex. 16). Not only is Sparks-Glencoe Council not a party to this case, more importantly, the Property is not located within its boundaries. (Pet. Exs. 3, 16).

Those facts notwithstanding, Sparks Glencoe Council submitted a letter, signed by Ms. Jones, which described general opposition to solar facilities on farmland in northern Baltimore County. (Prot. Ex. 7).

Ms. Jones' farm is located 6-7 miles from the Property. She expressed her concerns about water runoff, flooding and the negative impact on the agriculture industry created by using farmland for solar facilities. Her testimony centered on her dissatisfaction with the enactment of Bill 37-17 and development in general. Ms. Jones believes that solar facilities should be located in business and manufacturing zones. She is worried that the language in BCZR 4F-102.A and 4F-107 are not strong enough with regard to the issuance of a bond for maintenance and dismantling of the facility.

4. Kathleen Pieper.

Kathleen Pieper lives at 4310 Beckeysville Rd., Hampstead, MD which is 10 miles from the Property. Ms. Pieper presented Rule 8 papers for the North County Community Group, LLC for which she is the President ("North County"). North County is a volunteer organization of 500 members formed in 2015 with boundaries from the Maryland-Pennsylvania line in the north, York Rd. in the east, the Baltimore/Carroll County line in the west and Mt. Carmel Rd. in the south. The Property is within the boundaries of North County.

Ms. Pieper expressed concern that the special exception area is composed of prime and productive soils, and that solar facilities in general remove available farmland and crop production. Much of her testimony focused on 'Targeted Ecological Areas' or 'TEAs' which are designated as such because the land contains: forests; wildlife and rare habitats; non-tidal streams and fisheries; wetland adaptation areas; and tidal fisheries, bay and coastal ecosystems. (Prot. Ex. 32 and 33). Ms. Pieper explained when land is designated as having a TEA designation, it has



the opportunity to receive state funding from Project Open Space (“POS”). (*Id.*) Ms. Pieper testified that this Property is an unprotected TEA, and without any recorded conservation easement.

#### Decision

As set forth above in BCZR, §4F-102.A, solar facilities are only permitted by special exception under the factors set forth in BCZR §502.1. The testimony of Mr. Sloan and Mr. Cleveland support the Petitioner’s position that the proposed solar facility would not be detrimental to the health, safety or general welfare of the locality involved. To the contrary, the Protestants’ collective concerns are impacts which are inherent with this particular use. It was apparent that the Protestants’ complaints center on their dissatisfaction with the County Council’s enactment of Bill 37-17 which is codified in BCZR, Article 4F. Understandably, the Protestants want the land in RC zones to remain farm land.

However, it is beyond the jurisdiction of this Board to rewrite Bill 37-17 or Article 4F. Applying the standard in *Shultz*, *Loyola* and *Attar*, the Protestants were required to present evidence that the adverse effects stemming from this solar facility, at this location, are unique and different than the inherent impacts associated with this use in general. We did not have such evidence here.

As described in detail above, Mr. Sloan testified that the solar facility would not create congestion in the roads as it is not a use that generates traffic into or out of the Property. (BCZR, §502.1.B.) Further, Mr. Sloan confirmed that there are no flammable materials used in this solar facility and there is fire station on Middletown Rd. (BCZR, §502.1.C.) As with the lack of traffic, Mr. Martin repeated that this use does not generate people and therefore it would not tend to overcrowd the land or cause an undue concentration of population. (BCZR, §502.1.D.)

In the matter of: David Mathews - Legal Owner  
Bluefin Origination 2, LLC - Lessee  
Case No: 17-108-X

Additionally, both Mr. Sloan and Mr. Martin confirmed that this use does not interfere with schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements. (BCZR, §502.1.E.) To the contrary, the Board finds that it produces electricity which benefits the surrounding community.

Mr. Martin confirmed that the height of the facility will be 11 feet and would therefore not interfere with adequate light or air. (BCZR, §502.1.F.) The facility will stand in the cleared area of the Property, removed from any adjacent homes. Accordingly, the Board finds that shadowing and air circulation are not areas of concern.

As to the consistency of this use with the purposes of the RC zones and with the spirit and intent of the BCZR, solar facilities are consistent uses because they are temporary and are removed at the end of a lease term. There was much testimony and argument about removing 'prime and productive' soil from the agriculture industry. However, the evidence showed that the soil type remains the same before, during and after removal.

The County Council deemed solar facilities are uses consistent with the RC zone, provided they meet the special exception standard, as explained in *Shultz, Loyola* and *Attar*. The Protestants' argument that farming is the primary use and therefore solar facilities are inconsistent with the RC zones, is an argument which should be directed to the County Council. This Board is not required to determine whether a solar facility is detrimental to agricultural uses. Our authority to approve this use is contained in Article 4F and §502.1 factors. Moreover, even if this Property contains 'prime and productive' soil (an alleged fact which we are not deciding), the owner cannot be compelled to farm, or to lease the Property to a farmer.

Mr. Martin explained that the use is consistent with impermeable surface and vegetative retention provisions of the BCZR because there will not be any clearing or grading of land, and

no tree removal. Rain will propel off the solar panels and soak into the ground between the rows. Mr. Martin described to the Board that the separation between the rows of panels is designed so that there is no concentrated flow of water as there would be with water flowing off an impermeable surface such as pavement. This fact notwithstanding, Mr. Martin added that the Department of Environmental Protection and Sustainability (“EPS”) will determine whether any further storm water management retention measures are needed.

Finally, Mr. Sloan and Mr. Martin testified that this use, at this location, would not be detrimental to the environmental or natural resources of the Property, including the forest, streams, wetlands, aquifers and floodplains. The 2000 Minor Subdivision Plan defined and recorded the forest buffer easements and forest conservation easements of the Property and the facility will not be placed within, or disturb, those areas. (Pet. Ex. 2). Ms. Bowman testified that her mother placed 40 acres into the forest conservation easement and that her brother, Warren Dykes, filed the Minor Subdivision Plan outlining those environmental and natural resources. Accordingly, there is no dispute as to the precise location of these natural resources within the Property, and that this facility will not be located in those areas.

Having analyzed the special exception factors, the requirements of BCZR, §4F-102.B.1 and BCZR, §4F-104.A. 1-9, must also be satisfied by the Petitioner. Mr. Sloan testified that the 16.71 acre special exception area and 13 acre solar panel array is the minimum acreage needed to produce 1.9 megawatts AC of electricity. (BCZR, §4F-102.B.1.) The Protestants urged this Board to adopt the reasoning of the ALJ in his decision wherein he looked at the special exception areas and electricity generated in other recently approved solar facility cases and decided that the special exception area here should be restricted to 13 acres. (Prot. Ex. 21).

While the ALJ's decision was admitted as evidence at the request of Protestants (Prot. Ex. 21), the Board has traditionally accepted copies of ALJ opinions as well as copies of statutes or regulations, as a courtesy to the parties. Since this case is heard *de novo*, the ALJ's decision is not part of the record and his analysis is not binding on the Board. Based on the evidence presented to the Board, we find that there was no compelling evidence submitted by the Protestants here which contradicts the Petitioner's plan that 16.71 acre special exception area is the minimum area needed to produce less than 2 megawatts AC electricity. The Protestants did not have an expert testify on this issue. Accordingly, we find that the Petitioner has met this burden.

Mr. Martin testified that the Property is not encumbered by an agricultural preservation easement, an environmental preservation easement or rural legacy easement, nor is it in a Baltimore County historic district or on the Baltimore County Final Landmarks list. (BCZR, §§4F-104.A.1 and 2.) In addition, as with the special exception factors, Mr. Martin testified that the solar facility will not be located in the forest conservation easement or designated conservancy area. (BCZR, §§4F-104.A.3.) There was no evidence by the Protestants which contradicted either of these requirements.

As to the setback and height requirements, Mr. Martin made clear that the facility at its highest peak will not exceed 11 ft. and will not be located within 50 ft. from the tract boundary. BCZR, §§4F-104.A.4 and 5. Accordingly, both the height and setback requirements have been met. There was no evidence by the Protestants which contradicted either of these requirements.

With regard to the requirement for a landscape buffer on the perimeter, the photographs presented reveal the existing row of evergreen trees along Middletown Rd. (BCZR, §4F-104.6). (Pet. Ex. 11a-u) (Prot. Ex. 9a-o). The comments from the Department of Planning recommended

In the matter of: David Mathews - Legal Owner  
Bluefin Origination 2, LLC - Lessee  
Case No: 17-108-X

supplementing the existing row of trees with additional deciduous trees to form a subcanopy. (Pet. Ex. 12). The Petitioner is amenable to planting these additional trees and prepared a schematic Landscaping Plan in support of its Petition which was reviewed by the County. (Pet. Exs. 6, 7). Moreover, the Plan proposes a 7 ft. chain link fence without barbed wire between the landscape buffer and the solar facility. (BCZR, §4F-104.7). We find that these requirements have been satisfied.

Additionally, there is a requirement that the solar panels minimize glare in order to prevent vehicle collisions and safety hazards. (BCZR, §4F-104.8). In this case, the Petitioner had Mr. Cleveland testify and present his glare study. (Pet. Ex. 15). The Protestants did not present an expert to contradict Mr. Cleveland. The glare study indicated that there would be no glare produced by the solar panels here. Thus we find that requirement is satisfied.

Finally, the Site Plan must comply with BCC, §33-3-108. (BCZR, §4F-104.A.9). The Protestants argued that the Petition should be dismissed because the Site Plan failed to list each of the 18 elements in Subsection (c). In our review of BCC, §33-3-108, we find the that language in Subsection (a) is unambiguous. That Subsection requires the Department of Environmental Protection and Sustainability (“EPS”) (as defined in §33-3-101(f)), to approve the Site Plan. Further, Subsection (b) directs that the Site Plan shall generally include such information (graphs, charts, etc.) to enable EPS to “make a reasonably informed decision regarding the proposed activity.” Additionally, a plan submitted to EPS for approval must also contain the information listed in Subsection (c).

As a result, the specific items listed in Subsection (c) must be considered by EPS when it reviews and approves the Plan under that Section, not this Board. The testimony of Mr. Martin was that EPS’ policy is that they will not approve a site plan until after the special exception

relief is granted. We find his testimony to be consistent with the language in Section 33-3-105 (1) and (2) which provides that EPS is “responsible for enforcing the provisions of [Title 33]” and the Director of EPS “may adopt policies and regulations as necessary to implement the provisions of [Title 33].”

Given the express wording of Section 33-3-108 that EPS shall approve the Site Plan, and that EPS is responsible for ensuring that the Site Plan comply with both the general and specific requirements of Subsections (b) and (c), we find that the appropriate resolution for this Board is to place a condition in the Order reiterating the words of §4F-104.A.9, that the Petitioner shall comply with Section 33-3-108. To do otherwise would be to overstep this Board’s statutory authority.

Conclusion

After reviewing all of the testimony and evidence presented, the Board finds that Petition for Special Exception pursuant to BCZR, Article 4F should be granted.

ORDER

**THEREFORE, IT IS THIS** 25<sup>th</sup> day of April, 2019, by the Board of Appeals of Baltimore County,

**ORDERED**, that the Protestants’ Motion to Dismiss the Petition on the basis that the Petition was filed on October 17, 2016 and Bill 37-17 applied retroactively to petitions filed after October 18, 2016, be and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

**ORDERED**, that the Protestants’ Motion to Dismiss the Petition after the close of the Petitioner’s case-in-chief on the basis that the proposed Plan failed to provide some of the

information required in BCZR, §33-3-108(c), be and the same is hereby **DENIED** for the reasons set forth herein, and it is further,

**ORDERED**, that People's Counsel's Motion to Dismiss the Petition on the basis that the Petitioner submitted a red-lined Plan for a 13 acre special exception area as directed by the ALJ in his Opinion and Order dated March 1, 2018, but failed to file a cross-appeal of the ALJ's condition, be and the same is hereby **DENIED** for the reasons set forth herein and it is further,

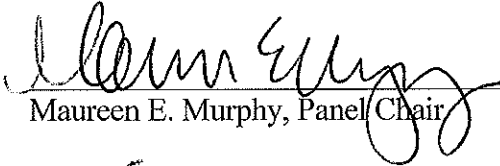
**ORDERED** that the Petition for Special Exception for a solar facility pursuant to BCZR, Article 4F as set forth on the Site Plan (Pet. Ex. 2), and the Landscape Plan (Pet. Exs. 6 and 7) be, and the same is hereby **GRANTED**, subject to the following conditions under the Board's authority in §4F-104.A.10:

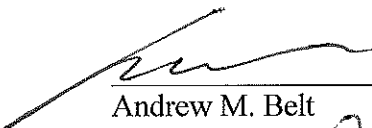
1. Petitioners shall submit for approval by Baltimore County a landscape plan for the Property demonstrating appropriate screening and vegetation is provided along Middletown Rd, a scenic route, as required by the Landscape Manual and as set forth in the Zoning Advisory Committee Comments dated November 28, 2017 (Pet. Ex. 12) and as under BCZR, §4F-104.A.6.
2. Petitioners shall install a 7 ft. high, security fence, without barbed wire, between the landscaping buffer and the solar facility as required by BCZR, §4F-104.A.7. Attached to the fence in a conspicuous place, while the solar facility is in operation, shall be the current contact information (name, address, telephone number with a 24-hour operator, website and email address) of the operator of the solar facility.
3. Prior to the issuance of a building permit, Petitioner must satisfy the environmental regulations set forth in BCC, §33-3-108 pertaining to the protection of water quality, streams, wetlands and floodplains and obtain approval of the Site Plan from the Department of Environmental Protection and Sustainability as required in that Section.


**In the matter of: David Mathews - Legal Owner**  
**Bluefin Origination 2, LLC - Lessee**  
**Case No: 17-108-X**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Panel Chair

  
Andrew M. Belt

  
William A. McComas





## Board of Appeals of Baltimore County

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April 25, 2019

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RE: *In the Matter of: David William Mathews – Legal Owner*  
*Bluefin Origination 2, LLC – Lessee*  
Case No.: 17-108-X

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington  
Administrator

KLC/taz  
Enclosure  
Multiple Original Cover Letters

c: See Attached Distribution List

Distribution List  
April 25, 2019  
Page 2

David William Mathews  
Geoff Fallon/Bluefin Origination 2, LLC  
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Jeanne Bowman  
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