Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

July 29, 2019

Timothy M. Kotroco, Esquire
305 Washington Avenue, Suite 502
Towson, Maryland 21204

H. Barnes Mowell, Esquire
H. Barnes Mowell, P.A.
16925 York Road
Monkton, Maryland 21111

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: *In the Matter of: Robert K. Gerner – Legal Owner*
ESA Sparks Glenco, LLC – Lessee
Case No.: 18-047-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,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: See Attached Distribution List

Robert K. Gerner
Brian Quinlan/ESA Sparks Glenco, LLC
William Mayo
Gorsuch's Retirement, Inc.
Sparks Glencoe Community Planning Council
Lynne Jones
Edd J. Matczuk
Al Rude
Nedda Pray
Rob Webster
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF ROBERT GERNER, LEGAL OWNER AND	*	BEFORE THE
ESA SPARKS GLENCO, LLC - LESSEE AND PETITIONERS FOR SPECIAL	*	BOARD OF APPEALS
EXCEPTION ON THE PROPERTY LOCATED AT 15637 YORK ROAD	*	OF
8TH ELECTION DISTRICT	*	BALTIMORE COUNTY
3RD COUNCILMANIC DISTRICT	*	CASE NO: 18-047-X

* * * * * * * * * * * * *

OPINION

This case comes to the Board of Appeals from a final Opinion and Order dated December 21, 2017, issued by Administrative Law Judge John E. Beverungen (the "ALJ") in which the ALJ granted the Petition for Special Exception to allow a nine-acre ± solar facility on a portion of land in an RC-7 zone. The ALJ also imposed several conditions to lessen the impact of the facility on the health, safety, and general welfare of surrounding residential properties.

On January 12, 2018, Petitioner's counsel sent a letter to the ALJ requesting what Petitioner considered a "clarification" of condition No. 4 ("No trees shall be removed from the site in connection with the construction and/or operation of the solar facility") requesting that Petitioner be permitted to remove trees necessary for the access road to the proposed solar field. Four days later, the ALJ signed off on the January 12, 2018 letter with the proposed language. There is nothing in the record demonstrating that Protestants were on notice of the clarification request or that the request was granted. Protestants appealed the ALJ final Opinion and Order.

The hearing in front of the Board occurred over four days, August 21-22, October 24, 2018, and November 28, 2018. Timothy M. Kotroco, Esquire appeared on behalf of Petitioner. Petitioner elicited testimony from the following witnesses: (1) Brian Quinlan, the President and Chief Executive Officer of Calvert Energy, LLC, as an expert in solar energy and the installation

of solar panels on solar farms, but also called on behalf of the Petitioner as a fact witness; (2) James Deriu, a Vice President of KCI Technologies, as an expert on environmental science, and stream and wetlands delineations; (3) Mitchell Kellman, an expert in planning and zoning, including specifically the Baltimore County zoning process; and (4) Bruce Doak, an expert in land surveying, planning, and zoning.

Protestants Sparks Glencoe Community Planning Council, William Mayo, and Gorsuch Retirement, Inc., through their counsel, H. Barnes Mowell, Esquire, presented the following witnesses: (1) John Altmeyer, who was called to address stormwater management, impervious surface, and topographical issues; (2) Lynne Jones, President of the Sparks Glencoe Community Council; (3) Edward Matczuk, a nearby neighbor to the subject property; (4) John Roemer, IV, President of Roemer Ecological Services, Inc., who was received as an expert in wetland delineations and the identification of bog turtle habitats; and (5) William Mayo, President of Gorsuch Retirement, Inc. (a family-owned business) that owns property adjacent to the subject property. Peter M. Zimmerman, Esquire, participated on behalf of the Office of People's Counsel for Baltimore County.

Factual Background

Petitioner seeks special exception approval of a solar farm at 15637 York Road. The subject property, zoned RC-7, is 30.27 acres[1], but only nine ± acres are intended for the solar panel array. The subject property is located along a section of York Road designated as a scenic route. Throughout the hearing, the property has been described as having a "bowtie" appearance, with the one part of the bow adjacent to York Road and the other part, approximately 1,100 feet from York Road, proposed to contain the solar farm. In between, the property narrows to form the

[1] The property has also been identified as consisting of 30.723 acres in the ALJ Opinion and Order. The discrepancy is not material to the resolution of this case.

"pinch" or "knot" of the bowtie.[2] At the bowtie knot, there presently is a road of sorts connecting the eastern and western halves.

The Maryland Community Solar Energy Generating System Program ("Program"), as is relevant, permits a person owning or operating a qualifying solar generating system ("subscriber organization") to contract with a third party for the third party to finance, build, own, or operate a community solar energy generating system. Md. Public Util. §7-306.2. In this case, Robert Gerner owns the property at 15637 York Road and has contracted with ESA Sparks Glenco, LLC, to finance, build, and operate a solar generating system as part of this Program.

Following the creation of the Program, Baltimore County enacted legislation to regulate the land use aspects of these community solar generating system facilities. The Council's stated purpose for the regulation sets forth (as identified in BCZR §4F-101(a)):

> Solar energy is recognized as an abundant, renewable, and environmentally sustainable source of electricity generation that will lead to greater local grid resiliency and security, and produce clean, renewable energy and reduce air and water pollution caused by the burning of traditional fossil fuels. The purpose and intent of this article is to permit solar facilities in parts of the rural and commercial areas of the County by special exception, and to balance the benefits of solar energy production with its potential impact upon the County's land use policies by ensuring sufficient safeguards are in place to protect the County's communities and its agricultural land, forests, waterways and other natural resources.

As implied above, BCZR §4F-102(a) requires petitioner to seek approval via special exception prior to construction and operation of a solar facility under the Program within, as relevant, the RC-7 zone. Further, BCZR §4F-102(a) restricts these facilities by capping power generation capacity to two megawatts and preventing proliferation of these facilities by limiting each council district to no more than 10 facilities. BCZR §4F-102(b). Petitioner proposes a solar farm that will generate 1.87 megawatts of power. At the time of this Opinion, the Third County

[2] For ease of reference, this Opinion will use the "bowtie" description to denote the property's eastern and western halves, as well as the pinch or knot, e.g. "at the bowtie knot," "the eastern half," etc.

Council District has not reached the maximum number of solar facilities allowed by BCZR §4F-102(b).

Summary of Testimony

Brian Quinlan, accepted as an expert in solar energy and the installation of solar panels on solar farms, provided expert witness and fact witness testimony regarding the subject property and the proposed use. Mr. Quinlan testified that ESA Sparks Glenco, LLC has been accepted as a subscriber by the Public Service Commission. He described the process of how the subject property came to be selected for the proposed solar farm, including noting its location off York Road, with the back nine acres (eastern half of bowtie) of the property being located approximately 1,100 feet from York Road. Its proximity to York Road assists with access to a substation and tying in distribution lines, and the eastern half of the bowtie provided ample area for the solar array and its topography allowed for the necessary solar exposure and screening.

Mr. Quinlan identified the plan for the property (which was prepared by Mr. Doak, whose testimony is addressed below). He stated that there will be an access drive from York Road, the entrance for which requires approval by State Highway Administration. The access drive, as proposed, will be approximately 20-feet wide and will be composed of crushed stone. The access drive will more or less travel the northern property boundary on the western half, continue through the bowtie pinch, and emerge on the eastern half, which will contain the solar panel array and related equipment. Also along the access drive will be wooden poles and transmission lines to connect to the BGE lines along York Road. While there will not be the need to remove any trees for the solar array, some trees in the western half of the property will likely need to be removed to construct the access drive and install the wooden poles.

Mr. Quinlan estimated that, on average, construction of a solar facility of this type takes about three months. The facility does not require anyone to be on site for operation. At least twice a year, there will be scheduled maintenance on the facility to make sure the facility is working properly. The electrical portion of the facility will have sensors and the facility will be monitored offsite. There will be a small weather station on site, which will assist in determining the existence of a problem and prompt an investigation in the event there is an unexpected discrepancy in expectations arising from the particular weather. The maintenance and monitoring will be outsourced. The panels and related equipment (*e.g.* inverter) will be contained within a secure, fenced area. Petitioner will provide the key to the local fire department so it can access the facility in the event there is an emergency.

The panels for the proposed array are made of standard polysilicone and are recyclable, just like solar panels located on houses. The panels will be mounted to steel posts and racking. The array will have a fixed 25-degree tilt facing south to maximize exposure to the sun. That angle results in the panels having a height of 7 feet, 5 ½ inches, and being 2 ½ feet off the ground, with each row to be approximately 14 feet apart. While there is no final design for the array to determine an exact location, he expects that the edge of the array will be about 150 feet from the nearest property line.

The area underneath the panels and in between rows will remain grassy, but controlled and maintained. At the end of the lease, identified as 20 years with an option, the land upon which the array sits can be restored. The steel posts can be pulled out of the ground, as well as the other equipment, and the area can be reseeded. At the outset, Petitioner will be required to enter a decommissioning agreement in order to ensure that sufficient funds remain available to restore the

land at the lease expiration. Mr. Quinlan testified that the County will require Petitioner to post a bond for financial security and Petitioner will obtain liability insurance.

As for stormwater management issues, those will be explored in more detail if the petition for special exception is approved. Mr. Quinlan testified that they are compelled to comply with the County requirements prior to obtaining a building permit. Mr. Quinlan, on cross examination, explained that Petitioner sought special exception approval prior to engaging in a more detailed environmental analysis as the costs to have the analysis at the time of special exception hearing is substantial (identifyied in rebuttal as an estimated $365,000.00) and Petitioner prefers to see if the petition will be granted prior to committing itself to such costs. The stormwater management, wetland delineation, and related environmental matters, as well as timing of such a study and whether sufficient information has been presented to the Board on those topics, form much of the dispute in this case, and will be discussed in greater detail below.

Mr. Deriu, again, an expert in environmental science and stream and wetland delineations, works for KCI Technologies and was retained by Petitioner to start evaluating the site in the event Petitioner receives special exception approval for the solar facility. Mr. Deriu visited the site on one occasion, focusing on the eastern half of the property. He believed the area of the bowtie knot was an old farm crossing and that the pipe that runs underneath the crossing, though "pretty old," appears to have supported farm equipment in the past. He witnessed some base flow in the pipe while he was present. If this matter progresses, he will perform a forest buffer analysis, steep slope analysis, and endangered species analysis.

Mitchell Kellman, an expert in planning and zoning, testified that York Road, at this location is a state road, but also designated as a County Scenic Road. He noted that the property's topography drops, with the house on the western part of the site sitting on a ridge at its highest

point. Mr. Kellman believes that the solar facility will not be visible from York Road and as such, will not affect the scenic view. Given the topography and existing landscaping, the site will not need much by way of additional landscaping, and if so, mostly because, during winter, the property is more visible.

Mr. Kellman explained that a landscape plan will be required if a development plan is required. A landscaped right of way agreement will be required before a permit is issued. Mr. Kellman echoed the testimony of Mr. Quinlan that stormwater management plans will come after the special exception hearing, if approved, and opined one is not required for the special exception hearing.

Mr. Kellman also opined that the proposed use is consistent with the existing zoning classification and regulations as the County Council expressly provided, by way of special exception, that properties within the RC-7 zone may have solar facilities. Mr. Kellman, in light of his experience in the County, testified that the Department of Environmental Protection and Sustainability ("DEPS") will require an analysis of environmental impacts and if DEPS is not satisfied, the project will not move forward. He also testified that Baltimore County Department of Permits, Approvals and Inspections ("PAI") requires Petitioner to enter into a Solar Facility Decommissioning and Security Agreement, before any building permit may be issued.

Bruce Doak prepared the plans identified as Petitioner's Exhibit 1 and 1A. Mr. Doak agreed with Mr. Kellman that, following approval, the next step is for environmental experts to conduct wetland delineations and other such work and submit that information to DEPS, who will review, and if approved, may impose conditions. In fact, Mr. Doak testified he spoke to someone at DEPS who told him there was no issue in proceeding with the special exception case prior to submitting the environmental information to DEPS.

On cross examination, Mr. Doak acknowledged the presence of a stream on site, and agreed that it is reasonable for a party seeking a special exception to present some information concerning environmental and stormwater management issues without the need for a full report at the time of the hearing. Mr. Doak also testified that he considered the solar facility an accessory use, not a principal use. He agreed that the RC-7 zoning regulation on impervious surfaces limits such surfaces to 10% of the property, but testified that grass will be under the solar panels, which is a pervious surface. Finally, Mr. Doak noted that the edge of the array could be as close as 60-70' or up to 150' from the property border. He believes that, like Mr. Kellman, the 50-foot setback applies to solar facilities, not the 300-foot setback generally applicable to RC-7 properties.

Protestants first called John Altmeyer, who worked for the County for 32 years, rising to the level of chief inspector for building permits, but also conducted environmental inspections for the County. Mr. Altmeyer testified that the impervious surface regulation applied to poles, fences and roads, but agreed that the solar panels here are not impervious surfaces under the regulation. Mr. Altmeyer presented testimony about steep slopes and methods to treat runoff. Mr. Altmeyer clearly had substantial knowledge, but ultimately appeared to agree that, though careful consideration of these issues are required, the stormwater and runoff issues may be decided after the special exception hearing. Particularly, on cross examination, Mr. Altmeyer agreed with counsel for Petitioner that if there was a plan for those items that was subsequently approved following a site visit, he would have no problem with the plan.

Lynne Jones next testified for Protestants. Ms. Jones is the President of the Sparks Glencoe Community Planning Council, an organization of 400+ members, whose territory covers much of the Third County Council District, including the site at issue. Ms. Jones's testimony was offered individually and on behalf of the organization. She visited the surrounding area four/five times

prior to her testimony. Ms. Jones was not offered as an expert, nor was her testimony received as that of an expert witness. However, Ms. Jones has taken significant efforts to become more informed about certain subject matters in order to help educate others about protecting natural resources. She estimated she put approximately 70-80 hours of work into this case.

Her testimony focused upon the special exception factors. More specifically, it was her belief that the proposed use: (1) was detrimental to the health, safety, and general welfare of the locality, particularly as to streams, waterways and wildlife (BCZR §502.1(a)); (2) presented a potential for fire, panic or other danger as there was one way in and out of the site for fire trucks (BCZR §502.1(c)); (3) was inconsistent with the zoning regulations, as she believed that there was to be no development on farmland on a RC-7 zoned property unless absolutely necessary (BCZR §502.1(g)); (4) was inconsistent with the impermeable surface and vegetative retention regulations, identifying 146,000 square feet of impervious surface (BCZR §502.1(h)); and (5) was detrimental to the environmental and natural resources of the site and vicinity, particularly as to migratory wildlife, waterways, fencing, flooding and runoff, potential bog turtle habitats, and streams and slopes (BCZR §502.1(i)).

Ms. Jones (as well as some evidence and argument from People's Counsel) suggested that soil is a natural resource, more specifically, prime and productive soils, which she contends is located on the right side of the bowtie, i.e. the location of the proposed solar facility. She noted that this matter is the only one in Baltimore County where a solar farm was proposed in a RC-7 Zone and in her reading and understanding of the relevant regulations and Master Plan 2020, that the RC-7 Zone was created to protect sensitive areas and restrict commercial development. She believed other RC zones were more appropriate for solar facilities and generally identified areas without streams or wetlands as being better options. Ms. Jones visited some of the adjacent

properties, including the property adjacent to the bowtie. She observed that the culvert had debris and was backed up.

Edward Matczuk, who lives on a nearby property to the east of the Gorsuch Retirement property that is immediately adjacent to the subject property, also testified. Mr. Matzcuk's property is not immediately adjacent to the subject property; rather, the subject property (to the southwest) and Matzcuk property (to the northeast) essentially "sandwich" the middle part of the Gorsuch Retirement property. He identified concerns over what he may see. He testified his house sits in a valley and therefore, is lower than the proposed solar field. He also identified possible flooding and runoff from the subject property, via the Gorsuch Retirement property, as issues. Like Ms. Jones, he identified existing flooding on Upper Glencoe Road. He also testified that his property has been flooded by water coming off the Gorsuch Retirement property. He testified he has to muck his pond every five-to-seven years because of the silt from the flooding.

On the last day, Protestants called John Roemer, IV, a wetland delineation expert, but also a nearby property owner (about 1-1½ miles away). He provided substantial information on identifying wetlands and identifying potential bog turtle habitats. He visited the Gorsuch Retirement home property to the northeast of the subject property, bringing his soil augur, as well as taking photographs. For his second visit, he went to the Rude property, located north of the western portion of the bowtie, walked around wetlands on that property and examined the streams. He had a third visit, at which time, he walked around the wetland area again and probed the soil. He found indicia, which in his opinion, satisfy each factor used to identify wetlands on at least one of the adjacent properties. He believes that the proposed access drive may be located within the 100-foot buffer separating wetlands from non-wetlands. As such, he believes that, if so, Petitioner will need permits from the County and State to build the access drive.

Mr. Roemer testified that if it was subsequently determined that there was encroachment into the buffer/setback, the plan may be modified during the permit review period. He felt it was beyond his area of expertise to opine whether wetland issues should be resolved prior to or during a special exception hearing.

William Mayo was the final witness. He testified individually and as President of Gorsuch Retirement, Inc. His family has owned 185 acres in the area for centuries, finding gravestones between the 1700s and 1820. Mr. Mayo lives 3/8ths of a mile from the subject property. He testified that he believes he will be able to see half of the solar field from his house due to elevation differences. He raised additional concerns about deer and runoff from the subject property. The Gorsuch property adjacent to the subject property has been steadily farmed since 1972. Mr. Mayo also identified concerns of traffic in and out of the site trying to turn on to York Road, tree cutting needed for the access drive, and the ability of fire trucks to access the eastern half of the property if necessary.

Testimony from witnesses on both sides established that the proposed area for the solar array has not been used as a farm for quite some time. Mr. Quinlan testified that he was aware that the area had been used for hay, but not farming. Mr. Doak also testified that the existing field was used for hay, but now is just mowed, which Ms. Jones echoed. Mr. Mayo also provided testimony that the subject property was recently used for hay, though not last year. He also testified the subject property had been farmed in the past. Within the immediate area, only the Gorsuch Retirement property is currently used for farming.

Relevant Law, County Code Provisions and Zoning Regulations

A. The RC-7 Zone

The RC-7 Zone is limited in terms of uses permitted by right, with BCZR §1A08.3(A) identifying only nine such uses. Subsection (B) of BCZR §1A08.3 identifies 15 enumerated uses permitted by special exception. As expected, the RC-7 Zone also has various regulations for scenic views, density, setbacks, impervious surface coverage, and historical properties, as well as performance standards for stormwater management, visibility, landscaping and signs. BCZR §§1A08.5, 1A08.6. The regulatory scheme also accounts for inconveniences arising from agricultural operations, including noise, dust, odors, fumes, and operation of machinery, among other items. BCZR §1A08.7. As noted below, BCZR §4F-102(a) adds a sixteenth use permitted by special exception in a RC-7 Zone --- a community solar facility.

B. Solar Facilities Law

In 2017, the County Council enacted new legislation regulating solar facilities, embodied in BCZR §§4F-101, *et seq.* The County Council recognized the advantages of an "abundant, renewable and environmentally sustainable source of electricity generation," that would lead to "greater local grid resiliency and security," and result in the production of clean, renewable energy and a reduction in air and water pollution. BCZR §4F-101.

In attempting to strike a balance between the benefits from solar energy production and the potential impacts to any rural and commercial areas, the County Council ensured the placement of certain safeguards by requiring proposed solar facilities in certain zones to be permitted by special exception as opposed to by right, including, as relevant, the RC-7 Zone. Id.

In addition, the County Council created ten additional "requirements" (at BCZR §4F-104) in regulating these facilities:

A. A solar facility located in an R.C. Zone is subject to the following requirements:

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 R.C. 4 or R.C. 6 Zone.

4. Aboveground 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 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.

Moreover, the County Council imposed certain maintenance, abandonment, and removal regulations upon owners, lessees, and operators of these solar facilities. BCZR §§4F-106, 4F-107. Violations of the solar facility regulations are subject to code enforcement proceedings in accordance with Article 3, Title 6 of the County Code. BCZR §4F-106(D).

C. Special Exception Law

Maryland courts historically have considered special exception uses as ones conditionally compatible with uses permitted as of right in the same zone. See, *e.g.*, Creswell v. Baltimore Aviation Serv., Inc., 257 Md. 712, 719; 264 A.2d 838, 842 (1970). The Court of Appeals revisited the law on special exception in 1979 with the seminal case of Schultz v. Pritts, 291 Md. 1; 432 A.2d 1319 (1979). In Schulz, the Court of Appeals held 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. 291 Md. at 11; 432 A.2d at 1325.

In 2016, the Court of Appeals in Attar v. DMS Tollgate provided additional guidance on the presumption that accompanies a proposed special exception use. 451 Md. 272; 152 A.3d 765 (2016). First, the Court reiterated that the special exception petitioner has both, the burden of production and the burden of persuasion. Attar, 451 Md. at 287; 152 A.3d at 773, *quoting* People's Counsel for Balt. Cty. V. Loyola Coll. In Md., 406 Md. 54, 109; 956 A.2d 166, 199 (2008); *see also*, Board of Appeals Rule 7(d), "the proponent of an action to be taken by the Board has the burden of proof." Second, the Court clarified that the concurrent presumption in favor of the special exception petitioner is not a mutually exclusive evidentiary burden. Attar, 451 Md. at 286; 152 A.3d at 773.

Referencing Maryland Rule 5-301(a),[3] the presumption identified by Schultz v. Pritts satisfies the burden of going forward on a fact presumed (in this case, the special exception is in the interest of the general welfare, and therefore has a presumption of validity) and "*may* satisfy the burden of persuasion if no rebuttal evidence is introduced by the other side." Attar, 451 Md. at 286-287; 152 A.3d at 773; *quoting* Anderson v. Litzenberg, 115 Md. App. 549, 564; 694 A.2d 150, 157 (1997) (emphasis in original).

The presumption is that a special exception use is valid, that is, one that *can* conform to the zoning plan depending on the location, zoning classification, and impacts on the surrounding area. The presumption that inures to a special exception petitioner's benefit requires a special exception protestant to present probative evidence of any harms or other detrimental impacts, as identified in BCZR §502.1, to the surrounding neighborhood that are above and beyond the impacts that may be experienced elsewhere in the zone from this proposed use (Schultz, 291 Md. at 22-23; 432 A.2d at 1331) and/or other noncompliance with applicable zoning regulations to warrant a denial.[4] In other words, a special exception protestant must show "non-inherent adverse effects," or "unique adverse effects" to overcome the presumption that the proposed use is in the interest of the general welfare and compatibility. See, Clarksville Residents Against Mortuary

---

[3] Md. Rule 5-301 sets forth:
(a) Effect. Unless otherwise provided by statute or by these rules, in all civil actions a presumption imposes on the party against whom it is directed the burden of producing evidence to rebut the presumption. If that party introduces evidence tending to disprove the presumed fact, the presumption will retain the effect of creating a question to be decided by the trier of fact unless the court concludes that such evidence is legally insufficient or is so conclusive that it rebuts the presumption as a matter of law.
(b) Inconsistent presumptions. If two presumptions arise which conflict with each other, the court shall apply the one that is founded upon weightier considerations of policy and logic. If the underlying considerations are of equal weight, the presumptions shall be disregarded.

[4] E.g., in solar facility cases, evidence that the proposed use does not meet the solar facility requirements set forth in BCZR §4F-104 may also warrant denial of a special exception petition.

Defense Fund, Inc. v. Donaldson Properties, 453 Md. 516, 543; 162 A.3d 929 (2017); Attar, 451 Md. at 287; 152 A.3d at 774.

If a special exception protestant presents sufficient evidence to create a genuine dispute of material fact as to a particular special exception factor or other zoning requirement, the evidentiary record must be sufficient to persuade the Board of Appeals that the proposed use will conform to the applicable zoning plan and satisfy the specified factors. Attar, 451 Md. at 286-287; 152 A.3d at 773; *quoting* Anderson, 115 Md. App. at 564; 694 A.2d at 157.

Even still, the Board can grant the special exception petition along with certain conditions or restrictions to protect the surrounding and neighboring properties, and in solar facilities cases, "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." BCZR §502.2, §4F-104(10). If the burden of persuasion is not met, the Board will deny the petition.

The special exception factors to be evaluated by the Board are set forth in BCZR §502.1. As stated therein, before any special exception may be granted, 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, and for consideration of a solar facility use under Article 4F, the inclusion of the R.C. 3, R.C. 6, and R.C. 8 Zones.

DECISION

A. BCC §33-3-108(c) Plan Requirements and Applicability To Special Exception Hearings

Before the special exception factors are discussed, the Board needs to address Protestants' argument that, pursuant to BCZR §4F-104(9), Petitioner is required to comply with the plan requirements of Baltimore County Code §33-3-108(c), which identifies an additional 18 requirements for solar facilities. Protestants further assert that Petitioner has the burden of proof and Petitioner has failed to produce evidence on various items required to be identified on the plan at issue in BCC §33-3-108(c). Therefore, the first question for the Board is what, if anything, Petitioner is required to prove with respect to BCZR §4F-104(9) during a special exception hearing.

To start, the Board looks at the language within the Code and Regulations. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC, 412 Md. 308, 314; 987 A.2d 48, 52 (2010) (citation omitted). "'Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language.'" Id. at 314–15, 987 A.2d at 52 (citations omitted). In interpreting a statute, a court first looks to the language, applying it where the statute's language "is unambiguous and clearly consistent with the statute's apparent

purpose[.]" Motor Vehicle Admin. v. Gonce, 446 Md. 100, 110, 130 A.3d 436, 442 (2016); *quoting* Lark v. Montgomery Hospice, Inc., 414 Md. 215, 227, 994 A.2d 968, 975 (2010) (citation omitted). As is well established under Maryland law, canons of statutory interpretation forbid construction of a statute so that a word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory. Oglesby v. State, 441 Md. 673; 109 A.3d 1147 (2015).

Clearly, the solar facility requirements, generally, are matters for the Board's consideration as the Board may deny a petition for special exception for a proposed solar facility for facial noncompliance. First, these requirements are set forth in the Baltimore County Zoning Regulations and, as relevant to this case, are applicable in the RC-7 Zone. Facial noncompliance with the requirements may result in a finding that the petition is inconsistent with the spirit and intent of the zoning regulations and/or run afoul of other BCZR §502.1 factors. Second, subparagraph 10 refers to the Board's authority to impose conditions if the special exception petition is approved. The implication is that the County Council intended for the Board to consider the additional solar facility requirements as part of a special exception hearing. However, the Board rejects Protestants' interpretation of BCZR §4F-104(9) that the County Council intended for the Board to review and decide the BCC §33-3-108(c) specific plan requirements as part of the special exception hearing.

Baltimore County Code §33-3-108(a) refers to a "plan" approved by "the Department" for "all development, forest harvesting operations, surface mining operations, and agricultural operations." The word "plan," as defined in BCC §33-3-101, "means a written and graphic representation of all proposed development, forest harvesting operations, surface mining operations, agricultural operations, and other land use activities not otherwise exempt from the provisions of this title that is prepared in accordance with § 33-3-108 of this title."

Baltimore County Zoning Regulation §4F-104(9) states that a "petitioner shall comply with the plan requirements of § 33-3-108 of the County Code." The word "plan," as used in BCZR §4F-104(9), neither supplements, nor alters, the definition of "plan" in BCC §33-3-101 or as applied to BCC §33-3-108(c) and therefore, the "plan" identified in BCZR §4F-104(9) is to be interpreted coextensively with the "plan" at issue in BCC §33-3-108(c).

The "Department," as used in Article 33, Title 3, is identified as "the Department of Environmental Protection and Sustainability ["DEPS"]," and the "Department" is charged with the duty to review the plan required by BCC §33-3-108. See, BCC §33-3-101(f); §33-3-108(a). In short, the "plan" at issue in the solar facility regulations is the plan required to be submitted for review and approval by DEPS. As further support, the County Code, pursuant to BCC §3-2-603, empowers DEPS to:

> (a) (1) Administer and enforce environmental laws, regulations, programs, and activities for the purpose of conserving, enhancing, and perpetuating the natural resources of the county and preserving and protecting the environmental health of its citizens; and (2) Have the duties, functions, and responsibilities provided for in the Code and assigned to it by directive of the County Administrative Officer.

In addition, DEPS has the responsibility to enforce the state laws and regulations concerning the environment upon delegation from the State. BCC §3-2-603(b). Furthermore, the County Code establishes that DEPS is the agency that enforces the provisions within Article 33, Title 3 and DEPS's Director is authorized to adopt policies and regulations, as necessary, to implement those provisions. BCC §33-3-105. It would be wholly nonsensical for both, the Board and DEPS, to independently review and assess the BCC §33-3-108(c) plan given the specific duties charged to DEPS and DEPS's expertise in the subject matter.

Furthermore, the Code provides that DEPS's Director or the Director's Designee is required to determine that the proposed development is in compliance with Article 33, Title 3

before any building or grading permit is issued by the Department of Permits, Approvals and Inspections. BCC §33-3-109. In other words, the requirements outlined by Article 33, Title 3 relate to development and do not relate to zoning.

Lastly, the County Council amended the special exception factors in connection with enacting the solar facility regulations, but the changes concerned zones other than RC-7 zones, which, to this Board, reflects an intent that the County Council intended for the Board to conduct the same review and analysis of the impacts of the environment and natural resources by the solar facility as it has for other proposed special exception uses. If the County Council wished for the Board to undertake the greater and more technical environmental analysis at issue in BCC §33-3-108(c), the County Council would have amended the BCZR §502.1 to reflect that intent or would have expressly authorized the same in Article 4F.

Taken together, the code provisions and regulations unambiguously establish that neither the ALJ, nor the Board of Appeals, reviews or approves the plan or any individual requirement identified in BCC §33-3-108 as part of a zoning special exception hearing. The only responsibility identified in BCZR §4F-104(9) is that petitioner is required to comply with the plan requirements. Notably, DEPS's comment submitted in this case stated that Petitioner will have to comply with the environmental regulations, as relevant for this discussion, found in BCC §§33-3-101 through 33-3-120, obviously inclusive of §33-3-108, and DEPS took no position on the request for special exception approval. (Petitioner's Exhibit No. 12). If Petitioner does not receive approval from DEPS, Petitioner will not receive any grading or building permit. Finally, and importantly, several witnesses testified expressly or by implication that they understood that DEPS will undertake this more comprehensive review after the Board resolves this matter, including namely Mr. Kellman, Mr. Doak, Mr. Altmeyer, and Mr. Roemer.

In light of the above, the Board concludes that Petitioner does not need to present at a special exception hearing evidence regarding each item required for a BCC §33-3-108(c) plan or, even simply, DEPS's approval of such a plan. Relatedly, the omission of such information at the time of the special exception hearing is, by itself, not fatal to a special exception petition.

B. Relevant Locality/Neighborhood

At the start, the Board must determine what the locality or neighborhood to evaluate what, if any, impact the proposed use has above and beyond effects inherently associated with a special exception use. Attar, 451 Md. at 278-284, 289; 152 A.3d at 769-772, 775. As stated by the Court of Appeals: "the Board's task is to determine if there is or likely will be a detriment to the surrounding properties" (Id., 451 Md. at 280; 152 A.3d at 769-770); the Board must assess "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." Schultz v. Pritts, 291 Md. 1, 22-23; 432 A.2d 1319, 1331 (1979).

Therefore, the question is whether the expected effects from the proposed use are somehow exacerbated by the location at issue, to the detriment of those to experience such effects. For a special exception, the description of the neighborhood to be impacted by the proposed use "must be precise enough to enable a party or appellate court to comprehend the area the Board considered." Attar, 451 Md. at 282; 152 A.3d at 771.

In this case, testimony and various maps and photographs establish that Upper Glencoe and Lower Glencoe Roads form the north, east, and south sides of the locality at issue. The area contained within, using York Road as its western boundary, is overwhelmingly zoned RC-7, with some portion north and east of the subject property zoned RC-2. (Petitioner's Ex. 9). It has been

suggested York Road should be the western boundary for the Board's analysis. However, there are residences directly across the street from the subject property located on Elizabeth Court, William Court, and Kampman Court, all of which rely on access from York Road across from the subject property and therefore, should be considered as part of this analysis, though noting those residential properties are zoned RC-2 and no resident from the homes on those streets testified at the hearing or otherwise indicated opposition.

C. Special Exception Factors

At the outset of the hearing, Protestants stated that its case focused only on three of the nine special exception factors, particularly, (A) the health, safety and general welfare of the locality; (G) the inconsistency with the property's zoning classification and/or inconsistency with the spirit and intent of the zoning regulations; and (I) the detrimental impact to the environment and natural resources of the site and vicinity. In fact, much of Protestants' case and closing memorandum focused on environmental matters and inconsistency with the zoning classification and/or inconsistency with the spirit and intent. Protestants also challenged the petition for lack of evidence regarding compliance with certain solar facility requirements, which will be discussed in the section below. People's Counsel also largely confined its evidence and arguments to the environmental issues, as well as inconsistency with the classification and/or spirit and intent. Both advanced an argument regarding the visual impact.

For the special exception factors Protestants' witnesses addressed, the testimony too often amounted to speculation, which the Board cannot consider and rely upon for its findings. By way of example, Mr. Mayo testified that he had concerns that the conversion of the adjacent property will cause more deer to pass through the Gorsuch Retirement property and cause more crop damage. While the Board does not question the sincerity of Mr. Mayo's concern, there were no

facts in the record from which the Board can find, as a matter of fact, that there is a likelihood of an increase in the deer population on the Gorsuch Retirement property caused by the presence of an adjacent solar facility, which in turn will cause more crop damage to the Gorsuch Retirement property.

Protestants also raised an issue as to the impervious surface coverage as part of the RC-7 Zone regulations without reference to BCZR §502.1(H). However, Protestants' factual underpinning for this argument require the Board to conclude that the solar panels qualify as an impervious surface as contemplated by the BCZR. The Board does not so conclude.

The evidence establishes that only the vertical support posts for the array and fencing will make contact with the ground. Based on the evidentiary record, the solar panels will be fixed on an angle, leaving approximately two feet of space from the ground, with ample separation between the rows of panels. Though not specifically argued, the Board also finds that the limited removal of trees, confined to the western half of the bowtie and only in connection with the access drive construction is not inconsistent with the vegetative retention regulations.

Similarly, Protestants' witnesses testified that the crossing point at the "bowtie knot" part of the subject property may not be able to support the weight of emergency vehicles, if needed. The witnesses presented by Protestants that provided this testimony, however, were not qualified as experts. The testimony is assuredly speculative as there is no information as to the present capacity or the crossing's weight-bearing capacity following the intended improvements. It should be mentioned that, when the property was farmed, farm equipment used the crossing. Any concerns about the weight-bearing capacity at the crossing will be addressed in the permit stage. [5]

[5] The Board recognizes that Protestants do not have access to the crossing point as it is located entirely within the subject property. At the same time, the permit process related to the construction of the access road and the DEPS plan review will, by necessity, analyze the crossing point and what improvements can and will be made to move forward with this project.

In light of the above, this Board can summarily find that Protestants have not adequately rebutted the presumption on several factors, particularly, (B) congestion in roads, etc.; (C) the creation of a potential hazard from fire, panic or other danger; (D) overcrowding of land, etc.; (E) interference with schools, parks, water, sewage, transportation of other public requirements, etc.; (F) interference with adequate light and air; and (H) inconsistency with the impervious surface and vegetative retention regulations. Also, the Board finds Petitioner has satisfied its burden for those factors.

With respect to BCZR §§502.1 (A), (G), and (I), certain arguments have been raised which require some further discussion. In furtherance, Protestants presented testimony identifying visual impact, runoff, the RC-7 Zone, and the aforementioned environmental issues as concerns that touch on these special exception factors.

For example, Protestants identified the visual impact that they will experience and People's Counsel has identified the visual impact on an adjacent scenic route. Protestants argue the Baltimore County Master Plan 2020 reflects the County's policy to "preserve scenic corridors and views through proper zoning and coordination with federal and state governments," and therefore, "special exceptions should be granted sparingly." (Master Plan 2020, pp. 99, 101). Absent an express code provision mandating conformity with the Master Plan, Master Plans are understood to be guides in the zoning process. People's Counsel v. Webster, 65 Md.App. 654, 701-703; 501 A.2d 1343, 1347 (1986). In fact, Baltimore County's Master Plan is specifically designated to serve as guidance --- Baltimore County Charter §523 states: "The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the county." (emphasis added).

Nevertheless, the regulations clearly establish that the County Council had awareness that any ground-based solar facility may be visible to nearby property owners and/or others passing by. The County Council accounted for and mitigated against any adverse visual impact to neighboring properties and the scenic roads by requiring a landscaping buffer for screening the facility from adjacent residential properties and public streets, as well as setting a height limit for any structure within the solar facility. See BCZR §4F-104(5) and (6). While the RC-7 Zone also has certain requirements for screening (See, e.g., BCZR §§1A08.5; 1A08.6(C)(4)), the County Council expressly allowed solar facilities within the RC-7 Zone by way of special exception. A primary rule of statutory construction that a legislature has full knowledge of existing laws and legislation pertaining to the subject matter under legislative consideration. See *e.g.*, Maryland-National Capital Park & Planning Com. v. Silkor Development Corp., 246 Md. 516, 524; 229 A.2d 135, 140 (1967). As such, the Board concludes that the visual screening required in the solar facility regulations satisfies the screening required within the RC-7 Zone and that the screening required is consistent with the Master Plan 2020's policy to preserve scenic corridors.

Leaving all of the above aside, the potential for someone on an adjacent property or on an adjacent roadway to see some part of the solar facility is obvious.[6] Protestants' evidence fails to establish an effect above and beyond those associated with the proposed use. As stated by Mr. Quinlan and seen in various photographs, the solar facility is to be located approximately 1,100 feet from York Road. Petitioner has also agreed to comply with any additional landscaping plan required by the County. The fixed angle of the panels limits their height to under eight feet when measured from the ground.

[6] These arguments are understood to contemplate different special exception factors, to wit: (A) for the neighbors, for the more immediate impact to the surrounding community, and (G) and (I) as to the impact on the scenic roadway.

Petitioner entered into evidence the Department of Planning's ("Planning") determination regarding the visual impact of the solar facility upon the scenic route. (See, Petitioner's Exhibit 10). Planning determined that, due to topography and the presence of the mature forest, the solar panels will not be visible from York Road or adjacent properties. (See Petitioner's Exhibit 10). Planning had no objection to the zoning relief. Given that the solar array will be approximately 1,100 feet from York Road, the fixed angle of the panels limits the height of the panels to under eight feet when measured from the ground, and, as testified to by Mr. Kellman, the western half of the property sits at a higher elevation than the eastern half, the Board concludes the solar facility will neither detrimentally impact the scenic route, nor the neighboring properties, to any degree greater at this location than other locations within the zone. Moreover, it is reasonable to conclude the features at this particular site help mitigate a detrimental impact where other RC-7 zoned properties, without the combination of features, will not.

Mr. Mayo and Mr. Matczuk identified concerns about runoff/flooding issues. Mr. Matzcuk's testimony revealed that he occasionally experiences flooding from Upper Glencoe Road, indicating present-day flooding independent of the Gorsuch Retirement property and/or the subject property to the west of the Gorsuch Retirement property. For this reason, Mr. Matczuk elaborated, he considered potential runoff as a possible exacerbation of the existing issues.

Protestants' Exhibit No. 16 reveals that the highest point of the proposed solar facility field straddles the boundary line with the Gorsuch Retirement property at roughly the mid-point of the subject property's northeastern edge. The topography proceeds to descend through the subject property to the southern edge of the eastern half to the property's lowest point. The topographical map suggests that water, without improvements, drains to the northwest, west, south, and

southeast. Much of that area is within the subject property's boundaries and away from the Gorsuch Retirement property, and therefore, also away from the Matzcuk property.

Mr. Roemer, via Protestants' Exhibits 28 and 28A, identified a "perennial" stream that brushes along the northern point of eastern bowtie half, then bisects the Gorsuch Retirement property, and runs more or less close to the boundary between the Gorsuch Retirement property and Mr. Matzcuk's property. Mr. Roemer explained a perennial stream is one with water flow for most of the year.

The topography and drainage plain suggest that any additional volume caused by runoff from the solar facility that flows to the northeast, which is assumed only to address this argument, would be minimal. Mr. Matzcuk's testimony reveals that the primary flooding issue he confronts comes from the north via Upper Glencoe Road. As such, the evidentiary record on this issue is insufficient from which the Board may conclude that Mr. Matzcuk's property will be adversely impacted by runoff from the solar facility. Nor can it be concluded on this record that the solar facility would exacerbate any existing flooding risk.

As alluded to above, DEPS will undertake a significant review of issues related to the runoff concerns raised. Protestants' expert, Mr. Altmeyer, testified that it would be satisfactory to him if runoff was addressed in a DEPS-approved plan, after DEPS conducted a site visit. Consistent with Mr. Altmeyer's testimony, the Board will order Petitioner to comply with DEPS's reviewed and approved plan.

Turning to factor (G), consistency with the legislative purposes and spirit and intent of the regulations, the BCZR does not identify purposes specific to the RC-7 Zone. There are findings and legislative goals, but no identified "purposes." Other Resource Conservation Zones have

defined purposes, including but not limited to, RC-2, RC-5, RC-20 and RC-50, and RCC. All Resource Conservation Zones have general purposes identified in BCZR §1A00.2:

A. Discourage present land use patterns of development and to create a framework for planned or orderly development;

B. Provide sufficient and adequate areas for rural-suburban and related development in selected and suitable areas;

C. Protect both natural and man-made resources from compromising effects of specific forms and densities of development;

D. Protect areas desirable for more intensive future development by regulating undesirable forms of development within these areas until such time as intensive development commences; and

E. Help achieve the goals of the Chesapeake Bay Critical Area Protection Law [1] by enacting land use policies to control development within the Critical Area by conserving the land and water resource base for agriculture, forestry and other natural resource uses; minimizing adverse effects on water quality; and conserving fish, wildlife and plant habitat.

Section 4F-101(A) sets forth:

A. Purpose. Solar energy is recognized as an abundant, renewable, and environmentally sustainable source of electricity generation that will lead to greater local grid resiliency and security, and produce clean, renewable energy and reduce air and water pollution caused by the burning of traditional fossil fuels. The purpose and intent of this article is to permit solar facilities in parts of the rural and commercial areas of the County by special exception, and to balance the benefits of solar energy production with its potential impact upon the County's land use policies by ensuring sufficient safeguards are in place to protect the County's communities and its agricultural land, forests, waterways and other natural resources. (emphasis added).

The safeguards required by BCZR §4F-104 are reflected in the solar facility regulations and the County Council expressly permitted solar facilities in Resource Conservation Zones. As set forth above, the County Council has full knowledge of existing laws and legislation pertaining to the subject matter under legislative consideration. See *e.g.*, Maryland-National Capital Park & Planning Com., 246 Md. at 524; 229 A.2d at 140. The County Council's express inclusion of the

RC-7 Zone in the solar facility regulations means that the County Council considered the legislative findings and goals specific to the RC-7 Zone. The County Council also requires the Board to consider conditions, as stated in BCZR §4F-104(10), affording additional measures for protection as necessary. Therefore, the Board concludes the proposed use does not run afoul of BCZR §502.1(G) as to a general inconsistency with the applicable purposes or spirit and intent of the zoning regulations.

Dispensing with the arguments regarding general inconsistency, Protestants also argue a more specific inconsistency, namely, that the 300-foot setback requirement in the RC-7 Zone as established by BCZR §1A08.6(B)(5)(b) applies to this matter. Petitioner contends that the 50-foot setback requirement within BCZR §4F-104(A)(4) applies.

The Board must first determine whether there is a conflict between the two regulations. Under Maryland law, "'when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute.'" State v. Roshchin, 446 Md. 128, 142; 130 A.3d 453, 461 (2016), *quoting*, Maryland-Nat'l Capital Park & Planning Comm'n v. Anderson, 395 Md. 172, 194, 909 A.2d 694 (2006) (*quoting* State v. Ghajari, 346 Md. 101, 116; 695 A.2d 143 (1997)). Furthermore, as recently stated by the Court of Appeals, when two statutes apply to the same situation, then the court will attempt to harmonize the statutes. Blackstone v. Sharma, 461 Md. 87, 93; 191 A.3d 1188, 1191 (2018). The Blackstone Court further established:

> "Courts presume that the legislature intends its enactments to operate together as a consistent and harmonious body of law. Thus, when two statutes appear to apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable. Nevertheless, if two statutes contain an irreconcilable conflict, the statute whose relevant substantive provisions were enacted most recently may impliedly repeal any conflicting provision of the earlier statute.

Id..

Protestants' reliance on BCZR §600.1 to establish which regulation controls does not aid the analysis because the regulations at issue are both contained within the BCZR. The repeated references of "these regulations" in comparison to "the provisions of any law, ordinance, regulation or private agreement," imply laws, ordinances, regulations and private agreements that are not contained within the Baltimore County Zoning Regulations. If interpreted in a manner as to apply to potential conflicts of regulations within the BCZR, the references to "these regulations" become confusing and fail to achieve the purpose of providing regulation construction guidance and hierarchy.

The Board interprets BCZR §4F-104(4) as requiring aboveground solar facility components and equipment to be a minimum of 50 feet from the tract boundary, such a minimum not applicable to any associated landscaping, security fencing, wiring, or power line. The Board interprets BCZR §1A08.6(B)(5)(b), as is relevant, as requiring for any principal building or any use that may be in conflict with any permitted agricultural operation a 300-foot setback from any adjacent property that was cultivated or used for pasture during the previous three years.

In other words, the minimum 50-foot setback is required of all solar facilities within any Resource Conservation Zone. The 300-foot setback is applicable in a RC-7 Zone, applies to more than just solar facilities, and is required if, and only if, certain conditions are met. First, there must be a principal building or a use that may be in conflict with any permitted agricultural operation on adjacent property. Also, the adjacent property must have been cultivated or used for pasture within the last three years. In short, the two regulations are not in conflict, at least, not in the context of this case.

The solar farm is not a principal building. As to the use, the only property identified as that used as a farm cultivated or used for pasture in the last three years was the Gorsuch Retirement

property. That property, however, is located within a RC-2 Zone. The 300-foot setback is to benefit adjacent RC-7-zoned properties. Once again, the County Council, when enacting the solar facility regulations, would be aware of the setback requirements for the Resource Conservation Zones. If the general 300-foot setback controlled and applied at all times, then the 50-foot setback regulation applicable to solar facilities would be rendered meaningless. If the County Council wanted to carve out exceptions to the application of the 50-foot setback or impose greater setbacks for particular Resource Conservation Zones, the County Council would have so provided. The Board concludes that the 50-foot setback in the solar facility regulations applies here, not the general 300-foot setback.

With respect to the environment and natural resources, the evidence presented by Petitioner may be fairly described as a skeleton, enough to hold the case together but primarily relying on other (and in this case, subsequent) processes to make it functional. To be clear, subsequent processes by other agencies do not excuse Petitioner from presenting sufficient evidence for the Board's consideration as part of a special exception hearing. Petitioner must still present sufficient evidence to the Board for the Board to evaluate the special exception factors and the failure to do so will result in a denial of a petition.

People's Counsel correctly argues that the special exception process involves and has some overlap with the development process. Echoing what has been stated above, even with overlap, these are two different evaluation processes and there are different purposes for those evaluation processes. The Board assesses whether the proposed use can conform to the zoning regulations without a detrimental impact to the surrounding area that is greater than what would be experienced elsewhere.

Despite the risky strategy with regard to this factor, Petitioner has met its burden. First, the site itself aids Petitioner. As referenced above, photographs and topographical information permit the Board to draw inferences and reach conclusions (*e.g.* drainage). Second, the bowtie, with confirmation as location of a water resource, appears to be the most environmentally-sensitive feature on the site and given the presence of water and proximity to other properties, effects experienced at the bowtie may also be experienced by neighboring properties via the course of water flowing from the subject property. The bowtie, however, is not the area of focus for the proposal; rather, it is the open field on the east side. The impact at the bowtie comes from the construction of the improvements related to the access road.

Mr. Roemer identified certain features on the adjacent Gorsuch Retirement property causing him to believe that the area at the properties' border qualifies as wetlands and at the subject property's northern most point along the eastern half, the border area may qualify as a potential bog turtle habitat. He considered it less likely that the bowtie area was a potential bog turtle habitat. As Mr. Roemer noted, however, the investigation he conducted was only preliminary. He relayed that a more detailed survey will be conducted as the project moves forward and that, depending on the findings, additional protective measures may be directed. He also indicated that the building permit process will require a greater study of the bowtie area as well.

As such, while Mr. Roemer identified potential issues, his testimony makes it clear that more investigation, surveying, and studying are required before any conclusions can be drawn. Moreover, his testimony, along with Mr. Altmeyer's, Mr. Doak's, and Mr. Kellman's, reveal that the additional investigations, surveying, and studying will in fact be performed and Petitioner will have to comply with the changes directed, at Petitioner's peril. Therefore, Protestants' evidence does not establish a basis for this Board to conclude a likelihood that the proposed use will result

in detrimental impacts to the environment. Nor does the record establish that the impacts are greater at this location compared to other sites in the RC-7 Zone.

Again, the Board notes that in another case, a petitioner may not obtain the relief at issue without more information. Nevertheless, in light of the testimony of Petitioner's witnesses regarding the site features (also depicted in exhibits), willingness to comply with any and all conditions and requirements, the location of the solar facility in the open field, DEPS's absence of objection or further comment, unanimity among the experts that additional investigations will take place, Petitioner has satisfied its burden on this point.

Protestants and People's Counsel raised the issue of impact to prime and productive soils, which the County Council identified in the legislative goals for the zone as a resource requiring protection. BCZR §1A08.1(B)(6). The witnesses agreed in near harmony that the subject property had not been used for farming for awhile. Nevertheless, accepting that the soils at the subject property qualify as prime and productive soils, the record establishes minimal disruption (in a relative sense) to the open field, mostly by way of the implanting the vertical poles for the racking system and surrounding fence. Much of the field will be undisturbed. No expert witness provided evidence that the presence of the solar field will cause a change in the soils to render them something other than prime and productive for future use. In addition, the evidentiary record fails to establish a basis for the Board to conclude that once the lease is up, the field will be in a condition that prevents it from being cultivated or farmed.

Therefore, the issue is more properly framed as the temporary loss of the potential to use the prime and productive soils in the eastern half of the property for farming for duration of the lease term. The Board cannot, and in any event will not, compel the property owner here to take advantage of and utilize the prime and productive soils on the owner's property. For all of these

reasons, the Board is not persuaded that a solar facility at this location, even if located on prime and productive soils, would run afoul of this factor.

Based on the evidentiary record here, the Board is persuaded that the proposed use will not detrimentally impact the environment and natural resources at the site and in the vicinity. The Board will also impose conditions to help protect the environmental and natural resources. Therefore, Petitioner has satisfied its burden on all special exception factors, though the Board will impose conditions to mitigate some of the effects and to effectuate the representations made by Petitioner upon which the Board relies in reaching this decision.

D. Solar Facility Requirements

Lastly, several requirements were expressly or impliedly addressed in the special exception factors set forth above, including (4) 50-foot setback requirement is satisfied; (5) the height of any structures will not exceed 20 feet; (6) landscape buffer and screening will be in place to mitigate visual impacts; and (7) security fencing will be in place. There is no evidence that the subject property is encumbered by an agricultural or environmental preservation easement, a rural legacy easement, or within a forest conservation easement. Similarly, there is no evidence that the property is within a historic district, nor is the property on the County Final Landmarks List.

As for the remaining solar facility regulations, Petitioner presented evidence via Mr. Quinlan that the facility will generate 1.87 megawatts of AC electricity, with the array covering only nine acres of the entire property (less than five acres per megawatt). BCZR §4F-102(B)(1). There is no evidence that granting this petition would result in exceeding the district cap for solar facilities, as identified in BCZR §4F-102(B)(2). With respect to glare, the evidentiary record establishes that the panels will be 1,100 feet from York Road and there are topographic changes in between and some trees and landscaping help screen the array from view. Mr. Kellman testified

a glare study will also be required prior to obtaining a building permit. Protestants did not present evidence that glare may present a problem. Given that, there is nothing in this record to establish that this proposal may violate the glare regulations.

In light of the above, the Board cannot conclude that this proposed solar facility fails to comply with the solar facility requirements in BCZR §§4F-101, *et seq.*

E. Conditions

The Zoning Regulations allow the Board of Appeals to "impose such conditions, restrictions or regulations as may be deemed necessary or advisable for the protection of surrounding and neighboring properties." In addition, if approved, BCZR §4F-104(10) empowers the Board of Appeals to:

> 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.

The Board, in granting this petition, finds it necessary to impose conditions to provide some additional protections and to effectuate representations made by Petitioner that addressed concerns identified by Protestants during the course of the hearing (as well as ones identified during the ALJ hearing). The Board imposes these conditions to protect the surrounding and neighboring properties, the environment and scenic views, as well as to otherwise lessen the impacts to surrounding properties.

Therefore, the Board grants the petition, but does so with the following conditions:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Opinion & Order. However, Petitioners are hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If, for whatever reason, this Order is reversed, Petitioner would be required to make corrections, which may include return of the subject property to its original condition.

2. Petitioner shall comply at all times with the ZAC comments submitted and requirements imposed by DEPS.

3. Petitioner shall comply with the solar facility regulations and requirements (specifically, BCZR §4F-104) at all times.

4. Petitioner shall comply at all times with the DEPS reviewed and approved plan, as identified in BCZR §4F-104(9) and BCC §33-3-108(c).

4. Petitioners shall obtain from and the State Highway Administration (SHA) and comply with the appropriate permit for entrance/access to and/from York Road.

5. No weed killers or herbicides shall be used to control weed or grass growth at the solar facility, the bowtie area, or the crossing point. If, following any subsequent development process, DEPS review, wetlands delineation, environmental study or survey and/or other investigation by any governmental agency, department, division, office, and/or other entity, it is determined, directed, ordered, or recommended that weed killers and/or herbicides should not be used on any other part of the subject property, Petitioner shall comply with those determinations, directives, orders, and/or recommendations.

6. Prior to the commencement of operations, Petitioner shall post on the solar facility contact information for the lessee company (including a 24-hour telephone number) and also that for a company representative so that the company and/or the company representative or agent can be notified in the event of an emergency and/or other circumstances requiring company action or response.

7. Aside from Condition No. 6, no signage or lighting shall be installed at the site in connection with the solar facility unless required by any Federal, State, or other County agency, department, division, or office, or otherwise required by law.

8. Petitioner shall submit for approval by Baltimore County a landscape plan for the site.

9. Prior to the commencement of operations, Petitioner shall provide contact information for the lessee company and also that for a company representative as well as the necessary key(s) and/or access code(s) or combination(s) with the local fire departments to ensure the local fire departments have access to the solar facility if needed.

10. Petitioner shall not use, incorporate, or attach barbed wire, razor wire, or barbed wire fencing or razor wire fencing as part of the solar facility.

11. The only trees permitted to be removed from the subject property are those on the western half of the property whose removal is necessary for the construction

of the access drive. For each tree removed, Petitioner shall replace the removed tree with per diameter equivalent replacement native species tree and each such replacement tree shall also provide similar or better shade and screening coverage. Should any tree become damaged as a result of the road construction or any construction activity related to the solar field so that the visual screening of the solar array is affected, Petitioner shall plant a per diameter equivalent native species tree and each such replacement tree shall also provide similar or better shade and screening coverage. Petitioner shall not remove or cause to be removed any tree in the bowtie area, crossing point or on the proposed solar field.

Conclusion

For the foregoing reasons, the Board grants the petition subject to the conditions outlined herein.

ORDER

THEREFORE, IT IS THIS 29th day of July, 2019, by the Board of Appeals of Baltimore County,

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. 1), be, and the same is hereby **GRANTED**, subject to the following conditions under the Board's authority in §4F-104.A.10:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Opinion & Order. However, Petitioners are hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If, for whatever reason, this Order is reversed, Petitioner would be required to make corrections, which may include return of the subject property to its original condition.

2. Petitioner shall comply at all times with the ZAC comments submitted and requirements imposed by DEPS.

3. Petitioner shall comply with the solar facility regulations and requirements (specifically, BCZR §4F-104) at all times.

4. Petitioner shall comply at all times with the DEPS reviewed and approved plan, as identified in BCZR §4F-104(9) and BCC §33-3-108(c).

4. Petitioners shall obtain from and the State Highway Administration (SHA) and comply with the appropriate permit for entrance/access to and/from York Road.

5. No weed killers or herbicides shall be used to control weed or grass growth at the solar facility, the bowtie area, or the crossing point. If, following any subsequent development process, DEPS review, wetlands delineation, environmental study or survey and/or other investigation by any governmental agency, department, division, office, and/or other entity, it is determined, directed, ordered, or recommended that weed killers and/or herbicides should not be used on any other part of the subject property, Petitioner shall comply with those determinations, directives, orders, and/or recommendations.

6. Prior to the commencement of operations, Petitioner shall post on the solar facility contact information for the lessee company (including a 24-hour telephone number) and also that for a company representative so that the company and/or the company representative or agent can be notified in the event of an emergency and/or other circumstances requiring company action or response.

7. Aside from Condition No. 6, no signage or lighting shall be installed at the site in connection with the solar facility unless required by any Federal, State, or other County agency, department, division, or office, or otherwise required by law.

8. Petitioner shall submit for approval by Baltimore County a landscape plan for the site.

9. Prior to the commencement of operations, Petitioner shall provide contact information for the lessee company and also that for a company representative as well as the necessary key(s) and/or access code(s) or combination(s) with the local fire departments to ensure the local fire departments have access to the solar facility if needed.

10. Petitioner shall not use, incorporate, or attach barbed wire, razor wire, or barbed wire fencing or razor wire fencing as part of the solar facility.

11. The only trees permitted to be removed from the subject property are those on the western half of the property whose removal is necessary for the construction of the access drive. For each tree removed, Petitioner shall replace the removed tree with per diameter equivalent replacement native species tree and each such replacement tree shall also provide similar or better shade and screening coverage. Should any tree become damaged as a result of the road construction or any construction activity related to the solar field so that the visual screening of the solar array is affected, Petitioner shall plant a per diameter equivalent native species tree and each such replacement tree shall also provide similar or better shade and screening coverage. Petitioner shall not remove or cause to be removed any tree in the bowtie area, crossing point or on the proposed solar field.

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

Jason S. Garber, Chair

Andrew M. Belt

William A. McComas