

IN THE MATTER OF  
HHK Farms, LLC - Legal Owner  
OneEnergy Development, LLC - Lessee  
1139 Monkton Road  
Hereford, MD

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. 18-030-X

RE: Petition for a Solar Facility

\* \* \* \* \*

**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 May 7, 2018. Protestants, Sparks-Glencoe Community Planning Council, Freeland Legacy Alliance, Inc., Richard Ryan, Lois Jean Bowman, Scott Dykes, Beverly and Salvatore Scavone, Wendy McIver, Lynne Jones, Kathleen Pieper (collectively the “Protestants”) filed an appeal.

A *de novo* hearing was held before this Board on December 11 and 12, 2018, and January 19, 2019. The Petitioners, HHK Farms, and One Energy Development LLC (the “Petitioners”) were represented by Adam Rosenblatt, 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 March 5, 2019.

**Factual Background**

The subject property is located at 1139 Monkton Road and consists of 98.49 acres+/- on the south side of Monkton Road, in the Hereford Area of Baltimore County (the “Property”). It is split-zoned RC2, RC4 and RC7. Monkton Road is a designated scenic route. The Property was previously a farm but no farming activities presently take place there. The proposed Special Exception is 19 acres, with 13 acres being used for the actual solar array on a cleared area of the

Property pursuant to Baltimore County Zoning Regulations (“BCZR”), Article 4F. The solar facility will generate no more than 2 megawatts of alternating current of electricity.

The Property contains a single, uninhabitable structure and is largely cleared and open in the center, having previously been farmed for many years. The entire southern, eastern, and western borders of the Property are wooded. An additional area of vegetation lines the northern boundary along Monkton Road. Testimony was presented that the Petitioners had previously obtained approval of forest stand delineation, wetland delineation and steep slope and erodible soils analysis, delineating forest buffers. (Pet. Ex. 21).

#### 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

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.

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 For Judgment

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

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

#### Evidence

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

1. Marni Carroll – OneEnergy.

Marni Carroll is the Director of Project Development and outreach for OneEnergy Renewable headquartered in Washington D.C. (Pet. Ex. 3) (“Company” or “OneEnergy Renewable”). Trillium Solar Energy, LLC is a wholly-owned subsidiary of OneEnergy

Renewable. OneEnergy Renewable has developed several solar projects throughout Maryland. (T.15-16), Ms. Carroll submitted a PowerPoint presentation that provided information about the Company, the materials and panels that will be installed, and the methods used for potential site locations. (Pet. Ex 4, (T. 29-32); *see also* Pet. Ex 6).

Ms. Carroll testified that the panels are nontoxic, nonflammable, and do not contain any cadmium. (T. 18). Through an industry standard glare study, she provided evidence that the proposed facility will not cause any glare on surrounding roads and properties. (T. 35-38; *see also* Pet Ex 8.) She further testified that the solar panels are mounted on galvanized steel posts and have an aluminum and steel frame. (T. 19). She noted that the supporting posts are driven into the ground without any cement or permanent impact to the land. *Id.* The land beneath the panels will be planted with pollinator habitat that absorbs runoff and provides the possibility for the production of agricultural products such as honey. (T. 21; *see also* Pet. Ex 5). The panels rotate with the sun and are approximately nine feet tall at their highest point. (T. 18). Once installed, the panels will be remotely monitored throughout the life of the 35 year lease. (T. 20). At the end of the lease, OneEnergy is required to remove all equipment to three feet below the ground and to restore the ground to its previous condition. (T. 23). All of the materials can either be recycled or reused by the solar industry. *Id.* A site plan for the proposed facility showed the area in which the solar panel array will encompass. (Pet. Ex. 1).

Maintenance of the solar panel facility will take place once a quarter or as needed if an issue arises.

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. 10). Mr. Martin prepared

a Schematic Landscape Plan based on information he obtained from the Baltimore County GIS system. (Pet. Ex 2). Mr. Martin provided the Board with a presentation of photographs of the subject area. (Pet. Ex. 11). With regard to landscaping, testimony from David Martin confirmed that Petitioners worked with the Department of Planning and the County's Landscape Architect to develop a landscape plan that satisfies all requirements and provides additional screening to the neighbors that live on the north side of Monkton Road. (T. 145-149; *see also* Pet. Ex 12). Mr. Martin explained that the focus for landscaping is on the northern side of the Property because the southern, western, and eastern sides are all surrounded by natural forests and there are no immediately adjacent residences. (T. 149-50; *see also* Pet. Exs. 1 and 2).

Due to the fact that Monkton Road is a county scenic road, Mr. Martin explained that the Department of Planning asked him to reinforce the existing landscaping and to provide selective views into the Property rather than simply to wall it off with an artificial row of landscaping. (T. 147). Mr. Martin further explained that while many trees and other plants will be added to the site, no trees will be removed as part of this project. (T. 115).

3. Matthew Durette– Mechanical Engineer/Installation of Solar Facilities.

The Petitioners provided the testimony of Matthew Durette, a mechanical engineer with expertise in the installation of solar facilities. Mr. Durette testified that the facility will consist of just under 13 acres of solar panels in a special exception area that is approximately 19 acres in size. (T. 96). Specifically, the facility will consist of: (i) galvanized steel posts driven directly into the ground in a north to south orientation; (ii) an aluminum racking system placed on top of the piles; (iii) photovoltaic solar panels with an antireflective coating that are connected to the racking system; (iv) wiring connecting the panels to an inverter, transformer, and, ultimately, to



external power lines; (v) fencing placed around the facility for security (with no barb wire); and (vi) additional landscaping. (T. 89-93).

With respect to the panels, Mr. Durette explained that the Petitioners are proposing a “single-axis tracker” panel array that is designed to move with (*i.e.*, “track”) the position of the sun to provide maximum exposure of the panels to the sun. (T. 88-89). The panels are three feet by six feet in size, are no taller than nine feet when they are tilted towards the sun, and are constructed of an aluminum frame and a glass top that is designed to minimize glare. (T. 88-90). Mr. Durette testified that there are no toxic chemicals in the solar panels, and there are no chemicals or other substances used to clean the panels. (T. 90). He further explained that the solar panels “self-clean” as rainfall in the region is typically sufficient to wash off any dust and dirt from the panels. (T. 100).

Mr. Durette explained that ground disturbance during construction consisted of the driving of piles to form the foundation of the tracker system, and some initial trenching for underground wiring. (T. 97). He further testified that he did not foresee any noise coming from the motors that operate the panel tracker system. (T. 118).

#### 4. Eric Hadaway: Environmental Regulations

Petitioners provided the testimony of Eric Hadaway, an expert in environmental regulations in Baltimore County employed by Daft McCune Walker. Mr. Hadaway testified that as there is no development history for the Property, there were no delineated environmental resources or recorded buffers on the Property prior to this request for a special exception. (T. 192). Testimony from Eric Hadaway revealed that Petitioners have performed a fully approved wetland and forest stand delineation and a steep and erodible soils analysis, so that if the special exception is approved, the environmental resources will be protected for the first time with

recorded buffers. (T. 192-193; *see* Pet. Exs. 1 and 21). The majority of the buffers are forested, but portions do extend into a cleared area that has been farmed over time. (T. 197-198). Additionally, all components of the solar facility, including the perimeter fence, are outside of the buffers. (T. 199). Mr. Hadaway opined that there will not be “any negative impact on the wetlands and streams on the property.” (T. 202).

5. David Straitman: Real Estate Appraiser

Petitioners provided the testimony of real estate appraiser, David Straitman. Mr. Straitman testified in response to concerns expressed by several Protestants regarding the impact that the proposed solar facility will have on property value. Mr. Straitman presented an economic impact analysis regarding the proposed use generally; a solar facility in Howard County; and (3) examples where homeowners voluntarily put ground mounted solar panels on their properties. *Id.* Based on his economic analysis, Mr. Straitman opined that the proposed use will not have any negative impact on surrounding property values.

6. Mitchell Kellman: Expert Land Planner

Petitioners provided the testimony of Mitchell Kellman, an expert land planner, employed at Daft McCune Walker. Mr. Kellman testified that the proposed facility meets the requirements of BCZR § 502.1, Article 4F of the BCZR, and all legal requirements for obtaining a special exception. (T. 277-278). He testified that, in the Third Council District, the limit of ten (10) solar facilities has not yet been met. (T. 257). Additionally, Mr. Kellman confirmed that the Property is not encumbered by an agricultural preservation easement, an environmental preservation easement, or a rural legacy easement and that the property is not located in a Baltimore County historic district, nor is the property listed on the Baltimore County Final Landmarks List. (T. 258; *see also* Prot. Ex. 11). Additionally, Mr. Kellman confirmed that the aboveground components

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of the solar facility, including solar collector panels, inverters, and similar equipment, will be set back at least 50 feet from the tract boundary. (T. 259). Finally, Mr. Kellman confirmed that no equipment associated with the solar facility will exceed 20 feet in height. (T. 259). Mr. Kellman also opined that the Site Plan complied with the plan requirements in BCC, §33-3-108. (§4F-104.A.9). Mr. Kellman presented a letter from Department of Environmental Protection and Sustainability (“DEPS”) approving the forest stand delineation, wetland delineation and steep slope and erodible soils analysis, delineating forest buffers. (Pet. Ex. 21). Mr. Kellman explained that, in his experience, the Petitioner must first obtain special exception relief before the DEPS will review the plan for the requirements listed in Section 33-3-108(c). Mr. Kellman provided the Board with the Baltimore County Zoning Review checklist which is required to be included in plan submitted for zoning review. (Pet. Ex 20.)

Mr. Kellman 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 a “passive” use, in that there is no impact on utilities, county structures, parks, schools. There is no density associated with the use nor is any traffic associated with the use. Nor is there any effects like dust smell, or noise.

As to BCZR, §502.1.F, given that the maximum height of the solar panels when tilted toward the sun is eleven feet, and the facility will be installed in the clear field of the Property away from neighboring residences as shown on Pet. Ex. 1, Mr. Kellman testified that the project would not interfere with adequate light or air or cause congestion.

Mr. Kellman testified that that the Baltimore County Council allowed for solar facility by Special Exception in the RC 2 zone and, therefore, is consistent with the spirit and intent of the zone, and noted the possibility of honey production on the site.

Relying on Mr. Hadaway's testimony as the basis for his opinion, Mr. Kellman noted that the proposed project was consistent with 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. Kellman deferred to.

In summary, Kellman opined that there are no adverse effects from this use above and beyond those inherent in solar facilities and that it would not have any greater impact in this location versus any other location on the RC2 zone.

Protestants' Case

The Protestants had several witnesses who testified in the merits of the case:

1. Timothy Edwards.

Protestants offered the testimony of Timothy Edwards, who owns 1132 Monkton Road, directly across from the entrance to the proposed solar facility. Mr. Edwards, testified that he had lived on the property for most of his life and that the house on the property had been standing since 1852. Mr. Edwards expressed his concerns regarding the impact that the proposed solar facility would have on the scenic view along Monkton Road, and more obviously, the view from his house onto the proposed solar field. Using photo simulations provided by OneEnergy, Mr. Edwards testified that he would like to see some additional landscaping between his property and the proposed facility to try to block his view to the greatest extent possible. (Prot. Ex 7). Mr. Edwards stated that he was pleased that a housing development was not being built on the property, but did not look forward to having to look at the solar field for the next 30 to 35 years.

2. Nicholas Federici.

Protestants provided the testimony of Nicholas Federici, who resides at 1200 Monkton Road. Mr. Federici owns a home remodeling business and provided lay testimony regarding his

concerns with run-off and storm water management. Mr. Federici testified that in his approximation that the proposed solar array would create over 160,000 square feet of new surface area. He further commented that he believed that such a surface area would cause serious problems with storm water management during sustained rain falls. Mr. Federici also shared his concerns that the proposed landscape plan was insufficient to properly screen the solar field from the road.

3. Wendy McIver.

Protestants presented the testimony of Wendy McIver, who lives 23 Manor Brook Road, approximately a mile and a half from the proposed solar facility and has lived in the area for over 39 years. Ms. McIver is the secretary of the Sparks-Glencoe Community Planning Council and is presently a Baltimore County Historic Landmark Commissioner. Ms. McIver testified as to her concerns with the possible adverse effects the proposed solar facility would have on the many surrounding historical sites. Ms. McIver presented an exhibit to the Board, outlining the many historical sites in the area. (Prot. Ex 11).

4. Lynne Jones.

Protestants provided the testimony of Lynne Jones, who 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"). (Prot. Ex 12 -13). Sparks-Glencoe Council, a party to this case, 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 proposed solar facility is within these boundaries. (Prot. Ex 14). 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. 13).

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 Bill 37-17 is not strong enough with regard to the issuance of a bond for maintenance and dismantling of the facility. Ms. Jones offered a body of exhibits emphasizing the agricultural strengths on this site within the context of the locality. These exhibits included documents, photographs, Master Plan 2020 excerpts and maps of the Agricultural Priority Preservation Areas.

5. Kathleen Pieper.

Protestants provided the testimony of Kathleen Pieper, who lives at 4310 Beckeysville Rd., Hampstead, MD, not in close proximity to the proposed site. Ms. Pieper is the president of the North County Community Group and has been involved as a community activist regarding the issue of solar farms in northern Baltimore county, but testified as a concerned citizen in this proceeding. She has lived in the vicinity for 30 years.

Ms. Pieper, who has been involved in the farming industry in the past, testified as to her concerns regarding the decreasing amount of farmland in Baltimore County which affects the livelihood of those who farm for a living. Ms. Pieper expressed a concern that the proposed special exception area is composed of prime and productive soils, and that solar facilities in general remove available farmland and crop production. She noted that the area where the solar array is proposed consists of Glenelg loam soil types, making it some of the finest prime and

productive farmland. (Prot. Ex. 41). Additionally, Ms. Piper presented evidence illustrating the amount of acreage used for solar arrays in other solar projects in the county and pointed out that it was possible to utilize less acreage and still produced two megawatts of energy. (Prot. Ex 43). Ms. Pieper offered into evidence the Maryland Department of the Environment's storm water guidelines for solar facilities and expressed her concerns that she felt that insufficient evidence had been presented regarding storm water management for the proposed site. (Prot. Ex. 45). Finally, Ms. Pieper provided examples of alternative locations where solar facilities could be located on land that was not prime and productive farmland. (Prot. Exs. 44a-d).

6. Ruth Masacri.

The Protestants presented the testimony of Ruth Mascari, who resides at 17210 Whitely Road, approximately, two miles from the proposed solar facility. Ms. Mascari testified that she has been active in the northern Baltimore county community for the past 45 years. She noted that she serves on Baltimore County's Landmarks Preservation Commission with Mr. Kellman. She expressed her concerns with the project and its impact on the "My Lady's Manor" national register historic district, which is near the proposed site. She is also concerned with the proposed site being near White Acres House, another local landmark. In addition to concerns regarding landmark preservation, Ms. Mascari is also concerned with whether the proposed solar facility will be properly screened from view along Monkton Road, a scenic road.

7. Adam Brown.

Protestants offered the testimony of Adam Brown, who resides at 1146 Monkton Road, where he has lived for 20 years. Mr. Brown provided photographs of the view from Monkton Road looking onto the proposed site. Mr. Brown testified to his displeasure with the speed in which a decision was being reached regarding the proposed project. He expressed his opinion

that he didn't believe farmland was the best place for such facilities and suggested that a landfill may be a more appropriate location. Additionally, Mr. Brown expressed his concern that the presence of the proposed solar facility may have a detrimental effect on surrounding property values. Finally, Mr. Brown expressed his concern that with the rapid development of technology, the technology on the proposed site may in time prove obsolete, leading to the projects abandonment.

8. Greg Volpitta.

Protestant provided the testimony of Greg Volpitta, who resides at 1220 Monkton Road, across the road from where the proposed solar facility will be located. He has lived at that location for 32 years. Mr. Volpitta expressed his concerns about being able to see the proposed facility when the leaves were off the trees in winter months. He also commented that the area was extremely quiet and that noise carried across the field. He worries that the sound of the inverter, even if it is as quiet as a hairdryer, may be heard from his home. Additionally, Mr. Volpitta shared the concerns of other neighbors regarding what effect the proposed site may have on surrounding property values. Finally, Mr. Volpitta expressed his preference that any new power line coming from the proposed site be run underground rather than using an above ground new utility pole, to connect with the line over Monkton Road.

9. Paul Colison.

The Protestants presented the testimony of Paul Colison, who resides at 1152 Monkton Road. Mr. Colison has lived at this address for 32 years. Mr. Colison testified that he is concerned that the present vegetation along Monkton Road is too thin to shield the proposed facility from view. He also expressed his concerns about the possible increased level of run off created by the proposed project. He explained that he currently has problems with water on his



property and fears that the proposed project would exacerbate this problem. Mr. Colison also expressed concerns about how the proposed project may affect local wildlife and shared in his neighbors' concerns regarding possible effects to surrounding real estate values.

#### 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. Martin, Mr. Kellman, Mr. Durette and Mr. Hadaway 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, Ms. Carroll and Mr. Durette 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, Ms. Carroll confirmed that there are no flammable materials used in this solar facility. Mr. Durette testified that it was unlikely for there to be a fire at the facility. Mr. Kellman testified that the Hereford Volunteer Fire company was in close proximity to the site. (T. 273; BCZR, §502.1.C.) As with the lack of traffic, Ms. Carroll and Mr.

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Kellman explained that this use does not generate people and therefore it would not tend to overcrowd the land or cause an undue concentration of population. (T. 272; BCZR, §502.1.D.) Additionally, Ms. Carroll, Mr. Martin and Mr. Kellman confirmed that this use does not interfere with schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements. (BCZR, §502.1.E.)

Mr. Durette confirmed that the height of the facility will be nine 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 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 within 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 is consistent 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.

Ms. Carroll and Mr. Hadaway 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. Hadaway testified that the DEPS will determine whether any further storm water management retention measures are needed. (T.209)

Finally, Mr. Hadaway 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.

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. Durette testified that the 19 acre special exception area and 13 acre solar panel array is the minimum acreage needed to produce approximately 2 megawatts AC of electricity. (BCZR, §4F-102.B.1.) The Protestants, through the testimony of Ms. Pieper, urged us to consider special exception areas and electricity generated in other recently approved solar facility cases and requested that the special exception area here should be restricted to 13 acres.

While Ms. Pieper's testimony was admitted as evidence at the request of Protestants, since this case is heard *de novo*, the ALJ's decisions in prior cases are factually specific to those cases is not part of the record and his analysis is not binding on the Board. Based on the evidence presented to the Board through the expert testimony of Mr. Durette, we find that there was no compelling evidence by the Protestants here, which contradicts the Petitioner's plan that 19 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. Kellman 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. Kellman 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, Ms. Carroll and Mr. Kellman made clear that the facility at its highest peak will not exceed 9 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.

As testified to by Mr. Martin, the Petitioners will provide a landscaping buffer around the perimeter of the Property in areas where the solar facility may be visible from an adjacent residential property or public street. Due to Monkton Road's designation as a Baltimore County scenic route, views from the road will be screened in accordance with the Baltimore County Landscape Manual to the satisfaction of the County's Department of Planning and Landscape Architect. (Pet. Ex. 11). A schematic Landscaping Plan in support of its Petition was reviewed by the County. (Pet. Ex. 12). The Site Plan proposes a 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 Petitioners'

representative, Marni Carroll testified regarding the findings of a glare study using the a ForgeSolar software tool utilized in the industry which concluded that solar facility was designed to minimize glare and that no glare would interfere with traffic or create a safety hazard. (Pet. Ex. 8). The Protestants did not present an expert to contradict Ms. Carroll. The glare study indicated that there would be no glare produced by the solar panels here. Thus, we find that this requirement is satisfied.

Finally, the Site Plan must comply with BCC, §33-3-108. (BCZR, §4F-104.A.9). The Protestants argued in their Motion for Judgment that the Petition should be denied 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 DEPS (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 DEPS for approval must also contain the information listed in Subsection (c).

In our view, the specific items listed in Subsection (c) must be considered by DEPS when it reviews and approves the Site Plan under that Section, not this Board. The testimony of Mr. Kellman was that DEPS’ policy is that it 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 DEPS is “responsible for enforcing the provisions of [Title 33]” and the Director of DEPS “may adopt policies and regulations as necessary to implement the provisions of [Title 33].”

Given the express wording of Section 33-3-108 that DEPS shall approve the Site Plan, and that DEPS 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** 17<sup>th</sup> day of May, 2019, by the Board of Appeals of Baltimore County,

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

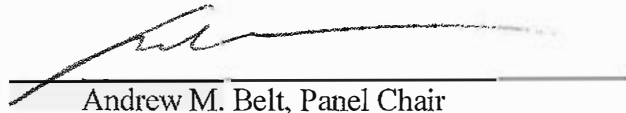
1. Petitioners shall submit for approval by Baltimore County a landscape plan for the Property demonstrating appropriate screening and vegetation is provided along Middletown Rd, a scenic route, as required by the Landscape Manual and as set forth in the Zoning Advisory Committee Comments dated November 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, 24-hour telephone

number, 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.

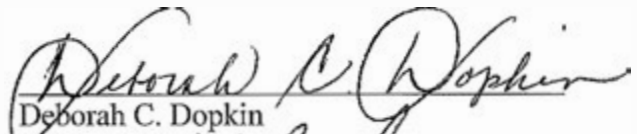
Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**



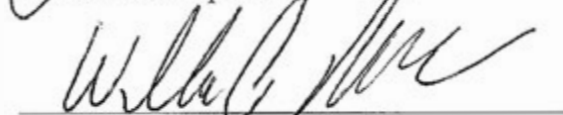
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Andrew M. Belt, Panel Chair



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Deborah C. Dopkin



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William A. McComas



## Board of Appeals of Baltimore County

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May 16, 2019

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RE: *In the Matter of: HHK Farms, LLC – Legal Owner*  
*OneEnergy Development, LLC – Lessee*  
Case No.: 18-030-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



In Re: HHK Farms, LLC – Legal Owner  
OneEnergy Development, LLC – Lessee  
18-030-X

Distribution List

May 16, 2019

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