

0IN RE: PETITIONS FOR SPECIAL HEARING *
AND SPECIAL EXCEPTION

W side of Hanover Road; 1,885 feet N *

of the c/l of Butler Road

4th Election District *

4th Councilmanic District

(Hanover Road) *

BEFORE THE

OFFICE OF

ADMINISTRATIVE HEARINGS

FOR BALTIMORE COUNTY

William R. Rosenberger, *Legal Owner* *

Baltimore Gas & Electric, *Contract Lessee*

Petitioners *

Case No. 2012-0187-SPHX

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings for consideration of Petitions for Special Hearing and Special Exception filed by William R. Rosenberger, Legal Owner, and Baltimore Gas & Electric, Contract Lessee, (the “Petitioners”). The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) as follows:

- Map 39 Parcel 245 - to abandon the Special Exception approval previously provided via Case No. 1971-134-X contingent upon the utilization, on this subject property, of the Special Exception for a public utility use which is filed concurrently with this Petition for Special Hearing; and
- In the event that BGE fails to close on the sale of the property from Rosenberger to BGE, the existing Special Exception (Case No. 1971-134-X) will continue.

In addition, Petitioners request Special Exception relief for a public utility use per B.C.Z.R. Section 1A01.2.C.17. The subject property and requested relief are more fully described on the site plan which was marked and accepted into evidence as Petitioners’ Exhibit 3.

Appearing at the public hearing in support of the requests were Carol Dodson with BGE, Brad Davis and Eric Jacobson with Constellation Energy, Zacharia Y. Fisch and R. Andrew Berlett, Jr., with FSH, Associates, the professional engineering company who prepared the site plan, and William P. Monk with Morris & Ritchie Associates, Inc. G. Scott Barheight, Esquire and Jennifer R. Busse, Esquire, with Whiteford, Taylor & Preston, LLP, appeared as counsel and represented the Petitioners. A number of interested citizens attended the hearing, including: Michael L. Snyder, William R. Rosenberger, S. Glenn Elseroad, Barb Ambrose, Teresa Moore, and George Harman. In addition, the file contains a letter of support, dated March 1, 2012, from the Valleys Planning Council (VPC).

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. A comment was received from the Department of Environmental Protection and Sustainability (DEPS) dated March 14, 2012, which states that the development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120 of the Baltimore County Code (B.C.C.) as well as comply with Forest Conservation Regulations (Sections 33-6-101 through 33-6-122) of the B.C.C. A comment was also received from the Department of Planning on March 16, 2012, supporting the zoning relief, and that Department also opined that the relief will not be detrimental to the health, safety or general welfare of the surrounding community.

The first witness to testify was Carol Dodson, an asset manager for BGE. Ms. Dodson explained that her job duties as concerns the Hanover Pike project would include ensuring that BGE addresses and meets all County and State standards and regulations with respect to the project. Ms. Dodson stated that the Hanover Pike project was essential, in that it would ensure the reliability of the electricity grid for central Maryland.

Ms. Dodson testified that the substation proposed in this case would transform the incoming 500 KV electricity to 230 KV, and from there the electrical service would be provided to nearby communities. Ms. Dodson emphasized that the BGE substation will not be manned by employees, but would be remotely monitored, and she estimated that BGE will visit once a month for inspections, and that in no event would BGE need to visit the site more than four times a month on an ongoing basis. Ms. Dodson emphasized that there would be locked gates around the equipment and transformer storage area, and that fencing would also contain barbed wire. She also indicated that there would be two 250-watt lights on opposite sides of the shelter structure, which would be illuminated at all times.

The next witness to testify was Zacharia Y. Fisch, a professional engineer with the firm of FSH, Associates. Mr. Fisch's Curriculum Vitae was admitted as Petitioners' Exhibit 4, and the witness was accepted as an expert witness in Baltimore County land development and zoning regulations. Mr. Fisch explained that he prepared the redlined site plan which was marked as Petitioners' Exhibit 3, and that he also created the environmental constraints map admitted as Petitioners' Exhibit 2. Mr. Fisch's firm also performed a wetland delineation and forest buffer analysis, both of which were accepted by the Baltimore County Department of Environmental Protection and Sustainability (DEPS). Mr. Fisch testified that there were two access points to the Hanover substation project, and he opined that there were more than adequate site lines and distances with respect to these points of ingress and egress.

The final portion of Mr. Fisch's testimony concerned a series of photographs he took of the site, from various vantage points. *See* Exhibit 5. Mr. Fisch then introduced a series of photographs showing various vantage points of the site as it exists now, and contrasted those with a corresponding series of photographs with the utility towers superimposed on the

photograph. The witness explained that the photographs were obviously not 100% accurate in all respects, but were intended to be illustrative of how the utility towers would look when the project was complete. In all instances, Mr. Fisch stressed that due to the topography of the site, the equipment building housing the generators and other electrical circuitry would not be visible from any of the vantage points. *See Petitioners' Exhibits 6 through 9.*

The final witness was William P. Monk, a project manager and site planner with Morris & Ritchie Associates, Inc. Mr. Monk's CV was marked and admitted as Petitioners' Exhibit 10, and he was accepted as an expert in the Baltimore County land development process, including the development and zoning regulations applicable thereto. Mr. Monk indicated that he was familiar with the applicable legal standards for the grant of special exception relief, as those are set forth in B.C.Z.R. § 502.1, and interpreted in the landmark case of *Schultz v. Pritts*, 291 Md. 1 (1981). Mr. Monk opined that the BGE Hanover project met all of the special exception requirements set forth in that regulation, as well as those in B.C.Z.R. § 411, pertaining to public utility uses. He emphasized that the transformers and electrical equipment would be "tucked in" to the middle of the 180 acre site, making it ideal for the proposed use. Given that no dwellings or water and sewer connections are proposed for the project, Mr. Monk also opined that the site would obviously not cause overcrowding or traffic congestion, and he also noted that the safety and security measures taken by BGE would help ensure that the project was safe and would not harm the health and welfare of the surrounding community.

Several community members appeared at the hearing, and in general indicated they were supportive of the project. Indeed, the file contains a letter of support from the Valleys Planning Council, signed by its President, Teresa Moore. Several speakers, including George Harman, Mike Snyder, and S. Glenn Elseroad, also voiced certain concerns about the appearance of the

utility towers, and they had particular concerns about the Glyndon Gardens operation which they believe was being conducted in violation of applicable zoning laws. The community members were also adamant that the development activity in this case be restricted to the cross-hatched area shown on Exhibit 3 (identified as “Proposed Equipment Area”), and that BGE not undertake any other activities on the balance of the 180 acre site that were not compatible with the RC 2 zoning. The community’s concerns were later articulated and summarized in a March 21, 2012, letter from S. Glenn Elseroad, a copy of which will be included with the case file.

Special Exception Standards

Special exception uses are presumptively valid and consistent with the comprehensive zoning plan, People’s Counsel v. Loyola College, 406 Md. 54, 77 n. 23 (2008), and no evidence was offered here to rebut the presumption. Petitioners’ expert, Bill Monk, testified that the project would satisfy Section 502.1 of the B.C.Z.R., and I concur, based upon the same factors Mr. Monk recited in his testimony. Most importantly, the proposed equipment area is a small portion of the overall tract, and is ideally situated in the center of the parcels. While utility infrastructure is certainly not aesthetically pleasing, the topographical features at this site assist in minimizing the impacts – visual and otherwise – upon the community.

One important caveat concerns the boundaries of the special exception area. Petitioners’ redlined site plan proposed that the entire 180 +/- acre tract be defined as the special exception area. After reviewing the plans and evidence, I believe that the special exception area should be restricted to that portion of the tract labeled “Proposed Equipment Area,” as shown on Exhibit 3. This will allow BGE to conduct the necessary site improvements for the substation, while at the same time providing comfort to the community that any uses of the balance of the site must comply with RC 2 zoning. Of course, and as mentioned at the hearing, BGE will be permitted to

construct or improve outside the special exception area any roadways, drains, and culverts that are necessary to service or access the “equipment area.”

Special Hearing

Petitioners have also requested special hearing relief, concerning the proposed abandonment of the special exception use (veterinary office – Case No. 1971-0134-X), currently existing on the site. This request is uncontroversial, and the contingent nature of the abandonment – as articulated on the lower right hand corner of Petitioners’ Exhibit 3 – is also appropriate and consistent with Baltimore County practice.

Community Concerns

As noted above, community members are concerned about the Glyndon Garden operation, and they presented a deed whereby the garden center’s predecessor sold certain lands to BGE, while reserving certain rights to the grantor (including the garden center, as grantor’s successor in interest) to “farm and use the same [i.e., the land] in any other manner.” Citizen’s Exhibit 1. As I indicated at the hearing, Maryland law precludes the OAH from construing private legal instruments, and I will therefore not consider the deed or its import. *Blakehurst v. Baltimore County*, 146 Md. App. 509, 520 (2002).

To the extent the garden center is operating in violation of the B.C.Z.R., that is a matter for the code enforcement bureau of the Department of Permits, Approvals, and Inspections. As I noted at the hearing, that agency will accept complaints via its web page, and the complainant can even remain anonymous.

The community was also concerned about the appearance of the large utility towers, which will apparently be 150 to 180 feet tall, and suggested that certain plantings be required to buffer the view. While this may be a good suggestion, I am concerned that I lack the authority to

impose such a requirement. In *PEPCO v. Montgomery Co.*, 80 Md. App. 107, 118 (1989), the Court of Special Appeals ruled that a County cannot impose conditions upon the construction of electric utility lines, and in so ruling held as follows:

“Once the PSC has by order authorized the erection of power lines along a designated route, little more remains for a local government to do except perform the ministerial duty of issuing the necessary building permits.”

Id. at 118.

In any event, perhaps this is a matter that can be revisited at the Hearing Officer’s Hearing (HOH), when BGE will seek approval of a Development Plan for the site. The plans and details will be more developed at that phase, and will allow for a more thoughtful and in-depth consideration of this issue.

Pursuant to the advertisement, posting of the property, and public hearing, and after considering the testimony and evidence offered, I find that Petitioners’ Special Exception and Special Hearing requests should be granted, subject to the comments and conditions which follow.

THEREFORE, IT IS ORDERED this 23rd day of March, 2012, by this Administrative Law Judge, that Petitioners’ request for Special Hearing filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) as follows:

- Map 39 Parcel 245 - to abandon the special exception approval previously provided via Case No. 1971-134-X contingent upon the utilization, on this subject property, of the special exception for a public utility use which is filed concurrently with this Petition for Special Hearing; and
- In the event that BGE fails to close on the sale of the property from Rosenberger to BGE, the existing Special Exception (Case No. 1971-134-X) will continue,

be and is hereby GRANTED; and

IT IS FURTHER ORDERED that Petitioners' Special Exception request for a public utility use per B.C.Z.R. Section 1A01.2.C.17, be and is hereby GRANTED; and

IT IS FURTHER ORDERED that the area for the special exception public utility use shall be restricted to the crosshatched area depicted on Petitioners' Exhibit 3, which is labeled "Proposed Equipment Area".

The relief granted herein shall be subject to the following:

1. Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/dlw