

IN RE: PETITIONS FOR SPECIAL HEARING *	BEFORE THE
AND SPECIAL EXCEPTION	
(15700 Hanover Pike) *	OFFICE OF
4 th Election District	
3 rd Council District *	ADMINISTRATIVE HEARINGS
Donald E. & Kathleen F. Lippy	
<i>Legal Owners</i> *	FOR BALTIMORE COUNTY
Petitioners *	Case No. 2016-0335-SPHX
* * * * *	

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Special Exception filed on behalf of Donald E. & Kathleen F. Lippy, legal owners (“Petitioners”). The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to approve the proposed solar panel array field as a permitted accessory use or structure to the farm. A Petition for Special Exception was filed to approve the proposed solar panel array field as a “public utility use.”

Appearing at the public hearing in support of the requests was Donald E. Lippy, surveyor John Lemmerman and Ken Donithan. Lawrence E. Schmidt, Esq. represented the Petitioners. Several protestants, represented by Michael McCann, Esq., opposed the requests. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR).

Petitioners presented testimony from surveyor John Lemmerman, who described the project and introduced the site plan (Ex. 2A) he prepared for the case. The witness testified the parcel is approximately 6.5 acres and is zoned R.C.-2. He stated landscaping and fencing would be provided to screen the solar panels, and noted Petitioners would comply with the County’s

Scenic Route guidelines.

Ken Donithan is the owner of Earth and Air Technologies, and he testified that solar projects comprise the vast majority of his business. He has an electrical engineering degree from Johns Hopkins University and is certified as a “power engineer.” Mr. Donithan testified he has designed and constructed approximately 100 solar farms, and he believes the subject property is ideal given the site is open, relatively flat and adjacent to high power electric lines on Hanover Pike. The witness stated approximately 6,500 panels would be installed at the site--which would be an unmanned facility--which would generate two (2) megawatts of electricity. Mr. Donithan opined the use would not be detrimental to the community, and he also stated the panels would meet all fire protection codes and the solar farm would not generate any noise which could be heard off site.

In response to questions on cross-examination, the witness stated approximately 60% of the electricity generated would be used by the Lippy farm, while 40% would go into the electric grid and sold to other customers. Given the size and scope of the facility, he confirmed the project would be regulated by the Maryland Public Service Commission.

The final witness in Petitioners’ case was Donald Lippy, who has been farming in Baltimore County for over 50 years. Mr. Lippy testified his family owns approximately 2,600 acres of land in the County, 2,200 of which are protected by agricultural easements. The witness stated his children would like to continue farming, but face increasing economic pressures with the rapidly fluctuating prices of crops. He testified the solar farm would generate steady income that would greatly assist his farming operations.

Several community members testified and expressed concern with the project. In addition to noting that proposed legislation concerning solar farms was pending before the County Council,

neighbors stated that numerous applications have been made recently to construct solar farms in agricultural zones. The neighbors believe the solar farm would be a visual blight that would be detrimental to the character of the rural area. In addition, they testified that using prime and productive agricultural land for solar farms would jeopardize the viability of area farms.

One threshold issue concerns whether a “solar farm” is permitted in the R.C.-2 zone. The Regulations permit by special exception “public utility uses.” B.C.Z.R. §1A01.2.C.18. The term “public utility” is not defined in the Regulations. The Webster’s Third New International Dictionary defines the term as “a business organization deemed by law to be vested with public interest usually because of monopoly privileges and so subject to public regulation.” Here, Mr. Donithan confirmed this project would be regulated by the Maryland Public Service Commission, which regulates public utility companies. As such, I believe the solar farm would qualify as a “public utility use” permitted in the zone by special exception.

SPECIAL EXCEPTION

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. Schultz v. Pritts, 291 Md. 1 (1981). The Schultz standard was revisited in People’s Counsel v. Loyola College, 406 Md. 54 (2008), where the court emphasized that a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use.

Maryland courts recognize most uses for which a special exception is required are regarded as “potentially troublesome because of noise, traffic, congestion....” Montgomery County v. Butler, 417 Md. 271, 297 (2010). The primary concern identified by the community was aesthetics or the loss of a rural feel, which I believe would be the case for any solar farm in an R.C.-2 zone.

Thus that impact is “inherent” in the use. To warrant the denial of a special exception, the opponents must show that the use, at the particular location proposed, would have “non-inherent adverse effects.” Id. at 282. In this case, I do not believe the Protestants made such a showing.

A discussion was held at the hearing concerning the evidentiary burden in a special exception case. I believe Petitioners have an initial burden to establish a *prima facie* case, demonstrating they “conform to all applicable requirements.” Loyola College, 406 Md. at 109. Thereafter, protestants must rebut the evidence presented by Petitioners and establish that the adverse impacts at this location would be greater than those inherent in the use. Id.; Attar v. DMS Tollgate, LLC, 2015 WL 9461754 (unreported, Court of Special Appeals); Dellinger v. Lincoln County, 789 S.E.2d 21, 30 (N.C. 2016)(reviewing special exception burden of proof in case involving solar farm).

Based on the testimony of Petitioners’ witnesses (as summarized above), I believe they have stated a *prima facie* special exception case, especially since they are aided by the presumption discussed in Schultz. In rebuttal, Protestants focused upon the aesthetic or visual impact of the use, which I believe is “inherent” in “public utilities” generally and solar farms specifically. Protestants argue the impact would be greater here due to the scenic route designation, but I do not believe such a designation would cause the panels to have any non-inherent impacts. The scenic route guidelines do not prohibit development; instead they attempt to ensure that new buildings and projects are constructed in such a manner so as to reduce to the extent possible their impact upon the scenic view or route. Here, Petitioners’ witnesses testified there will be a significant buffer area with fencing and landscaping, which I believe is consistent with the scenic view requirements set forth in the CMDP.

In granting a special exception in the R.C.-2 zone, the ALJ must also find “that the use

would not be detrimental to the primary agricultural uses in the vicinity.” B.C.Z.R. §1A01.2.C. Testimony addressing this point was provided by Donald Lippy, who is arguably one of the best known and well regarded farmers in Baltimore County. In fact, it is the Lippy family that owns and conducts most of the “agricultural uses in the vicinity.” Mr. Lippy explained the solar farm would provide a reliable source of income that would help to subsidize his farming operations that face enormous economic pressures in the current climate. The solar farm would occupy only six (6) acres of agricultural land, but would yield significant benefits that would allow Mr. Lippy’s children to continue farming in this area.

I understand Protestants’ concerns about the large number of solar farms proposed in this area and throughout the County generally. But I am required to focus upon the facts of this case, and cannot consider the impact of other cases that may or may not be filed in the future seeking similar approvals. Such issues will of course be considered by the County Council as it determines whether or not to enact legislation governing solar farms.

SPECIAL HEARING

The petition for special hearing seeks approval of the solar array as accessory to the farm use. As indicated at the hearing, while solar panels are frequently located in rural agricultural settings, I do not believe the practice is so widespread that it can be said they are “customarily” found on farms. B.C.Z.R. §101.1 (definition of “accessory use or structure”). In addition, the proposed solar panels will occupy nearly all of the parcel on which they would be situated, as shown on Petitioners’ Exhibit 2B. There would be no farming operations on the parcel if the solar panels were installed, and thus there would not be a principal farm use to which the panels would be “accessory.” The principal--and only--use of the property would be a solar farm. As

such, I believe the petition for special hearing must be denied.

THEREFORE, IT IS ORDERED this 18th day of October 2016, by this Administrative Law Judge, that the Petition for Special Hearing to approve the proposed solar panel array field as a permitted accessory use or structure to the farm, be and is hereby DENIED.

IT IS FURTHER ORDERED that the Petition for Special Exception to approve the proposed solar panel array field as a “public utility use” be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this 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, Petitioners would be required to return the subject property to its original condition.
2. Prior to issuance of permits Petitioners must submit for approval by the Baltimore County landscape architect a landscape plan demonstrating the “solar farm” will be adequately screened from Hanover Pike consistent with the Scenic View guidelines in the CMDP.
3. No signage or lighting shall be permitted.
4. If the solar farm is not in continuous use and operation for a period of one (1) year or more, it shall be removed at the owners’ or operator’s sole expense. Should the owners or operators fail to do so, Baltimore County may engage a contractor to perform the work, and all costs and expenses associated therewith shall be a lien on the property and collected in the same manner as real estate taxes.
5. The solar farm shall be enclosed by perimeter fencing to prevent unauthorized access to the site and screen the view from off-site.
6. All power lines at the site, to the extent practicable, shall be placed underground.

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/sln