



AGENDA

County Commissioners' Hearing Room

Wednesday
May 11, 2022
6:00 p.m.

Members of the public are welcome to attend meetings in person or listen to the meeting via the audio-only phone number and conference identification number listed below.

1. Dial **1-872-239-8359**
2. Enter Conference ID: **371 717 982#**

Members of the public are asked to mute their phones/devices, until the Commission Chair opens the floor for comment.

Minutes

January 25, 2022

Applications

Zoning Text Amendment to amend Article VII, *Special Exceptions, Section 7, Special Exceptions, §57.25, Solar energy systems, utility scale*, on farms in AZD and RCD, sub-section j., in order to clarify language that relates to the area of permitted solar arrays and referred to as “area of use” and to clarify the limitations set forth for adjacent properties.

General Discussion

Update on Comprehensive Rezoning Update process

Adjourn

DRAFT

Kent County Agricultural Advisory Commission Meeting Summary

The Kent County Agricultural Advisory Commission met on Tuesday, January 25, 2022, in the County Commissioners' Hearing Room at 400 High Street, Chestertown, Maryland, with the following members in attendance: Jennifer Debnam, Chair; John "Buddy" Cahall; Sean Jones; Catherine Abramavage, Richard Winters, and Valerie Mason. Also present were William Mackey, Director; Carla Gerber, Deputy Director; and Michael Pelletier, Clerk.

The meeting was called to order at 5:07 p.m.

APPLICATIONS

Resolution 2021-18, Resolution to Introduce a Text Amendment to Revise Chapter 222, Zoning, to Remove the Requirement Related to the Maximum Percentage of Property in Lots (10% Rule) from the Agricultural Zoning District (AZD).

Ms. Gerber informed the members that the 10 percent rule related to the maximum percentage of a property that can be subdivided into lots in the AZD, requiring 90 percent of the farm be left intact to protect the agricultural use of the property.

The benefits for eliminating the rule would be that it made it easier for farms to diversify and try new approaches for new farmers to establish enterprises and that protecting farm size is not the only approach to preserve the agricultural character of the County.

The Commission was also informed that there are examples that demonstrate how this rule made it difficult for farms that were split by roads or other features, and the property owners were unable to subdivide properties and sell them pursuant to the rule.

The members concerned about fragmentation of the AZD. They were concerned that the elimination of the 10 percent rule would result in splitting agricultural properties into large, non-agricultural lots.

Identified problems that could arise are that some commercial property owners or out of state property owners could purchase subdivided parcels to use as a second home or other non-agricultural use, which could have an effect on the agricultural character and economic development of the County. Another concern is the number of small "farmettes" that could result should this rule be eliminated.

Mr. Winters added that while living in New Jersey, he saw the deterioration of agricultural lands over the course of time and its impact on the State based on policies that allowed large-lot subdivisions.

Mr. Jones made a motion for the Commission to issue a finding that the Commission does not recommend elimination of the 10 percent rule but would recommend that the County Commissioners adopt specific waiver exceptions on a case-by-case basis. Jennifer Debnam, Chair, John "Buddy" Cahall, Sean Jones, Catherine Abramavage, and Richard Winters voted in favor of the motion and Valerie Mason was opposed. The motion passed.

DRAFT

Resolution 2021-19, Resolution to Introduce a Text Amendment to Revise Chapter 222, Zoning, to Amend Setbacks for Certain Animal Related Uses from 600 Feet and 400 Feet to 200 Feet in AZD.

Ms. Gerber informed the members that the proposed text amendment seeks to reduce the setback range from 600 or 400 feet to 200 feet related to animal housing, feeding or waste management structures as a means of simplifying and standardizing the regulations concerning animal husbandry. The rule would not apply to farms adjacent to other non-agricultural districts so the rule would only effect farms adjacent to other farms in the AZD.

Mr. Cahill made a motion for the Commission to issue a favorable recommendation to the County Commissioners on the legislation as proposed. All members were in favor and the motion passed.

Kent County Comprehensive Rezoning Process

Mr. Mackey discussed the anticipated timeline for the Comprehensive Rezoning process. Due to staffing shortages; the Comprehensive Rezoning Task Force meetings have been suspended until March, at which time the situation will be re-evaluated based on whether staffing vacancies have been filled.

ADJOURN

There being no further business, the meeting adjourned at 6:10 p.m.

Jennifer Debnam, Chair

/s/Michael Pelletier
Michael Pelletier, Clerk



TO: Kent County Agricultural Advisory Commission
FROM: Bill Mackey, AICP, Director
MEETING: Wednesday, May 11, 2022
SUBJECT: *Solar Energy System, utility scale* on farms in AZD and RCD – Clarification of language

Executive Summary

Request by Applicant

The applicant is the Department of Planning, Housing, and Zoning, per the request of the Board of Appeals. The request is to provide clarification of existing language in the Land Use Ordinance related to the special exception use *Solar Energy System, utility scale* on farms in AZD and RCD, specifically related to the “area of use” and the adjacent properties limitations set forth in Article VII, Section 7, §57.25 j. (LUO, p. 428). A copy of the signed decision by the Board of Appeals is attached for the Planning Commission’s reference.

Applicable Law

The Code of Public Laws in Chapter 172 establishes the Agricultural Advisory Commission, whose function is to provide advice to the Planning Commission and to the Board of County Commissioners concerning any proposals and zoning changes coming before them affecting agriculture in Kent County.

Summary of Staff Report

The proposed amendment would clarify language that the Board of Appeals found unclear while reviewing a recent special exception for a *Solar Energy System, utility scale*. The Board of Appeals denied the request, suggesting that the Department of Planning, Housing, and Zoning put forward a zoning text amendment.

Staff proposes the following amendment to the LUO to clarify the area of use and property adjacency:

- j. The area of use **of any Solar Energy System, utility scale** may not exceed 5 acres onsite. Adjacent properties shall not aggregate solar collection panels **by erecting solar panels in close proximity to each** other to achieve an area exceeding 5 acres.

The staff proposal relies on the existing definition in the LUO to limit the area of use to “Any device or combination of devices or elements which rely upon direct sunlight as an energy source, including but not limited to any substance or device which collects sunlight for generating energy primarily for use off-site...” This would include only the solar array panels and inverters, not the fenced area or landscaping.

The legal representative of the recent solar array applicant submitted a letter with language suggestions that are much more specific and detailed in order to address the comments made by the Board of Appeals, which is attached for your information.

Recommendation

Staff recommends sending a favorable recommendation to the Planning Commission and the County Commissioners to amend the text in order to clarify the Solar Energy System requirements. The AAC may want to consider recommending the staff proposal, applicant’s proposal, or some other text.

PRELIMINARY STAFF REPORT

TO: Kent County Agricultural Advisory Commission

SUBJECT: *Solar Energy System, utility scale* on farms in AZD and RCD – Clarification of language

Zoning Text Amendment to amend Article VII, *Special Exceptions*, Section 7, *Special Exceptions*, §57.25, *Solar energy systems, utility scale*, on farms in AZD and RCD, subsection j., to clarify language that relates to the area of permitted solar arrays and referred to as “area of use” and to clarify the limitations set forth for adjacent properties.

DATE: May 6, 2022

DESCRIPTION OF PROPOSAL

The Department of Planning, Housing, and Zoning (PHZ) submitted a proposed zoning text amendment that would clarify the existing language in the Land Use Ordinance (LUO) related to the conditions in the special exceptions provisions related to the use *Solar Energy System, utility scale* on farms in AZD and RCD.

On April 18, 2022, the Board of Appeals held a public hearing and reviewed a special exception for a *Solar Energy System, utility scale*, proposed at 26001 Still Pond Neck Road. During the review, the Board of Appeals opined that the undefined term “area of use” found in Section 7, §57.25 j. of the special exception provisions included “all required elements of a Solar Energy System,” which the Board further opined as the solar array and equipment, perimeter landscaping, setback areas to the fencing, and access roadways. A copy of the signed decision by the Board of Appeals is attached for reference.

Per definition 305.25, *Solar Energy System, utility scale* is defined as “Any device or combination of devices or elements which rely upon direct sunlight as an energy source, including but not limited to any substance or device which collects sunlight for generating energy primarily for use off-site. Energy generated may be used to serve on site power needs.” The Board of Appeals denied the application and requested that the Land Use Ordinance be re-written to clarify the “area of use.” The Board also noted that the adjacent properties sentence in the same Section 7, §57.25 j. was unclear as to what was being referenced.

Staff proposes the following amendment to the LUO to clarify the area of use and address adjacency:

- j. The area of use ***of any Solar Energy System, utility scale*** may not exceed 5 acres onsite. Adjacent properties shall not aggregate solar collection panels ***by erecting solar panels in close proximity to each*** other to achieve an area exceeding 5 acres.

As a defined term, the use *Solar Energy System, utility scale* and therefore its corresponding “area of use” is limited to the definition of the defined term, “Any device or combination of devices or elements which rely upon direct sunlight as an energy source, including but not limited to any substance or device which collects sunlight for generating energy primarily for use off-site....” This would include only the solar array panels and inverters, not the fenced area or landscaping. This is the interpretation that staff used when advising the applicant. It relies on the existing definition along with the special exception conditions.

The legal representative of the recent solar array applicant submitted a letter with language suggestions that are much more specific and detailed in order to address the comments made by the Board of Appeals, which is attached for your information.

The staff proposal would read as follows if inserted in the special exception conditions for the use:

57.25 *Solar energy systems, utility scale*, on farms in AZD and RCD provided:

- a. A solar collection device or combination of devices are designed and located to avoid glare or reflection onto adjacent properties and adjacent roadways and shall not interfere with traffic or create a safety hazard.
- b. Screening, capable of providing year-round screening, is provided along all sides that do not collect energy.
- c. Roof mounted solar collection devices shall not extend more than 10 feet from the top of the roof. The total height of the *building*, including the solar collection devices, shall comply with the height regulations established for each zoning district.
- d. Solar collection devices shall not exceed 38 feet in height.
- e. The solar collection system shall be incidental to the use of the farm.
- f. Installation of the solar collection system shall not adversely impact adjacent properties.
- g. All *structures* associated with the solar collection system shall be neither visually intrusive nor inappropriate to their setting.
- h. All solar collection devices shall register with the Department of Emergency Services and shall submit a map noting the location of the solar collection devices and the panel disconnect.
- i. Other than wire size, there shall be no alteration of utility infrastructure to accommodate the system.
- j. The area of use **of any Solar Energy System, utility scale** may not exceed 5 acres onsite. Adjacent properties shall not aggregate solar collection panels **by erecting solar panels in close proximity to each** other to achieve an area exceeding 5 acres.
- k. In AZD, the area developed by a utility scale solar energy system is considered *development* and counted toward the maximum percentage of the property in lots.
- l. Tree removal shall be minimized and any removal shall be mitigated in accordance with the Critical Area Program requirements.
- m. The applicant shall demonstrate that a utility scale solar energy system shall not unreasonably interfere with the view of, or from, sites of significant public interest such as public parks, a national or state designated scenic byway, a *structure* listed in the Kent County Historic Site Survey, an historic district, or the Chesapeake Bay and its tributaries

APPLICABLE LAW

The Code of Public Laws in Chapter 172 establishes the Agricultural Advisory Commission, whose function is to provide advice to the Planning Commission of Kent County and to the Board of County Commissioners concerning any proposals and zoning changes coming before them affecting agriculture in Kent County. The Planning Director is required to notify the Commission of all such proposals, such as text amendments, and the Commission is required to render its advice. The Commission's role includes offering recommendations for changes and programs that will improve and promote agriculture in the County.

COMPREHENSIVE PLAN

The proposed text amendment is consistent with the Kent County Comprehensive Plan.

Strategy: Identify and zone locations suitable for larger/utility scale renewable resource facilities.

Continue to include provisions in the Land Use Ordinance which provide suitable locations for large scale renewable energy facilities. Such areas will be located to not unduly impinge on the County's rural character nor its productive agricultural lands (p. 88).

STAFF COMMENT

As the purpose of amending the text would be to clarify existing language, there should be no effect on agricultural uses or properties. The currently permitted use would remain the same and be better defined.

When the Planning Commission reviews the item, the Planning Commission will need to consider the public need for the amendment and consistency with the Comprehensive Plan and Land Use Ordinance.

The public need for the amendment is to provide clarification for the Board of Appeals and the public, so applications are able to be approved via the special exception provisions that were adopted for the use.

RECOMMENDATION

Staff recommends sending a favorable recommendation to the Planning Commission and the County Commissioners to amend the text in order to clarify the Solar Energy System requirements. The AAC may want to consider recommending the staff proposal, applicant's proposal, or some other text.

Attachments

- Letter from Anthony Kupersmith, dated April 29, 2022
- Decision by the Board of Appeals, dated April 28, 2022



MCALLISTER
DETAR
SHOWALTER
& WALKER

Anthony Kupersmith
akupersmith@mdswlaw.com
(410) 934-3910 Direct

April 29, 2022

VIA EMAIL DELIVERY to wmackey@kentgov.org

William Mackey
Director of Planning, Housing, and Zoning
R. Clayton Mitchell, Jr. Kent County Government Center
400 High Street
Chestertown, Maryland 21620

Re: Zoning Text Amendment to Clarify “Area of Use” for Utility Scale Solar Projects in the AZD District

Dear Mr. Mackey:

This is to provide comments on behalf of 25809a Still Pond Neck, LLC in support of the above-mentioned zoning text amendment (“ZTA”). The prospect of such a text amendment was discussed at the Board of Zoning Appeals’ (“BZA”) public hearing on 25809a Still Pond Neck, LLC’s application for a special exception for a community solar project (the “Still Pond Project”) on April 18, 2022. We understand that your office is in the process of drafting a ZTA to clarify “area of use” and are grateful for the opportunity to comment.

The Kent County Code currently requires that the “area of use” for utility scale solar projects on farms in the AZD and RCD Districts be limited to five acres in size:

57.25 Solar energy systems, utility scale, on farms in the AZD and RCD provided:

...

- j. The area of use may not exceed 5 acres onsite. Adjacent properties shall not aggregate solar collection panels to achieve an area exceeding 5 acres.

...

See Kent County Code, Article VI, Section 11 57.25(j). Although the 25809a Still Pond Neck, LLC team and Kent County Planning, Housing, and Zoning staff (“Staff”) interpreted “area of use” to mean the panels themselves, the BZA determined that the phrase “area of use” was ambiguous and could be read to encompass not only the panels but also the entire area inside the security fence as well as the required 60’ landscape buffer outside of the fence. If the BZA’s interpretation were to stand, this would significantly reduce the generating capacity of the Still Pond Solar Project, likely rendering it and other similar community projects economically



unfeasible. The Chair of the BZA, Dr. Townshend, and the Board's attorney, Chris Drummond, indicated that a ZTA would be an appropriate means of clarifying the phrase "area of use".

We continue to believe that Staff's original interpretation of "area of use" as encompassing the panel array is correct but understand that "area of use" may be best clarified by the ZTA as the entire area inside of the security fence. If the ZTA will indeed be limited to area inside the security fence, we respectfully request that Staff consider expressly excluding the landscape buffer and other improvements outside the fence from the definition of "area of use". For example:

- j. The area of use may not exceed 5 acres onsite. "Area of use" means the area within the solar array's security fence or approved barrier and does not include landscape buffers, access roads, or utility-required improvements occurring outside of the fenced or barriered area. Adjacent properties shall not aggregate solar collection panels to achieve an area exceeding 5 acres.

We believe that the legislative history of the County's current utility scale solar regulations on farms in the AZD and prior decisions taken by the BZA on special exceptions for solar support the proposed ZTA language above. In addition, it is important to note that community solar projects, including this Project, serve the public interest by allowing consumers, who do not wish to install solar panels on their property or who are unable to do so, to purchase solar energy. Community solar projects of this type are limited in scope by State law, have substantially less impact on agricultural land than the typical larger scale utility solar project, and are required to have security fences pursuant to the National Electric Code. The proposed ZTA is also consistent with the Kent County Comprehensive Plan's sustainability and environmental goals. Finally, the effect of the proposed ZTA would be limited to solar projects in the AZD and RCD since the term "area of use" does not appear in other sections of the Code.

Thank you for considering our comments on the proposed ZTA and for your continued attention to this matter. We look forward to further engaging in the ZTA process and would be happy to provide additional information and feedback as needed.

Very truly yours,

A handwritten signature in black ink, appearing to read "AK", with a long horizontal line extending to the right.

Anthony P. Kupersmith

cc: Carla Gerber, Deputy Director of Planning, Housing, and Zoning
Cory McCandless, SGC Power
Connor Gonzalez, SGC Power

BEFORE THE KENT COUNTY BOARD OF APPEALS

IN THE MATTER OF:	*	
THE APPLICATION OF 25809a,	*	
STILL POND NECK, LLC	*	
FOR SPECIAL EXCEPTION	*	Case No: 22-09
APPROVAL FOR A UTILITY	*	
SCALE SOLAR ENERGY SYSTEM	*	

* * * * *

MEMORANDUM AND DECISION

This matter is before the Kent County Board of Appeals (“the Board”) pursuant to Article VII, Sections 2 and 7.57 of the Kent County Land Use Ordinance. The Applicant, 25809a Still Pond Neck, LLC., seeks special exception approval for a utility scale solar system on Still Pond Neck Road near the village of Coleman.

A. Procedural History

On February 17, 2022, the Applicant submitted its application. The application was scheduled for a hearing before the Board of Appeals for April 18, 2022, at 5:00 p.m. Public notice was submitted to and appeared in the *Kent County News* on April 7, 2022, as required by the Land Use Ordinance. The hearing notice was posted on the Applicant’s property on March 17, 2022. Notice of the application and hearing was mailed to adjoining neighbors on March 14, 2022.

The matter was heard by the Board on April 18, 2022. Dr. Al Townshend, P. Joan Horsey, and John R. Massey, Board members were present, as was David Hill, alternative Board member. William Mackey, Planning Director, and Mark Carper, Associate Planner, were present for the Department of Planning, Housing, and Zoning. Mike Pelletier acted as Clerk to the Board and Christopher F. Drummond, Esquire as attorney to the Board. The Applicant was

represented by Tony Kupersmith, Esquire, of Easton, Maryland, Ted Hastings, a Civil Designer with Becker Morgan Group, Inc., and Bruce Wilson and Cory McCandless, of SGC Power.

B. Board's Powers And Duties

Article X, Section 2 of the Land Use Ordinance provides that the Board shall “hear and decide applications for special exceptions” and may limit such approvals “by such conditions as the case may require.” Article VII, Section 2 provides that the Board “may authorize buildings, structures, and uses as special exceptions in specific instances . . . provided the location is appropriate and consistent with the Comprehensive Plan.” The general criteria for special exception approval are set forth in Article VII, Section 2 as follows.

1. The nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;
2. Traffic Patterns;
3. Nature of surrounding area;
4. Proximity of dwellings, houses of worship, schools, public structures, and other places of public gathering;
5. The impact of the development or project on community facilities and services;
6. Preservation of cultural and historic landmarks, significant natural features and trees;
7. Probable effect of noise, vibration, smoke and particulate matter, toxic matter, odor, fire or explosion hazards, or glare upon surrounding properties;
8. The purpose and intent of this Ordinance as set forth in Article II; 406
9. Design, environmental, and other standards of this Ordinance as set forth in Article V;
10. The most appropriate use of land and structure;
11. Conservation of property values;
12. The proposed development's impact on water quality;
13. Impact on fish, wildlife and plant habitat;
14. Consistency with the Comprehensive Plan, Land Use Ordinance, and where applicable the Village Master Plan;
15. Consistency with the Critical Area Program; and
16. Compatibility with existing and planned land use as described in the Comprehensive Plan, Land Use Ordinance, and where applicable the Village Master Plan.

A proposed utility scale solar energy system may be approved as a special exception in the AZD District under the following specific circumstances found in Article VII, Section 7.57.25:

- a. A solar collection device or combination of devices are designed and located to avoid glare or reflection onto adjacent properties and adjacent roadways and shall not interfere with traffic or create a safety hazard.
- b. Screening, capable of providing year-round screening, is provided along all sides that do not collect energy.
- c. Roof mounted solar collection devices shall not extend more than 10 feet from the top of the roof. The total height of the building, including the solar collection devices, shall comply with the height regulations established for each zoning district.
- d. Solar collection devices shall not exceed 38 feet in height.
- e. The solar collection system shall be incidental to the use of the farm.
- f. Installation of the solar collection system shall not adversely impact adjacent properties.
- g. All structures associated with the solar collection system shall be neither visually intrusive nor inappropriate to their setting.
- h. All solar collection devices shall register with the Department of Emergency Services and shall submit a map noting the location of the solar collection devices and the panel disconnect.
- i. Other than wire size, there shall be no alteration of utility infrastructure to accommodate the system.
- j. The area of use may not exceed 5 acres onsite. Adjacent properties shall not aggregate solar collection panels to achieve an area exceeding 5 acres.
- k. In AZD, the area developed by a utility scale solar energy system is considered development and counted toward the maximum percentage of the property in lots.
- l. Tree removal shall be minimized and any removal shall be mitigated in accordance with the Critical Area Program requirements.
- m. The applicant shall demonstrate that a utility scale solar energy system shall not unreasonably interfere with the view of, or from, sites of significant public interest such as public parks, a national or state designated scenic byway, a structure listed in the Kent County Historic Site Survey, an historic district, or the Chesapeake Bay and its tributaries.

C. Relevant Facts

The Applicant proposes to construct a 1MW solar energy system (“SES) on an 85-acre parcel of land owned by Raymond and Joyce Stoltzfus. The property has been assigned a 911 address of 26001 Still Pond Neck Road and is shown on Tax Map 12 as Parcel 98. It is zoned in the AZD District. The property is largely used for traditional agricultural activities on approximately 65 acres of tillable land. The balance of the property is wooded. The property is unimproved with residential or agricultural structures.

Mr. Kupersmith first noted that the SES had received a favorable recommendation from the Planning Commission at its meeting on April 7, 2022. He informed the Board that the Applicant had reviewed the report from Planning staff and concurred with its findings and recommendations. Mr. Kupersmith explained that the proposed SES will not exceed five (5) acres in area and is located in the northwest corner of the property. If approved and constructed, the SES will become part of the State’s Community Solar Pilot Program. SES in the Pilot Program may not exceed a capacity of 2MW. Mr. Kupersmith acknowledged that the Planning Commission requested that the Applicant study re-orienting the SES from the proposed east-west configuration to a north-south configuration to reduce the width of the SES when viewed from Still Pond Neck Road. Mr. Kupersmith directed the Board’s attention to a report prepared by Richard Gilker, a professional engineer with SGC Power. Mr. Gilker’s report concluded that a 90° rotation of the SES will require additional motors to turn the panels, increasing maintenance costs and the potential for mechanical failures, and will reduce the efficiency of the SES.

Mr. Kupersmith explained that the woodlands along the southern border of the property will shield views of the SES from the few residences to the south. The village of Coleman is

approximately ½ mile away from the property and will be unaffected by the SES. The surrounding properties are dominated by agricultural fields and woodlands. At the request of Planning staff, the landscape buffer surrounding the SES has been increased to a width of 60'. No trees will be removed to accommodate the SES and the Applicant is aware that it will need to comply with the Forest Conservation Act. Compliance with the latter will likely be accomplished through retention of existing woodlands through a long-term protective agreement. Grading of the site of the SES will not be necessary. The Community Solar Pilot Program prohibits the addition of solar panels once a SES is accepted into the Program so that a larger system on the property cannot occur.

Dr. Townshend inquired whether the SES will produce glare and whether any of the panels will exceed 38' in height. Mr. Kupersmith replied that solar panels are now designed to be non-reflective and will not exceed about 10' in height. Dr. Townshend asked whether the SES was "incidental to the use of the farm" noting that the current use of the property does not require any electricity. Mr. Kupersmith responded that the SES would be incidental as it will not disrupt the principal agricultural use of the property.

The Board next heard from Mr. Hastings. He explained that the supporting poles for the panels will be driven into the soil and will not be anchored in concrete. The Applicant will provide appropriate stormwater management in compliance with the State Manual. The stormwater management facilities will be non-structural so that excavating retention ponds and the like will not occur.

The Board then heard from Ms. McCandless. She testified that the Applicant has been working on the project for approximately 1½ years. The Applicant is a wholly owned subsidiary

of SGC Power, LLC located in Elkridge, Maryland. Ms. McCandless described the Citizens Participation Plan the Applicant undertook as required by the Pilot Program and Planning staff. Notice of the proposal and information about the Applicant and the SES was sent by mail to all property owners potentially impacted by the proposed land use. Ms. McCandless explained that electricity subscribers to a community solar installation in Maryland that is interconnected with the Delmarva Power grid must live within Delmarva Power's service area.

Mr. Wilson then testified. He explained that a 1MW community solar installation would expect to have approximately 300 electricity subscribers. The SES proposed by the Applicant will be accepted into the Pilot Program in the "open" category. Thirty percent of the power generated must be sold to low/moderate income subscribers who can expect a savings of 25%. Other subscribers can expect savings on electricity of about 10%. The Applicant will lease the area of the SES under an agreement providing for a 20-year term with two (2) 10-year extensions. In response to a question from Mr. Massey, Mr. Wilson acknowledged that the project will cover approximately 9.5 acres when the 20' perimeter road and the 60' landscaped buffer are included. The SES, as proposed, would have 5 acres of solar panels.

Mr. Massey directed Mr. Wilson's attention to Section 7.57.25(j) which limits the "area of use" of a SES to "5 acres onsite." Mr. Massey inquired whether the "area of use" includes the perimeter road and landscaped buffer and, if so, how may the Board approve a proposal that will have an area of 9.5 acres. Ms. McCandless responded by noting that the Applicant had a similar concern and inquired of Planning staff. Ms. McCandless reported that staff's interpretation was that "area of use" refers only to the area of solar panels. Mr. Mackey agreed with Ms. McCandless noting that the 5-acre limit was created as a result of the Renewable Energy Task

Force's recommendations delivered in 2013. The landscaping requirements for SES were created in 2020 and essentially are "add on" that should not be included in the "area of use." Mr. Hill, a member of the Renewable Energy Task Force, commented that he understood the 5-acre maximum to apply to all required components of a SES. Dr. Townshend expressed his concern that the proposed SES was not needed for onsite structures or agricultural uses and approving the application could set a precedent for much larger solar projects in the AZD including the Morgnec Road Solar project.

In light of the uncertainty of the legal effect of the language of Section 7.57.25, Mr. Massey moved that the Board meet in closed session to receive advice from Mr. Drummond. Ms. Horsey seconded the motion which passed unanimously. The Board then met in closed session from 6:00 p.m. to 6:25 p.m.

Once the Board returned to the open hearing, Dr. Townshend explained that his concerns regarding setting a precedent for larger solar projects had been allayed. Mr. Massey noted that the Land Use Ordinance permits SES in the AZD by special exception if the specific standards set forth in Section 7.57.25 are satisfied.

Ms. McCandless testified that the Community Solar Pilot Program standards are very strict. Locations permitted are few. Because Delmarva Power allows interconnections only to feeder lines, locating SES near roads cannot be avoided. Because only a few sites meet Pilot Program requirements and because Delmarva Power limits interconnections, Ms. McCandless opined that a proliferation of community solar projects is unlikely in Kent County.

Mr. Kupersmith argued that "incidental" and "accessory" have different meanings. Consequently, a SES need not be subordinate to or supportive of an existing legal use of

property. Because the 5 acres of panels will not interfere with the predominant agricultural use of the property, they are “incidental” to that use. The Board acknowledged that “incidental” is not synonymous with “accessory.”

Questioned by Mr. Kupersmith, Mr. Wilson testified that the proposal meets each of the standards of Section 7.57.25.

The Board then heard from Bob Payne, an adjacent landowner. Mr. Payne expressed his view that the property should remain wholly agricultural. Mr. Payne’s property is subject to a conservation easement administered by the Eastern Shore Land Conservancy.

Andy Simmons, who resides across Still Pond Neck Road from the property, objected to taking prime soil out of agricultural production. Mr. Simmons inquired whether Section 7.57.25(j) will prevent other nearby properties from proposing SES. Mr. Drummond explained his opinion that the “aggregate” language in the subsection was intended to prevent a single landowner from adding adjacent land to circumvent the 5-acre maximum for SES. Mr. Wilson, though, explained that the Pilot Program prevents SES on adjacent properties. Consequently, if properties adjacent to the property proposed for the Applicant’s SES decide to pursue SES approval, they may not apply for inclusion in the Pilot Program.

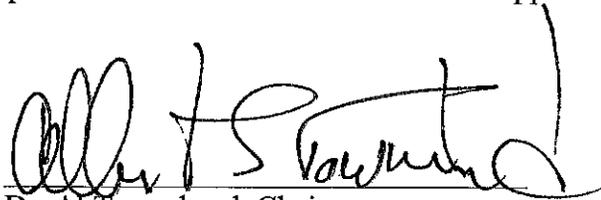
Mr. Carper highlighted the salient points of the staff report which recommends approval of the special exception. He noted that the Applicant has proposed to move the SES approximately 80' further away from Still Pond Neck Road in light of the Planning Commission’s concerns.

D. Deliberations, Conclusions Of Law/Findings Of Fact

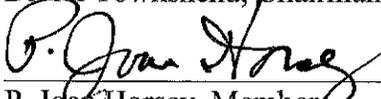
Mr. Massey reiterated his concern that the proposed use, if approved, would be

inconsistent with the 5-acre maximum size set forth in Section 7.57.25(j). Ms. Horsey concurred and asserted that, in her view, "area of use" is intended to include all components of a SES. Dr. Townshend asked Mr. Drummond whether any utility scale SES could be approved if the 5 acre maximum applied to all components. Mr. Drummond was uncertain that a SES with 2-3 acres of panels intended for off-site sale of electricity would be viable. Mr. Drummond suggested that the Board consider a condition of approval that would limit site plan approval to 5 acres inside the fenced area of the SES. Mr. Drummond commented that Section 7.57.25, as drafted, lacks clarity that could be resolved through legislative action. As written, Section 7.57.25(j) refers to the "use" which reasonably includes all required elements of a SES. Consequently, the perimeter road and landscaping are part and parcel of the "use" and properly included in the 5-acre maximum. Mr. Massey expressed his view that the Board is bound to apply the Land Use Ordinance as written. Accordingly, Mr. Massey moved to deny the application on the ground that the proposed "area of use" exceeds 5 acres and, therefore, the application does not meet the requirements of Section 7.57.25(j). Ms. Horsey seconded the motion. Dr. Townshend expressed his misgivings about denying the application, particularly as the Applicant had followed the interpretation provided by Planning staff. He agreed, though, that the language of the Land Use Ordinance compelled the result. The motion was then approved unanimously.

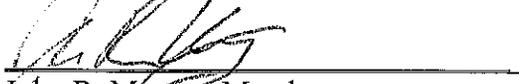
Date: April 28, 2022



Dr. Al Townshend, Chairman



P. Joan Horsey, Member



John R. Massey, Member