

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:	*	
FREE REIN SOLAR FARM, LLC	*	
Applicant	*	Conditional Use Application
	*	No. CU 23-05
Michael Chapman, Project Manager	*	
For the Applicant	*	
	*	
Soo Lee-Cho, Esq.	*	
Attorney for the Applicant	*	

Before: Kathleen Byrne, Hearing Examiner		

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Free Reign Solar Farm, LLC (Applicant or Free Rein) filed an application on November 14, 2022, seeking a conditional use to operate a solar collection system on a portion of the property known as 5011 Riggs Road, Gaithersburg, Maryland 20882 (subject property or property). Exhibit 1. The property is described as an 82.4-acre lot within the Agricultural Reserve zone identified as Parcel P200, on tax account number 01-00004532 located in the Brook Grove Subdivision and. Exhibit 25, pg. 6. Free Reign Realty, LLC owns the property with a mailing address of 5341 Pooks Hill Road, Bethesda, Maryland 20814 and the Applicant is a subsidiary/related entity of the property owner. Exhibit 1.

Currently the entire parcel is used as an equestrian facility for horse boarding, training and riding instructing. Exhibit 19, pg. 1. The Applicant intends to construct a 2-megawatt solar collection system on an interior 4.92-acre portion of the existing property located at least 400 feet from the nearest residential home. Exhibit 19, pg. 1. On March 30, 2023, the staff of the Montgomery County Planning Department (Planning Staff or Staff) issued a report recommending approval of the proposed conditional use subject to certain conditions. Exhibit

25. By letter dated April 20, 2023, the Planning Board conveyed to OZAH that it recommends, by unanimous vote, approval of the proposed conditional use subject to certain conditions.

The public hearing proceeded as schedule on Friday, April 28, 2023.¹ Ms. Soo Lee-Cho represented the Applicant during the hearing and Mr. Michael Chapman testified on behalf of the Applicant. Mr. Carols Garcia, Mr. Greg Eberly and Mr. Brad Glatfelter testified as the Applicant's experts in support of the application. Two neighbors appeared in support of the conditional use application. No witnesses in opposition testified at the hearing. After hearing evidence presented, the Hearing Officer held the record open for a period of 10 days to receive the transcript and to accept Exhibit 30, the decision of approval of Forest Conservation Plan. OZAH received Exhibit 30, on April 28, 2023. OZAH received the transcript on May 9, 2023 and the Hearing Examiner closed the record on May 9, 2023.

For the following reasons, the Hearing Examiner approves the conditional use application subject to the conditions listed in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

A. Subject Property

The subject property consists of 82.4 acres identified as Parcel P200 on tax map 01-00004532 located in the northwest corner of Rigs Road and Zion Road. Exhibit 25, pg. 7. It can be accessed from an existing driveway on Riggs Road. *Id.* The property is currently used as an equestrian facility and includes several barns, open pasture areas, and one outdoor paddock. *Id.*

¹ Due to the COVID-19 pandemic and restricted access to county offices for safety reasons, the public hearing was held remotely via Microsoft Teams. A link and phone number for the public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate

The natural environment of property consists of rolling hills, plateaus, a wetland on the north end, and forest stand surrounding pond that is shared with one abutting neighbor to the east. *Id.* The current ownership group purchased the property approximately 3 years ago to preserve the farm's current equestrian operation and intends to continue the equestrian use. T. 17-18.



Subject Property – Exhibit 25, pg. 8

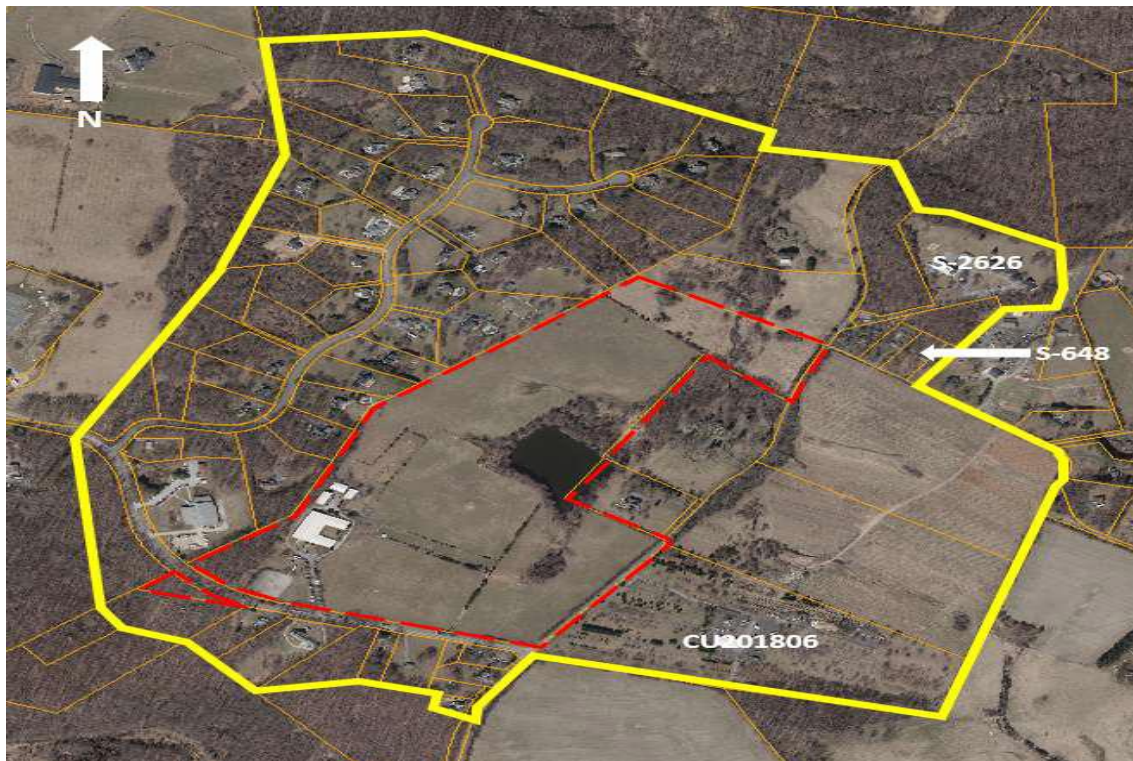
B. Surrounding Neighborhood

The property abuts single family detached homes also zoned AR and is an irregular shape with 1,795 feet of frontage on Riggs Road and 1,420 Feet of Frontage on Zion Road. Exhibit 19,

pg. 1. Properties to the south are zoned RE-2 containing residences and undeveloped parcels.

Exhibit 25, pg. 5. Since the solar collection system (project) is located in the center of the property, Staff limited the neighborhood to mostly the abutting and confronting properties, determining those properties to be the most impacted by the proposed use. *Id.* at pg. 4. The neighborhood consists of low-density residential development, agriculture uses and two conditional uses/special exceptions.

One special exception for a Private Educational Institution is located at 21515 Zion Road (S-2626) and the other for a Home Occupation, photo studio (S-648) is located at 4513 Gregg Road. Another property to the east at 21202 Zion Road received approval for use as a landscape contractor (CU201806).



Vicinity/Neighborhood Map
Exhibit 25, pg. 5

C. Proposed Use

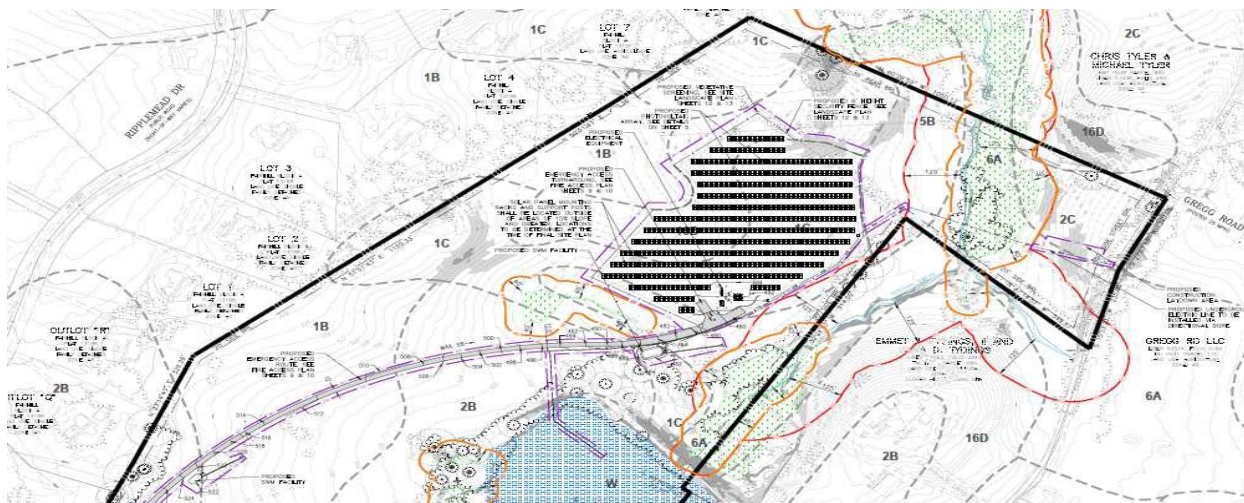
The Applicant seeks approval of a “solar photovoltaic (‘PV’) electric generating project up to 2 MW in generating capacity” to benefit the on-site farm and business and to provide the low and moderate-income community with 30% of the electricity output. Exhibit 19, pg. 2. The solar collection system will provide 100% pollution free electricity needs for Free Rein Farm for the next 25-years. *Id.* The solar project will protect the Farm from escalating electricity costs; make ground lease payments to the Farm to support the equestrian business; make use of a low-value area on the property; make improvements to fencing and field access; and help meet government renewable power goals while ensuring cleaner air and water. *Id.*

1. Site Plan and Landscape

The project will occupy 4.92 acres of the 82.4-acre property and consists of solar arrays, fencing around the compound associated landscaping and access drives. Exhibit 25, pg. 8. Once completed the project will not require on-site personnel and will not generate traffic except for occasional maintenance. *Id.* The ownership group seeks to make some of the excess land more productive economically. T. 30. The solar array will be located in the norther portion of the property that is approximately a quarter mile away from the horse buildings. T. 33. See aerial photograph and proposed site plan on the following page.



Proposed Site Conditions – Exhibit 25, pg. 8



Proposed Solar Collection System Location – Exhibit 25, pg. 9

The Zoning Ordinance does not require landscaping for the AR zone. Exhibit 26, pg. 14; T. 71. Because the facility is more than 200 feet away from any neighboring property, screening is not required. *Id.* The Applicant plans to propose screening to the west of the solar array to provide a screen to the neighbors' residences to the northwest. *Id.* The proposed screening consists of evergreen trees 8 feet high, and deciduous and evergreen shrubs 18 to 24 inches high and a mix of perennial groupings. *Id.* The Planning Board voted to approve the proposed Forest Conservation Plan on April 25, 2023, subject to certain conditions. Exhibit 30.

2. Parking, Lighting Plans and Signage

No parking, lighting or signage is being proposed with this Application and none is needed nor required by the Code for the use. Exhibit 26, pg. 14.

3. Operations

Mr. Chapman testified that construction is estimated to take approximately four months. T. 49. Construction will include fencing for the horses, road access to the solar array site, followed by installation of the metal support structures, mounting the panels and brining in the electrical equipment. T. 48. During this four-month period, they will also be performing the water intake work from the pond, directional drilling and the PEPCO intersect. *Id.*

The entity operating the solar project will be an affiliate of the horse farm and the two will operate pursuant to contractual agreement. T. 20. Once complete, the solar project will pay land lease payments to the horse farm, generate electricity for sale, 30% of which will be dedicated to low and moderate-income customers, and generate 100% of the farm's electricity needs at no cost for 25 years. T. 20. The solar project received approval to participate in the

Maryland Community solar pilot program which requires quarterly reporting and will track how the solar project is managing its subscribers. T. 26. The actual footprint of the solar project is 4.92 acres. T. 38. The solar project will connect to PEPCO via local power lines that run along Zion Road. T. 39. The solar panels will be motorized for movement and mounted to the ground on a steel rack arranged in an east-west orientation to pick up the southern exposure and will be facing at about a 25-degree angle from horizontal for the maximum amount of solar energy. *Id.* The electrical equipment will be installed “cubes” to connect to the underground drilling which will then connect to the PEPCO transmission line. T. 44-47.

D. Community Response

The Applicant held a Zoom virtual meeting on July 13, 2022, with members of the community. T. 78. The meeting lasted more than an hour and included a “robust question and answer session”. Exhibit 19, pg. 17. The Applicant attempted to contact all the neighbors on Ripplemead Drive, Riggs Road and Zion Road. In addition to the Zoom meeting, the Applicant held several meetings with adjacent neighbors, including the president of the Fair Hill HOA, conducted one on one phone calls, emails and property walks with various neighbors. *Id.*, T. 78, T. 79. The Staff did not receive any letters of correspondence from the community. Exhibit 25, pg. 24.

E. Environmental Issue

The Application is subject to the County's Forest Conservation Law and submitted a Preliminary Forest Conservation Plan that conforms with the Environmental Guidelines. Exhibit 25, pg. 10.

A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) # 420221890 was approved for the Property on June 14, 2022. The Property is located within the Hawlings River watershed, which is classified by the State of Maryland as Use IV-P watershed, and contains steep slopes, streams, wetlands, floodplains, and Environmental Buffers. There are large specimen trees distributed along the waterways and pond on the Property. The Property is not within Special Protection Area of Primary Management Area. However, the Property is within the Patuxent River Watershed Primary Management Area (PMA). *Id.*

The property does contain sensitive environmental areas including a variety of slopes, soils, forest streams, wetlands and associated buffers, but the construction/installation of the solar project will avoid these sensitive areas. T. 65.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set standards are both specific (to a particular use) and general (applicable to all conditional uses). The specific standards applied for a solar collection system are found in Section 59.3.7.2 of the Zoning Ordinance. The general standards (termed “Necessary Findings” in the Zoning Ordinance) for all conditional uses are found in Section 59.7.3.1.E. An applicant must prove that the use proposed meets all specific and general standards by a preponderance of the evidence. The Hearing Examiner concludes that the Applicant has done so in this case, with conditions of approval included in Part IV of this Report.

A. Necessary Findings (§59-7.3.1. E)

The relevant standards and the Hearing Examiner's findings for each standard are discussed below.² For discussion purposes, the general standards may be grouped into four main areas:

² Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2., E.3 and E.4. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: No prior approvals were granted for the subject property. Nothing in the testimony or the record disputes this fact. This section does not apply.

b. satisfies the requirements of the zone, use standards under Article 59.3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59.6;

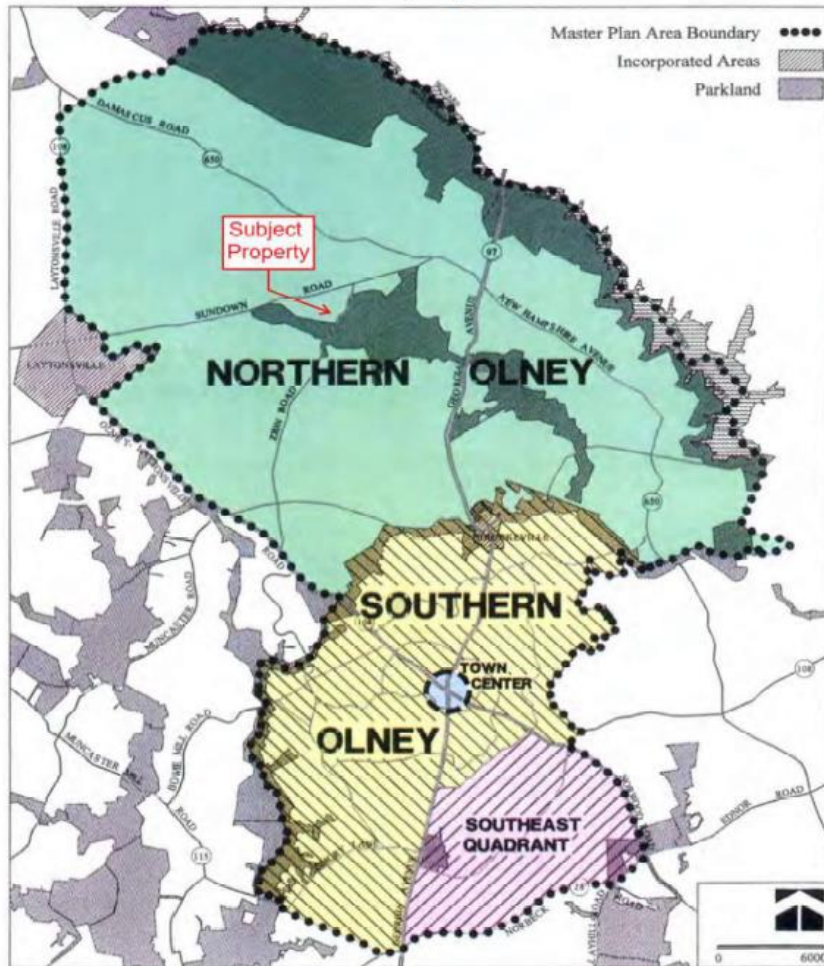
Conclusion: This subsection requires review of the development standards of the AR Zone contained in Article 59.4; the use standards for a Solar Collection Facility contained in Article 59.3.7.2.B.2 and the applicable development standards contained in Article 59.6. Each of these Articles is discussed below in Parts III.B, C, and D, of this Report, respectively. For the reasons explained there, the Hearing Examiner finds that the application satisfies these requirements.

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

The property is located within the Northern Olney area of the 2005 Olney Master Plan. Exhibit 25, pg. 14. The Plan identifies no specific land use recommendation for the property

other than continuation of the AR zoning. *Id.* The Plan seeks to support agricultural preservation in Northern Olney. 2005 OLNEY MASTER PLAN, MONTGOMERY COUNTY, MD, pg. 3.



2005 Olney Master Plan Boundary Map
Exhibit 19, pg. 6, Figure 2

In addition to the 2005 Olney Master Plan, the property is located within the 1993 Patuxent River Watershed Functional Master Plan, which limits the property to 10 percent imperviousness. *Id.* The property is located within the Patuxent River Primary Management Area (PMA), i.e., within 660 feet of streams on and near the property. *Id.* No existing development is located within the PMA transition area. *Id.* at 15. The construction related to the

new proposed use will add .63 acres of impervious surface equaling 8.4 percent of imperviousness within the PMA transition area which is less than the recommended maximum 10 percent. *Id.*

Staff determined that the the proposed addition of a solar collection facility at this location will “serve to support and enhance the existing agricultural equestrian facility on the Property.” *Id.* at 14. Staff also determined the proposed use substantially conforms with the recommendation of the 1993 Functional Master Plan for the Patuxent River Watershed. *Id.* at 15. In addition, Mr. Eberly opined that the project proposed complies with the impervious area requirement of the Patuxent River PMA. T. 70.

Conclusion: Based on this record, the Hearing Examiner agrees that the solar collection facility will substantially conform to the recommendations of both the 2005 Olney Master Plan and the 1993 Functional Master Plan for the Patuxent River Watershed. The project supports the continuation of agricultural uses as envisioned by the Plan and does not run afoul of the impervious area requirement under the Patuxent River PMA. The Hearing Examiner agrees with Mr. Chapman that the proposed solar facility is compatible with the agricultural use in furtherance of the Master Plan's goals. T. 28.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: The property is zoned AR and not located in a “residential detached” zone. The proposed conditional use will not increase the number, intensity or scope of conditional uses sufficiently to affect the area adversely. The Hearing Examiner previously found that the project conforms to the Master Plan. For reasons stated in Part III.A.4 of this Report below, she agrees with Staff that the application will not adversely affect or alter the predominantly low-density residential and agricultural uses in the area.

2. Adequate Public Services and Facilities

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

The proposed use does not require water, sanitary sewer, schools, or other public infrastructure connections other than a PEPCO electrical interconnection. Exhibit 25, pg. 16.

The Applicant received PEPCO approval to tie into the grid system and the Applicant submitted a Fire Department Access Plan for compliance review. *Id.*; Exhibit 19, pg. 8. The proposed use will generate less than 50 weekday net-new-peak-hour trips and is not expected to adversely

impact operations of existing roadway network at any time during construction or operation. *Id.* Mr. Garcia, Applicant's Traffic Expert, testified that the project is exempt from an LATR and that it is estimated that the solar project will generate approximately 16 trips per month, well below the requirement for an LATR. T. 60-63. In addition, the property is exempt from frontage improvements as well as from providing pedestrian and bicycle improvements. *Id.*

Table 1. Site Trip Generation under Standard Operation Conditions

Land Use	Weekday AM Peak Hour			Weekday PM Peak Hour		
	In	Out	Total	In	Out	Total
Existing Equestrian Facility ⁽¹⁾	43	31	74	31	43	74
Standard Operations for Solar Facility ⁽²⁾	2	0	2	0	2	2
Total Site Trips	45	31	76	31	45	76

(1) Based on information provided for the existing Free Rein Equestrian Facility. Please note that these numbers represent worst-case conditions, as during typical operations the existing facility experiences far fewer trips during the morning and evening peak hours.

(2) Based on average monthly trip generation of 16 trips (8 vehicles). For the purposes of this evaluation it was assumed that 2 vehicles would arrive to the site on the same day, and that both would enter during the morning peak hour and exit during the evening peak hour.

Traffic Statement Summary Table
Exhibit 19, pg. 9, Figure 3

Conclusion: The Hearing Examiner agrees with the findings in the Staff Report and finds the evidence provided and testimony of Applicant's expert persuasive regarding adequate public facilities. Based on the information in the record, adequate public facilities do exist for the project, including police, fire, schools, healthcare, stormwater, sewer, water, and public roads.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;

ii. traffic, noise, odors, dust, illumination, or a lack of parking; or

iii. the health, safety, or welfare of neighboring residents, visitors, or employees.

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on the surrounding area. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, do not justify the denial of a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects may be a basis to deny a conditional use, alone or in combination with inherent effects, if they cause “undue” harm to properties in the surrounding area.

Staff concluded that the following physical and operational characteristics are inherent to a solar collection facility (Exhibit 25, p.17):

- Ground mount solar arrays;
- Access road
- Temporary construction noise
- Visual impacts (arrays are 6', 6" high and fence is 6', 0" high)
- Solar array compound that may be enclosed within the fence and landscape screening; and
- Limited vehicle trips for construction and maintenance.

Conclusion: The Hearing Examiner agrees with Staff's list of inherent adverse characteristic of this use. Staff identified no noninherent adverse effects associated with the proposed use. *Id.* Staff determined that the proposed conditional use will not result in adverse effects over and above the Report's identified inherent impacts. *Id.* Mr. Chapman testified at length to the

impacts of the solar array regarding installation, operation, and screening. T. 32-49.

Specifically, he testified that the construction process would take less than four months and scheduled to limit disruption to the neighborhood as much as possible. T. 49. The access road will be an extension of the existing driveway and run through the center of the property. Exhibit 10(j). Once the solar array is installed there will be minimal visits to the project site. T. 62.

Only the pole structures of the “ground mount solar array” into the ground at the point of intersection is counted as impervious. T. 75. The property is heavily forested, and the project is naturally screened by existing trees. T. 66; Exhibit 25, pg. 17. Even though screening is not required additional trees will be planted to add further screening. T. 71. The Hearing Examiner agrees with Staff and the expert testimony presented by the witnesses that the project does not result in undue adverse effects requiring denial of this application.

As stated above non-inherent adverse effects may result from the “physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site”. Staff did not identify any non-inherent adverse impacts from the proposed use or site. The Hearing Officer agrees with Staff that there are no non-inherent adverse effects from the proposed development and concludes that the use and proposed development will not cause undue harm to the surrounding neighborhood from either non-inherent adverse effects or a combination of inherent or non-inherent adverse effects.

4. Compatibility with the Neighborhood

Several sections of the Zoning Ordinance require a proposed conditional use be compatible with the character of the surrounding neighborhood.

Section 59.7.3.1.E.1 includes the standards of approval below:

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the [master] plan.³

Staff found the project to be harmonious with and not alter the character of the neighborhood. Exhibit 25, pg. 15. The proposed use produces minimal noise traffic and visual impacts. The installation of the solar project sits back within the boundaries of the 82-acre parcel and will be surrounded by natural and additional screening. *Id.* The project site is naturally screened from 3 sides by dense natural forest and the closest residence is 465 feet away and is more than 400 feet from any public roadway. Exhibit 19 pg. 7.

The Applicant's expert, Mr. Chapman, testified that the surrounding neighborhood consists of low density residential, semi-farming lots and National Guard center. T. 33-35. Mr. Chapman agreed with Staff's characterization of the neighborhood and that the proposed use to be compatible T. 33-35.

Conclusion: Section 59.7.3.1.E.2.d examines whether the Master Plan goals are achieved in a manner compatible with the area. The Hearing Examiner has adopted Staff's characterization of the existing neighborhood as being low density residential, agricultural uses containing three conditional uses/special exceptions and that the property itself consist of a large existing agricultural use. She already found that the use fulfills the goals of the Master Plan and further finds that it does so in a manner that is compatible with the surrounding area. Key to this finding is the agricultural use that will continue operations and be supported by the solar collection facility furthering the goals of the Master Plan while providing additional energy resources to the

³ Section 59.7.3.2.E.2 requires that "any structure to be constructed ... under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood." This conditional use is in an AR zone, not a residential detached zone making this provision not applicable.

greater community. In addition, the solar panels themselves will be well shielded from the neighboring uses maintaining the rural feel and character of the neighborhood.

For these reasons, the Hearing Examiner finds that the use is compatible with the surrounding neighborhood in a manner consistent with the Master Plan and will not adversely affect the character of the surrounding area.

Section 59.7.3.1.E.3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed, meets the standards required for approval.

Section 59.7.3.1.E.4 In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.

Conclusion: Given the agricultural location of the use and the immediate surrounding area, the use and proposed development within the existing parcel will not be a detriment to the surrounding properties.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the AR Zone, contained in Article 59.4 of the Zoning Ordinance. Staff included a table (Exhibit 25, p.13-14, shown on the following page) in its report comparing the minimum development standards of the AR Zone to what is proposed in this application. Staff correctly note in the chart that “[t]here is no proposed development with this application.”

Table 1: Conditional Use Development and Parking Standards (Agricultural Reserve- AR)

Development Standard Section XXX	Permitted/ Required	Existing/Proposed*
Minimum Lot Area	25 acres	82.39 acres
Minimum Lot Width at Front Building Line	125 feet	> 125 feet
Minimum Lot Width at Front Lot Line	25 feet	>25 feet
Maximum Density	1 dwelling/25 acres	N/A
Maximum Building Lot Coverage	10%	1%
Minimum Front Setback	50 feet	600+ feet
Minimum Side Setback	20 feet	230 feet
Minimum Sum of Side Setbacks	N/A	N/A
Minimum Rear Setback	35 feet	225 feet
Maximum Height	50 feet	N/A
Vehicle Parking Requirement (Section 59.6.2.4.B)	N/A	N/A

Conclusion: Nothing contradicts Staff's assessment of compliance with the development standards of the Zone. The Hearing Examiner finds that the proposed facility complies with the standards of the AR Zone.

C. Use Standards for a Solar Collection System (Section 59.3.7.2.)

The specific use standards for approval of a Solar Collection System are set out in Section 59.3.7.2. of the Zoning Ordinance.

Zoning Ordinance §59.3.7.2.

A. Solar Collection System

1. Defined

Solar Collection System means an arrangement of panels or other solar energy devices that provide for the collection, inversion, storage, and distribution of

solar energy for electricity generation, space heating, space cooling, or water heating. A Solar Collection System includes freestanding or mounted devices. Solar Collection Systems are facilities that comply with the requirements of the State's net metering program under Maryland Code §7-306, COMAR 20.50.10, and COMAR 20.62, including Community Solar Energy Generating Systems, Aggregate Net Energy Metering Systems, and projects limited to a percentage of on-site energy use. A Solar Collection System larger than 2 megawatts (AC) is prohibited in the Agricultural Reserve Zone.

Conclusion: The Applicant proposes to construct and operate to a 2-megawatt photovoltaic solar collection system. Exhibit 19, pg. 1-2. The use proposed meets this definition.

2. Use Standards⁴

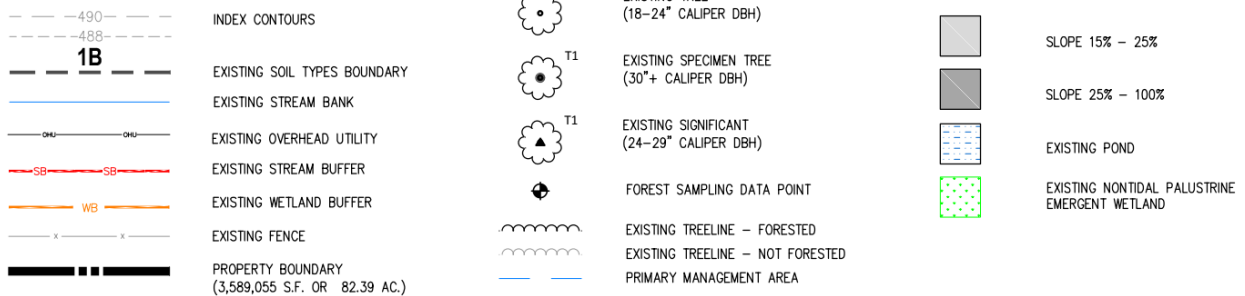
A Solar Collection System may be allowed as a Conditional Use in the AR zone if it exceeds a facility rated at more than 200% of on-site energy use and is less than 2 megawatts (AC). Where a Solar Collection System is allowed as a conditional use in the AR zone, it may be permitted by the Hearing Examiner under Section 7.3.1. Conditional Use and the following standards:

- a. The Solar Collection System is prohibited:*
 - i. on soils classified by the United States Department of Agriculture as either Soil Classification Category I or Category II;*
 - ii. in a stream buffer;*
 - iii. on wetlands; or*
 - iv. on slopes equal to or greater than 15%.*

Mr. Chapman testified and referred to Figure 4 of Exhibit 19, pg. 11. The Applicant referred to the Soil Conservation District's soil mapping of the County. T. 50. The plans submitted by the Applicant identify the soil category types with corresponding letters, i.e., I as A, II as B, III as C and IV as D. *Id.* The solar array will be located on soils identified as at I-C and 16-D.⁵ These "letters" identified on the plans submitted correlate to Soil Classification Categories III and IV. *Id.* See soil map on the following page.

⁴ 59.3.7.2.B.2

⁵ The transcript incorrectly transcribed Mr. Chapman's testimony as "16-B" instead of 16-D.



As shown on the image above, the solar array is outside the stream buffer, existing wetlands and on lands with less than 15% slope. Mr. Eberly, Applicant's Landscape Architecture expert,

testified that great lengths were taken to avoid environmentally sensitive areas including the slopes, soils, stream buffer, and wetlands. T. 64-68. In addition, the Staff Report confirms that the solar array will not be located on prohibited soils, in a stream buffer, existing wetlands or on slopes greater than 15%. Exhibit 25, pgs. 10-11.

Conclusion: Exhibit 19, Figure 4 clearly depicts the location of the solar array away from the prohibited environmental features on the site. The accuracy of exhibit is further bolstered expert testimony and staff report. The Hearing Examiner finds that placement of the solar array meets this requirement.

b. Scraping topsoil from the site is prohibited.

c. Grading and any soil removal are minimized.

Conclusion: Mr. Chapman testified that the team will work with the natural contours of the site and when the road is constructed any topsoil removed will be deposited and regraded on the site within the required limits of disturbance. T. 51-52. Mr. Chapman also testified that grading and soil removal will be minimized and will comply with the County requirements. *Id.* The Hearing Examiner finds Mr. Chapman's testimony persuasive that grading and soil removal will be minimized and that scraping of topsoil will not occur.

d. The solar collection system is compliant with the requirements of the State's net metering program under Maryland Code §7-306, COMAR 20.50.10, and COMAR 20.62.

Conclusion: A condition of approval will require compliance with the above regulations. Therefore, the use as conditioned will meet this requirement.

e. The area under the solar facility must be actively used for farming or agricultural purposes by satisfying one or more of the following requirements:

- (i) designated pollinator-friendly under the Maryland Pollinator-Friendly Designation Program;*
- (ii) planted, managed, maintained, and used for grazing farm animals; or*
- (iii) planted, managed, maintained, and used for any other agrivoltaic plant material.*

Mr. Chapman testified that the project will comply with 59.3.7.2.B.2(e) by installing pollinator friendly plant species presenting to the County the types of approved seed mix using industry best practices use a mix of plants to determine which performs best along the array site.

T. 55. Mr. Eberly further opined on the pollinator seed mix to be placed under solar array and installation of turfed areas for access and maintenance of the panels to not disturb those plantings. T. 71; Exhibit 19, pgs. 13 and 14.

Conclusion: Per the testimony of Mr. Chapman and Mr. Eberly, the planting notes and details included on the landscape plan (Exhibit 21) and in Exhibit 19, the project satisfies requirements of this subsection.

f. The applicant must provide evidence that the local utility company will allow the Solar Collection System to be connected to the utility grid.

g. The applicant must provide evidence that the application was submitted to the Office of Agriculture.

Conclusion: On July 27, 2022, the Applicant received written documentation from PEPCO approving the interconnection of the project to PEPCO's local electric distribution line, i.e., utility grid, located adjacent to the project site on Zion Road. *Id.*; Exhibit 25, pg. 11; Exhibit 19(a). Acceptance of this letter into evidence satisfies the requirement in subsection (f).

Mr. Chapman testified that required "evidence that the application has been submitted to the Office of Agriculture" was submitted. T. 56. On January 17, 2023, the Office of Agriculture (OAG) provided a letter to Staff in support of this Application and the Applicant forwarded to

OAG final documents addressing comments raised from Staff. Exhibit 25, pg. 12 and Attachment A. The testimony and letter included in the Staff Report as "Attachment A" satisfies the requirement in subsection (g).

h. Removal of trees or landscaping otherwise required or attached as a condition of approval of any plan, application, or permit for the installation or operation of a Solar Collection System is prohibited.

i. Any tree in or on a floodplain, stream buffer, steep slope, critical habitat, contiguous forest, or historic site, and any champion tree or other exceptionally large tree is left undisturbed unless a disturbance is allowed under Section 22A-12(b)(1).

j. Except for pad areas for transformers and electrical equipment, the use of concrete is prohibited.

k. Screening that satisfies Section 59.6.5.3.C.8 (Option A) on the sides of the facility within 200 feet of any neighboring house is required; however, a fence may not be required or prohibited.

Staff determined no trees or landscaping will be removed that were otherwise required as a condition of any prior approvals. Exhibit 25, pg. 12. The Preliminary Forest Conservation Plan submitted with the Application indicates that none of the trees being removed are in a flood plain, stream buffer, steep slope, critical habitat, contiguous forest or historic site and that the proposed forest to be removed does not prevent the contiguous forest from remaining adjacent to the clearing. *Id.* Concrete will only be used for transformer and electrical equipment pads. *Id.* In addition, Staff found no screening to be required because the solar array and "associated compound" to be more than 200 feet from any neighboring house, but the Applicant plans to provide landscaping "along the uphill side of the compound to help screen from the neighboring houses to the east. *Id.* Exhibits 11(c) and 11(d) identify the existing trees and tree lines both forested and not forested, which further support Staff's conclusions.

APPROVED: 4/18/2019
 New York State Department of Environmental Conservation
 Division of Forests and Lands
 Forest Management Planning Unit

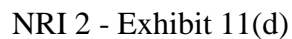
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NRI 1 - Exhibit 11(c)



l. The Hearing Examiner's decision must consider the recommendations of the Office of Agriculture.

- The applicant proposes to install 4.92-acres of solar panels on class III soils or higher, on slopes less than 15% without stripping topsoil and minimizing grading on site.

- The applicant proposes to meet the farming or agricultural activity requirement by planting the area underneath the solar panels in the pollinator habitat with an appropriate seed mix during the correct planting season using best practices.

See Exhibit 25, Attachment A. The testimony of Mr. Chapman and Mr. Eberly along with the details included in the landscape plan as referenced on pages 21-24 of this Report and Decision align with the comments from OAG and are included in this application. The Hearing Examiner considered OAG's review and notes that OAG offered no other specific recommendations to the Application.

m. The applicant must include a calculation of the total acreage used for the Solar Collection System, including any required setbacks and all acreage within the fenced or shrubbed area.

Conclusion: Mr. Chapman testified the total limits of disturbance area is 7.52 acres and the solar collection area footprint is 4.92 acres. T. 61-60. The Staff Report affirmed that the proposed fenced area is 4.92 acres and the net area that includes the access road totals 7.73 acres. The requirements of subsection (m) are satisfied.

n. The land area approved for the Conditional Use, in addition to all other Conditional Use approvals for solar facilities in the AR zone, will not exceed 1,800 acres of land.

Conclusion: Mr. Chapman testified that he believes this Application to be the first one for a solar collection facility in the AR Zone and will cover 4.92 acres of the still existing 1,800 acres of land available. T. 60. The Hearing Examiner agrees with Mr. Chapman that there is a "substantial excess" of acreage still available in the AR Zone and this facility will not exceed the maximum amount. The requirements of subsection (n) are satisfied.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. These requirements need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” *Zoning Ordinance*, §59.7.3.1.E.1.b. However, most of these requirements do not apply to the Application for the subject property.

1. Site Access

Conclusion: Zoning Ordinance section 59.6.1 governs “Site Access;” however, by its own terms, as stated in §59.6.1.2., section 59.6.1 does not apply to development in an agricultural zone as presented in this case.

2. Parking, Queuing and Loading

Conclusion: Zoning Ordinance section 59.6.2 governs “Parking, Queuing and Loading.” The use requires no parking. However, in the event service or repairs are needed, the site provides ample parking. (See Exhibits 10(d) and 21(b)).

3. Lighting and Landscaping

Conclusion: Zoning Ordinance section 59.6.4 governs “General Landscaping and Outdoor Lighting”. As no lighting is proposed, this section is inapplicable. The proposed landscaping is covered in the screening section below.

4. Screening

Conclusion: Zoning Ordinance section 59.6.5 governs “Screening”. Zoning Ordinance section 59.3.7.2.B.2.k requires screening within 200 feet of any neighboring house. Because the nearest house is greater than 200 feet away no screening is required by law. However, the Applicant intends to provide landscaping along the uphill side to the east.

5. *Signage*

Conclusion: Zoning Ordinance section 59.6.7 governs "Signage". Since the Applicant proposes no signage, this section is inapplicable.

IV. CONCLUSIONS AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59.3, 59.4, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Free Rein Solar Farm, LLC (CU 23-05) for a conditional use under Section 59.3.7.1. of the Zoning Ordinance to build and operate a Solar Collection System on property described as 5011 Riggs Road, Gaithersburg, Parcel P200, Map HV21 (Tax Account No. 01-00004532), in Gaithersburg, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The existing horse farm use will remain on the remainder of the property;
2. The use as located by the site plan on the 4.92 acres of the property is limited to a solar collection system;
3. The Applicant must restabilize the area around Zion Road where the electric line will be tied into the existing utility pole; and
4. The use is conditioned upon compliance with the requirements of the State's net metering program under Maryland Code §7-306, COMAR 20.50.10, and COMAR 20.62.

Issued this 8th day of June 2023.



Kathleen E. Byrne
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional

evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTIFICATION OF DECISION TO BE SENT TO:

Soo Lee-Cho, Esquire

Attorney for the Applicant

Barbara Jay, Executive Director, Montgomery County Board of Appeals

Robert Kronenberg, Deputy Director, Planning Department

Mark Beall, Planning Department

Greg Nichols, Manager, Department of Permitting Services

Victor Salazar, Department of Permitting Services

Michael Coveyou, Director, Finance Department

Elana Robison, Esquire, Associate County Attorney