

**DICKERSON POWER PLANT
CONDITIONAL USE NO. CU202413 &
FOREST CONSERVATION PLAN NO. F20240620**



Exhibit 28
OZAH Case No: CU 24-13

Description

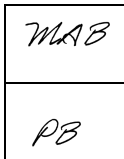
Request for Conditional Use approval and Forest Conservation Plan to construct and operate a Cable Communications System (Data Centers) and a Public Utility Structure (Battery Storage) in the IH Zone. The Applicant is seeking a general approval for the proposed uses at this time. The Conditional Use will be modified to provide additional details at each phase of development with an associated Site Plan.

No. CU202413
Forest Conservation No.
F20240620
Completed: 08-23-2024

MCPB
Item No. 6
September 5,
2024

2425 Reedie Drive
Floor 14
Wheaton, MD 20902

Planning Staff



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LOCATION/ADDRESS

North of Martinsburg Road and West of
Darnestown Road, Dickerson 20842

MASTER PLAN

1980 Preservation of Agriculture & Rural Open
Space Functional Master Plan

ZONE

IH- Heavy Industrial & AR- Agricultural Reserve
(proposed Conditional Use work is in the IH
zone only)

PROPERTY SIZE

758 Acres

APPLICANT

Terra Energy LLC

ACCEPTANCE DATE

December 27, 2023

REVIEW BASIS

Chapter 22A & 59

HEARING EXAMINER PUBLIC HEARING

October 3 & 4, 2024



Summary:

- Staff recommends approval of the Conditional Use for a Cable Communications System (Data Centers) and a Public Utility Structure (Battery Storage) with conditions and transmittal to the Hearing Examiner.
- Staff recommends approval with conditions of the associated Forest Conservation Plan.
- The Subject Site has a decommissioned Pepco power plant and associated substations under an existing Special Exception (S-235).
- The Applicant is seeking a general approval of the proposed uses at this time. If the Application is approved, the Applicant will modify this Conditional Use application and provide more detailed site plans with each phase of the Project, subject to the Hearings Examiner's determination of a Major or Minor Modification.
- Staff has not received any public correspondence as of the date of this Staff Report.

EXECUTIVE SUMMARY

The Property consists of an existing decommissioned Pepco coal fired power plant, coal storage area, and multiple substations. The Conditional Use application will cover the Property consisting of 758 acres, but the Applicant is only utilizing 292 acres at this time, mainly in the IH zoned portion of the Property. The Property has CSX railroad tracks traversing throughout. The Applicant is proposing two uses with this Application: Data Centers, which fall under the Cables Communications System use, and a Battery Energy Storage System (BESS), which falls under the Public Utility Structure use per definitions in Chapter 59, the Zoning Ordinance. The interpretation for these uses have been confirmed by Department of Permitting Services Zoning Section (Attachment F).

The Applicant is requesting a general approval for the uses with this Application for contracting and finance purposes. If the Conditional Use is approved, the Applicant will file more detailed site plans and modify the Conditional Use as needed with each phase of the project. The submitted plans show three Land Bays for the proposed future development. The detailed plans will address parking, lighting, and landscaping for each Data Center and BESS, and each phase will be required to submit a Final Forest Conservation Plan for area within each phase. The Property is large enough to be able to meet all the requirements for parking, lighting, and landscaping within all the proposed Land Bay areas and not affect the surrounding neighborhood.

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SECTION 1: RECOMMENDATIONS AND CONDITIONS

CONDITIONAL USE NO. CU202413

Staff recommends approval of Dickerson Power Plant- Terra Energy LLC Conditional Use No. CU202413, for a Cable Communications System (Data Centers) and Public Utility Structure (Battery Storage), subject to the following conditions:

1. The use is limited to Cable Communications System (Data Centers) and Public Utility Structure (Battery Storage).
2. The Applicant must record all plats in the Montgomery County Land Records prior to issuance of any building permits by the Department of Permitting Services (DPS).
3. New structures and proposed uses are limited to the Industrial Heavy (IH) zoned portion of the Property only.
4. Utility connections are permitted in the AR zoned portion of the Property as shown on the Conditional Use Plan.
5. The use of generators is for emergency backup power. Generators are not to be used as supplemental power if the applicant cannot receive enough power from the grid or the battery storage facility.
6. Maximum of 85 employees are permitted onsite at one time.
7. Prior to issuance of any building permit associated with this approval, the existing Special Exception (S-235) will need to be modified to remove the areas within this application from the existing approved Special Exception.
8. The Applicant must contact DPS Zoning for a preconstruction meeting prior to any work being performed with each phase of the project.
9. The Applicant must modify Conditional Use CU202413 with each phase to provide detailed plans including but not limited to buildings, parking lots, grading, landscaping and lighting, and refinement of the Forest Conservation Plan with each phase of the Project. The determination of whether the subsequent modifications qualify as a Major or Minor Modification of Conditional Use CU202413 will be made by the Hearings Examiner.

FOREST CONSERVATION PLAN F20240620

1. Before the start of any demolition, clearing, grading, or construction for this development Application, whichever comes first, the Applicant must record a Category I Conservation Easement over all areas of forest retention, forest planting and environmental buffers as specified on the approved Final Forest Conservation Plan. The Category I Conservation

Easement must be in a form approved by the M-NCPPC Office of the General Counsel and must be recorded in the Montgomery County Land Records by deed.

2. The Applicant must plant the variance tree mitigation plantings on the Subject Property with a minimum size of 3 caliper inches totaling 36.75 caliper inches. Planting locations to be shown on the Final Forest Conservation Plan.
3. Applicant must submit a Final Forest Conservation Plan for review and approval before obtaining a Sediment and Erosion Control Permit from the Montgomery County Department of Permitting Services for this Subject Property or with the next development application to be submitted.
4. The Final Forest Conservation Plan must be consistent with the approved Preliminary Forest Conservation Plan.

SECTION 2: NEIGHBORHOOD & SITE DESCRIPTION

VICINITY

The Subject Property outlined in Figure 1 in the red dashed line is located at the intersection of Martinsburg Road, Darnestown Road (MD Route 28) and Dickerson Road, Dickerson, Maryland. The Property is located in the 1980 *Preservation of Agriculture & Rural Open Space Functional Master Plan*.

As shown in Figure 1 below, Staff defined a neighborhood for the purposes of analyzing this Conditional Use and its possible impacts on the character of the surrounding. Staff determined the neighborhood boundaries based on properties that would be most impacted by the Conditional Use. Since the proposed Cable Communications System and Public Utility Structure are in the middle of the approximately 750-acre Property, Staff limited the neighborhood to abutting and confronting properties. The neighborhood as defined is comprised of low-density residential development, agricultural uses, public utility structures, a publicly owned and operated incinerator, and a composting facility. The properties to the north, east and south are all zoned AR. The properties to the north and east consist of low-density residential development and agricultural uses. The properties to the south are owned by Montgomery County Government and consist of the County Incinerator and the County Composting Facility. The western boundary abuts the Potomac River, the C&O Canal, the C&O Canal tow path, and National Park Service properties. The existing Special Exception for a Public Utility Structure use on the Subject Property is the only Special Exception within the neighborhood boundary.



Figure 1: Vicinity Map with Staff-defined neighborhood highlighted in bold, solid blue and Subject Property outlined in dashed red.

Staff identified one approved conditional use/special exception within the defined neighborhood:

1. The Subject Property, S-235: Public Utility Structure

PROPERTY DESCRIPTION

The Subject Property (outlined in red dashed line in Figures 1 and 2) consists of 758 acres. The Property consists of four recorded parcels and identified by Parcel 940 on Tax Map 03-03305536 and

Parcels 145, 377 and 500 on Tax Map 03-00039930. The Property is located at the corner of Martinsburg Road, Darnestown Road and Dickerson Road.

The Property includes a decommissioned coal fired power plant. The plant was decommissioned a little over four years ago. The Property also includes Pepco power transmissions lines and power substations. The Property has a series of CSX railroad tracks traversing through the Site. There is a former coal storage facility along the northwest corner of the Property. The Property also contains a water intake along the Potomac River as well as a water discharge. The Property contains a manmade white-water rapids facility that was used for training the US Olympic White-Water Rapid Team.

The Property contains multiple forest stands. There are numerous stormwater management facilities and ponds throughout the Property. The Property contains numerous streams, ponds and wetlands. Federal Emergency Management Agency (FEMA) designated floodplains and associated environmental buffer traverse into the Property in a few locations along the north and west sides of the Property.



Figure 2 – Subject Property

SECTION 3: PROJECT DESCRIPTION

PROPOSAL

The Applicant proposes to construct a Cable Communications System (Data Centers) and a Public Utility Structure (Battery Storage) on the Property. The Conditional Use work will be limited to the IH zoned portion of the Property. The Applicant is only proposing utility connections in the AR zoned portion of the Property which are permitted by right. The Applicant is proposing and requesting a general approval for the Conditional Uses on the Property. If the Applicant receives an approval of this Application, the Applicant will prepare and submit more detailed site plans and modify the Conditional Use as each phase is designed. The Applicant is seeking a general approval of the uses at this time.

The Applicant is proposing three Land Bays for the proposed uses. Land Bay 1, approximately 47.44 to 67.77 acres in size, will consist of two Data Centers (74,122 total square feet), two Administration Buildings (31,070 total square feet), and two warehouses (14,772 total square feet) with associated parking lots which will be approximately 120 feet from the rear property line. Land Bay 2, approximately 28.45 to 40.64 acres in size, will consist of a Battery Energy Storage System- BESS (40.64 acres), a substation (46,168 square feet), an office building (900 square feet), fencing and associated ring road around the BESS which will be approximately 350 feet from the rear property line and approximately 3,400 feet from the east property line. Land Bay 3, approximately 76.26 to 108.94 acres in size, will consist of five Data Centers (185,305 total square feet), five Administration Buildings (77,765 total square feet), and five warehouses (36,930 total square feet) with associated parking lots which will be approximately 1,000 feet from the rear property line and approximately 2,000 feet from the right property line. Land Bay 3 will also consist of a power transmission substation (118.969 square feet) and a fire safety storage area. The fire safety storage area is proposed to satisfy the future Fire Department Access Plan for water storage and fire apparatus setup area.

The Applicant is proposing to utilize the existing water intake at the Potomac River to help cool the Data Centers and then exhaust the water back into the Potomac River. This process was used previously with the Coal Fired Power Plant. The BESS will be used to supplement the power needed for the Data Centers during lower power supplies from the power grid. Backup generators are being proposed however they will only be used during power outages and not to supplement lower power supply from the grid.

Cable Communications System Definition (Section 59.3.5.2.A): Cable Communications System means an arrangement of antennas, cables, amplifiers, towers, microwave links, lines, wires, waveguides, laser beams, satellites, or any other conductors, converters, equipment, or structures designed, constructed and operated with the purpose of producing, transmitting, receiving, amplifying, storing, processing, or distributing audio, video, digital or other forms of electronic or electrical signals, programs and services in which the signals are distributed by wire or cable to subscribing members of the public. Cable Communications System does not include any similar system with cables that do not touch public rights-of-way and that serve only the occupants of a single property of land under common ownership or management.

Public Utility Structure Definition (Section 59.3.6.7.E): Public Utility Structure means a utility structure other than transmission lines or pipelines. Public Utility Structure includes structures for the occupancy, use, support, or housing of switching equipment, regulators, stationary transformers, and other such devices for supplying electric service or other public utilities.

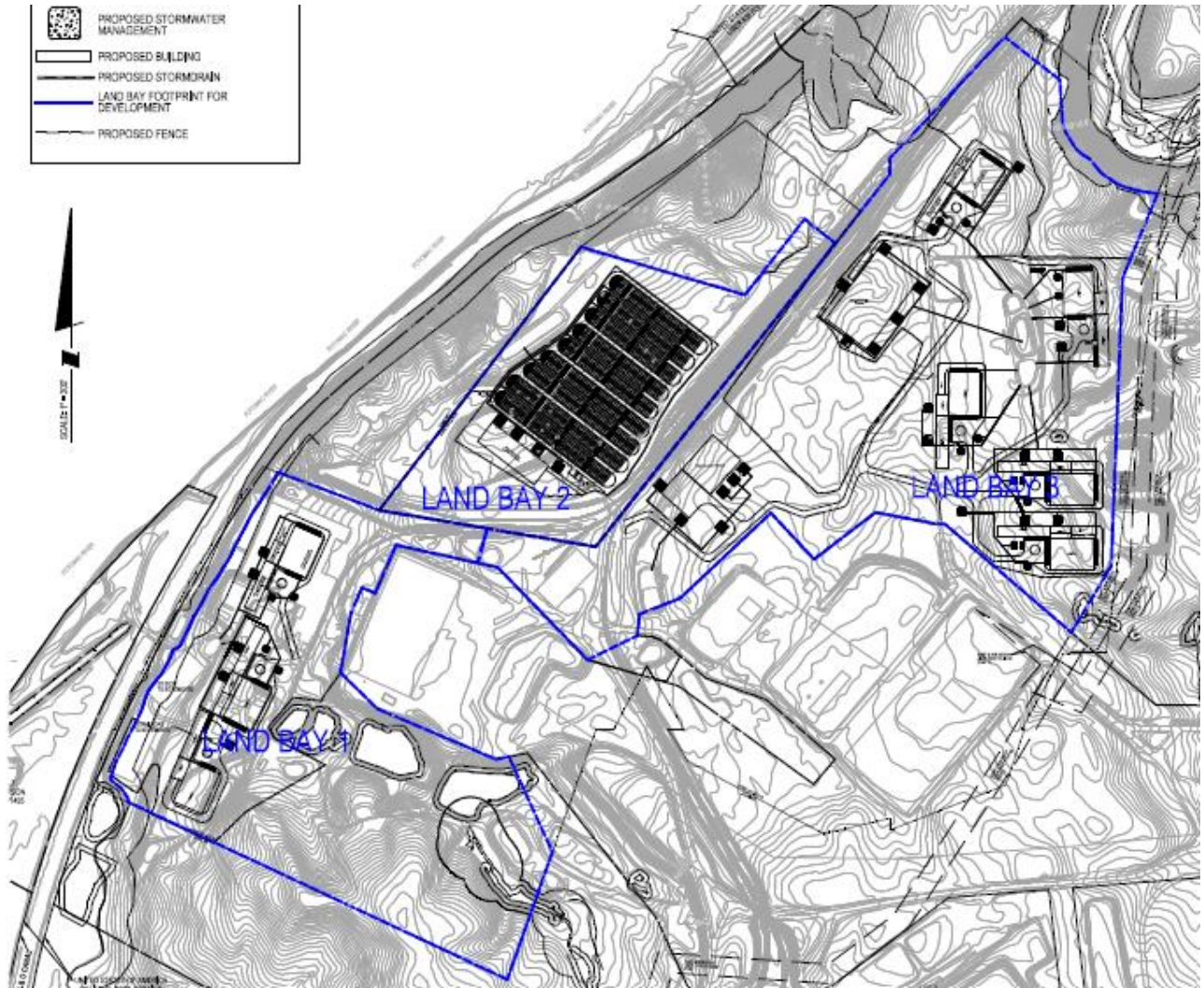


Figure 3: Proposed Site Conditions- All three Land Bays

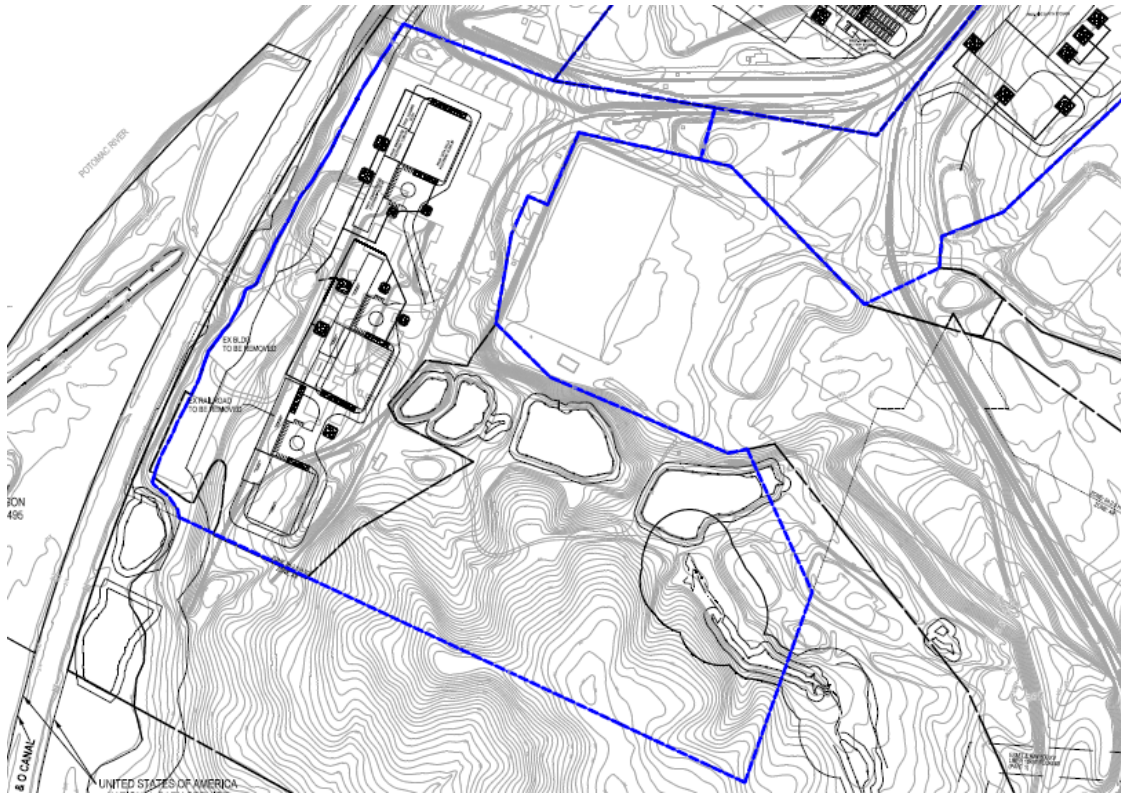


Figure 4: Land Bay 1

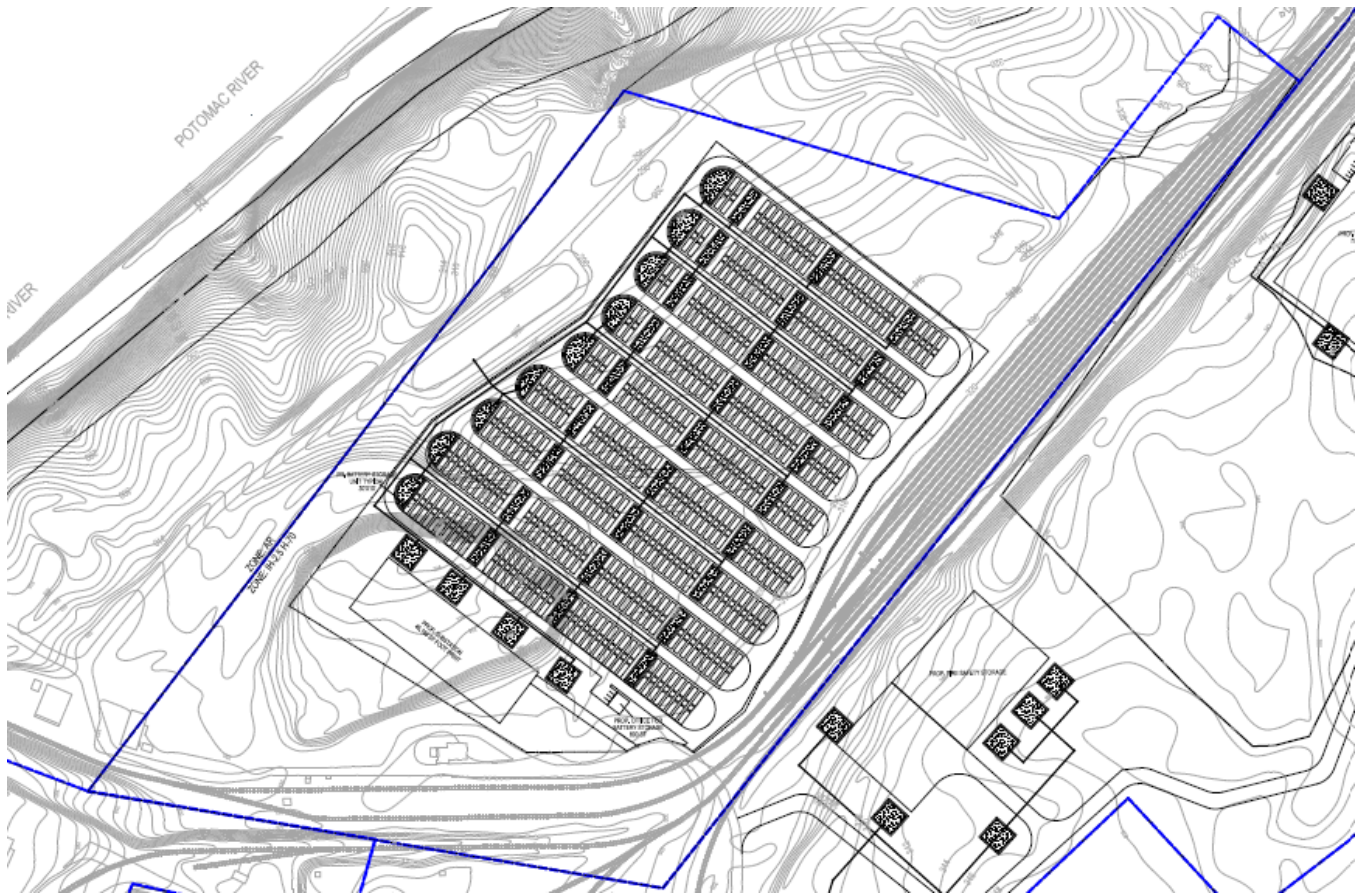


Figure 5: Land Bay 2

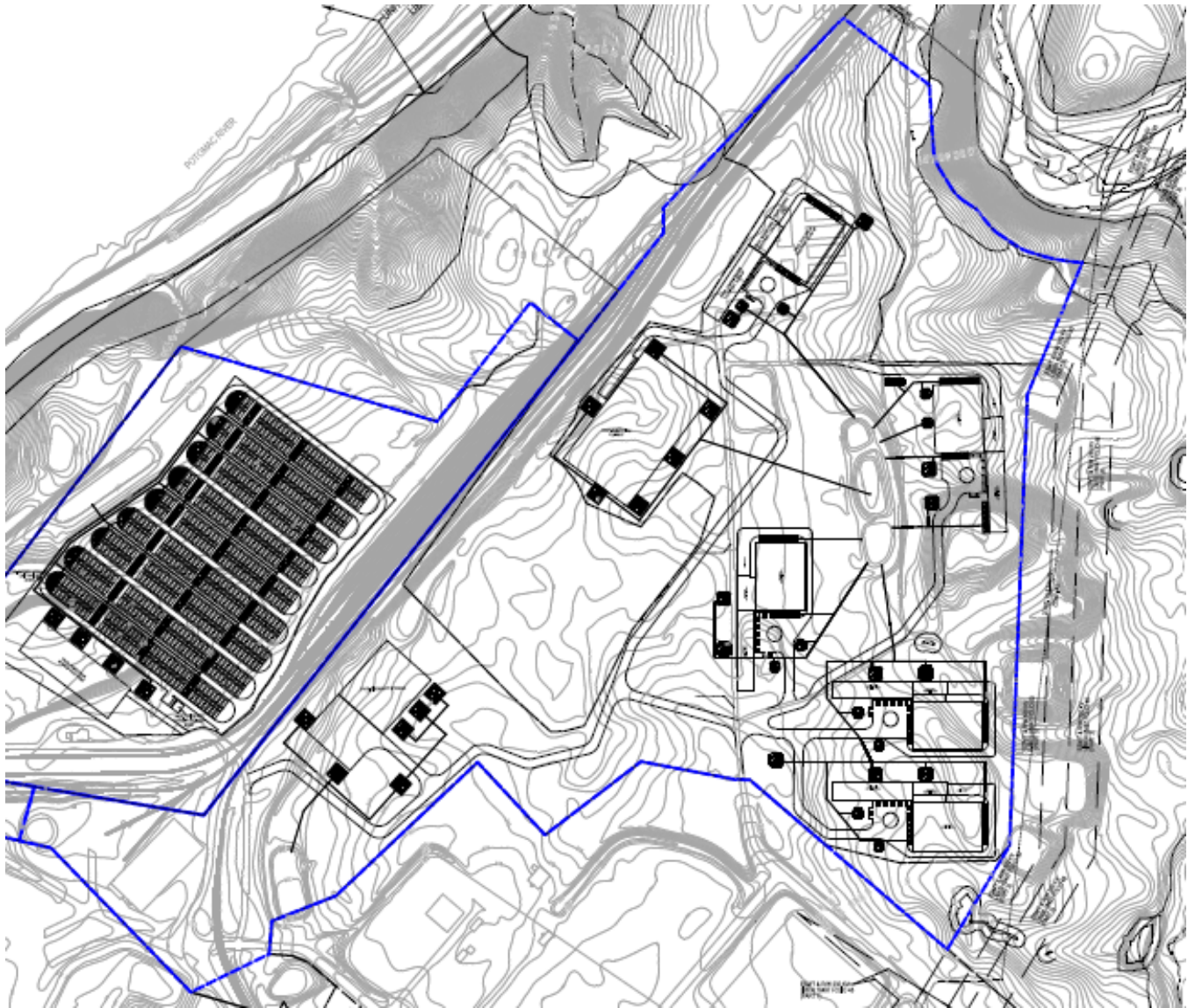


Figure 6: Land Bay 3

SECTION 4: COMMUNITY CORRESPONDENCE

As of the date of this Staff Report, Staff has not received any letters of correspondence from the community.

SECTION 5: ANALYSIS AND FINDINGS

CONDITIONAL USE NO. CU202413

Section 3.5.2.A of the Zoning Code requires the following:

- 1. Where as a Cable Communications System is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section [7.3.1](#), Conditional Use, and the following standards:**

a. Any proposed tower must be set back one foot for every foot of height of a tower from all property lines, measured from the base of the support structure.

The Applicant is not proposing towers with this application. This Section does not apply. The Applicant is proposing to leave the existing smokestacks in place. The smokestacks contain existing telecommunications systems that are allowed by right as colocations on an existing structure.

b. The location of the proposed community access centers or studios are consistent with the cable communications plan approved by the District Council.

The Applicant is not proposing community access centers or studios with this application. This Section does not apply.

c. Structures, buildings, and facilities in which or on which component elements of a Cable Communications System are located or which otherwise support the system, and which are operated by the entity operating the Cable Communications System under a franchise awarded by Montgomery County, may be allowed if approved by the Hearing Examiner.

The proposed operations do not require a franchise by Montgomery County. This section does not apply.

d. Offices are prohibited in Residential zones as part of the Cable Communications System Use.

The Applicant is proposing an administrative building located at each of the Data Center locations within the Site. All the Data Center locations are located entirely in the IH zone.

e. Screening under Division [6.5](#) is not required.

The Applicant is not proposing any additional screening with this application, and none is required for the Cable Communications System use. However, the Site is fully

surrounded by forested areas and is several hundred feet from public roads or any adjoining properties. The Applicant will be providing detailed landscaping plans with each phase of the project.

f. The transmission and distribution lines, wires, and cables that are component elements of a cable communications system are permitted uses in all zones and are not required to obtain conditional use approval.

The transmission and distribution lines, wires and cables are permitted uses and do not require conditional use approval. Moreover, the main power transmission lines that will serve the facility have long existed on the property given its extended period of power general.

Section 3.6.7.E of the Zoning Code requires the following:

1. A Public Utility Structure is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section [7.3.1](#), Conditional Use, and the following standards:

i. The proposed structure at the location selected is necessary for public convenience and service.

The proposed structures will be conveniently located adjacent to a major power grid in order to provide enough power to supply the proposed data centers without the need for supplemental generators. The proposed structures and operations are a critical component of our local, regional, and national data facilities. They do not require Public Service Commission approval based on public convenience and necessity but do nonetheless serve the public. In essence, every person who uses a computer, cellphone, smart speaker, television, or other device that relies on digital data, requires data storage facilities.

ii. The proposed structure at the location selected will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.

As noted, the proposed structures are located a substantial distance from any neighboring properties, and an even greater distance from any residents. The proposed structures will be designed according to all applicable building codes to protect the health and safety of workers as well. As further noted above, the subject location is ideal because of its accessibility to the power grid, data transmission facilities, water supply and its separation from neighboring properties. The Property is surrounded by an existing security fence. The property will only be accessed by a gated entrance monitored by security personnel.

iii. A Public Utility Structure allowed in any Rural Residential or Residential zone, must, whenever practicable, have the exterior appearance of a residential building

and must have suitable landscaping, screen planting and fencing, wherever deemed necessary by the Hearing Examiner.

The proposed structures are not located in a rural residential or residential zone; therefore, this Section does not apply.

iv. The Hearing Examiner may waive the height limits of the applicable zone where, in the opinion of the Hearing Examiner, adjacent residential uses will not be adversely affected by the increased height.

Applicant is not seeking a waiver of any height limits for proposed structures and the substantial distance between the proposed structures and any residential uses is so great that the buildings will be fully screened. Proposed structures will not exceed the maximum mapped height of 70 feet.

v. An applicant for a Public Utility Structure may file a conditional use application if the applicant states in writing under oath that a bona fide effort has been made to obtain a contractual interest in the subject property for a valid consideration without success, and that there is an intent to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the conditional use be approved.

Applicant owns the Property and does not require any further interest or condemnation to construct the facilities.

Section 59.7.3.1.E.

1. Per Section 59.7.3.1.E., 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.

The Property has a previously approved Special Exception (S-235) for a Public Utility Structure. The Applicant is required to modify the existing Special Exception S-235 to remove the area for this application from the existing Special Exception area prior to building permit approval.

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;

i. Use Standards for Cable Communications System- Section 59.3.5.2

ii. Use Standards for a Public Utility Structure- Section 59.3.6.7.E

As detailed above, the proposed Cable Communications System satisfies the requirements and use standards in Section 59.3.5.2 and

the proposed Public Utility Structure satisfies the requirements and use standards in Section 59.3.6.7.E.

iii. Development Standards

The Subject Property is in the IH and the AR zones, which allows a Cable Communications System and a Public Utilities Structure as a Conditional Use. The proposed Conditional Use will only be located in the IH zone portion of the Property. The Project complies with all development standards of the IH zone, as shown on the Development Standards Table below.

Table 1: Conditional Use Development and Parking Standards (Heavy Industrial- IH)

Development Standard Section 59.4.8.3.C*	Permitted/ Required	Existing/Proposed
Minimum Lot Area	N/A	758 acres
Maximum Density	N/A	N/A
Maximum Building Lot Coverage	N/A	N/A
Minimum Front Setback	10 feet	3000+ feet
Minimum Side Setback	30 feet	Right: 2000+ feet & Left: 1500+ feet
Minimum Rear Setback	52.5 feet	120 feet
Maximum Height	70 feet	70 feet
Vehicle Parking Requirement (Section 59.6.2.4.B)	Warehouse- 1.5 spaces/ 1,000 sq. ft.= 78 spaces	165 spaces

iv. General Requirements

Article 59-6 has the following applicable requirements which help ensure compatibility:

6.2 Parking

All proposed parking lots are internal to the Property and due to grade and vegetation cannot be viewed from outside the Property. The Applicant is proposing a maximum of 85 employees with this application and providing 165 parking spaces onsite. The proposed parking lots will meet the requirements of the Zoning Ordinance as it pertains to landscaping and canopy coverage. The Applicant will provide more detailed plans to include parking lot layout, landscaping, and canopy details on future modifications. The Property contains enough area within the limits of disturbance of all three Land Bays to be able to provide the required parking and landscaping.

6.4 Landscaping and Lighting

While staff has requested information regarding landscaping and lighting, the Applicant has declined to provide the requested information due to the nature and context of the Property. The proposed uses are far enough away from neighboring properties that lighting and landscaping should not have any effects on the neighboring properties. The Applicant has ample room to be able to install the required lighting and landscaping with each phase of the project. Each phase will require a modification and the Applicant will provide that level of detail at the time of each modification. That being said, the Applicant should install full cutoff lighting and comply with applicable Montgomery County lighting standards.

6.5 Screening Screening

While staff requested information regarding landscaping and lighting, the Applicant has declined to provide the requested information due to the nature and context of the Property. The Applicant is not proposing any additional screening with this application. However, the Property is fully surrounded by forested areas and is several hundred feet from public roads or any adjoining properties. More detailed Site Plans will be provided with each phase of development proposed and will require the Conditional Use to be modified.

6.7 Signs and Signage

No signage is being proposed with this Application.

c) *substantially conforms with the recommendations of the applicable master plan;*

1980 Preservation of Agriculture & Rural Open Space Functional Master Plan

The Site is located within the 1980 *Preservation of Agriculture & Rural Open Space Functional Master Plan* (Master Plan) area, which has no specific recommendations for the Property. The existence of the former use, Coal Fired Power Plant, occurred prior to this Master Plan, the 1957 General Plan and the 1964 General Plan which set the foundation of land use in Montgomery County. At the time of the 1980 Master Plan, the Site was identified only as the ‘PEPCO Site’, and the Master Plan does not recommend any rezoning on the Property or anticipate any change of use. The Master Plan had an emphasis on the preservation of agriculture and rural open space and did not contemplate any future uses or development of the Property.

The Applicant is not proposing any development or uses on AR-zoned property and/or Class I and II Prime Agricultural Soils. Thus, the proposed uses are consistent with the IH-zoned portions of the Property and with the Master Plan.

d) *is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;*

The land under this application is almost entirely Heavy Industrial Zoning and is surrounded by lands zoned Agricultural Reserve. Existing uses in this area, located on

both zoning categories, include a Dual Fuel Combustion Turbine, two (2) Electrical Substations, a Waste Incinerator, a Landfill, a Mulching Facility, the C & O Canal and privately owned agricultural properties. Traditional Heavy Industrial uses, including the power plant that operated here for many years, bring significant community impact in the following ways: a very high employee count, employee traffic, commercial/industrial shipping vehicles, noise pollution, light pollution, air pollution and ground contaminants. The impacts of the proposed uses will be much less than the previous coal fired power plant and existing uses surrounding the Property.

Thus, the proposed uses will not alter the character of the surrounding neighborhood.

- 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;**

The Property is zoned IH and AR and is not located in a Residential Detached zone. This application does not adversely affect or alter the predominantly low-density residential and agricultural uses in the area. The proposed uses are less intense than the previously approved coal fired power plant and existing uses surrounding the Property.

- 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**

Adequate public facilities exist to serve the proposed project. The Property is served by private well and septic. The Applicant is working with DPS Well &

Septic and will receive approvals at the time of building permits for each structure.

The Applicant will submit a Fire Department Access Plan with DPS each phase of construction. The Applicant received an email from DPS Water Resources that the stormwater management will be reviewed and approved at the time of building permits for the proposed structures (Attachment D).

The proposed use is located on Martinsburg Road, which is classified as a Rustic Road under the Rustic Roads Functional Master Plan. Roads designated in the Rustic Roads Program have been determined to have valuable characteristics and are to be preserved under this law. Maintenance practices and improvements must preserve the roads and certain significant features of them. Under Chapter 49, Section 49-32, rustic roads are called out as exceptions to the usual requirements applied to other roads in the county. Therefore, they are exempted from the design standards that apply to other roads such as any sidewalks, master-planned bikeways, ramps, curbs, and gutters.

According to the Rustic Roads Functional Master Plan, the required right-of-way width dedication for Martinsburg Road is 80 feet. According to Record Plat No. 21493, the existing right-of-way dedication is 40 feet from the centerline of Martinsburg Road to the property line. Thus, no additional right-of-way dedication is required. Martinsburg Road does not contain any pedestrian or bicyclist facilities. However, it is adjacent to the C&O Canal Towpath, an off-street trail, to the west of the Property. The 2018 Bicycle Master Plan also has no recommendations for Martinsburg Road. Additionally, under Chapter 49, Section 49-33 of the Montgomery County Code, the applicant is exempt from constructing any sidewalks, master-planned bikeways, ramps, curbs, and gutters due to its current roadway classification as a rustic road.

The Subject Application is located in the Rural West Transportation Policy Area, which is categorized as a Green Policy Area under the 2020-2024 Growth and Infrastructure Policy (GIP). If the proposed use generates more than 50 weekday peak-hour person trips. As demonstrated in the Transportation Exemption Statement (TES) provided by the applicant on September 18, 2023, the proposed use will generate less than 50 net new peak hour trips. Therefore, the applicant is exempt from the Local Area Transportation Review (LATR) under the GIP and is exempt from completing further transportation adequacy analysis. Roads and transportation facilities are adequate to support the Application.

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, residents, visitors, or employees.***

The Zoning Ordinance defines inherent adverse effects as “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.” Non-inherent adverse effects, on the other hand, are those associated with a conditional use “not necessarily associated with the particular use or created by an unusual characteristic of the site” (59.1.4.2). Inherent adverse effects alone are not a sufficient basis to deny a conditional use application. Non-inherent adverse effects, either alone or in combination with inherent effects, are sufficient to deny an application.

To determine the impact of adverse effects on the neighborhood in which a proposed conditional use is located, staff have focused on seven characteristics: size, scale, scope, light, noise, traffic, and environment. In this case, those effects typically and necessarily associated with a Cable Communications System and a Public Utility Structure are considered inherent effects, and those not usually associated with the use or created by site characteristics are considered noninherent effects. The physical and operational characteristics inherent with a Cable Communications System and a Public Utility Structure are:

- access road
- temporary construction noise
- backup generators noise
- exhaust fans vibration and noise
- traffic generated by employees
- industrial appearance

The Cable Communications System and Public Utility Structure will not be detrimental to surrounding properties and Staff has not identified any non-inherent adverse effects associated with this application.

The Project will be screened by existing trees and grade, so it will have a limited visual impact, and will not cause any objectionable noise, fumes, or illumination or decrease in the economic value of surrounding properties. The proposed use will have no adverse effect on road congestion or safety, as there is limited on-site personnel. There will be no noise generated by the uses other than backup generators during power outages. There will be no

offensive odors emitted by the equipment. The Site will not cause any vibrations.

The Conditional Uses generate very little traffic and has relatively minimal parking requirements. There will be limited noise, odors, dust, or illumination associated with the Application. The Proposed Use, provided all requirements and conditions of the use are satisfied, will have no adverse impacts on the health, safety, or welfare of neighboring residents, visitors, or employees.

2. ***Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.***

The Property is located in the IH and AR zones and is not located in a Residential Detached zone, so this section does not pertain to this application.

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 is not sufficient to require conditional use approval.***

The use is compatible and less intense and compatible to existing uses on nearby properties.

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.***

The proposed use of a Cable Communications System and a Public Utility Structure are not considered an agricultural conditional use, so this section does not pertain to this application.

5. ***The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:***

- a) ***Filling Station;***
- b) ***Light Vehicle Sales and Rental (Outdoor);***
- c) ***Swimming Pool (Community); and***
- d) ***the following Recreation and Entertainment Facility use: swimming pool, commercial.***

This section does not pertain to this application as it is not proposing any of the above listed uses.

6. ***The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due***

to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- a) Funeral Home; Undertaker;**
- b) Hotel, Motel;**
- c) Shooting Range (Outdoor);**
- d) Drive-Thru**
- e) Landfill, Incinerator, or Transfer Station; and**
- f) a Public Use Helipad, Heliport or a Public Use Helistop.**

This section does not pertain to this application as it is not proposing any of the above listed uses.

PRELIMINARY FOREST CONSERVATION PLAN

All Forest Conservation Law, Chapter 22A requirements are satisfied.

The Application meets the requirements of Chapter 22A of the Montgomery County Forest Conservation Law.

The Application is subject to the Montgomery County Forest Conservation Law (Chapter 22A of the County Code) under Section 22A-4(b) a person required by law to obtain approval of a special exception or a conditional use, or a sediment control permit on a tract of land 40,000 square feet or larger, and who is not otherwise required to obtain an approval under subsection (a).

Environmental Guidelines

A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) # 420240750 was approved for the Property on December 8, 2023. The Property is within the Potomac Direct and Little Monocacy watersheds, which are classified by the State of Maryland as Use I-P watershed, and contains steep slopes, streams, wetlands, floodplains, and Environmental Buffers. There are large specimen trees distributed across the Property.

Forest Conservation

The Applicant has submitted A Preliminary Forest Conservation Plan (“PFCP”)for review. That PFCP includes the total tract area minus any deductions (Net Tract Area). The Property is covered by two different Land Use Categories, Commercial and Industrial Area (CIA) and Agricultural Resource Area (ARA), each have there own thresholds.

Overall, all forest retained or planted onsite will be placed into a Category I conservation easement. All areas of environmental buffers within the Net Tract Area will be reforested and placed in in Category I conservation easements.

The Application meets the requirements of Chapter 22A of the Montgomery County Forest Conservation Law.

The entire subject property is 979.11 acres and is covered by two land use types under Chapter 22A. The property is composed of 439.79 acres of Commercial and Industrial Area (CIA) and 439.79 acres of Agricultural Resource Area (ARA). Each land type has a separate Forest Conservation worksheet.

Commercial and Industrial Area (CIA)

The Applicant has deducted 4.75 acres from the 239.32 total tract area for existing utility rights-of-way (ROW), leaving a net tract area of 234.57 acres. The Applicant proposes to remove 18.19 acres of forest and retain 55.06 acres of forest. Based on the land use category, CIA, and the forest conservation afforestation and reforestation thresholds (15% and 15% respectively) the worksheet does not result in a planting requirement.

Agricultural Resource Area (ARA)

The Applicant has deducted 21.45 acres from the 439.79 total tract area for existing utility rights-of-way (ROW), leaving a net tract area of 418.34 acres. The Applicant proposes to remove 0.72 acres of forest and retain 343.15 acres of forest. Based on the land use category, ARA, and the forest conservation worksheet's afforestation and reforestation thresholds (20% and 55% respectively) the proposal does not generate a planting requirement.

Forest Conservation Variance

Section 22A-12(b)(3) of Montgomery County Forest Conservation Law provides criteria that identify certain individual trees as high priority for retention and protection ("Protected Trees"). Any impact to these trees, including removal of the subject tree or disturbance within the tree's critical root zone ("CRZ") requires a variance under Section 22A-12(b)(3) ("Variance"). Otherwise, such resources must be left in an undisturbed condition. An applicant for a variance must provide certain written information in support of the required findings in accordance with Section 22A-21 of the County Forest Conservation Law. The law requires no impact to trees that: measure 30 inches or greater DBH; are part of an historic site or designated with an historic structure; are designated as a national, State, or County champion trees; are at least 75 percent of the diameter of the current State champion tree of that species; or trees, shrubs, or plants that are designated as Federal or State rare, threatened, or endangered species.

Variance Request

This Forest Conservation Plan variance request is for four (4) specimen trees to be removed and no trees other trees to be impacted by construction activities. The trees identified in this variance request for removal or CRZ impacts are shown on the Forest Conservation Plan. The trees to be removed are either located within the limits of disturbance or the Limits of Disturbance (LOD) impacts to their critical root zone are too large to expect tree survival.

Table 4: Variance Trees to be Removed.

TREE NO.	BOTANICAL NAME	COMMON NAME	D.B.H. (inches)	CONDITION	RECOMMENDATION
659	Acer saccharinum	Silver Maple	34	Good	REMOVE: 100% CRZ IMPACT
660	Quercus palustris	Pin oak	30	Good	REMOVE: 100% CRZ IMPACT
663	Prunus serotina	Black Cherry	36	Poor	REMOVE: 100% CRZ IMPACT
703	Acer saccharinum	Silver Maple	47	Poor	REMOVE: 100% CRZ IMPACT

Unwarranted Hardship Basis

Per Section 22A-21, a variance may only be granted if the Planning Board finds that leaving the requested trees in an undisturbed state would result in unwarranted hardship, denying the Applicant reasonable and significant use of the Property. In this case, there are several special conditions on the Property which would cause unwarranted hardship, absent of a variance for removal of specimen trees.

The property includes Industrial zoned portions of land and agricultural zoned portions of land. The limits of disturbance encompass 177.99 acres of which all of the land is industrial zoned. Prior to development 67.40 acres of forest exist on the industrial land which covers 28.7% of the industrial net tract area. The agricultural zoned property is not being proposed for development. In order to develop the Property, forest removal will be offset by existing forest within the agricultural zoned land, reforestation within the agricultural zoned land and a nearby lot that the developer owns located off of the existing Power Plant Service Road. Proposed improvements and the Limits of Disturbance were established to protect the agricultural land located outside of the LOD.

The LOD has been established to grant the owner maximum flexibility in the development of the industrial land while not compromising the existing and established forests and land within the agricultural zoned land.

Tree 659 – This specimen tree is impacted due to stormwater management as well as proposed parking features. Per Maryland State Legislation, impervious improvements on land need to be treated and offset by Stormwater Management Practices in order that the Maryland Watershed is not polluted by the results of the construction. This specimen tree is impacted by the installation of a stormwater management feature.

Tree 660 - This specimen tree is impacted due to stormwater management as well as proposed building, and fire access. Per Maryland State Legislation, impervious improvements on land need to be treated and offset by Stormwater Management Practices in order that the Maryland Watershed is not polluted by the results of the construction. This specimen tree is impacted by the installation of a stormwater management feature. The specimen tree is also unfortunately impacted by the proposed building. The location of the building was strategically placed in order to also comply with existing easements, access, stormwater management features, and fire safety.

Tree 663 – This specimen tree is impacted due to the location of the proposed building. When selecting the proposed building location several other rules and regulations had to be considered. The proposed building needed to be satisfied by Stormwater Management Requirements, access requirements, existing easements, and fire safety. All of these requirements are to be observed and complied with due to state and local regulations.

Tree 703 – This specimen tree is impacted due to stormwater management. Per Maryland State Legislation, impervious improvements on land need to be treated and offset by Stormwater Management Practices in order that the Maryland Watershed is not polluted by the results of the construction. This specimen tree is impacted by the installation of a stormwater management feature.

Therefore, the Applicant has a sufficient unwarranted hardship to justify a variance request.

Section 22A-21 of the County Forest Conservation Law sets forth the findings that must be made by the Planning Board for a variance to be granted.

Variance Findings

- 1. Will not confer on the applicant a special privilege that would be denied to other applicants.**

Granting the variance will not confer a special privilege on the Applicant as the removal and impacts of the trees is due to the location of the trees and necessary site design requirements. The Applicant proposes removal of the 4 trees with mitigation. Therefore, granting of this variance is not a special privilege that would be denied to other applicants.

2. Is not based on conditions or circumstances which are the result of the actions by the applicant.

The requested variance is not based on conditions or circumstances which are the result of actions by the Applicant. The requested variance is based upon the existing site conditions and necessary design requirements of this specific use.

3. Is not based on a condition relating to land or building use, either permitted or non-conforming, on a neighboring property.

The requested variance is a result of the existing conditions and not as a result of land or building use on a neighboring property.

4. Will not violate State water quality standards or cause measurable degradation in water quality.

The variance will not violate State water quality standards or cause measurable degradation in water quality. The FCP proposes to provide mitigation for the removal of Protected Trees in the form of tree planting on the Property. These trees will replace any water quality functions that may be lost by the removed trees.

Mitigation for Trees Subject to the Variance Provision

There are four trees to be removed in this variance request resulting in 147 inches of DBH removed. The Applicant proposes mitigation at a rate that approximates the form and function of the trees removed. These trees will be replaced at a ratio of approximately 1-inch caliper for every four inches removed using trees that are a minimum of three caliper inches in size. This results in a total mitigation of 36.75 inches utilizing 12 3-inch caliper trees. Although these trees will not be as large as the trees lost, they will provide some immediate benefit and ultimately replacing the canopy lost by the removal of these trees. These mitigation trees must be overstory trees native to the region. There is some disturbance within the critical root zones of five trees; however, these trees will not be removed, they will receive adequate tree protection measures, the roots will regenerate, and the functions they currently provide will continue. Therefore, no mitigation is recommended for trees impacted but retained.

Variance Recommendation

Staff recommends the Planning Board approve the variance request.

CONCLUSION

The Preliminary Forest Conservation Plan meets all applicable requirements of Chapter 22A of the County Code. Therefore, Staff recommends that the Planning Board approve the Preliminary Forest Conservation Plan with the conditions cited in this Staff Report.

SECTION 6: CONCLUSION

The proposed conditional use complies with the general conditions and standards of a Cable Communications System and a Public Utility Structure, subject to the recommended conditions of approval. The proposed use is consistent with the goals and recommendations of the 1980 *Preservation of Agriculture & Rural Open Space Functional Master Plan*, will not alter the character of the surrounding neighborhood, will not result in the loss of farmland, and will not result in any unacceptable noise, traffic, or environmental impacts on surrounding properties. Staff recommends approval of the Conditional Use with conditions and transmittal of comments to the Hearing Examiner and approval of the associated Forest Conservation Plan.

ATTACHMENTS

- Attachment A: Forest Conservation Plan
- Attachment B: Conditional Use Plan
- Attachment C: Email from DPS Well & Septic
- Attachment D: Email from DPS Water Resources
- Attachment E: National Park Service Email
- Attachment F: Email DPS Zoning Interpretation