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I. STATEMENT OF THE CASE

Terra Energy, LLC (Applicant or Terra Energy) filed an application on December 27, 2023 seeking approval of two conditional uses one for a public utility pursuant to Section 59.3.6.7.E and one for a cable communications system pursuant to Section 59.3.5.2.A of the Zoning Ordinance. The subject property is identified as Lots 8 & 9 on Martinsburg Road, Tax Account numbers 03-03853280 and 03-3853291 located in Dickerson, Maryland. Exhibit 1. The property is zoned IH and AR. *Id.* OZAH originally scheduled a public hearing for July 1, 2024, but at the request of the Applicant, the hearing was postponed indefinitely on June 13, 2024. Exhibit 24. When the case was rescheduled, OZAH sent notice of the public hearing on July 29, 2024, scheduling two dates, October 3 and 4, 2024, for the public hearing. Exhibit 25. On September 23, 2024, Planning Staff sent OZAH its Staff Report and the Planning Commission’s recommendation. Exhibits 28 and 27. Both Planning Staff and the Planning Commission recommended approval of the application 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.

Exhibit 28, pgs. 3-4.

The public hearing proceeded in a hybrid format as scheduled on October 3, 2024, and the hearing concluded that same day. The Applicant presented one witness, Jeffrey Ferrel, Vice President of Terra Energy. OZAH received a Notice of Intent to Provide Comment on the application from Caroline Taylor as the Executive Director of the Montgomery Countryside Alliance and the Sugarloaf Citizens Association. Exhibit 29. Ms. Caroline Taylor testified not in opposition or support, but as someone with “concerns and waiting for answers.” T. 9. At the conclusion of the testimony, the Hearing Examiner held the record open for a period of 10 additional days to allow for the transcript of the proceedings to be generated and to allow Ms.

Taylor to submit documents she referred to that would support her testimony. T. 139-140, 162.

To allow the Applicant to respond to the documents submitted by Ms. Taylor, the Hearing Examiner added an additional 7 days before closing the record. T. 162. Ms. Taylor submitted the documents supplementing her testimony on October 14, 2024. Exhibit 34. Robert Harris, attorney for the Applicant submitted a response on Friday, October 18, 2024. Exhibit 35. The Hearing Examiner closed the record on Monday, October 21, 2024.

II. FACTURAL BACKGROUND

A. Subject Property

The subject Property consists of four recorded lots covering 758 acres located at the corner of Martinsburg Road, Darnestown Road and Dickerson Road. Exhibit 28, pg. 6. The lots are identified by Parcel 940 on Tax Map 03-03305536 and Parcels 145, 377 and 500 on Tax Map 03-00039930. Exhibit 28, pgs. 6-7. For more than 50 years the property served as the location for the Dickerson Power Plant, a major electric power generating location. Exhibit 3, pg. 4. Multiple buildings of all shapes and sizes including the large power plant structures and a smokestack remain on site. *Id.* The property still contains a coal fired power plant, decommissioned a little over four years ago, along with PEPCO power transmissions lines and power substations. Exhibit 28, pg. 7. In addition, the property houses a series of CSX railroad tracks traversing the property, a former coal storage facility along the northwest corner of the and contains a water intake and water discharge along the Potomac River. *Id.* Unrelated to the power plant use, the property contains a manmade white-water rapids facility previously used for training the US Olympic White-Water Rapid Team. *Id.*

The irregular shaped property is split zoned heavy Industrial (IH) and Agricultural (AR). Exhibit 3, pg. 4. The Property contains multiple forest stands, stormwater management facilities and ponds along with numerous streams, ponds and wetlands. Exhibit 28, pg. 7.



Staff Report - Exhibit 28
Figure 2 – Subject Property

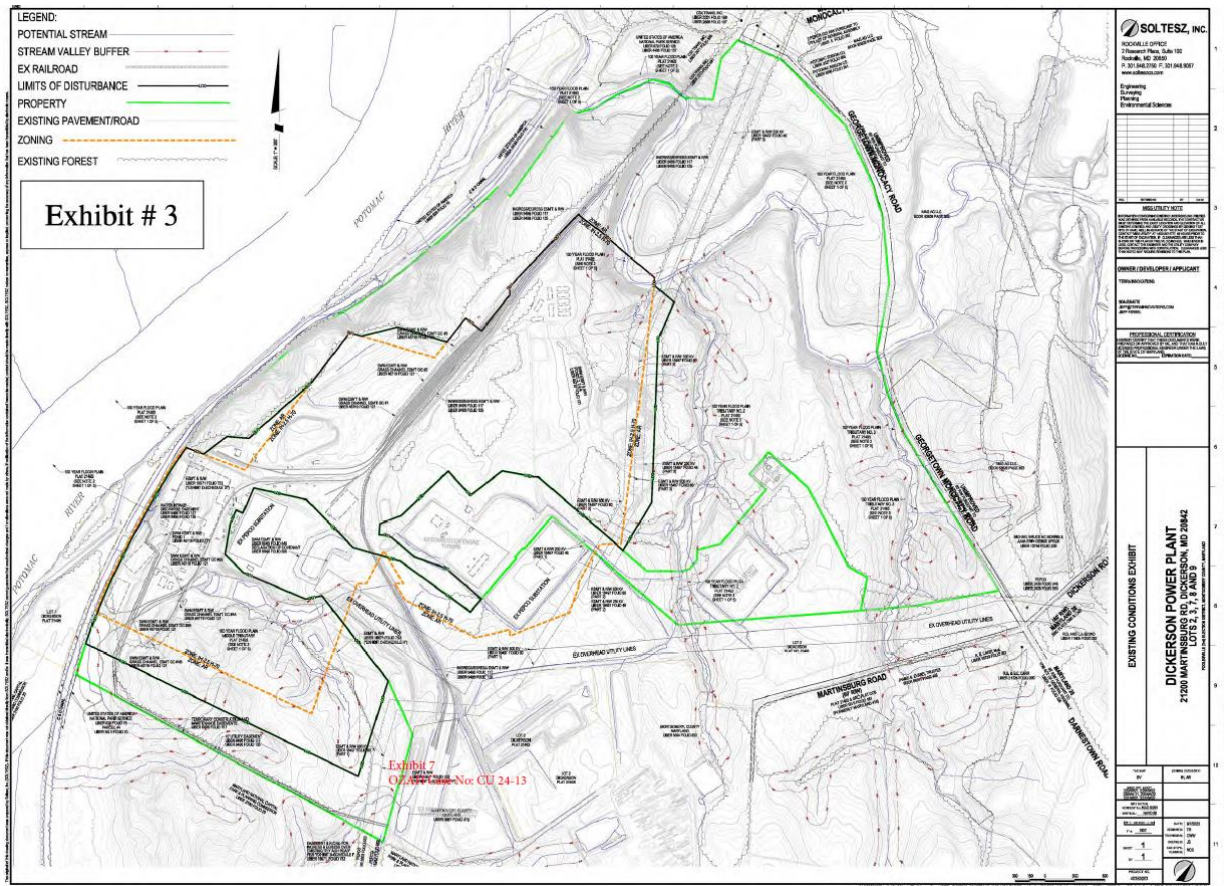
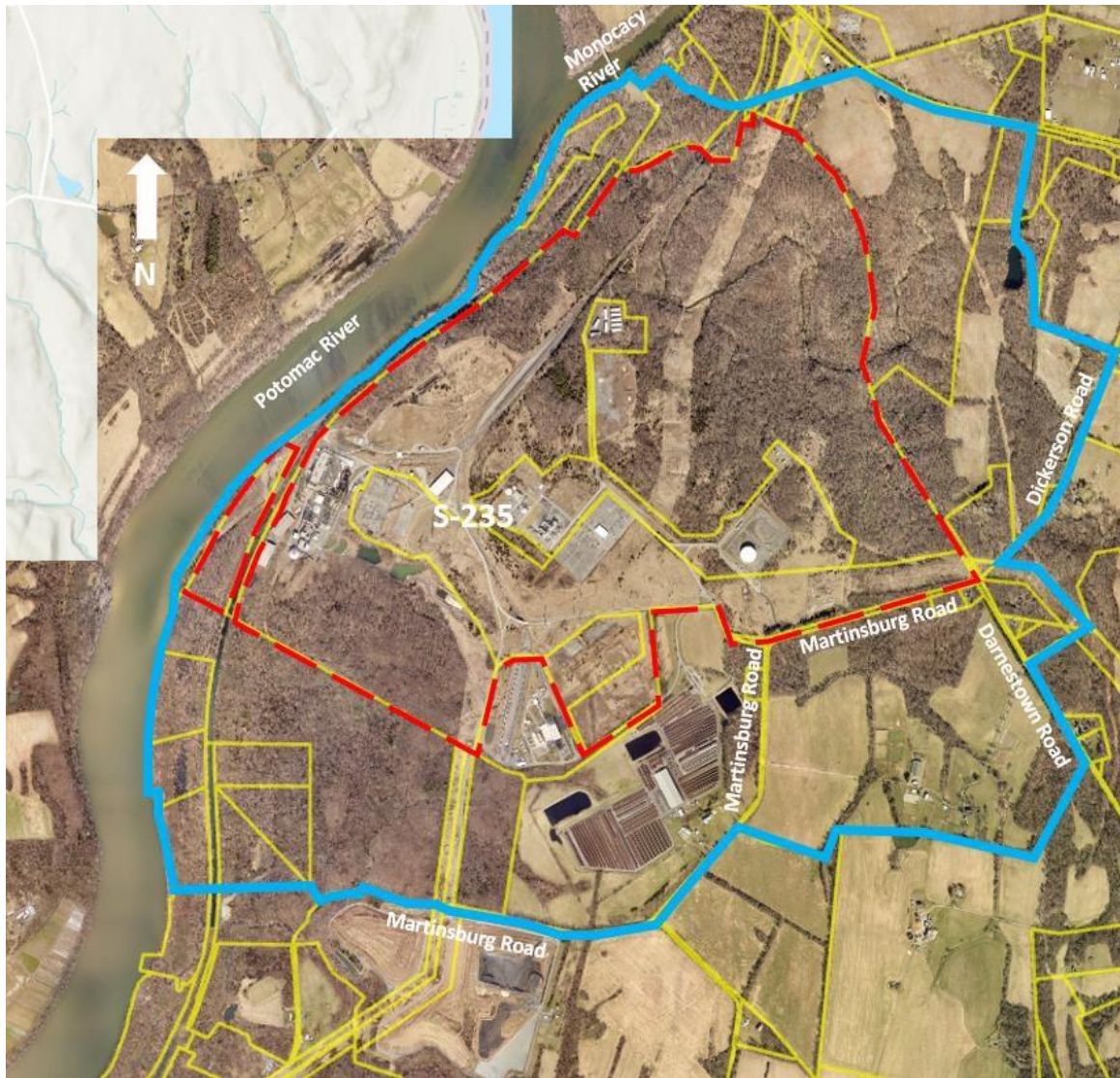


Exhibit 7 - Existing Conditions

B. Surrounding Area

Properties to the north, east and south are all zoned AR and the properties to the north and east consist of low-density residential development and agricultural uses. Exhibit 28, pg. 5. The properties to the south are owned by Montgomery County Government and consist of the County Incinerator and the County Composting Facility. *Id.* The western boundary abuts the Potomac River, the C&O Canal, the C&O Canal tow path, and National Park Service properties. *Id.* The Property is located in the 1980 *Preservation of Agriculture & Rural Open Space*

Functional Master Plan. Id. Staff determined the neighborhood boundaries based on those properties that would be most impacted by the use located in the middle of the 750+ acre property and limited the “neighborhood boundary” to abutting and confronting properties.¹ *Id.*



Staff Report – Exhibit 28;
Figure 1 – Vicinity Map

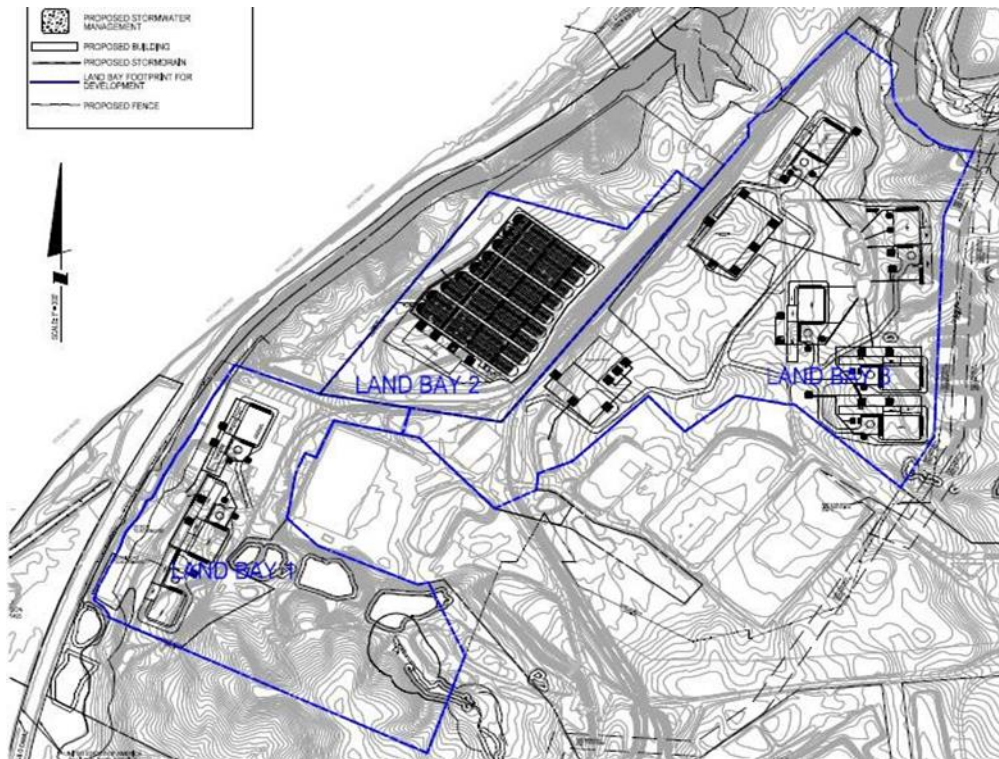
¹ Staff defined neighborhood is outlined in blue, subject property is outlined in red dashed line.

Staff identified only one approved conditional use/special exception in the defined neighborhood as S-235, Public Utility, and the use is located on the subject property. *Id.* at 5-6.

C. Proposed Use

The Applicant proposes to construct a Cable Communications System to function as a data storage facility (data centers) and a Public Utility Structure to house a battery energy storage system (battery storage or BESS) on the property. *Id.* at 8. The conditional use “work” will be divided into “three land bays” and contained to the IH zoned portion of the property. *Id.* Only proposing utility connections to be located in the AR zoned portion of the property which are permitted by right. *Id.* The Applicant is proposing and requesting a general approval for the conditional uses on the property and if the Applicant receives the requested, the Applicant proposes submit more detailed site plans modifying the conditional use at each phase.² *Id.* See site plan on the next page.

² The Zoning Ordinance does not specifically permit the Hearing Examiner to grant a conditional use “general approval”. The Hearing Examiner evaluated the Application, all testimony, and all documents in evidence pursuant to Section 59.7.3.1.E.



Staff Report Exhibit 28, pg. 9
Portion of Figure 3 - All 3 Land Bays

Terra Energy estimates maximum number of employees for both uses to be 85 with active hours of operation between 7 am to 7 pm noting that the facilities will operate 24 hours a day anticipating the possibility of reduced or limited staff onsite. Exhibit 3, pg. 8 and T. 120.

1. Public Utility Operations

The proposed battery storage facility enables utility system operators to store energy for later use. Exhibit 3, pg. 6. Operators charge batteries or collect energy from a source to discharge at a later time which provides “grid services” such as operating reserve or peak

capacity allowing for grid flexibility and promotion renewable energy sources. *Id.* The BESS will be housed in “land bay 2”. Exhibit 28, pg. 8.

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. *Id.*

Visually, the BESS will look like a shipping container measuring approximately 9' x 10' x 30' in size connected through several transformers. Exhibit 3. Pg. 7. The “field of self-contained units” will be surrounded by security fencing and cameras, similar to any electrical grid structure.

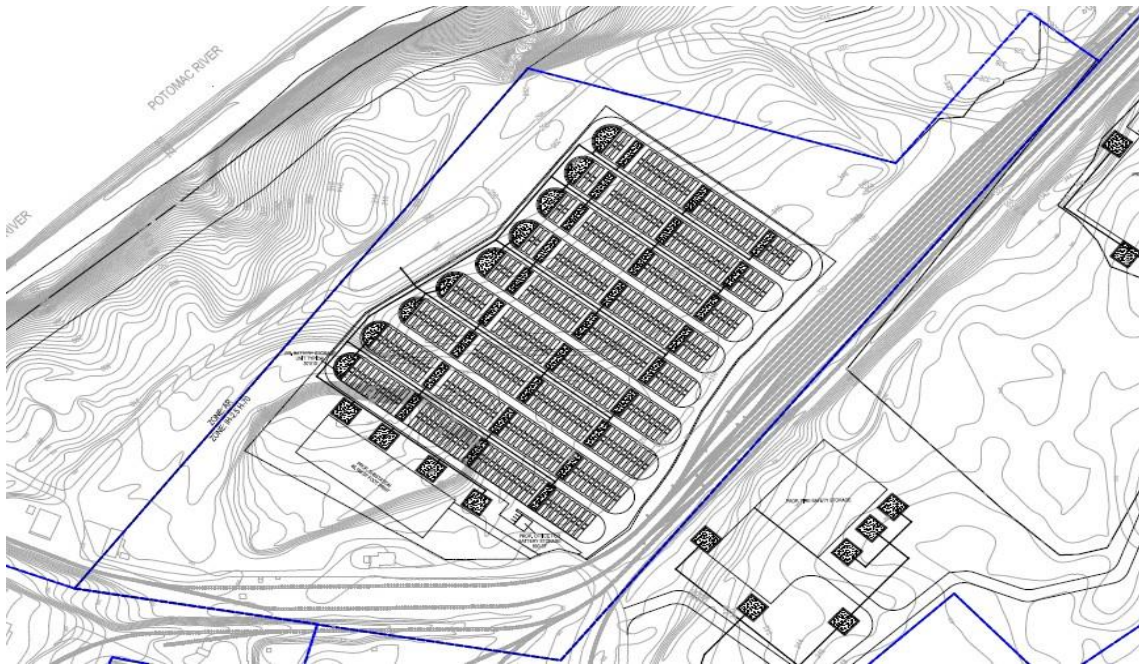


Exhibit 10, pg. 2 “Exhibit 5” – BESS Installations

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.

Exhibit 28, pg. 8.



Staff Report Exhibit 28, pg. 11.
Figure 5 – Land Bay 2

2. Communications Facility Operations

A data center/cable communications system “centralizes information technology operations and equipment for the purposes of storing, processing, and disseminating data and applications.” Exhibit 3, pg. 7. The data center will house computing infrastructure including servers, data storage drives, cooling equipment, power management devices, etc. to meet the demand for “online storage” for the purpose of housing digital records of every kind and website hosting. *Id.* Visually, data center will look much like a warehouse. *Id.* at 8.



Exhibit 16, pg. 2 “Exhibit 7” – Data Center

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.

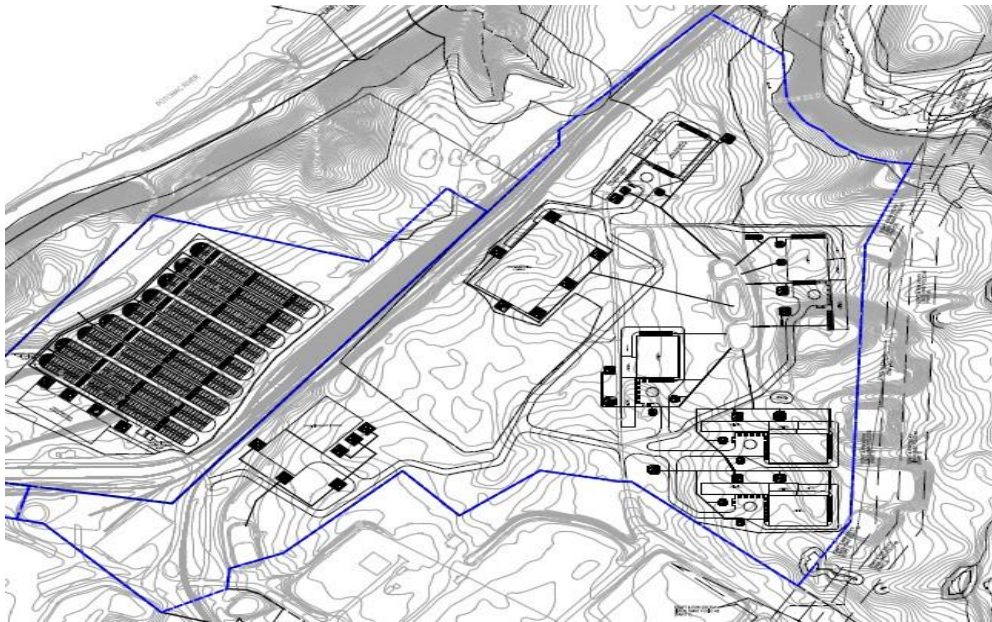
Exhibit 28, pg. 8.

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.

Id.



Staff Report – Exhibit 28, pg. 10
Figure 4 – Land Bay 1



Staff Report – Exhibit 28, pg. 12
Figure 6 – Land Bay 3

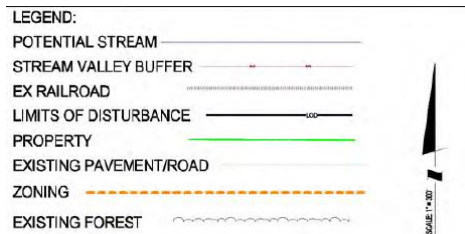
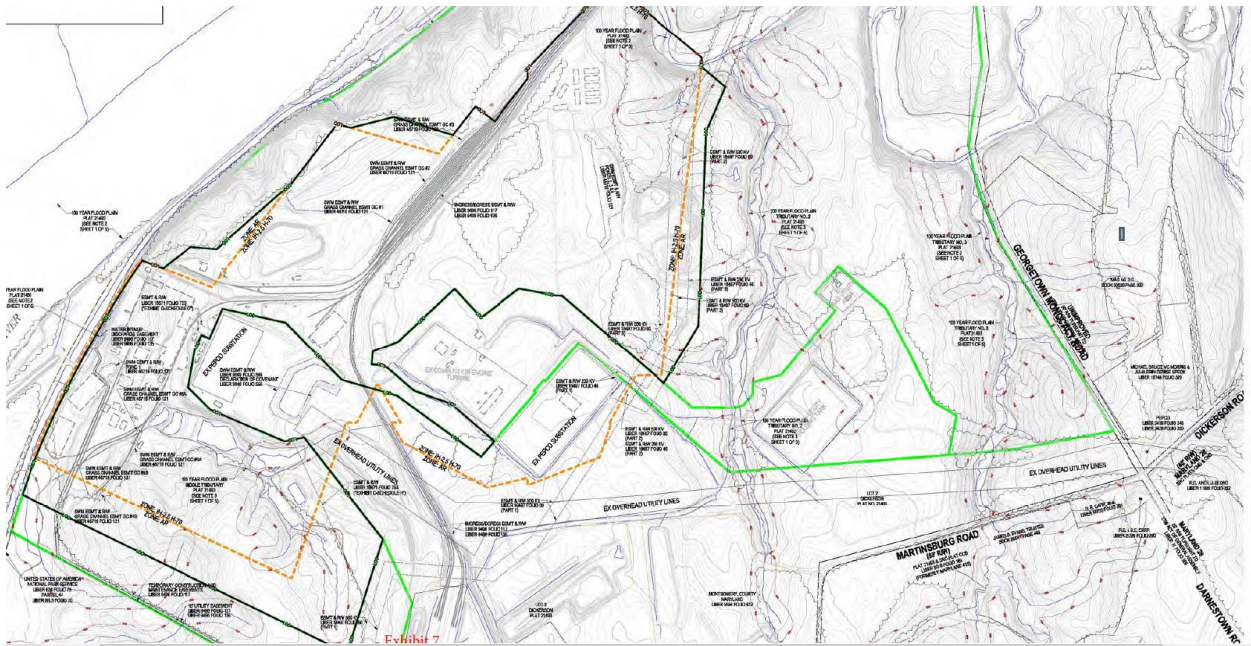
3. Access, Circulation, Parking

Staff note that the proposed use is located on Martinsburg Road, which is classified as a Rustic Road, but that property is several hundred feet from public roads. Exhibit 28, pg. 17. In addition, Staff note that no additional right of way dedication is required, and that the Applicant is exempt from construction any sidewalks, master-planned bike ways, ramps, curbs, and gutters due to the Rustic Road classification. *Id.* Jeffrey Ferrell testified the existing roadways/driveways and parking areas on the property. Specifically, he noted the existing parking lot accommodated 250 people working at the power plant. T. 56-57. He believed the parking area to be “between 80 and 90 acres.” Mr. Ferrell stated the overall concept for the site is that of a “campus” and there will be shared parking, shared staff and shared substations. T. 121.



Exhibit 33, Slide 26 – Parking Area

Regarding access, Mr. Ferrell testified that the prior operating power plant had “no less than 140 people on site at all times... trucks, semi-trucks, dump trucks, just everything running through” and the development proposal’s access scale “is going to so much smaller than the land would normally permit.” T. 124-125. Mr. Ferrell had no concern regarding the existing site being able to accommodate access, but noted location may be different. T. 125. When asked by the Hearing Examiner about infrastructure he affirmed that the roads and driveways were in existence, but change may need to occur after demolition. T. 125.



Portion of Exhibit 7 – Roadways with Legend

4. Community Response

The Staff Report noted no letters of correspondence received from the community as of August 23, 2024. Exhibit 28, pg. 12. Applicant's attorney noted the Applicant's extensive "advance work" with the community, county, state and federal officials prior to the hearing date. T. 20. Ms. Caroline Taylor testified on behalf of two 501(c)(3) organizations, Montgomery Countryside Alliance and Sugarloaf Citizens Association. T. 132. Ms. Taylor expressed that the organizations were not in full opposition of the project but expressed concerns regarding a general approval and the impact on certain resources, specifically "the river." T. 132-133, 139. Ms. Taylor also noted she testified before the Planning Board and expressed her disappointment with Staff's notation that no correspondence was received from the community. T. 135, 139. She stated her organizations both met with Planning Staff to voice concerns and provided several items to Staff regarding things that are legally required. T. 139.

Ms. Taylor expressed full support for the public utility structure during the Planning Board public meeting but believes the data center use needs closer examination including no diesel backup generator, stormwater management, and thermal pollution, specifically noting that river "withdrawal should be something that is undertaken extremely carefully in terms of the number of data centers and ... the amount of withdrawal of water." T. 134 -136.

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 Public Utility are in Section 59.3.6.7.E of the Zoning Ordinance. The specific standards applied for a Cable

Communications System are in Section 59.3.5.2.A 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.

As noted above the Applicant seeks a conditional use general approval. Ms. Taylor questioned the Hearing Examiner's authority to grant a general approval. T. 139. The Hearing Examiner agrees with Ms. Taylor that she cannot grant a general approval but must apply the specific standards associated with the proposed uses and the general standards/necessary findings to the Application submitted. 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 Applicant has done so in this case, with the conditions of approval included in Part IV of this Report.

A. Necessary Findings (General Standards, Section 59.7.3.1.E)

The relevant standards and the Hearing Examiner's findings for each standard are discussed below.³ For discussion purposes, the general standards may be grouped into four main areas:

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:

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

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

Conclusion: Special Exception (S-235) for a Public Utility Structure was previously approved for the property. The Applicant seeks to retain this original special exception on a portion of the property. T. 25-28. To do so, the Applicant must submit a separate request to modify the existing Special Exception S-235 with a detailed site plan that accurately represents where the old special exception remains and depicts the area for this application where the existing Special Exception is removed. The approval of this modification must be granted prior to building permit approval and is a condition of this 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;

Conclusion: This subsection requires review of the development standards of the IH / AR Zone contained in Article 59.4; the use standards for a Public Utility and a Cable Communications System contained in Article 59.3; 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 within the boundary of the 1980 Preservation of Agriculture & Rural Open Space Functional Master Plan (Plan). Exhibit 28, pg. 17. The Plan referred to the property as

“PEPCO site” and contained no specific recommendations or anticipation for any change of use. *Id.* Staff noted the Plan emphasizes preservation of agriculture and rural open space. *Id.* Staff determined that both proposed uses are consistent with the IH-zoned portions of the property and the Plan. *Id.* Mr. Ferrell testified the proposed uses will be placed on the heavy industrial zoned land and no activity on site would occur outside the industrial zoned area in the agriculturally zoned portion. T. 62

Conclusion: Based on this record, the Hearing Examiner agrees that both the public utility and data center will substantially conform to the recommendations of the Plan. Keeping the project footprint within the heavy industrial zone keeps the uses in the appropriate zone and will protect the agricultural land from any further intrusion. The project is consistent with the preservation of agricultural land as designed in the plan. The Hearing Examiner agrees with Staff that the two uses are consistent with the Plan.

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: Based on the testimony and Staff Report, the Hearing Examiner finds that the property is zoned IH and AR and not located in a residential detached zone. Further the Hearing Examiner finds that the proposed conditional uses will not impact the low-density residential and agricultural uses in the area and that the proposed uses will be less intense on the surrounding uses

than the prior coal-fired power plant. For reasons stated in Part III.A.4 of this Report below, she agrees with Staff that the project will be compatible with the surrounding 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

Staff determined that adequate public facilities exist at the Property to serve the proposed project. Exhibit 28, pg. 18. The property is served by private well and septic and the Applicant is working with DPS Well and Septic and will be required to receive approvals at the time of building permits for each structure. *Id.* at 19. Regarding Fire Access, the Applicant will be required to submit a Fire Department Access Plan as during building permit process and the Applicant received confirmation from DPS Water Resources that stormwater management will be reviewed at the site plan stage. *Id.* and Exhibit 28b., pg. 6.

Because the proposed use is located on Martinsburg Road, a Rustic Road under the Rustic Roads Functional Master Plan, rustic roads are “called out as exceptions to the usual requirements applied to other roads in the county... and are exempted from the design standards that apply to other roads such as any sidewalks, master-planned bikeways, ramps, curbs, and gutters.” *Id.* at 19. No additional right-of-way dedication is required, and Martinsburg Road does not contain any pedestrian or bicyclist facilities. *Id.*

The property is located in a “green Policy Area under the 2020-2024 Growth and Infrastructure Policy (GIP)”. *Id.* The submitted Transportation Exemption Statement (TES) provided by the Applicant indicates the proposed use will generate less than 50 net new peak hour trips. *Id.* Based on that fact, 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. *Id.* and Exhibit 6.

Conclusion: The Hearing Examiner agrees with Staff and finds adequate public facilities exist to serve both proposed uses. Final well, septic, stormwater management, and fire access will be reviewed by the appropriate County agencies during site plan review. Given the fact that the proposed uses will generate less than 50 net new peak hour trips, the roads and transportation facilities in existence adequately support the Application.

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 both a cable communications system and a public utility an (Exhibit 28, p. 20):

- Access road;
- Temporary construction noise;
- Backup generator noise;
- Exhaust fans vibration, and noise
- Traffic generated by employees; and
- Industrial appearance

The Hearing Examiner agrees with Staff's list of inherent adverse characteristic of this use.

The Applicant testified to the inherent impacts. T. 144-148. With respect to noise, Mr. Ferrell noted that all proposed structures will be up to 2,400 to 2,500 feet from any residence. T.

146. He noted that “liquid cooled” data center it is possible that you would not hear operation from 40 feet away, but if it is an “air cooled” system the noise would be louder. T. 145. He committed that the final development would satisfy the County’s noise ordinance. T. 146. Regarding the “industrial appearance” the Applicant will be removing the former power plant and smokestack. T. 81.

Staff did not identify any non-inherent adverse effects and found that the use would not be detrimental to the surrounding properties *Id.* at 20. Staff also noted that because the development will be screened by existing trees and grade, it will have a limited visual impact, and nor will it cause any objectionable noise, fumes, or illumination or decrease in the economic value of surrounding properties. *Id.* Staff also noted that the proposed uses will have no adverse effect on road congestion or safety, because of the limited on-site personnel. *Id.* In addition, Staff noted “no noise generated by the uses other than backup generators during power outages” and no offensive odors emitted, and the uses will not cause any vibrations. *Id.*

Ms. Taylor testified to concerns regarding data center use’s impact on the river, specifically “thermal pollution.” T. 137-138, Exhibit 34.

Conclusion: The Hearing Examiner agrees with Staff on the identified inherent effects and finds that there are no non-inherent adverse effects from the proposed development and concludes that use and proposed development will not cause undue harm to the neighborhood from either non-inherent adverse effects or a combination of inherent or non-inherent adverse effects. As described above Staff focused on inherent effects centering mostly on noise. This choice leads the Hearing Examiner to believe that Staff anticipated an air-cooled data center, not a liquid cooled data center. In the event, the Applicant chooses to install a liquid cooled data center, a major modification must

be submitted to determine what if any effect a liquid-cooled data center would have on Staff's list of inherent impacts. Further the Hearing Examiner finds the uses will generate very little traffic, create limited noise, odors, dust, or illumination associated assuming the proposed uses satisfy all conditions of the uses.

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.

Staff found that the project was compatible with the neighborhood and stated as follows (Exhibit 28, pg. 17-19):

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.

Conclusion: Section 59.7.3.1.E.d examines whether the Plans goals are achieved in a manner compatible with the area. The Hearing Examiner adopts Staff's characterization of the existing neighborhood as being heavy industrial, public utility, agricultural, and low-density residential. She already found that the use fulfills the goals of the Plan; she further finds that it does so in a

manner that is compatible with the surrounding area. Key to this finding are the following factors: 1) the proposed uses will be confined to the currently zoned IH portion of the property; 2) the 2,400 to 2,500 feet distance from the proposed uses to the nearest residential property; 3) the heavy industrial uses that abut the proposed uses; and 4) the historic heavy industrial use on the property.

For these reasons, the Hearing Examiner finds that the use is compatible with the surrounding neighborhood in a manner consistent with the 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.

B. Development Standards of the Zone (Article 59.4 and 59.6)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the IH Zone, contained in Article 59.4 of the Zoning Ordinance. Staff included a table (Exhibit 28 p.16, shown below) in its report comparing the minimum development standards of the IH Zone to what is proposed in this application.

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

Conclusion: Nothing contradicts Staff’s assessment of compliance with the development standards of the Zone. The Hearing Examiner finds that the proposed uses comply with the specific development standards of the IH Zone.

C. Use Standards for a Public Utility

The specific use standards for approval of a Public Utility are set out in Section 59.3.6.7.E, of the Zoning Ordinance.

1. Defined

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.

Conclusion: The Applicant’s Statement of Justification states that it meets this definition as does the Staff report. Exhibit 3, pg. 6, Exhibit 28, pg. 8. The Hearing Examiner finds the proposed BESS system is a public utility structure as defined by the Zoning Ordinance.

2. Use Standards

b. Where 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.*

Conclusion: The Hearing Examiner agrees with Staff finds the proposed structures and operations are a critical component of our local, regional, and national data facilities. The Hearing Examiner also agrees with the Applicant and finds that the BESS technology allowing energy storage systems to provide grid services to be necessary for the public convenience and service in that will create a reduced demand for large energy generation plans and provide grid flexibility.

- 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.*

Conclusion: The Hearing Examiner agrees with Staff and the Applicant and finds the location of the Property and location of the BESS structures on the property will not substantially impair or be detrimental to neighboring properties. Factors that make this location “ideal” in the location of the structures to the existing power grid, the substantial distance from any neighboring properties and even further distance to any residential properties.

- 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.*

Conclusion: Because the property is neither in a Rural Residential Zone nor a Residential Zone, this section is inapplicable.

- 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.*

Conclusion: Since the Applicant is not seeking a waiver of a height limit and the substantial distance from any adjacent residential use, the Hearing Examiner is not granting a height waiver, but finds that the maximum height shall not exceed 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.*

Conclusion: The Applicant owns the Property. No condemnation proceeds are required. The Hearing Examiner finds this section to be in applicable.

D. Use Standards for a Cable Communications Facility

The specific use standards for approval of a Cable Communication System are set out in Section 59.3.5.2.A, of the Zoning Ordinance

1. Defined

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.

Conclusion: The Applicant's Statement of Justification states that it meets this definition as does the Staff report. Exhibit 3, pg. 7, Exhibit 28, pg. 8. The Hearing Examiner agrees with

Staff and the Applicant and finds the proposed data center facility meets the definition of a cable communications facility.

2. Use Standards

Where 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.*

Conclusion: The Hearing Examiner agrees with Staff and finds that no tower construction is proposed with this Application and as such this section is inapplicable.

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

Conclusion: The Hearing Examiner agrees with Staff and finds that the Applicant is not proposing community access centers or a studio with this application and as such this section is inapplicable.

- 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.*

Conclusion: The Hearing Examiner agrees with Staff and finds that the proposed use does not require a franchise by Montgomery County and as such this section is inapplicable.

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

Conclusion: The Hearing Examiner agrees with Staff and finds the data center will be located entirely within the IH Zone, not in a residential zone and that the proposed administrative offices will be located within the property that is fully contained in the IH Zone. The “office” prohibition does not apply to this Application.

e. Screening under Division 6.5 is not required.

Conclusion: The Hearing Examiner finds no screening is required nor is any proposed. With that said, the Hearing Examiner notes the area around the location for the data center is fully forested and several hundred feet from public roads or adjoining properties.

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.

Conclusion: Any transmission or distribution lines or cables and wires are permitted uses in all zones and do not require approval from this Hearing Examiner. From the evidence in this record, the Hearing Examiner finds that this criterion for approval has been met

E. 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 (emphasis added). The applicable requirements, and whether the use meets these requirements, are discussed below. The proposed use and Zone do not require the review of Division 6.3 for Open Space and Recreation, or Division 6.6 for Outdoor Storage. The Property is in a IH zone

which allows for both public utility storage and cable communications facility as a conditional use and the Hearing Examiner finds project complies with all the standard method developments of the zone.

1. Parking

Section 59.6.2. sets forth the general requirements for parking, queuing and loading for any proposed uses. Staff note that “all proposed parking lots are internal to the Property and due to grade and vegetation cannot be viewed from outside the Property.” Exhibit 28, pg. 16. The Applicant anticipates shared parking and is proposing a maximum of 85 employees. T. 120-120. Staff note the Applicant proposes providing 165 parking spaces onsite and that the “proposed parking lots will meet the requirements of the Zoning Ordinance as it pertains to landscaping and canopy coverage.” Exhibit 28, pg. 16. The property contains enough area within the limits of disturbance of all three “Land Bays” to provide the required parking and landscaping. *Id.*

Conclusion: The Hearing Examiner agrees with Staff that the area proposed for parking is adequate and will meet the requirements of the Zoning Ordinance. The Hearing Examiner finds the persuasive the Applicant's testimony regarding the location of the parking lots surrounded by trees, internal to the site and the campus plan for parking for the new uses. The Hearing Examiner finds what has been submitted by the Applicant for parking to be sufficient to and ensure compatibility with Section 59.6.2 of the Zoning Ordinance.

2. *Site Landscaping, Lighting, Screening & Signage*

Even though the Applicant failed to provide specific details regarding landscaping and lighting, Staff determined the proposed uses are far enough away from neighboring properties that lighting and landscaping should not have any effects on the neighboring properties. Exhibit 28, pg. 17. Staff determined that because of the location of the proposed uses, the Applicant can install the required lighting and landscaping with each phase of the project and comply with applicable Montgomery County lighting standards. *Id.* Mr. Ferrell testified that the uses do not require a large amount of light and the lighting to be installed will be “dark sky compliant.” T. 144.

Staff note that the Applicant is not proposing any additional screening with this application but also recognize that the property is fully surrounded by forested areas and is several hundred feet from public roads or any adjoining properties. *Id.* See Exhibit 31(c) below. Staff also note that in the event the Applicant seeks to add screening a more detailed site plan would need to be required provided. Exhibit 28, pg. 17.

Staff note no signage is anticipated. *Id.* Mr. Ferrell also confirmed no signage is anticipated. T. 144.

Conclusion: The Hearing Examiner finds that given the extensive forested area surrounding the uses, the location of the uses in the interior of the larger parcel and the extensive distance from the adjoining properties, that what has been submitted by the Applicant to be sufficient to ensure compatibility with Section 59.6.4 (landscaping/lighting), 59.6.5 (screening) and 59.6.7 (signage) of the Zoning Ordinance.

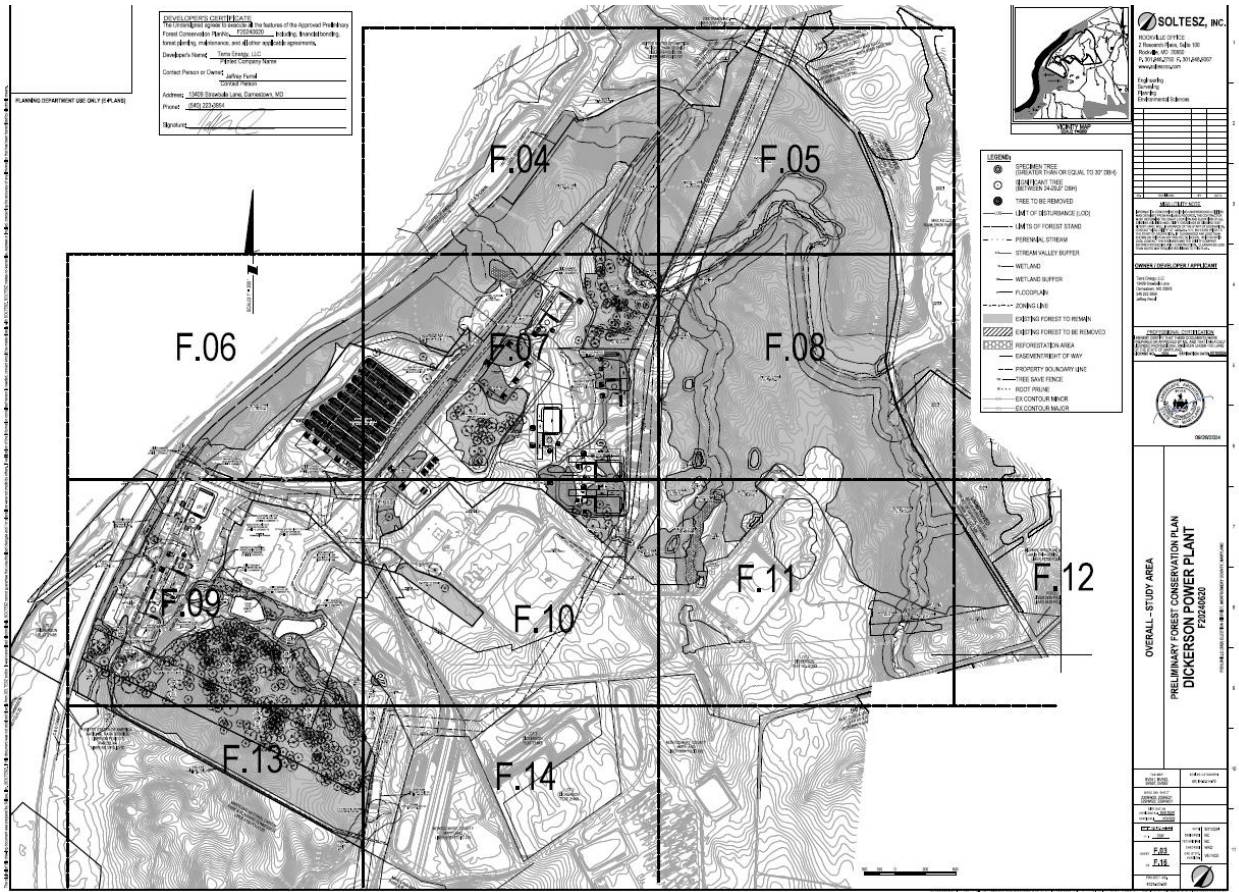


Exhibit 31(c) – Overall FCP Area

IV. CONCLUSION 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 review of the entire record, the Application of Terra Energy (CU24-13) for a cable communications system conditional use under Section 59.3.5.2.A and public utility structure conditional use under Section 59.3.6.7.E of

the Zoning Ordinance to operate a data center and battery storage which is located on Lots 8 & 9 on Martinsburg Road, Tax Account numbers 03-03853280 and 03-3853291 in Dickerson, Maryland is hereby GRANTED, 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 only. 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.** The Applicant must submit the required application to request to modify Special Exception (S-235). Prior to issuance of any building permit associated with the approval of this requested conditional use, 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. If the Applicant alters Exhibit 28b, the submitted proposed site exhibit, in anyway the Applicant must submit a request for a major modification of the grant this conditional use.

10. Each and every major modification requested by the Applicant of this approved conditional use must include detailed plans including but not limited to operation details, buildings, parking lots, grading, landscaping and lighting, and refinement of the Forest Conservation Plan.

11. With any major modification submitted for the data center use, the Applicant shall specify whether the use will be liquid-cooled or air-cooled and provide appropriate detailed plans.

Issued this 20th day of November 2024.



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:

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:

Robert Harris, Esquire
Attorney for the Applicant
Caroline Taylor
Barbara Jay, Executive Director, Montgomery County Board of Appeals

Robert Kronenberg, Deputy Director, Planning Department
Patrick Butler, Chief Up County, Planning Department
Mark Beall, Planner, IV, 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