

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660

IN THE MATTER OF: \*  
ALDER ENERGY DEVELOPMENT, LLC \*  
Applicant \* Conditional Use Application  
\* No. CU 24-04  
Donald R. Zimmerman, President/CEO \*  
For the Applicant \*  
\*  
Peter Ciferri, Esq. \*  
Attorney for the Applicant \*  
\* \* \* \* \*

Before: Kathleen Byrne, Hearing Examiner

**HEARING EXAMINER'S REPORT AND DECISION**

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## **I. STATEMENT OF THE CASE**

Alder Energy Development, LLC (Applicant or Alder Energy) filed an application on July 17, 2023, seeking a conditional use to operate a solar collection system on a portion of the property known as Parcel 115 in the addition to Brooke Grove subdivision in Brookville, Maryland (subject property or property). Exhibit 1. The property is described as a 53.95+/-acre lot within the Agricultural Reserve zone identified as Parcel P115, on tax account number 08-00711986 located in the Addition to the Brook Grove Subdivision and. Exhibit 5, pg. 1. Gregg Road Property, LLC owns the property with a mailing address of P.O. Box 5126 Laytonsville, MD 20882 and the Applicant is a lessee of the property owner. Exhibit 1.

Currently the parcel is used as a commercial tree farm, specifically known as the Stadler Nurseries tree farm. Exhibit 5, pg. 2. The Applicant intends to construct a 2-megawatt solar collection system situated on 10.04 acres of the property including access and landscape buffers. *Id.* On November 3, 2023, the staff of the Montgomery County Planning Department (Planning Staff or Staff) issued a report recommending approval of the proposed conditional use subject to certain conditions. Exhibit 49. By letter dated November 22, 2023, the Planning Board

conveyed to OZAH that it recommends, by unanimous vote, approval of the proposed conditional use subject to certain conditions. Exhibit 48.

The public hearing proceeded as schedule on Monday, December 11, 2023.<sup>1</sup> Mr. Ciferri represented the Applicant during the hearing and Mr. Donald Zimmerman testified on behalf of the Applicant. Mr. Nick Driban, Mr. Kevin Foster and Mr. Timothy Longfellow testified as the Applicant's experts in support of the application. No witnesses in opposition testified at the hearing. After hearing evidence presented, the Hearing Officer held the record open for a period of 10 days to receive the transcript. OZAH received the transcript on December 19, 2023 and the Hearing Examiner closed the record on December 19, 2023. For the following reasons, the Hearing Examiner approves the conditional use application subject to the conditions listed in Part IV of this Report and Decision.

## **II. FACTUAL BACKGROUND**

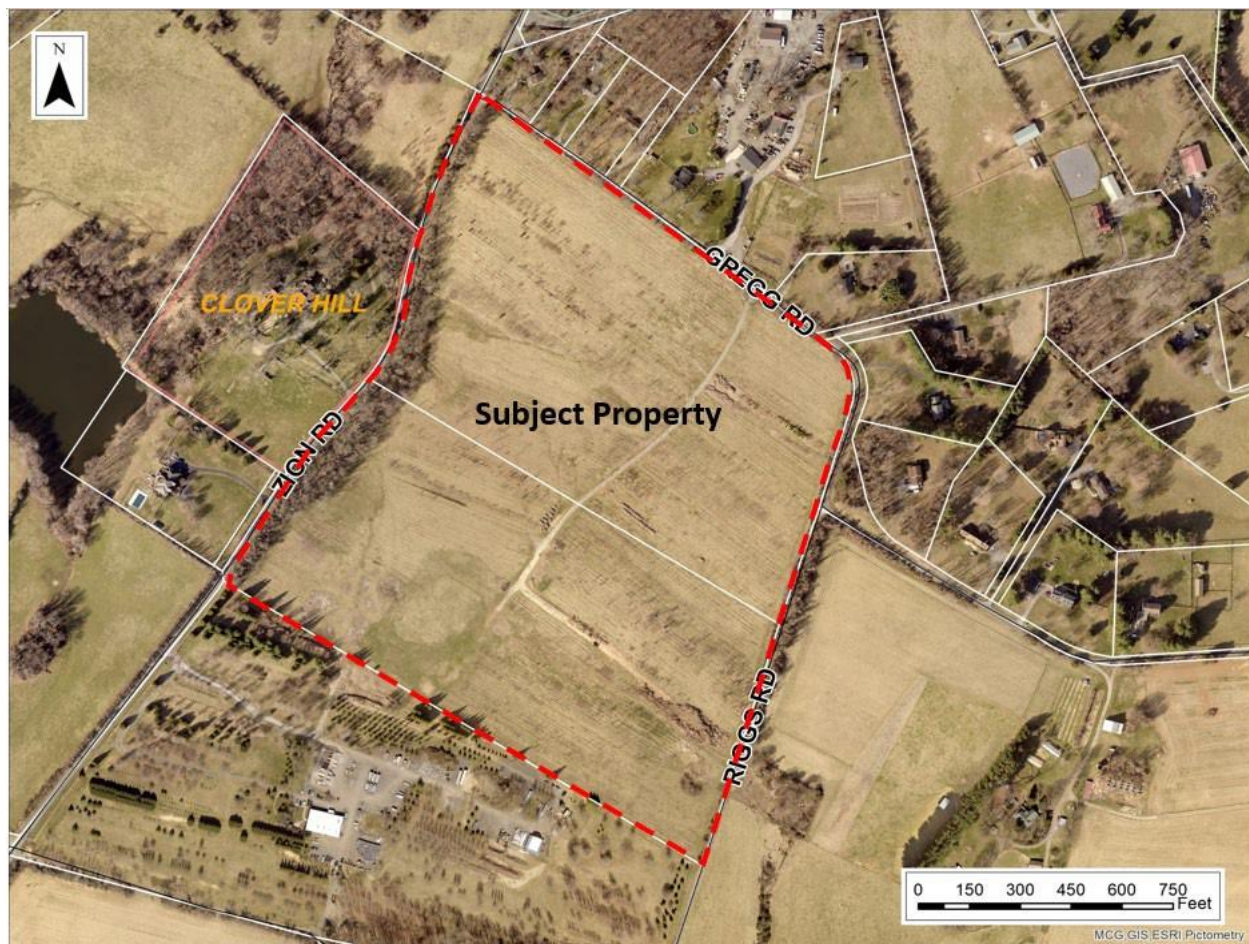
### **A. Subject Property**

The subject property consists of 53.95 acres identified as Parcel P115, formerly two parcels (P115 and P320) consolidated via deed recorded among County land records in Liber 63574 at Folio 184. Exhibit 49, pg. 6. The property fronts on Zion Road to the west, on Gregg Road to the north and Riggs Road to the southeast. *Id.* See image on following page. The property is currently used as commercial tree farm along with the parcel to the south. *Id.* The property contains no improvements except for an existing private dirt road that accesses Gregg Road and runs south through the center of the field. *Id.* The property is within the Hawlings

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<sup>1</sup> The public hearing was held in a hybrid format using Zoom. A link and phone number for the parties and/or public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate.

River watershed, classified by the State of Maryland as Use IV-P watershed and contains a 600 linear foot perennial stream that runs along the western property, parallel to Zion Road. *Id.* at pg. 8. Wetlands are in the same area, which is incorporated into to the stream buffer. The Property slopes slightly from the northeast and southeast toward the west. While not within a Special Protection Area, the Property is within the Patuxent River Watershed Primary Management Area (PMA). *Id.*



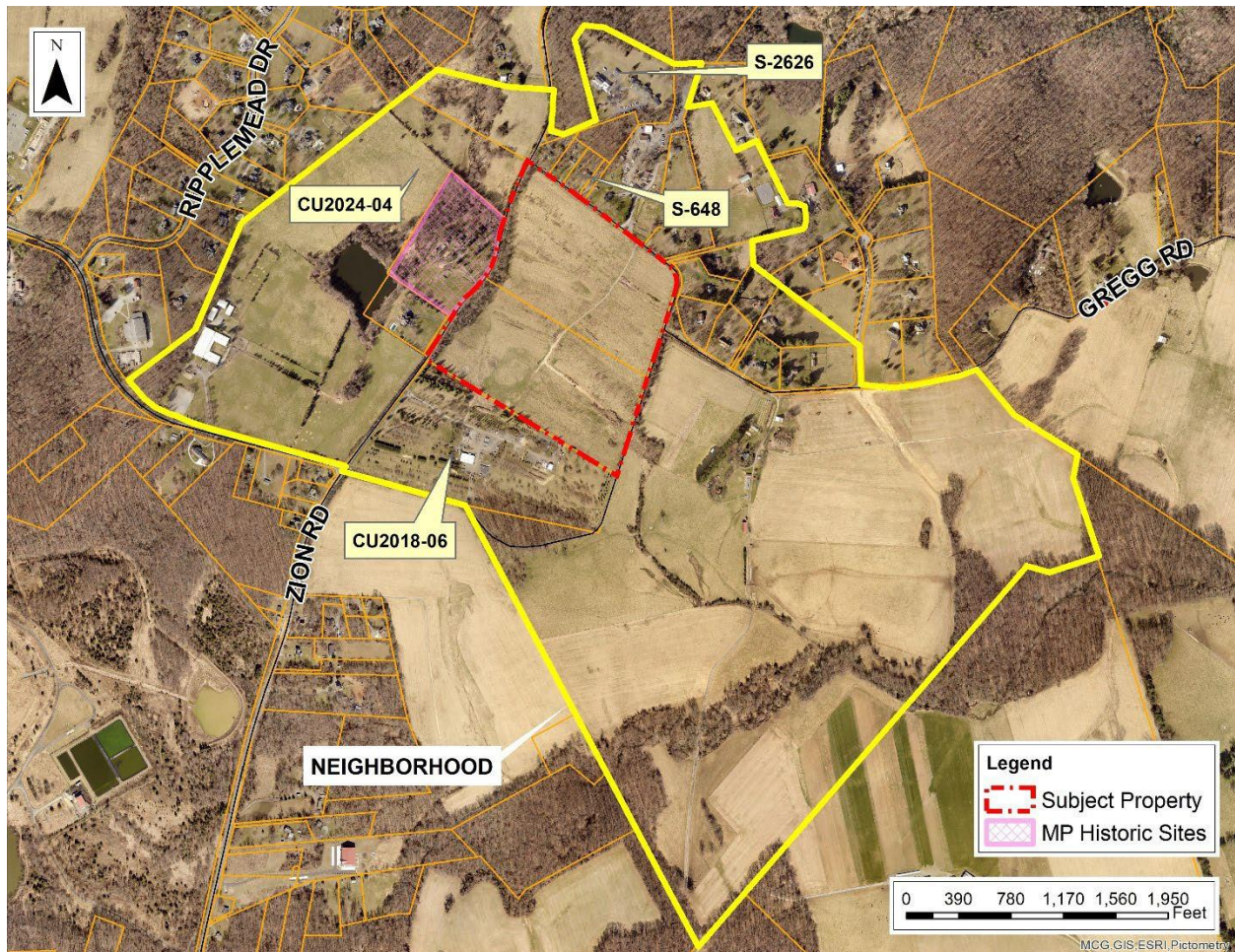
Subject Property – Exhibit 49, pg. 8

## **B. Surrounding Neighborhood**

The Solar Collection system will be located in the northern quadrant of the property. Staff defined the neighborhood to be those parcels that would be most impacted by the conditional use and limited the neighborhood to the abutting and confronting properties that are accessed from the road network immediately surrounding the property, all zoned AR. *Id.* at pg. 5. The neighborhood is comprised of low-density development, agricultural uses and four active conditional uses/special exceptions. Farm operations and other comparable agricultural uses operate to the east and south while immediately to the north across Gregg Road are six AR zoned private residences, at least two of which are farmettes. *Id.* To the west across Zion Road is Clover Hill, a site designated by the Master Plan of Historic Sites and agricultural land. *Id.*

Special Exception approval was previously granted to two properties to the northeast: 21515 Zion Road is a Special Exception for a Private Educational Institution (S-2626) and 4513 Gregg Road is a Home Occupation for a photo studio (S-648). A property located to the south at 21202 Zion Road has approval for a Conditional Use for a Landscape Contractor (CU201806). The Hearing Examiner granted approval to Free Rein Solar, Conditional Use No. CU2023-05 on July 8, 2023 to construct a Solar Collection System at 5011 Riggs Road, the Property surrounding the Clover Hill site. If constructed, this solar array will occupy the area behind the Clover Hill dwelling, northeast of the pond. *Id.* See vicinity map on the following page.





Vicinity/Neighborhood Map  
Exhibit 49, pg. 6

### C. Proposed Use

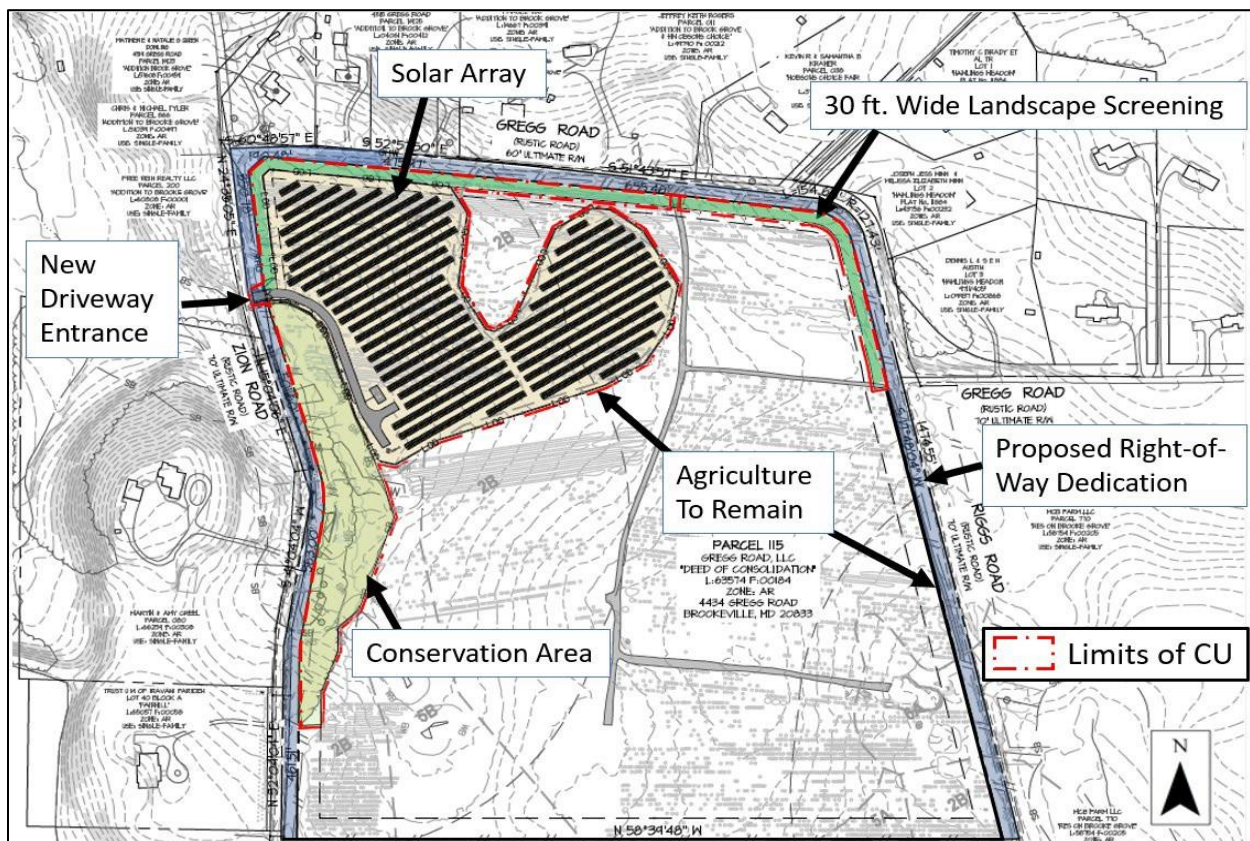
The Applicant seeks approval of a “solar photovoltaic (‘PV’) electric generating project up to 2 MW in generating capacity” on 12.84 acres of the overall 53.95-acre property. *Id.* at pg. 9. The solar collection system will expand community drive solar projects and give people who are not able to install solar on their own property a unique opportunity to directly support and benefit from a shared solar power source by providing power to community subscribers of the



PEPCO utility. Exhibit 5, pg. 1. Subscribers then receive credit against their utility bill and get a discount at the same time supporting solar development within their region. T. 15.

### 1. Site Plan and Landscape

Once completed the project will not require on-site personnel and will not generate traffic except for occasional maintenance. Exhibit 5, pg. 3. Other than the construction of the solar array itself the property does not require does not require substantial physical improvements and no occupiable buildings are proposed. *Id.* The physical structures and improvements will be limited to approximately 10.04 acres including the landscaping buffers. *Id.* The solar array will be in the northeastern quadrant of the property with access to Zion Road. Exhibit 49, pg. 9.



Proposed Solar Collection System Location – Exhibit 49, pg. 10

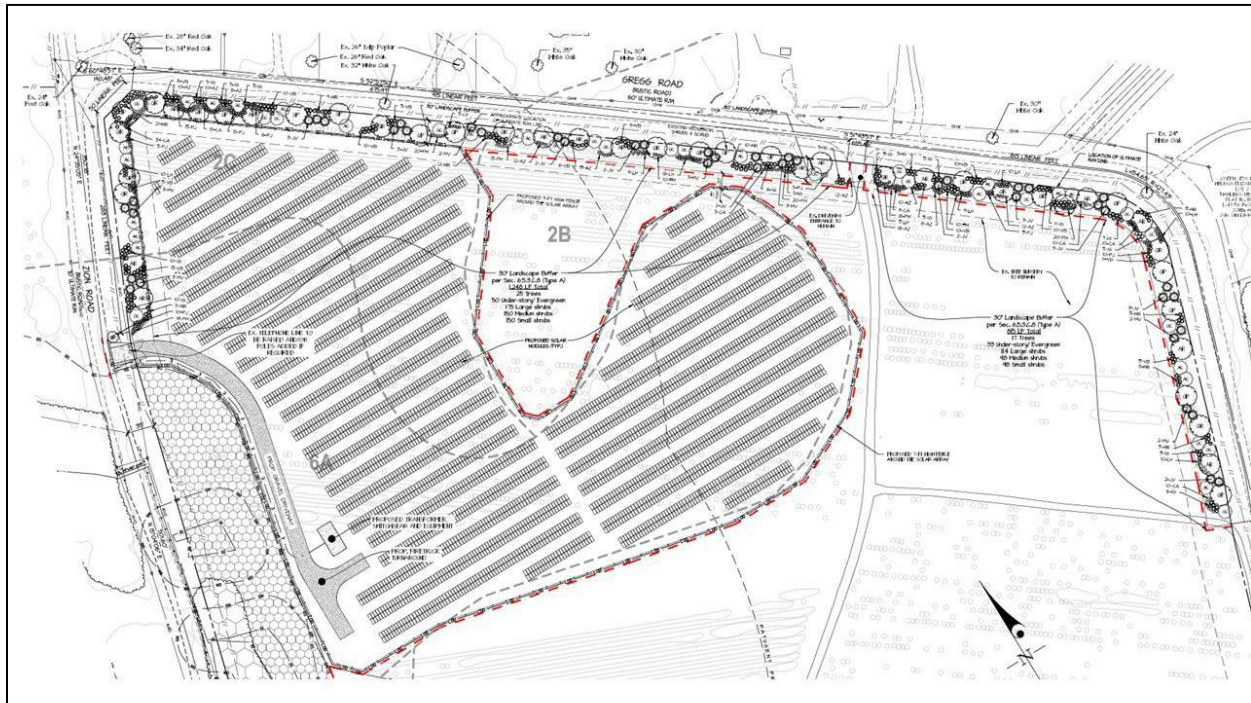


Exhibit 14(g) – Landscape Plan

The Applicant is required to install screening for any part of the project that would be visible from a residence. T. 56. In this instance the Applicant is required to provide a 30-foot landscape buffer around the permitter that is that would be visible to those residential properties. T. 30. The Applicant plans to install screening along the entire frontage of Gregg Road and extending onto a portion of the frontages of both Zion Road and Riggs Road. Exhibit 14(g). The Planning Board voted to approve the proposed Forest Conservation Plan subject to conditions. T. 59.

## *2. Parking, Lighting Plans and Signage*

No parking, lighting or signage is being proposed with this Application and none is needed nor required by the Code for the use. Exhibit 49, pgs. 18-19.



### *3. Operations*

Mr. Zimmerman testified that construction is estimated to take approximately four to six months. T. 20. Construction will include site prep, fencing, road access to the solar array site, followed by installation of the metal support structures, mounting the panels and brining in the electrical equipment. T. 18-21. The solar array will consist of 5,408 panels. *Id.* Once construction is complete and the system passes all the required tests, then the utility will issue a permission to operate certificate. T. 21. Once approved by the utility, the system will be energized and the subscriptions sold will begin receiving credits for the power created by the system. *Id.* Once constructed there are no “hours of operation” or “staff” onsite. *Id.*

### **D. Community Response**

Mr. Foster testified to the Applicant's community outreach. The Applicant held a Zoom virtual meeting on March 21, 2023, but no one outside of the Applicant's representatives attended. Exhibit 49, pg. 11 and T. 63. The Applicant contact a number of neighbors across Zion Road and met with them onsite and also corresponded with the Patuxent River Association regarding water quality. T. 64-64. The Staff did not receive any letters of correspondence from the community. Exhibit 49, pg. 11.

### **E. Environmental Issues**

The Application is subject to the County's Forest Conservation Law and submitted a Preliminary Forest Conservation Plan that conforms with the Environmental Guidelines. *Id.*

The Natural Resource Inventory/Forest Stand Delineation (“NRI/FSD”) 420212590 for this Property was approved on October 15, 2021. The NRI/FSD identifies the environmental features and forest resources on the Subject Property. The Subject Property is located within the Rocky Gorge Dam watershed

(watershed number 02131107), classified as a Use Class IV-P by the State of Maryland. The Subject Property contains 1.53 acres of forest located adjacent to Zion Road. The Subject Property also contains a perennial stream with 2.77 acres of associated stream buffer and four wetlands.  
*Id.* at pg. 26

The property does not contain any steep slopes or floodplains. *Id.* at pg. 8.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **A. Necessary Findings (§59-7.3.1. E)**

The relevant standards and the Hearing Examiner's findings for each standard are discussed below.<sup>2</sup> 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***

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

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

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

Conclusion: No prior approvals were granted for the subject property. Special Exception S-1386 for an accessory dwelling unit was abandoned on September 2, 2022. Exhibit 49, pg. 16. Nothing in the testimony or the record disputes this fact. This section does not apply.

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

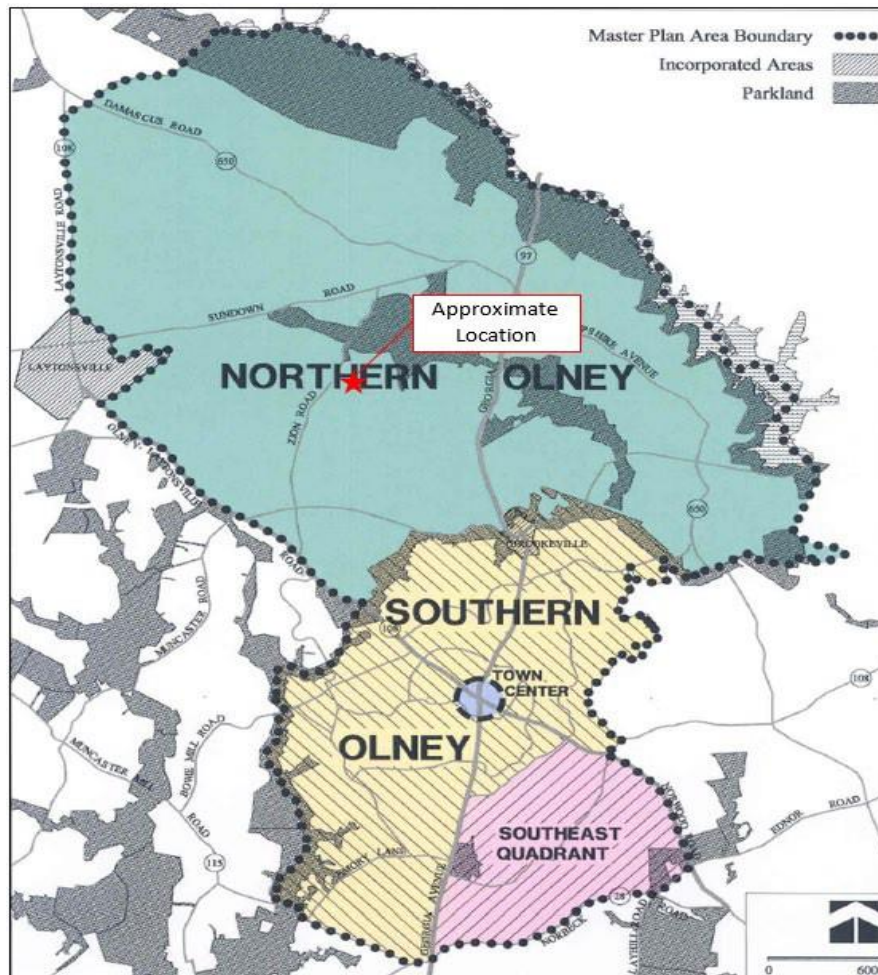
Conclusion: This subsection requires review of the development standards of the AR Zone contained in Article 59.4; the use standards for a Solar Collection Facility contained in Article 59.3.7.2.B.2 and the applicable development standards contained in Article 59.6. Each of these Articles is discussed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

***1. Substantial Conformance with the Master Plan***

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

The property is located within the Northern Olney area of the 2005 Olney Master Plan. Exhibit 49, pg. 18. The Plan identifies no specific land use recommendation for the property other than continuation of the AR zoning. *Id.* The Plan seeks to support agricultural preservation, watershed protection, and maintenance of the rural character in Northern Olney. 2005 OLNEY MASTER PLAN, MONTGOMERY COUNTY, MD, pg. 3.





2005 Olney Master Plan Boundary Map  
Exhibit 49, pg. 18, Figure 7

The Master Plan also supports strategies to reduce air pollution and the proposed use is part of the larger effort to reduce greenhouse gas emitting power generation facilities. *Id.* at pg. 19.

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

development is located within the PMA transition area. *Id.* at 20. The construction related to the new proposed use will add .43 acres of impervious surface equaling 1.5 percent of imperviousness within the PMA transition area which is less than the recommended maximum 10 percent. *Id.*

Staff determined that the proposed addition of a solar collection facility at this location conforms with the Master Plan guidance because “it only creates a small amount of imperviousness, and the solar array will only be minimally visible from surrounding properties.” *Id.* at 19. Staff also determined the proposed use substantially conforms with the recommendation of the 1993 Functional Master Plan for the Patuxent River Watershed. *Id.* at 20. In addition, Mr. Longfellow opined that the project proposed complies with the impervious area requirement of the Patuxent River PMA. T. 68-69.

The property is also subject to the 2023 Rustic Roads Functional Master Plan. The Application was reviewed by the Rustic Roads Advisory Committee who determined that the use generally conforms to the rural character of both Zion and Gregg Roads. Exhibit 49, pg. 20. Staff noted that one of the significant features of Gregg Road was its “tree-lined” farm road nature and that the landscape buffer would add to that feature. *Id.* at pg. 21. In addition, Mr. Foster testified to the changes that occurred to the Rustic Roads Master Plan during the Application review process and how the Applicant worked with the Rustic Roads Committee to locate access to the site. T. 43-45. He opined that the access to the site from Zion Road would be minimal and that the Application as submitted conforms to all three applicable Master Plans. T. 42-46.

Conclusion: Based on this record, the Hearing Examiner agrees that the solar collection facility will substantially conform to the recommendations of both the 2005 Olney Master Plan and the 1993 Functional Master Plan for the Patuxent River Watershed and the 2003 Rustic Roads Functional Master Plan Update. The project supports the continuation of agricultural uses as envisioned by the Plan, does not run afoul of the impervious area requirement under the Patuxent River PMA and the access from Zion Road will not disturb the “pleasant rolling” features along Zion Road. The Hearing Examiner agrees with Mr. Foster that the proposed solar facility is compatible with and in furtherance of the Master Plan’s goals. T. 46.

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

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

## ***2. Adequate Public Services and Facilities***

*f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public*



***facilities test is not required. If an adequate public facilities test is required and:***

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

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

No preliminary plan of subdivision is required, and Staff determined that there are adequate public services and facilities to serve the proposed use. Exhibit 49, pg. 22. The site is not served by public sewer or water and none are required for the use. Exhibit 5, pg. 11. The Applicant submitted all required plans for emergency services access and stormwater management. Both fire access and the stormwater management concept plan received approval from the County on March 8, 2023. *Id* at 10. Per the Applicant's traffic statement, the project will generate less than 50 trips that would be required for a traffic study and per the LATR guidelines the number of trips when totaled correlate to zero added vehicle tips per day on a typical day. *Id*. Mr. Driban, Applicant's Traffic Expert, testified that the project is exempt from an LATR and that these types of sites, i.e., solar, when calculated generate "zero trips". T. 33-23.

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

### ***3. No Undue Harm from Non-Inherent Adverse Effects***

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

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

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

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

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

Staff concluded that the following physical and operational characteristics are inherent to a solar collection facility (Exhibit 49, p.23):

- Ground mount solar arrays;
- Access road
- Temporary construction noise
- Visual impacts (arrays and fence)

- Solar array compound that may be enclosed within the fence and landscape screening; and
- Limited vehicle trips for construction and maintenance.

Conclusion: The Hearing Examiner agrees with Staff's list of inherent adverse characteristic of this use. Staff identified no noninherent adverse effects associated with the proposed use. *Id.* at 25. Staff determined that the proposed conditional use will not result in adverse effects over and above the Report's identified inherent impacts. *Id.* Mr. Foster testified to the impacts of the solar array regarding installation, operation, and screening. T. 5. Specifically, he testified that in his expert opinion the proposed use would have no non-inherent impact on the abutting and surrounding properties. T. 55. The Applicant's experts testified at length to the efforts made regarding stormwater management by providing adequate drainage via the culvert studies and the 30-foot landscape buffer around the perimeter where visible to residences. T. 53-56, 71.

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

#### **4. Compatibility with the Neighborhood**

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

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



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

Staff found the project to be harmonious with and not alter the character of the neighborhood. Exhibit 49, pg. 21. The proposed use produces minimal noise traffic and visual impacts. The installation of the solar project sits back within the boundaries of the parcel will be surrounded by natural and additional screening along Zion and Gregg Roads. *Id.* The proposed driveway will be constructed with gravel and curve behind the proposed forest conservation easement. *Id.* The mechanical pad and switch gear are to be located on the interior of the property for safety reasons and to limit the visual impacts. *Id.*

The Applicant's expert, Mr. Foster, testified that the site does not abut any residential properties or residentially zoned properties. T. 39. The surrounding neighborhood consists of low density residential, semi-farming lots, tree farm, landscape contractor and a pending solar installation on an equestrian parcel. T. 37-40. Mr. Foster agreed with Staff's characterization of the neighborhood and that the proposed use to be compatible T. 41.

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

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

is the tree farm use that will continue on the parcel facility furthering the goals of the Master Plan while providing additional energy resources to the greater community. In addition, the solar panels themselves will be well shielded from the neighboring uses and the driveway will be gravel construction maintaining the rural feel and character of the neighborhood.

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

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

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

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

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

## **B. Development Standards of the Zone (Article 59.4)**

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the AR Zone, contained in Article 59.4 of the Zoning Ordinance. Staff included a table (Exhibit 49, p.16-17, shown on the following page) in its Report

comparing the minimum development standards of the AR Zone to what is proposed in this application. Staff correctly note in the chart that “[t]here is no proposed development with this application.” *Id.*

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

<b>Development Standard Section 59.4.2.1.F</b>	<b>Permitted/ Required</b>	<b>Proposed</b>
<b>Minimum Lot Area</b>	40,000 SF 25 acres (Site)	50.38 acres (Site) 53.95 acres (GTA)
<b>Minimum Lot Width at Front Building Line</b>	125 feet	1,200 feet+/-
<b>Minimum Lot Width at Front Lot Line</b>	25 feet	1,200 feet +/-
<b>Maximum Density</b>	1 dwelling/25 acres	N/A
<b>Maximum Building Lot Coverage</b>	10%	0%
<b>Minimum Front Setback</b>	50 feet	50 feet
<b>Side Street Setback</b>	50 feet	50 feet
<b>Minimum Side Setback</b>	20 feet	N/A
<b>Minimum Sum of Side Setbacks</b>	N/A	N/A
<b>Minimum Rear Setback</b>	35 feet	700 feet +/-
<b>Maximum Height</b>	50 feet	N/A
<b>Vehicle Parking Requirement (Section 59.6.2.4.B)</b>	N/A	N/A
Note**Parcel P115 is an unrecorded parcel. Recordation of a plat is not required for the proposed use. The dimensions in this table are taken from the boundary of the Subject Property.		

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

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

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

#### **Zoning Ordinance §59.3.7.2.**

#### **A. Solar Collection System**

##### **1. Defined**

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

Conclusion: The Applicant proposes to construct and operate to a 2-megawatt photovoltaic solar collection system. Exhibit 5, pg. 3. The use proposed meets this definition.

##### **2. Use Standards<sup>4</sup>**

*A Solar Collection System may be allowed as a Conditional Use in the AR zone if it exceeds a facility rated at more than 200% of on-site energy use and is less than 2 megawatts (AC). Where a Solar Collection System is allowed as a conditional use in the*

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<sup>4</sup> 59.3.7.2.B.2

*AR zone, it may be permitted by the Hearing Examiner under Section 7.3.1. Conditional Use and the following standards:*

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

Mr. Foster testified regarding soils classification and referred to Exhibit 14(d) and the corresponding soils chart on the site plan at Exhibit 14(a). T. 52-53. The plans submitted by the Applicant identify the soil category types with use classification numbers and hydrological group letters such as 2B, 6A, etc. *Id.* Mr. Foster testified that prime agricultural soils are Class 1 and Class 2 and that the solar array are located on Class 3 and Class 4 soils T. 52. On Exhibit 14(a) the fifth column identifies the “use” for the soil. *Id.* See soil type chart below and map below.

### MAPPED SOIL TYPES

MAP UNIT	DESCRIPTION	HIGHLY ERODIBLE	HYDRIC RATING	USE CLASSIFICATION	HYDROLOGICAL GROUP	DRAINAGE CLASS	K-FACTOR
2B	Glenelg Silt Loam 3-8% slopes	Severe	0	2	B	Well drained	0.37
2C	Glenelg Silt Loam 8-15% slopes	Severe	0	3	B	Well drained	0.37
5A	Glenville Silt Loam 0-3% Slopes	Slight	10	2	C	Moderately Well drained	0.37
5B	Glenville Silt Loam 3-8% Slopes	Severe	10	2	C/D	Moderately Well drained	0.37
6A	Baile Silt Loam 0-3% Slopes	Slight	85	4	C/D	Poorly Drained	0.37
16D	Brinklow-Blocktown channey silt loam 15-25% slopes, very rocky	Severe	5	4	C	Well drained	0.24

ACCORDING TO USDA - WEB SOIL SURVEY  
Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture.  
Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/> accessed May 18, 2021.

Exhibit 14(a)





As shown on the image above, the solar array has an odd shape to avoid prime soils and is outside the stream buffer, existing wetlands and on lands with less than 15% slope. T. 53. Mr. Foster, Applicant's Landscape Architecture expert, further testified that efforts were made to avoid environmentally sensitive areas including putting the wetlands and stream buffers in a forest conservation easement. T. 53, 60-61. In addition, the Staff Report confirms that the solar

array will not be located on prohibited soils, in a stream buffer, existing wetlands or on slopes greater than 15%. Exhibit 49, pgs. 25-26.

Conclusion: Exhibit 14 clearly depicts the location of the solar array away from the prohibited environmental features on the site. The accuracy of exhibit is further bolstered expert testimony and staff report. The Hearing Examiner finds that placement of the solar array meets this requirement.

*b. Scraping topsoil from the site is prohibited.*

*c. Grading and any soil removal are minimized.*

Conclusion: Mr. Foster testified that no soil will be scraped, and grading will be minimized. T.

53. Mr. Zimmerman also testified that there will be no grading of the field area itself and the only earth work will be for the pad and trenches which will be regraded and topsoil replaced. T.

23 In addition, he testified that there will be no undercutting of the roadway used to access the facility. *Id.* The Hearing Examiner finds Mr. Foster and Mr. Zimmerman's testimony persuasive that grading and soil removal will be minimized and that scraping of topsoil will not occur.

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

Conclusion: A condition of approval will require compliance with the above regulations.

Therefore, the use as conditioned will meet this requirement.

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

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

*(iii) planted, managed, maintained, and used for any other agrivoltaic plant material.*

Mr. Zimmerman testified that the project will comply with 59.3.7.2.B.2(e). Specifically, he is working to hire a company to install/design a certifiable pollinator friendly habitat per the Maryland Pollinator Friendly Certification program. T. 26. They will obtain the correct seeds, establish the planting and obtain the certification to meet the requirements. *Id.* In addition, Staff reviewed and referred to Attachment E of Exhibit 49 for the meadow planting plan and determined the Applicant satisfies this condition. Exhibit 49, pg. 13.

Conclusion: Per the testimony of Mr. Zimmerman, the Staff Report, the planting notes and details included on Exhibit 14(a), the project satisfies requirements of this subsection.

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

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

Conclusion: On November 9, 2021, the Applicant received approval of the interconnection of the project to PEPCO's local electric distribution line. Exhibit 23; Exhibit 49, pg. 13; T. 24.

Acceptance of this letter into evidence satisfies the requirement in subsection (f).

Mr. Foster testified that required "evidence that the application has been submitted to the Office of Agriculture" was submitted. T. 49. On July 19, 2023, the Office of Agriculture (OAG) provided a letter to Staff in support of this Application and the Applicant forwarded to OAG final documents addressing comments raised from Staff. Exhibit 37 and Exhibit 49, pg. Attachment G. The testimony, Exhibit 37, and letter included in the Staff Report as "Attachment G" satisfies the requirement in subsection (g).

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

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

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

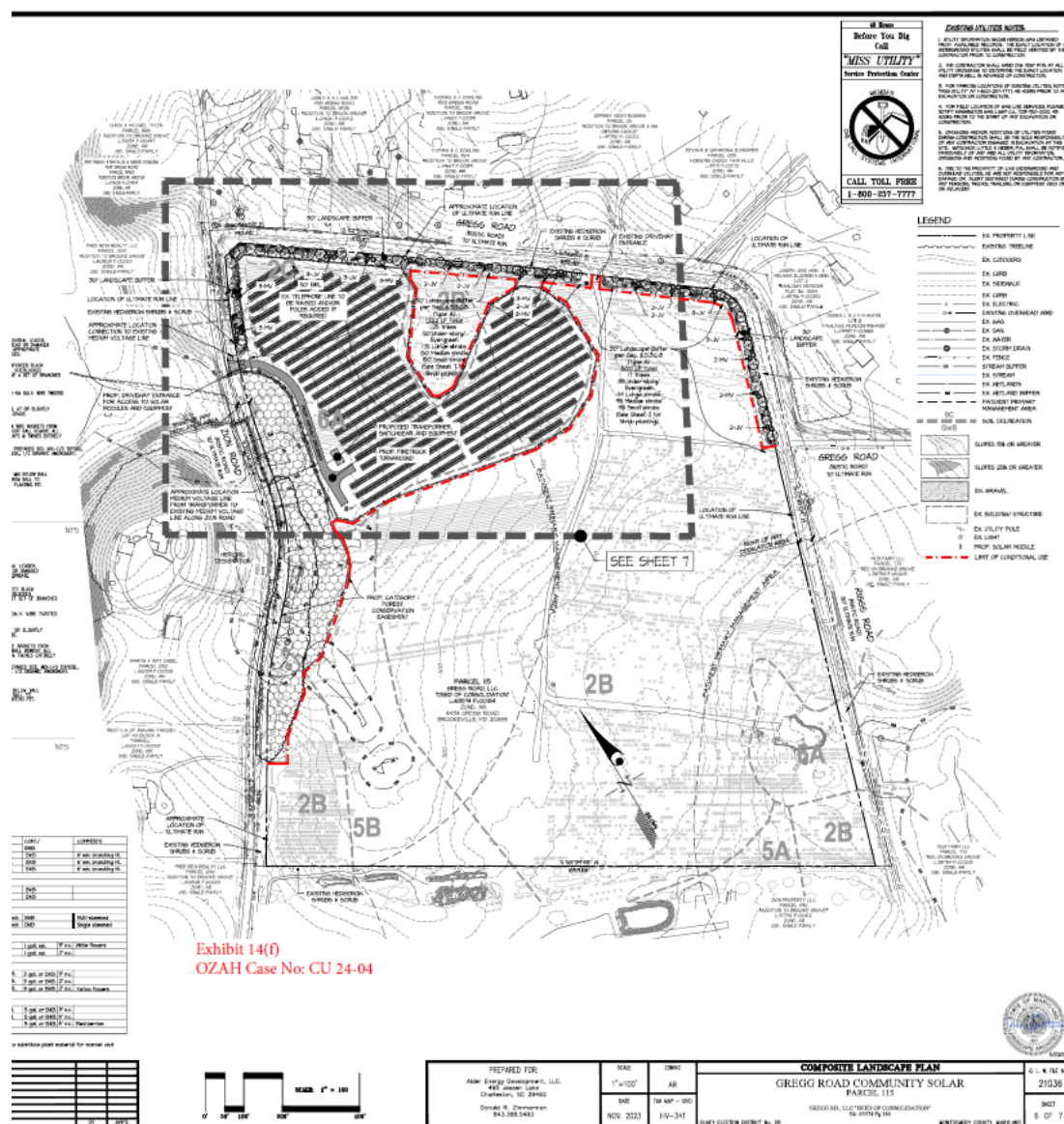
*k. Screening that satisfies Section 59.6.5.3.C.8 (Option A) on the sides of the facility within 200 feet of any neighboring house is required; however, a fence may not be required or prohibited.*

Staff determined no trees or landscaping will be removed that were otherwise required as a condition of any prior approvals. Exhibit 49, pg. 13. The Preliminary Forest Conservation Plan submitted with the Application indicates that none of the trees being removed are in a flood plain, stream buffer, steep slope, critical habitat, contiguous forest or historic site and that the existing forest is to be retained. *Id.* Concrete will only be used for transformer and electrical equipment pads. *Id.* at pg. 14. Regarding screening Staff found as follows:

Along the northern Property line, where the solar facility is within 200 feet of a neighboring house, landscape screening has been provided that satisfies Section 59.6.5.3.C.8 (Option A), along the perimeter of the Property. The solar array and associated fenced area are more than 200 feet from any neighboring house along the remaining perimeter of the Property; therefore, no screening is required. However, as shown on Figure 6, the Applicant is providing the same landscaping along the rest of the perimeter to provide a visual buffer between the panels and abutting rustic roads. The existing forested stream, wetlands, and associated buffer area, south of the new driveway entrance, are being placed in a Category I Conservation Easement. The Conservation Easement will ensure the environmental buffers are protected and the existing forest will act as natural screening.

Trees and scrub currently line the majority of Zion and Gregg Roads, which will remain. The proposed 30-foot-wide area of screening, made up of canopy trees, evergreen trees, shrubs, and understory planting will enhance the existing vegetation, which will adequately screen the view of the solar panels.

Further Mr. Foster, Applicant's Expert, testified to the required landscaping and walked the Hearing Examiner through the details in Exhibit 14(f). T. 56-57. See a portion of Exhibit 14(f) below.



Landscape Plan - Exhibit 14(f)



Conclusion: The Hearing Examiner agrees with Staff that application as submitted satisfies subsections (h), (i), (j) and (k).

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

Conclusion: The OAG letter dated July 19, 2023 “supports the Gregg Road Community Solar Project as proposed” and included the following comments:

- The applicant proposes to install 11.88 acres of solar panels on class III soils or higher, on slopes less than 15%, outside of any wetlands and stream buffers, without stripping topsoil, and minimizing grading on-site.
- The applicant proposes to meet the farming or agricultural activity requirement by planting the area underneath the solar panels in a pollinator habitat with an appropriate seed mix during the correct planting season using best practices.

See Exhibit 37. The testimony of Mr. Zimmerman and Mr. Foster along with the details included in the landscape plan as referenced on previous pages of this Report and Decision align with the comments from OAG and are included in this Application. The Hearing Examiner considered OAG's review and notes that OAG offered no other specific recommendations to the Application.

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

Conclusion: The Staff Report affirmed that following:

- The system will occupy 12.984 acres total including the Forest Conservation Easement;
- Total fenced area is 8.77 acres;
- Landscape buffer area is 1.33 acres;
- The BRL areas accounted for in the landscape buffer overlap is .22 acres; and
- Forest conservation area will incur an additional 2.53 acres.

See Exhibit 49, pg. 15. In addition, Mr. Foster testimony supports the findings of Staff. T. 39-60. The requirements of subsection (m) are satisfied.

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

Conclusion: Mr. Foster testified that the Office of Agriculture opined that there is still land existing within 1,800 acres of AR zoned land available for this solar project. T. 49. Staff determined the Application represents the second conditional use application for a solar collection system in the AR zone and currently only 4.92 acres of AR land have been approved for Community Solar. Staff note that the Free Rein Solar Farm approved via CU23-05 by this Hearing Examiner on June 8, 2023 has not yet been constructed.

The Hearing Examiner agrees with Mr. Foster and Staff that acreage remains available in the AR Zone and this facility will not exceed the maximum amount. The requirements of subsection (n) are satisfied.

#### **D. General Development Standards (Article 59.6)**

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

##### *I. Site Access*

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

presented in this case. Access to the site is proposed with a new 20-foot-wide driveway from Zion Road providing adequate site access for maintenance and emergency vehicles.

## *2. Parking, Queuing and Loading*

Conclusion: Zoning Ordinance section 59.6.2 governs “Parking, Queuing and Loading.” The use requires no parking. However, in the event service or repairs are needed, the site provides ample parking. Exhibit 49, pg. 17.

## *3. Lighting and Landscaping*

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

## *4. Screening*

Conclusion: Zoning Ordinance section 59.6.5 governs “Screening”. Zoning Ordinance section 59.3.7.2.B.2.k requires screening within 200 feet of any neighboring house. As identified in this Report and Decision above, one house is located within 200 feet of the proposed solar array. The Applicant’s proposed screening as discussed in the use standard for the Solar Collection Systems above and identified in Exhibit 14(f) satisfies the screening requirement landscaping along the northern property line.

## *5. Signage*

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

#### IV. CONCLUSIONS AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59.3, 59.4, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Alder Energy/Gregg Road Community Solar (CU 24-04) for a conditional use under Section 59.3.7.1. of the Zoning Ordinance to build and operate a Solar Collection System on property described as Parcel 115 in the addition to Brooke Grove subdivision in Brookville, in the southeast quadrant of the intersection of Zion and Gregg Roads in Brookville, is hereby **GRANTED**, subject to the following conditions:

1. The use is limited to a Solar Collection System that generates no more than two (2) megawatts.
2. Prior to the release of the access permit by the Montgomery County Department of Transportation, the Applicant must provide the following dedications, by deed, as shown on the Conditional Use Plan:
  - a) All land necessary to accommodate thirty-five feet (35) from the existing pavement centerline along the Subject Property frontage for Zion Road;
  - b) All land necessary to accommodate thirty-five feet (35) from the existing pavement centerline along the Subject Property frontage for Gregg Road, and
  - c) All land necessary to accommodate forty feet (40) from the existing pavement centerline along the Subject Property frontage for Riggs Road.
3. Within one year after planting, the Applicant must submit proof to the OZAH that the area below the solar array has been certified as pollinator-friendly under the Maryland Pollinator-Friendly Designation Program.
4. Before issuance of any building permit or sediment control permit, whichever comes first, the Applicant must enter into a Surety and Maintenance Agreement with the Planning Board in a form approved by the M-NCPPC Office of General Counsel that outlines the responsibilities of the Applicant. The Agreement must include a performance bond or other form of surety, with the following provisions.
  - a) A cost estimate of the materials and facilities, which, upon Staff approval, will establish the surety amount.
  - b) The cost estimate must include landscape screening and fencing, as shown on the approved Conditional Use Site Plan.
  - c) Completion of all improvements covered by the surety will be followed by inspection and potential reduction of the surety, through the one-year warranty period.

- d) The bond or surety for each item shall be clearly described within the Surety & Maintenance Agreement, including all relevant conditions.

Issued this 18th day of January 2024.



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Kathleen E. Byrne  
Hearing Examiner

### NOTICE OF RIGHT TO APPEAL

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

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

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

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

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

**Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to [BOA@montgomerycountymd.gov](mailto: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:**

Peter Ciferri, Esquire

Attorney for the Applicant

Barbara Jay, Executive Director, Montgomery County Board of Appeals

Robert Kronenberg, Deputy Director, Planning Department

Mark Beall, Planning Department

Greg Nichols, Manager, Department of Permitting Services

Victor Salazar, Department of Permitting Services

Michael Coveyou, Director, Finance Department

Elana Robison, Esquire, Associate County Attorney