

**From:** Robeson Hannan, Lynn **Sent:** Sunday, January 24, 2021 3:34 PM  
**To:** Iseli, Claire  
**Cc:** Zyontz, Jeffrey  
**Subject:** Request for Comment on Circular Distributed on Pending Solar Farm ZTA

Ms. Iseli, the purpose of this email is to respond to your request for comments on the attached circular apparently prepared in conjunction with the pending ZTA on solar farms.

Let me start by saying that OZAH does not take policy positions; my comments relate solely to clarifying some of the issues presented in the circular. In addition, given the relatively limited time for my review, I am including Jeff on this communication as he may disagree with my analysis.

Taking my comments in the order presented in the circular, these are:

1. "...requirements and to the SUBJECTIVE will of an unidentified Hearing Examiner who could basically terminate proposed solar projects for almost any reason. In effect, even a limited amount of solar production reserved for low-income households would be banned unless the additional "conditions" are met, and then still be exposed to the uncertain and potentially arbitrary decision of an Examiner whose connection to the County is not specified."
  - i. Most of the conditions imposed on conditional uses are recommended by Planning Staff and approved or modified by the Planning Board. At times, the Hearing Examiner may impose a condition to address an issue that wasn't considered by the Planning Board based on concerns raised at the public hearing or where the applicant disagrees with the Planning Board's recommended condition. Under law, Hearing Examiners may not impose arbitrary, subjective conditions—they must be based on evidence presented at the public hearing and typically relate to concerns raised either by the applicant (which sometimes disagrees with the Planning Board) or the community.
  - ii. The Planning Board is also authorized to impose conditions beyond the requirements of Chapter 59.3 when approving a site plan. See, 2014 Zoning Ordinance, 59.7.3.4.F.1.
2. "But, as the memo below reveals, so-called 'Conditional Use' zoning would effectively stop Community Solar by basically eliminating the County Planning Board, which has supported limited solar development, from the final solar project approval process."
  - i. The Planning Board and Planning Department do play a significant role in the conditional use process and the Hearing Examiner cannot disagree with their recommendations without justification. This circular appears to assume that the Planning Board for some reason will be more favorable to solar farms than the Hearing Examiner. I do not know the basis for that supposition and cannot comment on it. I do not have at hand statistics for the number of conditional uses denied by the Hearing Examiner, but the vast majority are approved.

3. “‘Conditional Use’ would subject solar projects to time-consuming and expensive additional requirements and to the SUBJECTIVE will of an unidentified Hearing Examiner who could basically terminate proposed solar projects for almost any reason.”

i. The Zoning Ordinance does not require site plan approval after approval of a conditional use unless the Council adds that requirement to the limited use standards. Section 59.7.3.4.A.7 of the Zoning Ordinance exempts the following from site plan approval:

7. An area covered by a conditional use approval requires a site plan only if:
  1. the area is included in a sketch plan; or
  2. the use standards in Article 59-3 require it.

ii. The application requirements for a site plan and conditional use are quite similar; a conditional use requires submission of a certified copy of the Zoning Map that is readily available online. Compare, Sections 59.7.3.1.B. and 59.7.3.4.B.

iii. Because no site plan is required for conditional uses, unless the Council decides to require one, the question is whether the conditional use process or the site plan process takes longer. OZAH has already provided median times for approval of a conditional use from acceptance by OZAH through review by the Planning Staff/Board to approval by the Hearing Examiner, which is 6.2 months. I have no information on the actual times taken for approval of a site plan (including certified site plan approval).

4. “This approval decision may go beyond the conditions specified in zoning, to subjective factors as perceived by the Commissioner.”

i. Both the Hearing Examiner and the Planning Board may impose conditions on an approval that go beyond the limited use standards listed in Section 59.3. during the site plan or conditional use process. See, Sections 59.7.3.1.F.1, 59.7.3.4.F.1. Conditions imposed cannot be not “subjective” but must relate to and be justified by the facts presented and relevant to the standards for approval. For conditional uses, the conditions imposed are often recommended by the Planning Board and Planning Staff and typically address specific impacts on the community or when applicants disagree with the conditions recommended by the Planning Board.

5. “Approval of a project is open to appeal by any potentially interested party, resulting in further delay and uncertainty.”

i. The only persons that may appeal a conditional use are those that appear at OZAH’s public hearing or are otherwise made a party under OZAH’s Rules (very rare). See, 2014 Zoning Ordinance, 59.7.3.1.F.1.c. Appeals of site plans are permitted by “any aggrieved party”. Section 59.7.3.4.F.2. Generally, under Maryland case law, an “aggrieved party” is a person that appears at the public hearing and is impacted by the use in a manner different than the public. *Id.*, 7.3.4. A rule of thumb for determining who is “aggrieved” is that they must be “within sight and sound” of the property or they must experience some impact of the use different than the general public.

ii. I have no statistical information on whether the difference between “persons who appear at a hearing” and “aggrieved party” would increase the number of appeals. In opposed conditional uses cases; an “aggrieved party” typically appears at the public hearing (for instance, an adjacent property owner), which would permit an appeal under either process.

iii. State law governing conditional uses states, “an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.” Md. Land Use Code Ann. 22-301. Therefore, the Council may amend the Zoning Ordinance for these conditional uses to be consistent with the appeal of a site plan.

iv. Most conditional uses must be appealed to the Board of Appeals then to Circuit Court. Site plans may be appealed directly to Circuit Court. In telecommunications cases, the Council eliminated the intermediate step of an appeal to the Board of Appeals and may do so here if they feel that the additional check from the Board of Appeals is unnecessary. Since the 2014 Zoning Ordinance was adopted, approximately 7 cases have been appealed to the Board of Appeals. I do not have information on the processing time at the Board of Appeals for these appeals.

6. “‘Conditional Use’ was formerly called “Special Exception,” and that’s what it’s for - one-off, individual exceptions to zoning rules.”

iv. The label “special exception” was changed to “conditional use” in the 2014 Zoning Ordinance because it is not, and never has been, a “one-off, individual exception[s] to the zoning rules.” Special exceptions and conditional uses are permitted uses if the applicant demonstrates that it can meet the legislative standards. In this, they are like a “limited use”.

7. “The Master Plan does NOT require projects to be subject to Conditional Use”: I do not understand the countervailing arguments presented in this paragraph and so will not comment.

8. Comparison of approval standards between Site Plan and Conditional Uses:

v. The circular refers to discretionary, subjective standards for approval of conditional uses and lengthy public hearings versus standards of approval for a site plan.

i. Both site plans and conditional uses are subject to a public hearing. The difference between a “limited use” site plan approval and a conditional use is whether the Council decides that the potential adverse impacts of the use warrants consideration under the “necessary findings” listed for conditional uses (§59.7.3.1.E.1) or the “necessary findings” that the Planning Board must make when approving site plans. Zoning Ordinance, §59.7.3.4.E. Differences between site plan approval standards and the conditional use approval standards include the following:

ii. Inherent v. non-inherent adverse impact: In my opinion (Jeff may disagree), the major difference between the findings required for site plan and the findings required for a conditional use is whether there is a “non-inherent” physical or operational characteristic of the proposed use at the proposed location that warrants denial. Compare, §59.7.3.1.E.1 with 59.7.3.4.E.1. For conditional uses, the Hearing Examiner must find that (Section 7.3.1.E.1.g.) the use:

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:

1. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;
2. traffic, noise, odors, dust, illumination, or a lack of parking; or
3. the health, safety, or welfare of neighboring residents, visitors, or employees.

iii. Past examples of denials due to non-inherent physical characteristics include location of landscape contractor business on a long, narrow lot where the driveway carrying large trucks was 22 feet from an off-site dwelling. An example of a non-inherent operational condition that warranted denial is the enrollment of a child day care center for 30 children on a small lot, with parking in the front yard, located on substandard roads.

iv. For the use the Council is considering, it must decide whether it believes the potential adverse impacts of the use should be subject to this criterion. OZAH takes no position on the matter.

ii. Compatibility Standards:

a. Site Plan: For uses located in the AR Zone, the Planning Board must find that the use is compatible with existing and approved or pending adjacent development.

b. Conditional Use: The Hearing Examiner must find that the use is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the [master] plan. *Zoning Ordinance*, Section 7.3.1.E.1.c. OZAH decisions in conditional uses recognize the significant overlap between this requirement and substantial conformity with the Master Plan, which permits uses that are not identical to the character of the neighborhood but are consistent with the Master Plan to meet this standard.

c. An additional compatibility standard for conditional uses is Section 7.3.1.E.4, which states: “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.” I do not know whether solar “farms” are classified as agricultural uses—that decision would be up to the Council and could so provide in the ZTA.

iii. Other Conditional Use Compatibility findings are not applicable to the AR Zone: Not all the “necessary findings” for required for conditional uses apply to properties within the AR Zone.

- a. Section 59.7.3.E.1.e requires the Hearing Examiner to determine whether there is an “overconcentration” of conditional uses in the defined surrounding area only if the use is in or adjacent to a Residential Detached Zone. Residential Detached Zones are listed in §59.7.1.3.C.1 of the Zoning Ordinance. The AR Zone is not a Residential Detached Zone.
- b. Section 59.7.3.1.E.2 requires compatibility with an area defined by the properties that are directly impacted by the use. This criterion only applies where the proposed use is in a Residential Detached Zone. The AR Zone is not a Residential Detached Zone.
- c. None of the required findings in Section 59.7.3.1.E.2., 5., and 6 apply to this conditional use.

iv. Non-Presumption of Compatibility/Conditional uses: There is no presumption of compatibility for a conditional use—the Applicant must demonstrate that it meets the standards of approval based on the weight of the evidence. This provision was included to overrule case law finding that special exception/conditional uses enjoyed a presumption of compatibility.

v. Non-Presumption of compatibility/site plans: I am unaware of any presumption given by case law that site plans are presumptively compatible, nor do I see anything in the Zoning Ordinance that would make this the case. Jeff may know of such case law, and I have not had time to research the issue.

9. Circular’s Summary of Site Plan Development Process

- a. Site plan is not added to the conditional use process. A decision to make this a conditional use or a site plan would be either a site plan or a conditional use, unless the Council decides to make both apply.
  - b. Site Plan Approval Process listed in the Circular: Much of the “site plan” 24-month time frame listed in the circular is required regardless of whether it is a conditional use or a site plan.
1. Given that a site plan is not added onto a conditional use, the information on the amount of time required for approval of a site plan (including the certified site plan referred to in the list) would be relevant. The only permitting approval required after approval of a conditional use is a building permit and DPS requirements unless the property requires subdivision.

- c. There is no mandatory community meeting required for a conditional use.
  - d. I am unaware of any statutorily mandated review by a “Design Review Committee”. This may be an administrative procedure instituted by the Planning Department. If not mandated by statute, it could be eliminated in the site plan process. Some design review is already incorporated into the conditional use process through the compatibility criteria.
- ii. Department of Permitting Services requirements listed in the circular are the same in both the conditional use and site plan processes.
  - iii. Bonding should be the same whether this is a conditional use or a site.

Again, this email is intended only to respond to your request to clarify the information contained in the attached circular. Jeff may disagree with this analysis. OZAH takes no position on whether the Council should or should not make solar farms in the AR Zone a conditional use.

Unfortunately, I will be in a hearing all day on Monday. I trust this provides you with the information requested. If you have question, I will be checking email periodically.

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