

BOARD OF APPEALS

April 3, 2019

County Administration Building, 100 W. Washington St., Meeting Room 2000, Hagerstown, at 7:00 p.m.

AGENDA

DOCKET NO. AP2019-004: An appeal made by 2014 Lappans Road, LLC for a special exception to establish a retail sales facility on property owned by the Appellant and located at 18206 Lappans Road, Boonsboro, zoned Rural Village - **GRANTED**

DOCKET NO. AP2019-005: An appeal made by Kieffer Funk, LLC for a special exception to establish a solar energy generating system (SEGS) on property owned by Elizabeth Funk Joachim and located at 11609 Kieffer Funk Road, Smithsburg, zoned Residential Transition and Agricultural (Rural) – **GRANTED**

Pursuant to the Maryland Open Meetings Law, notice is hereby given that the deliberations of the Board of Zoning Appeals are open to the public. Furthermore, the Board, at its discretion, may render a decision as to some or all of the cases at the hearing described above or at a subsequent hearing, the date and time of which will be announced prior to the conclusion of the public hearing. Individuals requiring special accommodations are requested to contact Kathy Kroboth at 240-313-2469 Voice, 240-313-2130 Voice/TDD to make arrangements no later than March 25, 2019. Any person desiring a stenographic transcript shall be responsible for supplying a competent stenographer.

The Board of Appeals reserves the right to vary the order in which the cases are called. Please take note of the Amended Rules of Procedure (Adopted July 5, 2006), Public Hearing, Section 4(d) which states:

Applicants shall have ten (10) minutes in which to present their request and may, upon request to and permission of the Board, receive an additional twenty (20) minutes for their presentation. Following the Applicant's case in chief, other individuals may receive three (3) minutes to testify, except in the circumstance where an individual is representing a group, in which case said individual shall be given eight (8) minutes to testify.

Those Applicants requesting the additional twenty (20) minutes shall have their case automatically moved to the end of the docket.

For extraordinary cause, the Board may extend any time period set forth herein, or otherwise modify or suspend these Rules, to uphold the spirit of the Ordinance and to do substantial justice.

Paul Fulk, Chairman
Board of Zoning Appeals

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

2014 LAPPANS ROAD, LLC

Appeal No. AP2019-004

Appellant

OPINION

This appeal is a request for a special exception to establish a retail sales facility at the subject property. The subject property is located at 18206 Lappans Road, Boonsboro, Maryland; is owned by 2014 Lappans Road, LLC; and is zoned Rural Village (RV). The Board held a public hearing on the matter on April 3, 2019.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Appellant is the owner of the subject property, located at 18206 Lappans Road, Boonsboro, Maryland. The end-user will lease the building which has yet to be constructed.

2. The subject property consists of four (4) lots, with Lot 1 comprised of approximately 1.64 acres, in addition to adjacent lots 2, 3 and 4. The lots are located at the northeast corner of the intersection of Lappans Road and Sharpsburg Pike. The subject property is currently unimproved.

3. Appellant proposes to combine portions of Lot 3 to Lot 1 pursuant to a subdivision to increase the size of Lot 1 to approximately 2.2 acres. Appellant further proposes to construct a Dollar General or similar general retail/merchandise store on the subject property. It will consist of a single-story building, approximately 9,100 square feet which will operate seven (7) days per week from 8:00 a.m. to 10:00 p.m., with two (2) to three (3) employees per shift.

4. The intersection of Lappans Road and Sharpsburg Pike is operating a level of service "A" pursuant to State Highway Administration standards.

5. There is an average of twenty-nine (29) peak hour morning trips and an average of forty-one (41) peak hour evening trips for the subject property.

6. The proposed store building will be located away from the intersection due to existing rights-of-way along Lappans Road and Sharpsburg Pike for future dedication. The entrance to the subject property will be located three hundred (300) feet from the intersection on Lappans Road.

7. The southwest corner of the intersection of Lappans Road and Sharpsburg Pike is comprised of an AC&T convenience store and gas station. The northwest corner of the intersection is comprised of May's Service Center and McNamee's Tavern and Liquor Store.

Rationale

The Board has authority to grant a special exception pursuant to Section 25.2(b) of the Zoning Ordinance for Washington County, Maryland. A special exception is defined as "a grant of a specific use that would not be appropriate generally or without restriction;

and shall be based upon a finding that the use conforms to the plan and is compatible with the existing neighborhood.” Article 28A. In the instant case, Appellant requests the Board is called upon to consider a special exception request to establish a retail sales facility as a substantially similar use to those permitted in the Rural Village (RV) zoning district.

Before we consider the impact of such a use at the subject property, we must first consider whether it may be considered as a special exception request pursuant to the Ordinance. Pursuant to Article 3, Section 3.3 of the Zoning Ordinance, bakery shops, candy stores, florist shops, garden shops, and laundry or dry-cleaning services are all principally permitted uses in the Rural Village (RV) zoning district. In addition, auction houses, flea markets, clothing stores, dairy product stores, furniture and upholstering stores, gift or jewelry stores, grocery stores and hardware stores are all permitted by special exception. The proposed used is retail sales facility which necessarily includes the sale of candy, dairy and food products, some clothing items, some garden items, some items commonly found in grocery stores and hardware stores. In sum, the proposed use is a compilation of other enumerated uses which are permitted by right or by special exception in the zoning district. Accordingly, the proposed use is substantially similar to those uses specified by the Ordinance as special exception or permitted uses.

There is nothing about the subject property or the surrounding properties that would produce more adverse effects at this location as opposed to somewhere else in the zone. Arguably, the AC&T convenience store and gas station has more impact on the surrounding properties than any retail sales use would at the subject property. A neighborhood, low cost retail sales use at the subject property will have no greater

“adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” *Schultz v. Pritts*, 291 Md. 1, 15 (1981). Although there was opposition to the project, most if not all was based on aesthetics and no evidence was presented of any actual adverse effects. The common theme during opposition testimony was to preserve natural land and that the proposed store would be suited for other properties but not the subject property. However, the evidence presented had very little to do with adverse impacts and failed to distinguish any such impact at the subject property versus other properties in the zoning district. For all these reasons, we conclude that this appeal meets the criteria for a special exception and secures public safety and welfare and upholds the spirit of the Ordinance.

Accordingly, the request for a special exception to establish a retail sales facility at the subject property is hereby GRANTED, by a vote of 5–0.

BOARD OF APPEALS

By: Paul Fulk, Chair

Date Issued: May 1, 2019

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

KIEFFER FUNK, LLC

Appeal No. AP2019-005

Appellant

OPINION

This appeal is a request for a special exception to establish a solar energy generating system (SEGS) at the subject property. The subject property is located at 11609 Kieffer Funk Road, Smithsburg, Maryland; is owned by Joachim Elizabeth Funk; and is zoned Residential Transition (RT) and Agricultural (Rural). The Board held a public hearing on the matter on April 3, 2019.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Appellant is the prospective lessee of the subject property, located at 11609 Kieffer Funk Road, Smithsburg, Maryland.
2. The subject property consists of a total of 167.6 acres, with 79.8 acres zoned Agricultural, Rural (AR) and the remaining approximately 87 acres zoned Residential, Transition (RT).
3. Appellant proposes to construct an 11.8-megawatt solar energy generating

system which would occupy the 79.8 portion of the subject property. The system will consist of an array of solar modules, ground mounted and approximately eight (8) feet off the ground. The entire system will be surrounded with a minimum six (6) foot security fence. There will be no employees or customers, and the only visits will consist of periodic repair and maintenance, and mowing on a periodic and as-needed basis.

4. Appellant has renewable lease terms with the owner of the subject property, but upon termination of the lease, all system equipment will be removed, and the property will be returned to something consistent with its current composition.

5. There is abundant vegetation and trees along property lines adjacent to the subject property. There is also a grove of trees bordering the location of the proposed system that will remain in conservation.

6. The solar power collected from the system will be transmitted underground to an interconnection point at the southern corner of the property.

7. Appellant has also submitted an application to the Public Service Commission for approval of the system.¹

Rationale

Section 28A of the Zoning Ordinance defines a solar energy generating system (SEGS) as “a grid tie solar facility consisting of multiple solar arrays whose primary

¹ Counsel for Appellant explained that a previous case was appealed to the Circuit Court for Washington County on the issue of whether the Board of Appeals had authority to hear a SEGS application and ultimately the Court ruled that it did not when the application was over 2 megawatts. The case was appealed to the Court of Special Appeals which affirmed the lower court’s ruling. The matter is now scheduled for argument before the Court of Appeals on May 2, 2019. Pending a decision from the appellate courts, Appellant sought relief in both forums to be safe.

purpose is to generate electricity for distribution and/or sale into the public utility grid and not for onsite consumption. The testimony and evidence presented by Appellant clearly demonstrate that the proposed use meets the definition of a solar energy generating system pursuant to the Zoning Ordinance. Solar energy generating systems are permitted as a special exception in the Agricultural (Rural) zoning district, wherein the subject property is located.

The Board has authority to grant a special exception pursuant to Section 25.2(b) of the Zoning Ordinance for Washington County, Maryland. A special exception is defined as “a grant of a specific use that would not be appropriate generally or without restriction; and shall be based upon a finding that the use conforms to the plan and is compatible with the existing neighborhood.” Article 28A. In the instant case, the Board is called upon to consider a request to establish a solar energy generating system (SEGS) on farm property in the Agricultural (Rural) zoning district.

The subject property appears to be ideal for the proposed solar energy generating system. The property is located among rural farm land and is obscured somewhat by the grade differences and the groves of trees and other vegetation present around the subject property. The nature of the system is that it does not emit any odors, gas, dust or noise, and does not produce any by-products that could be offensive to neighboring properties. The construction is only temporary, for the term of the lease, and will not disturb the existing vegetation or result in the cutting of any trees. Appellant noted that all reasonable efforts are made to avoid disruption of the existing ecosystem, farming operations, soil and groundwater. Appellant explained in detail that the size of the use will not expand because the zoning designation for the remaining land does not permit

SEGS.

There is nothing unique about the subject property or the surrounding properties that would produce more adverse effects at this location as opposed to somewhere else in the zone. The construction of a solar energy generating system (SEGS) at the subject property will have no greater “adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” *Schultz v. Pritts*, 291 Md. 1, 15 (1981). Although there was opposition to the project, most if not all was based on aesthetics and no evidence was presented of any actual adverse effects. For all these reasons, we conclude that this appeal meets the criteria for a special exception and is secures public safety and welfare and upholds the spirit of the Ordinance.

Accordingly, the request for a special exception to establish a solar energy generating system (SEGS) at the subject property is hereby GRANTED, by a vote of 5–0.

BOARD OF APPEALS

By: Paul Fulk, Chair

Date Issued: May 1, 2019