

BOARD OF APPEALS

September 29, 2021

County Administration Building, 100 W. Washington St., Meeting Room 2000, Hagerstown, at 6:00 p.m.

AGENDA

DOCKET NO. AP2021-025: An appeal was made by Benevola Solar Energy Center LLC for a special exception to establish a solar energy generating system "SEGS" on parcel designated as a priority preservation area with a industrial mineral floating zone on property owned by Martin Marietta Materials Inc and located at 20301 Benevola Church Road/Boonsboro Quarry, Boonsboro, Zoned Agricultural, Rural with a Industrial Mineral Floating Zone.-**GRANTED**

DOCKET NO. AP2021-029: An appeal was made by Timothy & Lavonda Martin for a variance from the floodplain ordinance enclosures below the lowest floor requirements for previously built addition to single family dwelling on property owned by the appellants and located at 21013 Lehman's Mill Road, Hagerstown.-**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 Katie Rathvon at 240-313-2464 Voice, 240-313-2130 Voice/TDD no later than September 20, 2021. 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**

BENEVOLA SOLAR ENERGY CENTER LLC

APPELLANT

APPEAL NO. AP2021-025

OPINION

Benevola Solar Energy Center LLC, a Maryland limited liability company, (hereinafter, "Appellant"), requests a special exception to allow the installation and operation of a solar energy generating system on the subject property. The subject property is owned by Martin Marietta Materials Inc., and is comprised of 42.273 acres located on Benevola Church Road, Boonsboro, Maryland 21713 (Tax ID #06-008615), and is zoned Agricultural (Rural), in a Priority Preservation Area, within a Mineral Overlay area. The Board held a public hearing on the matter on September 29, 2021.

The appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County, Maryland (hereinafter, the "Ordinance") and upon proper notice to the parties and general public as required.

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 proposed lessee of approximately 42.273 acres of the subject property, located on Benevola Church Road, Boonsboro, Maryland. The owner of the subject property, Marting Marietta Materials Inc., has authorized Appellant to seek a special exception. The subject property is zoned Agricultural (Rural) (A(R)), and is in a defined Priority Preservation Area, within a Mineral Overlay area.¹

2. Appellant desires to install and operate a solar energy generating system (hereinafter, "SEGS") on the subject property, within the leased area.

¹ Pursuant to Section 4.26 of the Ordinance, SEGS are prohibited in Priority Preservation Areas; however, an amendment to the Ordinance (effective August 10, 2021) permits SEGS in Priority Preservation Areas that are in Mineral Overlay areas identified on the zoning map.

3. A special exception is required to install and operate a SEGS in the A(R) zoning district (Ordinance §3.3(1)(R)).

4. The subject property contains a quarry, operated by the property owner, which operation likely will continue beyond the maximum term of the SEGS lease (5-year initial term, with two 25-year extensions).

5. The proposed SEGS area on the subject property will be bounded on several sides by berms 10 to 25 feet high to separate the SEGS area from the quarry. In addition, existing tree cover in several areas will provide additional viewscape protection, and a proposed 7 foot high perimeter fence surrounding the SEGS facility will provide security.

6. Appellant does not need any easements or rights-of-way for access to the subject property, does not intend to install any lighting, will implement appropriate dust controls during construction/installation of the solar panels and other equipment, and any noise from the SEGS facility (after installation) will be no greater than normal conservation level.

7. Appellant is required by the lease to implement a vegetation restoration plan after construction/installation, and to implement a decommissioning and land reclamation plan upon removal of the SEGS facility.

8. Appellant indicated that no blasting will be done to install the SEGS and there will be minimal disturbance of the soils.

9. Aside from the quarry activities, the subject property has been used for agricultural purposes for many years, but at a reduced yield, due to the lower quality of the existing soils.

10. Mining locations are protected from adjoining properties having incompatible land uses, so it is unlikely that the SEGS facility will have a greater impact on neighboring properties than the current mining operations.

11. Testing by Appellant's soil scientists has indicated that there likely are no prime agricultural Class 1 soils on the subject property, and any Class 2 soils are minimal (approximately 1.5 acres in total located to the northeast side of the subject property). Appellant has agreed to avoid disturbing any Class 2 soils to the extent practicable.

12. No persons other than Appellant's attorney and technical representatives testified in support of the application. No persons testified in opposition to the application.

13. A letter was received and read into the record from the Washington County Department of Planning & Zoning. Said letter states that the Comprehensive Plan for the County "is generally silent on the issue of renewable energy facilities such as...(SEGS)...[thus] the application is neither consistent nor inconsistent with the Comprehensive Plan." The letter further states that the Washington County Planning Commission "has been extremely vocal in their opposition to SEGS being permitted on lands that contain prime agricultural soils...a portion of this SEGS project will be placed on prime agricultural soils." The letter continues to note that a text amendment to the Ordinance is being processed "to specifically deter these uses from being placed on prime agricultural soils" and "Staff would recommend that if the application were approved, that the location of the solar panels be relocated to areas of the farm that do not contain prime (Class 1 and 2) agricultural soils."

RATIONALE

The Board has authority to grant a special exception pursuant to Section 25.2(b) of the Ordinance. 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" (Ordinance, Article 28A).

As noted in the Findings of Fact hereinabove, in the instant case, Appellant's technical representatives testified as to the location, installation, operation, maintenance, and decommissioning of the SEGS upon the leased area of the subject property. Further testimony was given by Appellant's technical representatives to address any adverse impacts from the above activities. This testimony also indicated that Appellant does not use blasting for installation of the SEGS, that it will undertake necessary and appropriate maintenance of the SEGS, that it will use appropriate fencing for the SEGS perimeter, that there will be no lighting for the SEGS, and the location of the SEGS on the leased area of the subject property, together the existing topography, retention of natural tree stands, location of existing quarry berms, and the prohibition of land uses on adjoining properties that are incompatible with mining operations will all minimize or eliminate any negative impacts on surrounding property owners.

In addition, the Board finds that testimony given regarding the results of "refined" on-site testing performed by Appellant's representatives (as opposed to soil surveys conducted by government agencies that do not physically sample and test the soil) reasonably establishes there are minimal prime agricultural soils on the subject property. Moreover, for the acreage that does contain Class 2 soils, the Board finds credible the testimony given that the size of the acreage and its poor historical yield would make it economically unfeasible to continue to farm.

In its consideration of the testimony and evidence, the Board notes with favor Appellant's significant and prudent planned efforts taken to minimize any negative effects of the SEGS on surrounding properties, and believes its will be a good steward of the land.

The Board notes the concerns raised by the County's Department of Planning & Zoning, and the proposed text amendment to the Ordinance to address those concerns by deterring the installation of SEGS on prime agricultural soils, such as exist where the SEGS will be located. However, the Board is satisfied that Appellant has satisfactorily addressed these concerns.

The Board finds that the current use at the subject property currently has 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). For all these reasons, the Board concludes that this appeal meets the criteria for a special exception, secures public safety and welfare, otherwise conforms to and upholds the spirit of the Ordinance, and is compatible with the existing neighborhood.

Therefore, Appellants' request for a special exception to install and operate a SEGS in the leased area of the subject property is GRANTED, by a vote of 5-0. Said variance is granted upon the condition that installation and operation of the SEGS shall be: (1) in compliance with the design standards for SEGS as set forth in Section 4.26 of the Ordinance; and (2) in a manner consistent with the testimony and evidence presented herein and in compliance with all other applicable governmental requirements.

BOARD OF APPEALS

By: Paul Fulk, Chair

Date Issued: October 29, 2021

Notice of Appeal Rights

Any person or persons, jointly or severally, aggrieved by any decision of the Board of Appeals, or any taxpayer, or any officer, department, board, or bureau of the jurisdiction, may appeal the same to the Circuit Court for Washington County within thirty (30) days, in a manner set forth in Md. Code Ann., Land Use, § 4-401.

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

TIMOTHY MARTIN & LAVONDA MARTIN

APPEAL No. AP2021-029

APPELLANTS

OPINION

Timothy Martin and Lavonda Martin (hereinafter collectively, "Appellants") request a variance from Section 5.3(C)(3) of the Washington County Floodplain Management Ordinance (hereinafter, "Ordinance") which requires flood openings in enclosures below the lowest floor, to allow Appellants to forego such flood openings for an existing addition to a single-family dwelling (hereinafter, the "Dwelling") located on the subject property. The subject property is located at 21013 Lehmans Mill Road, Hagerstown, Maryland. The Board held a public hearing on the matter on September 29, 2021.

The appeal was heard pursuant to Section 7.0 of the Ordinance and upon proper notice to the parties and general public as required.

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. Appellants are the owners of the subject property located at 21013 Lehmans Mill Road, Hagerstown, Maryland.

2. A single-family dwelling (hereinafter, the "Dwelling") consisting of 3,762 square feet of above grade living area (with no basement) is situate on the subject property in the southwestern most portion of the lot, which is an irregularly shaped lot currently containing approximately 85.9 acres. Appellants acquired the subject property in 1994, but did not live in the Dwelling until 2018, the same year as when they constructed a 336 square foot addition (hereinafter, the "Addition") attached to the Dwelling. The Addition was constructed to provide a first-floor bathroom for Mrs. Martin's mother, who is an amputee, and visits Appellants from time to time.

3. A variance is required in the event a property owner does not wish to provide flood openings for any enclosures below the lowest floor (Ordinance, §7.0).¹

4. Prior to and for several years after construction of the Addition, Appellants were unaware of the requirement for flood openings as set forth in the Ordinance.

5. A prior owner of the subject property indicated to Appellants that the worst flooding experienced thereat was in 1972 during Hurricane Agnes, and then, the waters from the Antietam Creek came only to 300 feet from the Dwelling. Further, the orientation of the house to said Creek would result in floodwaters entering the garage and window wells of the lowest floor of the Dwelling before reaching the Addition.

6. Having flood openings in the Addition would subject the plumbing beneath the Addition to freezing temperatures, and would decrease the temperature within the Addition and Dwelling, causing significantly higher heating expenses. Furthermore, flood openings below grade would defeat the purpose of the existing french drains surrounding the home to keep ground water from entering the home.

7. No other persons testified in support of or in opposition to the application. A letter was received and read into the record from the Senior Plan Reviewer / Floodplain Manager of the Washington County Division of Plan Review & Permitting noting the requirements of Section 5.3 of the Ordinance for flood openings in enclosures below flood level, and that the applicant should be made aware of increased flood insurance rates and risks to life and property in the event a variance is granted.

8. With regard to the specific factors of Section 7.3 of the Ordinance, the Board finds as follows:

- a) The danger that materials may be swept onto other lands to the

¹ The Board notes that compliance with Section 5.3 of the Floodplain Ordinance is required of "[n]ew residential structures...and *substantial improvement* of existing residential structures...", and Section 2.0 defines "substantial improvement" as "[a]ny reconstruction, rehabilitation, addition, or other improvement of a building or structure, over a five year period, the cumulative cost of which equals or exceeds 50 percent of the *market value* of the building or structure before the *start of construction* of the improvement." The addition at issue clearly is not a "new residential structure"; further, it does not appear to the Board that the addition at issue in this matter satisfies the "substantial improvement" portion of the definition. Nevertheless, out of an abundance of caution, the Board determined that the hearing should proceed and this Opinion be issued.

- injury of others is negligible, given the orientation of the Dwelling and Addition to the Antietam Creek, and the extent of floodwater levels in relation to the said structures over the past 50 years;
- b) The danger to life and property due to flooding or erosion damage is negligible, given the orientation of the Dwelling and Addition to the Antietam Creek, and the extent of floodwater levels in relation to the said structures over the past 50 years;
 - c) The susceptibility of the proposed development and its contents (if applicable) to flood damage and the effect of such damage on the individual owner is negligible, given the orientation of the Dwelling and Addition to the Antietam Creek, and the extent of floodwater levels in relation to the said structures over the past 50 years;
 - d) The importance of the services to the community provided by the proposed development is not applicable in this matter;
 - e) The availability of alternative locations for the proposed use which are not subject to, or are subject to less, flooding or erosion damage is non-existent, as the Addition has been attached to the Dwelling in a location least likely to be subject to such damage as compared to the rest of the Dwelling;
 - f) The necessity to the facility of a waterfront location, where applicable, or if the facility is a functionally dependent use, is not applicable in this matter;
 - g) The compatibility of the proposed use with existing and anticipated development. The Addition is compatible with the existing development on the subject property, and no further development is anticipated;
 - h) The relationship of the proposed use to the comprehensive plan and hazard mitigation plan for that area. The use is compatible with those plans in this area.
 - i) The safety of access to the property in times of flood for passenger

vehicles and emergency vehicles. The safety of access is not impacted in a manner greater than what existed prior to construction of the Addition.

- j) The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site. In the past 50 years, floodwaters have reached no higher than 300 feet from the Dwelling and Addition;
- k) The costs of providing government services during and after flood conditions, including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and streets and bridges. Said costs are not impacted in a manner greater than what existed prior to construction of the Addition; and
- l) The comments provided by MDE (NFIP State Coordinator). The comments provided have been evaluated. Appellants have been made aware that granting of a variance in this matter may result in increased flood insurance premium rates and that the construction allowed without flood openings increases risks to life and property.

9. With regard to the specific limitations of Section 7.4 of the Ordinance, the Board finds as follows:

- a) A showing of good and sufficient cause. The Board determines that a showing of good and sufficient cause has been made by Appellants in that anecdotal evidence pertaining to and the general physical characteristics of the subject property do not appear to indicate a significant threat of floodwaters reaching the Dwelling and Addition;
- b) A determination that failure to grant the variance would result in exceptional hardship due to the physical characteristics of the property. The Board determines that an exceptional hardship would result from a failure to grant the variance, given that anecdotal evidence pertaining to and the general physical characteristics of the subject property do not appear to indicate a

significant threat of floodwaters reaching the Dwelling and Addition, that the Addition has been placed in the most advantageous location with regard to the Dwelling to minimize the threat from floodwaters, and that the risk of groundwater penetration to the Dwelling and Addition would be significantly increased if flood openings were required;

- c) A determination that the granting of a variance for development within any designated floodway, or flood hazard area with base flood elevations but no designated floodway, will not result in increased flood heights beyond that which is allowed in these regulations. The Board determines that granting the variance will not result in increased flood heights beyond that allowed;
- d) A determination that the granting of a variance will not result in additional threats to public safety; extraordinary public expense, nuisances, fraud or victimization of the public, or conflict with existing local laws. The Board determines that granting the variance will not result in any of the foregoing;
- e) A determination that the building, structure or other development is protected by methods to minimize flood damages. The Board determines that the placement of the Addition in relation to the Dwelling, that the elevation of the Addition is higher than the first floor of the Dwelling, and the existence of French drains around the entire home connected to sump pumps all serve to mitigate and/or minimize flood damages; and
- f) A determination that the variance is the minimum necessary to afford relief, considering the flood hazard. The Board determines that the variance is the minimum necessary to afford relief, given all of the testimony, evidence, facts, and circumstances as mentioned elsewhere in this Opinion.

RATIONALE

The Board has authority to grant a variance upon findings of fact and satisfaction of the limitations for granting variances as set forth in Sections 7.3 and 7.4, respectively.

The Board finds that for the variance requested in this case, upon the testimony and evidence presented herein, the findings of fact as set forth hereinabove and determinations of the limitations for granting variances also as set forth hereinabove, that the granting the variance sought herein is not contrary to the public interest, and a literal enforcement of the applicable regulations of the Ordinance would result in an unnecessary hardship upon Appellants.

Therefore, Appellants' request for a variance from the requirement for flood openings in enclosures below the lowest floor, to allow Appellants to forego such flood openings for an existing Addition to a single-family Dwelling located on the subject property is GRANTED, by a vote of 5-0. Said variance is granted upon the conditions that the Addition will continue to be used consistent with the testimony and evidence presented herein and in compliance with all other applicable government regulations.

BOARD OF APPEALS

By: Paul Fulk, Chair

Date Issued: October 29, 2021

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