



HARVESTING THE SUN ON MARYLAND FARMLAND

LOCAL ZONING RESTRICTIONS
FOR SOLAR FIELDS

By Casey L. Cirner



The increased use of agricultural land for utility scale solar generation facilities (solar fields that generate power for sale) has many Maryland counties struggling with how to balance two public interests – renewable energy and farmland.

The ideal location for a utility scale solar generation facility (solar farm) is a large swath of flat, cleared land (*i.e.*, farmland). The availability of agricultural land, either through purchase or lease, coupled with Maryland's renewable energy goals and the community solar pilot project (discussed below), has many Maryland counties seeing an influx of zoning and regulatory applications for solar farms on agricultural land. These same counties are concerned that the solar projects will diminish the available agricultural land and are tightening zoning regulations to further restrict its use. But, the effectiveness of these local efforts remains to be seen because, typically, State law impliedly preempts local law in the area of solar farms. This could leave many local regulations without teeth.

On February 2, 2017, the Maryland General Assembly, through gubernatorial veto override, passed legislation to increase Maryland's renewable energy goals to 25 percent in 2020. Acts 2017, c. 1, § 5, eff. Oct. 1, 2016. Subsequently, Maryland implemented a "community solar" pilot project, which will make solar energy available to all in-

quality of life issue for certain rural areas and residents. Press Release, Anne Arundel County, Anne Arundel County Announces Eight Month Industrial Solar Operations Ban (Dec. 3, 2017). The eight-month moratorium ended on August 30, 2018, with the Anne Arundel County Council's introduction of Bill 89-18. Bill 89-18 imposes stricter zoning regulations on solar fields per the recommendations of the County's Agriculture, Agritourism, and Farming Commission.

Caroline County lifted its six-month moratorium on solar fields on December 12, 2017, through enactment of Ordinance #2017-2. Before that, Frederick County enacted a six-month moratorium by Executive Order No. 01-2016, effective January 15, 2016. On May 16, 2017, Frederick County adopted a solar facility commercial floating zone district (the "Floating Zone") for the use of agricultural land for solar fields that requires a corresponding land use designation in the Comprehensive Plan. Frederick County Code § 1-19-10.700. After the expiration of Frederick County's moratorium, the Baltimore County Council enacted its

agricultural land are not allowed by right, but rather pursuant to either a special exception (conditional use) or other zoning application, such as the Floating Zone. Anne Arundel County Bill No. 89-18; Caroline County § 175-13; Baltimore County Code § 4E-102(A); Wicomico County Code § 255-155B(2); Dorchester County Code § 155-50(LL); Cecil County Code § 54.4; Frederick County Code § 1-19-10.700. The resulting zoning standards in these counties restrict solar fields on agricultural land in various ways by including, for instance, provisions for:

- A limit on the amount of prime agricultural soils that can be disturbed for solar projects. Anne Arundel County Bill No. 89-18; Frederick County Code § 1-19-10.700(C)(4).
- A cap on the total acreage available for solar farms in the county. Caroline County Code § 175-85(A)(1). (Caroline County recently reduced the 3,000 acres of the County that can be used for solar farms to 2,000 acres. *Id.*)
- A cap on the number of facilities within each council district. Baltimore County Code § 4E-102(B)(4). (Only 10 solar farms, at any one time, are permitted in each council district. *Id.*)
- A cap on lot coverage or net area of the site used for the solar field. Anne Arundel County Bill No. 89-18; Frederick County Code § 1-19-10.700(C)(5).
- Prevention of the development within environmental features, such as environmentally sensitive areas, animal habitats, planned greenways and require forest conservation law compliance or other limitations on tree removal. Anne Arundel County Bill No. 89-18; Caroline County Code §§ 175-85(A)(4) and (B)(2); Baltimore County Code § 4E-104(A)(10); Frederick County

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come levels through a subscription to a single solar farm. COMAR 20.62.01, *et seq.* As a result, solar farms (utility scale and community) continue to be developed in rapid succession.

Many counties have imposed moratoriums on construction of solar farms in order to strengthen their zoning restrictions to strike a balance between what some perceive as competing public interests. Anne Arundel County most recently enacted a moratorium to halt the use of agricultural land for solar fields, framing the problem as a

own moratorium via Bill No. 68-16, which was vetoed by the late County Executive Kevin Kamenetz. Notwithstanding, the Baltimore County Council adopted amendments to its solar farm zoning regulations. Currently, Somerset County is in the process of amending its solar ordinance.

An underlying theme of the resulting zoning amendments adopted or proposed by the above counties and the zoning provisions already in place within some of the remaining Maryland counties is that solar fields on

Code § 1-19-10.700(C)(7).

- Imposition of buffer and screening requirements, including fencing. Anne Arundel County Bill No. 89-18; Baltimore County Code §§ 4E-104(A)(6) and (7); Dorchester County Code § 155-50(LL)(1)(e) and (k).
- Protection of viewsheds, agricultural, conservation and historic preservation easements. Anne Arundel County Bill No. 89-18; Caroline County Code § 175-85(A)(3), §§ 175-85(B)(1) and (4); Baltimore County Code §§ 4E-104(A)(1)-(5); Frederick County Code § 1-19-10.700(B)(4); Dorchester County Code § 155-50(LL)(1)(g).
- Regulation of glare and visible light. Anne Arundel County Bill No. 89-18; Caroline County Code §§ 175-85(B)(6) and (7); Baltimore County Code § 4E-104(A)(8); Dorchester County Code §§ 155-50(LL)(1)(a) and (d).
- Imposition of a decommissioning plan, with a decommissioning bond/security, or other solar panel and infrastructure removal requirements. Anne Arundel County Bill No. 89-18; Caroline County Code § 175-85(C); Baltimore County Code § 4E-107; Frederick County Code § 1-19-10.700(C)(10); Dorchester County Code § 155-50(LL)(1)(l).
- Imposition minimum distances between commercial solar projects. Anne Arundel County Bill No. 89-18.

Some counties prefer not to strike a balance, but to prohibit solar farms altogether on agricultural land. For example, Montgomery County has 90,000 acres of land in its agricultural reserve and allows solar only as an accessory use on that land (*i.e.*, free-standing solar array must produce a maximum of 120 percent of the on-site consumption). Montgomery County Code § 59.3.7.2.B.1.

Despite these local efforts, the Maryland Public Service Commission (PSC) has jurisdiction to approve solar fields through the certificate of public conve-

nience and necessity (CPCN) process. Public Utility Article (PUA) § 7-207(b)(1)(i). It is recognized in certain instances that the CPCN process preempts the local zoning processes. The seminal case, *Howard County v. PEP-CO.*, 319 Md. 511 (1990), held that State law impliedly preempted local law in the field of public utility service. Specifically, the Court of Appeals held that State law preempted the Montgomery County Zoning Ordinance special exception requirements governing the location of power lines in excess of 69,000 volts because the State granted the PSC broad powers in this field and the State law gave no controlling deference or approval rights to the local jurisdiction. The State law merely provided for the PSC to give “due consideration to the recommendations of such bodies.” *Id.* at 526.

The “due consideration” standard is still applicable today. PUA § 7-207(e)(1) provides for “due consideration” of “the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station...is proposed to be located.” However, in 2017, H.D. 1350, 2017 Leg., 437th Sess. (Md. 2017) and S. 851, 2017 Leg., 437th Sess. (Md. 2017) added two additional criteria to which the PSC must give “due consideration”: (1) the consistency of the application with the comprehensive plan and zoning or each county or municipal corporation where any portion of the generating station is proposed to be located” and; (2) “the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located.” PUA § 7-207(e)(3). This triggered some counties to question whether preemption of local zoning was still the case.

The PSC’s public utility law judge (“PULJ”) relied on the State’s implied preemption of local regulations in the field of solar generation facilities when it initially approved the LeGore Bridge Solar Center, LLC’s application for a 20 megawatt solar field on agricultural land in Frederick County.

Proposed Order, P.S.C. Case No. 9429, 44-46 (Oct. 3, 2017). LeGore obtained special exception approval from Frederick County for its solar field prior to consideration of its CPCN application and Frederick County’s replacement of the solar farm special exception process with the piecemeal Floating Zone process. *Id.* At the close of the CPCN record, Frederick County filed with the PULJ a copy of the Floating Zone legislation to advance the notion that LeGore’s special exception was no longer valid and that it had to obtain Floating Zone approval. *Id.* at 33. The PULJ held in its Proposed Order that State law preempted Frederick County’s local zoning restrictions and alternatively, LeGore had obtained a special exception, and the special exception approval included a finding of conformance with the Comprehensive Plan. *Id.* at 46.

Frederick County appealed the Proposed Order to the PSC on multiple grounds. Notice of Appeal, P.S.C. Case No. 9429, 44-46 (Nov. 1, 2017). It argued against preemption on the basis of the recently enacted § 7-207(e)(3), Pub. Util., Md. Ann. Code, which added due consideration be given to the local jurisdictions’ Comprehensive Plan and zoning, thereby creating “complementary roles in the process” for the County and State. Frederick County, Maryland’s Memorandum of Appeal, P.S.C. Case No. 9429, 9 (Nov. 9, 2017). Frederick County also argued that the holding in *Howard County* was limited to public service companies, which LeGore was not. *Id.*

Without addressing preemption, the PSC upheld the Proposed Order on alternative grounds. *In re: LeGore Bridge Solar Center, LLC*, 2018 WL 1586448 (Md.P.S.C). It concluded that LeGore had vested its special exception and due process prevented the PSC from requiring LeGore to undergo the floating zone process so late in the game. *Id.* The PSC’s dissenting opinion argued that “due consideration” equates to “considerable weight” and by overlooking Frederick County’s comprehensive plan recommendations and Floating Zone, the PSC was deviating

from its normal practice. *Id.* The dissenting opinion also rebuffed LeGore's reliance on preemption when it specifically mentions LeGore's strategy to continue with the special exception process when faced with a moratorium and Frederick County's proposed Floating Zone legislation. *Id.*

Although the PSC declined to approve LeGore's CPCN on the basis of preemption, the Court of Special Appeals recently addressed preemption in an unreported opinion. On August 28, 2018, the Court of Special Appeals issued unreported opinion, *Board of County Commn. of Washington County v. Perennial Solar, LLC*, 2018 WL 4090873, that upheld the issuance of a CPCN for a solar farm on the basis that local zoning regulations are preempted by State law and the applicant, although not a public utility company, was governed by the PSC because it was a "person" under PUA § 7-207(b)(1)(i) over which the PSC has jurisdiction to issue a CPCN. However, the CPCN at issue was subject to PUA § 7-207(e) before the amendments enacted by H.D. 1350, 2017 Leg., 437th Sess. (Md. 2017) and S. 851, 2017 Leg., 437th Sess. (Md. 2017). Accordingly, the viability of preemption by State law of local zoning requirements and Comprehensive Plan recommendations appears to be uncertain at this time, absent a subsequent decision by a PULJ, PSC, or Maryland appellate court.

Thus, preemption by State law may continue to be challenged by the local jurisdictions. However, the counties will likely continue to establish more stringent solar field zoning regulations and adopt Comprehensive Plans touching on solar field locations, in an attempt to preserve farmland – all balanced against the CPCN process.

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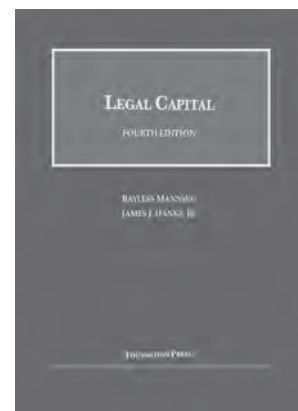
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