

Impact of Siting Energy Generation Facilities



Maryland Sustainable Growth Commission ☀️ Chestertown Meeting

14 November 2016

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Kent County Land Use Ordinance: History of Agricultural Zoning

18 November 1969 – Rural District:

The purpose of this district is to provide for a full range of agricultural activities and to protect agricultural land, as one of the county's most valuable natural resources, from the depreciating effect of objectionable, hazardous, and unsightly uses.

7 January 1975 – Rural District:

The purpose of this district is to provide for a full range of agricultural activities and to protect agricultural land, as one of the county's most valuable natural resources, from the depreciating effect of objectionable, hazardous, and unsightly uses.

1 August 1989 – Agricultural Zoning District:

This district is intended to protect and preserve areas of the County which are presently rural or agricultural in character and use; to provide for a full range of agricultural activities, and to allow low density residential development for those who are willing to live in more remote locations and to assume the costs of providing many of their own services and amenities. The primary purpose of the AZD is the protection of the preferred agricultural activities and land.



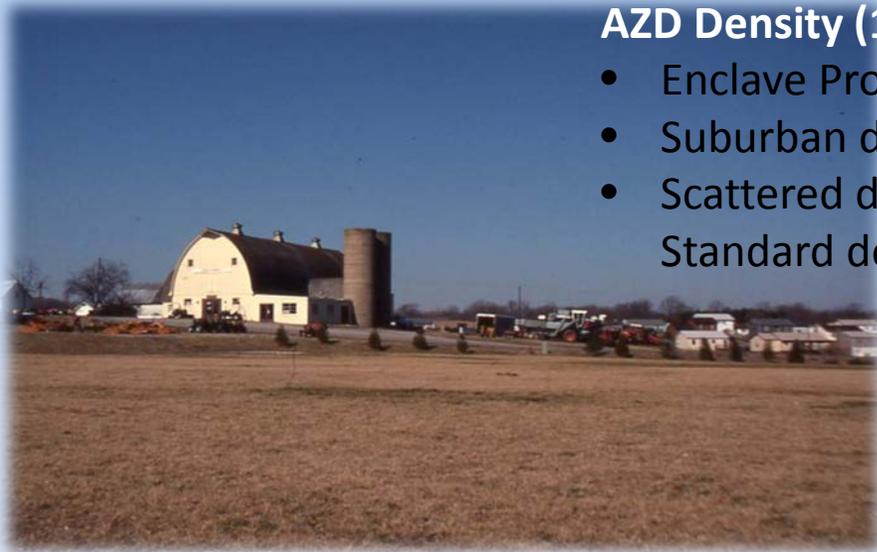
Kent County's Agricultural Zoning District

3 December 2002 – Agricultural Zoning District

The purpose of the Agricultural Zoning District is to encourage the use of agricultural land for farming and other agricultural businesses and to limit the use of these lands for non-agricultural purposes. Agriculture, including animal husbandry, is the preferred and primary use in the Agricultural Zoning District. In general, the District will consist of large contiguous areas predominantly devoted to agriculture or forestry and principally composed of Class I, II, and III soils.

AZD Density (1989 to present)

- Enclave Provisions were adopted in 1989 **(1/10)**
- Suburban development standards were adopted in 1989 and removed in 2003 **(1/20)**
- Scattered development standards were adopted in 1989 but amended to reflect Standard development in 2003 **(1/30)**



Kent County Comprehensive Plan

History of Agriculture: The Industry

August 1968

Those soil conditions most favorable for agricultural use frequently are the same conditions suitable for urbanized development...The importance of agricultural productivity to the economy of Kent County underscores the need for avoiding any wholesale or wasteful encroachment on prime farm lands.

Foreseeable conflicts resulting in the misuse of choice agricultural land can be largely avoided through an overall allocation of planned land use which recognizes inherent soil characteristics and their corresponding capabilities.

July 1984

The importance of agricultural productivity to the economy of Kent County underscores the need for avoiding any wholesale or wasteful encroachment on prime farm lands.

The land use policy regarding agricultural land is threefold:

- First, farming and animal husbandry should be the primary uses;
- Second, no public sewer or water systems should be established; and
- Third, housing development should be discouraged.



Kent County Comprehensive Plan

July 1996

The open, flat expanses of rich fertile soil that blankets the County is a gift of immeasurable value. Approximately 57% of the County is defined as prime farmland as compared with 23% of Maryland as a whole. In 1992, agriculture directly contributed over \$54 million to the County economy in terms of the market value of agricultural products sold.

In addition to being an important component of the local economy, agriculture also provides a picturesque agrarian landscape which contributes to the tourism industry and the overall quality of life for Kent County residents.

May 2006

Agriculture is the thread which runs through our economy, our culture, our history, and our everyday experiences. We cannot afford to have this thread unravel. In many areas farmland is considered undeveloped land or an interim use. In Kent County, however, **we view agriculture as a permanent and preferred land use**. In order to preserve farmland, we must enhance the economic viability of agriculture in the County and discourage non-agriculturally related uses of rural land, while implementing strategies to encourage new development to locate in and around our existing towns and villages.



Kent County Renewable Energy Task Force

Following the 2008 adoption of the Empower Maryland Act and the 2009 state initiative known as “Generating Clean Horizons,” the County Commissioners of Kent created and appointed members to the Renewable Energy Task Force (RETF) in March 2010. The RETF presented findings in the form of a White Paper to the County Commissioners in November 2010.

The text amendments proposed by the RETF in the White Paper were ultimately adopted by the County Commissioners in August 2010 adding both permitted primary and secondary use and special exception provisions for small scale wind energy systems and small scale solar systems, as well as utility scale solar systems.

The Task Force members, the Planning Commission, and the County Commissioners concurred that utility scale renewable energy systems were industrial uses and not compatible with the intent of the AZD and with the Comprehensive Plan.

Small scale and utility scale systems are differentiated by whether energy is produced primarily for onsite use as follows.



Land Use Ordinance (2010 Amendments)

Renewable Energy System Definitions

Solar Energy System, utility scale - Any device or combination of devices or elements which rely upon direct sunlight as an energy source, including but not limited to any substance or device which collects sunlight for generating energy primarily for use off-site. Energy generated may be used to serve on site power needs.

Solar Energy System, small - Any device or combination or devices or elements which rely upon direct sunlight as an energy source, including but not limited to any substance or device which collects sunlight for generating energy for use on site. However, the energy output may be delivered to a power grid to offset the cost of energy on site, as well as aggregate metering as defined by the State of Maryland.

Wind Energy System, small - A wind turbine mounted on a free standing wind tower or building for the purpose of generating energy for use on site and not for sale and includes windmills that are used for pumping water or other purposes. However, the energy output may be delivered to a power grid to offset the cost of energy on site



Kent County and Municipal Small Scale Solar Energy Systems/Aggregate Metering

County Commissioners:

#12-11 - Worton Park

Ground-mounted Solar – 5.92 acres - 1.26 mW (1260 kW)

#11-10 - Kennedyville Wastewater Treatment Plant

Ground-mounted Solar – 8.51 acres - 1.184 mW (1184 kW)

#12-442 - Fairlee Wastewater Treatment Plant

Ground-mounted Solar – 4.7 acres - 0.809 mW (809.4 kW)

Town of Chestertown:

#15-115 – Wastewater Treatment Plant

Ground-mounted Solar – 4.36 acres - 1.31 mW (1310.4 kW)

Town of Rock Hall:

#12-12 – Wastewater Treatment Plant

Ground-mounted Solar – 6.6 acres - 1.26 mW (1260 kW)



Land Use Ordinance (2010 Amendments)

Renewable Energy Zoning Provisions

Utility scale solar energy systems are permitted as special exception uses in AZD subject to performance standards and Planning Commission and Board of Appeals approval. Such systems are likewise permitted in the Resource Conservation District. Notably, such utility scale solar systems in AZD and RCD are limited to 5 acres.

In addition, utility scale solar energy systems are permitted as special exception uses in the Crossroads Commercial, Commercial, and Commercial Critical Area Zoning Districts subject to performance standards and Planning Commission and Board of Appeals approval. Notably, such systems in these districts are not limited to 5 acres.

Utility scale solar energy systems are permitted as primary uses in both the Employment Center and Industrial Zoning Districts and are subject to performance standards and site plan review by the Planning Commission. Notably, such systems in these districts are not limited to 5 acres.

Utility scale wind energy systems are not permitted in any zoning districts.

Small scale solar and wind energy systems are permitted in most zoning districts.



ACRES IN EACH ZONING DISTRICT IN WHICH UTILITY SCALE SOLAR ENERGY SYSTEMS ARE PERMITTED

Zoning	Acres
Agricultural Zoning District	117,643
Commercial	152
Crossroads Commercial	111
Commercial Critical Area	21
Employment Center	1,539
Industrial	1,242
Industrial Critical Area	193
Resource Conservation District	37,153
Total	158,055



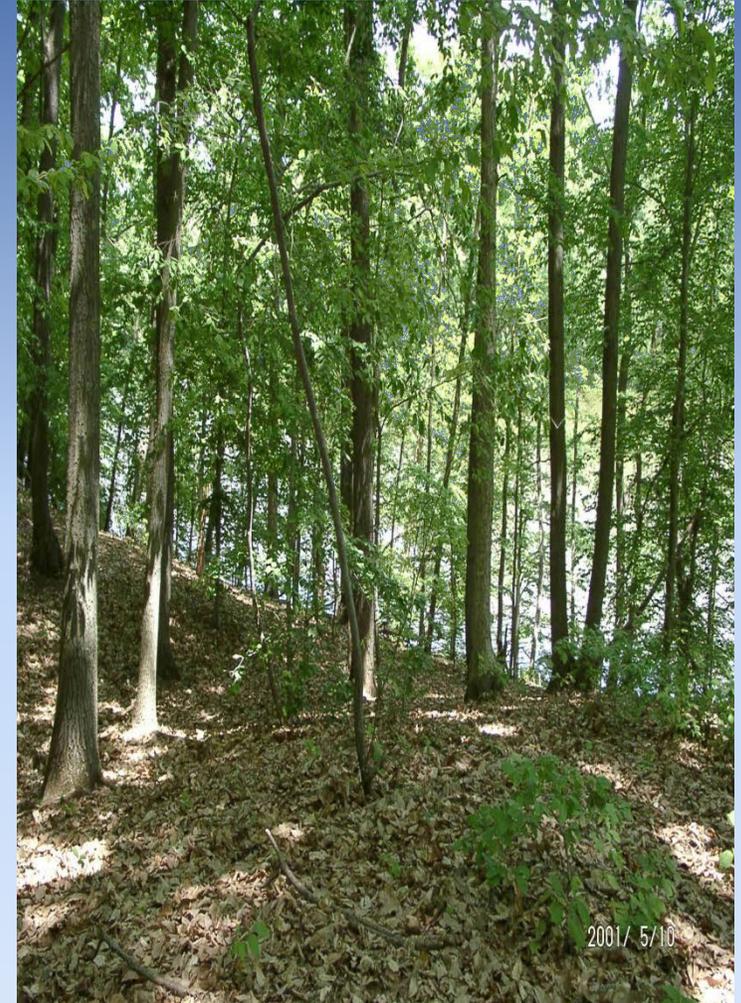
Forest Conservation Provisions

Case No. 9387 (OneEnergy BlueStar): Attempted to evoke the forest conservation exception as follows:

Kent County Land Use Article VII, Section 8.2 applies to minor and major site plans, subdivisions, public utilities not exempt under this section and all grading permits for a disturbed area over 40,000 square feet excluding those areas governed by the Chesapeake Bay Critical Area Protection Law (Natural Resources Article, Section 8-1801-1816, Annotated Code of Maryland). This Section also **does not apply** to the following:

The cutting or clearing of a **public utility right of way** licensed under Article 78, Section 54A and 54B or 54I, Annotated Code of Maryland, or **land for electric generating stations** licensed under Article 78, Section 54A and 54B or 54I Annotated Code of Maryland, provided:

- a) Certificates of public conveniences and necessity have been issued in accordance with Natural Resources Article 78, Section 5-1603(f), Annotated Code of Maryland; and
- b) Cutting or clearing of the forest is conducted to minimize the loss of forest.



Forest Conservation Provisions

Kent County Land Use Article VII, Section 8.2 applies to minor and major site plans, subdivisions, public utilities not exempt under this section and all grading permits for a disturbed area over 40,000 square feet excluding those areas governed by the Chesapeake Bay Critical Area Protection Law (Natural Resources Article, Section 8-1801-1816, Annotated Code of Maryland).

Article V, Sections 14.2 and 15.2 of the Kent County Land Use Ordinance establish all permitted uses in the Employment Center and Industrial Districts in which the application is proposed. Utility-scale solar energy systems are listed in both Districts as permitted uses subject to site plan review standards in accordance with Article VI, Section 5 and Article VI, Sections 14.8.B.3 and 15.8. Section 14.8.B.3 establishes Environmental Standards in both Districts, including Forest Conservation provisions.

A simple summary of these provisions results in the requirement to retain or afforest 15% of the net tract area (area of lease/use) of any proposed development when land in excess of 40,000 square feet is developed, regardless of tree/vegetation clearing.

A proposed utility scale solar energy system is not subject to the exception. The exception applies specifically to cutting or clearing of a public utility right of way or to power generation facilities which involve clearing of trees.



Forest Conservation Provisions

The County's Position (Case No. 9387): A proposed utility scale solar energy system is not subject to the exception evoked by OneEnergy BlueStar. The exception applies specifically to cutting or clearing of a public utility right of way or for the power generating station and not to the general site plan review standards and forest conservation standards for land disturbance of over 40,000 square feet. The OneEnergy BlueStar project totals over 35 acres of land disturbance.

PSC Evidentiary Hearing (Case Nos 9887/OneEnergy Blue Star in Kent and 9392/OneEnergy Ibis in Somerset): County staff and state agency representatives put forward a case before the Public Utility Law Judge relative to the applicability of the FCA in both bases. Kent County maintained that its Land Use Ordinance must be upheld. The LUO includes applicable FC provisions.

Public Utility Commission Decision/Order No. 87835:

- (1) That, as stated herein, the findings in the Proposed Orders are hereby modified to reflect the application of the FCA to the OneEnergy Solar Farm Project and the Ibis Solar Farm Project, and the holding that orders issued by the Commission in accordance with NR § 5-1603(f) may preempt local forest conservation ordinances; and
- (2) That the licensing conditions imposed upon the Projects by the Proposed Orders are hereby affirmed.



Preempted?

The Case: Howard County v. Potomac Electric Power Co. 319 Md. 511 (1990), argues that all local restrictions of its project are inapplicable because State law preempts local zoning.

The Howard County case involved the construction of **transmission lines** by a regulated utility through a certain area of the County. Those lines by their very nature were required to be located where proposed. The electricity flowing through those lines was for the benefit of Maryland consumers. The **zoning ordinance upon which Howard County sought to restrict those lines** was found to be in conflict with the public's needs. The Court of Appeals ruled under those facts that state law preempted the local zoning.

Kent County's position (Case No. 9411): Mills Branch Solar, LLC is a development and construction company. It is not an electric company or a public service company as those terms are defined. The project that it proposes is a utility scale solar project that could be constructed anywhere that access to the electric grid is available. The electricity which would be produced will be sold on the open market. The *Land Use Ordinance*, in this case, provides for uses such as the applicant proposes in other zoning districts.

The applicant's reliance on case law for its position that it is exempt from local zoning is misplaced. The doctrine of preemption is intended to be used as a shield against the overregulation of public utilities, not as a weapon against reasonable locally adopted restrictions.



Preempted?

The Office of the People’s Counsel (Case No. 9411): “It may be time to consider whether to rely less upon the old precedent which elevated the public interest in adequate regulated utility supply over the concerns of local jurisdiction in almost every case. Reflexively granting a CPCN for a merchant generation project over local objections makes much less sense when the Applicant shows no direct nexus on the record that the project provides real measurable benefits to Maryland utility customers.”



Burden of Proof and Due Consideration

If the **Public Service Commission** determines that the doctrine of preemption precludes Kent County from enforcing the terms of its Land Use Ordinance, it is submitted that the evidence shows that Mills Branch Solar, LLC has failed to meet its burden of proof that would permit the issuance of a Certificate of Public Convenience and Necessity. In assessing the evidence, the Public Service Commission is required to give “due consideration to the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station or overhead transmission line is proposed to be located.” Public Utility Article 7-207(e).

The County’s Position: Mills Branch Solar, LLC has failed to meet its burden of proof to establish that its project, at the location proposed, is in the public interest. From the outset, the applicant was aware that the site it had chosen was not permitted by zoning. The applicant elected to proceed without investigating the feasibility of any other locations.

In effect, once the County made its position known that the proposed site was not acceptable, but other properly-zoned properties could be considered, the burden of exploring alternative sites became incumbent upon the applicant. The applicant cannot now contend that “an alternate site presently advocated by Project opponents is far less suitable in every way.” The record is not clear as to what alternative site is being referenced, as approximately 3,000 acres of County land is zoned for this use.



Preempted?

Mills Branch Solar, LLC (Case No. 9411)

21 June 2016 – Public hearing (Chestertown Library)*

22-23 June 2016 – Evidentiary hearings (County Commissioners Hearing Room)*

29 August 2016 – Supplemental Hearing/Heritage Area Review (Baltimore)

9 September 2016 – Briefs Due

15 September 2016 – Rebuttal Briefs Due

60 days? – PULJ Ruling

It is not necessarily PSC procedure to hold local evidentiary hearings; it is advised to request that the PULJ consider holding **all hearings in the community.*



USEFUL RESOURCES:

Kent County Renewable Energy Task Force:
<http://www.kentcounty.com/committees/retf>

Maryland Public Service Commission Case/Docket Portal:
<http://www.psc.state.md.us/>

QUESTIONS?

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