



MEMORANDUM

To: Development Review and Regulations Committee

From: M. Tyler Klein, AICP, Senior Planner *MTK*

Subject: June 27, 2019 Meeting and Agenda

Date: June 21, 2019

The Frederick County Development Review and Regulations Committee (DRRC) will be meeting on Thursday June 27, 2019 at 7:00 p.m. in the **first-floor conference room (purple room)** of the County Administration Building, 107 North Kent Street, Winchester, Virginia. The DRRC will discuss the following agenda items:

AGENDA

- 1) **Election of DRRC Chairman and Vice-Chairman.** As stipulated in the DRRC Operating Procedures, a Chairman and Vice-Chairman will be elected during the first meeting of each year.
- 2) **Update Previous Zoning Ordinance Text Amendments.**
- 3) **Public Utilities.** Discussion of a request by County staff to include a definition for “Public Utilities” that includes utility-scale solar energy generating facilities and solar power generating facility decommissioning requirements in the Fredrick County Zoning Ordinance *Supplemental Use Regulations* as required under the Code of Virginia.
- 4) **Other.**

Please contact this office if you will not be able to attend the meeting. Thank you.

Access to this building is limited during the evening hours. Therefore, it will be necessary to enter the building through the rear door of the four-story wing. I would encourage committee members and interested citizens to park in the County parking lot located behind the new addition or in the joint Judicial Center parking lot and follow the sidewalk to the back door of the four-story wing.

MTK/dw
Attachment

Item #2: Update on Previous Zoning Ordinance Text Amendments

Since the last regular meeting of the DRRC the following items were not moved forward for a public hearing (action) by the Board of Supervisors:

- Solar Farms as a Conditional Use in the RA (Rural Areas) Zoning District;
- Self-Storage Facilities as a Conditional Use in the RA Zoning District; and
- Shipping Containers as Accessory Structures/Uses in all Zoning Districts.

Staff will provide a brief summary on each item and Board of Supervisors meeting discussion.

No action is requested by the DRRC.

Item #3: Public Utilities

Based on recent amendments to the Code of Virginia, Staff proposes amendments to Chapter 165 – Zoning Ordinance to include:

1. A definition for “Public Utilities” that includes utility-scale solar power energy generating facilities; and
2. Additional regulations for specific uses that requires utility-scale solar power generating energy facilities to make arrangements, including financial security, for decommissioning.

The General Assembly amended the Code of Virginia (§15.2-22.41.2) to include decommissioning of solar energy facilities in March 2019. As background, the County Attorney and Staff made a determination that was shared with the Board of Supervisors in July 2018, stating that utility-scale solar power generating energy facilities would qualify as a “public utility” type-facility and would otherwise be allowed by-right in the County’s RA Zoning District (and other zoning districts where public utilities are permitted by-right).

The proposed amendment remains consistent with the above determination and clarifies that utility-scale solar power generating facilities are defined as a “public utility” in the Zoning Ordinance and fulfills the Code of Virginia requirements for decommissioning of such facilities.

Staff is looking for direction from the DRRC on the appropriateness of this request for a text amendment to the Zoning Ordinance. Depending on the outcome of this discussion, Staff may forward this item to the Planning Commission for further discussion.

**Attachment: Proposed Changes to Frederick County Zoning Ordinance Articles I & II
Code of Virginia §15.2-2241.2
Memo to the Board of Supervisors, July 26, 2018**

**ARTICLE I
GENERAL PROVISIONS; AMENDMENTS; AND CONDITIONAL USE PERMITS**

Part 101 – General Provisions

§ 165-101.02 Definitions and word usage.

Public Utilities

Power (energy) generating, booster or relay stations, transformer substations, transmission lines and towers, pipes, meters and other facilities (including utility-scale solar power energy generating facilities), railroad facilities and sewer and water facilities and lines owned by public utilities, railroad companies, public agencies, or those operators with a “Certificate of Public Convenience.”

**ARTICLE II
SUPPLEMENTARY USE REGULATIONS, PARKING, BUFFERS, AND REGULATIONS FOR SPECIFIC USES**

Part 204 – Additional Regulations for Specific Uses

§ 165-204.26. Public Utilities

1. Public utilities. Lot requirements for lots used by political subdivisions, municipal corporations, the Virginia Department of Transportation, the Frederick-Winchester Service Authority, or the Frederick County Sanitation Authority for public utility purposes shall be as follows:

- A. In all zoning districts, the Zoning Administrator shall have the authority to determine the minimum lot size necessary for such public utilities and the appropriate setbacks for such lots used for public utility purposes.
- B. Such lots shall be exempt from the individual on-site sewage disposal system requirements.
- C. Such lots may be accessed by private access easements; any such easement shall be a minimum of 15 feet in width.

2. Public Utilities - Utility-Scale Solar Power Energy Generating Facilities. Any owner, lessee, or developer of real property for the purposes of solar power energy generation shall enter into a written agreement, prior to site plan approval, with Frederick County to decommission solar energy equipment, facilities, or devices pursuant to §15.2-2241.2 of the Code of Virginia (2019, as amended).

CHAPTER 743

An Act to amend the Code of Virginia by adding a section numbered **15.2-2241.2**, relating to rezoning and site plan approval; decommissioning solar energy equipment, facilities, or devices.

[H 2621]

Approved March 21, 2019

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered **15.2-2241.2** as follows:

§15.2-2241.2. *Bonding provisions for decommissioning of solar energy equipment, facilities, or devices.*

A. *As used in this section, unless the context requires a different meaning:*

"Decommission" means the removal and proper disposal of solar energy equipment, facilities, or devices on real property that has been determined by the locality to be subject to §15.2-2232 and therefore subject to this section. "Decommission" includes the reasonable restoration of the real property upon which such solar equipment, facilities, or devices are located, including (i) soil stabilization and (ii) revegetation of the ground cover of the real property disturbed by the installation of such equipment, facilities, or devices.

"Solar energy equipment, facilities, or devices" means any personal property designed and used primarily for the purpose of collecting, generating, or transferring electric energy from sunlight.

B. *As part of the local legislative approval process or as a condition of approval of a site plan, **any locality shall require** an owner, lessee, or developer of real property subject to this section to enter into a written agreement to decommission solar energy equipment, facilities, or devices upon the following terms and conditions: (i) if the party that enters into such written agreement with the locality defaults in the obligation to decommission such equipment, facilities, or devices in the timeframe set out in such agreement, the locality has the right to enter the real property of the record title owner of such property without further consent of such owner and to engage in decommissioning and (ii) such owner, lessee, or developer provides financial assurance of such performance to the locality in the form of certified funds, cash escrow, bond, letter of credit, or parent guarantee, based upon an estimate of a professional engineer licensed in the Commonwealth, who is engaged by the applicant, with experience in preparing decommissioning estimates and approved by the locality; such estimate shall not exceed the total of the projected cost of decommissioning, which may include the net salvage value of such equipment, facilities, or devices, plus a reasonable allowance for estimated administrative costs related to a default of the owner, lessee, or developer, and an annual inflation factor.*

CHAPTER 744

An Act to amend the Code of Virginia by adding a section numbered **15.2-2241.2**, relating to rezoning and site plan approval; decommissioning solar energy equipment, facilities, or devices.

[S 1091]

Approved March 21, 2019

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered **15.2-2241.2** as follows:

§15.2-2241.2. *Bonding provisions for decommissioning of solar energy equipment, facilities, or devices.*

A. *As used in this section, unless the context requires a different meaning:*

"Decommission" means the removal and proper disposal of solar energy equipment, facilities, or devices on real property that has been determined by the locality to be subject to §15.2-2232 and therefore subject to this section. "Decommission" includes the reasonable restoration of the real property upon which such solar equipment, facilities, or devices are located, including (i) soil stabilization and (ii) revegetation of the ground cover of the real property disturbed by the installation of such equipment, facilities, or devices.

"Solar energy equipment, facilities, or devices" means any personal property designed and used primarily for the purpose of collecting, generating, or transferring electric energy from sunlight.

B. *As part of the local legislative approval process or as a condition of approval of a site plan, a locality shall require an owner, lessee, or developer of real property subject to this section to enter into a written agreement to decommission solar energy equipment, facilities, or devices upon the following terms and conditions: (i) if the party that enters into such written agreement with the locality defaults in the obligation to decommission such equipment, facilities, or devices in the timeframe set out in such agreement, the locality has the right to enter the real property of the record title owner of such property without further consent of such owner and to engage in decommissioning, and (ii) such owner, lessee, or developer provides financial assurance of such performance to the locality in the form of certified funds, cash escrow, bond, letter of credit, or parent guarantee, based upon an estimate of a professional engineer licensed in the Commonwealth, who is engaged by the applicant, with experience in preparing decommissioning estimates and approved by the locality; such estimate shall not exceed the total of the projected cost of decommissioning, which may include the net salvage value of such equipment, facilities, or devices, plus a reasonable allowance for estimated administrative costs related to a default of the owner, lessee, or developer, and an annual inflation factor.*



MEMORANDUM

TO: Frederick County Board of Supervisors

CC: Kris C. Tierney, County Administrator
Roderick B. Williams, County Attorney
Mike T. Ruddy, AICP, Director of Planning & Development
Mark R. Cheran, Zoning Administrator

FROM: M. Tyler Klein, AICP, Senior Planner 

SUBJECT: Solar (Photovoltaic) Energy Facilities Text Amendment – Update

DATE: July 26, 2018

This is an update to the proposed text amendment to Chapter 165 – Zoning Ordinance to add solar (photovoltaic) power generating facilities (i.e. solar farms) to the permitted use list for the RA (Rural Areas) Zoning District. This item was previously discussed by the Board of Supervisors on January 10th, February 14th and April 11th. Following our last discussion, the Board of Supervisors had directed staff to make the proposed use a “conditional use” and provide additional supplemental use regulations to address abandonment on the facility and return of the land to its pre-development state. At the time of presentation to the Board, the premise of the draft text amendment, as supported by the Development Review and Regulations Committee (DRRC), and previously discussed by the Planning Commission, was that because solar farms are typically “privately-owned, they would not qualify as a “public utility” generating facilities.

Since Board discussion in April, the County Attorney and Planning and Development staff have met and determined that solar (photovoltaic) energy facilities would *appear* to qualify as a “public utility generating” facilities and would otherwise today be allowed by right in the County’s RA Zoning District. The Zoning Ordinance currently permits as a by right use in the RA Zoning District, “Public utility generating, booster, or relay stations, transformer substations, transmission lines, and towers, pipes, meters, and other facilities, railroad facilities, and sewer and water facilities and lines owner by public utilities, railroad companies or public agencies” (§165-401.02(Q)). The term “public utility” does not address the public or private nature of the ownership of the facility; most electricity generating facilities in the United States are owned by “private” entities as opposed to government, i.e. “public” entities.

Further, the Frederick County Zoning Ordinance does not define the term “public utility” and definitions not included in the definitions section of the Zoning Ordinance “shall have the meaning ascribed to such word, term or phrase in the most recent addition of Merriam-Webster’s Dictionary unless, in the opinion of the Zoning Administrator, established customs or practices in Frederick

County, Virginia justify a different or additional meaning” (§165-101.02). Webster’s defines “public utility” simply as “a business organization (such as an electric company) performing a public service and subject to special governmental regulation.” This definition does not limit the concept of a “public utility” to entities that sell electricity directly to the public or to entities that are publicly traded and therefore does not exclude from its reach solar farms owned by non-publicly traded entities. Within Code of Virginia §56-1, nothing in the definition of public service companies suggests a distinction between the types of companies that operate solar farms and the types of companies that operate other types of electricity generation facilities. State law specifically regulates solar facilities as it does other electricity generating facilities, regardless of the nature of ownership, by requiring the operator to seek a certificate of public convenience and necessity from the State Corporation Commission (SCC) (§ 56-265.2). The County would recognize a solar energy facility as a public utility under this interpretation.

This determination of solar electric generating facilities qualifying as a “public utility” would not preclude the Board of Supervisors in the future from further regulating solar (photovoltaic) energy facilities as allowed under the Code of Virginia or excluding them all from the current allowance in §165-401.02(Q). Staff notes that possible supplementary regulations as previously discussed, such as a requirement for removal of the facilities upon abandonment of use would place them in a category currently unique to telecommunications towers. As well, any requirement for a bond securing the removal of an abandoned facility might be sufficient economic disincentive as to preclude any use of the opportunity that would be enabled by the ordinance generally.

Please contact the County Attorney’s office or Planning and Development staff directly with any questions or comments. Unless otherwise directed by the Board of Supervisors, staff will proceed with the above interpretation to allow solar energy facilities (i.e. solar farms), by right, under the present allowance for public utilities in the RA Zoning District.

MTK/pd