

MINUTES

PRESENT:

J. Burke
R. Dodds
D. Haywood
J. Mathieu
S. McNicol
E. Niemann
J. Strasser
D. Banisch, Planner
D. Pierce, Attorney

ABSENT:

T. Kratzer
L. Senus
M. Syrnick, Alt #1

CALL TO ORDER

The meeting was called to order at 7: 32 PM by R. Dodds.

NOTIFICATION

In order to ensure full public participation at this meeting, all members of this Board, and members of the public are requested to speak only when recognized by the Chair so that there is no simultaneous discussion or over-talk, and further, all persons are requested to utilize the microphones which are provided for your use by the Township. Your cooperation is appreciated.

Notification of the time, date and place of this meeting has been published in the Hunterdon County Democrat and Express Times, and has been posted in the Kingwood Township Municipal Building at least 48 hours prior to this meeting and has been filed with the Municipal Clerk.

NEW AND PENDING MATTERS

Horseshoe Bend LLC – Block 14, Lot 30 – Horseshoe Bend Road – Request for Extension of Time to File

D. Pierce stated this is the minor subdivision that allowed the seller to retain a nine acre lot. The County terminated its purchase of this property. The Township is still trying to discuss different options with the seller and is requesting a 120 day extension of time to file.

It was moved by J. Mathieu, seconded by D. Haywood and carried to grant a 120 day extension of time to file for Block 14, Lot 30. All members present voted **AYE** on **ROLL CALL VOTE**.

Township of Kingwood – Block 7, Lot 2 – Oak Summit Road – Agricultural Subdivision

E. Niemann stated the property is the Gergar farm on Oak Summit Road. The Township inherited the farm from H. Gergar. She passed away in April of 2008. The Township finally took ownership of the property during the summer of last year. The Township is considering the possibility of auctioning the property. H. Gergar’s will required that the farm be preserved in perpetuity. The Leon family farms the property. The Township would like to subdivide the triangle around the buildings. The tree line includes a little orchard. The Township reviewed the situation with the prospective auction company. The Township realized that the farming activity without end would not be an asset to the property. The prospective purchasers buying the house would not have any ability to use the property in their foreseeable future. They would be responsible for the payment of the taxes on the property. If the Leon family decided the farm needed a building, it would increase the tax bill to the owner who did not have access to the farmed portion of the property. The Township felt, to maximize the value, it would be a good decision to subdivide the property. The Township is seeking an agricultural subdivision of the house and improvements. The farming piece would remain a separate piece and be farmed as per the will’s requirement. The Township is considering holding the auction for the house in September. The balance, after removing the house, will be 35 acres on one side and 60 on the other.

D. Pierce indicated the action the Board needs to take is that it finds the application to be an agricultural subdivision and that it qualifies as an agricultural subdivision. The qualifications are that no new roads have been created, all parcels are least five acres or larger and it is for agricultural purposes.

It was moved by J. Mathieu, seconded by D. Haywood and carried to determine the above application qualifies as an agricultural subdivision. All members present voted **AYE** on **ROLL CALL VOTE**.

Milford Meadow Farm – Block 9, Lot 25 – Slacktown Road

D. Pierce stated W. Milford proposes to erect a 5800 sq ft structure on his farm for farm purposes. He has made application to the County Agricultural Board for that approval. He has been given the impression that the Township does not issue building permits for this type of structure. The County Agricultural Board indicated, based on the decision of Township of Franklin v. David den Hollander, Garden State Growers and Quaker

Valley Farms, that the applicant is exempt from municipal requirements of drawings and escrow fees. The Township received a letter from the County Agricultural Board indicating their decision. W. Milford was called and requested if he would be able to attend tonight's meeting. He was able to attend. D. Pierce stated he disagrees with the County Agricultural Board that the application falls under the above decision. The decision does not pre-empt zoning and set back requirements. The Township does grant building permits for these types of structures. The ordinance exempts, from site plan review, structures that are less than 5,000 sq ft. W. Milford is here this evening to explain what he is proposing and see if the Board can get the application to a position to have some sort of approval. W. Milford should indicate the size of the lot and the purpose of the structure. At the end of the discussion, the Board can adopt a resolution that the Board has no issue or disagreement with the structure. If the Board did not make a decision within 30 days, the County Agricultural Board could hold its own hearing and make their decision and give W. Milford his approval. With the last application the Board reviewed it and actually appeared at the County Agricultural Board and made a statement. At that time, the Board did not have any objection to the proposed project.

W. Milford and S. Milford were present. W. Milford stated the property has been in the family and farming since 1928. The structure will contain a manure storage facility. It will keep the livestock off the ground from November to April. They received a grant from the USDA to construct the structure. The USDA designed the structure. Currently the property has a pig structure, equipment storage and a workshop. There are a total of 28 acres on this parcel but he has access to 100 acres in total. The entire farm is used for animals. He grows grain, corn and oats on an additional 300 acres elsewhere. He has a few hundred acres in upstate New York where he brings the livestock in the summer. S. Milford stated they raise cows, calves and steers. They sell their meat at the Dvoor farm on Thursdays and Sundays. W. Milford stated all of the houses on the left are family. The entire 100 acres is fenced. There is a pond in the back. The USDA sited the structure. They received notice of the grant in May of 2010. The grant funding could disappear if they do not complete the structure by December 31st. S. Milford stated the structure will be stick-built. There will be 4' high concrete wall in the manure storage area and a 1' high curb for the heavy use area. W. Milford stated it will be a pavilion type roof with no sides. The livestock will be locked in that area on a concrete slab. The distance between one of the accessory buildings is 50' and the other is 46'. They could swing the proposed structure a little bit. It has been designed for the wind. He could not get on the agenda for the July County Agricultural Board meeting. S. Milford stated the structure is at least 150' from the property lines.

D. Pierce stated the resolution would indicate the Board has no objection to this application based on the facts but that it disagrees with the County Agricultural Board's decision and procedures. The Board can address the variance for the distance between the buildings. The Board cannot grant a variance or approval of a site plan. It seems that the USDA has designed and sited the building under the best management practices. The distances between this building and the other building would be pre-empted.

W. Milford stated he is paying out of his pocket to do the specs and stated it would be cheaper for him to apply to the Township for a building permit.

D. Pierce stated a letter to the County Agricultural Board should be written expressing the Township has no objection to the proposal. The County Agricultural Board may be able to expedite the issuance of his approval since the Township is not making an objection.

It was moved by J. Burke, seconded by D. Haywood and carried to memorialize that the Board has no objection to the proposed structure, the structure complies with the side yard setback requirements but does not comply with the required distance between the buildings, an issue related to the Agricultural Best Management Practices, which makes it pre-empted and the objection of the Board and Township to the County Agricultural Board's practices in these matters. All members present voted **AYE** on **ROLL CALL VOTE**.

Draft Ordinance for Residential Storage Containers – Amendment to Zoning Ordinance

R. Dodds stated the draft ordinance defines portable storage containers. It also discusses that a single one is allowed on a property and describes the fees for each one of those pieces. It permits possible extensions that would be granted by the construction official. The draft ordinance also provides a section for agricultural properties which has not been previously reviewed by the Board. The agricultural portion allows agricultural properties to have a single storage container as long as they meet the restrictions set forth in the draft ordinance.

After some discussion on notifying the residents of the requirements of a permit for the containers, E. Niemann responded the newsletter in August could publicize this ordinance stating the containers were prohibited in the past and a permit is required for their use.

D. Pierce suggested there be no grandfathering on the presence of a container.

It was moved by J. Mathieu, seconded by S. McNicol and carried to recommend introduction and adoption of the draft ordinance with the removal of the stacking reference. All members present voted **AYE** on **ROLL CALL VOTE**.

Solar Farms

R. Dodds provided, on the overhead, some samples of solar arrays. It is typically there is something pounded in the ground with a frame structure and panels. It can be different shapes, sizes and heights. The samples he provided were of fixed arrays.

D. Banisch provided the following memorandum to the Board for their review:

The purpose of this memorandum is to provide the Board with an outline of a draft ordinance for the regulation of solar and photovoltaic energy facilities and structures.

For zoning purposes, it may be helpful to consider these facilities and structures in two classes: (1) principal use and (2) accessory use. The principal use is the installation that generates electricity for sale to the public utility grid. The accessory use is the situation where electricity is generated for the principal use, which may or may not generate enough electricity to sell power to the grid, and which may or may not be physically attached to the principal structure.

For the purposes of the draft ordinance provisions provided in this memorandum, we have borrowed from two ordinances that we were able to locate for solar facilities, including one ordinance from Kittitas County, WA, and a proposed ordinance from Whitemarsh Township, Montgomery County, PA. These ordinances are provided as separate documents to this memorandum.

Background

In November of 2009, the Legislature adopted and the Governor signed P.L. 2009, c 146, into law, which included certain definitions as amendments to the Municipal Land Use Law (P.L.1975, c.291.) that relate to the regulation of solar facilities and structures. These include the following two definitions:

"Inherently beneficial use" means a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare. Such a use includes, but is not limited to, a hospital, school, child care center, group home, or a wind, solar or photovoltaic energy facility or structure.

"Wind, solar or photovoltaic energy facility or structure" means a facility or structure for the purpose of supplying electrical energy produced from wind, solar, or photovoltaic technologies, whether such facility or structure is a principal use, a part of the principal use, or an accessory use or structure.

Definitions:

For the purpose of regulating these uses, we recommend that the ordinance identify two classes of 'solar or photovoltaic energy facilities or structures' – a 'minor' class for the accessory use variety and a 'major' class for the principal use variety. Definitions will be needed in the ordinance for both classes of installations. We've modified definitions that the Board may have reviewed in the Kittitas County, WA ordinance that was previously provided to the Board.

Minor solar or photovoltaic energy facility or structure. "Minor solar or photovoltaic energy facility or structure " or "minor solar or photovoltaic energy system" means a fuel cell, solar or photovoltaic panel or system of panels for the production of electrical energy that:

- (1) (a) Uses solar energy as its fuel;
 - (b) Is located on the power beneficiary's premises;
 - (c) Is designed and intended primarily to offset part or all of the beneficiary's requirements for electricity consumption on site; and
 - (d) is secondary to the beneficiary's use of the premises for other lawful purpose(s); or,
- (2) Is intended to mitigate electrical system improvement requirements.

Major solar or photovoltaic energy facility or structure. "Major solar or photovoltaic energy facility or structure" means a solar farm that is not a minor solar or photovoltaic energy facility or structure.

Solar Farm. "Solar farm" or solar farms" means a facility or area of land principally used to convert solar radiation to electricity through the use of solar or photovoltaic energy facilities or structures. The term does not include minor solar or photovoltaic energy facility or structure.

Whitemarsh Township, Montgomery County, PA proposed an ordinance in 2009 that included the following two definitions:

Solar Energy System - any solar collector or other solar energy device, or any structural design feature whose primary purpose is to provide for the collection, storage and distribution of solar energy for space heating or cooling, for water heating or for electricity that may be mounted on a building or on the ground and is not the primary use of the property.

Solar Panels – a structure containing one or more receptive cells, the purpose of which is to convert solar energy into usable electrical energy by way of a solar energy system.

These definitions can be modified for the Township's ordinance if the Board prefers these to the definitions provided above.

Minor Solar Facilities or Structures

For solar facilities or structures that are accessory to a principal use such as a residence, farm or business, we recommend that these be permitted accessory uses in all zones. The ordinance should require that the installation (1) be accessory and subordinate to the principal use; and (2) conform to the bulk regulations for accessory uses. For example, in the AR 2 Zone, the bulk requirements are as follows:

Min. front yard:

100'

Min. side yard:	30'
Min rear yard:	30'
Min. distance between buildings:	20'
Max. building coverage (%):	2
Max. building height:	35' / 2-1/2 stories

The ordinance could state that roof-top mounted equipment and panels conform to the maximum building height for the zone to avoid confusion regarding permitted building height.

Major solar or photovoltaic energy facility or structure

In use variance applications involving a use that is not permitted in zoning ("d" variances) there are essentially two tests or demonstrations required of the applicant for the granting of the variance, which are referred to as the so-called positive and negative criteria. The first test, the positive criteria, is a demonstration that the non-permitted use promotes the general welfare of the citizens of the State as indicated in the purposes of zoning (N.J.S.A. 40:55D-2). The two new M.L.U.L. definitions identified above are important changes in the law because they raise solar and photovoltaic energy installations to the special class of uses - inherently beneficial uses. As such, a use variance application involving an inherently beneficial use automatically satisfies the so-called positive criteria as a matter of law (*Smart SMR of New York, Inc. v. Fair Lawn, Bd. of Adj.*).

The second test, the negative criteria, is stated in the last unnumbered paragraph of N.J.S.A. 40:55D-70d, which reads: "No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." The applicant for a use variance must address this in order the Board to grant use variance approval.

There are six types of 'd' variances enumerated at N.J.S.A. 40:55D-70d:

- (1) a use or principal structure in a district restricted against such use or principal structure,
- (2) an expansion of a nonconforming use,
- (3) deviation from a specification or standard pertaining solely to a conditional use,
- (4) an increase in the permitted floor area ratio,
- (5) an increase in the permitted density,
- (6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure.

These variances may only be heard by the Zoning Board of Adjustment and an affirmative vote by at least five members is required for the grant of a 'd' variance.

For the solar farm or 'major solar or photovoltaic energy facility or structure' that is a principal use, we recommend designating these uses as conditional uses. The ordinance should (1) require site plan approval; and (2) identify conditions under which the use is permitted. If an application fails to conform to one or more of the ordinance conditions, the applicant will be required to seek Zoning Board of Adjustment approval of the use.

Conditionally permitting the 'Major solar or photovoltaic energy facility or structure' or solar farm use will permit the Township to identify conditions under which these facilities may be permitted. The 'conditional use' approach is recommended because of the test required for an applicant to be granted approval for an inherently beneficial use when one or more of the conditions is not met.

Positive criteria - Since NJ Law has defined wind, solar and photovoltaic energy facilities and structures as inherently beneficial uses, the positive criteria standard will be effectively met.

Negative criteria - An applicant for an inherently beneficial use must show the application meets the negative criteria by establishing that the requested relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. In determining whether an inherently beneficial use satisfies the negative criteria, the New Jersey Supreme Court in *Sica v. Board of Adjustment of Tp. of Wall*, adopted a four part balancing test.

The Board's task on such an application is to:

- (1) identify the public interest or benefit at stake;
- (2) identify the detrimental effect;
- (3) ameliorate or mitigate any detrimental effect by imposing reasonable conditions; and
- (4) weigh the benefits against the ameliorated negative effects to determine, on balance, whether the variance would cause a "substantial" detriment to the public good.

Denial of a variance may then be justified only if the inherently beneficial use would create a substantial detriment. This test adds a dimension of analysis that will relate to the conditions identified in the ordinance, which if not met, could result in a substantial detriment to the public good.

Suggested conditions for the major solar or photovoltaic energy facility or structure (solar farm) use are listed in the numbered references below. Please note that we have included editorial comments within the numbered conditions for the Boards consideration and discussion.

Solar Farms – Solar or Photovoltaic Energy Facilities and Structures

Major solar or photovoltaic energy facilities or structures (solar farm) shall be conditional permitted uses in the following zones: AR-2, Agricultural and Single-family Residential District; HC, Highway Commercial District; BP, Business Park District, PO/R Professional Office Residential District.

1. Solar farms, including all major solar or photovoltaic energy facilities and structures, must conform to the bulk requirements for a principal use in the zone in which such facilities and structures are to be located
2. No solar farm or major solar or photovoltaic energy facilities and structures shall occupy areas of land containing Prime Soils and Statewide Significant Soils.

(the rationale for this condition is that the economically beneficial aspects of productive agricultural soils will be lost to a use that may preclude future use of the land for agricultural purposes; and that the loss of these classes of soils is contrary to some of the purposes of zoning which state that:

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

j. To promote the conservation of historic sites and districts, open space, *energy resources* and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;

n. *To promote utilization of renewable energy resources;*

References to energy resources and promotion of renewable energy resources are included in these purposes of the Municipal Land Use Law. We do not believe that these references in the law outweigh a restriction against utilization of valuable agricultural soils and lands (valuable natural resource) for solar farm and energy facilities and structures.) Discussion recommended

3. Solar farm or major solar or photovoltaic energy facilities and structures shall not occupy areas of land designated by the NJDEP as critical habitat for State threatened and/or endangered species of flora and fauna or any areas of species of special concern.
4. Solar farm and associated solar or photovoltaic energy facilities and structures shall not occupy an area of the property upon which they are to be erected that is greater than the total combined maximum coverage limits for principal and accessory uses for the zone in which the facilities and structures are located.

(A possible rationale for this condition is that limiting areas of land devoted to these uses in a manner consistent with other permitted uses in the zone treats all uses similarly, which seems to be consistent with the uniformity clause found in the Municipal Land Use Law at the second paragraph of Section 62, which states that:

“The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts.”

In addition if installations are limited to areas that are permitted to be occupied by structures and uses in accordance with ordinance standards, required open space standards will be maintained. This is recognized as a purpose in the Municipal Land Use Law:

c. To provide adequate light, air and open space;)

Discussion recommended.

5. Solar and photovoltaic energy facilities and structures shall not be visible from the public traveled way (public roads, trails, waterways, scenic highways and bi-ways), publicly owned properties, open space, preserved farmland and historic resources, including sites and buildings listed or eligible for listing on the State and National Registers of Historic Places.
 - a. Installations shall be sited behind existing vegetation, which shall be supplemented with landscaping to shield the installation from public view.
 - b. To the extent achievable, solar and photovoltaic energy facilities and structures shall be sited using the natural topography to screen the energy project from public view and the view of any adjoining residences.

6. In all zoning districts, solar and photovoltaic energy facilities and structures shall not be visible from adjoining residential uses or zones, and shall be screened by a combination of berms and landscaping, and where found to be necessary in the judgment of the Board, fencing of a type and material suitable and compatible with the character of the zoning district in which the installation is located. Maintenance of required berms landscaping, and where necessary fencing, shall be a continuing condition of any approval that may be granted.
7. As required herein, a landscaped berm shall be provided not less than 25' in width and of sufficient height to totally obscure any view of all solar and photovoltaic energy facilities and structures at the time such facilities and structures are placed in service. Landscaping shall include a mix of coniferous and deciduous trees and shrubs that are indigenous to the area, which shall be depicted on a plan prepared by a licensed landscape architect. At the time of planting, deciduous trees shall be not less than 2" to 2-1/2" caliper and coniferous trees shall be a minimum of 8' to 10' in height.
8. Where it can be demonstrated to the satisfaction of the reviewing Board that the use of natural topography and siting behind existing vegetated areas will sufficiently screen solar and photovoltaic energy facilities and structures from view as required herein, berm and landscaping may be reduced at the Board's discretion if it is determined that such measures are not needed for screening purposes.
9. The design of solar energy systems shall, to the extent reasonably possible, use materials, colors, textures, screening and landscaping that will blend the facility into the natural setting and existing environment.
10. Areas not occupied by solar and photovoltaic energy facilities and structures, berms and landscaping shall be planted and maintained as lawn or other suitable ground cover as may be approved by the Board. Regular maintenance of these areas shall be provided as a continuing condition of site plan approval.
11. Solar energy systems shall not be used for displaying any advertising except for reasonable identification of the manufacturer or operator of the system. In no case shall any identification be visible from the property line.
12. Permitted height – the maximum permitted height for solar and photovoltaic energy facilities and equipment shall be the maximum permitted height for the zone in which the facilities and structures are located.
13. Prior to the issuance of site plan approval, the applicant shall provide documentation and evidence of a firm commitment from the electric utility that the alternative electrical energy to be generated by the solar and photovoltaic energy facilities and structures shall be purchased by the utility provider on a long-term basis that is coincident with the useful life of facilities and structures to be constructed.
14. Abandonment and Removal of solar energy systems.
 - (a) Solar and photovoltaic energy facilities and structures (roof or ground) which have not been in active and continuous service for a period of one (1) year shall be removed from the property to a place of safe and legal disposal.
 - (b) If the applicant ceases operation of the energy project or begins, but does not complete, construction of the project, the applicant shall restore the site according to a plan approved by the Board. The applicant shall submit a plan that ensures that the site will be restored to a useful, non-hazardous condition without significant delay, including but not limited to the following:
 - (i) Removal of aboveground and underground equipment, structures and foundations to a depth of at least three feet below grade. Underground equipment, structures and foundations need not be removed if they are at least three feet below grade and do not constitute a hazard or interfere with agricultural use or other resource uses of the land.
 - (ii) Restoration of the surface grade and soil after removal of aboveground structures and equipment.
 - (iii) Removal of graveled areas and access roads.
 - (iv) Restoration of surface grade and soil.
 - (v) Revegetation of restored soil areas with native seed mixes, plant species suitable to the area, which shall not include any invasive species.
 - (vi) For any part of the energy project on leased property, the plan may incorporate agreements with the landowner regarding leaving access roads, fences, gates or buildings in place or regarding restoration of agricultural crops or forest resource land.
 - (vii) The plan must provide for the protection of public health and safety and for protection of the environment and natural resources during site restoration.
 - (viii) The plan must include a schedule for completion of site restoration work.
 - (c) Before beginning construction of the energy project, the applicant must submit a bond or letter of credit in a form and amount satisfactory to the Township Attorney, assuring the availability of adequate funds to restore the site to a useful, non-hazardous condition, if the operator fails or is otherwise unable to restore the site as required by the permit.
 - (d) The amount of the bond or letter of credit shall be adjusted for inflation using the U.S. Gross Domestic Product Implicit Price Deflator. The applicant shall increase the amount of the bond or letter of credit annually by the percentage indicated to adjust for inflation.
 - (e) The certificate holder shall describe the status of the bond or letter of credit in an annual report submitted to the county/city.
 - (f) The bond or letter of credit shall not be subject to revocation or reduction before retirement of the energy project site.

D. Pierce inquired, under the definition of a minor solar facility or structure, should there be some sort of standard or limitation on what percentage they would be able to generate. He suggested in the design for approval the applicant would need to show the Board what their needs are and the generating capacity of the system and possibly provide for a 5-10% excess energy generation. D. Banisch suggested, under permitted accessory use, that documentation the facility is only designed to accommodate the typical annual usage with an allowable increase of 5-10% cap be added. D. Haywood stated if her consumption increases, she can increase her system.

R. Dodds suggested under Solar Farms – Solar or Photovoltaic Energy Facilities and Structures all zones be included.

J. Mathieu stated there are companies currently looking to lease roof tops. D. Haywood stated Public Service is leasing roof tops.

D. Pierce stated the Board should permit solar farms in designated areas. Just because it is inherently beneficial, it should not be allowed everywhere. D. Pierce stated he does not think a court would be able to say by favoring prime soils over the solar farm is being unreasonable or capricious.

D. Banisch stated that solar farms would be required to comply with the current development standards and a reasonable expectation of what is allowed on that lot. D. Pierce stated this is new and is not certain what the courts would say in that regard. It would be reasonable to say that there is a limit of how much of the surface area of a lot can be developed due to the need for appropriate space and buffers. Considering solar farms as impervious coverage would affect stormwater management. The Legislature is saying do not worry about stormwater management because you have a lot of pervious ground to absorb the runoff. It is different from the concept of providing the appropriate space for buffers and setbacks. After reviewing D. Banisch's memo, D. Pierce stated the Township does not allow very much in the AR-2 zone on maximum aggregate coverage.

D. Banisch stated if the Township adopts an ordinance, it can be tailored to those zoning districts where more intense development is allowed. It would not be an outright prohibition but identify a standard of impervious coverage in the surface development standard in the conditional use section and identify with the numbers so it is not called impervious coverage.

D. Pierce stated he has difficulty with that approach. It is arguing over the definition of surface development. Solar arrays are larger than the super structure that is put in the soil. How do you measure the extent of coverage? Depending on the angle they are tilted, they may have a different surface. D. Banisch responded you can calculate the surface area of each individual array within the outbounds of the development area and measure it against the permitted coverage.

In response to an inquiry by a Board member regarding stormwater management, D. Pierce responded stormwater management is not to be considered.

After some discussion, the Board requested a requirement be provided for a maintenance plan for the landscaping.

D. Pierce stated in #6 on page 6, there is a reference to fencing where deemed necessary in the judgment of the Board. It is problematic because it has the vague potential for arbitrary decision without any standards.

D. Banisch stated the berms are setback 40' on the sideyard, 15' from the toe and the property line, 60' from the front property line and 35' from the rear so it is not likely the berm will occur on the property line. D. Pierce stated the berms will have to be part of the stormwater management on the property because of the change in the grading.

In response to an inquiry regarding the limitation of the height of the solar array, D. Pierce responded what he has seen in the statutes D. Banisch has indicated in his memo, the limitations are in respect to roof mounted units. With a system of more than ten panels, the Township can legitimately regular the height of those panels. He stated this is a particular use which is different from a building use. It is consistent with a zoning district of what you allow can be limited. He suggested talking with designers to get some information on the typical height of a ground mounted solar array. The ordinance would decide what use is allowed, the dimensions and setbacks. The applicant will have to comply with all other building code requirements.

D. Banisch suggested adding that these facilities do not generate offsite glare. D. Pierce stated it allows a lot of discretion by not requiring any particular standards. The Board decided to require the extruded metal frames of the array must match the panel in coloring.

D. Pierce stated #10 is over broad. In the AR-2 zone, 13% is allowed and the rest of the property has to be kept as a lawn. You cannot regulate how a person has to maintain the other part of their property because they are putting in a solar farm. The Board expressed their concern over the use of herbicides. D. Pierce stated the Board can make a determination to seek and promote to the greatest extent possible organic farming. The Board can require a maintenance plan as part of the conditions of the maintenance of these facilities and how they are going to mow the property during the year. In response to a comment from a Board member, D. Pierce responded the limitation of the use of herbicides can be limited to the major solar farm.

D. Pierce stated #13 might be beyond the Township's ability. Why would the Township prohibit someone from getting approval before they have a firm commitment from the electric utility? If you require that documentation, it gives the utilities the ability to regulate what is being done in the

Township. One of the ordinances D. Banisch has provided requests the applicant provide documentation of a letter written to the utility company. A bond or letter of credit would have to be provided with the application and run in perpetuity.

D. Pierce inquired on #14(b)'s time frame. D. Banisch suggested 180 days.. D. Pierce inquired about allowing too much discretion with the Township attorney in regard to the amount of the bond or letter of credit. The amount should be based on an estimate approved by the Board engineer for the removal and restoration costs at the time of the site plan approval. D. Pierce stated he prefers a bond rather than a letter of credit.

It was suggested the renaming solar farm to a solar energy farm.

D. Banisch provided the following memo to the Board:

The Board may wish to identify some of these suggested conditions as design standards, which would reduce the number of conditions that would be subject to conditional use variance relief.

Re: Solar and Photovoltaic Energy Facilities and Structures – adopted and pending Legislation

We are providing this memorandum as a supplement to our memorandum of July 9, 2010, concerning an ordinance for the regulation of solar and photovoltaic energy facilities and structures. This memorandum summarizes adopted and pending legislation that will impact the degree and manor in which these facilities may be regulated at the local level.

1. C. 146, L 2009, adopted November 20, 2009 , made a wind, solar or photovoltaic energy facility or structure an inherently beneficial use. This legislation was discussed in our memorandum of July 9, 2010. No additional commentary is offered on this legislation.

2. C. 4, L 2010, adopted April 22, 2010, provides that solar panels may not be included in any calculation of impervious surface or impervious coverage, for purposes of planning board approval of a subdivision or site plan. This is codified at NJSA 40:55D-38.1. The language of concern in this law is as follows (underlined emphasis added):

C.40:55D-38.1 Solar panels not included in certain calculations relative to approval of subdivisions, site plans.

9. An ordinance requiring approval by the planning board of either subdivisions or site plans, or both, shall not include solar panels in any calculation of impervious surface or impervious cover.

As used in this section, "solar panel" means an elevated panel or plate, or a canopy or array thereof, that captures and converts solar radiation to produce power, and includes flat plate, focusing solar collectors, or photovoltaic solar cells and excludes the base or foundation of the panel, plate, canopy, or array.

10. Section 3 of P.L.1981, c.32 (C.40:55D-95) is amended to read as follows:

C.40:55D-95 Storm water management plan, ordinance; requirements.

3. A storm water management plan and a storm water management ordinance or ordinances shall conform to all relevant federal and State statutes, rules and regulations concerning storm water management or flood control and shall be designed: a. to reduce flood damage, including damage to life and property; b. to minimize storm water runoff from any new land development where such runoff will increase flood damage; c. to reduce soil erosion from any development or construction project; d. to assure the adequacy of existing and proposed culverts and bridges; e. to induce water recharge into the ground where practical; f. to prevent, to the greatest extent feasible, an increase in nonpoint pollution; g. to maintain the integrity of stream channels for their biological functions, as well as for drainage; and h. to minimize public safety hazards at any storm water detention facilities constructed as part of a subdivision or pursuant to a site plan. A storm water management plan shall also include such structural changes and such additional nonstructural measures and practices as may be necessary to manage storm water. A storm water management plan and a storm water management ordinance or ordinances shall not be construed to prohibit solar panels to be constructed and installed on a site. Solar panels shall not be included in any calculation of impervious surface or impervious cover.

For purposes of this act:

"Nonpoint pollution" means pollution from any source other than from any discernible, confined and discrete conveyance, and shall include, but not be limited to, pollutants from agricultural, silvicultural, mining, construction, subsurface disposal and urban runoff sources.

"Solar panel" means an elevated panel or plate, or a canopy or array thereof, that captures and converts solar radiation to produce power, and includes flat plate, focusing solar collectors, or photovoltaic solar cells and excludes the base or foundation of the panel, plate, canopy, or array.

Condition #4 of the proposed conditional use standards is included on page 5 of our July 9, 2010 memorandum, and reads as follows:

4. Solar farm and associated solar or photovoltaic energy facilities and structures shall not occupy an area of the property upon which they are to be erected that is greater than the total combined maximum coverage limits for principal and accessory uses for the zone in which the facilities and structures are located.

This suggested condition is fairly limiting because it seeks to limit the area of a site occupied by solar or photovoltaic structures to the area of a parcel of land that could otherwise be occupied by principal and accessory structures and uses as calculated in accordance with the coverage limits for the zone. This draft ordinance condition does not seek to limit the area on the basis of impervious cover, and appears to be consistent with the Law. If, after consideration, the Board determines that this suggested standard is too restrictive, an alternative two-tiered approach may be to (1) allow solar or photovoltaic facilities and structures in nonresidential zoning districts to occupy the entire principal building envelope; and (2) limit their placement in accordance with the suggested condition in the AR-2 zone.

3. C. 35, L 2009, adopted March 31, 2009 (N.J.S.A. 40:55D-66.11), provides that "1. A renewable energy facility on a parcel or parcels of land comprising 20 or more contiguous acres owned by the same person or entity shall be a permitted use within every industrial district of a municipality. For the purposes of this section: "renewable energy facility" means a facility that engages in the production of electric energy from solar technologies, photovoltaic technologies, or wind energy.

"Industry", "industrial district" or "industrial zone" are not defined terms in the ordinance. The Latest Illustrated Book of Development Definitions, (Moskowitz & Lindbloom, 2004) defines "Industry" as "Those fields of economic activity including forestry, fishing, hunting, and trapping; mining; construction; manufacturing; transportation, communication, electric, gas and sanitary services; and wholesale trade."

The Township's Business Park District appears to be the most consistent with the intent of the legislation. The BP District permits Business Offices, Warehousing, including Miniwarehousing/storage, Laboratories and research, Manufacturing and assembly operations, Lumberyards, Agriculture, Professional offices and Banquet/convention centers. Conditional uses include Retail under certain circumstances, Wholesale greenhouses, Mechanical and business equipment storage, Contractor yards, and construction businesses, glex sffice/warehousing and Planned business parks.

The HC Highway Commercial District permits Local retail uses, Local service uses, Restaurants, bars and taverns, banks, Bed-and-breakfast inns, Child Care Center, Mechanical contractors, furniture and appliance stores, department stores and supermarkets, Farm equipment dealerships, Agriculture, Miniwarehousing and veterinary hospitals, Nurseries and garden centers, feed and grain outlets, theaters, bowling alleys, department stores, automobile dealerships and supermarkets, and conditional use Shopping centers and Accessory apartments.

The AR-2 Agriculture Residential District permits farms and agriculture, detached single-family dwelling units, Public playgrounds, conservation areas, parks and public purpose uses, Churches and cemeteries, Golf courses, Firehouses, rescue squad facilities and government buildings and Family day-care homes and as conditional uses, Private residential airstrips, Home occupations, Barn conversions, Wholesale greenhouses, accessory apartments and ECHO units.

The PO/R Professional Office/Residential District permits all uses in the AR-2 District and also permits the following uses by right: General and professional offices, including business, administrative and professional, including real estate, insurance, medical/dental or similar offices, Fiduciary or financial institutions such as banks or S&L's, Restaurants, Convenience grocery stores, antique stores, gift stores, pharmacies and Family daycare. PO/R Conditional uses include Accessory apartments, Home Occupations and Barn conversions.

The VC-1 and VC-2 zones permit a wide range of commercial uses, and the VR-2 permit Automobile service stations in existence as of February 8, 1993, and restaurants and the zone also permits Expansion of any automobile body repair shop or service station in existence.

Because of certain limited permitted uses that are of an industrial or quasi industrial nature that are identified in the Township's ordinance in the HC District, the AR-2 District, and by extension the PO/R District and the VC-1 and VC-2 Districts, an argument could be made that these districts permit industrial uses. This issue as it pertains to the permitted uses in the Township's zoning districts should be discussed by the Board since existing law permits solar and photovoltaic facilities and structures in all Industrial Districts on lots over 20-acres in area.

4. S2006, was adopted by the Senate on June 28, 2010 (identical bill A3125) and is expected to be adopted by the Assembly this session, prohibits a municipality from adopting a zoning ordinance regulating the installation on residential property of photovoltaic solar energy systems when 1) for a roof-mounted system the panels and equipment extend 12 inches or less beyond the roofline or the highest point of the roof structure or 2) for a ground-mounted system, the system consists of 10 or less panels and is situated more than 50 feet from the nearest property boundary line.

This legislation also provides that if a municipality adopts an ordinance regulating solar systems that do not meet the above standards, nothing shall preclude the applicant from seeking a variance.

The legislation indicates that fees charged by municipalities are limited to processing costs for an application. (this includes "small wind energy systems")

Suggested Condition # 12 in our July 9 memorandum for the conditional use ordinance reads as follows:

12. Permitted height – the maximum permitted height for solar and photovoltaic energy facilities and equipment shall be the maximum permitted height for the zone in which the facilities and structures are located.

The Board should discuss whether the 12” height exception in this draft legislation should be reflected in any ordinance that the Township may adopt.

In response in to an inquiry of why we are allowing solar energy farms in the AR-2 zone, D. Pierce responded the Legislature has said that you must permit solar energy farms in industrial zones on properties that are greater than 20 acres. The Legislature has also said that these types of solar energy farms are IB uses. If anyone wants to put one anywhere in the Township and need to get a use variance, they have a much lesser standard to satisfy the variance for that use. Rather than take all these applications to the Board of Adjustment, the Township can create an ordinance that regulates their use in each of the zones. If someone wants to put a solar energy farm in the AR-2 zone, they would have to go to the Board of Adjustment for approval.

D. Banisch stated a reason resolution would accompany the ordinance that sets forth a purpose statement which would be codified with the ordinance amendment. The resolution would have a series of “WHEREAS” clauses that would talk about each of the zones. The Business Park Zone would have to be recognized as the Industrial Zone. R. Dodds stated that forestry is considered by the State as Industrial. D. Banisch made reference to the industrial definition. Some clarification is needed on the items on page 2 & 3 of the second memo.

D. Banisch will prepare a draft ordinance for next month’s meeting.

D. Banisch stated his brother was approached by someone who was going to be an applicant in Delaware Township for a solar energy farm installation. He did no consulting work. The applicant might have or might make an application. He would have to recuse himself. It would have no bearing on the drafting of the ordinance. He could recommend someone who could represent the Township.

R. Dodds said goodnight to D. Banisch and D. Pierce at 9:53 PM.

Resolutions

It was moved by J. Mathieu, seconded by J. Burke and carried to adopt **Resolution 2010-13 - Cacciabaudo – Block 37, Lots 3.05-3.07 – Federal Twist Road – Request for Extension of Time to File**. All members present voted **AYE** on **ROLL CALL VOTE**.

Release of May 11, 2010 Executive Session Minutes

It was moved by J. Strasser, seconded by J. Mathieu and carried to release the May 11, 2010 Executive Session Minutes. All members present voted **AYE** on **ROLL CALL VOTE**.

Approval of June 8, 2010 Minutes

It was moved by E. Niemann, seconded by S. McNicol and carried to approve the minutes of June 8, 2010 and place on file with the following correction (corrections are bold and underscored):

Page 5 of 11 – Section 132-11(e)(1) – Mobile Homes, trailers or campers:

1. In residential zoning districts, provided that appropriate permits as set forth below are obtained, ~~no more than~~ one portable storage container shall be allowed on a lot for a period no longer than thirty (30) days

Page 5 of 11 – Section 132-11(e)(2) – Mobile Homes, trailers or campers:

2. In business or commercial zoning districts, ~~no more than~~ one portable storage container shall be allowed on a lot for a period no longer than five (5) days

All members voted **AYE** on **ROLL CALL VOTE**, except J. Burke, who **ABSTAINED**.

Approval of June 8, 2010 Executive Session Minutes

It was moved by D. Haywood, seconded by S. McNicol and carried to approve the minutes of June 8, 2010 Executive Session and place on file. All members voted **AYE** on **ROLL CALL VOTE**, except J. Burke, who **ABSTAINED**.

Release of June 8, 2010 Executive Session Minutes

It was moved by D. Haywood, seconded by J. Mathieu and carried to release the June 8, 2010 Executive Session minutes. All members present voted **AYE** on **ROLL CALL VOTE**, except J. Burke, who **ABSTAINED**.

APPLICATION STATUS

CORRESPONDENCE

R. Dodds reviewed as per the agenda.

PRIVILEGE OF THE FLOOR

E. Niemann reported D. Pierce, T. Decker, W. Sidote, M. Fornaciari, A. VanVeldhuisen, M.L. Haring and R. Dodds met regarding zoning and code enforcement, specifically along Route 12. They discussed a consistent approach for code enforcement and zoning along Route 12 to the best of the Township's ability. They decided communication to the business owners along Route 12 should be written. E. Niemann stated the Commercial and Industrial Commission meets three or four times a year and is having difficulty with its membership. E. Niemann stated Chris' Citgo is off the docket for July and has been rescheduled for the September docket. Chris' Citgo requested it to be rescheduled. It is a subject on which the judge will allow comments from the public.

S. McNicol stated there have been a number of improvements along Route 12.

R. Dodds stated another part of the discussion earlier this evening was businesses are changing and not coming in for site plan approvals.

J. Burke stated he would like to compliment W. Sidote and the way he approaches a situation. He has a very effective personality.

ADJOURNMENT

It was moved by E. Niemann, seconded by D. Haywood and carried to adjourn the meeting at 10:08 PM. All members present voted **AYE**.

Respectfully submitted,

Diane Laudenbach, Secretary