ML 219558

ORDER NO. 88613

IN THE MATTER OF THE APPLICATION OF LEGORE BRIDGE SOLAR CENTER, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A 20.0 MW SOLAR PHOTOVOLTAIC GENERATING FACILITY IN FREDERICK COUNTY, MARYLAND	* * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9429

Issue Date: March 23, 2018

I. Background

This Order addresses an appeal filed by Frederick County, Maryland ("Frederick County") from a Proposed Order issued by the Public Utility Law Judge ("PULJ"), approving LeGore Bridge Solar Center, LLC's ("LeGore" or "Applicant") Application for a Certificate of Public Convenience and Necessity ("CPCN").[1] That Application sought approval to construct a nominal 20.0 megawatt alternating current solar photovoltaic generating facility within Frederick County. For purposes of this decision, a brief overview of the timeline of major occurrences in this matter is helpful:

January 15, 2016 – Frederick County Executive Order No. 01 – 2016.

January 28, 2016 - LeGore obtains local zoning approval through a special exception from the Frederick County Board of Zoning Appeals.

October 7, 2016 – LeGore submits its Application for a CPCN with the Maryland Public Service Commission ("Commission").

May 12, 2017 – After the PULJ conducted lengthy proceedings in which the Applicant agreed to numerous conditions, the PULJ closed the evidentiary record.

[1] Commissioners Richard and Linton dissent from this decision and write separately.

May 16, 2017 – Frederick County passes County Bill 17-07.

June 5, 2017 – Frederick County files a copy of this bill with the PULJ.

July 5, 2017 – County Bill 17-07 goes into effect.

July 6, 2017 – Frederick County files a "Motion to Intervene and Re-Open the Case".

July 13, 2017 – The PULJ grants Frederick County's Motion, with the limitation that Frederick County could only respond to three questions posed by the PULJ as to Frederick County's position in the case.

October 1, 2017 – The General Assembly enacts a new subsection – (e)(3) – to § 7-207 of the Public Utilities Article. This new subsection requires the Commission to provide "due consideration" to any county's plan and zoning laws before granting a CPCN.

October 3, 2017 - The PULJ issues his Proposed Order, granting the Application.

Frederick County now appeals this Proposed Order, contending essentially that the new PUA § 7-207(e)(3) required the PULJ to give "due consideration" to the most recent plan and local zoning laws created by County Bill 17-07.[2] Because LeGore complied with all local laws throughout the Application process, we will affirm the decision of the PULJ for the reasons stated below.

II. Standing

As an initial matter, Staff contends that Frederick County lacks standing to appeal the PULJ's Proposed Order because they failed to timely intervene and participate in the proceedings. Although Staff's position has merit, we conclude that we providently granted Frederick County's appeal for the following reasons. Staff points to PUA §§ 3-

[2] The parties agree that LeGore's Application (and possibly that of any future Applicant) would not comply with the changes created by County Bill 17-07. This is so because those changes would require the Applicant to apply for a "floating zone" permit, and the Application does not meet those requirements. The reason the Application does not meet those criteria is that the "floating zone" requirement did not exist until well after LeGore obtained its special exception and submitted its Application.

106 and 3-107, which together describe the process of becoming an intervenor (and thereby accruing all the rights of a party). PUA § 3-113(d)(2) then states that:

> A proposed order of a commissioner or public utility law judge under § 3-104(d) of this subtitle becomes final unless **a party to the proceeding** notes an appeal with the Commission within the time period for appeal designated in the proposed order.

Although Frederick County certainly did not file a "timely" request to intervene pursuant to the PULJ's designated timeline,[3] the fact that the PULJ allowed very limited intervention thereafter is sufficient to provide Frederick County the right to raise their concerns before the Commission.[4] We will therefore address the substance of the County's appeal on the merits.

III. Pre-Emption and Due Process

The parties have extensively briefed the issue as to whether the power conferred upon the Commission pre-empts any conflicting local zoning laws or other concerns. We do not believe this issue needs to be resolved in this particular case because we conclude that: 1) LeGore acquired a vested interest in its special exception because it complied with all local laws in effect at the time; and 2) basic due process requires that we affirm the PULJ.

Frederick County cites the addition of § 7-207(e)(3) to the PUA as evidence that the PULJ did not sufficiently consider its amended plan and zoning laws under County

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[3] *See* the PULJ's October 28, 2016 "Notice of Pre-Hearing Conference", directing any interested parties to submit petitions to intervene prior to the November 14, 2016 Pre-Hearing Conference.

[4] Additionally, PUA § 3-202(a) provides that a "party or person in interest" may file a petition for judicial review of any Commission decision to the appropriate Circuit Court. The Circuit Court for Baltimore City has previously determined that a "person of interest" need not have participated before the PULJ to have standing to petition that court – thereby bypassing Commission review. *See,* June 2, 2016 Memorandum and Order of Judge Jeffrey Geller, *In the Matter of the Petition of John Bradley, et al.* Case No. 24-C-15-006830. It would make little sense to deny Frederick County's right to appeal the Proposed Order to the Commission, when the result would potentially be an appeal to the Circuit Court without the Commission's opportunity to hear argument.

Bill 17-07. We do not believe this analysis is necessary and in so ruling, we do not intend to suggest that local counties are not entitled to due consideration on any issue pertinent to a CPCN Application. We have always welcomed such input and will continue to do so.[5] The PULJ would have worked with Frederick County in a complementary fashion had they participated earlier in the proceedings below.

(a) Vested Interest

In its memorandum on appeal, Frederick County cites to *O'Donnell v. Bassler*, 289 Md. 501 (1981) for the proposition that "[T]he Commission is required to apply the law in effect at the time it makes its decision."[6] However, we read *Bassler* to support our decision in this matter. The precise language of *Bassler* (with citations omitted) is:

> An appellate court must apply the law in effect at the time a case is decided, provided that its application does not affect intervening vested rights…Generally, in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use, the owner must initially obtain a valid permit.[7]

Unlike in *Bassler,* there is no dispute that LeGore obtained a valid special exception. In *Bassler*, the Court of Appeals determined that the circuit court had improperly altered the original special exception on appeal. Even if the circuit court acted improperly by doing so, its ruling invalidated the special exception. In the present case, nobody appealed the grant of the special exception, and LeGore properly acted in reliance upon its special exception in filing the subject Application.[8] Therefore, any subsequent change in the law

[5] *See, e.g.*, *In the Matter of Dan's Mountain Wind Force, LLC*, Case No. 9413, Order No. 88260 (June 16, 2017); *In the Matter of Pinesburg Solar, LLC*, Case No. 9395, Order No. 88053 (March 3, 2017).
[6] Memorandum at 5.
[7] *Id.* at 508.
[8] It is significant that the Board of Zoning Appeals granted the special exception to LeGore shortly after Executive Order No. 01-2016, presumably with knowledge of it.

does not affect the fact that LeGore complied with the law in effect at the time. Our fellow Commissioners who dissent place significant weight on Executive Order No. 01-2016. However, the Executive Order itself does not alter the County's Ordinance. Only the subsequent enactment of the County Council effects a change in the County law.

(b) Due Process

In *John Deere Construction and Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 146 (2008), the Court of Appeals discussed when a statute may be applied retroactively, concluding:

> [A] proper retroactive application of a statute requires a two part analysis: first, a determination that the legislature intended the statute to apply retroactively and second, a determination that retroactive application does not 'impair vested rights, deny due process, or violate the prohibition against *ex post facto* laws.'

We have already concluded that LeGore acquired a vested right in its special exception because the operative laws were those in effect at the time it was granted. We also find that to apply the new laws contained in Council Bill 17-07 - which came into effect 18 months after LeGore obtained its special exception – to invalidate LeGore's special exception would violate due process.

LeGore invested substantial time and resources and complied with all local ordinances in effect throughout this lengthy process. It did so in reliance upon the fact that it had obtained a valid special exception, which formed the basis for its Application.

It would be grossly unfair to the Applicant to deny their Application based upon issues raised so late in the proceeding and after the record had closed.[9]

We view this matter more as one in which the Applicant complied with local ordinances than one in which the Application and Frederick County's local laws so differ that we must determine whether PUA § 7-207 or Frederick County's amended zoning requirements govern. We therefore do not reach the pre-emption issues raised by the parties on appeal.

For these reasons, we affirm the Proposed Order in this case.

W. Kevin Hughes

Anthony J. O'Donnell

Mindy L. Herman

Commissioners

[9] Unlike our dissenting colleagues, we also think it would be grossly unfair under these particular facts to remand this matter to the PULJ to require LeGore, having already gone through one County zoning process, to go through the new floating zone approval process created by Bill No. 17-07.

DISSENTING OPINION OF COMMISSIONERS MICHAEL T. RICHARD AND ODOGWU OBI LINTON

We respectfully dissent from the Commission's Order in this case, which sustains the PULJ's October 3, 2017 Proposed Order granting a Certificate of Public Convenience and Necessity ("CPCN") to LeGore Bridge Solar Center, LLC ("LeGore" the "Applicant") to construct a 20.0 MW solar photovoltaic generating facility in Fredrick County, Maryland, a project opposed by Frederick County and inconsistent with the County's Comprehensive Plan. PUA § 7-207(e)(1) and (3) require the Commission give "due consideration" to the recommendation of the governing body of each county. In 2017, the Maryland Legislature further enhanced this standard by requiring the Commission give "due consideration" to "the consistency of the application with the comprehensive plan and zoning of each county." In previous CPCN orders the Commission has gone even further and stated that it gives "significant weight" to these local recommendations. The Department of Natural Resources Power Plant Research Project ("PPRP"), the State agency which the Commission relies upon extensively as the expert in these matters, also notes that even if the Commission grants the Applicant's CPCN in this case, "the County is on record that it will be unable to accept and process Project related applications … unless and until the Applicant obtains zoning and site plan approvals under current [newly enacted] requirements." LeGore agreed to multiple conditions which require County approvals through procedures that no longer exist or, have been modified significantly during the course of this proceeding. The Record is unclear as to how those procedures, which normally would be incorporated into the CPCN review process, will impact the issuance of a CPCN in this case. Under these

circumstances, PPRP notes that the Commission can on its own initiative "reopen the proceedings" for further development of the record, which is the approach that we believe the Commission should take.

In this case, the record is clear that the County, through Executive and Legislative considerations, was on a deliberative and transparent path, prior to Applicant's CPCN filing at this Commission, to address the "unprecedented" size of prospective solar projects within its jurisdiction – projects that were "unanticipated" under the County's existing land use regulations – and to consider a number of zoning, land-use, density, construction and other issues of importance to the County. The County filed comments in the proceeding as early as April of 2016 requesting that statutory notice requirements not be waived. In carrying out her responsibilities, the County Executive by Executive Order (EO) No. 01-2016 notes that the County "supports the construction of solar projects" but given that "these solar arrays are much larger than the typical types of solar facilities previously reviewed" in the County, the EO (dated January 15, 2016) put in place a temporary hold on the County's review of commercial solar applications in order to give the County time to "study these larger arrays." The EO further advised any applicant that had already applied for a special exception that their applications would be considered to be on temporary hold, that they would proceed at their "own risk" in going forward with their project(s), and that any change in the County law would likely apply to pending projects unless those projects were able to "vest" their zoning approval pursuant to Maryland law prior to any new County law becoming effective. To be clear, the County, in our opinion, should have more aggressively engaged in the statutory CPCN review process initiated by LeGore. Entering its appearance a full nine months after the

case was filed at the Commission, when they were aware of the filing, limited their ability to raise their concerns during the evidentiary proceeding or, as they noted in their filing, take advantage of the opportunity to work with the company in the development of this project.

The County's error in this case, unfortunately, harms all parties to this proceeding, as we rely on the expertise of local government for CPCN approvals.

However, here, the Applicant was fully aware of the County's interests and considerations. Yet, even after the County passed legislation that changed both the process and the criteria to be met before obtaining approval to locate a commercial solar facility in Frederick County, the Applicant continued its strategy of preemption rather than making efforts to resolve issues presented by the County regarding the proposed project location. We find it unfortunate that the Order adopted by the Majority in this case vindicates that strategy.

Given that the Commission in this case is rejecting the *recommendation* of the County, and approving the project despite its *inconsistency* with the County's Comprehensive Plan, we are concerned that the Commission is deviating from its own standard of giving "significant weight" to the local jurisdiction's recommendation, or the clear direction the General Assembly has provided in adoption of PUC § 7-207(e). We believe the adoption of this new statutory requirement is merely a codification of the Commission's existing practice to compare a CPCN application with County or municipality's comprehensive plan and zoning strategy and with the intention to resolve any issues presented. Here, the Majority has, at a minimum, failed to explain how it is

applying and then dismissing the new legislative requirement to consider the "consistency" with the local zoning requirements.

We believe the Order too narrowly focuses on the Special Exemption granted to the Applicant by the Board of Zoning Appeals while the County was in the process of considering the interests of its constituency, especially when the Applicant suggests that the County's approval is unnecessary and preempted by the Commission's authority. The PULJ accepted the County's motion to intervene in this proceeding as it pertained to the Special Exemption, but after allowing the County to explain the impact of Bill No. 1707 on the project, Judge McGowan noted that "the Bill did not explicitly attempt to substitute [the County's] procedures for the Commission's, but the effect of the Bill's stringent new siting regulations for solar facilities, and Frederick's requirement that the Project refile its application, amounts to the same thing." We disagree. Rather than attempting to override the Commission's authority in this area, we view the County's legislation as a reasonable further development of its Comprehensive Plan in light of the development (and potential development) of large scale solar projects inconsistent with the County's land use plan. It further bares repeating: that the legislation advanced with full notice to the developer in this case that the scope of this project would be subjected to additional criteria, even with the interim issuance of a *special exemption*.

A fair and prudent decision, in this case, we believe would be to remand the Proposed Order to develop the record more fully, consider the County's legitimate statutes setting local land use priorities and have them recognized vis-à-vis the

Applicant's proposed project, and provide the Applicant the opportunity to find accommodations with the County.

Michael T. Richard

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Commissioners