

addressed County Bill 17-07, which Frederick County had adopted on May 16, 2017, with an effective date of July 15, 2017. Although the record was closed at the time Frederick County joined the proceedings, the PULJ allowed Frederick County to offer evidence of this new ordinance, which he addressed in his Proposed Order. After discussing the merits of the case and considering Frederick County's supplemental submissions, the Proposed Order recommended that the Commission approve LeGore Bridge's request for a CPCN.

3. Frederick County appealed this Proposed Order and filed a memorandum in support of its appeal on November 9, 2017. On November 29, 2017, LeGore Bridge submitted its memorandum in support of the Proposed Order. On the same date, the Commission's Staff and the PPRP also filed memoranda in support of the Proposed Order.

4. On March 23, 2018, the Commission issued Order No. 88613, affirming the Proposed Order. However, the Commission declined to address Frederick County's substantive objections to the Proposed Order or any arguments made by the parties. Instead, the Commission ruled that because LeGore Bridge had previously obtained a special exception under the local law in effect at the time, and had relied on this exception in filing the Application, to invalidate the Company's vested right--under the new zoning law--would be unfair. The Commission referred to several cases involving "vested rights" to support its decision.

5. Frederick County appealed the Commission's decision to the Circuit Court for Baltimore City. After the Circuit Court affirmed the Commission, Frederick County appealed to the Court of Special Appeals.

6. On November 20, 2020, the Court of Special Appeals reversed and remanded the Commission's Order, concluding that the Commission erroneously relied upon the real estate doctrine of "vested rights" in concluding that consideration of Frederick County's zoning changes would violate LeGore Bridge's right to due process. The Court of Special Appeals concluded that the doctrine of "vested rights" did not apply and remanded the case to allow the Commission to address the substance of Frederick County's objections without reference to that doctrine, as well as affirmatively address Frederick County's arguments based upon PUA § 7-207(e)(3).

7. On April 1, 2021, the Circuit Court for Baltimore City issued its "Final Order on Remand" based upon the decision of the Court of Special Appeals, returning the matter to the Commission.

8. On June 21, 2021, the Commission issued Order No. 89859, in which it stated that the previously submitted memoranda by the parties remained before the Commission. However, given the length of time that had passed as this case went through the Court of Special Appeals, the Commission stated that any party that wished to supplement their previously filed memoranda could do so within 20 days and submit reply memoranda within 10 days thereafter. Frederick County, LeGore Bridge, and Staff submitted Supplemental Memoranda.¹ Frederick County, LeGore Bridge, and PPRP submitted reply memoranda.² Frederick County also submitted a concurrent Motion to Strike certain portions of LeGore Bridge's Supplemental Memoranda, and LeGore Bridge filed

¹ In Staff's memorandum, it concluded that "[T]he Proposed Order in this case is a proper exercise of the Commission's pre-emptive CPCN authority to site power plants, rendered after due consideration of each and every factor prescribed by PUA § 7-207, including issues set forth in what was in 2017 the newly enacted § 7-207(e)(3)." Staff Supplemental Memorandum at 1.

² In PPRP's Supplemental Memorandum, it noted that "Frederick County now asserts that the Commission may not have a sufficient factual record on which to make a final decision in this case. PPRP disagrees."

a response to that motion. In this Order, the Commission will address the issues raised by Frederick County's appeal of the Proposed Order in light of the direction given by the Court of Special Appeals as well as Frederick County's Motion to Strike.

II. Frederick County's Motion to Strike

9. As an initial matter, Frederick County has asked the Commission to strike two subjects raised by LeGore Bridge in its Supplemental Memorandum, both of which Frederick County contends are inappropriate references to documents outside the record. First, Frederick County objects to LeGore Bridge's attachment and reference to Frederick County's September 3, 2019 Livable Frederick Master Plan ("LFMP"). Frederick County adopted this plan while the matter was before the Circuit Court for Baltimore City on Frederick County's Petition for Judicial Review of the Commission's earlier decision.

10. Frederick County also objects to any reference or reliance upon the Commission's Order No. 89668, issued on November 24, 2020, in a separate case (No. 9439) before the Commission involving a CPCN application by Biggs Ford Solar Center, LLC ("Biggs Ford") for a solar generation facility in Frederick County. The County contends that this Order did not exist at the time PULJ McGowan issued the Proposed Order under review and more generally objects to referring to facts and cases outside of the record created in the case currently under review.

11. In response, LeGore Bridge offers several reasons why it believes the Commission should deny Frederick County's motion. LeGore Bridge contends that this LFMP is a publicly available document adopted by Frederick County pursuant to *Md.*

Code Ann, Land Use Art. § 3-201(a)(3). That statutory provision requires local governments to adopt plans every 10 years to “serve as a guide to public and private actions and decisions to ensure the development of public and private property in appropriate relationships.”

12. LeGore Bridge contends that PUA § 3-111(d) allows the Commission to take notice of “judicially cognizable facts”. The existence of this publicly available document is an undeniable fact that Frederick County does not dispute. LeGore Bridge also cites to Maryland Rule 5-201(b) which provides that a “judicially cognizable fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” LeGore Bridge cites to *Chesek v. Jones*, 406 Md. 446, 456, n.8 (2008) for the proposition that Rule 5-201 may apply to public documents.

13. Additionally, LeGore Bridge notes that the Commission has taken notice of publicly available documents in the past, citing *Re Baltimore Gas & Elec. Co.*, 273 P.U.R.4th 522, n.11 (2009) (involving EDF’s purchase of 49.99% of Constellation Energy’s nuclear assets in which the Commission stated that it would take notice of “all publicly available documents filed by the parties with various governmental bodies, including but not limited to, this Commission, the Securities and Exchange Commission, and the Nuclear Regulatory Commission, whether or not the documents were offered or entered into the record in the proceeding”).³

³ LeGore Bridge Opposition to Motion to Strike at 3-4; Order No. 82719, *Re Baltimore Gas and Electric Company*, Case No. 9154, slip op. at 4, n.11 (Jun. 11, 2009).

14. Regarding Frederick County’s objection to references to similar cases before the Commission (*i.e.* Biggs Ford), LeGore Bridge notes that the Commission has referred to its own prior decisions on a regular basis for decades, including a recent rate case in which the Commission did so 42 times in one order.⁴

Commission Decision

15. The Commission denies Frederick County’s motion to strike largely for the reasons contended by LeGore Bridge and referenced above. The Commission will take notice of Frederick County’s LFMP. Frederick County does not dispute the authenticity of its own publicly available comprehensive plan or the text of the provisions contained within.⁵ Under PUA § 3-111(d), the Commission may (and often has) taken notice of “judicially cognizable facts”. Frederick County’s LFMP is an easily knowable fact, and therefore satisfies this definition.

16. The Commission will also deny Frederick County’s motion to strike references to Case No. 9439. In the case under review, the record contains multiple citations to prior Commission decisions involving similar CPCN applications. Staff and LeGore Bridge cited, and the PULJ referenced, several prior cases in which this Commission asserted its plenary authority to site electric generation facilities, such as LeGore Bridge’s project.⁶

17. In fact, whether a Commission decision is consistent with its own prior precedent is one factor a reviewing court may use to determine whether a Commission decision was

⁴ LeGore Bridge Opposition to Motion to Strike at 5, referencing Case No. 9645, Order No. 89678 (Dec. 16, 2020).

⁵ The LFMP may be found at:

<https://www.frederickcountymd.gov/DocumentCenter/View/319126/Livable-Frederick-Master-Plan>.

⁶ Proposed Order at 43, citing to *Dan’s Mountain Wind Force, LLC*, Case No. 9413 (June 16, 2017). *See also* Staff Memorandum at 10, n.28, citing multiple prior Commission decisions regarding similar CPCN applications.

“arbitrary or capricious” under PUA § 3-203(4). *See e.g., Baltimore Gas & Elec. Co. v. Pub. Serv. Comm’n of Maryland*, 305 Md. 145, 161-62 (1986) (“Although never binding upon the courts, the contemporaneous interpretation of a statute by the agency charged with its administration is entitled to great deference, especially when the interpretation has been applied consistently and for a long period of time.”). In other words, not only may the Commission refer to prior decisions, at times it may be obliged to do so. If the Commission deviates from prior precedent, it should explain its reasons for doing so.

18. Frederick County is correct that, although similar, the facts between Biggs Ford and the present case are not identical, but much of the analysis – independent of factual differences – is identical, as discussed below.

III. Frederick County’s Issues on Appeal.

19. Frederick County raises two substantive issues on appeal, both related to PUA § 7-207(e)(3). First, Frederick County claims that the Proposed Order failed to give “due consideration” to its recommendations as required by PUA § 7-207(e)(3)(i). Second, Frederick County claims that the PULJ relied upon a lapsed Special Exception when making certain factual findings and therefore failed to address LeGore Bridge’s efforts to address the County’s concerns as set forth in PUA § 7-207(e)(3)(ii).

- a. Frederick County’s contention that the Proposed Order failed to give “due consideration” to its recommendations as required by PUA § 7-207(e)(3)(i).

20. The Commission concludes that the PULJ gave due consideration to the County’s zoning laws as required by PUA § 7-207(e)(3)(i) and properly exercised his discretion to

apply the doctrine of pre-emption in effect at the time of his ruling.⁷ The PULJ discussed LeGore Bridge’s objections to Frederick County Bill 17-07, including an analysis of the acreage restrictions compared with the available parcels of land in Frederick County.⁸ Based on this analysis, PULJ McGowan noted LeGore Bridge’s conclusion that due to the acreage restrictions in County Bill 17-07, “essentially no parcels in Frederick County [would] remain.”⁹

21. In his Proposed Order, the PULJ agreed with LeGore Bridge regarding the effect of County Bill 17-07, concluding:

In reviewing the record on this issue, I conclude that (1) the ultimate decision to approve solar generating station installations in Maryland lies with this Commission; (2) the [County Bill 17-07] does not affect the Commission’s authority to issue a CPCN in this matter; and (3) the Commission must give due consideration to the recommendation of the County as to the size and location of the Project.

Analyzing this matter, I rely on the Court of Appeals’ ruling in *Howard County v. Pepco*. That ruling is very clear that “§ 54A [currently PUA § 7-207] manifestly ...implies that the recommendations from other state agencies and local governing bodies are advisory only and not controlling.” Further, the Court stated that, based on its reading of § 54A, that “the [Maryland] legislature did not intend that the PSC be bound by local actions during the certification process.”

The “due consideration” of local governing bodies’ recommendations does not require the Commission to accept all, or any, local requirements. The Bill [17-07] did not explicitly attempt to substitute its 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

⁷ As discussed below, the Court of Appeals issued its ruling in *Bd. of County Commissioners of Washington County v. Perennial Solar, LLC*, 464 Md. 610 (2019) (“*Perennial Solar*”) after the Proposed Order. Therefore, the PULJ’s analysis of the doctrine of pre-emption was largely based upon *Howard County v. Potomac Elec. Power Co.*, 319 Md. 511 (1990), the primary case that addressed the doctrine of pre-emption at the time of his Proposed Order.

⁸ Proposed Order at 41-42.

⁹ *Id.* at 42.

application, amounts to the same thing. The Commission is not required to accede to the County's request.¹⁰

22. PULJ McGowan concluded: "It is inappropriate for a county to impose its own requirements alongside the Commission's in such a situation. Weighing these considerations, I conclude that the County's arguments must be rejected."¹¹

23. Subsequent to the PULJ's Proposed Order, the Court of Appeals issued its decision in *Perennial Solar*. There, the Court of Appeals unanimously affirmed that the Commission's CPCN authority, including solar facilities such as that proposed by LeGore Bridge, pre-empts local zoning. The Court of Appeals explained:

Under the plain language of PUA § 7-207, the PSC is the ultimate decision-maker and approving authority of generating stations. Local government is a participant in the process and has an advisory role. The 2017 Amendment [the addition of PUA § 7-207(e)(3)] clarifies the role government as a significant stakeholder in the process, whose recommendations, and local planning and zoning regulations must be duly considered but leaves the PSC responsible for reaching the final balance that includes local planning and zoning as one of several factors.¹²

24. *Perennial Solar* therefore only amplified the Commission's ultimate authority as articulated by the PULJ. In addition to the analysis by the PULJ, the Commission has given significant consideration to Frederick County's multiple pleadings on the subject, which has made Frederick County's position abundantly clear. The Commission on its own authority concludes that Frederick County's position has received due consideration as required by statute, and the Commission agrees with the PULJ that the facts of this case warrant the exercise of the doctrine of pre-emption in this case. This is not a decision the Commission takes lightly. The Commission often works closely with local

¹⁰ *Id.* at 44-45.

¹¹ *Id.* at 46.

¹² *Perennial Solar* at 644-645.

governments, and the relationship is mutually beneficial. Local officials are almost always invited to share the bench with the PULJ, particularly during public comment hearings. However, under the facts of this case, the Commission will exercise its discretion and pre-empt what appears to be a deliberate attempt to indirectly ban all utility-grade solar facilities from Frederick County and thereby undermine the responsibility the General Assembly has conferred upon the Commission.

25. In 2019, Frederick County adopted its LFMP, which sets forth many environmental goals that on its face would appear to render LeGore Bridge's project at least more consistent with Frederick County's stated goals. For example, LeGore Bridge points to four environmental targets contained within the LFMP:

1. An air goal designed to protect air quality through the elimination of air pollution or the reduction of air pollution. One listed method to achieve this goal is to “[s]upport the provision of clean energy systems, such as wind and solar, in the county to replace or supplement conventional power supply.”
2. A “clean energy” goal with a stated intent to “[l]ead in the use of clean energy sources, such as solar, wind, geothermal, biofuels, and hydropower.”
3. An initiative for the County to become “carbon footprint zero” whereby it will “strive to be greenhouse gas neutral in energy production and consumption.”
4. An initiative for “energy independence,” including a goal of the County becoming a “net exporter of clean energy.”¹³

26. The LFMP is a statement of goals and is not mandatory unless specified in an ordinance.¹⁴ Reviewing the stated goals of Frederick County's LFMP, there are many

¹³ LeGore Bridge Supplemental Brief at 8-9, citing LFMP at 192-195.

¹⁴ *Richmarr Holly Hills, Inc. v. Am. PCS, L.P.*, 117 Md. App. 607, 640 (1997).

reasons to conclude that LeGore Bridge’s project is largely, if not entirely, consistent with some of those goals.

27. However, the Commission need not reach a final determination as to whether any disparities remain between LeGore Bridge’s project and the LFMP. The governing “floating zone” ordinance (County Bill 17-07) that an entity such as LeGore Bridge must satisfy (unlike LFMP “goals”) remains unchanged.

28. The Commission has previously determined, and repeats that determination here, that Frederick County Bill 17-07 acts as a *de facto* ban on solar projects such as LeGore Bridge. In Case No. 9439, the Chief PULJ evaluated a CPCN request filed by Biggs Ford in Frederick County. On August 27, 2020 (approximately a year after Frederick County adopted the LFMP), the Chief PULJ issued his Proposed Order, concluding that:

The Project is not consistent with the County’s zoning. However, I give no weight to this factor as Bill No. 17-07 is effectively a *de facto* ban on utility-scale solar projects which is not in the public interest. In light of the facts and circumstances of this case, especially my finding related to the application of Bill 17-07, I find it appropriate to exercise the Commission’s pre-emption authority over the County’s zoning ordinance.¹⁵

29. The Commission affirmed that decision on November 24, 2020.¹⁶ The Commission re-affirms its conclusion that Frederick County Bill 17-07 is a *de facto* ban on utility-scale solar projects. Under the circumstances, the Commission will exercise its discretion to pre-empt the County’s zoning ordinance. Due to the passage of time as a result of the appellate process, the procedural history in this case has become somewhat

¹⁵ Case No. 9439, Phase II Proposed Order at 87. It should be noted that the reason this citation includes a preliminary “Phase II” is because the Commission gave more than due consideration to Frederick County and ordered Biggs Ford to submit an application under Frederick County’s new “Floating Zone” laws, despite record evidence that doing so might be futile.

¹⁶ Case No. 9439, Order No. 89668.

convoluted. But throughout the process, LeGore Bridge has participated in good faith to meet the requirements of PUA § 7-207. At both the PULJ and Commission level, Frederick County's zoning laws have received due consideration. However, the Commission affirms the conclusion of PULJ McGowan and reaffirms the decision rendered in Case No. 9439 that County Bill 17-07 is so restrictive that no proposed utility scale solar facility could meet its restrictions. Pursuant to *Howard County* and *Perennial Solar*, the Commission exercises its authority to pre-empt the County's recommendations. Based upon the above, the Commission further concludes that requiring LeGore Bridge to submit a floating zone application pursuant to County Bill 17-07 is unnecessary.

- b. Frederick County's contention that the PULJ relied upon a lapsed Special Exception when making certain factual findings and therefore failed to address LeGore Bridge's efforts to address the County's concerns as set forth in PUA § 7-207(e)(3)(ii).

30. Section 7-207(e)(3)(ii) requires the Commission to address "the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located." Frederick County contends that PULJ McGowan did not properly address PUA § 7-207(e)(3)(ii) because he relied upon a special exception that had expired by the time of the Proposed Order.

31. The Commission agrees with LeGore Bridge that the Proposed Order sufficiently notes the efforts by LeGore Bridge to address the concerns of Frederick County as well as other parties.¹⁷ The Commission also notes that Frederick County did not make any

¹⁷ In fact, prior to Frederick County's belated entrance into the case, the other parties had reached a settlement agreement. PPRP also agrees that the record contains sufficient evidence of the efforts by LeGore Bridge to meet the concerns of other parties, including Frederick County. PPRP Supplemental Reply Brief at 2.

recommendations during the creation of the record before the PULJ because Frederick County did not participate in those proceedings. To the extent LeGore Bridge was able to address concerns of the County, it did so through its efforts to acquire a special exception. Frederick County argues that these efforts to address the County's concerns became irrelevant once the special exception became void. However, the Commission concludes the record sufficiently noted the efforts that were made to satisfy the language of PUA § 7-207(e)(3)(ii). The PULJ did not rely upon the issuance of a special exception in approving the CPCN application. Although County Bill 17-07 voided the special exception, LeGore Bridge did make several efforts to work with the County, and the PULJ noted those efforts.

32. PUA §7-207(e)(2) contains six factors the Commission must consider when evaluating a CPCN application. The PULJ addressed these six factors consecutively by reference to the relevant statutory provision, and the Commission confirms those findings.¹⁸ The PULJ did not explicitly link his findings regarding PUA § 7-207(e)(3)(ii) to that specific provision. However, the Commission concludes that the record does describe the efforts made by LeGore Bridge sufficiently to satisfy this statutory provision.

33. First, although the passage of County Bill 17-07 rendered the special exception inoperative, LeGore Bridge did work with Frederick County to obtain the special exception. As the Court of Appeals concluded in *Perennial Solar*, this effort to work with the County to obtain a special exception was not required by law. LeGore Bridge could have bypassed Frederick County and simply filed a CPCN application with the

¹⁸ Proposed Order at 47-48.

Commission. In *Perennial Solar*, the Court of Appeals refused to allow Washington County even to raise the issue of whether it must grant a special exception to the generating plant, concluding that the entire issue was pre-empted by the Commission's CPCN process. The Court cited favorably to *Howard County* for the proposition that "in the field of public utility service, the General Assembly intended to grant broad powers to the PSC to execute its principal duty of assuring adequate electrical service statewide."¹⁹ Later, it affirmed that "no PSC rule or order requires compliance with local zoning ordinances as a precondition for obtaining a certificate of public convenience and necessity."²⁰

34. In the present case, LeGore Bridge did acquire a special exception and attempted to comply with local zoning ordinances, although Maryland law did not require these efforts. The PULJ repeatedly noted that LeGore Bridge made the effort to comply with Frederick County's then-operative special exception requirements as well as the concerns of other parties. He summarized those efforts as follows:

On June 13, 2017, the Applicant responded to Frederick [County]'s June 5, 2017 filing and noted that the Project had received zoning approval by a special exception formally adopted on February 25, 2016. The Project's response also asserted that "the Project is an allowable use in its location, is consistent with the County's comprehensive plan, in harmony with the surrounding landscape, and will not have an adverse impact on neighboring properties." The response further noted that the Project had been evaluated by the Commission's Staff, PPRP and People's Counsel, and that the Applicant had agreed to specific conditions proposed by the parties.²¹

¹⁹ *Perennial Solar* at 10; *Howard County* at 524.

²⁰ *Perennial Solar* at 11; *Howard County* at 525.

²¹ Proposed Order at 34-35.

35. The PULJ fully summarized the efforts made by LeGore Bridge. Because Frederick County did not participate in the CPCN proceedings or offer any other suggestions, the Commission concludes that the record reflects LeGore Bridge did all it could to address the concerns raised by those parties that did participate.²² Based on the record before it, the Commission affirms the findings within the PULJ's Proposed Order, and concludes that those findings satisfy the requirements of PUA §7-207(e)(3)(ii).

36. Based upon the above as well as all of the findings and conclusions contained in the Proposed Order, the Commission concludes that the public interest that will be furthered by approving LeGore Bridge's Application outweighs the consideration due to the County's contrary recommendations.

IT IS THEREFORE, this 19th day of August, in the year of Two Thousand Twenty-One, by the Public Service Commission of Maryland;

ORDERED: That LeGore Bridge Solar Center, LLC's Application for a Certificate of Public Convenience and Necessity is hereby granted.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners

²² PUA §7-207(e)(3)(ii) does not reference attempts to address concerns by other parties. However, had Frederick County been a party, the record strongly suggests, as with LeGore Bridge's efforts to obtain a special exception, it would have at least tried to address Frederick County's concerns.