IN THE CIRCUIT COURT
FOR FREDERICK COUNTY, MARYLAND

The Petition of THE POTOMAC EDISON COMPANY	*	
For Judicial Review of the DECISION OF THE BOARD OF APPEALS OF FREDERICK COUNTY, MARYLAND	*	
In the case of THE APPLICATION OF THE POTOMAC EDISON COMPANY (Special Exception) Before the Board of Appeals for Frederick County, MD—File No. B-10-08	*	Civil No. C-11-0133
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SUGARLOAF CONSERVANCY, INC.'S
ANSWERING MEMORANDUM IN SUPPORT
OF THE DETERMINATION OF THE
BOARD OF APPEALS OF FREDERICK COUNTY

Sugarloaf Conservancy, Inc., by undersigned counsel and pursuant to Rule 7-207 files this Memorandum in Support of the Determination of the Board of Appeals of Frederick County, Maryland, and in support states:

OVERVIEW

The Applicant wants to place a 42-acre substation—larger than the Pentagon, or approximately 32 football fields—consisting of galvanized steel and including towers taller than the Statue of Liberty, in a doughnut hole of agricultural land that is surrounded by residential communities. The Board found that the Applicant failed to satisfy its burden under four separate provisions of the Frederick County Code: (1) it is not consistent with the Comprehensive Plan; (2) the nature and intensity of the operations are not in harmony with the orderly development of the neighborhoods within which it will be located; (3) it will have adverse effects beyond those

inherently associated with the special exception at any other location within the agricultural zone; and (4) it does not have an appearance consistent with the surrounding neighborhood. Any one of these four grounds was sufficient to support the Board's denial, and the Board's determination under each provision is supported by substantial evidence.

The test defined by *Schultz v. Pritts,* is only considered, if at all, in the context of those statutory requirements. There, the question is: are there facts and circumstances that show that the particular use proposed (*a substation unprecedented in Maryland and only comparable to a handful of other substations in the world)*, at the particular location proposed (*an agricultural piece of land sitting in the center of several residential communities*) would have any adverse effects "above and beyond those inherently associated with such a special exception use, irrespective of its location within a zone." The answer to that question—as decided by the Board—is plainly "yes." The proposed use is not a "typical" nongovernmental utility–or even a typical *substation*—and the adverse effects associated with it are above those inherently associated with such a special exception use, in many ways, as the evidence demonstrated.

The bottom line is that a special exception is not a permitted use. It is, instead, a use that is recognized to have some risks and therefore requires scrutiny on a case-by-case basis. If the proposed Substation in this case—the most extreme example of a substation to ever be considered in Maryland—is not an example of an instance in which the Board is justified in determining that the adverse effects associated with it exceed those that inherently associated with such a special exception, then what is? Under the law, as long as a reasonable mind could come to this same conclusion, the Board's decision should not be overturned.

LEGAL STANDARDS

A. Standard of Review

Judicial review of an administrative agency's action is narrow and highly-deferential. *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n,* 412 Md. 73, 83 (2009). The court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency . . ." *People's Counsel for Balt. Co. v. Loyola College in Maryland*, 406 Md. 54 (2008) (citing *United Parcel Serv., Inc. v. People's Counsel for Balt. Co.*, 336 Md. 569, 576-77 (1994)). The only question for this court, on review of the Board of Appeals' ("Board") decision, is, was the Board's determination supported by "such evidence as a reasonable mind might accept as adequate to support its conclusion." *Id.; see also Peoples' Counsel for Balt. Co. v. Surina*, 400 Md. 662 (2007). When (Cite as: 43 Md.App. 229, *236, 403 A.2d 858, **863)

there is fairly debatable evidence, the courts must refrain from substituting their judgment for that of the Board. *Commissioner, Baltimore City Police Department v. Cason*, 34 Md. App. 487 (1977); *von Lusch v. Board of County Commissioners of Queen Anne's County*, 24 Md. App. 383 (1975).

"Courts must strive, rather, to uphold the decision of the administrative agency, if there is *any evidence* which can be said to have made the issue for decision by the agency fairly debatable. . . . [T]he same standard applies in [the appellate] court and the circuit court." *People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership* 107 Md. App. 627, 637 (1995) (citing *Eger v. Stone,* 253 Md. 533, 542 (1969) and *Relay v. Sycamore,* 105 Md. App. 701, 713 (1995)). Evidence is "fairly debatable" if it is evidence from which reasonable persons could come to different conclusions. *White v. North,* 356 Md. 31 (1999). As is discussed further below, the Board had countervailing evidence before it—"fairly debatable" evidence—and,

based upon its review of that evidence, it determined that the Applicant was not entitled to a Special Exception. Given the narrow review of this Court, when such evidence is presented and considered by an administrative agency, the determination below should not be disturbed.

The Applicant emphasizes that, for the Board's legal conclusions, this Court should engage in a *de novo* review. This is true. However, in that regard, even in hybrid areas—where it is not necessarily a question of fact or a legal conclusion in the common sense—such as an agency's interpretation of a law or regulation with respect to which the agency has special expertise, judicial deference is also called for:

> *Even with regard to some (Cite as: 144 Md.App. 369, *373, 798 A.2d 26, **29)legal issues, a degree of deference should often be accorded the position of the administrative agency.* Thus, *an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Lussier v. Md. Racing Commission,* 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner,* 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ('The interpretation of a statute by those officials charged with administering the statute is ... entitled to weight'). Furthermore, *the expertise of the agency in its own field should be respected. Fogle v. H & G Restaurant,* 337 Md. 441, 455, 654 A.2d 449, 456 (1995); (Cite as: 144 Md.App. 369, *374, 798 A.2d 26, **29) *Christ [ex rel. Christ] v. Department of Natural Resources,* 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make 'significant discretionary policy determinations'); *Bd. of Ed. For Dorchester Co. v. Hubbard,* 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ('application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the' legal issues)."

Angelini v. Harford County, 144 Md. App. 369, 373 (2002) (citing *Board of Physician Quality Assurance v. Banks,* 354 Md. 59, 68-69 (1999)) (emphasis in original). Although the Applicant has masked its factual argument as a question of law as to the application of the *Schultz* case, the question is more appropriately whether the Board correctly applied the various sections of the Frederick County Code, discussed further below. That determination should be accorded deference, as described in *Angelini*.

B. Burden of Proof

A "special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, *prima facie,* properly be allowed in a specified use(Cite as: 406 Md. 54, *106, 956 A.2d 166, **197) district, *absent any fact or circumstance in a particular case which would change this presumptive finding." People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 105-106 (2008) (citing *Merlands Club,* 202 Md. at 287) (emphasis added). Thus, a special exception applicant does carry a *prima facie* presumption that, if an applicant satisfies the requirements associated with that special exception, it may be properly allowed. However—contrary to the applicant's assertions—this does not switch the burden of proof to the protestants to prove otherwise.

It is still applicant's burden to show that the proposed use would be conducted without real detriment. This was succinctly described in *Schultz v. Pritts*, and affirmed in *Loyola*, as follows:

> Whereas, the **applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements**, he does not have the burden of establishing affirmatively that his proposed use would be a **benefit** to the community. **If he shows to the satisfaction of the Board that the proposed use would be conducted without(Cite as: 406 Md. 54, *89, 956 A.2d 166, **187) real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.** The extent of any harm or disturbance to the neighboring area and uses is, of course, material. **If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.**

Schultz, 290 Md. at 11-12. As Judge Murphy stated in his concurring opinion in *Loyola*:

> . . . it is of no real consequence whether we say that an applicant "is entitled to a special exception, *provided that,*" or that **an applicant "is *not* entitled to a special exception, *unless,*" the applicant for a special exception bears both the burden of production and the burden of persuasion** on the issue of whether the special exception should be

> granted. If the zoning authority is presented with evidence that generates a genuine question of fact as to whether the grant of a special exception would violate the applicable legislation and/or the requirements of *Schultz,* the **applicant must persuade the zoning authority by a preponderance of the evidence that the special exception will conform to all applicable requirements**.

People's Counsel for Baltimore County v. Loyola Coll. in Maryland, 406 Md. 54, 109 (2008) (J. Murphy, concurring). Applicant, in effect, argues that the burden should be shifted to the Respondents to disprove its entitlement. Instead, however, the applicant has the burden of (1) adducing testimony that shows his use meets the standards and requirements; and (2) showing that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest. In that respect, an application could be denied without any evidence on behalf of the protestants. And, to the extent that evidence is offered by the Respondents, it goes to contradict Applicant's evidence of harm or disturbance, or disruption of harmony of the comprehensive plan. As *Loyola* clearly reflects, if the evidence—meaning *any* evidence—makes the question fairly debatable, it becomes a question of fact for the Board to decide.

Once some evidence is shown to make the matter fairly debatable, plaintiff no longer enjoys a "prima facie" presumption because facts and circumstances have been shown, "which . . . change this presumptive finding." *Loyola*, 406 Md. at 105-06. The Board must weigh the evidence and make a determination as the finder of fact. Applicant treats the special exception as if it were a permitted use, or an entitlement of right. It is nothing but a middle ground between a permitted use and a prohibited use. *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 192 Md. App. 218, 229-230 (2010); *Montgomery County v. Butler*, 417 Md. 271 (2010) (citing Loyola College, 406 Md. at 71)). A permitted use is a use *permitted as of right. Loyola*, 406 Md. at 71. "A special exception, by contrast, is **merely** deemed *prima facie* compatible in a

given zone. The special exception requires a **case-by-case evaluation** by an administrative zoning body or officer according to **legislatively-defined standards**." *Id*. (emphasis in bold added). Applicant urges that the *prima facie* presumption is a "strong presumption" [see memo at 21]. It is not, however, a "strong presumption".[1] Indeed, in the *Butler* case, [insert citation] the Court discussed that a "special exception" lies in the middle-ground between uses that are too deleterious and those for which the potential deleterious effect is not so tangible:

> The uses for which a special exception is required are conceptualized generally as having some deleterious effects on surrounding uses or undeveloped land in the neighborhood—or, stated differently, **may be said potentially not to promote the public safety, health, morals, welfare, and prosperity and, therefore, are not appropriate to be allowed as uses of right.** *See* John J. Delaney et al., *supra,* § 30:1 ("Most [uses for which a special exception is required] are regarded as potentially troublesome because of noise, traffic, congestion, or other associated problems."). The local legislature, however, determines that this potential **may not be so tangible in every case** as to warrant prohibition of the use in the zone or zones; rather, an applicant should be given the opportunity to satisfy an administrative decision-maker (Cite as: 417 Md. 271, *297, 9 A.3d 824, **840)
> that in his/her/its case, such potential does not rise to the level of so likely or actual incompatibility as to rebut the presumption. . . . **After all, a "presumption of compatibility" is nothing more than a rebuttable presumption that the intended use is in the interests of public safety, health, and welfare** . . .**(Cite as: 417 Md. 271, *299, 9 A.3d 824, **840)**
> **Merely concluding that the abstract presumption of compatibility accompanying the inclusion in a zoning ordinance of special exception uses—or the grant of a particular application for a special exception—derives from the general presumption that all parts of a comprehensive zoning scheme advance the general welfare, however, does not end [the court's] inquiry.**

[1] Although the law provides for a "strong presumption" in a variety of other contexts there is not a "strong presumption in favor of a special exception. ("[L]and use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the State's police power to *advance the public health, safety and welfare Montgomery County v. Butler*, 417 Md. 271, 299 (2010) and there is a "strong presumption of correctness and validity" in favor of the "motives or wisdom of the legislative body in adopting original or comprehensive zoning, making it more difficult to be changed. *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 192 Md. App. 218, 232-233(2010). But there is no strong presumption in favor of a special exception.

Montgomery County v. Butler, 417 Md. 271, 297-299 (2010). It is recognized that special exception uses have some potential risk to the public and, therefore, they must be examined on a case-by-case basis. The rebuttable presumption is not the end of the Court's inquiry—it is the beginning.

C. Statutory Requirements and the Application of *Loyola* and *Schultz* Cases

1. Statutory Requirements

The Code provides that a special exception shall be granted when the Board finds that[2]:

(1) The proposed use is consistent with the purpose and intent of the Comprehensive Development Plan and of [chapter 1-19 of the Frederick County Code]; and

(2) The nature and intensity of the operations involved in or conducted in connection with it and the size of the site in relation to it are such that the proposed use will be in harmony with the appropriate and orderly development of the neighborhood in which it is located;

(3) Operations in connection with the special exception at the proposed location shall not have an adverse effect such as noise, fumes, vibration, or other characteristics on neighboring properties above and beyond those inherently associated with the special exception at any other location within the zoning district; and

. . .

Frederick County Code, § 1-19-3.210 (B) (1)-(5). Further §1-19-3.210 (C) incorporates § 1-19-8.339, which provides:

. . .

(I) When permitted in nonresidential zones, a nongovernmental utility shall have an appearance consistent with the surrounding neighborhood.

. . .

2. "Schultz v. Pritts" Standard and Refinement of its Interpretation.

With an understanding of the four separate statutory grounds upon which the Board based its denial of the special exception—the failure under any of them alone being sufficient to warrant denial—it is also necessary to consider the case law applicable. All parties will

[2] Sections of the Code that were not considered as dispositive by the Board are omitted.

recognize that the seminal case is *Schultz v. Pritts*, 291 Md. 1. Yet, there still exists controversy and confusion over the correct interpretation and application of some of the provisions of *Schultz*, which should be clarified.

The *Schultz* court initially held that the test for determining whether a proposed use would have an adverse effect and, should be denied, is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects "above and beyond those inherently associated with such a special exception use irrespective of its location within a zone." *Id*. at 291. However, the progeny of *Schultz* erroneously latched onto dicta from the *Schultz* opinion, providing that the proposed use must be denied if it had an adverse effect on adjoining and surrounding properties different from the adverse effect that would otherwise result from the development of such a special exception use located at other locations within the zone. *See Loyola*, 406 Md. at 90-101 (discussing progeny). Thus, many practitioners, zoning boards, and courts, were requiring a comparative analysis—between the proposed location and other locations within the zone.

The *Loyola* court, however, overruled that erroneous interpretation and held that "the Schultz standard, as presaged in *Anderson*, requires that the adverse effect 'inherent' in a proposed use be determined *without recourse to a comparative geographic analysis* or, in other words, without a comparison of the adverse effects of the special exception use at a location elsewhere in the zone. Any language to the contrary in *Holbrook*, *Lucas*, *Futoryan*, *Hayfields*, and *Mossburg* is disapproved."[3] *Loyola*, 406 Md. at 105 (emphasis added). Thus, no such comparative analysis is required. Instead, the analytical overlay is "focused entirely on the

[3] "The language is a backwards-looking reference to the legislative 'presumptive finding' in the first instance made when the particular use was made a special exception use in the zoning ordinance. It is not a part of the required analysis to be made in the review process for each special exception application. It is a point of reference explication only." *Loyola*, 406 Md. at 106-107.

neighborhood involved in each case." *Id*. at 102. The question is, then, **whether the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.** *Id*. at 102. And this question is asked within the context of each individual factor that a Board considers in evaluating a proposed special exception. *Loyola***,** 406 Md. at 69.

More recently, in *Montgomery County v. Butler,* the Court of Appeals recognized that a legislature can be *more restrictive* than is required by the *Schultz* case. 417 Md. 271, 304 (2010) (even assuming County Code is inconsistent with *Schultz*, it is an appropriate exercise of local legislative authority and discretion). The Court in *Butler* "disagree[d] with the notion that a local zoning ordinance's treatment of special exceptions always must 'be read in context and harmony with the holding in *Schultz*,' and . . . refuse[d] to give such ordinances this 'judicial gloss' when the local legislature has spoken unambiguously to the contrary." *Id*. at 277. Instead, the *Butler* court held that *Schultz* only becomes pertinent and controlling if the zoning ordinance is silent on the matters to which *Schultz* and its progeny speak. 417 Md. at 306.

In sum: First, the law of *Schultz does not* generally require a comparison of the proposed project at the subject location with its impact at any other location in the zoning district. Instead, it only requires a consideration of evidence of potential adverse effects of its proposed use *within the area of such proposed use*. Second, the legislature is free, nevertheless, to develop requirements *more restrictive* than, or contrary to, those provided for by *Schultz*. And, in the present case, §19-10-3-210 (B)(3) *does* impose an additional requirement—a comparative consideration of whether the operations in connection with the special exception have an adverse

effect (above and beyond those inherently associated with the special exception at any other location within the zoning district.

As the Board's opinion reflects, it made proper consideration of the foregoing in determining that the Applicant failed to meet its burden under §§ 1-19-3.210 (B) (1) , 1-19-3.210 (B) (1), 19-10-3.210 (B)(3) and § 1-19-8.339.

ARGUMENT

I. The Board Correctly Applied the Law and Its Decision is Supported by Substantial Evidence.

The Board found that the Applicant failed to demonstrate entitlement to a special exception on four different statutory grounds. The failure *on any one of these four grounds alone* is sufficient to support the denial of the special exception. In each instance, the Board had fairly debatable evidence—evidence from which reasonable persons could come to different conclusions—before it, and it made a determination based upon that evidence. Its determination must, therefore, be upheld. *People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership,* 107 Md. App. 627, 637 (1995). The four grounds for denial are discussed below, along with some of the facts supporting the Board's decision. Sugarloaf notes, however, that much of the factual support underpinning the denial on any given ground also supports the denial on other grounds; the supporting evidence should, therefore, be considered as a whole.

A. The Board correctly found that the proposed use was not consistent with the purpose and intent of the Comprehensive Plan under §1-19-3.210(B)(1) of the Frederick County Code.

1. The Board's determination of inconsistency with the Comprehensive Plan is supported by substantial evidence.

The Board found that the proposed use was not consistent with the purpose and intent of the Comprehensive Plan and Chapter 19 of the Frederick County Code, which is required by § 1-

19-3.210 of the Frederick County Code. In doing so, the Board recognized that the Comprehensive Plan is not a "binding document" but, rather, a guideline to be used by the Planning Commissions, Boards of Appeal, and other entities involved in land use and development, and also that the Applicant did not even need to meet all criteria in the Comprehensive Plan. Op.[4] at 7- 8. Nonetheless, it still found that the Applicant's proposed use was not consistent with the goals of the Comprehensive Plan, which included a balance of the agricultural underpinnings and sense of community, on one hand, and the commercial and residential growth of the County, on the other hand. The Board determined that the proposed use did not coincide with this goal. It recited that the "size of the proposed use is, quite simply, massive." *Id*. at 8. It considered the size, as well as composition—42 acres of galvanized steel, with 50-to-175 foot towers on a gravel base. Indeed, the current zoning map reflects that the area is located in the middle of 20 residential developments—this does not coordinate with the "concept of this particular project, given the size and nature and extent of it with this rural residential community." T4[5] at 34; *see also* Binder submitted by Sugarloaf Conservancy, attachment U.

Under this statutory requirement, the Board gave the Applicant more latitude than was necessary. By only requiring that the special exception be consistent with the goals of the Comprehensive Plan, the Board followed the holding in *Trail v. Terrapin Run, LLC,* 403 Md. 523 (2008). In *Terrapin*, the Court of Appeals held that the comprehensive plan referenced in Md. Code Ann., Article 66B, is a guide to local governments and, therefore, a special exception

[4] Board Opinion, dated 12/20/2010.

[5] T1 = Transcript, Day 1, September 29, 2010.
T2 = Transcript, Day 2, October 14, 2011.
T3 = Transcript, Day 3, November 13, 2011.
T4 = Transcript, Day 4, November 18, 2011.

use does not have to *strictly* comply with it. Instead, it required only a general compatibility with the purposes of the plan. In consideration of the *Terrapin* case, the Board found that even this general compatibility was not satisfied.

But, since *Terrapin*, the Court of Appeals has recognized statutory changes that "purport to abrogate to some extent the holding in the *Terrapin Run* decision." *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n,* 412 Md. 73, 99 (2009); *see also* n.27 and n.28 ("T Sbd53e4ca11721 ***99** S8fb24af914ca1 ****1175**he Preamble to House Bill 297[6], as enacted in Chapter 181 of the 2009 Laws of Maryland, stated the General Assembly's intent to abrogate prospectively this Court's holdings in *Terrapin Run . . ."*).

Nonetheless, the Board, applying the lesser *Terrapin* standard, still determined that the proposed use was not consistent with the purpose and intent of the Comprehensive Plan. As it stated, "[b]oth the Applicant and those opposing the project point to various Chapters of the

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[6] . . . WHEREAS, The decision of the Maryland Court of Appeals in *David Trail, et al. v. Terrapin Run, LLC et al.,* 403 Md. 523[, 943 A.2d 1192] (2008) held that a special exception could be granted even if it did not strictly conform to the comprehensive plan; and

WHEREAS. . . the General Assembly is concerned that a broader interpretation of the decision could undermine the importance of making land use decisions that are consistent with the comprehensive plan; and

WHEREAS, Article 66B, § 4.09 of the Annotated Code of Maryland requires a local jurisdiction to implement the provisions of its local comprehensive plan through "the adoption of applicable zoning ordinances and regulations, planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations that are consistent with the plan;" and

. . .

WHEREAS, The **people of Maryland are best served if land use decisions are consistent with locally adopted comprehensive plans**; and

WHEREAS, It is the intent of the General Assembly to encourage the development of ordinances and regulations that apply to locally designated priority funding areas and allow for mixed uses and bonus densities beyond those specified in the local comprehensive plan by excluding land uses and densities or intensities in the definition of "consistency" for priority funding areas; and

WHEREAS, It is the intent of the General Assembly, . . . that comprehensive plans should be followed as closely as possible while not being elevated to the status of an ordinance **and that deviations from the plan should be rare**....

Greater Baden, 412 Md. 73, 99 n.28 (2009) (emphasis added) (citing the Preamble to HB 297); *see also* HB 297, 17:29-31, SECTION 3 ("AND BE IT FURTHER ENACTED, That it is the intent of the General Assembly that this Act overturn the Court of Appeals ruling in David Trail, et al. v. Terrapin Run, LLC et al., 403 Md. 523 (2007)").

Comprehensive Plan to support their respective positions." Op. at 7. It, therefore, had countervailing evidence from both sides, making the issue fairly debatable. The Respondents produced ample testimony and evidence demonstrating the inconsistency with specific provisions of the Comprehensive Plan. *See, e.g.,* Sugarloaf Conservancy Comments, Tab 5; CAKES Ex[7]. No. 9 (written testimony, 11/13/2011); comments of Sierra Club, dated 9/9/10, filed. 9/13/10, p. 7-9; see also T3 at 110-116 (summarizing), 181-182 (pointing out specific inconsistencies). The Board's determination was also supported by a Finding of Inconsistency from Frederick County Planning Commission, through which the Commission determined the application inconsistent generally due to the location, character, and extent of the proposal, and also that it was inconsistent with 13 of the goals and policies of the Comprehensive Plan. *See* CAKES Ex. No. 7, FCPC Transmittal Memo. 9/16/2010.

This is supported, as well, by an expert witness submitted by CAKES, Mark Holtzinger. *See* CAKES/Opp. Ex. 2 (Holtzinger Resume & Affidavit). Mr. Holtzinger testified that he had reviewed the Comprehensive Plan, and had even worked on it as Director of Engineering. T3 at 90. He testified that the proposed use was not consistent with the Comprehensive Plan, and specifically with the rural reserve as defined therein. *Id*. at 90-93. The Board's finding was also bolstered by the testimony of various individual protestants who stated various bases for findings of inconsistency. T3[8] at 216-220; 222-224; 376-77; *see also* Direct Testimony by the Officers of Sugarloaf Conservancy, Inc., 11/13/2010 (testimony of Nick Carrera, p. 7-8); T3 at 365-67 (testimony of Tamara Austerman, representing Frederick County Association of Realtors,

[7] References to the Record have been made in an attempt to be as clear as possible. Where an exhibit was numbered by the Board, it has been referenced. Certain evidence (e.g., binders and written testimony submitted by the various parties) was not marked and has been identified herein by description of the referenced document.

[8] There are several other examples of such testimony; a sampling is provided here.

addressing inconsistency with character of area, proximity to homes and schools, public infrastructure/utility capacity, and environmental goals).

In any event, the Board need only review the Application and the Comprehensive Plan itself and make its own determination as to its consistency with the Comprehensive Plan[9]. In sum, the Board based its conclusion that the substation was not consistent with the Comprehensive Plan on evidence presented from both sides, which made the issue fairly debatable. The Board's conclusions on this one issue—sufficient alone to uphold the denial of the special exception—should not be reversed.

2. Applicant's claims that the Board imposed an "unachievable standard" are misplaced—all the Board required was compliance with the statute.

Applicant claims that the Board required *complete concealment* of the substation under §1-19-3.210(B)(1), holding it to an unachievable standard. App. Memo.[10] at 32. This is not the case, as is discussed above. And, the matter of *Miller v. Kiwanis Club of Loch Raven, Inc*., 29 Md. App. 285 (1975), cited by Applicant, is inapplicable. In *Miller*, the Court of Special Appeals, held that a board could not deny a special exception on the ground that the requested use would increase vehicular traffic, since there were permitted uses in the zoning district that would have the same effect. *See Exxon, Inc. v. City of Frederick,* 36 Md. App. 703, 706-07 (1977) (discussing *Miller*). The Exxon court clarified that it "did not say that the local zoning authority could not impose reasonable conditions, when authorized by a zoning ordinance, upon the granting of a special exception or conditional use even though such conditions may not be authorized by the ordinance upon permitted uses in the same district." *Id*.

[9] The Comprehensive Plan, as well as all of the associated maps, may be publicly viewed at http://www.frederickcountymd.gov/index.aspx?NID=170 (site last visited September 4, 2011).

[10] Applicant's Memorandum.

Here, the Board determined general consistency with the Comprehensive Plan; it did not even require compliance with specific provisions of the Comprehensive Plan. And it found, for a variety of reasons, that it was inconsistent. Though it considered the massive size of the proposed use (which, makes it inconsistent with the Plan on a variety of grounds) it did not add any additional requirement aside from consistency, which is statutorily required.

B. The Board also correctly found that the proposed use would be inconsistent with the surrounding neighborhood pursuant to §1-19-3.210(B)(2).

1. The Board's determination that the proposed use would not be consistent with the surrounding neighborhood is supported by substantial evidence.

The Board also found that the Applicant did not demonstrate that its proposed use satisfied the requirement under § 1-19-3.210(B)(2): that the nature and intensity of the operations involved, and the size of the site in relation to it, were such that the proposed use would be in harmony with the appropriate and orderly development of the neighborhood. First, the Board considered the nature and intensity of operations, and the size of the site in relation to them. Op. at 9. Second, considering the nature and intensity, the Board determined that the proposed use was not in harmony with the appropriate and orderly development of the neighborhood. Both of these findings were supported by substantial evidence.

With respect to the nature and intensity of the operations involved, the Board's finding is supported by evidence of the proposed structure. It was undisputed that the substation would be the largest substation in Maryland. It would also be one of the largest in the United States. The Applicant referenced only a few other substations similarly-sized in California Europe, and Canada. T1 at 352; T3 at 433-436. The substation would be larger than the Pentagon (42 acres,

which is roughly equivalent in size to the entirety of Baker Park[11]), and have towers taller than the Statue of Liberty. It cannot be disputed that this substation is "massive", and unique in terms of size and function. *See, e.g.,* CAKES Binder, tab 7 (comparing features of proposed Substation with other notable landmarks). It will include seven transformers weighing over 700,000 pounds each, 6 structures 175 feet in height, 10 structures 135 feet in height, a maintenance building, approximately 1.2 miles of 6-foot-tall chain-linked barbed wire fence. T3 at 206. The seven transformers would employ mineral oil, which is less environmentally-friendly, and burns more easily. T1 at 40-42. Each transformer (about 20 feet x 20 feet) will hold nearly 30,000 gallons of oil. T1 at 158-159.

Considering the nature, intensity, and size of this site, the Board determined that the proposed use is not in harmony with the appropriate and orderly development of the neighborhood. This determination is supported by the evidence underlying several bases. To start, a substation fire is atypical of a residential fire. See T1 at 67. The problem is not just one of size, but of the type of fire expected from a transformer failure. It cannot be extinguished with water, which just serves to spread the fire; it requires foam-producing equipment, which Frederick county firefighters do not have. *See* T1 at 40-42. Neither Montgomery, nor Carroll, nor Howard County has the necessary capacity to lend to Frederick County in the event of such an emergency, either. *Id*. And, an oil leak in a transformer may affect the water table, the well, or water quality. T1 at 65.

Likewise, CAKES' expert witness, Mr. Holtzinger, a civil engineer, testified that it would be difficult for the Applicant to screen the facility, even with berming and landscaping, also affecting the harmony and development of the neighborhood. *See* CAKES/Opp. Ex. 2

[11] Baker Park is approximately 44 acres. See http://www.fredericktourism.org/members/view/83/sect:v (site last visited September 4, 2011).

(Holtzinger Resume & Affidavit). It will have "an overwhelming visual impact on the neighborhood." T3 at 88; *compare* Opp. Ex. 6A & 6B (before-and-after photos). The berms, themselves, will negatively impact the neighboring property, in addition to being insufficient to totally block the view of the substation. *Id*. The Applicant's measures to "conceal" the facility would not be sufficient to conceal it from the surroundings. This was evident from the photographs submitted by the Applicant itself. Op. at 8. The Board relied on the Applicant's own testimony that it would not be able to "hide" the facility from surrounding areas, especially those areas directly east of the Subject property. *Id*. At 9. Although Applicant claims that it will be "invisible" (see Memo at 11), its own witness admitted it will be in the view of some of the surrounding areas. *See* T2 at 152-53.

The Board also had the opportunity to visit and observe the surrounding neighborhoods, which weighed into its factual determination. *Id*. At 9. The fact that the proposed facility would be inside a circle surrounded by residentially-zoned, and residentially-used properties ("doughnut hole"), cannot be ignored. *Id*. at 9; see CAKES binder, tab 2 (map demonstrating density of surrounding neighborhoods). The Board also considered the resulting diminution on the fair market value of neighboring property (discussed further, below) as "neither appropriate nor orderly" under the statute.

The Board's finding is supported by *Montgomery County v. Butler*, 417 Md. 271 (2010). There, the applicant sought a special exception to operate a landscape business, which was permitted by special exception. The shape of her property was relevant—it was a long narrow piece of property, with 170 feet along the street frontage, but approximately 700 feet on either side, where the property abutted neighboring lots on either side. Although the applicant's landscaping business was run off-site, she received mulch deliveries (which she agreed to limit

to 2-3 times per week) and employees arrived at the beginning and end of the day. *Id*. at 280. The Hearing Examiner recommended denial mainly because of the proximity of the proposed use to the neighboring lots. *Id*. at 282 ("Because of the commercial use . . .and the closeness . . . to neighboring properties, I do not believe that conditions can be devised that will attenuate these adverse effects adequately."). The Board agreed, finding that "due to the proximity to Week's property, the commercial traffic traveling on the driveway would have servious adverse consequences on that property, that the noise generated would have serious adverse consequences on the adjoining neighbors, and "the configuration of the lots and the proposed use" would cause immediate adverse effects for the neighbors. *Id*. at 282.

The Court of Appeals held that the phrase "detriment to the neighborhood" implied necessarily that the Board was required to determine the detriment to the surrounding properties. *Id*. at 306, 307-08. The Board was not required to consider the adverse effects on an *average neighborhood* but the *specific, actual, surrounding* area. *Id*. The Court of Appeals considered the uniqueness of the property, both in terms of shape and proximity to the neighbors' property line, as well as the location of the driveway, and the inability of bordering trees to mitigate against the nuisance. This supported the Board's finding that the Applicant's "proposed use—deemed a 'very intense and industrial commercial establishment'—would have unique, non-inherent adverse effects on adjoining properties in the immediate vicinity . . .". *Id*. at 308.

Similarly, here, the Board considered, among other things, uniqueness of the property, both in terms of shape and proximity to the 1,300 neighboring properties, as well as the location and the inability to fully mitigate against the adverse effects. As in *Butler*, the Board here was correct in determining that the nature and intensity of the operations are not in harmony with the appropriate and orderly development of the neighborhood.

2. Applicant's argument on this ground is misplaced and circular.

Applicant dedicates less than one page of its 35-page brief to rebutting the Board's finding on this ground. App. Memo. at 33. Its sole argument is that (1) the proposed Substation complies several with other requirements under the Code, and (2) considerations of the Board here (such as size and concealment) are not required under the Code; *ergo*, the Board should not have considered them. This circular argument ignores the very provision—§ 1-19-3.210(B)(2) of the Code—which *requires the Board to consider the harmony* with the appropriate and orderly development of the neighborhood. And harmony implies a determination of things such as size and concealment. If only other sections of the Code were relevant, § 1-19-3.210(B)(2) would not exist. The various factors considered by the Board go to the question of harmony and orderly development under the statute and were, therefore, not improper.

C. The Board properly determined that, under § 1-19-3.210 (B)(3), the Applicant did not demonstrate no adverse effects above and beyond those associated with the special exception at any other location within the zoning district.

1. The Board's denial under § 1-19-3.210 (B)(3) is supported by substantial evidence.

Section 1-19-3.210(B)(3) requires that the operations in connection with the special exception at the proposed location shall not have adverse effects, such as noise, fumes, vibration, or other characteristics, on neighboring properties, above and beyond those inherently associated with the special exception at any other location within the zoning district. Although *Schultz* standard, as explained by the *Loyola* court, does not *require* a comparative analysis, in this section of the Frederick County Code, the legislature elected to incorporate a consideration of the adverse effects compared to those at other locations in the agricultural zone.

The Board considered, therefore, whether the adverse effects would manifest themselves to a greater degree at the proposed location than would otherwise exist in another location in an agricultural district. In doing so, the Board found that the adverse effects of the proposed use included the adverse visual effects and lifestyle effects of those in surrounding neighborhoods and residing on the three sides of the proposed locations. Op. at 11. Likewise, it considered the effects on the water supply and the fair market value of the property. The Board recognized that some adverse effects may be present under any circumstance. However, the Board found that they are magnified at this particular location, as opposed to elsewhere in the zone, because (1) there are a significantly greater number of homes and people affected than may be affected at a more remote location; (2) the proposed location is not a remote location surrounded by other farms or sparsely populated areas, as would be the case in another agricultural area. It found that, because of the "doughnut hole" location, the adverse effects would be worse here than at other locations within the zoning district.

The Board's decision under this sub-section of the statute is supported by the evidence discussed above. It is also well-supported by evidence regarding the diminution in property values of the neighboring properties. The Applicant argues that "even the safety and property value concerns of the protestants will not support a denial unless they are somehow unique to the proposed substation." App. Memo at 21. In doing so, it completely ignores the finding of the Board and the evidence supporting it—the adverse effects to the property values of the homeowners is unique to this substation at this location—this is particularly true due to the unusually massive size of the substation and the unusual set-up of this particular location in which the agricultural land is a "doughnut hole" surrounded by residential neighborhoods.

There was substantial evidence supporting the adverse effects on home prices, certainly enough to make the question fairly debatable before the Board. Mr. Six, an expert in real estate appraisal, was called on behalf of the Citizens Against Kemptown Electric Substation, Inc. ("CAKES"). See Opp. Ex. 1 (Wayne Six Resume). An appraiser of real estate in Frederick County for 29 years, he was asked to develop an opinion as to any change in value resulting from the presence and operation of the proposed substation. T3, 16-17. Mr. Six testified that the property values would decrease as a result of external obsolescence. *Id*. at 21-22. He also examined the loss in value to three specific properties as a result of the substation, and the resulting loss—from 12-20% was directly related to the property's view of the substation. *Id*. at 18. As he stated regarding one property, ". . . right now, they're looking out on a farm. They're going to be looking right out on a 42-acre massive substation. They would have a 20 percent loss in value." *Id*. In other words, the loss in property value is directly related to the vastness of the substation and, therefore, is "unique to the proposed substation." *compare* Memo at 21.

Mr. Six also testified as to what detrimental effects would impact a potential purchaser's determination of the value to be attributed to one of the homes that will be affected by the substation. *Id*. at 25-26. The largest detrimental effect is going to be the view. He specifically focused on the 42-acre size of the proposed substation. *Id*. Likewise, a potential purchaser will be concerned with the potential—whether real or perceived—for the property to catch on fire or to be the subject of a terrorist attack. *Id*. Mr. Six testified that the berm proposed by the Applicant to "conceal" the 42-acre substation "would probably help, but it's not going to cure the problem. I mean, it's a Band-Aid, but is—your patient still has the problem". *Id* at 62.

The Board made specific inquiry to satisfy the statutory requirement that the proposed use not have adverse effects on neighboring properties, above and beyond those inherently

associated with the special exception at any other location within the zoning district. See § 1-19-3.210(B)(3):

> Mr. Clapp: If I understand correctly, the law that—because this is a special exception, it's presumed that there's going to be an adverse effect on neighboring property. Is there anything about its location in this particular spot that creates an adverse condition greater than might exist in any other location?
> Mr. Six: Oh, no doubt. Sure.
> Mr. Clapp: Why?
> Mr. Six: . . . So you got like, ag zoning surrounded by—it's like a doughnut hole in the doughnut would be this farm, and then the doughnut itself would be the R-1 zoning. So to answer your question, there's lots of farms that are surrounded by other farms that wouldn't have this negative impact. Did I answer your question?
> Mr. Clapp: You did. Thank you.

T3 at 69-71. Evidence was also submitted to demonstrate that many other high-voltage substations elsewhere are surrounded by non-developed lands. See, e.g., Opp. Ex. 1 (Testimony of Phillip Thurston) comparing Axton, VA; Catletsburg, KY; Smyth Co., VA; Ironton, OH; Wythe Co., VA; Madison, IN; Farmersburg, IN; and Clear Fork, WV.

Mr. Six also testified, again consistently—under the *Schultz* and *Loyola* requirement that the adverse effects not be above and beyond those inherently associated with such a special exception use—that because of its size and shape, it is different from another similar special exception use, irrespective of its location in the zone. *See Loyola*, 406 Md. at 102.T3 at 71 ("so it's not necessarily the use that's going on there. Its more the size and shape? . . . To the view, yeah. It's what you have to look at, yes, ma'am. That's a very good analysis"). In response to various attempts to determine whether the impact to be suffered by this substation is above and beyond those inherently associated with such a special exception use, Mr. Six testified that he couldn't think of "hardly anything that would have as bad of an impact as this substation." *Id*. at 73.

Mr. Six's testimony supports the Board's findings relating to the adverse visual and lifestyle effects, as well as the adverse effects to the fair market value of the property of surrounding neighborhoods. The Applicant also presented an expert to testify as to the effect on market value of the property. The Board, however, as finder of fact, was entitled to accept or reject that testimony. The testimony of Mr. Six made the question fairly debatable, requiring this Court to give it deference. Any reasonable mind could accept Mr. Six's testimony and find that the nature of this substation caused adverse effects above and beyond those inherently associated with such special exception use (*Loyola,*406 Md. at 102) and above and beyond those inherently associated with the special exception at any other location within the zoning district (§ 1-19-3.210(B)(3).

The Board also referenced the effects on the water supply in its determination. Mr. Thomas Owens, the Director of the Division of Fire and Rescue Services ("Department") for Frederick County, testified that in the event of a transformer fire, leaking oil could affect the water table. T1 at 65. Although the Department's preferred action is to abate the environmental hazard by allowing it to burn itself out, if the fire must be extinguished this could result in the leaking of oil into the ground. *Id*. at 65-66. The containment area is based upon only one transformer leaking—not all of them having a problem, which suggests that in the event of simultaneous failures, containment would not be possible. T1 at 246. If a fire is allowed to burn as is directed, there is more likelihood that more transformers will become involved, and therefore the containment, which would not cover all of the transformers, would be compromised. The proposed project places the containment area in very close proximity to the storm water management pond. T1 at 246.

Further, in the event of an incident, water supply would have to come from somewhere. Chief Owens testified that this may come from ponds, streams, water tankers, portable pools, or other forms of rural water supply. T1 at 72-73. In the event that the municipal water supply was insufficient—as is likely the case here since the hydrants at Bradford Estates are not active—the Department would treat it as rural fire fighting and have to shuttle in water to deal with a fire. T1 at 80.

Further, the risks associated with such a fire would not be as much of a concern if the substation were not surrounded by residential properties. *See* Direct Testimony by Officers of Sugarloaf Conservancy, 11/13/2010, p. 5-6. The increased adverse effects of this Substation, at this location, is also supported in the context of health issues. Written testimony indicated that the proposed substation presents risks to human health that is "too great to warrant the issuing of this special exception permit, especially in an area surrounded by 1,300 plus homes within a 1 mile radius of the site." T3 at 238-40.

This Court need only find any of this evidence sufficient to support the Board's findings. The question is not whether this Court would have made a different determination, but whether there was substantial evidence before the Board for a reasonable mind to have reached the same determination. These issues were made fairly debatable by the presentation of evidence from various witnesses, and any reasonable person could have reached the same determination as the Board. Accordingly, the determination with respect to § 1-19-3.210(B)(3) should be accorded deference by this Court and affirmed.

2. Applicant's claims that the Board misapplied *Schultz* and ignored relevant evidence ignore the correct legal standard, as well as the fairly-debatable evidence before the Board.

Applicant argues that the Board misapplied *Schultz*. But, the Board correctly made a determination—under *Schultz*—that the particular use proposed here, at this particular location, proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *Id*. Loyola, 406 Md. at 102. And, because the specific provision of this subsection of the statute required it, the Board also found that "recognized adverse effects of this special exception use will be greater in this location than in other locations in the agricultural zone." Op. at 12.

In spite of this, Applicant claims that "the Board's decision and its findings did not focus on adverse impacts created by the Substation irrespective of its location within the zone." App. Memo. at 24. However, the *Loyola* court clarified what was meant in Schultz by "irrespective of its location in the zone." It held that "[i]t is clear in examining the plain language of *Schultz*, and the cases upon which *Schultz* relies, that *the* Schultz analytical overlay for applications for individual special exceptions is focused entirely on the neighborhood involved in each case." (citing *Schultz*, 291 Md. at 22-23). And, the Board identified several bases for the finding that the special exception cannot be granted, when considering the factors of §1-19-3.210(B)(3), and "focus[ing] on the particular locality involved around the proposed site." *Loyola*, 406 Md. at 100 (citing *Schultz*, 291 Md. at 15). Contrary to the Applicant's assertions (App. Memo. at 26), several adverse impacts, discussed above, were not inherent to the special exception use, but atypical.

But, further, this subsection of the statute does require a consideration of whether the adverse effects were different at the proposed location than elsewhere in the zone. Applicant

recognizes that the Respondents provided evidence of alternative sites (fn. 14), but instead argues that this consideration is not required by *Loyola*. Although Applicant is correct that the consideration is not required by *Loyola*, the statute does require a consideration of whether the adverse effects are beyond those associated with the special exception at any other location within the zoning district. And, as is discussed above, the Court of Appeals in *Butler* recognized that a statutory requirement can be more demanding than that which is required under the *Loyola* and *Schultz* standards. This consideration was, therefore, proper and the Board's determination was supported by the evidence discussed above.

Applicant further claims that the determination is without substantial evidence because the Board "without explanation, the Board rejected outright the testimony of Petitioner's property value expert, Jay Goldman; instead, the Board relied on protestants' complaints and the unsubstantiated evidence of Mr. Wayne Six." App. Memo at 25. In doing so, however, the Applicant *acknowledges* that the Board had *competing evidence*[12] before it. With competing evidence before it, the Board, as the trier of fact, was charged with determining what weight to give to which testimony and was certainly justified in making a determination after the "fairly-debatable" evidence was considered. *White v. North,* 356 Md. 31 (1999). There is no basis for reversal of the Board's determination.

D. The Applicant did not demonstrate that the appearance of the Substation was consistent with the surrounding neighborhood §1-19-8.339(I).

1. The Board's determination is supported by substantial evidence.

For the same reasons discussed in the preceding sections, the Board's determination that the appearance was not consistent with the surrounding neighborhood, as is required under § 1-

[12] Mr. Goldman is certified in West Virginia, his background and experience is in West Virginia, and he testified as to a property in West Virginia. T3 at 437-38, 440-43, 451-55. Although he disagreed with Mr. Six's methodology, he did not himself carry out any such appraisal relating to the property at issue in this case. *Id*. at 458-63.

19-8.339(I) is supported by substantial evidence. It is incredible for the Applicant to argue that the *appearance* of 42-acres of galvanized steel is consistent with a typical residential subdivision.

Applicant argued that, because there were existing transmission lines already transversing the subject property, there is a consistency of appearance. But the Board focused—as the statute requires that it do—on the surrounding neighborhood. The transmission lines are not located in the surrounding neighborhood. Board member Sepe expanded on this during the final hearing:

> The applicant indicated there are several transmission lines and towers which make it somehow consistent or, you know, similar in appearance, but it's---it's not. The proposal is for 15 towers with six of them 175 feet. There would be additional towers and poles up to about 80 feet. Even though the current site has transmission line[s], it's not a substation and the current footprint of the towers on the agricultural land is minimal compared to the proposed 42 acres of substation. It's a significant difference.
>
> So I don't find that this is gonna have an appearance consistent with the surrounding neighborhood.

T4 at 29. This was expanded upon:

> . . . the problem I have with that [argument] is that the code says the utility shall have the appearance consistent with the *surrounding neighborhood*, not with the property itself.
> . . .
> . . . but when I look at the surrounding neighborhood—and we visited the site, we looked at it, we walked across it, we drove around the various neighborhoods—I—I don't see that this 42-acre site with galvanized steel and the 175-foot towers, the wires, that sort of thing is going to be consistent with the appearance of this rural, residential community . . .

Id. at 35-36. The evidence was fairly debatable; indeed, there was disagreement between two Board members, demonstrating that fair debate. T4 at 65-66. So long as the evidence is fairly-debatable the determination should not be revisited by this Court. In the end, the Board found that the industrial appearance of the massive substation would "come to define the entire area," including the adjoining residential area which is presently a typical residential subdivision in appearance.

2. Applicant advocates the wrong standard under this subsection of the statute.

The cases offered by Applicant to suggest error in the Board's findings under § 1-19-8.339(I) apply the wrong standard and are offered to paint the Board as unduly swayed by unfounded citizen concerns. The question of whether the appearance is consistent with the surrounding neighborhood is not a difficult one; it implies a factual determination that the Board needs to make by simply considering the appearance. And, under *Butler*, the requirement that this consideration be made is simply an allowable and "appropriate exercise of local legislative authority and discretion." *Montgomery County v. Butler*, 417 Md. 271, 304 (2010)

Yet, Applicant argues that under *AT&T*, *Evans*, *Mossburg*, and *Anderson* cases, the Board erred. These cases are not on point. To start, *AT&T*, *Evans*, and *Mossburg*, all consider the *generally* applicable *Schultz* test, not some specific requirement as the Frederick County legislature has required under this provision of the code. And, further, they all also incorrectly apply the *Schultz* standard, employing an analysis of the adverse effects of the use at the proposed location in comparison with the adverse effects that would otherwise result from the development of such a special exception use located elsewhere in the zone. The *Loyola* court overruled cases that apply such a standard. *Loyola*, 406 Md. at 105 (expressly overruling *Mossburg* on that issue).

In addition to applying the wrong standard, the *AT&T*, *Evans*, and *Mossburg* are distinguished on their facts. In *AT&T Wireless Servs. v. Mayor and City Council of Baltimore,* 123 Md. App. 681 (1998), the Board acted more as a mediator than as a trier of fact. It stated that it "felt that time is not a critical issue in the placement of the tower when there is an opportunity to co-locate the tower in another area and still satisfy the needs of the appellant and all parties involved." *Id.* at 689. It stated that the placement at the proposed location "would

only be seasonable at best and there is a suitable site elsewhere in the area needed to be served" *Id*. It also held:

> The Board is also aware of the testimony from the Department of Planning stating that out of approximately seventy-three prior sites for towers/antennas, the Department of Planning was able to accommodate seventy-two of those sites to the satisfaction of all parties involved. The Board feels that if the appellant works with the Department of Planning, a mutually agreeable site can be found.

In other words, it told the parties to "play nice" and come to an agreement. The Court of Special Appeals agreed that "the Board never explicitly set forth what, if any, adverse effects of the tower facility at the proposed site would be greater than the adverse effects at another location within the R-1 zone." *Id.* at 692. As indicated, this standard is not the correct one. Further, in *AT&T*, the Court of Appeals even acknowledged—contrary to the present case—that "[b]ecause the area was not densely populated, that unique feature would, if anything, make the site more appropriate for a tower in an R-1 zone because fewer persons could see it. 123 Md. App. at 681.

In *Evans v. Shore Commc'ns.,* 112 Md. App. 284 (1996), again, the incorrect test was employed to consider whether the adverse effects at the proposed location would be greater than elsewhere within similarly-zoned areas. And, the question there was totally different. There, the question was raised as to the adverse impact of the tower on the rural environment, including the effects on real estate values. *Evans*, 112 Md. App. at 305. The Court of Special Appeals held that the "uniqueness" under the (misapplied) *Schultz* test was not demonstrated simply because the tower was to be placed in a rural area. *Id*. There, there was no expert testimony on behalf of the respondents, value, as there was in this case. But, more significantly, the question of adverse impact on real estate values—or the adverse effects in general resulting from placing a tower in a rural area—is distinct from the simple question of *consistency of appearance* under this section

of the statute. Applicant fails to explain how the Evans case relates to the discussion under this subsection of the statute.

In *Mossburg v. Montgomery Cnty.,* 107 Md. App.1 (1995), again, the Court of Special Appeals applied the wrong test. The consideration was whether there was any evidence that the proposed use at the subject location would have greater environmental or traffic safety impacts than if located in other similarly-zoned acres. The Court found that most of the uses within the industrial corridor drained into the same tributary, producing the same effects upon that tributary. *Id.* at 13. The question has nothing to do with a statutorily-mandated requirement that a consistency of appearance be found between the proposed use and the surrounding neighborhood, as is the case here.

Finally, *Anderson v. Sawyer,* 23 Md. App. 612 (1974) does not require a different holding. There, again, the depressing effects and traffic were inherent in a nursing home and no different with the proposed use. *Id*. at 624-25. And, like in *Mossburg*, there was a question as to the effect on value of neighboring properties. Id. at 625. The protestants in Anderson showed no evidence of the effect on value of neighboring properties. *Id*. Again, however, these considerations were made in the context of a general considerations of adverse effects over and above those inherent in a funeral home. Here, the legislature has opted to ask a separate, specific question, unrelated to the general question of inherent adverse effects, that is, is the appearance consistent. The legislature is entitled to attempt to preserve the general aesthetic of its properties through such a statutory prerequisite.

In sum, because the Applicant failed to satisfy its burden on the four foregoing statutory sections—*and any one of those alone being sufficient reason for the Board to deny the application*—the Board was correct to deny Applicant's request for a special exception.

II. Responses to Additional Issues Raised by Applicant.

A. This Court should disregard applicant's unfounded claims of bias.

The Applicant suggests that the Board was incapable of making an objective, unbiased determination. *E.g.,* App. Memo. at 3 (suggesting that the Board was improperly swayed by the protestants); *id*. at 6 (suggesting the site visit improper and Board member bias). "In determining whether there is either actual bias or an appearance of impropriety on the part of a decision maker in a judicial or quasi-judicial proceeding, we begin with the presumption of impartiality." *Bd. of Educ. of Somerset County v. Somerset Advocates for Educ.*, 189 Md. App. 385, 409 (2009). There being no evidence to suggest otherwise, impartiality is presumed. The Applicant's suggestions are, instead, made for purposes of tainting the credibility of the administrative proceeding before this Court.

B. The Applicant's evidentiary Claims should be ignored.

Applicant argues that the Respondents submitted no evidence in support of their case, and makes a great deal of its expert witnesses, effectively arguing that this Court should discredit the non-expert evidence offered by the other parties to this proceeding. The argument is misleading, since protestants did produce expert witnesses[13], which are discussed above. And, in addition to expert testimony, the evidence submitted by the Sugarloaf Conservancy, Sierra Club, CAKES, and individuals, was substantial, as this Court can note from the approximately 1,400-page-transcript and two large boxes constituting the record, which included multiple binders, power-point presentations, charts, written testimony, and a variety of other documents submitted as exhibits in this case.

[13] CAKES produced two expert witnesses—Mr. Holtzinger and Mr. Six—contrary to Applicant's claim that it only produced one.

In any event, although the protestants *did* produce expert witnesses, they were not required to do so. The Board is allowed to consider and reject or accept any and all of the testimony provided to it, based upon its own observations as trier of fact. *See, e.g., Anderson v. Sawyer*, 23 Md. App. 612, 618 (1974) ("[T]he opinion or conclusion of an expert or lay witness is of no greater probative value than that warranted by the soundness of his underlying reasons and facts").

Although the Board was required to consider the expert evidence submitted by the Applicant, it was only required to weigh that evidence against the other testimony and evidence that it observed. The Board is perfectly entitled to reach a conclusion at odds with such expert evidence, whether it is because it finds the experts not to be credible, or because it simply finds that other countervailing evidence is stronger than that submitted by the expert witness. These determinations fall within the realm of factual determinations to be made by the Board and that cannot be disturbed unless this Court finds that a reasonable mind could not come to the same conclusion.

In *Eger v. Stone*, 253 Md. 533 (1969), for example, the Court recognized that the testimony of a lay witness was sufficient to offset contradictory expert testimony. Various jurisdictions have recognized that a zoning hearing board may reject the testimony of expert witnesses, and can accept the testimony of a neighbor over the opinion of an expert. 83 Am. Jur. 2d Zoning and Planning § 712 (*citing Berman v. Manchester Tp. Zoning Hearing Bd.*, 115 Pa. Commw. 339, 540 A.2d 8 (1988); *Kaeser v. Conservation Com'n of Town of Easton,* 20 Conn. App. 309, 567 A.2d 383 (1989); *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983); *Hersh v. Zoning Hearing Bd. of Marlborough Tp.*, 90 Pa. Commw. 15, 493 A.2d 807 (1985)).

The applicant makes its negative opinion of protestant testimony clear. But, the procedure allows for this testimony to be heard and considered by the Board. Even hearsay evidence is admissible and, if credible and of sufficient probative force, may be the sole basis for its decision. *Redding v. Boad of County Comm'rs for Prince George's County*, 263 Md. 94 (1971). To determine whether evidence is material, it need not be determinative of an outcome—it need only be of such a nature as would tend to influence the making of the decision. *Breedon v. Maryland State Dep't of Educ*., 45 Md. App. 73, 84 (1980). It is beyond the authority of this Court to review the weight given to the evidence in a special exception proceeding. *Entzian v. Prince George's County,* 32 Md. App. 256 (1976). Thus, in spite of Applicant's arguments, the Board was entitled to review, consider, and give weight to all of the relevant evidence submitted during the four-day hearing in arriving at its determination.

CONCLUSION

During the hearing on Applicant's special exception, evidence was submitted by various parties. There is no doubt that the evidence, when considered in the context of §§ 1-19-3.210 (B)(1), 1-19-3.210 (B)(2), 1-19-3.210 (B)(3), and 1-19-8.339, was "fairly debatable." The Board, then, was required to consider that fairly-debatable evidence. In doing so, it determined that the Applicant was not entitled to the special exception. As is discussed above, the legal determination was based upon substantial evidence. Therefore, there being no basis for the Applicant's requested reversal and remand, Sugarloaf asks that Applicant's request be DENIED.

Respectfully Submitted,

MILLER, MILLER & CANBY

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2011, I mailed a copy of the foregoing Response to Petition for Judicial Review by first- class mail, postage prepaid, to:

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