

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

PETITION OF
THE POTOMAC EDISON COMPANY

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FOR JUDICIAL REVIEW OF THE
DECISION OF THE FREDERICK COUNTY
BOARD OF APPEALS

Civil Action No. 10-C-11-000133

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IN THE CASE OF THE APPLICATION OF
THE POTOMAC EDISON COMPANY
(Special Exception)
Before the Board of Appeals for
Frederick County, Maryland
Case No. B-10-08

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**CITIZENS AGAINST KEMTOWN ELECTRIC SUBSTATION, INC'S
MEMORANDUM IN OPPOSITION TO THE POTOMAC EDISON COMPANY'S
PETITION FOR JUDICIAL REVIEW OF THE FINDINGS AND
DECISION OF THE BOARD OF APPEALS FOR FREDERICK COUNTY DATED
DECEMBER 20, 2010**

I. Introduction

On December 20, 2010, the Frederick County Board of Appeals (the "Board") correctly and legally denied an application for a special exception by The Potomac Edison Company ("Petitioner") to construct an electric substation covering 42 acres (the "Substation"). The Substation was proposed to be constructed on an assemblage of land 170.153 acres in size (the "Property") which was purchased by the Petitioner or its affiliates prior to filing its application for special exception approval, is zoned Agricultural ("AG") and located within a one (1) mile radius of approximately 1,300 homes. The proposed Substation was part of a larger project to be constructed in Maryland, West Virginia and Virginia known as the PATH project.

Petitioner asserts that it presented sufficient evidence illustrating the Substation's

compliance with all applicable provisions in the Frederick County Code and Zoning Ordinance (the "Code") and that those opposed to their application, including Citizens Against Kempton Electric Substation, Inc. ("CAKES") which represented the interests of the 1,300 residents within a mile radius of the Property failed to produce evidence to establish that the Petitioner's special exception request did not meet the requirements set forth in the Code, and that the Substation did not satisfy the test set forth in Schultz v. Pritts, 291 Md. 1 (1981).

Despite the Petitioner's characterization of the evidence offered by those opposed to the Substation as "subjective, emotional, and anecdotal" and generally in support of a "NIMBY" position, the record establishes that there was more than sufficient evidence presented to support the decision of The Frederick County Maryland Board of Appeals ("Board"). Accordingly, CAKES respectfully requests that this Court affirm the findings and decision of the Board.

II. Questions Presented

The Petitioner presents to this Court the following questions in its appeal:

1. Did the Board err in its application of Maryland case law, including its application of the Schultz v. Pritts test?
2. Was the Board's decision denying Petitioner's special exception application supported by legally sufficient evidence?

III. Statement of Facts

The Petitioner, at great length in its Memorandum, outlines the history of the proposed substation which has little if any relevance to the subject matter of this appeal and should be disregarded by this Court as the "need" for the substation has no relevance to this appeal. "Need" is not to be considered by the Board because "need" is not one of the general set forth in Section 1-19-3.210 or specific criteria set forth in Section 1-19-8.339. Further, the Petitioner

offers up to this Court a “procedural history” that includes, much to the chagrin of the Petitioner, the efforts of the concerned neighbors in the area to inform their fellow neighbors of the pending application and upcoming hearing on the special exception.

Petitioner takes issue with the efforts of the homeowners whose homes surround the Property upon which the Petitioner proposes to construct one of the largest, if not the largest substations in the entire country in their residential community comprised of 1,300 homes (November 18, 2010 Hearing Transcript Page 29, hereinafter “TR ____, ____, 2010”). According to the Petitioner, any resident who expresses concerns about this massive and unprecedented facility operates with a NIMBY attitude and is dismissed as “fueling resident outrage” (Petitioner’s Memorandum Page 6, hereinafter “Petitioner’s Memo P. ____”).

Petitioner also notes that “... prior to the first night's testimony, the Board visited the Property and walked the Site.” and concluded that the site visit contributed to “a premature death knell for Petitioner’s application”. (Petitioner Memo P. 6). There is no doubt that at the site visit the Board observed with its own eyes the nature of the surrounding neighborhood and the relation of the proposed Substation to it. No doubt, their site visit certainly did assist the Board in determining if the Substation would be in harmony with the appropriate and orderly development of the neighborhood in which it was proposed to be located.

Relevant to this appeal and relevant to the Board’s decision are the details of the special exception use proposed by the Petitioner. In order to build the Substation the Petitioner proposed to grade a significant portion (approximately 73 acres) of the rolling terrain of the Property to create a level surface for the 42 acre Substation. (TR 43, October 14, 2011). The Substation itself was to consist of two buildings constructed of white metal sheeting and a metal roof, numerous transformers and reactors, galvanized tubular steel structures and towers

some of which were to be 175 feet in height. (TR 144, September 29, 2011). The site plan filed as part of the Petitioner's application shows that at least 10 of the galvanized steel towers would be 130 feet in height and 6 of them would be 175 feet in height. (TR 52-52, October 14, 2010). The 42 acre Substation was proposed to be surrounded by fencing six (6) feet in height topped with barbed wire or razor coil (TR 171, 343, September 29, 2011). The elevation of the Substation was proposed to be substantially lower than the 1,300 homes surrounding it. (TR 86-87, November 13, 2011).

In response to the application package submitted by the Petitioner, CAKES submitted a package of information to the Board which included a zoning map depicting the residential neighborhood in which the Substation was proposed, a justification statement in support of its opposition which included data and studies which substantiated its concerns over electromagnetic fields ("EMF's"), supported its concerns over the noise which would be generated by the facility, supported its concerns over safety risks, including those associated with transformer fires, terrorist attacks, and other catastrophic events that could occur at the Substation and included photos of the balloons flown by the Petitioner depicting angles and views of the proposed Substation that Petitioner did not present to the Board.

The Petitioner recounts the testimony of its witnesses in detail and suggests that it is beyond cavil but characterizes the evidence and testimony presented by the opposition as "merely anecdotal and based on blogs, random substation websites and highly questionable reports". (Petitioner's Memo P.14).

Numerous witnesses testified regarding the inherent adverse effects of a substation and how those inherent adverse effects are exacerbated as a result of the unprecedented size of the proposed Substation. In addition, CAKES presented the testimony of two expert witnesses who

testified to the effect of the inherent adverse effects of the Substation on the neighboring properties in the general neighborhood.

Petitioner conveniently omits from its Memorandum any reference to the expert civil engineer, Jeff Holtzinger, retained by CAKES to review and evaluate the plans for the proposed Substation that were submitted by the Petitioner. Mr. Holtzinger testified that he thoroughly reviewed the plans and conducted an extensive site visit in which he observed the site in relation to the 1,300 homes surrounding the proposed location for the Substation. (TR 81 November 13, 2011). Mr. Holtzinger testified that the Substation was going to be an overwhelming visual impact on the neighborhood and that it was not feasible to adequately screen the Substation from the view of the surrounding residences (TR 82, 86-87 November 13, 2011). Further, Mr. Holtzinger testified that the berms proposed for screening were themselves a negative impact on the surrounding residences because some of the berms were placed right on the common property line of the Substation and the residences and thus residents would be looking directly at a 20 foot tall earth berm. (TR 87-88 November 13, 2011).

CAKES also presented the testimony and appraisals of Wayne Six, local appraiser, with 29 years of experience in the local real estate market. Mr. Six testified that he has been appraising real estate in Frederick County for 29 years and has qualified as an expert witness many times in Maryland courts. (TR 16, November 13, 2011). Mr. Six testified that he studied three residential properties proximate to the proposed Substation and concluded that those three residential properties would experience a loss in value ranging from 12 1/2% to 20% based on the presence and operation of the proposed Substation. (TR 17-19, November 13, 2011). Mr. Six opined that the value of the homes would suffer a loss in value because of external obsolescence created by the presence and operation of the Substation. (TR 21-24, November 13,

2011). Mr. Six testified that he studied several local Frederick County properties and was able to quantify the loss in value caused by external conditions. He described the “before” and “after” valuation process that he utilized to determine the actual loss in value for those properties utilizing actual sale prices. (TR 21-24, November 13, 2011). Mr. Six explained that based on actual sales that had occurred where negative external conditions such as a gas station, a sound wall and a landfill were present, the loss in value ranged from 10% to 26% for homes located in Frederick County. (TR 21-24, November 13, 2011). Mr. Six explained the negative impacts associated with the proposed Substation. He noted that the largest negative effect would be the impact on the views currently enjoyed by the surrounding residences. (TR 25, November 13, 2011). Mr. Six opined that the negative impacts on the surrounding residences would be very apparent to a buyer. (TR 28, November 13, 2011). He used the principle of substitution to explain why a buyer would not be willing to pay the same price for the same house, where one house would overlook the Substation and the other would not. Mr. Six explained that:

One of the basic principles of real estate is called the principle of substitution. It states that a typical informed purchaser will pay no more for one property than the cost of acquiring a similar property with similar utility. So why in the world is somebody going to buy a house that has to look out over this massive substation, when you can go, you know, three or four miles away and buy a house that backs up to a regular farm or backs up to a woods or whatever?

(TR 25-26, November 13, 2011).

Chief Thomas Owens, Director of the Frederick County Division of Fire and Rescue Services also presented testimony to the Board regarding inherent adverse impacts associated with a substation, namely the possibility of transformer fires. Petitioner attempts to minimize the concerns expressed by Chief Owens by noting that Chief Owens did not know what type of transformer oil the Petitioner intended to use but Petitioner only revealed what type of oil it would use in the transformers after being pressed to do so. The Petitioner declined to use safer

ester based oil in its transformers and instead proposed to use a more volatile mineral based oil in the transformers because it was more efficient. (TR 171, October 14, 2010). Chief Owens also expressed concern with an adequate water and fire suppressant foam supply to fight a transformer fire. (TR 50-53, 80, September 29, 2010). In an effort to appease the concerns of the neighbors of the catastrophic results of a multiple transformer fire, the Petitioner advised the County staff that it would not be “opposed” to including a fire suppression system in their design and that Petitioner “discussed” with Chief Owens the option of building a stored water supply. (TR 171, October 14, 2010).

The Petitioner called several witnesses in an attempt to establish that the Substation was not a detriment to the neighborhood. Petitioner’s experts failed to convince the Board that the Substation would not be a detriment to the neighborhood which in part was due to the imprecise “studies” conducted by these experts. For instance, the noise study conducted by the Petitioner’s expert, Mr. Silva, projected noise levels only at Property perimeter not noise levels at the surrounding residences. (App. J.S. at 6, TR 478 September 29, 2011). Accordingly, the Board could not accurately assess the noise impacts on the residents surrounding the proposed Substation. The topography of the area is such that the Substation would be built at a much lower elevation than the surrounding homes and thus the noise generated from the Substation would carry over and up (TR 478 September 29, 2011). Mr. Silva testified he projected sound readings at the base of the berms, but Petitioner’s sound expert Mr. Peppin admitted that the sound from the Substation would not travel in that manner. (TR 485-488 September 29, 2011). Furthermore, the Petitioner’s expert, Mr. Peppin believed that the berms proposed to be constructed on the Property were designed and placed for sound attenuation (TR 486 September 29, 2011), when in fact they were only designed and placed in an attempt to screen the lower

structures of the Substation from view and were not designed nor placed for sound attenuation. (TR 152 October 14, 2011).

Moreover, the Petitioner's "expert" appraiser, Mr. Goldman testified that he did not believe that the proposed Substation would have any detrimental affect on the surrounding properties but he did not appraise any of the surrounding properties and he does not appraise property in Frederick County or even Maryland for that matter. (TR 447, November 13, 2011).

The Board, as the finder of fact has in its discretion the right to make its findings based on the evidence presented. The fact that the Board chose to accept Mr. Six's conclusions over the conclusions of Petitioner's expert are well within the discretion of the Board. The Board adopted the rationale behind Mr. Six's conclusion and noted in its findings that:

The rationale for his opinion was based primarily on the adverse effect of having an industrial appearing facility of this size, height and magnitude, directly in the midst of three well established residential neighborhoods. In short, people do not want to pay as much money for a house with a 42 acre electrical substation with 175 foot tall towers in close proximity to the house as they would for the same house without such a facility. (Findings and Decision P. 5, hereinafter "F&D, ____").

The Board declined to accept the conclusion reached by Petitioner's appraiser. Although characterized by the Petitioner as a "highly respected and well credentialed real estate appraiser," Mr. Goldman based his conclusion that the Substation would have no negative impact on the residents' homes on his observations of the value of homes located in the vicinity of a small (2 acre) substation. (TR 440-443 November 13, 2011) Not only were the homes and the substation that Mr. Goldman observed not located in Frederick County, they were not even located in the State of Maryland. (TR 440 November 13, 2011). Moreover, Mr. Goldman never appraised any of the 1,300 homes in the neighborhood because he does not do any appraisal work in Maryland. (TR 447, November 13, 2011).

Although the concept of a 42 acre substation having a detrimental impact on 1,300 surrounding residences was summarily dismissed by Mr. Goldman, Mr. Six, a well respected and well credentialed real estate appraiser who actually appraises property in Maryland and actually appraised 3 of the homes proximate to the Substation, came to a different conclusion.

Based on hours of testimony presented to the Board, and voluminous documentation submitted by the Petitioner and the opposition, the Board voted to deny the Petitioner's request for special exception because the proposed Substation use was inconsistent with the purpose and intent of Frederick County's Comprehensive Plan, nature and intensity of the operations involved in or conducted in connection with the Substation and the size of the relation to the Substation are such that the proposed Substation would not be in harmony with the appropriate and orderly development of the neighborhood in which it is located, the operations in connection with the Substation at the proposed location would 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, and the proposed Substation, being a nongovernmental utility, will not have an appearance consistent with the surrounding neighborhood. (F&D, P. 7-11.)

IV. Standard of Review

Maryland courts recognize two standards of review when reviewing decisions of zoning boards: one for the board's conclusions of law and another for the board's findings of fact and conclusions of mixed questions of law and fact. Cinque v. Montgomery County Planning Board, 173 Md.App. 349, 360, 918 A.2d 1254, 1260 (2006) (quoting Eastern Outdoor Advert. Co. v. Mayor and City Council of Baltimore, 128 Md.App. 494, 514, 739 A.2d 854 (1999)). With regard to a zoning board's factual findings, we must determine "whether the issue before the

administrative body is “fairly debatable,” that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions.’ ” Id. (quoting Stansbury v. Jones, 372 Md. 172, 183, 812 A.2d 312 (2002)).

In zoning matters, the zoning agency is considered to be the expert in the assessment of evidence, not the court. As a result, a court may not substitute its judgment for that of the zoning agency when the issue is rendered fairly debatable. Eger v. Stone, 253 Md. 533 (1969); Omen Group v. Moser, 112 Md. App. 694, reconsideration denied, cert. denied, 344 Md. 568 (1996); Cox v. Prince George’s County, 86 Md. App. 179 (1991). An issue is considered “fairly debatable” if it is supported by substantial evidence such that a reasonable mind might accept as adequate to support a conclusion, even if there is substantial evidence to the contrary. Omen, supra.

Decisions of administrative agencies are prima facie correct and carry a presumption of validity; as a result reviewing courts must review agency decisions in the light most favorable to the agency. Department of Human Resources v. Thompson, 103 Md.App. 175 (1995).

This Court is charged with determining whether the Board’s decision in this matter was “fairly debatable;” that is, if the Board’s decision was supported by substantial evidence such that a reasonable mind might accept as adequate to support a conclusion.

Moreover, in reviewing the Board’s decision, this Court must give deference to the Board by reviewing its decision in the light most favorable to the Board.

It is only the Board's legal conclusions which may be reviewed by this Court without deference to the Board’s legal conclusions. In reviewing for legal error, a court “must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law.” Eastern

Outdoor Adver. Co. v. Mayor and City Council of Baltimore, 128 Md.App. 419, (quoting Richmarr Holly Hills, Inc. v. American PCS, L.P., 117 Md.App. 607, (1997).

But where there are mixed questions of law and fact, the substantial evidence test applies and the Court may not substitute its judgment for that of the zoning agency when the issue is rendered fairly debatable. In Friends of the Ridge v. Baltimore Gas and Electric Co., 120 Md.App. 444, 466, (1998), the Judge Harrell explained:

The substantial evidence standard applicable to the Board's findings of fact and resolution of mixed questions of law and fact, sometimes referred to as the "fairly debatable" test, is implicated by our assessment of whether the record before the Board contained at least "a little more than a scintilla of evidence" to support the Board's scrutinized action. If such substantial evidence exists, even if we would not have reached the same conclusions as the Board based on all the evidence, we must affirm. Stated another way, substantial evidence pushes the Board's decision into the unassailable realm of a judgment call, one for which we may not substitute our own exercise of discretion.

In the present case the questions raised by the Petitioner are questions of fact or mixed questions of law and fact and thus the substantial evidence test applies.

V. Argument

Schultz v Pritts Correctly Applied

The Petitioner asserts that the Board erred when it misapplied the Schultz v. Pritts test in the present case. The Shultz v Pritts test is "whether there are facts and circumstances to show that the particular use at the particular proposed location would have any adverse effects above and beyond those inherently associated with such a special exception irrespective of its location within the zone." Schultz v. Pritts, 291 Md. 1, 22-23 (1981). The Board in its written decision thoroughly explained why the proposed Substation did not satisfy the Schultz v. Pritts test:

The Board finds that the adverse effects of the proposed use in this case include the adverse visual effects that will be experienced by those in the neighborhood, the adverse effects on the lifestyles of those residing on

the three sides of the Subject Property, the potential adverse effects on the water supply and ultimately, the adverse effect on the fair market value of surrounding property. While these adverse effects might be present under any circumstance, they are magnified to an excessive degree in this particular location by the mere fact that there are a significantly greater number of homes and people affected than might otherwise be affected in a more remote location. The circumstances in this case are unique in that the "farm" on which the project is envisioned to be situated is not in a remote location surrounded by other farms or sparsely populated areas, as one might normally expect in an agricultural area; rather, the Subject Property is the "hole in the doughnut" in that it is an oasis of agricultural land surrounded by lands zoned for and used as residential homes. (F&D, P. 11-12).

Special exception cases in Frederick County are unique in that they are to be viewed through the prism of Shultz v Pritts except where the specific sections of the Code require a standard other than Shultz v Pritts be applied. As the Court of Appeals in Montgomery County v. Butler, 417 Md. 271, 304 (2010) recognized, a statutory requirement can be more demanding than that which is required under the Shultz v Pritts standards. Section 1-19-3-210 (B)(3) of the Code requires that "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." (§ 1-19-3-210 (B)(3), emphasis added). The Shultz v Pritts test "speaks pointedly to an individual case analysis focused on the particular locality involved around the site". People's Counsel for Balt. Co. v. Loyola College in Maryland, 406 Md. 54, 104 (2008). The Shultz v Pritts test is to be applied without recourse to a comparative geographic analysis. Id. However, Section 1-19-3-210 (B)(3) of the Code goes further to require the Board to not only focus on the particular locality involved around the site but to also focus on "any other location within the zoning district". The Board did both.

It is clear that the Board determined that the Substation at the particular proposed

location would have adverse effects over and above the adverse effects inherent with the Substation irrespective of its location within the agriculture zone in the County and further determined that the Substation's inherent adverse effects at the proposed location were above and beyond those associated with the Substation "at any other location within the zoning district." The Board found the proposed location to be unique in that it was not in a sparsely populated area that one would normally expect in an agriculturally zoned area, but in fact is located in a heavily populated area in which the site is surrounded by residences. (F&D, P. 12).

Although the recent opinion of the Court of Appeals in People's Counsel for Balt. Co. v. Loyola College, supra. explained that any language in Holbrook, Lucas, Futoryan, Hayfields and Mossburg which speaks to a comparative geographic analysis with regard to the Shultz v Pritts test is disapproved, the Court of Special Appeals decision in Futoryan v. Baltimore, 150 Md.App. 157 (2003) is instructive when applying the criteria set forth in Section 1-19-3-210 (B)(3) of the Code which does require a comparative geographic analysis.

In Futoryan v. Baltimore, the Court was faced with deciding what to do if the proposed special exception use encompassed the entire zone such that it was impossible to determine if the inherent adverse impacts associated with the proposed use were greater than elsewhere within the zone. In answer to this question, the Court of Special Appeals made several key determinations. The Court in Futoryan v. Baltimore held that:

Even when a locational comparison within a zone is a logical impossibility, as in this case, it is still appropriate for the Board of Zoning Appeals to assess a proposed use's adverse impact on the neighboring properties. Even in the absence of a locational comparison within a zone, other comparisons are still appropriate.

Id at 180.

The Court then went on to state by way of example:

The Board might be able to determine, for example, that if a very small B-3-2 zone were completely surrounded by residential zoning, a particular conditional use might be inappropriate that would be appropriate if the B-3-2 zone were surrounded, instead, by an industrial zone, a commercial zone, or an agricultural zone. The Board might be able to determine, for instance, that a conditional use in a small B-3-2 zone completely surrounded by residential zoning and radiating its subversive influence, therefore, through 360 degrees of the compass has a greater deleterious effect than if the B-3-2 zone sits on the edge of the residential zone and casts its harmful rays through a significantly narrower arc.

Id at 180.

The Board addressed both the non-comparative geographic analysis with regard to the Shultz v Pritts and the comparative geographic analysis with regard to Section 1-19-3-210 (B)(3) of the Code. In compliance with Shultz v Pritts, the Board determined that:

The circumstances in this case are unique in that the "farm" on which the project is envisioned to be situated is not in a remote location surrounded by other farms or sparsely populated areas, as one might normally expect in an agricultural area; rather, the Subject Property is the "hole in the doughnut" in that it is an oasis of agricultural land surrounded by lands zoned for and used as residential homes. (F&D P.12).

In compliance with 1-19-3-210 (B)(3) of the Code, the Board also determined that

The recognized adverse effects of this special exception use will be greater in this location than in other locations in the agricultural zone. (F&D, P. 11-12).

The Petitioner further asserts that the Board held the Petitioner to a higher standard in that the Petitioner asserts that the Board required the Petitioner to demonstrate that the Substation would have no adverse impact on the neighboring properties. Petitioner's assertion is simply not supported by the record in this case. In the Board's Findings and Decision, it specifically stated that "while these adverse effects might be present under any circumstance, they are magnified to an excessive degree in this particular location by the mere fact that there are a significantly greater number of homes and people affected than might otherwise be affected in a

more remote location. (F&D, P. 11, emphasis added). The Board clearly acknowledged that the adverse effects might be present under any circumstance but also observed that they are magnified at the proposed location because of the greater number of homes and people affected.

This reasoning is consistent with AT&T Wireless Servs. v. Mayor and City Council of Baltimore, 123 Md. App. 681 (1998) cited by Petitioner. In that case the Court held that:

There was testimony that the Ten Hills area was “bucolic” and “rural,” but again, similar to the situation in *Evans*, the Board failed to state how construction of the tower in question would undermine the rural or bucolic character of Ten Hills or how it would transform the area into a neighborhood “antithetical in character” to that of a rural or bucolic neighborhood. Similarly, although the Ten Hills community may be “unique,” there was no showing that the community's uniqueness would make the presence of a tower more harmful than it would otherwise be if it were located elsewhere in the R-1 zone. The evidence showed that the Ten Hills community was a well-established community with houses located on large, heavily forested lots. Because 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. Additionally, the fact that the houses are on lots surrounded by numerous trees would make the tower facility less objectionable, or at least less visible, than it would if it were located in an area denuded of trees. In sum, we conclude that the subject case cannot be distinguished in material respect from *Evans*, supra.

Id at 699 (emphasis added).

In the present case, there was substantial evidence in the record to establish the area in which the Substation was proposed was unique and that the unique nature of the area would make the presence of the Substation more harmful than it would otherwise be if located elsewhere in the AG zone. The fact that the area in which the Substation was proposed is a densely populated area is a key component of the analysis. Consistent with the Court’s rationale in AT&T Wireless Servs. v. Mayor and City Council of Baltimore, supra., the Substation would be much less appropriate in the location within the AG zone in which it is proposed because so many more people and properties will be impacted by its inherent adverse effects than if it were

located in a less densely populated AG zoned area of the County. Petitioner's only response to the impact on such a densely populated area is that "Petitioner will protect neighboring view sheds as much as reasonably possible" (App. J.S. at 4).

The Petitioner's civil engineer admitted that several key view sheds would not be protected and the Substation would not be screened from view. (TR 152-153, October 14, 2010.) The Petitioner relies solely on the assertion that "visibility, however, is an inherent effect of the Substation, and the Substation will be visible regardless of where it is sited." (Petitioner Memo P.11). What Petitioner does not want linked is exactly what the Board linked in this case; the inherent adverse effects of the visual impact of a 42 acre substation is greater when sited in an area containing 1,300 homes (many of which are higher in elevation than the proposed Substation) than if sited in an AG zoned area that contains far fewer, if any homes that would be subjected to the adverse effects of the Substation. The AG zone is by its nature rural, open and largely undeveloped. The unique feature of this particular area is that it is highly populated and densely developed.

Despite the protestations of the Petitioner, the impact upon property values is a valid adverse effect that the Board could validly consider as part of its determination. Holbrook v. Board of County Comm'rs, 314 Md. 210 (1988).

Wayne Six, an experienced residential real estate appraiser in Frederick County, testified that depending on the location of the particular home in relation to the Substation, the owners of homes in the area could expect a loss of value between 12 1/2% and 20%. (TR 17-19, November 13, 2011).

The Petitioner cites three cases in support of its contention that the Board erred in its application of the Schultz v Pritts test, AT&T Wireless Servs. v. Mayor and City Council of

Baltimore, supra. addressed above, Evans v. Shore Communications, Inc., 112 Md.App. 284 (1996) and Mossburg v. Montgomery County, 107 Md.App. 1 (1995). All three cases were decided prior to People's Counsel for Balt. Co. v. Loyola College, supra. and thus should only be considered in light of the more specific requirements of Section 1-19-3-210 (B)(3) of the Code.

In Evans, supra., the Court of Special Appeals held that the administrative agency erred when the Board failed to make a finding that the adverse effects would be greater in the proposed location than they would generally be elsewhere within the areas of the county where they [communication towers] may be established. Such is not the case in the matter before this Court. The Board specifically found:

While these adverse effects might be present under any circumstance, they are magnified to an excessive degree in this particular location by the mere fact that there are a significantly greater number of homes and people affected than might otherwise be affected in a more remote location. The circumstances in this case are unique in that the "farm" on which the project is envisioned to be situated is not in a remote location surrounded by other farms or sparsely populated areas, as one might normally expect in an agricultural area; rather, the Subject Property is the "hole in the doughnut" in that it is an oasis of agricultural land surrounded by lands zoned for and used as residential homes. The applicant recognizes this in its Justification letter by noting the "contiguous nature of the current large agricultural mass in the region". (F&D P. 12).

The Board clearly relied upon the zoning maps of the area which depicted the "hole in the donut" and relied upon the Petitioner's own description of AG zoned areas in the County noting the "contiguous nature of the current large agricultural mass in the region". The Board cited and relied upon substantial evidence contained in the record to support its conclusion.

In Mossburg, supra., the applicant sought special exception approval for a solid waste transfer station in an I-2 Industrial zone. The administrative agency's decision to deny the requested special exception was overturned in Mossburg because, although the administrative

agency found adverse impacts would be associated with the proposed use, the administrative agency did not articulate any reasons why those adverse impacts would be greater at the proposed location than elsewhere in the I-2 Industrial zone.

In the present case, the Board had no such problem in articulating, based on facts set forth in the record before them, that the Substation would have a greater adverse effect in the proposed location because of the unique “hole in the donut” nature of the proposed location relative to the 1,300 surrounding residences and the fact that other AG zoned areas of the County were much less densely populated and made up of areas characterized by contiguous parcels of land which make up a large agricultural land mass.

The Nature And Intensity Of The Operations Involved In Or Conducted In Connection With The Proposed Substation, And The Size Of The Site In Relation To The Proposed Substation, Are Such That The Proposed Substation Will Not Be In Harmony With The Appropriate And Orderly Development Of The Neighborhood In Which It Would Be Located

The Petitioner argues that the Board improperly based its denial in part on the massive size of a substation whose landscaping will not conceal the facility from its surroundings. (Petitioner Memo P. 16). The Petitioner further asserts that “nowhere in the Code is a substation’s size (other than height, which is not at issue) regulated.” (Petitioner Memo P. 33). Petitioner’s assertions are proverbial red herrings.

The express terms of the Code require that the Board find that 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 would be located.” (Code § 1-19-3-210 (B)(2)). Logically, the nature and intensity of the operations involved are clearly linked to the massive size of the Substation itself. The Board clearly made this link when it expressed in its Findings

and Decision that:

There is no need to repeat that the use of the Subject Property will be intensive. Electrical substations have become common place in industrialized society, and their appearance is well recognized and established. This particular substation is nearly unparalleled in size and scope, The Applicant acknowledged that it will be the largest such substation in Frederick County and, indeed, in Maryland. When asked about other similarly sized substations, the Applicant made reference to several (perhaps four) located in California, Maine and Europe. The opposition groups compared the size of the proposed substation as larger than the Pentagon with towers taller than the statute [sic] portion of the Statue of Liberty.
(F&D P. 9-10).

To suggest that the connection between size of a use and the intensity of operations associated with that use is not permissible not only defies logic but is also contrary to Maryland law. In Futoryan v. Baltimore, supra, the Court noted that:

Even within the same zoning geography, the intensity of the proposed conditional use could also be a factor. A large-scale operation of automobile storage, automobile repair, and body and fender work completely filling, and perhaps spilling over, the entire lot could well be deemed to constitute a degree of adverse influence not constituted by a much smaller automobile repair operation as an auxiliary incident of a service station.

Id. at 180-181.

Accordingly, a 42 acre substation located on 170 acre parcel of land could well be deemed to have a completely different degree of adverse influence than a 2 acre substation located on 170 acre parcel of land.

The Petitioner alleges that the Board was legally flawed in its “unwillingness” to include the 170 acre property on which the 42 acre Substation was proposed as part of the neighborhood it is considering. The Board clearly did consider the 170 acre property as part of the neighborhood when it concluded that the:

The circumstances in this case are unique in that the "farm" on which the project is envisioned to be situated is not in a remote location surrounded by other farms or sparsely populated areas, as one might normally expect in an agricultural area; rather, the Subject Property is the "hole in the doughnut" in that it is an oasis of agricultural land surrounded by lands zoned for and used as residential homes. (F&D P. 11-12)

What is clear from the Board's Findings and Decision is that the Board also considered where the Substation was to be sited on the 170 acre property and concluded that the Substation:

structures are proposed to be placed at less than two hundred feet from adjacent residential properties to the west and several hundred feet from other adjacent properties, The Board does not find that a 42 acre substation bearing the appearance described is harmonious with the surrounding residential areas and does not advance the further development of this area in an appropriate and orderly manner. To the contrary, the Board accepts the evidence that this project will adversely affect the fair market values of the surrounding properties, and that such devaluation is neither appropriate nor orderly. (F&D P. 10)

A review of the site plan submitted as part of the Petitioner's application reveals that several environmental and topographical features dictated that the Substation be sited less than two hundred feet from adjacent residential properties to the west and several hundred feet from other adjacent properties. The Petitioner could not locate the Substation elsewhere on the 170 acre property without impacting the wellhead protection area, streams and mature forest stands. As a result a Substation unparalleled in size and scope (larger than the Pentagon with many of the steel towers taller than the Statue of Liberty) was proposed by the Petitioner to be sited less than two hundred feet from adjacent residential properties to the west and several hundred feet from other residential properties. There was substantial evidence in the record to support the Board's finding that granting approval for a 42 acre Substation was not in harmony with the appropriate and orderly development of the neighborhood in which it would be located.

Proposed Use Is Inconsistent With The Purpose And Intent Of The Comprehensive Development Plan

In an effort to discount the evidence presented by CAKES and others opposed to the approval of the Substation, the Petitioner resorts to characterizing the information submitted by CAKES and others opposed to the approval of the Substation as merely emotional pleadings from protestants with no facts to support their assertions. (Petitioner's Memo P. 30-31). In support of its position that the proposed 42 acre Substation was not consistent with the purpose and intent of the County's Comprehensive Plan, CAKES devoted 11 pages of its opposition package submitted to the Board in advance of the hearings to explaining why the proposed Substation was not consistent with the purpose and intent of the County's Comprehensive Plan. (Opposition Package P. 3-14)

In addition, the Board had before it the decision of the Frederick County Planning Commission which was previously reviewed whether or not the Substation was consistent with the County's Comprehensive Plan. (CAKES Exhibit #7, November 13, 2010). The Frederick County Planning Commission determined that the Substation was inconsistent with thirteen (13) different goals and policies of the County's Comprehensive Plan.

Further, at the November 13, 2010 hearing CAKES introduced expert testimony from Jeff Holtzinger that the proposed Substation was not consistent with the purpose and intent of the Priority Preservation Plan Element of the County's Comprehensive Plan because the 170 acre property was designated as part of the County's Rural Reserve, the purpose of which is to identify and promote the rural agricultural characteristics of the County and the potential for agricultural and resource based industries. (TR 90-93, November 13, 2010).

It is evident from the Findings and Decision of the Board that it was convinced that the rural agricultural characteristics of the County's Rural Reserve areas were a key component to the overall purpose and intent of the County's Comprehensive Plan. In its Findings and Decision the Board concluded that

The Comprehensive Plan also looks to the preservation of the County's rural communities from inharmonious development (specifically in Charters 3: Conserving Our Natural Resources, Chapter 4: Protecting and Preserving Our Heritage, Chapter 5: Preserving Our Agricultural and Rural Community, Chapter 9: Assessing Our Water Resources and Chapter 10: Managing Our Growth). The question, then, is whether the use of the Subject Property as envisioned by the Applicant is consistent with these efforts, The Board concludes that it does not. (F&D, P. 8).

The use of the Subject Property as envisioned by the Applicant is not consistent with the purpose and intent of the Comprehensive Plan which seeks to preserve such areas from uses which are not consistent with that preservation effort. (F&D, P. 9).

There was substantial evidence in the record to support the Board's finding that the 42 acre Substation was not consistent with the purpose and intent of the County's Comprehensive Plan. Based on the testimony of the numerous witnesses in opposition, the 11 pages of specific instances in which the Substation was inconsistent with specific goals and purposes of the Comprehensive Plan, the determination made by the Frederick County Planning Commission that the Substation was not consistent with the County's Comprehensive Plan and the expert opinion offered by Mr. Holtzinger, there was clearly sufficient evidence before the Board to render the issue before the Board fairly debatable, that is, sufficient enough from which reasonable persons could come to different conclusions.

The Proposed Substation Does Not Have An Appearance Consistent With The Surrounding Neighborhood.

In order for the Petitioner to obtain approval of its requested special exception, Petitioner

must satisfy all of the general criteria as set forth in Section 1-19-3.210 of the Code and must satisfy each and every one of the specific criteria set forth in Section 1-19-8.339 of the Code. Section 1-19-8.339 (I) of the Code requires that “when permitted in nonresidential zones, a nongovernmental utility shall have an appearance consistent with the surrounding neighborhood.” The Petitioner does not dispute that the AG zoning district is a nonresidential zone and also does not dispute that the proposed Substation is a nongovernmental utility.

Therefore, in order for the special exception to be approved by the Board, the Board must find that the proposed 42 acre Substation surrounded by fencing six (6) feet in height which will be topped with 3 levels of barbed wire that will contain numerous reactors, 7 massive transformers each of which will be filled with 30,000 gallons of flammable oil and weigh 700,000 pounds, two control buildings constructed of white metal sheeting and a metal roof and sixteen massive steel towers each reaching a height between 130 and 175 feet will have an appearance consistent with the surrounding neighborhood.

In order to adequately access the Board’s conclusion the appearance of the neighborhood must be established. It was well established on the record that the neighborhood is characterized by its 1,300 homes all within a radius of one mile from the Substation site. The Petitioner has never challenged the residential character of the surrounding neighborhood nor the number of homes located within it.

Accordingly, it is the Petitioner’s assertion that it was not at least fairly debatable that the proposed Substation covering a massive 42 acres located in the middle of 1,300 homes did not have an appearance consistent with the neighborhood and thus the Board erred.

Petitioner’s first line of defense is to argue that the “Maryland's appellate courts repeatedly have reversed zoning board decisions in which politically unpopular special

exception applications were denied due to generalized citizen concerns about "aesthetics" and "compatibility" within an area. See, e.g., Deen, supra, (high tension wires); AT&T, supra, (communications tower); Evans, supra, (communications tower); Mossburg, supra, (solid waste transfer station); and Anderson, supra, (funeral home)." (Petitioner Memo P. 28). In support of this first line of defense the Petitioner asserts "There is nothing that distinguishes the citizen testimony in this case from that in the aforementioned cases." (Petitioner Memo P. 28).

What the Petitioner fails to point out is the zoning ordinances applicable in Deen, AT&T, Evans, Mossburg and Anderson did not specifically require Deen, AT&T, Evans, Mossburg or Anderson to demonstrate that their proposed use *had an appearance consistent with the surrounding neighborhood*. The fact that distinguishes the present case from Deen, AT&T, Evans, Mossburg and Anderson is that the specific criteria set forth in Section 1-19-8.339 (I) of the Code in Frederick County requires that an applicant seeking approval for a special exception for a nongovernmental utility to demonstrate that their proposed use have an appearance consistent with the surrounding neighborhood.

Much to the Petitioner's chagrin, the specific requirements of Section 1-19-8.339 (I) require the Board consider "aesthetics" and "compatibility" within the neighborhood and thus make the holdings in Deen, AT&T, Evans, Mossburg and Anderson inapplicable and irrelevant to the review of the Board's decision that the Substation did not meet the specific requirements of Section 1-19-8.339 (I) of the Code.

Presented with evidence that the Petitioner intended to built a massive 42 acre substation proposed to operate 24 hours a day, 365 days a year that contained within it 130-175 foot tall towers, metal buildings with metal roofs, an array of transformers and reactors all surrounded by fencing topped with barbed wire located in the middle of 1,300 existing homes, it was least

fairly debatable that the Board could conclude that the proposed Substation would not have an appearance consistent with the surrounding neighborhood.

Petitioner's second line of defense is to assert that the neighborhood is characterized by the presence of an existing 500 kV transmission line and thus the 42 acre Substation does have an appearance consistent with the surrounding neighborhood. Unfortunately for the Petitioner, this proposition poses a question of fact, not law and unless the Board was arbitrary and capricious in its decision with regard to Section 1-19-8.339 (I), the Board decision can not be disturbed.

The record is clear that the Board considered the existing 500 kV transmission line in its decision. The Chairperson noted that "you saw—you saw the slopes, I saw the towers, John saw the neighborhood" (TR 66, November 18, 2010). Board Member Sepe then noted "I saw the nice views that the saw from the homes" (TR 67, November 18, 2010).

Evidence that the Board considered the presence of the 500 kV transmission line is also contained in the Board's Findings and Decision. The Board said:

Secondly, even if one were to consider that the transmission lines located on the Subject Property are to be considered in assessing the appearance of the surrounding neighborhood, the Board still finds that the presence of these lines do not serve to satisfy the requirements of this section. While the appearance of the existing transmission lines unquestionably bears an industrial appearance, their presence does not define the appearance of the entire area of the Subject Property and its environs. Those lines are merely a part of the picture, and the entire picture, in the opinion of the Board, is that of a residential community surrounded by farm land, albeit with a transmission line running through the farm land.

Be that as it may, the proposed use will magnify, exponentially, the industrial appearance of the area, and will, in the view of the Board, come to define the entire area, including the adjoining residential areas.

(F&D at P. 13).

Moreover, the Board concluded based on the Petitioner's own testimony that the Substation would be visible notwithstanding the screening and berming that was proposed by the Petitioner. Further, the Board had before it the testimony of Jeff Holtzinger, an experienced civil engineer practicing in Frederick County, who testified that it was not possible to effectively screen the massive Substation from the view of the surrounding residences given the topography (TR 86-87, November 13, 2010).

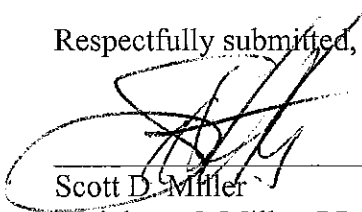
The Board concluded based on substantial evidence that "The appearance of the surrounding neighborhood is that of a typical residential subdivision. The appearance of the proposed substation facility is that of galvanized steel structures, industrial in nature. The two are not consistent." (F&D P. 13).

It is well settled in Maryland law that the zoning agency is considered to be the expert in the assessment of evidence, not the court. As a result, a court may not substitute its judgment for that of the zoning agency when the issue is rendered fairly debatable. Eger v. Stone, supra. The decision of the Board in this case must be considered as prima facie correct and carries with it a presumption of validity, therefore, review of the Board's decision must be viewed in the light most favorable to the Board. See, e. g. Department of Human Resources v. Thompson, supra.

V. Conclusion

For the reasons set forth herein and those as set forth in other Answering Memorandums filed in this case, the Board's decision to deny the Petitioner's special exception request should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2011, copies of the Memorandum in Opposition to The Potomac Edison Company's Petition for Judicial Review of the December 20, 2010 Findings and Decision of the Board of Appeals for Frederick County were mailed, postage prepaid, to

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