IN THE CIRCUIT COURT FOR FREDERICK COUNTY

PETITION OF THE POTOMAC EDISON COMPANY	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE FREDERICK COUNTY BOARD OF APPEALS	* *	Civil Action No.10-C-11-000133
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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THE POTOMAC EDISON COMPANY'S REPLY MEMORANDUM IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW OF THE DECEMBER 20, 2010 FINDINGS AND DECISION OF THE BOARD OF APPEALS FOR FREDERICK COUNTY

The Potomac Edison Company ("Petitioner") and The Sugarloaf Conservancy, Inc. ("Sugarloaf"), Citizens Against Kemptown Electric Substation, Inc. ("CAKES"), the Board of County Commissioners of Frederick County, Maryland (the "Commissioners") and the Frederick County Board of Appeals (the "Board of Appeals") (Sugarloaf, CAKES, the Commissioners and the Board of Appeals are collectively referred to herein as the "Respondents") have markedly different interpretations of both Maryland case law and the Frederick County Code (the "Code") and, as a result, two very different views of the outcome of this case. We discuss below the fundamental flaws in the Respondents' arguments.

I. Respondents' Reliance on *Montgomery County v. Butler* is Misplaced.

In much the same way as the *Butler* court refused to "paint the prevailing County Code with a *Schultz*-colored 'judicial gloss,'" (*Montgomery County v. Butler*, 417 Md. 271, 306

(2010), so, too, should this Court refuse to paint the Code with a *Butler*-colored judicial gloss. Both the facts and the county code provision upon which the *Butler* court's holding were based are readily distinguishable from the case before this Court.

In *Butler*, the Maryland Court of Appeals took great pains to appreciate and distinguish the zoning code of Montgomery County, Maryland. In Montgomery County, the County Council went to great lengths to negate a presumption of compatibility of any given use in any given zoning district. *See Butler*, 417 Md. at 287 *et seq.* In fact, Montgomery County's zoning code and special exception provisions collectively mention at least 19 times that "[t]he fact that an application for [a specific zoning designation, development or site plan approval, or a special exception] complies with all specific requirements and purposes set forth herein does not create a presumption that the application is, in fact, compatible with surrounding land uses, and, in itself, is not sufficient to require the granting of any application." *See, e.g.,* Montgomery County Code Sections 59-C-1.721, 59-C-2.22, 59-C-4.301, 59-C-4.310, 59-C-4.330, 59-C-4.360, 59-C-5.430, 59-C-7.15, 59-C-7.21, 59-C-7.60, 59-C-7.75, 59-C-9.24, 59-C-9.25, 59-C-12.1, 59-D-1.2, 59-D-2.11, 59-D-2.42, 59-D-3.4, and 59-G-1.21. The Respondents reliance upon *Butler* begins with the faulty premise that the Montgomery County Code and the Frederick County Code are equivalent. This is simply not true. In contrast to the Montgomery County Code, the Frederick County Code negates the presumption that special exception uses are compatible only once, in Section 1-19-10.400.2, which states that *mining* activities have "the potential to adversely impact the surrounding area by virtue of the noise, dust, light, glare, vibrations and traffic generated, and may also impact groundwater supplies. Therefore, compliance with or satisfaction of the criteria contained in this section shall not create a presumption of compatibility with nearby land uses, nor shall it require the granting of the requested reclassification." *See also Butler*, 417 Md. at

291, n.15, which cites this Code section. Nowhere does the Code negate the presumption of compatibility as to nongovernmental utilities.

Having considered the restrictions placed upon the presumption of compatibility in the Montgomery County Code, the *Butler* court turned its attention to determining whether the Montgomery County Council, or any local government for that matter, "in enacting its zoning ordinance, is permitted to legislate standards for consideration of special exception applications different than discussed in *Schultz* [*v. Pritts*, 291 Md. 1 (1981)] and its progeny." *Butler*, 417 Md. at 301 *et seq.* The *Butler* court not only found that local governments could so legislate, it cited a case out of Frederick County to underscore its point. Discussing *Gotach Center for Health v. Board of County Commissioners of Frederick County*, 60 Md. App. 477 (1984), the Butler court quoted Judge Wilner, who concluded:

> All that *Schultz* seems to say is that, *absent some clear legislative direction to the contrary,* if a particular kind of impact is required to be taken into account considering a special exception, the impact is to be measured by the test enunciated in *Schultz* and not in *Gowl. We see no reason, however, why a county legislative body cannot adopt a Gowl-type standard in the ordinance itself, if it chooses to do so.*

Butler, 417 Md. at 302 (quoting *Gotach*, 60 Md. App. at 485) (emphasis added in *Butler*).

Despite PATH and the Substation being commonly debated topics in the press and among Frederick County constituents, the Commissioners have taken no action to disturb the presumption of compatibility as it pertains to nongovernmental utilities generally or the Substation in particular when they amended the Code in 2009.[1] In the absence of any stricter

[1] It is worth noting that the Commissioners amended the Code, including sections governing zoning, 18 times in 2009, 15 times in 2010 and 8 times thus far in 2011. Despite having the opportunity, the Commissioners did not seek to restrict the application of *Schultz* by negating the presumption of compatibility as to nongovernmental utilities.

zoning standard than *Schultz*,[2] Petitioner's compliance with and satisfaction of the criteria contained in Code §§ 1-19-3.210 and 1-19-8.339 did, in fact, create a presumption of compatibility with nearby land uses and did require the granting of the special exception by the Board of Appeals. *See generally Butler*, 417 Md. at 293 (citing *People's Counsel for Baltimore Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 71 (2008) ("A special exception...is merely deemed *prima facie* compatible in a given zone"); *Mossburg v. Montgomery County*, 107 Md. App. 1, 7-8; *Creswell v. Baltimore Aviation Serv., Inc.*, 257 Md. 712, 719 ("A special exception is a use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone...." Thus, unlike the court in *Butler*, which was legislatively precluded from doing so, this Court must apply a "*Schultz*-colored judicial gloss" to the facts.

The *Butler* court, while recognizing that local legislatures wear "Sorting Hats" when distinguishing permitted uses from special exceptions, but doubting that they "delve into issues of degree, intensity, or scope of the inherent adverse effects" associated with a special exception, appreciated that Montgomery County took care to distinguish the term "inherent adverse effects" from "non-inherent adverse effects." *Butler*, 417 Md. at 304, n.26. By identifying the discrete differences between these terms, the Montgomery County Code and the holding in *Butler* are further distinguished from the Frederick County Code and this improper Decision of the Board of Appeals.

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[2] "In the absence of a provision in a zoning statute clearly requiring a stricter standard than *Schultz*, *Schultz v. Pritts* applies." *Butler*, 417 Md. at 303 (citing *Mossburg*, 107 Md. App. at 21).

Unlike Montgomery County, Frederick County has not legislated distinctions between inherent adverse effects and non-inherent adverse effects. As discussed in Section II, *infra*, the pith of the Board of Appeals' denial of Petitioner's special exception application is that the proposed Substation has an industrial appearance and is large. *Dec.* at 8-10, 13. These traits, however, are inherent adverse effects of the proposed Substation, for they will be true wherever the Substation will be sited.[3] The fact that the property upon which the 42+/- Substation will be situated is 170+/- acres of agricultural land, which is near residential properties does not somehow change the Substation's industrial appearance or size. They are what they are. If anything is unique about or creates an "unusual characteristic" of the site, it is that the 170+/- acre property is so much larger than the Code requires for the siting of a 42+/- acre substation.[4] *See, infra*, Section II generally. If, however, the Commissioners wanted to empower the Board of Appeals to deny a special exception application based upon non-inherent adverse effects and unusual characteristics of the proposed Substation, such as the heavily relied upon "physical and operational characteristics not necessarily associated with" substations, then it could have legislated such changes. *See, infra,* footnote 9. This Court should not engraft such requirements

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[3] The Board acknowledges that "[e]lectrical substations have become common-place in industrialized society, and their appearance is well recognized and established." Dec. at 9. If electric substations have a "well recognized and established" appearance, one the Board defines repeatedly as "industrial," then query why the Board believes the standard for this Substation's appearance, absent legislation dictating otherwise (there is none), would or should be different at this location.

[4] The minimum lot area required for a nongovernmental utility in an agricultural district is 40,000 square feet, which is less than one acre (which is approximately 43,560 square feet). *See* Code § 1-19-6.100. The property on which the proposed Substation will be situated is approximately 170.150 acres, or 7,411,864.68 square feet. Even if the Code required a minimum of one acre per acre of the size of the Substation – which it does not – the property would exceed that ratio by more than four times over.

upon the Code. The Respondents position would require the Court to apply the holding in *Butler* more broadly than the *Butler* court intended.

II. The express terms of the Code govern – not what the Respondents wish it said.

The Code permits an electric substation by special exception on agriculturally zoned land. (Code § 1-19-3.200.2(B)). To obtain approval, the Petitioner had to show that the Substation complies with Code §§ 1-19-3.210 (general special exception requirements) and 1-19-8.339 (specific special exception requirements for a non-governmental utility use, i.e. the Substation). In addition to Code compliance, Petitioner needed to comply with all other administrative requirements, including all application requirements.

In their memorandum, the Commissioners and the Board of Appeals attempt to argue that the Code should not be read on its face, but rather should be interpreted more broadly than the express words in the Code. Specifically, they seek to assert that the proposed Substation is not a nongovernmental utility, as defined in the Code. This argument is confounding at best.

Petitioner's special exception application for the siting of a nongovernmental utility on agriculturally-zoned land complied with all administrative requirements and provided explicit detail about the Substation. Among other things, the Petitioner provided an executed application, a justification statement, various reports, site plans, maps, letters of authorization, and ten appendices. The application was reviewed by County staff, accepted as part of the record before the Board of Appeals, and weighed upon in the Board of Appeals' decision. At no time prior to the submission of its answering memorandum did the Commissioners and/or the Board of Appeals assert that the application was either incomplete or improperly submitted on the grounds that an application for this particular Substation did not qualify as an application for a nongovernmental utility. This Court should preclude the Respondents from making such an

assertion now and deem this argument to have been waived by the Commissioners and the Board of Appeals in the case below.

Even if this new argument had been asserted below, it is invalid. The Respondents theorize that the proposed Substation cannot be a specially excepted use in an agriculturally-zoned parcel because the definitions under which a substation falls did not contemplate a substation of the "size, scale and scope of the proposed development." (Commissioners' and Board of Appeals' Brief at 4.) This argument is without merit.

As the Commissioners and the Board of Appeals admit, the terms "utility" and "nongovernmental utility" are defined terms in the Code:

> ***NONGOVERNMENTAL UTILITY.*** Any utility *not owned by a governmental entity*. Facilities include all buildings, structures, and land used to house the utility and equipment, *including substations for transforming*, boosting or switching purposes; regulators; *stationary transformers and other such devices for supplying electric service*; telephone offices; radio and television transmitter towers and stations; storage yards; and above ground pipelines.
>
> ***UTILITY.*** *Any facility erected, constructed, altered or maintained as part of an integrated system* or program *designed to furnish* necessary services for the public health, safety or convenience, including water, *electric*, gas, communication (cable, wireless, satellite, telephone), steam or sewer.

The proposed Substation is plainly a "facility erected, constructed...[and] maintained as part of an integrated system," owned by Petitioner and not a governmental entity, "designed to furnish...electric" services through the use of "substations for transforming" and "stationary transformers and other such devices for supplying electric service." Notwithstanding the Respondents' invitation for the Court to stretch the language of the Code to conclude that the proposed facility does not fall within the purview of the Code, the plain language permitted this special exception application.

Respondents argument fails based upon a plain reading of Code § 1-19-3.210(B)(2), which clearly delineates the difference between size and use: "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." (Emphasis added.) The operations of a site are clearly distinguishable in this Code provision from the size of a site. This understanding of the Code is consistent with other Code provisions. *See, e.g.*, Code § 1-19-3.200.1 ("[F]or all applications for a special exception or approval, a statement shall be provided explaining in detail how the use is to be operated. The following information is required to be submitted: (a) Hours of operation; (b) Number of anticipated employees; (c) Equipment involved; and (d) Any special conditions or limitations which the applicant proposes for adoption by the Board."). Notice that the Code does not require the size, bulk, or height of a building or facility to be stated when describing the intensity of the operations[5] or the use[6] occurring at that site. That is because

[5] When discussing the intensity of operations, the *Butler* court referenced the delivery of mulch, the noise beeping made by trucks driving in reverse down a 130 foot driveway, the odors created by decomposing organic material stored on site, etc. *See Butler*, 417 Md. at 307-08. These are all clear example of the intensity of the operations of the landscaping business which was conducted on the property. The Board in the case before this Court, however, did not deny the Petitioner's application based on the operations of the Substation, e.g., the sound generated from the Substation (which the Petitioner's expert testified met or fell below Code requirements (TR 342; 354; 357, Sept. 29, 2010)) or its heavy traffic impact (Petitioner testified that traffic would be minimal (TR 16-17, Oct. 14, 2010)). To do so would have been an apples to apples operations comparison, if you will, to the intensity of operations found to be offensive in the *Butler* case. Rather, the Board improperly equated size and mass to use. If the *Butler* court had done this, it would have focused on the physical size of the landscaping shed ("as long as the Null Building"), the height of the mulch pile ("as tall as the pyramids in Giza"), etc.

[6] The term "use" is defined in Code § 1-19-11.100 as "[t]he principal purposes for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be used, occupied or maintained." The definition for "use" does not include size, height or other physical restrictions.

the Commissioners never intended that the operations of a facility be measured against that facility's size or dimensions.[7] Rather, the Commissioners purposefully differentiated between the two concepts. Thus, for this Court to set a precedent that, absent legislative history or citation in the affirmative, standards and requirements not found in a county code can be implied and should be inferred by zoning boards would, to quote the Respondents, "lead to absurd consequences." (Commissioners' and Board of Appeals' Brief at 5.)

As suggested above in *Butler* and in *Gotach*, the Commissioners have authority to legislate such restrictions, but if they have not adopted such restrictions in the Code, such restrictions cannot arbitrarily be conjured and enforced.[8] The Commissioners could have, before the Petitioner submitted its application, amended the Code to restrict either substations from being located on agriculturally zoned parcels or to restrict their size, height, bulk, etc. within very specific confines.[9] Thus, the Respondents assert no legal grounds on which to make the size of the Substation – whether overtly or under the guise of "intensity of operations" – a central tenet of its denial because there are no such regulations in the Code.

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[7] *See, e.g.*, Code § 1-19-6.100 for design requirements, such as lot area, setback requirements and height restrictions for specific districts.

[8] All of the Respondents emphasize the large size of the Substation. Absent clearly stated controls in the Code as to size, bulk and intensity of use, however, they do not suggest how this Court should determine what would be an acceptable size, etc. If a project the size of the Pentagon is not acceptable, would one the size of a Regal Westview Stadium 16 screen movie theater complex be acceptable? Or perhaps the Frederick Keys Stadium? Arbitrary comparisons are easy to make when the zoning code does not restrict size or bulk, or define intensity, but such arbitrary comparisons are not the province of this Court.

[9] Once again, it is worth noting that the Commissioners amended the Code, including sections governing zoning, a total of 41 times over the past three years, yet at no time did they limit the size, height or definition of a nongovernmental utility.

The Respondents also discuss at length that the Substation will not be concealed from the view of the surrounding neighbors, yet they fail – as does the Board of Appeals – to cite a Code requirement which requires that the Substation be concealed completely or to any specific degree. Other counties have legislated that certain uses be completed screened from view. *See, e.g.*, Wicomico County Code §224-143 ("All public utilities shall be *fully screened.*"); Harford County Code § 267-88(B)(7)(f) ("[f]acilities testing self-propelled machinery shall be buffered with a 100-foot landscaped buffer yard that provides a *100% opaque screen year-round.*"); Queen Anne's County Code § 18:1-49(c) ("Outside storage of material necessary for a permitted home occupation use must be *completely screened* from the view of adjacent streets and properties.") (Emphasis added.) Petitioner, in addition to meeting or exceeding all applicable Code requirements, offered at the hearing to meet all reasonable screening conditions the Board of Appeals might impose in granting the special exception. (TR 21, Oct. 14, 2010). The Board of Appeals rejected the opportunity to establish screening conditions in favor of creating impossible screening standards not found or even suggested in the Code. This Court should preclude the Board of Appeals from creating arbitrary screening requirements when the Commissioners have not legislated actual ones.

III. Respondents' arguments rely on portions of the Code which the Board of Appeals found the Petitioner met.

Respondents rely on the testimony of Fire Chief Thomas Owens, Director of the Frederick County Division of Fire and Rescue Services, asserting that it underscores both the negative impact the Substation could have on the health and safety of the area residents and the Petitioner's reluctance to negate such impact. These assertions are fundamentally flawed for two reasons.

First, Respondents failed to acknowledge that Fire Chief Owens admitted that, prior to his testimony, he had not reviewed Petitioner's application.[10] Moreover, he testified that his knowledge of the Substation consisted of "some comments made by Mr. Dick Ischler[11] based on a face-to-face conversation that [Fire Chief Owens and Mr. Ischler] had as he provided [Fire Chief Owens] with some basic information." (TR 37, Sept. 29, 201). Although Fire Chief Owens correctly stated that certain Substation fires are allowed to burn, he acknowledged that many hazards depend on how the Substation's transformers would be arranged (TR 48, Sept. 29, 2010) and what oils are used (TR 50 and 60, Sept. 29, 2010 ("I do not know which oil they are proposing.")). Fire Chief Owens concluded his testimony by expressing a willingness to work with Petitioner to verify that all of the County's fire and other safety requirements are met. (TR 80-81, Sept. 29, 2010). To that end, Fire Chief Owns met with the Petitioner on October 8, 2010 to outline the issues the Petitioner would need – and agreed – to address to meet Mr. Owens' concerns and Code requirements. *See Exhibit 1 – Minutes from October 8, 2010 meeting.*

Second, and perhaps more importantly, the Board of Appeals' Findings and Decision specifically states which sections of the Code the Board of Appeals believes "have not been satisfied thereby requiring a denial of the application for special exception." (Dec. at 7.) The

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[10] Pursuant to a meeting Fire Chief Owns had with representatives for the Petitioner on October 8, 2010:

> Chief Owens began the meeting by apologizing if his comments, as presented at the Frederick County Board of Appeals ("BOA") hearing (on September 29, 2010), had been a surprise. Chief Owens explained that all development applications are routed through Frederick County Office of Life Safety ("OLS") for review and approval. Some applications, at the discretion of OLS, are also routed to FCFRS for additional review and comment. Unfortunately, the Kemptown Substation application had not been forwarded to FCFRS for review prior to the September 29th hearing.

See *Minutes from October 8, 2010 meeting*, attached hereto as Exhibit 1.

[11] Mr. Ischler is a resident of Mt. Airy who spoke on behalf of CAKES. TR 179 *et. seq.*, Nov. 13, 2010.

Code sections which the Board of Appeals determined the Application did not meet were: Section 1-19-3-210(B)(1) ("The proposed use is consistent with the purpose and intent of the Comprehensive Plan and of this chapter"); Section 1-19-3-2.10(B)(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"); Section 1-19-3-210(B)(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 Section 1-19-8.339(I) ("When permitted in nonresidential zones, a nongovernmental utility shall have an appearance consistent with the surrounding neighborhood"). Although the Board of Appeals mentioned the testimony of Fire Chief Owens and the health and safety concerns raised by others (*see* Dec. at 4), it neither based its findings and conclusions on these concerns nor found affirmatively that the Petitioner had failed to meet those requirements. Fire Chief Owens' testimony is therefore irrelevant to this appeal. The Court should apply its appellate review solely to the elements of the Code which the Board of Appeals found were not met.

IV. <u>This appeal is ripe for review</u>.

The Commissioners and the Board of Appeals argue the Petitioner's appeal is moot because the Petitioner has withdrawn from the Maryland Public Service Commission (the "PSC") its application for a certificate of public need and necessity (a "CPCN") for the electric transmission line commonly known as "PATH." Although the Commissioners and the Board of Appeals adopted the memoranda of CAKES and Sugarloaf, who argue that need is not an

element of the special exception application which must be proven by the Petitioner, the Commissioners and the Board of Appeals assert that absent the need for PATH, the special exception – and this appeal in particular – are now moot. Assuming that the Commissioners and the Board of Appeals are legally able to adopt a theory (need is not an element of the case) which they then disregard (because there is no need, there is no case), this Court should note that the Petitioner explained the need for the Substation merely to put the importance of the selection of the site on which the Substation would be located into context. Moreover, the Petitioner's right to appeal the Board of Appeals' decision does not hinge on any action before the PSC. The Code provide that if an applicant's request for a special exception is denied, the petitioner has 30 days to appeal the decision. *See* Code § 1-19-3.230(a) *et seq.* The Code does not state that if other, related aspects of a project are suspended,[12] the applicant's rights to appeal vanish. Thus, Petitioner has the right to pursue an appeal of an unjust denial of a requested use of its property. For this Court to find otherwise would be akin to finding the Board of Appeals could have revoked the special exception, had it been approved, because the CPCN was withdrawn.

V. An expert witness need not have been personally involved in an activity upon which he testifies as an expert.

The Respondents attempt to discredit the Petitioner's property valuation expert, Mr. Goldman, because he is from West Virginia and not a local appraiser who has actively appraised the properties surrounding the Substation site. Mr. Goldman testified before the Board of Appeals that, having driven through the communities, flown over them in a helicopter, studied land records and historical sales, and visited the County's Land Records office, he was very

[12] PATH has been suspended and not abandoned, for Petitioner and its affiliates "remain convinced the project will be needed and plan to move forward with it...." *See* http://www.prnewswire.com/news-releases/aep-seeks-to-withdraw-applications-for-path-project-117073768.html.

familiar with the Property and the surrounding areas. (TR 438-39, Nov. 13, 2010). Given this knowledge and his years of experience, the opinions of Mr. Goldman should not be discredited or devalued simply because he has not appraised property in Frederick County. *See Maryland Rule 5-702; see also Wantz v. Afzal*, 197 Md. App. 675, 683 (2011) (an expert's knowledge "may be derived from 'observation or experience, standard books, maps of recognized authority, or any other reliable sources'" and that "the mere fact that a person offered as a witness has not been personally involved in the activity about which he is to testify does not, as such, destroy his competency as an expert." (Internal citations omitted)).

VI. The Respondents and the Board of Appeals incorrectly apply the *Schultz* test.

As indicated *supra* in our discussion of *Butler*, *Schultz* makes clear that special exception uses are favored. An applicant that makes a facial showing that its proposal will not cause adverse effects beyond those typically associated with such a use regardless of its location within the zone is entitled to a presumption that the use is appropriate. Once this presumption is established, it can be rebutted only by *"strong and substantial"* evidence. In the case before this Court, the Board of Appeals failed to give Petitioner the presumption of appropriateness after Petitioner stated its *prima facie* case and instead denied the Petitioner's application despite the absence of "strong and substantial existing facts or circumstances showing that the particularized proposed use would have detrimental effects above and beyond the inherent ones ordinarily associated with such uses." *Schultz*, 291 Md. at 14-15. Because the Board of Appeals failed in its decision to cite the strong and substantial evidence upon which it based denial of the Petitioner's special exception application, the Board of Appeals' decision should be overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2011, copies of the Reply Memorandum in Support of 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

1. Michael Chomel, Esquire
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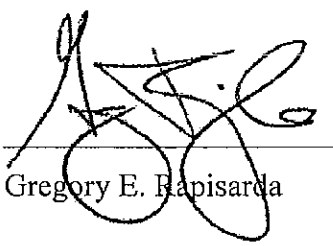

Gregory E. Rapisarda

EXHIBIT 1

Loiederman
Soltesz Associates, Inc.

MEETING MINUTES

ATTENDEES:	Mike Hosier	Applicant
	Dave Purkey	Applicant
	Robert Slebodnik	Applicant
	K.C. Reed	Loiederman Soltesz
	Thomas Owens, Chief	Frederick County Fire / Rescue
	Douglas Brown	Frederick County Fire / Rescue
	Mark McNeal	Frederick County Fire / Rescue
FROM:	K.C. Reed	
CC:	Attendees	
	Bob Cannon	Saul Ewing
	File	
DATE:	October 11, 2010	
MEETING DATE:	October 8, 2010	
SUBJECT:	Kemptown Substation – Meeting with Frederick County Fire & Rescue	
LSA NO:	1814-00-02	

The purpose of the meeting was to further discuss concerns of Frederick County Fire and Rescue Services Division ("FCFRS") pertaining to the proposed Kemptown Substation; specifically, correspondence prepared by Chief Thomas Owens (dated September 29, 2010). The potential solutions discussed to address the safety concerns raised by FCFRS were acknowledged by the Applicant to be contingent entirely upon the proposed Kemptown Substation receiving zoning approval and actually being constructed.

Chief Owens began the meeting by apologizing if his comments, as presented at the Frederick County Board of Appeals ("BOA") hearing (on September 29, 2010), had been a surprise. Chief Owens explained that all development applications are routed through Frederick County Office of Life Safety ("OLS") for review and approval. Some applications, at the discretion of OLS, are also routed to FCFRS for additional review and comment. Unfortunately, the Kemptown Substation application had not been forwarded to FCFRS for review prior to the September 29th hearing.

Following review of the Kemptown Special Exception application, FCFRS expressed the following to the be key concerns:

1. **Water Availability –**

   It was discussed that the immediate area surrounding the proposed substation location did not possess a public water system. Although there is a municipal system within Bradford Estates, internal documentation and recent fire flow

testing confirmed testimony at the hearing that the fire hydrants within Bradford estates are not currently able to sustain flow for fire fighting purposes. Recent field tests showed a 55 psi static pressure (14 psi residual) with significant pressure drops at higher flows. FCFRS clarified that the nearest public water system is located approximately 3.5 miles from the site and that there are no static water sources readily available (constructed with dry hydrants) in the general vicinity.

Put another way, the fire hydrants serving Bradford Estates are not presently sufficient to put out a fire should one occur in that community. Moreover, there are no hydrants available to fight fires in the other neighborhoods adjacent to the proposed Kemptown Substation property.

FCFRS requested that PATH provide a water source to provide sufficient volumes of water to combat a fire. Although the Applicant may need to consider other alternatives, we discussed two options which the Applicant might be able to implement to accomplish this goal:

a. Modifications to the Bradford Estates municipal system that could allow for the system to provide water flow to both the existing community and the proposed substation. This is the preferred option as it would provide a water source for the Substation and correct current deficiencies within the existing system. The Applicant agreed to research the existing system to determine what modifications would be required.
b. Provide a static water source and dry hydrant onsite by constructing an onsite reservoir (pond or tank). M. McNeal of FCFRS provided design specifications regarding the volume required within the reservoir and placement of the dry hydrant. The Applicant further agreed to consider providing an onsite static system should the Option (a), noted above, not be feasible.

Either system should terminate in an accessible hydrant near the termination of the main access road or 'safe zone'. Since this access road, and consequent water supply system, will be accessible to FCFRS (by way of a Knox Box system near Bartholow's Road), the system will afford the requisite fire protection safeguards for the Substation while establishing much needed fire fighting capabilities within the surrounding communities. In other words, the water service which may be provided should the Kemptown Substation receive zoning approval and be constructed will not only meet the fire safety concerns of the Substation, but will also make the neighboring houses safer from fire dangers, including house fires, than they would be should the Substation (and its firefighting systems) not be built.

Since this system may act as part of a 'pump and haul' scenario when in use to serve other parts of the community, the current turn-around area may need to be expanded to accommodate additional emergency response equipment. The Applicant agreed to review the access road and turn-around area configuration to provide a feasible, practical solution mutually agreeable to PATH and the FCFRS.

2. **Site Access –**

PATH clarified that the site access, as well as, the internal Substation access

routes, will be designed to accommodate vehicles and loads that are far in excess of that required for fire fighting equipment. The internal access route shown on the Special Exception application was illustrative that this internal access route will be continuous and will be placed to accommodate vehicular turning radii. It was also clarified that the main access road will secured at both the entrance along the public road and at the Substation fence. A Knox Box system will provide emergency responders access to the site, but access to the Substation itself will be limited until such time that the Applicant's or its affiliate's personnel arrive at the site.

The Applicant clarified that the Substation will be monitored 24 hours a day from a remote location. The Applicant's emergency response time will vary depending on weather conditions and when an event occurs, but is estimated to be between 30 and 60 minutes.

The proposed improvements will also provide vehicular access to other site features, such as line towers. These routes will be improved with a similar material as those of the other access systems, but are currently not designed to accommodate large response vehicles. The Applicant agreed to review the access road and turn-around area configuration to provide a feasible, practical solution mutually agreeable to the Applicant and the FCFRS.

In addition, FCFRS requested that the Applicant consider allowing training exercises to be conducted at the Substation site (prior to energizing the system). The Applicant agreed to consider this request in the future and check into the associated liability issues.

Lastly, FCFRS requested additional information regarding safety equipment, specifically defibrillators, that will available at the Substation or within the service vehicles of the Applicant or its affiliates. The Applicant agreed to research and share this information.

3. **Fire Suppression Systems –**

The Applicant clarified that currently no remotely operated fire suppression systems are proposed as part of the Substation design, for it was felt that the physical clearance between each transformer (70' on center) reduced the concern related to radiant heat of an initial transformer failure. Considering that the use of ester based oil is not feasible and to further reduce this concern, the Applicant offered to construct fire walls between each transformer. FCFRS liked and agreed to the construction of the fire walls should the Substation receive zoning approval and be constructed. In addition, the Applicant clarified that the oil containment system, located at each transformer, will be located underground (stone filled reservoir) and will therefore provide additional fire dampening properties should a transformer breach during a failure. FCFRS was satisfied with this approach to the oil containment system.

FCFRS clarified that the current foam suppression systems on board emergency response vehicles are limited to responses dealing with motor vehicle accidents and do not possess the quantity of foam (or the ability to disperse the foam at higher rates) to respond to a transformer failure. FCFRS clarified that current response units could be retrofitted with additional equipment to disperse foam at a high rate and that the foam concentrate could be stored at the Substation

location. (Such foam typically has a service life of 3-5 years.) The Applicant agreed to share information regarding foam quantities needed to respond to similar transformer failures and to work with FCFRS (a) to possibly store foam concentrate onsite, and (b) discuss what equipment will be needed to disperse the foam.

Lastly, FCFRS agreed to allow the Applicant to characterize the meeting as productive and note the commitments made to satisfy the needs and concerns of FCFRS. This information may also be conveyed to the Board of Appeals.

COMMITMENTS / AGREEMENTS BY THE APPLICANT:

The following commitments / agreements discussed to address the safety concerns raised by FCFRS were acknowledged to be contingent entirely upon the proposed Kemptown Substation receiving zoning approval and actually being constructed:

1. The Applicant agreed to research the existing Bradford Estates water supply system to determine what improvements / modifications would be required to provide adequate water to the Substation, combat a fire, and be accessible for domestic usage.

2. The Applicant agreed that, if Commitment #1 was not feasible, it would provide an onsite static system to provide water to an onsite "Dry Hydrant".

3. The Applicant agreed to review the access road and turn-around area configuration to provide a feasible, practical solution mutually agreeable to the Applicant and the FCFRS.

4. At the request of the FCFRS, the Applicant agreed to consider allowing the FCFRS to conduct training exercises at the Substation site (prior to energizing the system). The Applicant agreed to consider this request in the future and check into the associated liability issues.

5. At the request of the FCFRS, the Applicant agreed to research the availability of safety equipment, specifically defibrillators.

6. The Applicant agreed to share information regarding foam quantities needed to respond to similar transformer failures and to work with FCFRS (a) to possibly store foam concentrate onsite, and (b) to discuss what equipment will be needed to disperse the foam.

7. The Applicant agreed to research the feasibility of installing automatic fire suppression systems and to discuss those findings with FCFRS. FCFRS recognizes that automatic fire suppression systems are mainly used for in-building designs or where exposure hazards exist and that the use of an automatic fire suppression system may not be feasible.

*The above constitutes the writer's understanding of the events and agreements that were made during the meeting. If any of the attendees have a different understanding of the above, please notify the undersigned, in writing, within 5 days of the date of these minutes. Revisions, if any, will be forwarded to all attendees. If no revisions are forthcoming, the minutes will be considered a true and accurate description of the meeting.