

IN THE CIRCUIT COURT FOR FREDERICK COUNTY

PETITION OF *
THE POTOMAC EDISON COMPANY *
c/o James R. Haney *
800 Cabin Hill Drive *
Greensburg, PA 15601 *

FOR JUDICIAL REVIEW OF THE *
DECISION OF THE FREDERICK COUNTY *
BOARD OF APPEALS *
12 East Church Street *
Frederick, Maryland 21701 *

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 *

* * * * *

**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**

I. Introduction

On December 20, 2010, the Frederick County Board of Appeals (the "Board") unlawfully denied an application for a special exception by The Potomac Edison Company ("Petitioner") to construct an electric substation (the "Substation"). The Substation is proposed on 42.745 acres of land (the "Site") situated within an area comprised of 170.153 acres (the "Property"). The Property is zoned "A" for agricultural and is located three miles southeast of New Market, Maryland, and west of Bartholows Road. The Substation is permitted as a special exception in an A zoning district and is part of a larger project to be constructed in Maryland, West Virginia and Virginia that will ultimately improve the reliability of the electric transmission grid in Maryland and the mid-Atlantic region.

The special exception hearing was held over four sessions.¹ Over the course of the hearing, Petitioner presented substantial evidence illustrating the Substation's compliance with all applicable provisions in the Frederick County Code and Zoning Ordinance (the "Code"), and specifically addressed the concerns of opponents. At the same time, opponents, including nearby residents, environmental groups, and activists from Maryland and out of state, offered subjective, emotional, and anecdotal arguments against the Substation and the motives of the Petitioner, and generally in support of a NIMBY² position. The record shows that the Substation fully meets or exceeds the requirements set forth in the Code, and that the Substation passes the test set forth in the seminal zoning case of *Schultz v. Pritts*, 291 Md. 1 (1981). Just as importantly, the record also shows that the opponents failed to produce substantial evidence to show the Substation's noncompliance or that the Substation fails the test set forth in *Schultz*.

In a fourteen-page opinion, the Board denied Petitioner's special exception application on four grounds – none of which provide legal support for the denial. In arriving at its decision, the Board misapplied *Schultz* by requiring the Petitioner to demonstrate that the Substation would have no adverse effects – even those inherently associated with electrical substations. To support a denial, *Schultz* requires a showing that the inherent and non-inherent adverse effects at the proposed location be greater than at other agriculturally zoned property. There was no such showing in this case. In addition, the Board disregarded the substantial evidence offered by Petitioner that shows compliance with each and every special exception requirement in the Code.

¹ The hearing was held on September 29, 2010, October 14, 2010, November 13, 2010, and November 18, 2010. The record was closed at the end of the November 13, 2010 session, and November 18, 2010 consisted of a discussion and oral decision.

² "NIMBY" refers to "Not In My Back Yard," a common position taken by certain opponents whereby the opponents do not necessarily protest the specific proposal but, rather, protest the location of the specific proposal as being too close to their own property.

Ultimately, it appears that the Board was swayed by the incredibly vocal, but factually unsupported, opposition to the Substation. When the record is viewed through the proper legal lens, the abundant evidence supports approval of the special exception application. Consequently, Petitioner respectfully requests that this Court reverse and remand the case to the Board with instructions to grant Petitioner's special exception.

II. Questions Presented

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

A. History of the Proposed Substation

PJM Interconnection, L.L.C. ("PJM") is the regional grid operator that coordinates the movement of electricity, ensures reliability of the transmission system, and plans transmission expansion in thirteen states (including Pennsylvania, New Jersey and Maryland, hence the name "PJM") and the District of Columbia. (Application Introduction, hereinafter "App. Intro." at 1). PJM determined in 2007 that the region's electric transmission system must be upgraded to meet near-future demands and to assure the reliability of the grid in the mid-Atlantic region, including the areas of western and central Maryland, *id.*, and directed Petitioner to construct new transmission lines to address these reliability concerns. *Id.*

The Potomac-Appalachian Transmission Highline (PATH) is a proposed high-voltage interstate transmission line that will traverse West Virginia, Virginia, and Maryland, crossing state lines four times to establish long-term, reliable operation of the regional electric transmission grid. (App. Intro. at 1). PATH will consist of a single 765 kV line that will begin

at the John Amos Substation in Putnam County, West Virginia, pass through the proposed Welton Spring Substation in Hardy County, West Virginia, and end at the proposed Substation in Frederick County, where it will connect with two existing 500 kV lines located on and adjacent to the Property. *Id.* The line will be approximately 276 miles long, with approximately 225 miles in West Virginia, 31 miles in Virginia, and 20 miles in Maryland. (App. Intro. at 1).

Petitioner and its affiliate, PATH Allegheny Transmission Company, LLC (“PATH-Allegheny”), formed PATH Allegheny Maryland Transmission Company, LLC, a Delaware limited liability company (“PATH-MD”), to own and finance the Maryland portions of PATH, including the Substation. (Application, Justification Statement (hereinafter “App. J.S.”) at 1). When authorized by the Maryland Public Service Commission, Petitioner will construct, operate, and maintain PATH in Maryland. *Id.* To date, no existing substation in Maryland has sufficient capacity, based on its equipment capacity, location, or site size, to accommodate PATH. The 765 kV line must have an end terminus that accepts and then “steps down” the voltage to 500 kV, which is a voltage that can be distributed throughout the local and regional grid to lower voltage facilities and, ultimately, to residences, businesses and other end-use customers. (App. Intro. at 1). This “step down” function is the primary role of the Substation. *Id.* To adequately perform this function, the Substation has been designed to include three transmission line shunt reactors and six transformers (Hearing Transcript (hereinafter “TR”) 155, Sept. 29, 2010) situated on 42 acres of the 170 acre Property. Petitioner is pursuing this judicial review because PATH cannot be built without the Substation.³

B. Petitioner’s Application Package

³ Board Chairperson Westdorp acknowledged that, if approved, the Substation could be built even if PATH is not. (TR.410-411, Sept. 29, 2010)

The Frederick County Zoning Ordinance permits an electric substation by special exception on agriculturally zoned land. (Frederick County Code (hereinafter the "Code") § 1-19-3.200.2(B)). To be approved, Petitioner must 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 needs to comply with all other administrative requirements, including all application requirements.

Petitioner's application package complied with all administrative requirements and provided explicit detail, in the form of, among other things, an executed application, a justification statement, various reports, site plans, maps, letters of authorization, and ten appendices. In all, the application package itself, once accepted as part of the record, provided substantial evidence that the Substation complied with all applicable requirements and was permissible under the Code.

C. Procedural History

Petitioner has consistently maintained that the Substation is an integral component of PATH, and subject only to the authority of the Maryland Public Service Commission, and not subject to Frederick County zoning or permitting requirements. (*See* letters in the Record dated July 7, 2009 and August 5, 2010 from Mr. Cannon to Frederick County Assistant County Attorney Richard McCain.) However, pursuant to the letter to the Board dated August 5, 2010 from Mr. Cannon, Petitioner's counsel, Petitioner agreed to proceed in good faith with the County's special exception process under a reservation of its rights to assert the pre-emption argument at any time.

Following PJM's directive to construct PATH, Petitioner began to identify potential sites for the Substation. Once the Property was selected, Petitioner began holding a series of public information meetings to educate the public about PATH.

Prior to the first night of the special exception hearing, well-organized and extremely vocal opposition to, and misinformation about, PATH, including the Substation, spread in the news media, on the internet, and at political town hall meetings and debates. Also prior to the first night's testimony, the Board visited the Property and walked the Site. In the wake of resident outrage fueled by misinformation, and in light of at least one Board member's history of actively opposing projects (*see* the letter in the Record dated December 8, 2010 from Mr. Cannon to the Board), this visit appears to have been a premature death knell for Petitioner's application.

D. The Hearing

1. County Staff Testimony

Frederick County Principal Planner Richard Brace reviewed the sections of the Code which applied to Petitioner's special exception application. (TR 29, Sept. 29, 2010).⁴

Janet Davis, the Historic Preservation Commissioner for the Frederick County Division of Planning, testified that the Historic Preservation Commission concurred with the Maryland

⁴ Mr. Brace also noted that applicable portions of the Code had been "significantly changed in a text amendment process in September of 2000," with the intent of such changes "to have been focused on new substations...in close proximity to residential areas that may not have mature screening and/or appropriate design." (TR 29, Sept. 29, 2010). It is worth noting that neither the 2000 nor the 2009 Code revisions to the applicable portions of the Code incorporated any restrictions on the size or appearance of an electric substation. *See* Board Member Clapp's comments TR 99, Nov. 13, 2010:

I agree that perhaps had this [Substation] been envisioned, the county commissioners *could have* approved the comp plan that provided for something of this size, *but it didn't*. And so we're left with the question of, this type of facility not addressed with regard to size in the comp plan or in the code, is permitted by special exception in an agricultural area.

(Emphasis added.) Furthermore, these Code revisions did not delete the siting of an electric substation from an agricultural parcel so that they could only be constructed on industrial parcels. *Id.*, *see also* TR 497, Nov. 13, 2010 ("this [P]roperty could have been given a different designation when the zoning map was revised but it wasn't").

Historical Trust's determination that the Substation would not have a negative impact on those historic and cultural resources identified and evaluated within a one-mile radius of the Substation. (TR 83-84, Sept. 29, 2010).

Fire Chief Thomas Owens, Director of the Frederick County Division of Fire and Rescue Services, testified as to the safety of the Substation. Fire Chief Owens admitted that, prior to his testimony, he had not reviewed Petitioner's application. In addition, Fire Chief Owens testified that his knowledge of the Substation consisted of "some comments made by Mr. Dick Ischler⁵ 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 are 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.⁶ (TR 80-81, Sept. 29, 2010).

2. Petitioner's Testimony

Over the course of three days and nights of testimony,⁷ Petitioner put on seven witnesses for direct and extensive cross-examination and four rebuttal witnesses. Each and every witness provided substantial evidence in the form of expert testimony and detailed studies which both met all applicable Code requirements and showed that the location and design of the Substation

⁵ Mr. Ischler is a resident of Mt. Airy who spoke on behalf of the Citizens Against Kemptown Electric Substation, Inc. (or "CAKES"). TR 179 *et. seq.*, Nov. 13, 2010.

⁶ See Meeting Minutes dated October 11, 2010 and prepared by Loiederman Soltesz Associates and delivered to Fire Chief Owens, which reflect the meeting Petitioner and its consultants had with Fire Chief Owens and the various agreements the parties made in order to address Mr. Owens' concerns.

⁷ The record was closed at the end of the third session on November 13, 2010, and the fourth session on November 18, 2010, included a discussion and oral decision by the Board.

would not have a greater adverse effect at the proposed Site than it would be in another agriculturally zoned area.⁸

Petitioner selected the Property for the Substation for a number of reasons. The Property is bisected by and adjacent to the two existing 500 kV transmission lines which must connect at the Substation to meet PJM's reliability objectives. (TR 15 and 176, Oct. 14, 2010). The distance from the existing lines played a crucial role in the site selection process, so much so that, at the hearing, Mr. Michael Gogol, a licensed civil engineer, testified that other potential locations were rejected because of their distance from these existing lines. (TR 177, Oct. 14, 2010); *see also* testimony of Mr. William Reed at TR 15, Oct. 14, 2010). The Property was identified as the optimal location for the Substation because it enables the Petitioner "to readily connect [the existing 500 kV transmission lines] to the [S]ubstation with minimal disturbance to the surrounding areas." (TR 177, Oct. 14, 2010).

The 170+ acres on the Property were identified as being in acceptable proximity to the existing lines and as being substantial enough to allow Petitioner to situate the Substation so as to meet all special exception setback requirements. (App. Intro. at 1). Once the Property was identified, Petitioner conducted extensive studies to confirm that the Property would be suitable for the Substation and that the placement of the Substation at the Site would meet all Code requirements. Mr. William Reed, a licensed civil engineer, reviewed the Habitat Assessment and Threatened and Endangered Species Review conducted on the Site. (TR 13 and 28, Oct. 14, 2010). Mr. Reed explained that no evidence of threatened or endangered species had been found on the Property. (TR 13, Oct. 14, 2010).

⁸ *See* Petitioner's Special Exception Application, which provides specific descriptions and detailed reports indicating how the Substation will meet all applicable Code requirements.

Petitioner also conducted a Forest Stand Delineation, Stream and Wetland Investigation and Delineation, and Geotechnical Report. (TR 18, 26 and 34-35, Oct. 14, 2010). This report identified and located environmentally sensitive areas, including stream valleys, steep slopes, and wetlands, on the Site. (App. J.S., at 2). Petitioner complied with the Code and avoided these environmentally sensitive areas when establishing the placement and design for the Substation. *Id.* Moreover, Petitioner's proposed mitigation relating to one onsite forested area includes planting a quantity of trees that will not only meet or exceed the requirements set forth in the Frederick County Forest Resource Ordinance, but will further enhance and protect these sensitive areas by surrounding the stream valleys. *Id.*

Petitioner's witnesses clearly testified that the Substation would not have any adverse impact on the neighboring properties' water resources. (TR 18-19, Oct. 14, 2010). Mr. Gogol explained that while a Wellhead Protection Area encroached upon the northeastern-most portion of the Property, the Site itself did not overlap this area. (TR 480, 485, 489-90, Nov. 13, 2010; App. J.S. at 3). Moreover, while certain components of the Substation's equipment would house oil for the purpose of cooling the transformers, these components would be protected by the oil containment system that Petitioner would construct in accordance with all Frederick County Wellhead Protection, State, and Federal regulations. (App. J.S. at 3).

Mr. Reed also explained that the protection of the area's water resources was a critical consideration of the Substation design. (TR 18-19, Oct. 14, 2010). With the exception of the main access road and internal roads, the Substation pad will consist of a cover of loosely laid gravel. (TR 18, Oct. 14, 2010). This cover will be maintained in a well-draining manner in accordance with the National Electric Safety Code. *Id.* Moreover, all stormwater facilities will be designed in accordance with the Maryland Stormwater Management Act of 2007 and the

recently revised Frederick County Stormwater Management Ordinance. (App. J.S. at 3). By meeting or exceeding all applicable codes, ordinances, and requirements, the Substation will be consistent with the purpose and intent of the Frederick County Comprehensive Plan by having a limited impact on existing surface waters and wetlands. *Id.*

Mr. Gogol also testified that Petitioner conducted a Phase 1 Cultural Resources Survey. (TR 178, Oct. 14, 2010). Pursuant to a January 29, 2010 letter from the Maryland Historical Trust (the "MHT"), the MHT considered the Phase 1 Cultural Resources Survey when conducting its Section 106 review of the effects the Substation would have on these architectural resources / historical properties. *Id.* MHT determined that none of the characteristics of area architectural resource or historical property would be diminished by the Substation. (TR 178-179, Oct. 14, 2010). Given the remarkable suitability of the Site, Petitioner determined that the Site would be the best alternative for ensuring the reliable operation of the regional electric transmission grid. (TR 185-187, Oct. 14, 2010).

Mr. Reed also testified that the Substation will not have any material adverse impact on area roadways. (TR 16-17, Oct. 14, 2010). The Substation will be unmanned, and will require four to five regular maintenance visits each month. *Id.* Mr. Reed testified that these visits would not generate high volumes of either local or regional motor vehicle traffic along the existing roadway infrastructure. *Id.*

Petitioner will protect neighboring view sheds as much as reasonably possible. In fact, Petitioner proposes to grade the Site to create berms and to plant material and trees that will screen the Substation, including many large caliper trees, some of which will be over 20' tall at the time of planting. (App. J.S. at 4). Moreover, Petitioner acquired a location as large as the Property so that it could situate the Substation on the Property as far from the nearest roads and

homes as possible. *Id.* Petitioner acknowledged it is simply impossible to render the Substation invisible from some neighboring or nearby properties. (TR 152-53, Oct. 14, 2010). Visibility, however, is an inherent effect of the Substation, and the Substation will be visible regardless of where it is sited.

Petitioner, in addition to meeting or exceeding all applicable Code requirements, offered at the hearing to meet all reasonable screening conditions the Board might impose in granting the special exception. (TR 21, Oct. 14, 2010). Petitioner's evidence made clear that with the proposed berms, the quantity and quality of the plantings, and the natural screening offered by the Site's location within the Property, the Site offers the lowest overall impact on the surrounding communities. (App. J.S. at 4-5). These factors illustrate that the Substation passes the *Schultz* test and that the Substation would not have a greater impact at this location than elsewhere in the agricultural zone.

Petitioner also studied the noise and the electric and magnetic fields ("EMF") that might emanate from the Substation. (TR 341, Sept. 29, 2010). Mr. Michael Silva, an electrical engineer specializing in issues related to EMF, testified that his firm modeled the EMF which might be generated by the Substation. (TR 341, Sept. 29, 2010). Upon assessing measurements along the Property lines under existing conditions and calculations of EMF based on operation of the Substation under various loading conditions, Mr. Silva concluded that the Substation equipment itself has no material effect on EMF levels at the Property lines due to the equipment's distance from the Property lines. (TR 342; 354; 357, Sept. 29, 2010).

Mr. Silva also testified that his firm conducted a multi-day series of measurements of the existing audible noise environment along the perimeter of the proposed Substation in order to characterize day and nighttime noise levels and identify dominant noise sources (TR 343, Sept.

29, 2010). In addition, Mr. Silva's firm generated computer modeling of the Substation site to predict the noise levels along the property perimeter due to the three transmission line shunt reactors and six transformers proposed for the Substation. (App. J.S. at 6). Specifically, two source noise levels were modeled: one using standard substation equipment, and the other using reduced noise substation equipment. *Id.* The predicted noise levels using standard equipment all modeled to be below the most stringent guideline in the Frederick County noise ordinance at all locations along the Property lines, except on the western border of the Property along an existing transmission line right of way. (TR 382, Sept. 29, 2010). The predicted noise levels using reduced noise equipment modeled to be below the most stringent guideline at all locations along the Property lines. (TR 363; 473, Sept. 29, 2010). Consequently, Petitioner proposed to use the reduced noise equipment when constructing the Substation. (TR 358-359; 363, Sept. 29, 2010).

Mr. Richard Peppin, a mechanical engineer board certified in noise control engineering, offered testimony regarding the audible noise environment along the perimeter of the proposed Substation. (TR 478, Sept. 29, 2010). Mr. Peppin testified that the predicted noise levels at the Property lines were "way below COMAR or Frederick County Code." (TR 478, Sept. 29, 2010).

Dr. Linda Erdreich, a senior managing scientist specializing in epidemiology of EMF, analyzed the EMF findings in the context of leading national and international studies analyzing the health effects of regular EMF exposure. (TR 265, 272, Sept. 29, 2010). Dr. Erdreich concluded that EMF levels along the boundary lines of the Property would be substantially lower than EMF levels recommended for public exposure by the International Commission on Non-Ionizing Radiation and the Institute of Electrical and Electronic Engineers. (TR 274, Sept. 29, 2010). Therefore, Dr. Erdreich testified that the Substation would have no known scientific impact on the neighboring properties. (TR 273, Sept. 29, 2010).

Mr. Ronald Dombrosky, an electrical engineer and senior consulting engineer for the Petitioner specializing in extra-high-voltage practices, testified that the Substation would not generate any discernible fumes or vibrations, and thus would not have any adverse impact on the neighboring properties. (TR 148, Sept. 29, 2010).

Petitioner also offered the expert testimony of a highly respected and well-credentialed real estate appraiser and consultant, Mr. Jay Goldman. Mr. Goldman was very familiar with the Property and the surrounding areas and testified he had driven through the communities, flown over them in a helicopter, studied land records and historical sales, and visited the County's land records office. (TR 438-39, Nov. 13, 2010). With this personal knowledge of the Property and proposed Substation, Mr. Goldman compared the Site to the Quarry Creek development in Charlestown, West Virginia. (TR 440-43, Nov. 13, 2010). Mr. Goldman stated that the Quarry Creek development is the most expensive in the area, with the value of most of the 60 to 65 houses exceeding \$1 million, and three houses exceeding \$5 million. *Id.* Mr. Goldman testified that a large rock quarry and an electrical substation are located at the development's entrance. *Id.* Moreover, the development is adjacent to the main line of CSX Railroad, (which transports high volumes of coal and chemicals), is intersected by power lines, and backs up to the Charleston landfill. *Id.* Mr. Goldman also indicated that the development contains a water tower, a cemetery, and at least one gas well. *Id.* Mr. Goldman testified that despite these perceived negative influences, the property values for the homes in the development remained quite high. (TR 442, Nov. 13, 2010).

Mr. Goldman also testified about a development in Putnam County, West Virginia, which is near the John Amos power plant and the Scott Depot interchange of Interstate 64, is traversed by a 765 kV transmission line similar to the proposed PATH line and two gas transmission lines,

is adjacent to the main line of CSX Railroad, and contains at least one gas well. (TR 442, Nov. 13, 2010). According to Mr. Goldman, despite all of these perceived negative influences, the property was sold to a Virginia developer who paid the most per acre for any development property in the area. *Id.*

Mr. Goldman concluded his testimony by stating that, based upon his education, experience, and personal knowledge, and given that the Substation will be located in the middle of the Property, and largely screened from view, the Substation would not likely substantially impair or prove detrimental to neighboring properties. (TR 445, Nov. 13, 2010).

3. Protestants' Testimony

Individual protestants⁹ were so numerous during the hearing that a separate room in the building where the hearing took place was made available for additional seating. (TR 8, Sept. 29, 2010) Moreover, three organizations – The Sierra Club, The Sugarloaf Conservancy, and CAKES – offered testimony on the third night of the hearing.

Of the countless protestants, including representatives of three groups, testifying in opposition to the Substation, not a single one was: a civil engineer who had conducted a wetland study; an environmental engineer who had conducted an environmental impact review; an historical expert who had conducted a historical impact analysis; an EMF specialist; or an epidemiologist who had examined available health impact studies. While the heated emotions and fears of the protestants were palpable and readily appreciated, the opposition's testimony was anecdotal and based on blogs, random anti-substation websites, and highly questionable "reports." The protestants' testimony, with one exception, was thick with emotion, replete with

⁹ Petitioner refers to the opposition as "protestants" or "opponents" and not "residents" given that a number of those testifying in opposition to the Substation do not live in the neighborhood closest to the Property, much less Frederick County or even the State of Maryland (e.g., Patience Wait of West Virginia).

legal “red herrings,” and consisted of lay testimony raising aesthetic, safety, property value, health and environmental concerns. Moreover, although the opposition questioned the reliability of the habitat and species report, the only evidence offered were anecdotal stories of seeing deer or playing with cows currently living on the Property. (TR 69, Oct. 14, 2010). The one exception noted above was the testimony of Mr. Wayne Six, a Frederick County appraiser familiar to the Board. (TR 14 *et seq.*, Nov. 13, 2010). Mr. Six painted a dreadful picture of falling home values as a result of the Substation, but when asked to provide any substantiating evidence for his conclusions, Mr. Six had none. In fact, Mr. Six testified that he had left his papers back in his office. (TR 40, Nov. 13, 2010 (“I mean, you have to trust me to a point that I have this in my files.”). While this “I promise I’ve got it” evidence from a familiar witness was apparently persuasive to the Board, it falls well short of the burdens of production and/or proof.

Protestants also raised general and unsupported concerns over their wellhead protection. In fact, not one opponent was able to counter Petitioner’s evidence that it would be physically impossible for any oil leak to defy gravity and flow upstream to infiltrate the Wellhead Protection Area. (TR 490, Nov. 13, 2010 (“It will not have any adverse impact. The water's not going to flow uphill.”). Opponents also voiced general and unsupported concerns over the possible health risks associated with EMF exposure. While Petitioner can appreciate many of the heartfelt concerns over possible health risks associated with EMF exposure, none of the opponents’ concerns rise to the level of substantial evidence, much less scientific evidence to support their assertions. While some protestants testified that they could hear the hum of the existing 500 kV wires during a rainstorm (TR 494, Sept. 29, 2010), none of the protestants submitted evidence that contradicted Petitioner’s evidence on compliance with noise

requirements in the Code, much less any evidence that the computer-modeled noise levels exceeded Code requirements.

Finally, and in an effort to apply the *Schultz* test, the opposition suggested several alternate locations for the Substation. There was no evidence presented that these “alternative locations” were in any way suitable for the Substation, much less whether they were even permissible locations under the Code. Instead, the only evidence offered in support of these locations seems to be that they would place the Substation in someone else’s back yard.

D. The Board’s Decision

On November 18, 2010, the Board voted 2-1 to deny Petitioner’s special exception application. Pursuant to the Board’s by-laws, Petitioner asked the Board to reconsider its decision. This request was denied, without discussion, on November 18, 2010. On December 20, 2010, the Board issued a fourteen-page written decision denying Petitioner’s special exception application on four grounds.

First, the Board determined that the proposed use did not comply with § 1-19-3-210(B)(1) of the Code and would be inconsistent with the purpose and intent of the Comprehensive Plan. The rationale behind this section of the Board’s decision is that “the size of the proposed use is, quite simply, massive.” Despite Petitioner’s efforts to mitigate visual impacts, and despite the fact that visibility is an inherent effect of any substation, the Board ultimately found that because Petitioner cannot “hide” the Substation from view, it is not consistent with the purpose and intent of the Comprehensive Plan. (Dec. at 8-9).

Second, the Board found that the nature and intensity of the operations involved in or conducted in connection with the Substation and the size of the Site in 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. (See Code § 1-19-3-210(B)(2); see also, Dec. at 9). Specifically, the Board found that the size and appearance of the Substation created an incompatible industrial-looking use, noting that “[t]here is little, if any, property in the areas south of I-70 and east of Green Valley Road which is zoned for either industrial or commercial uses.” (Dec. at 10).

Third, the Board found a violation of § 1-19-3-210(B)(3) of the Code, which requires no greater adverse effects at the proposed location than elsewhere within the zoning district. The Board provided that it “is charged with the duty and obligation to review this conditionally permitted use^[10] in light of the various criteria established in the zoning code provisions.” (Dec. at 11) The Board found that , because of the number of houses surrounding the Property, the operations in connection with the Substation at the Site on the Property would have a greater adverse visual, lifestyle, fair market value and potential water supply impact than if the Substation were proposed “in a more remote location.”

Fourth, the Board found a violation of § 1-19-8.339(1) of the Code because the Substation, being a nongovernmental utility, would have an appearance inconsistent with the surrounding neighborhood. (Dec. at 12-13).

III. Standard of Review

This Court considers a petition for judicial review on zoning matters under a bifurcated standard. With respect to factual findings, the Court must determine whether “there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Critical Area Comm’n for the Chesapeake and Atlantic Coastal Bays v. Moreland*, 418

¹⁰ See discussion of application of *Schultz v. Pritts*, 291 Md. 1 (1981), on page 19 *et seq.* of this memorandum.

Md. 111, 122-23 (2010) (internal citations omitted). When making this determination, this Court must determine “if reasoning minds could reach the same conclusion based on the record...” *Hayfields, Inc. v. Valleys Planning Council*, 122 Md. App. 616, 629 (1998) (citations omitted); *see Heard v. Foxshire Assocs., LLC*, 145 Md. App. 695, 700 (2002) (quoting *Bullock v. Pelham Wood Apartments.*, 283 Md. 505, 512 (1978)). Thus, with respect to factual questions, the issue is whether the Board's decision was supported by substantial evidence from which a reasonable finder of fact could have reached the Board's conclusion. *See E. Outdoor Adver. Co. v. Mayor of Baltimore*, 146 Md. App. 283, 301 (2002). Substantial evidence means more than a scintilla of evidence “such that a reasonable person could come to more than one conclusion.” *Id.* (quoting *Wisniewski v. Dep’t. of Labor*, 117 Md. App. 506, 516-17 (1997)).

The Board's legal conclusions, on the other hand, are considered by this Court *de novo*. *See Hayfields, Inc.*, 122 Md. App. at 629; *Heard*, 145 Md. App. at 699-700 (quoting *United Parcel v. People’s Counsel*, 336 Md. 569, 577 (1994)). On issues of law, no deference is paid to the Board. *E. Outdoor Adver. Co.*, 128 Md. App. at 514 (citing *Richmarr Holly Hills, Inc. v. Am. PCS, L.P.*, 117 Md. App. 607, 652 (1997), *cert. denied*, *Baltimore v. Eastern Ad*, 358 Md. 163 (2000)). Therefore, with respect to legal conclusions, this Court must make the determination of whether the administrative decision is based on an erroneous conclusion of law. *Heard*, 145 Md. App. at 699-700 (quoting *United Parcel*, 336 Md. at 577).

V. Argument

The Board erred when it misapplied the *Schultz* test by determining that there would be less adverse effects at some unspecified “more remote location.” (*See* Dec. at 11; *see also* fn 13, *infra*). Additionally, the Board erred in finding that there was either no substantial evidence to

support the Substation's compliance with the Code, or that reasonable minds could differ on whether there was substantial evidence to support such a finding.

The rule that “[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” is well settled and longstanding. *Creswell v. Baltimore Aviation Servs., Inc.*, 257 Md. 712, 719 (1970). A special exception is a “valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, *prima facie*, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding.” *Rockville Fuel & Feed Co. v. Bd. of Appeals of Gaithersburg*, 257 Md. 183, 188 (1970); *see also Montgomery Cnty. v. Merlands Club, Inc.*, 202 Md. 279, 287 (1953). The special exception use carries with it the presumption that “it is in the interest of the general welfare, and therefore, valid.” *Schultz*, 291 Md. at 12.

The Board plainly failed to apply the correct legal analysis to the applicable facts, and ignored burden of production and persuasion issues, along with binding appellate precedent. Below, Petitioner discusses the legal framework for evaluating special exception applications, and demonstrates how the Board failed to properly apply that law with respect to its final decision.

A. The Board erred in its application of the *Schultz v. Pritts* test.

- 1. The proposed substation at the proposed location will not create greater adverse effects such as noise, fumes, vibration, or other characteristics above and beyond those inherently associated with a substation than if the substation were located elsewhere in the zoning district.**

The seminal case enunciating the standard by which special exception questions are resolved is *Schultz v. Pritts*, 291 Md. 1 (1981). In *Schultz*, the Court held that

the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied 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 inherently¹¹ associated with such a special exception irrespective of its location within the zone.*

Id. at 22-23 (emphasis added).

The applicant has the initial burden of producing evidence that the proposed use does not have disproportionate adverse impacts. *See Futoryan v. Mayor of Baltimore*, 150 Md. App. 157, 171-72 (2003) (relying upon *Anderson v. Sawyer*, 23 Md. App. 612, 617 (1974)); *see, e.g., Turner v. Hammond*, 270 Md. 41, 54-55 (1973); *Cason v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 261 Md. 699, 706-07 (1971); *E. Outdoor Adver. Co.*, 146 Md. App. at 309; *B.P. Oil, Inc. v. Cnty. Bd. of Appeals for Montgomery Cnty.*, 42 Md. App. 576, 579-80 (1979). When that burden has been met, the applicant is entitled to a presumption that the use is appropriate. *See, e.g., Schultz*, 291 Md. at 11-13. "Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere." *Mossburg v. Montgomery Cnty.*, 107 Md. App. 1, 9 (1995).

The presumption in favor of the special exception use "cannot be overcome unless there are *strong and substantial* existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses." *Anderson*, 23 Md. App. at 625 (emphasis added); *see Moseman v. Cnty.*

¹¹ The Board refers to the Substation as a "massive" and "industrial" looking facility, but fails to indicate how the appearance of the Substation at this location creates adverse effects above and beyond those inherently associated with such a substation irrespective of its location within the zone.

Council of Prince George's Cnty., 99 Md. App. 258, 263 (1994) (explaining that there must be evidence presented to rebut the presumption that a special exception use is in the interest of the general welfare (citing *Sharp v. Howard Cnty. Bd. of Appeals*, 98 Md. App. 57, 86 (1993))), *cert. denied*, 335 Md. 229 (1994)). Lastly, the adverse impact caused by the proposed special exception must be unique and atypical to justify denial. *See, e.g., Mayor of Rockville v. Rylyns Enters.*, 372 Md. 514, 541 (2002) (citations omitted).

In light of the strong presumption, even in this Substation's case, "a special exception is a valid zoning mechanism that *delegates only limited authority* to an administrative board to determine the use to be permissible in the absence of any fact or circumstances that negate the presumption." *Evans v. Shore Commc'ns.*, 112 Md. App. 284, 303 (1996) (emphasis added). This limited authority is not affected by the nature of the harm. Even the safety and property value concerns of the protestants will not support a denial unless they are somehow unique to the proposed Substation. *See, e.g., Deen v. Baltimore Gas & Elec. Co.*, 240 Md. 317, 330-331 (1965); *Anderson*, 23 Md. App. at 624-625; *Schultz*, 291 Md. at 12-14 (relying upon *Anderson* and *Deen* for the same proposition); *see also* fn 7, *infra*.

Schultz does not apply in a vacuum. Thus, the Board's special exception regulations must be read in the *Schultz* context. *See Days Cove Reclamation Co. v. Queen Anne's Cnty.*, 146 Md. App. 469, 475 (2002) (citing *Mossburg v. Montgomery Cnty.*, 107 Md. App. 1, 21 (1995)); *see Harford Cnty. v. Preston*, 322 Md. 493, 500 (1991) (explaining that *Schultz* states that "absent some clear legislative direction to the contrary, *if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in Schultz*") (emphasis supplied). When, as here, a county develops specific special exception regulations applicable to a use, the *Schultz* standard "is engrafted upon them."

Although a board's findings are entitled to deference, they must be supported by "*strong and substantial*" evidence to rebut the presumption. Merely mentioning *Schultz* is insufficient. Perhaps the best discussion of this concept is found in *Mossburg v. Montgomery Cnty.*, 107 Md. App. 1 (1995). That case, like this one, involved a politically unpopular use—a waste transfer station. In its written decision denying the waste transfer special exception, the Montgomery County Board of Appeals pointed to evidence in the record that the proposal would generate unusually high stormwater run-off and traffic. Relying on these facts, the Board attempted to craft a decision that satisfied *Schultz*. Indeed, the Board specifically found that the proposed use did not meet the *Schultz* standard.

The Court of Special Appeals rejected the Board's analysis. Returning time and time again to the fundamental principle that special exceptions are legislatively favored uses with well-understood drawbacks, the Court chided the Board's attempts to turn citizens' concerns into evidence sufficient to overcome the *Schultz* presumption. Indeed, the Court went so far as to say that the Board paid mere "lip service" to the *Schultz* test. *Id.* at 15. The Court held that the presence of drawbacks could not support a special exception denial absent strong and substantial evidence that those drawbacks were somehow greater at the proposed location than they would generally be elsewhere in the I-2 Industrial Zone. As the Court explained:

The question in the case *sub judice*...is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station ... will have adverse effects at this proposed location. Certainly, it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, *i.e., greater here*, than they would generally be¹²

¹² Judge Rita Davidson, the author of the *Schultz* opinion, wrote another opinion which many deem to be the penultimate precursor to *Schultz*. In *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974), Judge Davidson wrote:

Id. at 9 (emphasis in original). Quoting an earlier Court of Appeals case, the *Mossburg* court noted that any purported drawbacks “must be in some sense unique or else a special exception could never be granted in such an area.” *Id.* at 10 (emphasis in original) (quoting *Deen*, 240 Md. at 330-31).

A careful examination of the record reveals that any material adverse impact by the Substation on the neighboring properties would be no different or greater at the proposed location than anywhere else in that zone. In fact, the alternative properties identified by the Board or the protestants were: (1) outside the permitted agricultural zone; (2) outside of the

There can be no doubt that an undertaking business has an inherent depressing and disturbing psychological effect which may adversely affect persons residing in the immediate neighborhood in the enjoyment of their homes and which may lessen the values thereof. Indeed, it is precisely because of such inherent deleterious effects that the action of a local legislature in prohibiting such uses in a given zone or zones will be regarded as promoting the general welfare and as constitutionally sound. But in the instant case the legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity and correctness which the courts will honor.

The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. Consequently, the bald allegation that a funeral home use is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all.

.....

The protestants have shown nothing more than that they would suffer the same degree of harm as would be suffered by any homeowner if a funeral home were permitted on land adjacent or in close proximity to their residences. *If the residents of Baltimore County do not want funeral homes in residential use districts, they should prevail upon the local legislature to change the ordinance.* *Anderson*, 23 Md. App. at 624-25, (Internal citations omitted) (Emphasis added).

County,¹³ and/or (3) would require the construction of additional lines and, therefore, disturb additional residential and farming areas.¹⁴

In *People's Counsel for Baltimore Cnty. v. Loyola Coll. in Md.*, 406 Md. 54 (2008), the Maryland Court of Appeals clarified the application of the *Schultz* test. In the *Loyola College* case, the People's Counsel for Baltimore County argued that special exception applicants must compare, and zoning bodies must consider, "the adverse effects of the proposed use at the proposed location to, at least, a reasonable selection or representative sampling of other sites within the same zone throughout the district or jurisdiction, taking into account the particular characteristics of the areas surrounding those other test sites." *Id.* at 102. The Court of Appeals disagreed, determining that "[t]he *Schultz* standard requires an analysis of the effects of a proposed use 'irrespective of its location within the zone'" and finding that "no such evidentiary burden [need] be shouldered by an applicant nor analysis undertaken by the zoning decision-maker." *Id.*; see also *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 192 Md. App. 218 (2010).

When the evidence is reviewed with the *Schultz* and *Loyola College* holdings in mind, two things are made obvious: (1) the Board's decision and its findings did not focus on adverse impacts created by the Substation irrespective of its location within the zone; and (2) Petitioner is

¹³ See, e.g., TR 189, Oct. 14, 2010 (questioning whether there were locations in Montgomery County, Maryland where the Substation could have been sited because of the nature of the 500 kV lines).

¹⁴ Unlike the siting of telecommunications towers, for example, the Code does not require an applicant to submit evidence as to alternative locations considered for the siting of a substation. Both the Board and the protestants, however, made alternative sites a fulcrum of their collective argument against the siting of the Substation at this location. This clearly is contrary to the Court of Appeals' analysis in *Loyola College*:

Petitioners contend that *Schultz* requires an applicant for a special exception to compare, and concomitantly the zoning body to consider, the adverse effects of the proposed use at the proposed location to, at least, a reasonable selection or representative sampling of other sites within the same zone throughout the district or jurisdiction, *taking into account* the particular characteristics of the areas surrounding those other test sites. The *Schultz* standard requires no such evidentiary burden be shouldered by an applicant nor analysis undertaken by the zoning decision-maker.

Loyola College, 406 Md. at 102.

being held to the higher standard of shouldering the evidentiary burden that the Substation would have no adverse impact on the neighboring properties.

As explained above, the *Schultz* test applies to any impact determination, be it particular or general. *See, e.g., Harford Cnty.*, 322 Md. at 776 (explaining that *Schultz* states that “absent some clear legislative direction to the contrary, *if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in Schultz*”) (emphasis supplied). Here, the Code does not impose consideration of a “particular kind of impact” on property value, but rather requires that “[o]perations 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 in the zoning district.”

If the fair market values of neighboring properties are to be considered characteristics of those properties, then we must evaluate the Substation’s potential impact on them while looking through the *Schultz* prism. Yet, without explanation, the Board rejected outright the testimony of Petitioner’s property value expert, Jay Goldman; instead, the Board relied on protestants’ complaints and the unsubstantiated evidence of Mr. Wayne Six. For example, according to his August 13, 2010 letter to Virginia McCall, whose house he appraised, Mr. Six based his assertions of potential devaluation on the Substation equipment height, the distance from the property, and the voltage transmitted on the lines running through the Substation. (TR 46, Nov. 13, 2010). However, it was readily accepted, and not a point of debate either during the hearing or in the Board’s decision, that the Substation’s equipment height and setback from the property line met and exceeded all applicable Code requirements. Seemingly lost in the Board’s decision

is the fact that the 170+ acre Property itself provides a greater insulation than other, even theoretically available, properties elsewhere in the zone.

Moreover, the Code does not regulate – in fact, Frederick County has no jurisdiction over – the voltage carried by the power lines running through the Substation. Although he admitted he did not base his findings on the impact that other substations have had on neighboring property values (TR 57-8, Nov. 13, 2010), Mr. Six determined that “[t]his Substation is going to be nasty... in terms of property values. There’s no...gray area on this.” (TR 28, Nov. 13, 2010). Yet, Mr. Six did not explain why this “nastiness” would be greater at this location than at any other location. He simply made a blanket assertion.

Faced with an expert who failed to provide tangible evidence in support of his assertions, the Board was left to consider the outcry of protestants’ concerns in the face of Petitioner’s experts. In *AT&T Wireless Servs. v. Mayor and City Council of Baltimore*, 123 Md. App. 681 (1998), the Court of Special Appeals was faced with a similar situation. In that case, the City’s Board of Municipal Zoning Appeals (“BMZA”) elected to disregard the tower proponent’s property value expert, and relied instead on the generalized concern of neighbors that the site would have myriad deleterious effects, including property devaluation. The Court ruled, as a matter of law, that even if the BMZA properly rejected the expert’s testimony, such generalized concerns could not rebut the presumption attending a special exception use. As the Court’s ruling is directly on point, it is controlling here.

Petitioner met its burden of demonstrating that the Substation would have no atypical adverse impacts. As the Court of Special Appeals explained in *AT&T*, the inherent drawbacks of industrial-looking equipment such as telecommunication towers or, in this case, an electric substation, stem from their visibility, whether those drawbacks are couched in terms of

aesthetics, impact on the “character” of an area, or property devaluation. *Id.* at 693-94. Here, as the Board observed, the Substation cannot be rendered invisible. Accordingly, the Board possessed only the “limited authority” to determine if the Substation as proposed would cause materially greater visual impact than potential substations located at other sites in the general area. *Evans*, 112 Md. App. at 303. Simply put, there was no evidence in the record to support such a conclusion.

It was incumbent on the Board to grant the application absent “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. No such evidence was produced. Rather, as in *Deen*, *Anderson*, *Evans*, and *AT&T*, the Board relied on generalized citizen concerns that the facility was somehow inconsistent with the area and would cause property devaluation. Far from offering “strong and substantial” evidence, the Board based its decision on a series of factual and legal misstatements that mirror the analysis labeled as “lip service” by the Court of Special Appeals in *Mossburg*.

The Board erred by applying the *Schultz* test incorrectly. Specifically, the Board did not give Petitioner the presumption of appropriateness after Petitioner stated its *prima facie* case. Additionally, the Board did not rely on “strong and substantial” facts to overcome the presumption. Instead, the Board relied on just the sort of flimsy evidence that resulted in reversals by the Court of Special Appeals in *AT&T* and *Evans*.

As explained in detail above, *Schultz* makes clear that special exception uses are favored ones. 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. No such evidence was offered into the record by the protestants. Consequently, the Board’s denial should be reversed.

2. **The proposed substation, being a nongovernmental utility, has an appearance consistent with the surrounding neighborhood.**

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).¹⁵ There is nothing that distinguishes the citizen testimony in this case from that in the aforementioned cases. Rather, it is apparent from the complete dearth of testimony supporting the Board’s *Schultz* finding that the Board was seeking a reason to deny Petitioner’s politically unpopular application. While this Court should give the Board’s findings appropriate deference, that does not mean that the Board can patch together illogical rationales and call them “conclusions.” The Court of Special Appeals struck down a similar example of outcome-determinative decision making in *Mossburg*.

On at least two occasions, Maryland’s appellate courts have rejected county boards’ “*Mossburg*-like” efforts to demonstrate disproportionate negative impact in communications tower cases. In *Evans*, the court remanded the case to the Circuit Court with instructions to vacate the administrative decision and to grant the special exception. *Evans*, 112 Md. App. at 311. In reaching this decision, the court concluded that the administrative body failed to apply

¹⁵ The *Anderson* court elaborated that “unsupported conclusions of witnesses to the effect that a proposed use will or will not result in harm...amount to nothing more than generalized expressions of opinion which are lacking in probative value.”

Schultz to a Talbot County special exception ordinance pertaining to communications towers. The Court explained that the administrative body had concluded wrongly, without explanation, that the tower would undermine the rural character of the neighborhood and that the tower was “unique to the pattern of existing developed land use in the vicinity.” *Evans*, 112 Md. App. at 305. The Court further explained that the Board was required to provide an explanation for such a determination and that, under *Schultz*, the “uniqueness referred to by the Board must be in terms of adverse effects and the adverse effects must be above and beyond those inherently associated with the location of a special exception use any where else within the zone.” *Id.* (citing *Deen*, 240 Md. at 331; *Mossburg*, 107 Md. App. at 24-25). In the case here, the Board failed to apply *Schultz* properly and failed to provide any rationale for why the placement of the monopole at the Site would be unique in a manner above and beyond that normally associated with monopoles.

AT&T involved AT&T’s efforts to construct a 143’ tall monopole in the Ten Hills section of Baltimore City. During the hearing, much testimony was adduced that the pole would have significant visual impact on Ten Hills. Moreover, numerous witnesses, including the City’s Chief of Planning and Director of Planning, testified that the Ten Hills area was so unique that the pole’s visual impact would be disproportionately high. Relying on testimony that the area was unique and that the tower would disproportionately impact both property values and the area’s “bucolic setting,” the City’s BMZA denied AT&T’s application.

In the case at hand, citizens testified about a variety of concerns, including property devaluation and excessive visual impact. Also as in the case at hand, there was no alternative location from which the pole would be invisible. Finally, the BMZA also disregarded AT&T’s

property value expert and relied instead on generalized and lay testimony concerning property devaluation.

Reviewing the entire record in the *Schultz* context, the Court of Special Appeals rejected the BMZA's conclusions, despite the undisputed evidence that the proposal would change the "character" of the area. Relying on *Schultz*, the Court found that "there is no evidence that there was any place in an R-1 zone where the adverse aesthetic effects of a tower would be less than if it were located at the proposed site." *AT&T*, 123 Md. App. at 694. Importantly, the Court recognized that the drawbacks of such a facility—be they couched in terms of property value or visual impact—are "caused solely by the negative aesthetic consequences of having a tower nearby." *Id.* at 693. In response to citizen suggestions that the facility would be more appropriate at a local high school, the Court stated that "there was no evidence that the tower, if it were located at Edmondson High School, would be less visually intrusive to neighboring properties than it would be located at the proposed site." *Id.* at 695. To that end, there is no evidence in this record that, if located anywhere else, the Substation would be less visually intrusive to neighboring properties.

B. The Board's decision denying Petitioner's special exception application was not supported by legally sufficient evidence.

1. The Board's findings were insufficient to support its decision that the proposed use is inconsistent with the purpose and intent of the Comprehensive Development Plan and of Frederick County Zoning Code Section 1-19-3.210(B)(1).

For the Board's decision to be meaningful, one must be able to find "evidence or reasonable inferences to be drawn from the evidence to support certain of the Board's conclusions." *Becker v. Anne Arundel Cnty.*, 174 Md. App. 114, 143 (2007). While there were substantial, emotional pleadings from protestants that the Substation was inconsistent with the

purpose and intent of the Comprehensive Plan, there was not a record of facts to support these assertions. Petitioner produced in the form of studies and reports, as well as expert witnesses, substantial evidence that the proposed use was consistent with the purpose and intent of the Comprehensive Plan. However, no comparable testimony or studies were offered into evidence to undermine the validity of Petitioner's Habitat Assessment and Threatened and Endangered Species Review, its Phase 1 Cultural Resources Survey, or its forest delineation and stormwater management plans. There was no evidence that the Substation would impair the County's heritage areas (Chapter 4 of the Comprehensive Plan); rather, there is evidence on the record from both the Historic Preservation Commission and the Maryland Historical Trust that the County's historic and culturally significant sites would not be adversely affected by the Substation. While concerns were expressed, there was no actual evidence that the Substation would negatively affect the County's water resources (Chapter 9 of the Comprehensive Plan); rather, Petitioner's witnesses and submitted reports indicated that the County's water resources, including its wellheads, would not be impaired. As Mr. Gogol testified, additional farmland would have to be disturbed if the Substation were located elsewhere because additional, longer, and relocated lines would be required to cut across larger swaths of rural neighborhoods and farmland.

Without explicitly referring to any opposing testimony, and failing to articulate any evidence in support of its decision, the Board made conclusory findings that the Substation would be inconsistent with the Comprehensive Plan. *See Bucktail v. Cnty. Council of Talbot Cnty.*, 352 Md. 530 (1999). Moreover, by merely stating its conclusion of inconsistency without pointing to specific evidence in the record upon which such conclusion is based, the Board made findings that were "not amenable to meaningful judicial review." *Moreland*, 418 Md. at 134.

In determining that the Substation would be inconsistent with the purpose and intent of the Comprehensive Plan, the Board held Petitioner to a standard that is virtually impossible to overcome. Nowhere in the Comprehensive Plan (or in the Code, for that matter) is there a requirement that a use permitted by special exception be completely concealed. Yet, the Board rationalizes that if the Substation cannot be concealed despite Petitioner's best efforts, it should not be allowed at all. If this is the standard to which all applications are to be held, then the Board has, *ipso facto*, placed a moratorium on much of the development in Frederick County by creating an insurmountable obstacle to the approval of any special exception application.

In *Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285 (1975), the Maryland Court of Special Appeals considered the circuit court's denial of a special exception to operate a day camp. Despite citizen complaints that "the property was not served by public water and sewer facilities" and concerns regarding the impact on traffic, the court explained, "If an applicant for a special exception meets its burden of satisfying the requirements of Section 502.1 . . . we find nothing in the Baltimore County Zoning Regulations placing upon it the added burden of proving that it will be a good neighbor." *Id.* at 290-298, (internal quotation marks omitted). Ultimately, therefore, the court stated that it was "inappropriate for the court to have itself imposed 'conditions and restrictions' upon the use of property for that purpose" and to have denied the special exception. *Id.* at 298. Similarly, it was inappropriate for the Board in this case to impose a condition on the Substation – complete concealment ("While the Board recognizes the plans of the Applicant to take measures to conceal the facility. . . The earthen berms with landscaping will not conceal the facility from its surroundings" (Dec. at 8-9)) – when such condition is not found in either the Comprehensive Plan or the Code.

2. **The Board's findings were insufficient to support its decision that 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.**

With respect to these findings, the Board's decision focuses a great deal on the height of the Substation's towers as well as the general area of the Substation's footprint. The Board found that the size of the Substation is not in harmony with the appropriate and orderly development of the neighborhood in which it would be located. The legal flaw in this finding is rooted in the Board's unwillingness to include the 170+ acre Property as part of the neighborhood it is considering.

The Board readily ignored that the Code sets forth various setback requirements for substations, all of which Petitioner met and none of which were questioned in the Board's decision. It is also significant to note that the Frederick County Commissioners had two opportunities to revise the Code regulations which pertain to electric substations, once in 2000 and once again in 2009 (TR 29, Sept. 29, 2010).¹⁶ The latter opportunity is significant, because the Substation was a commonly debated topic in the press and among Frederick County constituents at that time. Yet the Code was not amended to prohibit electric substations from being sited on agricultural parcels, to limit their size regardless of the zone in which they are located, or to require full and complete screening from any and all views. These changes could have been made, but they were not. Nevertheless, the Board repeatedly based its denial on the "massive" size of a substation whose landscaping "will not conceal the facility from its surroundings." (Dec. pp. 8-9). Nowhere in the Code is a substation's size (other than height, which is not at issue) regulated. Moreover, nowhere does the Code mandate that a substation

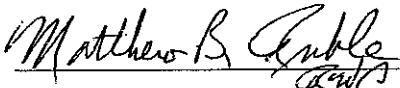
¹⁶ See p. 7, *supra*.

must be concealed or completely screened from view. While the Board is certainly authorized to recommend additional screening, it is not authorized to legislate additional Code requirements. The Board asserts no legal grounds on which to make the size of the Substation a central tenet of its denial because there are no such regulations in the Code.

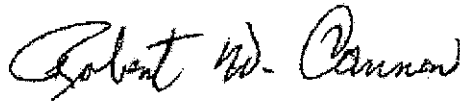
VI. Conclusion

For the foregoing reasons, the Board's decision should be reversed and remanded.

Respectfully submitted,



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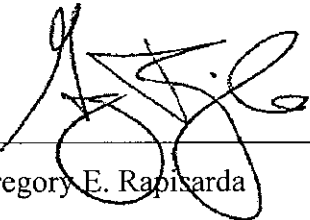
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2011, copies of the 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

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