Circuit Court for Baltimore City
Case No. 24-C-21-3999

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 37

September Term, 2022

IN THE MATTER OF THE PETITION OF
FREDERICK COUNTY, MARYLAND

Wells, C.J.
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: December 8, 2022

This is a second appeal challenging the grant of a Certificate of Public Convenience and Necessity ("CPCN") for a 20 megawatt solar energy generating system ("SEGS") proposed by LeGore Bridge Solar Center, LLC ("LeGore"), appellee, and opposed by Frederick County, Maryland (the "County"), appellant. In the first appeal, we remanded for the Maryland Public Service Commission (the "PSC" or the "Commission"), appellee, to reconsider its grant of a CPCN for that facility. *See Frederick Cnty. v. LeGore Bridge Solar Ctr., LLC*, No. 1249, Sept. Term 2019, 2020 WL 6892007 (filed Nov. 24, 2020) ("*LeGore Bridge I*"). We held "that the PSC erred in concluding that LeGore 'acquired a vested right in its special exception[.]'" *Id.* at *2. In turn, because the PSC expressly decided "not to give due consideration to the statutory factors under" former Md. Code (2010 Repl. Vol., 2019 Supp.) § 7-207(e)(3) of the Public Utilities Article ("PU"),[1] "and

[1] This provision was renumbered and amended as PU § 7-207(e)(4), effective October 1, 2021. The newly added PU § 7-207(e)(3) requires the PSC, when considering applications for a SEGS, to give due consideration to:

> (3) the effect of climate change on the generating station, overhead transmission line, or qualified generator lead line based on the best available scientific information recognized by the Intergovernmental Panel on Climate Change[.]

See 2021 Md. Laws, ch. 615 (S.B. 83).

In turn, that same amendment requires the PSC to give "due consideration" to the following factors

(4) for a generating station:

(continued…)

not to exercise its preemptive authority" over the County's conflicting zoning ordinance purporting to regulate SEGS facilities, as recognized in *Bd. of Cnty. Comm'rs of Washington Cnty. v. Perennial Solar, LLC*, 464 Md. 610 (2019) ("*Perennial Solar*"), we could neither "affirm the PSC's order based on the reasons stated in that order[,]" nor "substitute alternate grounds for the PSC's decision." *LeGore Bridge I*, 2020 WL 6892007, at *2. Consequently, this Court "vacate[d] the judgment and remand[ed] for further proceedings[.]" *Id.*[2]

> (i) the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating station is proposed to be located;
>
> (ii) the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located;
>
> (iii) the impact of the generating station on the quantity of annual and long-term statewide greenhouse gas emissions, measured in the manner specified in § 2-1202 of the Environment Article and based on the best available scientific information recognized by the Intergovernmental Panel on Climate Change; and
>
> (iv) the consistency of the application with the State's climate commitments for reducing statewide greenhouse gas emissions, including those specified in Title 2, Subtitle 12 of the Environment Article.

PU § 7-207(e)(4).

Because these amendments took effect on October 1, 2021 – after we remanded for reconsideration and after the PSC issued its order doing so – this opinion discusses the provision applicable to the proposed LeGore Bridge SEGS at the time the PSC considered it as PU § 7-207(e)(3).

[2] In dissent, Judge Gould, now on the Court of Appeals, agreed that the PSC erred in predicating its decision to approve the CPCN on a vested rights theory. *See LeGore* (continued…)

After the parties presented supplemental memoranda, the PSC again granted LeGore a CPCN to construct its proposed SEGS facility. In its order, the PSC expressly "agree[d] with the [Public Utility Law Judge ("PULJ")] that the facts of this case warrant the exercise of the doctrine of pre-emption" recognized in *Perennial Solar*. After briefing and a hearing, the Circuit Court for Baltimore City affirmed.

The County again challenges approval of the LeGore Bridge CPCN, raising issues that we restate as follows:

> I. Did the PSC violate the County's due process rights by taking notice of the County's "Livable Frederick Master Plan" and the PSC's decision in another case that the County's Bill No. 17-07 constitutes a de facto ban on SEGS?
>
> II. Did the PSC give "due consideration" to the County's comprehensive planning and zoning, as required by PU § 7-207(e)(3)?
>
> III. Did the PSC err in exercising its authority to preempt the County's conflicting local zoning provision, Bill No. 17-07, by approving a CPCN for the LeGore Bridge SEGS?

Once again, "[b]ecause we must 'look through' the circuit court's decision, to determine whether the PSC erred, our focus is on the PSC's record and reasoning. *See Md.* [*Off.*] *of People's Counsel v. Md. Pub. Serv. Comm'n,* 246 Md. App. 388, 400 (2020) (citing *Md.* [*Off.*] *of People's Counsel v. Md. Pub. Serv. Comm'n*, 461 Md. 380, 391 (2018); *Accokeek, Mattawoman, Piscataway Creeks Communities Council v. Md. Pub. Serv.*

Bridge I, 2020 WL 6892007, at *16. Nevertheless, he concluded that the PSC's decision was made after considering the proposed order of the public utilities law judge ("PULJ"), who did review the required statutory factors. *Id*. at *19. Finding such consideration of the PULJ's recommendations sufficient to establish that "the PSC *did* give the due consideration required by PU § 7-207(e)(3)[,]" he concluded the PSC's error did not affect its decision and therefore did not require remand. *Id*. at *16, *19.

Comm'n, 451 Md. 1, 11 (2016)." *LeGore Bridge I*, 2020 WL 6892007, at *1. Evaluating this new CPCN under the statutory framework that the Court of Appeals detailed in *Perennial Solar*, and we applied in *LeGore Bridge I*, we conclude that the PSC did not violate the County's right to due process, fail to give due consideration to the applicable statutory factors, or otherwise err in exercising its preemptive authority to approve the CPCN.

STANDARDS GOVERNING REVIEW OF CPCNS FOR SOLAR ELECTRIC GENERATING STATIONS

In *LeGore Bridge I*, we applied standards governing CPCNs for SEGS, including LeGore's proposed project. In particular, we incorporated the detailed review in *Perennial Solar*, explaining the statutory framework in the Public Utilities Article for approving utilities generally and for regulating solar energy specifically. *See Perennial Solar*, 464 Md. at 621-30, 631-33; *LeGore Bridge I*, 2020 WL 6892007, at *2-4. Rather than repeating that full description here, we focus on the provisions pertinent to our resolution of this appeal.

Since 2009, the General Assembly has set statutory requirements and benchmarks for reducing greenhouse gas emissions. *See Perennial Solar*, 464 Md. at 622. These "include[] a significant increase in electricity sales derived from solar energy" and a mandate that the PSC "'implement a renewable energy portfolio standard'" ("RPS"). *Id.* at 622-23 (quoting PU § 7-703(a)).

"The PSC's review process of a [solar] generating station is extensive." *Id*. at 624. Although the PSC must "coordinate with and include the local governing body of the

county . . . in the CPCN public hearing process," *id.*, the Court of Appeals has emphasized that

> [u]nder the express language of the PU, the PSC is the final approving authority for the siting and construction of generating stations, which require a CPCN, after giving "due consideration" to the following statutory factors:
>
> > (e) *Final action by Commission*. – The Commission shall take ***final action*** on an application for a certificate of public convenience and necessity *only after* ***due consideration*** *of*:
> >
> > (1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station . . . is proposed to be located;
> >
> > (2) the effect of the generating station . . . on:
> >
> > (i) the stability and reliability of the electric system;
> >
> > (ii) economics;
> >
> > (iii) esthetics;
> >
> > (iv) historic sites;
> >
> > (v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;
> >
> > (vi) when applicable, air quality and water pollution; and
> >
> > (vii) the availability of means for the required timely disposal of wastes produced by any generating station; and
> >
> > (3) *for a generating station:*
> >
> > (i) *the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating station is proposed to be located*; and

> (ii) the efforts to resolve any issues presented by the county or municipal corporation where any portion of the generating station is proposed to be located.

PU § 7-207 (emphasis added).

Perennial Solar, 464 Md. at 625-26 (additional emphasis added). *See LeGore Bridge I*, 2020 WL 6892007, at *4.

We review the PSC's decision to grant a CPCN for the LeGore SEGS based solely on the findings and reasons stated by the PSC. *See Accokeek*, 451 Md. at 11; *Comptroller of the Treasury v. Two Farms, Inc.*, 234 Md. App. 674, 697 (2017); *LeGore Bridge I*, 2020 WL 6892007, at *11, *15-16. In doing so, we recognize that "[b]y statute, a PSC decision approving a CPCN is considered 'prima facie correct and shall be affirmed[,]"' *LeGore Bridge I*, 2020 WL 6892007, at *12 (quoting PU § 3-203), unless clearly shown to be either "unconstitutional," "made on unlawful procedures[,]" "affected by other error of law[,]" or otherwise "unsupported by substantial evidence on the record considered as a whole." PU § 3-203. The Court of Appeals,

> [i]n giving meaning to this language in PU § 3-203 without rendering it surplusage, . . . believe[s] that it calls for a court to be particularly mindful of the deference owed to the Commission on those issues on which courts typically accord some degree of deference to administrative agencies – *i.e.* findings of fact, mixed questions of law and fact, and the construction of particular statutes administered, and regulations adopted, by the agency. On those questions on which a court does not typically defer to an agency – general questions of law, jurisdiction and constitutionality – PU § 3-203 requires no greater deference to the Commission than any other agency. Such legal questions "are completely subject to review by courts."

Md. Off. of People's Couns., 461 Md. at 393-94 (footnotes omitted). *See LeGore Bridge I*, 2020 WL 6892007, at *12.

FACTS AND LEGAL PROCEEDINGS

This dispute began with LeGore's filing of an application for a CPCN on October 7, 2016. Having detailed the first stages of the ensuing administrative and judicial proceedings in *LeGore Bridge I*, we incorporate that summary of the facts and legal proceedings leading to our decision in the first appeal. *See LeGore Bridge I*, 2020 WL 6892007, at *4-11.

We vacated the PSC's initial approval of a CPCN for the proposed LeGore Bridge SEGS because the PSC erred in predicating its decision on a vested rights theory, then "expressly refused to" give due consideration to the PU § 7-207(e)(3) factors or otherwise exercise its preemptive authority to approve the proposed SEGS notwithstanding the County's opposition to the CPCN based on local zoning ordinance, Bill No. 17-07. *See id.* at *15-16. Because the PSC did not articulate an affirmable reason for approving the CPCN, we remanded for the PSC to reconsider LeGore's CPCN application. *See id.* at *16. In this appeal, we review those post-remand proceedings.

Post-Remand Proceedings Before the PSC

After remand, the circuit court ordered the case returned to the PSC. The PSC then issued a scheduling order stating that previously submitted memoranda would remain before the Commission and that the parties could submit supplemental memoranda "regarding any issue," including the impact of the Court of Appeals' decision in *Perennial Solar*. The County, LeGore, and the State's Department of Natural Resources, Power Plant Research Program ("PPRP") filed supplemental memoranda.

LeGore argued that in accordance with *Perennial Solar*, the PSC should exercise its authority to preempt the County's conflicting local ordinance regarding SEGS, Bill No. 17-07, which the PSC had already determined in another contested case seeking a CPCN for a SEGS, the Biggs Ford case, to be "an unreasonable unilateral attempt to ban utility scale solar facilities in Frederick County."[3] LeGore also maintained that its proposed SEGS was not inconsistent with the County's newly adopted comprehensive plan, attaching as an exhibit Frederick County's "Livable Frederick Master Plan" ("LFMP")[4] and asking "the Commission [to] take judicial notice of" it "pursuant to PUA § 3-111(d)(1)[.]"

The "PPRP agree[d] with [LeGore's] recommendation that the Commission give judicial notice to the County's current comprehensive plan[,]" and argued that, with the "exception of more recent information . . . , the analysis provided in PPRP's filings remains viable" and "the Commission has sufficient and accurate information to make a final determination . . . consistent with the ruling by the Court of Special Appeals."

In response, the County moved to strike both the LFMP and LeGore's reference to the PSC's decision regarding the Biggs Ford application. The County objected, arguing

[3] In approving the Biggs Ford application for a SEGS (Case No. 9439), the PSC concluded that the County's local ordinance, Bill No. 17-70, constituted a *de facto* ban on SEGS throughout the County. *See* https://www.psc.state.md.us/search-results/?q=9439&x.x+0&search=all&search=case. After the Circuit Court for Baltimore City affirmed the PSC's decision, the County appealed to this Court. *See In the Matter of the Petition of Frederick Cnty., Maryland,* No. 668, Sept. Term 2021 (argued Apr. 1, 2022). That appeal is still pending.

[4] The LFMP is available at https://ww3.frederickcountymd.gov/lfmp/ (last visited Oct. 31, 2022).

this constituted "supplemental evidence" that was not part of the record when the PULJ held a hearing and the PSC issued its previous order approving the LeGore CPCN.

The PSC's Revised Order

On August 19, 2021, the PSC issued a written order denying the County's motion to strike and granting LeGore's application for a CPCN. The order reviews the proceedings leading to the PULJ's Proposed Order of October 3, 2017, recommending approval of LeGore's application, as well as subsequent pleadings and proceedings, including our decision in *LeGore Bridge I* and the ensuing post-remand pleadings.

With respect to the County's newly adopted LFMP, the PSC stated that it "will take notice of" that document as "an easily knowable fact" because the County "does not dispute the authenticity of its own publicly available comprehensive plan or the text of the provisions contained within." As for references to the Biggs Ford case, the PSC noted that "the record contains multiple citations to prior Commission decisions involving similar CPCN applications" when "this Commission asserted its plenary authority to site electric generation facilities, such as LeGore Bridge's project." In addition, "whether a Commission decision is consistent with its own prior precedent is one factor a reviewing court may use to determine whether a Commission decision was 'arbitrary or capricious' under PUA § 3-203(4)."

The PSC rejected the County's claim that the PULJ's "Proposed Order failed to give 'due consideration' to its recommendations as required by PUA § 7-207(e)(3)(i)." To the contrary, the PSC "conclude[d] that the PULJ gave due consideration to the County's zoning laws . . . and properly exercised his discretion to apply the doctrine of pre-emption

in effect at the time of his ruling." Specifically, the PULJ "agreed with LeGore Bridge" that "[i]t is inappropriate for a county to impose its own requirements alongside the Commission[]" citing "the effect of" the "stringent new siting regulations for solar facilities" imposed by Bill No. 17-07 and the County's "requirement that the Project refile its application[.]" As support for that decision, the PSC cited *Perennial Solar*, which was issued after the PULJ's Proposed Order, emphasizing that the Court of Appeals' decision "only amplified the Commission's ultimate authority as articulated by the PULJ."

"In addition to the analysis by the PULJ," the PSC stated that it had "given significant consideration to Frederick County's multiple pleadings[,]" which made its "position abundantly clear." Based on its independent review, "[t]he Commission on its own authority conclude[d] that Frederick County's position has received due consideration as required by statute, and the Commission agrees with the PULJ that the facts of this case warrant the exercise of the doctrine of pre-emption in this case." Consequently, the PSC "exercise[d] its discretion [to] pre-empt what appears to be a deliberate attempt to indirectly ban all utility-grade solar facilities from Frederick County and thereby undermine the responsibility the General Assembly has conferred upon the Commission."

In support of its due consideration determination, the Commission discussed "four environmental targets contained within the LFMP[,]" including support for "'"clean energy systems, such as wind and solar"'; an "intent to '[l]ead in the use of"' such sources; and initiatives "for the County to become 'carbon footprint zero[,]'" "'energy independen[t],'" and "a 'net exporter of clean energy.'" The PSC concluded these "would appear to render LeGore Bridge's project at least more consistent with Frederick County's stated goals[,]"

and that "there are many reasons to conclude that LeGore Bridge's project is largely, if not entirely, consistent with some of those goals."

Nevertheless, the PSC decided that it "need not reach a final determination as to whether any disparities remain between LeGore Bridge's project and the LFMP" because the PSC "exercise[d] its discretion to pre-empt the County's zoning ordinance":

> [] The Commission has previously determined, and repeats that determination here, that Frederick County Bill 17-07 acts as a *de facto* ban on solar projects such as LeGore Bridge. In Case No. 9439, the Chief PULJ evaluated a CPCN request filed by Biggs Ford in Frederick County. On August 27, 2020 (approximately a year after Frederick County adopted the LFMP), the Chief PULJ issued his Proposed Order, concluding that:
>
> > The Project is not consistent with the County's zoning. However, I give no weight to this factor as Bill No. 17-07 is effectively a *de facto* ban on utility-scale solar projects which is not in the public interest. In light of the facts and circumstances of this case, especially my finding related to the application of Bill 17-07, I find it appropriate to exercise the Commission's pre-emption authority over the County's zoning ordinance.
>
> [] The Commission affirmed that decision on November 24, 2020. The Commission re-affirms its conclusion that Frederick County Bill 17-07 is a *de facto* ban on utility-scale solar projects.

(Footnotes omitted.)

Despite "the passage of time as a result of the appellate process," and the "somewhat convoluted" procedural history of LeGore's application, the PSC concluded that "[a]t both the PULJ and Commission level, Frederick County's zoning laws have received due consideration." In any event, the PSC stated that it "affirms the conclusion of PULJ McGowan and reaffirms the decision rendered in Case No. 9439 that County Bill 17-07 is so restrictive that no proposed utility scale solar facility could meet its restrictions." Citing

Perennial Solar and *Howard Cnty. v. Potomac Elec. Power Co.*, 319 Md. 511 (1990), the PSC expressly "exercise[d] its authority to pre-empt the County's recommendations" and "further conclude[d] that requiring LeGore Bridge to submit a floating zone application pursuant to County Bill 17-07 is unnecessary."

Next the PSC pointed out that the PULJ addressed the six PU § 7-207(e)(2) statutory "factors consecutively by" referring to each. Although "[t]he PULJ did not explicitly link his findings regarding PUA § 7-207(e)(3)(ii) to that specific provision[,]" the Commission "conclude[d] that the record does describe the efforts made by LeGore Bridge sufficiently to satisfy this statutory provision." These included "work[ing] with Frederick County to obtain the special exception" and to otherwise "comply with local zoning ordinances" and address "the concerns of other parties[,]" even though satisfying those was not required after *Perennial Solar* decided that the Commission could preempt any such requirement. "Because Frederick County did not participate in the CPCN proceedings or offer any other suggestions, the Commission conclude[d] that the record reflects LeGore Bridge did all it could to address the concerns raised by those parties that did participate." On this record, the PSC "affirm[ed] the findings within the PULJ's Proposed Order, and conclude[d] that those findings satisfy the requirements of PUA §7-207(e)(3)(ii)."

Circuit Court Proceedings

The County petitioned for judicial review. Conceding that "[t]his is not a substantial evidence case[,]" but "an error of law case[,]" counsel argued that after remand, the PSC "vacated its prior order, which left the previous PULJ opinion as their starting point. And then invited the filing of memorand[a], but it did not make any indication that it was going

to reopen the record." So "the County moved to strike" LeGore's references to both the LFMP and the Biggs Ford case, both of which occurred after the PULJ issued his Proposed Order in October 2017, on the ground that this was "supplemental evidence" that the PSC should not have considered, much less "cherry-picked" from, without re-opening the record.

Denial of that motion, the County claimed, was a violation of its right to due process because the PSC allowed LeGore to submit the LFMP as additional evidence and then considered the decision in Biggs Ford that Bill 17-07 is a *de facto* ban on SEGS within the County, without affording the County an opportunity for cross-examination or rebuttal. In the County's view, moreover, the PSC could not take "judicial notice" of that "inappropriate . . . type of information" without "notice to the parties and an opportunity to contest that."

Counsel for the PSC insisted that the Commission solely "relied on the doctrine of preemption" rather than the LFMP, even though "17-07 is a *de facto* ban on" approval of utility-scale SEGS. Counsel stated that "[t]he master plan didn't even come up in deliberations. I just mentioned it in the order because it was attached to LeGore's memo." In turn, because "no Commissioner cared about the master plan[,]" which "wouldn't have changed anything[,]" counsel rhetorically asked, "why would we reopen evidence?"

The County further argued that the PSC erred in failing to give due consideration to the statutory factors enumerated in PU § 7-207(e)(3). In the County's view, "the remand was for the PSC to do the analysis required under that specific subsection of the Public Utility Article on Section [7-207]."

In response, the PSC emphasized that its ruling was predicated on the substantial evidence developed by the PULJ, which included evidence pertinent to the statutory factors. Counsel asserted that the PSC did determine that the County "has gotten all the due consideration they need, but . . . nobody, LeGore Bridge, Biggs Ford or any other unnamed solar generation facility operator, could ever comply with 17-07" because "it's a ban effectively" given "that there's not enough acreage anywhere in Frederick County that would comply with the ordinance." "[W]e have goals we have to meet when it comes to renewable energy, and we'll never ever meet them if local governments can just block us, the way Frederick County is, and that's exactly what Perennial Solar said."

LeGore argued that "in light of Perennial Solar, which was . . . an intervening Court of Appeals[] decision[,]" the PSC had discretion to decide "[w]hat weight to give the County's comprehensive plan zoning, and efforts to resolve issues regarding the project, and to articulate grounds for its decision that are not predicated on mistakenly applied concepts of vested rights." Although "the statute requires the Commission to give due consideration to the whole list of statutory factors," LeGore pointed out that "due consideration doesn't mean that they have to agree with it."

Nor did the PSC violate the County's due process rights by taking notice of the LFMP, LeGore argued, because that plan "was promulgated by the County itself" and "published on the [C]ounty's website." Moreover, "[t]he County had notice and an opportunity to object to [its] consideration[,]" and "did object" by moving to strike it, even though "it is a publicly available document" with "content" that "[t]hey don't dispute[.]"

In addition, the County "had an opportunity also to submit a supplemental memorandum after [LeGore] . . . asked the Commission to take judicial notice."

Moreover, LeGore pointed out, "the Commission did give due consideration to the Comprehensive Plan[,]" as required by PU § 7-207(e)(3)(i), by expressly "recogniz[ing] that the project is in some respects consistent with the Comprehensive Plan" that the County had "issued . . . in the intervening time" and concluding that "the County does express goals that are . . . consistent with promoting the use of clean and renewable energy." Likewise, "the Commission's decision" itself "reflects that it gave due consideration to all of the required factors and to the County's position."

At the conclusion of the February 8, 2022 hearing, the circuit court affirmed the PSC's decision to grant a CPCN. The court applied PU § 3-203, establishing that the PSC's decision is "prima facially correct" and "shall be affirmed unless clearly shown to be either unconstitutional[,]" "affected by other error of law[,]" "arbitrary or capricious," or "unsupported by substantial evidence on the record considered as a whole."

With respect to the PSC's consideration of the LFMP and conclusion in Biggs Ford that the County's Bill 17-07 amounted to a ban on SEGS, the court pointed out that the PSC "has extraordinarily wide discretion regarding" how it evaluates "recommendations made by the" PULJ. This includes authority to "reopen proceedings" to "amplify" the record "through additional proceedings[,]" *see* PU § 3-113(d)(3), and to "determine what weight, if any, to give to consideration of statutory factors." Moreover, the PSC "should apply the law in effect at the time it makes its decision[,]" which "include[d] the County's most recently adopted Comprehensive Plan." Ultimately, the court found the County failed

to establish "that the order was entered in an unconstitutional fashion" based "on unlawful procedure, or that it was clearly arbitrary [and] capricious" or "affected by other error of law[,]" in violation of "the parties' due process rights."

Next, the court rejected the County's contention that the PSC failed to "specifically articulate findings required by [PU] Section 7-207(e)(3)([i]), which would require due consideration of consistency of the applicability of the County's zoning considerations." To the contrary, the court found that the PSC's written order expressly discusses how the LFMP corresponds to the County's environmental goals, as well as how the County's "Bill 17-07 acts as a *de facto* ban on solar projects such as LeGore Bridge." Instead, the court found "to the contrary that it was . . . highly rationalized and . . . specifically articulated reasoning" that supported "the denial of the motion to strike the exhibit complained of by Frederick County" and the decision to grant a CPCN for the LeGore Bridge SEGS.

On February 10, 2022, the Circuit Court for Baltimore City entered judgment affirming the PSC's decision based on "the Court's reasoning articulated on the record[.]" The County noted this timely appeal.

DISCUSSION

I. DUE PROCESS CHALLENGE

At the heart of the County's challenge to the LeGore Bridge SEGS is its threshold contention that during the remand proceedings, the PSC erred in considering "new evidence" presented with LeGore's Supplemental Memorandum. Specifically, the County contends that the PSC violated due process principles when it accepted, took judicial notice of, and relied on the County's Livable Frederick Master Plan and the PSC's prior decision

in another CPCN application for a SEGS in the County, Case No. 9439 (the Biggs Ford case), without affording the County an opportunity for cross-examination or to submit rebuttal evidence.

PU § 3-111(a) governs the PSC's preparation of the "official record that includes testimony and exhibits" for "each hearing[.]" It provides that "[a]ny evidence, including records possessed by the Commission, that the Commission or a party in a proceeding before the Commission desires to use, shall be offered and made part of the record." PU § 3-111(b)(1). Although the PSC "may take notice of judicially cognizable facts and also of general, technical, or scientific facts within its specialized knowledge[,]" PU § 3-111(d)(1), other "[f]actual information or evidence not made part of the record may not be considered in the determination of a case." PU § 3-111(b)(2). When taking notice, the PSC "shall notify each party in an appropriate manner of the material noticed under paragraph (1) of this subsection, and shall provide each party an opportunity to contest the notice by the Commission." PU § 3-111(d)(2).

According to the County, "[t]he PSC erred as a matter of law when it ignored the requirements of PUA § 3-111 and Frederick County's objections, summarily 'took notice' only of the four LFMP 'goals' and the Case No. 9439 information provided by LeGore, and incorporated it into its final Order." Because such evidence was not in the record of the hearing before the PULJ, the County maintains that the Commission erred in "accept[ing] and incorporat[ing] the 'new evidence' submitted by . . . LeGore, into a 'closed record' and over the objections of another party, and [in] anchor[ing] its findings and decision with the 'new evidence.'" Although the County concedes that under PU § 3-

111(d)(1), the PSC "may take notice of judicially cognizable facts and also of general, technical, or scientific facts within its specialized knowledge[,]" it contends the PSC lacks such knowledge and otherwise failed to comply with the requirement that each party be notified "in an appropriate manner of the material noticed" and afforded "an opportunity to contest the notice[.]" PU § 3-111(d)(2).

Instead, the County contends that the PSC should have either granted its Motion to Strike the LFMP and references to the Biggs Ford case, or "re-open[ed] the record to allow all parties to submit additional evidence, and to cross-examine and rebut all of the additional evidence that would be submitted." According to the County, this was legal error that "violated basic rules of fairness and the due process rights of Frederick County and the other parties."

The PSC and LeGore respond that the PSC "acted within its discretion to take judicial notice and consider the County's LFMP" because it "is a publicly available document adopted by Frederick County" and not doing so would have given the County grounds to argue that the PSC erred in failed to consider "the consistency of the application with the comprehensive plan and zoning" of the County, as required by this Court and PU § 7-207(e)(3)(i). Nor did the court abuse its discretion in considering "its [own] decision in Case No. 9439[,]" because the PSC "has referred to its own prior decisions on a regular basis for decades" and "whether a Commission decision is consistent with its own prior precedent is one factor a reviewing court may use to determine whether" the challenged decision is "arbitrary or capricious" under PU § 3-203(4).

We are not persuaded that the PSC failed to comply with PU § 3-111 or otherwise violated the County's right to due process, either by considering the County's own LFMP or by citing the PSC's decision in the Biggs Ford case that County Bill No. 17-07 establishes a *de facto* ban on SEGS within the County. Specifically, we conclude that the PSC's consideration of these did not violate the due process protections afforded to parties before the PSC. *See generally* Art. 24, Md. Decl. of Rights ("[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."); PU § 3-107(2) ("In addition to any other right a party in a proceeding before the Commission may be entitled to, the party may . . . conduct cross-examination and submit rebuttal evidence[.]"); PU § 3-111(b)(2) ("Factual information or evidence not made part of the record may not be considered in the determination of a case."); PU § 3-111(a) ("In each hearing, the Commission shall prepare an official record that includes testimony and exhibits."). We address the Commission's consideration of the LFMP and the Biggs Ford case in turn.

Consideration of the LFMP

Although the Commission is required to "consider the matter on the record before the . . . public utility law judge[,]" it may also "conduct any further proceedings that it considers necessary[.]" PU § 3-113(d)(3)(i)-(ii). Here, the PSC properly exercised its discretion to consider the LFMP, which was adopted after the PULJ issued his proposed order in 2017, because it was a "judicially cognizable" public record that also presented "general, technical, or scientific facts within [the PSC's] specialized knowledge." *See* PU

§ 3-111(d)(1). *Cf.* Md. Rule 5-201(b)-(c) ("A court may take judicial notice" of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *Abrishamian v. Washington Med. Grp., P.C.*, 216 Md. App. 386, 414 (2014) (recognizing that "the categories of adjudicative facts susceptible to judicial notice" include "public records"). *See Est. of Steiner*, 255 Md. App. 275, 285 n.1 (2022).

The County, which created, adopted, and published the LFMP, concedes "that if proper procedures are followed, the existence of the LFMP and the date of its adoption would be an appropriate 'fact' to be taken judicial notice of." In doing so, the County necessarily admits that the LFMP is a public record that the PSC properly considered.

Significantly, it is also a document that the PSC *must* consider in order to fulfill its duty to evaluate "the consistency of [LeGore's] application with the comprehensive plan and zoning of [the County] where . . . the generating station is proposed to be located[.]" PU § 7-207(e)(3)(i). The Commission fulfilled this duty by taking notice that the County adopted a new comprehensive plan after the hearing before the PULJ. Given its obligation on remand to evaluate the consistency of LeGore's application with that new planning and zoning, and the publicly verifiable nature of the information presented in the LFMP, we reject the County's suggestion that additional proof was required before the PSC could take notice of that document or its contents, including "the four LFMP 'goals'" discussed by the PSC in its decision.

Likewise, the County elevates form over substance when it claims that the PSC erroneously failed to give notice of its intent to consider the LFMP and an opportunity to

respond. Because the LFMP is the County's own document, neither its existence, nor its contents was a surprise or otherwise in dispute. When LeGore attached the LFMP to its supplemental memorandum and argued that its proposed SEGS would be consistent with goals set forth therein, the County had both notice that the PSC was being asked to consider the LFMP and an opportunity to respond. And the County did so, via its motion to strike and supporting oral argument. Rather than addressing the contents of the LFMP, however, the County curiously insisted on the exclusion of its own comprehensive plan, without addressing the merits of LeGore's contentions.

As this record shows, the County has never contested the existence or contents of the LFMP, including the goals cited in the PSC's order. Nor has it claimed any surprise or other form of unfair prejudice from the PSC's post-remand consideration of that plan. In these circumstances, the PSC did not violate the County's due process rights by considering it.

Consideration of the Biggs Ford Case

Similarly, the PSC did not err or abuse its discretion in considering its own decision in the Biggs Ford case, that the County's Bill No. 17-07 operates as a *de facto* ban on SEGS within the County. "'[P]ublic records such as court documents' are some of the most common of the 'types of information [that] can fall under the umbrella of judicial notice.'" *In re H.R.*, 238 Md. App. 374, 401-02 (2018) (quoting *Abrishamian*, 216 Md. App. at 413). The Commission's quasi-judicial decision regarding another SEGS application opposed by the County on the same ground, *i.e.*, that Bill No. 17-07 precludes approval, is patently a public record that is highly pertinent to the LeGore proposal.

When a county zoning authority "acts in its quasi-judicial capacity," reviewing courts determine "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." *Town of Upper Marlboro v. Prince George's Cnty. Council*, 480 Md. 167, 181 (2022) (quotation marks and citations omitted). When reviewing an administrative agency's decision regarding "matters committed to agency discretion,"

> a reviewing court applies the "arbitrary and capricious" standard of review, which is "extremely deferential" to the agency. This standard is highly contextual, but generally the question is whether the agency exercised its discretion "unreasonably or without a rational basis." Under this standard, a reviewing court is not to substitute its own judgment for that of the agency[.]

Md. Small MS4 Coal. v. Md. Dep't of the Env't, 479 Md. 1, 30 (2022) (citation omitted). Although reviewing courts "accord[] the agency less deference" regarding legal conclusions, nevertheless, "in construing a law that the agency has been charged to administer, the reviewing court is to give careful consideration to the agency's interpretation." *Id.*

Here, the PSC did not err or act arbitrarily by considering its own precedent in Biggs Ford, regarding the conflict between the statutory framework governing CPCNs for SEGS and the County's Bill No. 17-07. In that case, the Commission decided to give "no weight" to the proposed project's inconsistency with the County's zoning, on the ground that "Bill No. 17-07 is effectively a *de facto* ban on utility-scale solar projects, which is not in the public interest[,]" so that it would be "appropriate to exercise the Commission's preemption authority over the County's zoning ordinance." *See* PSC Case No. 9439, Order No. 89668, (Aug. 27, 2020), https://www.psc.state.md.us/wp-content/uploads/Order-No.-

89668-Case-No.-9439-Order-Denying-Appeal.pdf. In our view, examining such precedent was not only "rational," but failing to do so might have been challenged as an arbitrary agency action or legal error.

Moreover, we discern no unfair surprise or prejudice in the PSC's consideration of its decision in the Biggs Ford case. Because the County was a party to those administrative proceedings, it had ample notice and opportunity to be heard on the question of whether Bill No. 17-07 establishes a *de facto* ban on SEGS in Frederick County, both in that case and again, when the PSC was required to address the same issue after we remanded in this case.

For these reasons, we hold that the PSC did not err in considering either the LFMP or its decision in the Biggs Ford case.

II. DUE CONSIDERATION CHALLENGE

The County alternatively challenges the LeGore Bridge CPCN on the ground that the PSC failed to give "due consideration" to "the project's consistency with the County's Comprehensive Plan and zoning, and the efforts of the applicant to address issues raised by the County." *See* PU § 7-207(e)(3). We disagree.

As discussed, the statutory scheme "grants the PSC broad authority to determine whether and where SEGS may be constructed" after "undertak[ing] a multi-faceted review" that "includes input from other state agencies, as well as from local government." *Perennial Solar*, 464 Md. at 632, 644. This "key role for local government in the PSC's review and approval process" requires "due consideration" of the County's recommendation, among the other factors enumerated in PU § 7-207(e). *Id.* at 632-33.

We are satisfied that the PSC corrected its previous error in declaring that, because LeGore had vested rights with respect to the proposed SEGS, it was unnecessary to consider the factors enumerated in PU § 7-207(e)(3). As we explained in Part I, we reject the County's contrary suggestion that the Commission was limited to the evidence in the "original record" before the PULJ. Here, the Commission reviewed the proposed LeGore Bridge SEGS in light of the comprehensive planning that the County adopted while LeGore's application was pending, in the 200+ page LFMP. As the PPRP argued in its post-remand supplemental memorandum, that presented the Commission with current and accurate information regarding whether the LeGore Bridge SEGS would be consistent with the "comprehensive plan and zoning," as required by PU § 7-207(e)(3)(i).

The Commission expressly concluded that four goals articulated in that plan, regarding air quality, clean energy, greenhouse gas neutrality, and energy independence, appeared to be consistent with the development of the solar energy generating facility within the County, notwithstanding the County's opposition to the LeGore Bridge SEGS. This record is sufficient to establish that PSC fulfilled its obligation to give "due consideration" to "the County's comprehensive plan, zoning, and efforts to resolve issues regarding the Project[.]" *LeGore Bridge I*, 2020 WL 6892007, at *16.

III. PREEMPTION CHALLENGE

The County posits that the PSC "has no authority to reject" the County's restrictive zoning provisions in Bill No. 17-07. To the contrary, we conclude that the PSC had preemptive authority, and properly exercised it, to approve the LeGore Bridge CPCN despite the County's enactment of Bill No. 17-07.

As we recognized in *LeGore Bridge I*, the decision in *Perennial Solar* unequivocally rejects the County's claim of primacy for its local ordinance. *See Perennial Solar*, 464 Md. at 621-26; *LeGore Bridge I*, 2020 WL 6892007, at *3-4, 15. The Court of Appeals was called upon to "[c]ompar[e] the comprehensive provisions of PU § 7-207 against the applicable provisions of" a Washington County zoning ordinance. *Perennial Solar, LLC*, 464 Md. at 631. In that case, as in this case, "both the statute enacted by the General Assembly and the local ordinance adopted by the County attempt[ed] to regulate the siting and location of SEGS." *Id.*

"Applying the principles of implied preemption to PU § 7-207," the Court held that "it is clear that the General Assembly intended to vest final authority with the PSC for the siting and location of generating stations requiring a CPCN" because "[t]he statute manifests the general legislative purpose to create an all-encompassing statutory scheme of solar energy regulation. That statute is 'extensive and embrace[s] virtually the entire area involved.'" *Id.* at 631 (citation omitted). Notwithstanding that the "key role for local government in the PSC's review and approval process" requires "due consideration" of the County's recommendation and other factors enumerated in PU § 7-207(e), the Court concluded that, "[u]ltimately, the final decision regarding whether to approve a generating station lies exclusively with the PSC." *Id.* at 632. *See also Howard Cnty.*, 319 Md. at 526 (holding that local governments were impliedly preempted from regulating construction of transmission lines carrying in excess of 69,000 volts by broad legislative grant of power to Public Service Commission to regulate construction of overhead transmission lines, so that local recommendations were "advisory only and not controlling").

As *Perennial Solar* makes clear, the Commission has authority to control the siting and operation of SEGS within Frederick County. Here, the PSC expressly "relied on the doctrine of preemption" in reaffirming its determination to disregard Bill No. 17-07 on the ground that it "is a *de facto* ban" on new SEGS facilities in Frederick County. We discern neither error, nor abuse of discretion in that exercise of preemptive authority.

CONCLUSION

We hold that the PSC did not err in approving the LeGore Bridge CPCN, after preempting the County's restrictive requirements for SEGS in Bill No. 17-07 and giving due consideration to the County's comprehensive planning and zoning expressed in its LFMP.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.