Circuit Court for Baltimore City
Case No. 24-C-18-002189

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1249

September Term, 2019

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FREDERICK COUNTY, MARYLAND

v.

LEGORE BRIDGE SOLAR CENTER, LLC, et al.

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Wells,
Gould,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, J.
Dissenting opinion by Gould, J.

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Filed: November 24, 2020

In this appeal, Frederick County (the "County"), appellant, challenges a decision by the Maryland Public Service Commission (the "PSC" or the "Commission"), appellee, to approve 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. While LeGore was seeking to build this solar facility (the "Project") on land zoned for agricultural use, two legislative enactments and one appellate case impacted LeGore's application, as follows:

- First, the County, responding to an influx of private proposals to build SEGS on agricultural land, changed its criteria and procedure governing special exceptions for commercial SEGS, by enacting an ordinance designated as Bill 17-07.

- Second, the General Assembly, responding to concerns of local jurisdictions about the development of generating systems, amended the statute governing approval of CPCNs, Md. Code (2010 Repl. Vol & Supp. 2019), § 7-207(e)(3) of the Public Utilities Article ("PU"), to add requirements that the PSC must give "due consideration" to "the consistency of the application with the comprehensive plan and zoning of" the county where the proposed system would be located and to "efforts to resolve any issues presented" by that county.

- Third, both this Court and the Court of Appeals decided that the statutory scheme granting the PSC regulatory authority over SEGS impliedly preempts local zoning regulation of such facilities, in *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610 (2019), *aff'g*, 239 Md. App. 380 (2018).

In reviewing the PSC's approval of a CPCN for the LeGore Project, we are called upon to consider how the timing and substance of these changes affected, first, the proposed order issued by the Public Utilities Law judge ("PULJ"); next, the order of the PSC; and then, the order affirming the PSC's decision by the Circuit Court for Baltimore

City. The County challenges the legal reasoning in these decisions, presenting two questions:

1. Did the Public Utility Law Judge and the Public Service Commission err when they failed to apply the law in effect at the time their respective decisions/orders were issued?; and

2. Did the Public Service Commission err in its application and interpretation of the doctrines of "vesting" and "due process"?

Because 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. Ofc. of People's Counsel v. Md. Pub. Serv. Comm'n,* 246 Md. App. 388, 400 (2020) (citing *Md. Ofc. 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. Comm'n*, 451 Md. 1, 11 (2016). As we understand the County's contentions in context, we must decide whether the PSC erred in failing to give due consideration to the County's comprehensive plan, zoning, and efforts to resolve issues concerning the Project, as required by PU § 7-207(e)(3), and whether the PSC erred in approving the LeGore CPCN based on the reasoning articulated in its order.

Although the administrative record reflects some consideration of the statutory factors by the PULJ, the prevailing majority of the PSC expressly declined to consider those factors. Likewise, they elected not to exercise the PSC's preemptive authority over the County's regulations and concerns. Instead, they determined that it would be "unfair" to deny the CPCN because LeGore "acquired a vested right in" a special exception issued by the County before changing its zoning regulations for commercial SEGS, so that

"retroactive application of" those new standards and procedures would violate LeGore's right to due process.

For reasons that follow, we hold that the PSC erred in concluding that LeGore "acquired a vested right in its special exception[.]" Because the PSC expressly predicated its decisions not to give due consideration to the statutory factors under PU § 7-207(e)(3), and not to exercise its preemptive authority, on its erroneous treatment of LeGore's special exception as a vested right, we cannot affirm the PSC's order based on the reasons stated in that order. Nor may we substitute alternate grounds for the PSC's decision. Consequently, we shall vacate the judgment and remand for further proceedings that reflect the significant changes in the legal and factual landscape on which this Project is situated.

## STATUTORY SCHEME GOVERNING CPCNs

In *Perennial Solar*, the Court of Appeals summarized the statutory framework governing applications for approval of a solar generating facility like the one proposed by LeGore, as follows:

> In response to the growing concern over climate change, the Maryland General Assembly enacted legislation intended to reduce Maryland greenhouse gas emissions. The legislation included a specific intent to move the Maryland energy market away from historical reliance on fossil fuels and enacted a Renewable Energy Portfolio Standard ("RPS"). *See* Maryland Code, Environment Article ("EN") § 2-1201, *et seq.*; PU § 7-701.
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> The RPS statute, PU § 7-701, *et seq.*, was originally enacted in 2004 to facilitate the State's transition to renewable energy sources. The objective of the RPS statute is to recognize and develop the benefits associated with a diverse collection of renewable energy supplies to serve Maryland. As part of its enactment, the General Assembly specifically determined that: "the benefits of electricity from renewable energy resources, including long term

decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large;" and that the State needed to "develop a minimum level of these resources in the electricity supply portfolio of the State." PU § 7-702(b). The RPS includes specific targets for the share of electricity coming from solar electric generation. PU § 7-703.

In 2009, the Maryland General Assembly enacted the Greenhouse Gas Emissions Reduction Act of 2009 ("GRRA"), a law that requires the State to reduce greenhouse gas emissions from a 2006 baseline by 25% by 2020 and by 40% by 2030. EN §§ 2-1204, 2-1204.1; PU § 7-701, *et seq.* During the 2019 legislative session, the General Assembly adopted the Clean Energy Jobs Act, which increases the State's RPS target to 50% by 2030. Senate Bill ("S.B.") 516, 2019 Reg. Sess. (cross-filed as H.B. 1158). The Clean Energy Jobs Act also includes a significant increase in electricity sales derived from solar energy from 1.9% to 5.5% in 2019, and to 14.5% in 2028. *Id.*

The General Assembly has delegated to the PSC the authority to "implement a renewable energy portfolio standard" that applies to retail electricity sales in the State by electricity suppliers consistent with the specific timetable established by the statute. PU § 7-703(a). On an annual basis, the PSC is required to report to the General Assembly on the status of the implementation of the RPS program, including the availability of Tier 1 renewable sources such as solar energy. PU § 7-712.

Consistent with the PSC's duties to ensure compliance with the RPS, including the specific targets for the share of electricity coming from solar electric generation, the General Assembly has also delegated to the PSC the exclusive authority to approve generating stations in Maryland. Unless exempt by the statute, a generating station cannot be constructed unless the PSC issues a CPCN, which is only issued after a detailed application and approval process. PU § 7-207.

The PSC's review process of a generating station is extensive. Upon receipt of an application, the PSC provides notice of the application to: (i) the Maryland Department of Planning; (ii) the governing body, and if applicable, the executive of each county or municipal corporation in which a portion of the generating station is proposed to be constructed; (iii) the governing body of any county or municipal corporation within one-mile of the proposed location of the generating station; (iv) each member of the General Assembly representing any part of the county in which any portion of the generating station is proposed to be constructed; (v) each member of

the General Assembly representing any portion of each county within one-mile of the proposed location of the generating station; and (vi) all other interested persons. PU § 7-207(c)(1). A copy of the application is also provided to each appropriate State unit and unit of local government for review, evaluation, and comment regarding the significance of the proposal to the State, area wide, and local plans or programs (*see* PU § 7-207(c)(2)), and to each member of the General Assembly who is provided with the statutory notice pursuant to PU § 7-207(c)(1). *Id.*

The statute requires that the PSC coordinate with and include the local governing body of the county or municipality in the CPCN public hearing process, and establishes a public hearing framework designed to ensure input and public comment from interested persons in the geographic area within which the generating station is being proposed:

> (d) *Public hearing*. – (1) The Commission shall provide an opportunity for public comment and hold a public hearing on the application for a certificate of public convenience and necessity in each county and municipal corporation in which any portion of the construction of a generating station ... is proposed to be located.
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> (2) The Commission shall hold the public hearing jointly with the governing body of the county or municipal corporation in which any portion of the construction of the generating station ... is proposed to be located, unless the governing body declines to participate in the hearing.
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> (3)(i) Once in each of the 4 successive weeks immediately before the hearing date, the Commission shall provide weekly notice of the public hearing and an opportunity for public comment:
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> 1. by advertisement in a newspaper of general circulation in the county or municipal corporation affected by the application;
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> 2. on two types of social media; and
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> 3. on the Commission's website.
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> (ii) Before a public hearing, the Commission shall coordinate with the governing body of the county or municipal

> corporation in which any portion of the construction of the generating station ... is proposed to be located to identify additional options for providing, in an efficient and cost effective manner, notice of the public hearing through other media types that are familiar to the residents of the county or municipal corporation.

PU § 7-207.

Under 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:
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> (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;
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> (2) the effect of the generating station . . . on:
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> (i) the stability and reliability of the electric system;
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> (ii) economics;
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> (iii) esthetics;
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> (iv) historic sites;
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> (v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;
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> (vi) when applicable, air quality and water pollution; and
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> (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(e) (emphasis added).

*Perennial Solar,* 464 Md. at 621-26 (underlining added; footnotes omitted).

## FACTS AND LEGAL PROCEEDINGS

The PSC approved a CPCN for LeGore's Project, which is a 20 megawatt solar photovoltaic generating facility on two parcels totaling approximately 170 acres of leased land in Frederick County, currently zoned for agricultural use. As the parties acknowledge, the pertinent facts are undisputed. We present them in the following timeline:

**January 15, 2016:** The Frederick County Executive issued Order No. 01-2016 (the "Executive Order"), implementing "[a] six month temporary hold on the consideration of" applications filed after this date for special use exceptions seeking to build solar arrays. The Order cited the County's receipt of "four applications in the previous six months for solar arrays ranging from 55 acres to 220 acres," which "are much larger than" previously reviewed solar projects and "were not anticipated when the land use regulations were considered and adopted[.]" The Executive Order further stated that all new and pending applicants "may proceed at [their] own risk" because a property holder's interest in a building permit cannot "vest" "[u]ntil [a] good faith, visible construction has begun," so that "any changes in the County zoning law would apply to the project (even though the special exception had previously been approved)."

**January 28, 2016:** The Frederick County Planning Commission granted the LeGore Project a special exception from the agricultural use zoning restriction.

**February 25, 2016:** The Frederick County Board of Zoning Appeals affirmed the special exception, finding "[t]hat the proposed use is consistent with the intent and purpose of the

Comprehensive Development Plan and of the Zoning Ordinance[,]" that "the nature and intensity of the operations involved in" the Project and the size of the site . . . will be in harmony with the appropriate and orderly development of the neighborhood in which it is located," and that "the operations . . . shall not have an adverse impact . . . on neighboring properties above and beyond those inherently associated with the special exception at any other location within the zoning district."

**October 7, 2016:** LeGore applied to the PSC for a CPCN authorizing the Project.

**March 8, 2017**: PSC staff and representatives of State administrative agencies, acting in their collective role under the "Power Plant Research Program," preliminarily recommended approval of a CPCN for the LeGore Project. They "concluded that the site is suitable and that the plant can be construed and operated in accordance with all applicable environmental regulations provided that . . . attached recommendations are incorporated as conditions to the CPCN."

**March 21, 2017:** Frederick County Bill 17-07 was introduced to revise "provisions relating to solar collection systems" by creating, *inter alia*, "a Commercial Solar Facility Floating Zone" that expressly applied to any facility that had not yet obtained both a CPCN and "a signed final site plan approved by the Frederick County Planning Commission."

**May 12, 2017:** Following proceedings before the PULJ, during which LeGore agreed to certain conditions on the Project and Frederick County did not participate, the PULJ closed the evidentiary record.

**May 16, 2017:** The County enacted Bill 17-07 (effective date July 5, 2017).

**June 5, 2017:** The County filed a copy of Bill 17-07 with the PULJ.

**July 6, 2017**: The County filed a "Motion to Intervene and Re-Open the Case[,]" seeking to require consideration of the new zoning criteria and procedures established under Bill 17-07.

**July 13, 2017:** The PULJ granted the County's motion in part, allowing the County to intervene for the purpose of responding to three questions.

**October 1, 2017:** Effective on this date, the Maryland General Assembly amended PU § 7-207(e)(3), to add a new subsection requiring that before the PSC takes final action on any CPCN application for a generating station, it must give "due consideration" to "the consistency of the application with the comprehensive plan and zoning of" the county where it is located and "the efforts to resolve any issues presented by" that county.

**October 3, 2017:** The PULJ issued a Proposed Order approving a CPCN for the Project, subject to enumerated licensing conditions, and finding that it "is just, reasonable, and in the public interest[.]"

**March 23, 2018:** By a vote of 3-2, the PSC affirmed the Proposed Order, approving a CPCN for the LeGore Project, based on reasons we shall discuss below (the "PSC Order").

**October 19, 2018:** The Circuit Court for Baltimore City held a hearing on the County's petition for judicial review of the PSC Order.

**November 15, 2018:** This Court filed its decision in *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 239 Md. App. 380 (2018), holding that the statutory scheme giving the PSC final authority to approve a CPCN for SEGS impliedly preempts local zoning authority over such facilities.

**July 15, 2019:** The Court of Appeals affirmed, in *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610 (2019).

**July 17, 2019**: The Circuit Court for Baltimore City entered an order (bearing a date of January 29, 2019) affirming the PSC decision to grant the LeGore CPCN, concluding that "the issues presented in this case are controlled by" the decision in *Perennial Solar.*

## THE CHALLENGED DECISIONS

As the timeline shows, decisions by the PULJ, the PSC, and the circuit court were issued over a period of time during which there were significant changes in the law affecting LeGore's Project and CPCN application. To provide context for our discussion of the issues raised in this appeal, we examine those decisions in light of the evolving law.

### *The PULJ's Proposed Order*

In the PULJ's fifty-page Proposed Order, the sole citation to PU § 7-207(e)(3), which became effective two days before that Proposed Order was filed, was a footnote at the beginning of a lengthy discussion of Bill 17-07. Nevertheless, the PULJ devoted

thirteen pages to considering the impact of the County's recently enacted law creating "floating zone" special use exceptions for commercial solar installations. After reviewing the history and effect of the new ordinance, the PULJ concluded that if LeGore "must apply for Floating Zone authority to construct the Project, it is almost certain that the Project could not meet the County's requirements and would not be approved."

The PULJ, anticipating the preemption holding in *Perennial Solar*, determined that neither the County's new law, nor its recommendations precluded approval of the CPCN, concluding:

> (1) The ultimate decision to approve solar generating station installations in Maryland lies with this Commission; (2) the Bill does not affect the Commission's authority to issue a CPCN in this matter; and (3) the Commission must give due consideration to the recommendation of the County as to the size and location of the Project.

With respect to the preemptive authority of the PSC, the PULJ relied

> on the Court of the Appeals' ruling in *Howard County v. Pepco*[, 319 Md. 511 (1990)]. That ruling is very clear that, in the Commission's review of CPCN applications, is "§ 54A [of the PSC Law] manifestly . . . implies that the recommendations from other state agencies and local governing bodies are advisory only and not controlling." Further, the Court stated that, based on its reading of § 54A, that "the [Maryland] legislature did not intend that the PSC be bound by local actions during the certification [of electric facilities] process." In addition, the Court noted "that the legislature delegate[ing] this authority to a state agency with state-wide powers, perspective, and expertise is indicative of the intent that electric utility companies respond to a centralized authority. In sum, the Court stated that "[w]hen . . . an exercise of local power obstructs the fundamental purpose of Article 78, we must conclude that these local powers were not intended to exist concurrently with those of the PSC."

With respect to the County's newly enacted zoning standards for commercial SEGS, the PULJ concluded that

> "due consideration" of local governing bodies' recommendations does not require the Commission to accept all, or any, local requirements. The Bill did not explicitly attempt to substitute its procedures for the Commission's, but the effect of the Bill's stringent new siting regulations for solar facilities, and Frederick's requirement that the Project refile its application, amounts to the same thing. The Commission is not required to accede to the County's request. While the Court in *Howard v. Pepco* stated that "the legislature . . . did not intend that local interests be ignored by the PSC," the Court stressed that "the counties may present recommendations during the PSC public hearings." In this case, Frederick County declined to take advantage of that opportunity.
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> In this case, Frederick's new zoning requirements would negate the special exception granted to the Applicant 18 months before the Bill became law, would add a lengthy and burdensome review process, and would likely result in the County's denial of the new Application due to its inconsistency with the new County zoning laws. Maryland law simply does not permit a locality, such as Frederick, to substitute its own approval process for the Commission's CPCN process. Further, if the counties were to have veto authority in the granting of CPCNs, as would essentially occur if Frederick were to prevail in this matter, a dual system of State laws would create "utter confusion."
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> Finally, the Commission's responsibility covers electric service over the entire State, with interconnection of generating stations, such as LeGore, with the larger PJM system. It is inappropriate for a county to impose its own requirements alongside the Commission's in such a situation. Weighing these considerations, I conclude that the County's arguments must be rejected.

(Footnotes omitted.)

After "rejecting the County's proposal to require LeGore to file a Floating Zone application for the proposed LeGore Bridge Solar Center[,]" the PULJ considered the statutory factors under PU § 7-207(e)(2). The PULJ ultimately found, "based on the preponderance of the evidence, that approval of the . . . . Certificate of Public Convenience and Necessity . . . is just, reasonable, and in the public interest."

*The PSC Order and Dissent*

A majority of three PSC commissioners (the "Majority") affirmed the Proposed Order, an order predicating that decision on different grounds than those stated by the PULJ. The Majority acknowledged the County's contention "that the new PUA § 7-207(e)(3) required the PULJ to give 'due consideration' to the most recent plan and local zoning laws created by County Bill 17-07" and that "[t]he parties agree that [the Project] . . . would not comply with" those changes in the County's zoning and planning. "Because LeGore complied with all local laws through the Application process," however, the Majority "affirm[ed] the decision of the PULJ" "for the reasons stated" in its Order.

The Majority explained that although "the issue as to whether the power conferred upon the Commission pre-empts any conflicting local zoning laws or other concerns" had been "extensively briefed by the parties[,]" they

> did not believe this issue needs to be resolved in this particular case because we conclude that: 1) LeGore acquired a vested interest in its special exception because it complied with all local laws in effect at the time; and 2) basic due process requires that we affirm the PULJ.

The Majority "view[ed] this matter more as one in which [LeGore] complied with local ordinances than one in which the Application and Frederick County's local laws so differ that we must determine whether PUA § 7-207 or Frederick County's amended zoning requirements govern."

Regarding the County's argument that the PULJ failed to give "due consideration" to the zoning changes implemented by Bill 17-07, the Majority also did "not believe this

analysis [was] necessary[,]" but added that they "did not intend to suggest that local counties are not entitled to due consideration on any issue pertinent to a CPCN Application." To the contrary, they asserted, "[w]e have always welcomed such input and will continue to do so." In this instance, they concluded, "[t]he PULJ would have worked with Frederick County in a complementary fashion had [it] participated earlier in the proceedings[.]"

The Majority then explained why LeGore had a vested right in its special exception. Citing the principle that"[a]n appellate court must apply the law in effect at the time a case is decided, provided that its application does not affect intervening vested rights[,]" *O'Donnell v. Bassler*, 289 Md. 501, 508 (1981), the Majority reasoned that LeGore's right to proceed with the Project under the special exception vested before the County changed its zoning law because "the operative laws were those in effect at the time it was granted." After the Majority acknowledged that when LeGore acquired its special exception, it was on notice, via the County's Executive Order issued two days earlier, that the special exception was subject to future zoning changes that might be made to address pending solar projects. Nevertheless, they concluded that "the Executive Order itself does not alter the County's" zoning ordinance, so that "[o]nly the subsequent enactment of the County Council effect[ed] a change in the County law."

Relying on its conclusion that "LeGore acquired a vested right in its special exception[,]" the Majority then found "that to apply the new laws contained in Council Bill 17-07 – which came into effect 18 months after LeGore obtained its special exception – to

invalidate LeGore's special exception would violate due process." The Majority reasoned that "retroactive application" of the new law "so late in the proceeding and after the record had been closed" "would be grossly unfair" because "LeGore invested substantial time and resources and complied with all local ordinances in effect throughout this lengthy process. It did so in reliance upon the fact that it had obtained a valid special exception, which formed the basis for its Application" for a CPCN.

Two commissioners dissented (the "Dissenters"). Citing both the new "due consideration" requirements in PU § 7-207(e)(3) and the new zoning law enacted by the County, the Dissenters pointed out that "LeGore agreed to multiple conditions which require County approvals through procedures that no longer exist or, have been modified significantly during the course of this proceeding." In their view, the Majority "too narrowly focuse[d] on the" special exception that was granted "while the County was in the process of considering the interests of its constituency, especially when [LeGore] suggests that the County's approval is unnecessary and preempted by the Commission's authority." The Dissenters acknowledged that the County "should have more aggressively engaged in the statutory CPCN review process initiated by LeGore[,]" but pointed out that the Executive Order issued before LeGore obtained its special exception put LeGore on notice that it was "proceed[ing] at [its] 'own risk' in going forward with" the Project.

The Dissenters also disagreed with the PULJ's conclusion that the County's "stringent" new zoning law, and its requirement "that the Project refile its application," amounted to an "attempt to substitute [the County's] procedures for the Commission's[.]"

In the Dissenters' view, Bill 17-07 was instead "a reasonable further development of [the County's] Comprehensive Plan in light of the development (and potential development) of large scale solar projects inconsistent with the County's land use plan." By "rejecting the recommendation of the County, and approving the [P]roject despite its inconsistency with the County's Comprehensive Plan," the Majority decision prompted the Dissenters to state their

> concern[] that the Commission is deviating from its own standard of giving "significant weight" to the local jurisdiction's recommendation, or the clear direction the General Assembly has provided in adoption of PUC [sic] § 7-207(e). We believe the adoption of this new statutory requirement is merely a codification of the Commission's existing practice to compare a CPCN application with County or municipality's comprehensive plan and zoning strategy and with the intention to resolve any issues presented. Here, the Majority has, at a minimum, failed to explain how it is applying and then dismissing the new legislative requirement to consider the "consistency" with the local zoning requirements.

"A fair and prudent decision," the Dissenters posited, "would be to remand the Proposed Order to develop the record more fully, consider the County's legitimate statutes setting local land use priorities and have them recognized vis-à-vis [LeGore's] proposed [P]roject, and provide [LeGore] the opportunity to find accommodations with the County." Under these circumstances, the Dissenters found it "unfortunate" that the Majority's approval "vindicates" LeGore's "strategy of preemption rather than making efforts to resolve issues presented by the County regarding the proposed [P]roject[.]"

*Circuit Court Hearing*

At the hearing before the Circuit Court for Baltimore City on the County's petition for judicial review, the County argued "that there were three errors of law committed by the PULJ and the PSC[.]" With respect to "the initial failure of the PULJ . . . to consider and address the requirements of" PU § 7-207(e)(3), the County argued that the Proposed Order included "no analysis and no application of those requirements" even though "the Governor had signed that bill into law in May while this case was still open and pending" and the Proposed Order "was issued after the effective date of that change in State law." After the County "raised that very issue" in order "to give [the PSC] the opportunity to rectify that error[,]" "the PSC also failed to apply" PU § 7-207(e)(3).

The County argued this first "error of law" was "compounded" by two more, when the PSC erroneously found that LeGore "had obtained what is known as vested rights in the zoning arena, based on the granting of the special exception" and "that somehow the application of a change in the County law would have been a retroactive application" that "would violate LeGore's due process rights." In the County's view, because the PSC "specifically declined to address the preemption issue in its opinion, . . . that issue" was not before the court for judicial review.

When the court asked whether "the findings of fact set forth in the special exception are not sufficient to meet" the "due consideration" requirements in PU § 7-207(e)(3), counsel for the County answered that "simultaneously with the change in the State law, . . . the County was actively changing its own law" in a manner that invalidated that special exception. Moreover, the PSC's vesting conclusion was "totally incorrect" given that

Maryland is "a 'late vesting state' because you have to have obtained an actual valid building permit" and "commence construction pursuant to that permit[.]" In the County's view, the PSC's vested right rationale amounted to "com[ing] up with an equitable remedy when [the PSC] really had no equitable jurisdiction[.]" In turn, because LeGore did not have a vested right in its special exception, this "was not a retroactive application" of the zoning changes in Bill 17-07, and therefore, not a due process violation.

The County contended that the PSC, like the PULJ, was "obligated to apply the then existing law to the review of the application." Reversal was necessary because neither the PULJ nor the PSC complied with PU § 7-207(e)(3) and because the PSC decision was based on "erroneous findings of law with respect to vesting and due process[.]"

The PSC countered that it has "always do[ne] more than give due consideration to County laws[,]" by inviting County representatives "to sit on the bench with us during the CPCN process[,]" so the enactment of PU § 7-207(e)(3) "really changed nothing in terms of our approach with these types of cases." Yet the County did not choose to participate during the "seven months of CPCN proceedings," when evidence was considered, "LeGore agreed to certain licensing requirements[,]" and the record was closed. In these circumstances, counsel for the PSC explained, "the basis for our decision is [that] what happened to LeGore Bridge is simply unfair." Whether characterized as "due process, a lack of equity," or "vested rights," counsel for the PSC argued that LeGore should not be required to go "back through a whole another approval process that only came to our

attention after [the PSC] had already spent seven months and quite a bit of time and money.'"

When the court raised the Majority's vested rights rationale, counsel argued that in obtaining the special exception, LeGore invested "a year-and-a-half and I'm sure quite a bit of money[,]" which "as a matter of equity should vest their right not to have to do it all over again when the proceedings really are closed[.]" The court then asked whether, given that LeGore knew the County was planning to change its zoning laws for commercial SEGS, its decision to proceed with the Project was "a business gamble" rather than "an inequity[.]" Counsel for the PSC acknowledged that LeGore made a "business decision," but pointed out that it was based on knowledge that the PSC proceedings would "take precedence over any conflict between the State of Maryland interest and Frederick County interest." Counsel argued that "Frederick County law does not bind the Commission" even though the PSC has "to give it due consideration" under PU § 7-207(e)(3).

According to counsel, the PSC could have affirmed the PULJ's Proposed Order "by finding these floating zone requirements aren't substantively serious[,]" but it "didn't do that." Instead, the PSC "studiously avoided the preemption option" and "went the procedural route," because it considered itself "a partner with" the County, and therefore preferred not "to use [preemption] if we don't have to." Nevertheless, counsel pointed out, "the preemption option does give us extraordinary discretion as to how we run our proceedings."

LeGore argued that the decisions of both the PULJ and the PSC "adequately complied with" PU § 7-207(e)(3), because the record was re-opened to allow the County to participate, the PULJ "devoted at least 13 pages in the proposed decision to evaluating the effect of the new law and considering Frederick County's decision[,]" and "the findings in the special exception are sufficient to meet those requirements." "Just because the Commission did not specifically go through the analysis of every single factor in" PU § 7-207(e)(3), counsel maintained, "doesn't mean that it didn't consider those, that those disappeared."

With respect to preemption, counsel for LeGore acknowledged that the PSC declined to adopt the PULJ's reasoning, but argued that "everything else is a part of the Commission's decision" and that preemption remained an issue. The court asked whether, "as a legal matter," it could "hang any ruling on preemption" even though "that was not the basis of a decision below[,]" pointing out that "all of the administrative law cases I've read have said, I have to limit myself to what was determined below and I can't go rogue and find something else that I want to hang my hat on." Counsel for LeGore answered that the PSC's decision was affirmable based on the reasoning in its order. Alternatively, affirming "based in part on the doctrine of preemption" would not be "going rogue" because "that is the reason why the Commission is not bound by common law principles of vesting."

In counsel's view, even though the PSC "cited a common law decision on vesting, it was not . . . intending to refer to vesting in the legal sense of having to have a shovel in

the ground[,]" but rather "in terms of the overall fairness of granting a CPCN in the totality of the circumstances presented here." Consequently, "even if the [P]roject is inconsistent with the local comprehensive plan or with the local recommendation," counsel for LeGore argued that "the Commission still has the discretion to approve that as long as they give it due consideration, which we believe they did here," as "reflected in the" both PSC's decision and the PULJ's Proposed Order.

When the court asked counsel to identify "where it is reflected" in the PSC order, she conceded there is nothing in the Majority decision, but argued that "[i]t is throughout the [PULJ's] decision. There is a discussion of the special exception in particular and then . . . discussions specifically of the new Frederick County bill on page 13 of the" Proposed Order. Counsel maintained that because the PSC Order "incorporates" the PULJ's Proposed Order, "which we believe is a very thorough analysis of all the County's arguments[,]" that was enough to satisfy the "due consideration" requirement.

In rebuttal, the County insisted that "preemption is not an issue" because the PSC "sidestepped that issue" and "there was no cross-appeal" raising that "as a valid issue on judicial review." Although the County sought to "apprise both the [PSC] and the PULJ" on the "relevance" of PU § 7-207(e)(3), counsel reasserted those factors "were not really given the due consideration but rather were summarily rejected."

*Circuit Court Order*

Within weeks after the October 19, 2018, judicial review hearing, this Court filed its decision in *Perennial Solar*, answering the same preemption question that these parties debated to the PULJ, the PSC, and the circuit court. On November 15, 2018, we held that the statutory scheme governing applications for a CPCN "preempts, by implication, local zoning regulation" governing SEGS like the LeGore Project. *See Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 239 Md. App. 380, 392 (2018).

On July 15, 2019, the Court of Appeals affirmed, holding:

> PU § 7-207 preempts by implication local zoning authority approval for the siting and location of generating stations which require a CPCN. The statute is comprehensive and grants the PSC broad authority to determine whether and where SEGS may be constructed. Local land use interests are specifically designated by statute as requiring "due consideration" by the PSC. This includes 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, as well as due consideration by the PSC of the consistency of the application with the comprehensive plan and zoning for the respective local jurisdiction.
>
> Under the plain language of the statute, local government is a significant participant in the process, and local planning and zoning concerns are important in the PSC approval process. However, the ultimate decision-maker is the PSC, not the local government or local zoning board. Although local zoning laws are preempted and therefore not directly enforceable by the local governments as applied to generating stations such as SEGS, they are nevertheless a statutory factor requiring due consideration by the PSC in rendering its ultimate decision.

*Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610, 644-45 (2019).

Two days later, the circuit court filed its order affirming the PSC Order approving the LeGore CPCN. The decision, internally dated January 28, 2019, but filed on July 17, 2019, cites this Court's decision in *Perennial Solar*, without referencing the Court of Appeals decision.

In its order, the circuit court pointed out that the PSC approved a CPCN "for construction of a solar wind farm, despite Frederick County having modified its zoning regulations in such a manner that would preclude LeGore from establishing a farm in LeGore's chosen location[.]" Citing this conflict between local and state authorities, the court "conclude[d] the preemption issue . . . is a controlling issue" that was "addressed" by our decision in *Perennial Solar* "in the context of a solar energy generating system[.]" In turn, because the decision in *Perennial Solar* "renders the need for the PULJ to reexamine the issues of less consequence[,]" and "State law preempts Frederick County's zoning authority with respect to LeGore's proposed facility[,]" the circuit court "affirm[ed] the [PSC's] determination that LeGore is entitled to a [CPCN]."

The County noted this timely appeal.

## STANDARDS GOVERNING APPELLATE REVIEW

When reviewing the final decision of an administrative agency like the Public Service Commission, we "look through" the circuit court's decision, to "review the agency's decision directly[.]" *See Accokeek, Mattawoman, Piscataway Creeks Communities Council v. Md. Pub. Serv. Comm'n*, 451 Md. 1, 11 (2016); *Assateague Coastal Tr., Inc. v. Schwalbach*, 448 Md. 112, 124 (2016). "A court may not uphold an

agency decision on any basis other than the findings or reasons stated by the agency." *Comptroller of the Treasury v. Two Farms, Inc.*, 234 Md. App. 674, 697 (2017). Consequently, "[w]hile a court's decision may be upheld as right for the wrong reason, an agency decision must be 'right for the right reason.'" *Id*. (quoting *Mueller v. People's Counsel for Baltimore Cty.*, 177 Md. App. 43, 84 (2007)).

By statute, a PSC decision approving a CPCN is considered "prima facie correct and shall be affirmed unless clearly shown to be" deficient on enumerated grounds, including that it is "affected by . . . error of law[.]" PU § 3-203. *See Accokeek*, 451 Md. at 11. The Court of Appeals has explained that,

> [i]n giving meaning to this language in PU § 3-203 without rendering it surplusage, we believe 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. Ofc. of People's Counsel v. Md. Pub. Serv. Comm'n*, 461 Md. 380, 393-94 (2018) (footnotes omitted). "[T]he standard of review does not depend on whether we would reach the same conclusions as the Commission, but on whether the Commission's decision or process is infected by the specified defects." *Id*. at 391-92.

## THE PARTIES' CONTENTIONS

The County insists that in contrast to *Perennial Solar*, this appeal "is NOT about preemption of the County's zoning laws," but instead about errors committed by the PSC. Specifically, the County contends that the PSC erred as a matter of law by failing "to apply the law in effect at the time each decision/order was issued[,]" which required "'due consideration' to the consistency of LeGore's CPCN application with the County's Comprehensive Plan and zoning regulations, and to the efforts to resolve any issues presented by" the County about the Project. In support, the County points out that the PULJ's Proposed Order has only a single, footnoted reference to PU § 7-207(e)(3) and that the PSC stated that it did "not believe" any due consideration "analysis [was] necessary." The PSC then compounded its error in failing to comply with PU § 7-207(e)(3), by erroneously treating LeGore's special exception as a "vested right," so that "retroactive application" of the County's new zoning standards to the Project would violate due process and be unfair.

The PSC responds that it "correctly declined to require LeGore to pursue a second lengthy review process after investing significant time and resources pursuant to the laws in effect at the time and after giving 'due consideration' to Frederick County's arguments." Although the PSC acknowledges that the Majority "chose not to address the pre-emption issue that the PULJ resolved in LeGore's favor," it argues that the circuit court correctly considered the subsequent decision in *Perennial Solar* because it was issued while LeGore's petition for judicial review was still pending. The PSC maintains that "allowing

Frederick County to insist that the Commission give more weight to County Bill 17-07 than it chose to would violate the clear mandate that the Commission's CPCN process preempts local zoning laws." In the PSC's view, its "absolute discretion renders any remand . . . a waste of time" because it "could satisfy any remand with a simple sentence: "Given the inequitable procedural posture into which Frederick County's late intervention has placed [LeGore], we conclude that Frederick County's local zoning regulations and comprehensive plan are not due any consideration.'"

LeGore argues that both the PULJ and the PSC complied with the due consideration requirements in PU § 7-207(e)(3), by discussing the effect of Bill 17-07 in Section IV of the Proposed Order. According to LeGore, "[i]n affirming the PULJ's decision, the Commission also expressly recognized that subsection (e)(3) was in effect at the time of the PULJ's decision and its own decision." As for the PSC's vesting and due process rationales, LeGore maintains that the PSC was focused on equitable factors and fundamental fairness, rather than applying common law or constitutional principles.

In reply, the County argues that both the PULJ and the PSC erred in "refus[ing] to accept the fact asserted by the County, that LeGore's special exception was no longer valid after the effective date of County Bill 17-07." In turn, "[t]he voiding of LeGore's special exception approval invalidates the crucial record evidence which provided the foundation for the PULJ's Proposed Order and the PPRP conditions incorporated therein." "Without a valid special exception approval the PSC Order unravels[,]" rendering "the findings and

decisions by the PULJ and the PSC . . . arbitrary and capricious, and unsupported by the evidence in the record."

## ANALYSIS

We must decide whether the PSC erred in approving the LeGore CPCN, by misapplying vesting and due process concepts and/or by failing to give "due consideration" to the County's comprehensive plan, zoning, and efforts to resolve issues concerning the Project, as required by PU § 7-207(e)(3).[1] We address each question in turn.

### *Vesting and Due Process*

We agree with the County that the PSC erred in concluding that LeGore "acquired a vested right in its special exception." The pertinent facts are undisputed. Two weeks after the County issued Executive Order 01-2016 stating that "[u]ntil good faith, visible construction has begun, any changes in the County zoning law would apply to the project (even though the special exception had previously been approved)," the County approved a special exception for LeGore's Project. At that time, LeGore knew it would need to obtain a CPCN from the PSC before it could begin any construction. Consequently, LeGore acquired its special exception with knowledge that at any time before it began

[1] Although the PSC, in this Court, questions whether the County has the right to appeal or obtain a remand, the Majority concluded that the order allowing the County to intervene, and thereby to assert the rights of a party, "is sufficient to provide . . . the right to raise their concerns before the Commission." Moreover, the Majority recognized that PU § 3-202(a) authorizes any "party or person in interest" who "is dissatisfied by a final decision or order of the Commission to seek judicial review of the decision or order[.]" *See Accokeek, Mattawoman, Piscataway Creeks Community Council, Inc. v. Md. Pub. Serv. Comm'n*, 451 Md. 1, 15 (2016).

construction, the County could change its zoning laws in a manner that invalidated that special exception.

And that is what happened. Before LeGore began construction on the Project, while it was still seeking a CPCN, the County enacted Bill 17-07, changing its zoning for commercial SEGS, including the LeGore Project.

By advising that any special exception for a commercial SEGS would remain subject to changes in the County's zoning laws until "visible construction" began, the County notified LeGore that its special exception was *not* vested, so that proceeding with the Project would be "at its own risk" of future changes in the County's zoning scheme. This is consistent with established Maryland law governing vested rights in a particular land use. As the Court of Appeals recently affirmed, "in order to vest rights in an existing zoning use that will be protected against a subsequent change in zoning use, the owner must obtain a valid permit and undertake a substantial beginning in construction before the change in zoning has occurred." *75-80 Props., LLC v. Rale, Inc.*, __ Md. __, No. 59, Sept. Term, 2019, 2020 WL 4933499, at *19 (Aug. 24, 2020).

Because LeGore did not begin construction on the Project before the County enacted Bill 17-07, changing its standards for commercial SEGS, LeGore did not acquire a vested right in its special exception. The Majority erred in concluding that it did.

For the same reason, the Majority also erred in concluding that it "would violate due process" to "apply the new laws contained in Council Bill 17-07 – which came into effect 18 months after LeGore obtained its special exception – to invalidate" LeGore's special

exception. The Majority predicated that due process determination on their erroneous conclusion that the new zoning ordinance had been applied "retroactively" to LeGore after it "acquired a vested right in its special exception."

We recognize that the Majority linked its vesting conclusion to equitable concerns about the timing of the County's change in the law and its belated participation in the Commission proceedings. Yet we are not persuaded that the error in treating LeGore's special exception as vested can be overlooked by recharacterizing the Majority rationale as equitable rather than legal.

To be sure, "[p]rocedural due process, guaranteed to persons in this State by Article 24 of the Maryland Declaration of Rights, requires that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them." *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397, 408-09 (1999) (quotation marks and citations omitted). "The doctrine that every person is entitled to a fair and impartial hearing applies to an administrative agency exercising judicial or quasi-judicial functions." *Id.*

When the Majority invoked equitable grounds for approving the CPCN, their legal errors tainted that reasoning. As counsel for the PSC acknowledged, the Majority's finding that "[i]t would be grossly unfair" to deny the CPCN was premised on LeGore's investment of "substantial time and resources" to "compl[y] with all local ordinances" and its "reliance upon the fact that it had obtained a valid special exception." Yet, as discussed, LeGore was on notice that, consistent with established legal principles, its special exception was

not vested and that when LeGore proceeded to the PSC, it did so "at its own risk" that the County would invalidate that special exception by changing its zoning standards for SEGS. Moreover, the detailed discussion of the impact of Bill 17-07 in the PULJ's Proposed Order establishes that there was sufficient time and opportunity for LeGore to address the changes made by the County during these administrative proceedings.

We may not uphold the PSC's decision "on any basis other than the findings or reasons stated by the agency." *Two Farms*, 234 Md. App. at 697 (citation omitted). Because the Majority expressly predicated its due process/fairness rationale for approving the CPCN on an erroneous treatment of LeGore's special exception as a vested right, we cannot affirm the PSC Order for the reasons stated by the Majority.

*Preemption and Due Consideration*

The County further contends that neither the PULJ or the PSC complied with PU § 7-207(e)(3), requiring "due consideration" of the County's comprehensive plan, zoning, and efforts to resolve issues concerning the Project. In the County's view, even though *Perennial Solar* made it clear that the PSC has preemptive authority to discount or disregard those statutory factors, the PSC may not refuse to consider them, as it did here.

The PSC and LeGore urge us to "look through" the PSC Order, then deem the PULJ's examination of Bill 17-07 sufficient to satisfy the statutory "due consideration" requirement. They contend that after the PULJ considered the statutory factors, the PSC was free, in the exercise of its preemptive authority, to disregard or discount the County's zoning priorities and concerns.

To be sure, the PULJ went well beyond a footnote to PU § 7-207(e)(3), discussing in detail the impact of Bill 17-07 on the Project and correctly recognizing that the PSC has preemptive authority in deciding whether "to accept all, or any, local requirements." Yet we need not resolve the parties' dispute over whether the PULJ's analysis falls short of "due consideration" because it lacks any discussion of "consistency with the County's Comprehensive Plan. That is because the PSC, in its Majority decision, expressly refused to conduct *any* "due consideration" analysis under PU § 7-207(e)(3). Similarly, the Majority declined to exercise preemptive authority over the County's zoning laws and concerns, instead concluding "that: 1) LeGore acquired a vested right in its special exception . . . .; and 2) basic due process requires that we affirm the PULJ." Finding both due consideration and preemption analyses unnecessary, the Majority predicated its decision to approve the CPCN on "fairness" concerns, stating that it viewed "this matter more as one in which [LeGore] complied with local ordinances than one in which the Application and Frederick County's laws so differ that" the PSC had to decide the preemption question that was still unresolved by our appellate courts at that time.

As *Perennial Solar* teaches, the PSC has discretion when weighing the impact of the County's new zoning standards for commercial SEGS, but it must exercise that discretion after giving due consideration to the County's comprehensive plan, zoning, and efforts to resolve issues regarding the Project. *See Perennial Solar*, 464 Md. at 644-45; PU § 7-207(e)(3). The Proposed Order demonstrates that the County's belated intervention did not actually prevent the PSC from considering the impact of Bill 17-07. Even after the

PULJ examined the County's zoning changes, the Majority refused to do so. Instead, the Majority premised their approval of the CPCN on a fairness determination that was tainted by their erroneous conclusions that LeGore "acquired a vested right in its special exception" so that considering the County's priorities and concerns in light of Bill 17-07 would violate LeGore's right to due process. Here, the PSC expressly refused to do so. Instead, the Majority concluded that no matter what the County's concerns were, it would be "grossly unfair" to deny LeGore a CPCN because it had obtained a special exception before the County changed its zoning standards and the County waited until "late in the proceeding and after the record was closed" to challenge the Project.

Our task is to evaluate the decision of the PSC, not the PULJ. *See Accokeek*, 451 Md. at 11. Because we may not uphold the PSC's decision "on any basis other than the findings or reasons stated by the agency[,]" *Two Farms*, 234 Md. App. at 697 (citation omitted), we are limited by the Majority's reasoning. In turn, because the Majority expressly declined to predicate their decision on the PSC's preemptive authority over the County's comprehensive plan, zoning, and concerns regarding the Project, or even to discuss those factors, we may not affirm the PSC Order based on due consideration or preemption rationales.[2]

[2] Although our task is to review the PSC Order, we recognize that the circuit court misapplied *Perennial Solar* as authority to affirm that Order, because a court may not affirm an administrative decision for reasons other than those given by the agency. *See Comptroller of the Treasury v. Two Farms, Inc.*, 234 Md. App. 674, 697 (2017).

*Remand*

"When an agency reaches a decision 'based on several grounds and one or more is invalid, a reviewing court must appraise whether the invalid ground 'may not have infected the entire decision.'" *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 765 (2006) (citation omitted). "As a general rule, when courts decide that an administrative agency's decision is based upon an error of law, we remand the matter to the agency for further proceedings." *Cty. Council of Prince George's Cty. v. FCW Justice, Inc.*, 238 Md. App. 641, 679 (2018) (citing *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 522 (2012)). Remand is required unless "there is no administrative function that remains to be performed" or "it would be futile[,]" such as when "there [is] only one action [the agency] could take." *Id*. (quoting *Cty. Council of Prince George's Cty. v. Zimmer*, 444 Md. 450, 581 (2015)). *See also O'Donnell v. Bassler*, 289 Md. 501, 509 (1981) ("if an administrative function remains to be performed after a reviewing court has determined that an administrative agency has made an error of law, the court ordinarily may not modify the agency order" and instead "should remand the matter to the administrative agency without modification").

We conclude that the PSC's approval of the LeGore CPCN was "infected" by both its error in treating LeGore's special exception as a vested right and its refusal to conduct a due consideration analysis in accordance with PU § 7-207(e)(3). *See Bernstein*, 167 Md. App. at 764. As discussed, the Majority's erroneous determination that LeGore "acquired a vested interest in its special exception" formed the predicate for the PSC Order approving

the LeGore CPCN. The Majority expressly declined to conduct any "due consideration" or preemption analysis, substituting its erroneous conclusions about vested rights, due process, and fairness.

In these circumstances, we do not agree with the PSC that "a remand would serve no purpose." To be sure, the Commission's "absolute discretion" means that it "is not required to place a specific amount of weight on Frederick County's recommendations[.]" But the PSC cannot "take final action on" LeGore's Project without giving "due consideration" to its "consistency with the comprehensive plan and zoning" and to "the efforts to resolve any issues presented by" the County. *See Perennial Solar*, 464 Md. at 644-45; PU § 7-207(e)(3). Nor may the PSC correct its failure to give due consideration or its erroneous vested right analysis merely by issuing the sentence suggested by the PSC, eschewing consideration of the statutory factors and ascribing approval of the CPCN based on "the inequitable posture into which Frederick County's late intervention . . . placed" LeGore.

We cannot fill in the blanks created by the Majority's errors and omissions. See *O'Donnell*, 289 Md. at 509. Consequently, we must remand for the PSC to consider, in light of *Perennial Solar*, what 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. *See* PU § 7-207(e)(3); *Perennial Solar*, 464 Md. at 645.

**JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO REMAND TO THE MARYLAND PUBLIC SERVICE COMMISSION FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY EACH APPELLEE.**

Circuit Court for Baltimore City
Case No. 24-C-18-002189

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1249

September Term, 2019

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FREDERICK COUNTY, MARYLAND

v.

LEGORE BRIDGE SOLAR CENTER, LLC, et al.

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Wells,
Gould,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Dissenting Opinion by Gould, J.

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Filed: November 24, 2020

I respectfully dissent. I agree with the Majority that Legore did not, as the PSC found, acquire vested rights in the special exception.[1] I also agree that the due consideration requirement under PU § 7-207(e)(3) applied to the PSC, notwithstanding the fact that it went into effect just two days before the Proposed Order was issued. Nevertheless, I disagree with the Majority's analysis in two respects. First, in stating that "[our] task is to evaluate the decision of the PSC, not the PULJ," (slip opinion at 30), the Majority seems to view the Commission's final order as distinct from the PULJ's Proposed Order that it affirmed. I think that's a mistake—our review should focus on both the PSC's order as well as the PULJ's Proposed Order. Second, in my view, the PSC *did* give the due consideration required by PU § 7-207(e)(3).

**The Final Order**

Under PU § 3-104(a)(1), the "Commission shall institute and conduct proceedings reasonably necessary and proper to the exercise of [the Commission's] powers or the performance of its duties." The final order or decision that results from such a proceeding is, under PU § 3-202(a), subject to "judicial review." The question here is what, exactly, constitutes the final order that is the subject of this judicial review. In my view, the combination of the Commission's order and the PULJ's Proposed Order constitutes the final order or decision.

[1] For the sake of simplicity, all capitalized words or terms shall have the same definition as set forth in the Majority's opinion.

The PSC has two ways to conduct the proceeding and decide the matter. First, the PSC can have the proceeding heard and decided by a panel, of which there are three kinds: (1) an *en banc* panel of the Commissioners; (2) a panel of at least three Commissioners, or (3) a panel of one public utility law judge and at least two commissioners. PU § 3-104(a)(2). The panel's decision *is* the Commission's decision, meaning that no further administrative review is available.

Second, the PSC can "delegate to a commissioner or to a public utility law judge the authority to conduct a proceeding that is within the Commission's jurisdiction." PU § 3-104(d(1). The PULJ conducts the proceeding and then issues a proposed order and findings of fact. PU § 3-104(d)(2) & (3). Unlike a decision issued by a panel, further administrative review *is* available to a party. PU § 3-113(d). Specifically, unless ordered otherwise, a party has 30 days to note an appeal with the Commission. PU § 3-113(d)(2)(ii). When such an appeal is noted, the Commission "promptly shall: (i) consider the matter on the record before the commissioner or public utility law judge; (ii) conduct any further proceedings that it considers necessary including requiring the filing of briefs and the holding of oral argument; and (iii) issue a final order." PU § 3-113(d)(3). If, however, no timely appeal to a PULJ's proposed order is noted, the proposed order becomes the final order of the Commission. PU § 3-113(d)(2)(i).

Regardless of which path is chosen, the parties get to the same place: a final order. And, a final order "shall: (1) be based on consideration of the record; (2) be in writing; (3) state the grounds for the conclusions of the Commission; and (4) in the case of a

complaint proceeding between to public service companies, be issued within 180 days after the close of the record." PU § 3-113(a).

Here, the Commission's order affirmed the Proposed Order without entertaining the preemption and "due consideration" arguments of the parties. Viewed in isolation, the Commission's order does not provide any relief, let alone grant a CPCN; nor does it impose any new conditions on the granting of the CPCN. But we know from the Proposed Order that Legore was granted a CPCN and that there were conditions attached to that grant. The Commission effectively incorporated the Proposed Order by affirming it without any further relief or conditions. Thus, the final order in this case consists of two documents: (1) the Proposed Order; and (2) the Commission's order dated March 23, 2018.

As a result, I am not convinced that the Majority has correctly framed the appropriate standard of review. Citing cases arising out of decisions by agencies other than the PSC, the Majority states that we cannot uphold the agency's decision on grounds not relied upon by the agency. However, the Court of Appeals has cautioned against using the standard of review applicable to the Administrative Procedures Act. *Clipper Windpower, Inc. v. Sprenger*, 399 Md. 539, 559 n.18 (2007); *Mid-Atlantic Power Supply Ass'n v. Pub. Serv. Comm'n of Maryland*, 361 Md. 196, 214 (2000). The Majority's analysis appears to view the agency's decision here as consisting only of the Commission's March 23, 2018 order. On that basis, the Majority draws the conclusion that we can't look past the Commission's erroneous vested rights analysis and uphold for reasons it had not addressed, including the rationale behind the PULJ's Proposed Order. In my view, because the final order subject to judicial review includes the Proposed Order by the PULJ, we *can* properly

look to the Proposed Order and, as explained in the next section, uphold for reasons stated therein.

**The Due Consideration Requirement under PU § 7-207(e)(3)**

PU § 7-207(e)(3) provides:

> The Commission shall take final action on an application for a certificate of public convenience and necessity only after due consideration of:
>
> ***
>
> (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 a county or municipal corporation where any portion of the generating station is proposed to be located.

Two points are worth noting about the text of this subsection. First, this provision merely requires the Commission to *consider* these factors, but it doesn't require the Commission to re-open the hearing to take additional evidence to do so. Second, this provision *presumes* that there is evidence in the record that would enable the Commission to consider the factors. Thus, any consideration of these factors must be predicated solely on the evidence before the Commission at the time the Commission makes its decision.[2]

[2] That's true even on appeal of a PULJ's proposed order. Under PU § 3-113(d)(3), the Commission's review must be based "on the record before the commissioner or public utility law judge." Likewise, as noted above, when the Commission appoints one of the three types of panels to conduct the proceedings, the panel's final order shall, among other things, "be based on consideration of the record." PU § 3-113(a)(1).

The adequacy of the Commission's consideration cannot be viewed in isolation from the quantity and quality of the information before it.

Here, the County declined to take full advantage of the opportunity to make its views on these matters known to the Commission. Petitions to intervene were, under the original notice issued by the PULJ, supposed to have been *considered* at November 14, 2016 scheduling conference. Had the County timely intervened, the County would have enjoyed all of the rights provided to parties under PU § 3-107, which includes: the right to "summon witnesses, present evidence, . . . present argument," "conduct cross-examination and submit rebuttal evidence[,] and" "take depositions in or outside of the State, subject to regulation by the Commission to prevent undue delay, and in accordance with the procedure provided by law or rule of court with respect to civil actions." For whatever reason, the County chose not to timely petition to intervene as permitted under PU § 3-106. PU § 7-207(e)(3) doesn't give the County a do-over.

In fact, the evidentiary record had originally closed on May 12, 2017. On April 11, 2017, citing the impending adoption of Bill 17-07 that had been in the works for the prior 18 months, the County sent the Commission a letter making a general "request that any pending applications for CPCN's not be expedited or granted 'waiver.'" The County further stated that "the County Council will need sufficient time to enact its legislation and the solar companies will need time to familiarize themselves with the local regulations." By that time, Bill 17-07 had already been introduced and, by its terms, would have applied to the Project. The County, therefore, had sufficient information to weigh in on the "consistency of [the Project] with the comprehensive plan and zoning of [the County]" as

well as to give Legore the opportunity to "resolve any issues presented by [the County]" so that the Commission could give the consideration that the County believed was due.

I recognize, of course, that PU § 7-207(e)(3) did not go into effect until October 1, 2017. But it's not as if the County needed the General Assembly to require consideration of the PU § 7-207(e)(3) factors for it to make the Commission aware of its views on these issues. *Bd. of Cnty. Comm'rs of Washington Cnty. v. Perennial Solar, LLC,* 464 Md. 610, 624-25 (2019) (explaining that the requirement for the Commission to coordinate and work with the local governing body is "to ensure input and public comment from interested persons in the geographic area within which the generating station is being proposed[]").[3] Moreover, Bill 17-07 had been in the works for well over a year; clearly the County knew enough about its own "comprehensive plan and zoning" to adequately inform the Commission well before the May 12, 2017 evidentiary hearing and to give Legore an opportunity to resolve any issues. The County didn't need PU § 7-207(e)(3) to tell it to do so.[4]

So, when it comes to assessing whether the Commission gave "due consideration" to the PU § 7-207(e)(3) factors, the Commission was required to do nothing more than give good faith consideration to the factors based on the information before it. In my view,

[3] From the text of the provision alone, it seems as if the General Assembly was not concerned that counties and municipal corporations were hesitating to make their views known, but rather was acting to ensure that once known, the Commission would give due consideration to its views.

[4] It's worth noting that this new subsection was approved by the Governor on May 4, 2017, before the evidentiary hearing.

there is no question that the PULJ did just that. The PULJ"s ruling on the County's petition to intervene as well as its Proposed Order reflects that it intended to, and in fact did, consider the County's position. Simply put, the PULJ was acutely aware that (1) the Project was inconsistent with the County's comprehensive plan and zoning; and (2) Legore was resisting the County's entreaty that it be required to start over by submitting a Floating Zone application. Indeed, it was for those reasons that the PULJ embarked on its preemption analysis in the first place. The PULJ considered the County's positions and granted the CPNC anyway.

On appeal, the Commission declined to address the PULJ's preemption analysis based on its legally untenable vesting rights analysis. Nevertheless, the Commission's final order includes the Proposed Order that it expressly affirmed.[5] Thus, I think it would be incorrect to conclude that the Commission failed to give due consideration to the PU § 7-207(e)(3) factors.[6]

The scope of judicial review of the PSC's final order is set forth in PU § 3-203, which provides:

> Every final decision, order, or regulation of the Commission is prima facie correct and shall be affirmed unless clearly shown to be:
> (1) unconstitutional;
> (2) outside the statutory authority or jurisdiction of the Commission;
> (3) made on unlawful procedure;
> (4) arbitrary or capricious;

[5] There is nothing in the Commission's order that grants the CPCN or explains the findings behind its grant—for that, one would have to look at the Proposed Order. Thus, the Commission's order cannot be read in isolation from the Proposed Order that it expressly adopted.

> (5) affected by other error of law; or
> (6) if the subject of review is an ordered entered in a contested proceeding after a hearing, unsupported by substantial evidence on the record considered as a whole.

Applying this standard of review, the Commission's erroneous vested rights analysis does not warrant or require a remand. If we disregard its vested rights analysis, we are left with a final decision that includes, by virtue of its affirmance of the Proposed Order, due consideration of the PU § 7-207(e)(3) factors and a preemption analysis that comports with the Court of Appeals' decision in *Bd. of Cnty. Comm'rs of Washington Cnty.*, 464 Md. 610 (2019). Thus, while the Majority is correct that the final order *includes* an error of law, in my view, it is ultimately not "affected" by an error of law under PU § 3-203(5). I would, therefore, affirm the judgment of the circuit court.