Circuit Court for Baltimore County
Case No. C-03-CV-20-003240

UNREPORTED

IN THE APPELLATE COURT OF MARYLAND

No. 1496

September Term, 2021

HOLLY SPRINGS NATURE CONSERVANCY & WILDLIFE SANCTUARY, INC.

v.

VALLEYS PLANNING COUNCIL, INC., ET AL.

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 28, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant in this zoning appeal is Holly Springs Nature Conservancy & Wildlife Sanctuary, Inc. ("Holly Springs"). Holly Springs owns two adjacent tracts of land located east of Falls Road in the rural Hampstead area of Baltimore County. Holly Springs' property is split zoned RC-8 and RC-2 and it sought a special exception to build two solar facilities on its property.[1] In both RC-8 and RC-2 zones, solar facilities are permitted but in order to build such a facility, the landowner must meet all of the requirements for a special exception that are set forth in the Baltimore County Zoning Regulations ("BCZR") § 502.1.

In 2018, a petition for special exception to build a solar facility was filed by Holly Springs and Power Factor LLC ("Power Factor"). Power Factor was the lessee of the two parcels. The land Holly Springs owns is composed of two separately deeded properties, *i.e.*, Parcel 144 and Parcel 121.

Initially, the petitioners asked to build a single solar facility on Parcel 144. But after receiving, on December 24, 2018, unfavorable comments from the County Department of Environmental Protection and Sustainability due to the adverse impact on forest stands, floodplains, wetlands, streams and forest buffers, the petitioners filed, on May 17, 2019, an amended petition for a special exception. Attached to the amended petition was a site plan that called for two solar facilities to be constructed on Holly Springs' property. One of the facilities was to be located on Parcel 144 and a second facility was to be located partially on Parcel 144 and partially on Parcel 121 ("Parcel 144/121"). The revised site

[1] The initials "RC" stand for rural conservation.

plan ("the Proposal") shows that there would be a single equipment structure on Parcel 144, serving the solar facilities on both Parcel 144 and the facility on Parcel 144/121. The revised site plan also shows that there would be a six foot high, 125 foot long privacy fence between the southern property line of Parcel 144/121 and the neighboring property.

In the Proposal, Holly Springs and Power Factor also asked for a variance from the 50 foot setback requirements of BCZR § 1A01.3.B.3 that, if granted, would allow the solar facility to be built on Parcel 144/121 zero feet from the interior lot line.

Additionally, in the amended petition, the petitioners requested a "limited exception" from the requirement set forth in the Baltimore County Code ("BCC") § 32-4-106(a)(1)(vi) on the grounds that the commercial structures on the two parcels of land would be "minor commercial structures." The requested exemption, if granted, would allow petitioners to avoid some of Baltimore County's development review processes and procedures.

The amended petition filed by Holly Springs and Power Factor was considered by an administrative law judge ("ALJ") at a public hearing held on May 30, 2019. The ALJ issued a written Opinion and Order on June 20, 2019, approving the special exception petition with conditions. One of the conditions was that the petitioners comply with the comments written by the Department of Environmental Protection and Sustainability ("EPS"). There was more than one comment by EPS, but one of the comments, dated June 3, 2019, read, in pertinent part:

> [T]he underground electric cable currently proposed through the Forest Buffer Easement and under the stream will require EPS review and approval

of an alternative analysis and must be included in the project's limit of disturbance.

An appeal of the ALJ's decision was filed to the Board of Appeals of Baltimore County ("the Board") by Valley Planning Council, Inc. and several other protestants. The protestants are the appellees in this appeal.

The Board, as required by the Baltimore County Charter § 603, conducted a *de novo* evidentiary hearing. Following that hearing, the Board conducted public deliberations in December 2019 and issued a written Order and Opinion dated April 27, 2020. In its Order and Opinion, the Board denied the special exception petition. In doing so, the Board made a number of findings including: 1) that the proposed solar facility use would be detrimental to the health, safety or general welfare of the locality involved and thus contrary to BCZR § 502.1.A; 2) that the proposed solar facility use would be inconsistent with the spirit and intent of BCZR § 502.1.G; 3) that the proposed solar facility use would be inconsistent with the vegetative retention provisions of BCZR §502.1.H; and 4) that the proposed solar facility would be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and flood plains in an RC zone and thus inconsistent with BCZR § 502.1.I.

After recognizing that it was not required to address the variance issue, because it had turned down the request for a special exception, the Board nevertheless decided to address the issue to protect against the possibility that its decision denying the special exception might be reversed on appeal. The grounds for the Board's denial of the variance will be set forth, *infra*.

In regard to the request for a limited exemption from the requirements of BCC § 32-4-106(a)(1)(vi), the Board denied that request saying that the solar facilities: "are not minor commercial structures" but are, instead, "two large elaborately designed facilities which consume the majority of both [p]arcels."

Petitioners filed a motion for reconsideration of the Board's opinion and order to which it attached a second revised site plan ("the Redesigned Project"). In their Redesigned Project, the petitioners proposed to build only one solar facility, which was to be located entirely on Parcel 144. If a special exception was granted based on the Redesigned Project, no variance would be needed.

The Board conducted public deliberation on July 15, 2020, to consider the motion for reconsideration. Afterward, in a written Ruling and Opinion dated August 3, 2020, the Board denied the motion for reconsideration.

Holly Springs, but not Power Factor, filed a petition for judicial review in the Circuit Court for Baltimore County on September 1, 2020. After a hearing, the circuit court issued an Opinion and Order on October 22, 2021, affirming the Board's denial of the special exception and its denial of the motion for reconsideration. This timely appeal followed.

I.

QUESTIONS PRESENTED[2]

1. Did the Board err in finding that the proposed Solar Facility use would be inconsistent with the vegetative retention provisions of the BCZR § 502.1.H and would be detrimental to the environmental and natural resources of the site and vicinity including forest, streams, wetlands, and floodplains in an RC zone § 502.1.I?

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[2] Holly Springs lists five questions presented:

1. Did the Board err in finding that the proposed Solar Facility use did not satisfy the statutory standards for special exception uses codified in BCZR § 502.1?

2. Did the Board err in considering and denying the special exception petition based upon factors (*e.g.* the competence of the developer of the project and its financial soundness) that are not contained in BCZR § 502.1?

3. Did the Board err in finding that the proposed Solar Facility use would be inconsistent with the vegetative retention provisions of the BCZR (§ 502.1.H) and would be detrimental to the environmental and natural resources of the site and vicinity including forest, streams, wetlands, and floodplains in an RC zone (§ 502.1.I)?

4. Did the Board err in finding that the proposed solar facility was not a single facility located on a single tract of land?

5. Did the Board err in not holding an evidentiary hearing and/or approving the Appellant's revised plan submitted with its Motion for Reconsideration?

We note that because the requirements of BCZR § 502.1 are in the conjunctive, it is unnecessary for us to answer Holly Springs' questions 1, 2 and 4 because, as will be demonstrated, *infra*, there was sufficient evidence to support the Board's conclusion that grant of the special exception would be inconsistent with the criteria set forth in BCZR § 502.1.H and I.

2. Did the Board err in not holding an evidentiary hearing and/or approving the Appellant's revised plan submitted with its Motion for Reconsideration?

II.

REQUIREMENTS FOR A SPECIAL EXCEPTION IN BALTIMORE COUNTY

BCZR § 502.1 provides:

> Before any special exception may be granted, it must appear that the use for which the special exception is requested will not:
>
> A. Be detrimental to the health, safety or general welfare of the locality involved;
> B. Tend to create congestion in roads, streets or alleys therein;
> C. Create a potential hazard from fire, panic or other danger;
> D. Tend to overcrowd land and cause undue concentration of population;
> E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
> F. Interfere with adequate light and air;
> G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;
> H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor
> I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in R.C.2, R.C.4, R.C.5, or R.C.7 Zones[.]

These factors are set forth in the conjunctive and, therefore, each of them must be met in order for a special exception to be granted. As mentioned, the Board found that factors set forth in Section 502.1.A, G, H, and I had not been met but, in this opinion, we shall focus on the Board's findings as to § 502.1.H and I.

III.

THE PROPERTY

Parcel 144 consists of 26.34 acres. The entire northern and northeastern portion of Parcel 144 is forested, the majority of which is classified as "Priority" forests, the most sensitive and protected of forests under the State's forest conservation law. The amended site plan shows that one solar facility will be completely within Parcel 144. That parcel is currently unimproved.

Parcel 121 is composed of 6.25 acres and contains a dilapidated and abandoned dwelling and shed and is known as 18627 Falls Road. As shown on petitioners' amended site plan, a second solar facility is to be built that is partially on Parcel 144 and partially on Parcel 121.

A use III stream[3] called Compass Run runs westerly across the forested northern portion of the property and an unnamed tributary of that stream runs southerly and bisects the two proposed solar facilities. There are numerous trees along the banks of the unnamed tributary and on many other parts of Holly Springs' property.

According to Holly Springs' amended site plan, the solar facility that is completely on Parcel 144 will be accessed via a gravel 'S' shaped driveway on the northwestern boundary of Falls Road. The solar facility on Parcel 144/121 will be accessed via a 'U' shaped gravel driveway at the southwestern end of Parcel 121. Under Holly Springs

[3] A use III stream is the highest order of stream under the State's classification of stream systems. Use III streams are ones that are capable of supporting a naturally reproducing trout population.

amended site plan, each of the solar facilities will be enclosed within its own seven foot vinyl coated, chain link fence. Running along each of these fence lines is a 100 foot forest buffer that is necessary because of the aforementioned unnamed stream. In addition, designated areas of wetlands (in the same area as the unnamed steam), are also located between the two proposed solar facilities.

The amended site plan shows that the facilities will be connected by an underground electric line which is designated on the amended site plan as "UGE." The UGE will be installed underneath the stream, the forest buffer, and the line of trees and the vegetation on either side of the stream. On Parcel 144, the UGE will continue beneath the fence and stream buffer and ultimately connect to the Baltimore Gas and Electric ("BGE") interconnector. On the eastern side of the 144/121 solar facility are nine "specimen trees." Those trees are at least 35 inches in diameter at breast level and are subject to regulation under both State and Baltimore County law. Moreover, there are isolated specimen trees throughout the property owned by Holly Springs.

IV.

PERTINENT RULES AND REGULATIONS

A "forest buffer" (as defined and regulated under Baltimore County's Environmental Protections, BCC § 33-3-101(h)) is a protective area adjacent to water resources created to maintain the water quality of those resources.

Section 33-3-111(a) provides:

(a) *In general*.

> (1) (i) A forest buffer for a stream system shall consist of a forested strip of land extending along both sides of a stream and its adjacent wetlands, riverine floodplain, and slopes.
>
> (ii) The forest buffer width shall be adjusted to include contiguous, sensitive areas, such as steep slopes or erodible soils, where development or disturbance may adversely affect water quality, streams, wetlands, or other bodies of water.
>
> (iii) The adjustment required under subparagraph (ii) of this paragraph shall be accomplished by evaluating the potential of a site for impacts that result from runoff, soil erosion, and sediment transport.

Because the surface water design used for the unnamed stream is a use III, the forest buffer must be at least 100 feet. BCC § 33-3-111-(b)(4).

Section 33-3-112(b)(2)(ii) provides that "[e]xcept as provided in subsection (c) of this section, the existing vegetation within the forest buffer may not be disturbed, including disturbance by tree removal, shrub removal, clearing, mowing, burning, spraying, and grazing." Subsection (c)(2)(i) of § 33-3-112, authorizes utilities, such as a solar facility, within the forest buffer, "<u>provided that an alternatives analysis has clearly demonstrated that no other feasible alternative exists and that minimal disturbance will take place</u>." (emphasis added).

V.

THE PROPOSED SOLAR FACILITIES

A solar facility is defined as a series of solar collector panels which harvest energy from the sun to generate photovoltaic power. *See* BCZR § 4F-101.B. The two proposed solar facilities, combined, will cover 9.13 acres. The solar panels will be above ground and mounted atop a post that is then buried in the ground. Grasses, which will absorb storm

water runoff, will be planted underneath the elevated panels. The panels will be approximately nine feet above ground. Each solar facility will contain a series of non-rotating solar panels, which are often referred to as a "solar field." The panels will be oriented in a southerly direction to capture energy from the sun. The energy captured by the panels will be converted to electric current. A structure to be built on Parcel 144 will contain the equipment necessary to convert the energy into electricity. The electricity will be transmitted through a meter that measures the amount of electricity produced; the electricity will then be transmitted, via a UGE, to the public electric transmission wires owned and maintained by BGE. The transmission wires are to be located on Falls Road and are part of BGE's energy grid that is designed to provide electricity to the homes and businesses in the area. Baltimore County Zoning Regulation § 4F-102.B.1 restricts the amount of energy that can be produced by a supplier (such as Holly Springs) to less than two megawatts. Holly Springs proposed solar facilities complied with that limitation inasmuch as the facilities are designed to produce a combined 1.8 megawatts.

V.

TESTIMONY OF WITNESES AND EXHIBITS CONSIDERED BY THE BOARD[4]

A. Testimony of Andrew Streit

Mr. Streit is the Director of Business Development with Power Factor. His employer was Holly Springs' co-petitioner in this case. At the time of the hearing, Mr. Streit had worked for Power Factor for one and one-half years but had been employed in the solar energy business for twelve years. He testified that Power Factor had leased the subject property for 25 years from Holly Springs; later, however, he explained that the lease will be assigned to an entity know as Meade Communities, Inc. ("Meade").

Power Factor's role in the proposed solar energy project will be as a construction and maintenance contractor. Meade will be the entity responsible for connecting the solar facilities to the BGE grid and preparing the application for BGE approval. Additionally, Meade will install the meters needed to monitor the amount of electricity generated to the grid and will maintain the list of subscribers buying electricity from the proposed facilities.

On cross-examination, Mr. Streit conceded that the solar panels to be installed have an efficiency rating of 18%, but that panels with a higher efficiency rating do exist. A high efficiency rating would be 22% and the highest possible rating is 42%. If a higher efficiency panel were used, fewer panels would be needed and less vegetation would be

[4] In its Opinion and Order, the Board summarized the testimony of the witnesses that appeared before it. Appellant does not contest the accuracy of the Board's summary. In our recap of the witnesses' testimony, we have, in some instances, quoted from the Board's Opinion without direct attribution. Our summary, however, does not cover all of the evidence presented to the Board; instead, we have only set forth facts that either put in context or are directly relevant to the questions presented.

disturbed. He did not know the minimum amount of land needed to produce 1.85 megawatts of electricity. Additionally, Mr. Streit admitted that it was possible to run power lines above ground, rather than using an UGE, but it would be more expensive. Arguably, at least, this admission was important because to avoid the necessity of submitting an alternative analysis (under BCC § 33-3-112(c)(2)(i)) there must be a clear showing, *inter alia*, that no other feasible alternative exists.

B. <u>Testimony of Nicholas Leffner</u>

Mr. Leffner was accepted by the Board as a professional engineer with particular expertise in the area of planning, zoning, and limited exemption applications. Mr. Leffner explained to the Board the hydrological conditions of the property and testified that he commissioned a field delineation of wetlands, streams and waters on Holly Springs' property. He further explained that the owner of the property was required by zoning regulations to establish a forest buffer around the wetlands and the streams on the property in accordance with criteria established by Baltimore County. He testified that the amended site plan proposes that all development, *i.e.*, facilities, arrays, etc. are located away from the identified water resources and outside the forest buffer. He opined that Holly Springs' proposal satisfied all the requirements for a special exception set forth in BCZR § 502.1.

In regard to the UGE, Mr. Leffner testified that the forest buffer regulations required non-disturbance of the stream and its buffer. According to Mr. Leffner, a subsurface connection, such as a UGE, is not a disturbance.

Mr. Leffner was asked by a Board member whether Parcel 121, by itself, was of "an adequate size to support the solar facility[.]" Initially, he responded that the Commission

would have to "ask the applicant." He later amended his answer by saying that, to his understanding, Parcel 121 would not be big enough to support a solar facility that would generate two megawatts of electricity.

Mr. Leffner further testified that the horizonal UGE that would connect the two solar facilities, would go under the forest buffer and the unidentified stream. He did not know the depth that the UGE would be buried.

With respect to the consistency of the anticipated use with the impermeable surface and vegetative retention provisions of BCZR § 502.1.H and the requirement of § 502.1.I that requires that the project not have a detrimental impact on environment and natural resources, including forests, streams, wetlands, aquifers and floodplains, Mr. Leffner opined that these solar facilities did not impact the environment. He stressed that drainage from the solar facilities would fall toward the stream.

Mr. Leffner was also asked about the variance that the petitioners had requested. As mentioned earlier, Baltimore County zoning regulations require that there be a 50 foot setback from the interior property lines between Parcel 144 and Parcel 121. Because the proposed 144/121 solar facility is on two adjoining parcels, there will be a zero foot setback rather than the required 50 feet. He testified that the requested variance was justified because of the geographic features of the property, i.e., the streams, the forest buffer, the flood plains, the wetlands, the downward slope of the land from a portion of Parcel 141 and the northern end to a converging point at the stream between the parcels; steep slopes on the eastern end of Parcel 144/121, the shape of 144 and 121; and the specimen trees, particularly the specimen trees located in the middle of Parcel 121. He opined that the two

parcels were unique and, as a result, the petitioners would suffer a hardship if the variance was not approved. He further opined that if the 50 foot setback was required from the internal property lines between Parcel 144 and 121, the scope of the project area would be reduced by one-third; this would require the removal of solar panels within the 50 foot setback area. If such a requirement were met, the project would not be financially viable for the petitioners.

Mr. Leffner agreed that no alternative analysis had been prepared even though an underground utility line is a "utility" within the meaning of BCC § 33-3-112(c)(2)(i). He opined that the 200 foot UGE that would be installed by directional moorings, did not constitute a disturbance under § 33-3-112 of the County Code and therefore no alternative analysis was needed. He admitted, however, that he was unaware that in written comments by the EPS on June 3, 2019, it was stated that an alternative analysis would be required; he was also unaware that the ALJ had listed an alternative analysis as one of the recommended conditions for the grant of a special exception. Later in his testimony, he admitted "there may be some disturbances within the root system" when the UGE is installed. When asked by one of the Board members what happens if there are impacts to the root system and a tree is damaged, he responded "there could be a damage and nothing would happen. It could kill the tree . . . then . . . there could be damages[.] . . . [T]here's a lot of what ifs, so I can't really answer that directly."

C. <u>Testimony of Michael S. Kulis</u>

Mr. Kulis is a Natural Resource Specialist, II, employed by the Baltimore County Department of Environmental Impact Review Section of the EPS. He was subpoenaed by

the petitioners to testify on their behalf. Like Mr. Leffner, he testified that the forest buffer regulations require non-disturbance of the stream and its buffer. But, in his opinion, a subsurface connection of the UGE, as long as it meets EPS criteria insofar as depth is concerned, is not considered a disturbance.

Mr. Kulis admitted on cross-examination that while an alternative analysis is legally required under BCC § 33-3-112(c)(2)(i), and that such an analysis was one of the conditions imposed by the ALJ, this provision would not be enforced by the EPS based on an unwritten policy. That unwritten policy provided that as long as the stream that bisects the solar facilities is not disturbed, an alternative analysis would not be needed.

Mr. Kulis acknowledged on cross-examination that vegetation will be cleared and soil will be disturbed in the forest buffer when the UGE is installed.[5]

D. Testimony of Protestant Kathleen Piper

Ms. Piper testified in her individual capacity and as President of the North County Community Group, LLC ("North County"), a voluntary organization of 500 members. According to Ms. Piper, the most significant concern of North County was the environmental impact of the proposed solar project. She stressed that the site includes streams, solar panels in the RC-8 zone, multiple entrances and solar arrays, and underground cabling. It was very concerning to Ms. Piper that Mr. Streit, one of the petitioners' agents, wasn't even aware of the alternative analysis requirement even though

[5] In its finding, the Board accurately pointed out that there appeared to be a change in the EPS's position as to whether an alternative analysis was needed inasmuch as in a comment set forth in a June 3, 2019 letter, the EPS said that an alternative was needed, but, the position taken by Mr. Kulis, as a representative of EPS, was the opposite.

that requirement was reflected in earlier comments from EPS that were easily available in the file, and it was made a condition of the ALJ's recommending of the special exception.

VI.

THE BOARD'S OPINION

The Board found several reasons why the requirements for a special exception, as set forth in BCZR § 502.1, had not been met. But, for our purposes, we need to examine only the following reasons. The Board said:

> (3) Inconsistent with Vegetative Retention Provisions (BCZR § 502.1.H) and Detrimental to Environmental and Natural Resources (BCZR § 502.1.I)
>
> With regard to vegetative retention provisions under BCZR § 502.1.H, and impact on the environmental and natural resources under BCZR § 502.1.I, the Board finds that the proposed facilities will be inconsistent with, and detrimental to, each of those factors. We note that the Parcels at issue are not cleared, farmland. Rather, each has abundant natural resources and environmental constraints as revealed by Petitioners' photos. The Petitioners' Wetlands Delineation Report provides concrete details about wetlands, vegetation, topography, soil type, trees, specimen trees, floodplains and forests inherent in these Parcels.
>
> According to Mr. Leffner, the initial proposed plan provided for one solar facility confined to Parcel 144. Due to the numerous environmental aspects on Parcel 144 alone including the forest buffer areas, wetlands, floodplains, streams, trees, vegetation, and the limits of disturbance ("LOD") impacts, EPS was not in support of the initial proposal. As a result, Mr. Leffner revised the Site Plan to propose the two solar facilities at issue by utilizing Parcels 144 and 121. In amending the Site Plan, rather than only request one solar facility within the confines of Parcel 144 by using the most efficient solar panels available and reducing the special exception area, the Petitioners desire to maximize their return on investment.
>
> It is a significant concern to this Board that existing trees and vegetation will be removed to make room for the solar facilities in the following areas:

> (1) the line of existing trees and vegetation in the center of Solar Facility 144/121;
> (2) the line of existing trees and vegetation on the northern end of Solar Facility 144/121;
> (3) the line of existing trees and vegetation in the center of Solar Facility 144; and
> (4) the line of existing trees and vegetation around the 'S' shaped and 'U' shaped gravel driveways.
>
> We do not agree that the removal of trees and vegetation as listed above, is minimal. <u>In the Board's view, the removal of trees and vegetation is substantial and unnecessary, and directed by the Petitioners' own interests</u>. As Mr. Kulis stated, "if left in their natural state, a forest would grow near the stream." The Site Plan reveals, and this Board so finds, that specimen trees, and the critical root systems of those specimen trees, will be negatively impacted by the construction of solar panels in the area of those root systems. The access driveway to Solar Facility 144/121 will be constructed through not only the critical root system of a specimen tree, but through two areas of trees and vegetation. Moreover, the ZAC [Zoning Advisory Committee] comments dated December 24, 2018 provide useful information to this Board in that a special variance to the Forest Conservation Law must be approved by EPS when critical root zones of specimen trees are impacted. Yet, Mr. Leffner maintained that no special variances would be needed.
>
> <u>Further, it is only because of the Petitioners' desire for two solar facilities rather than one (1), that the UGE is even needed; it is entirely self-imposed</u>. The Board finds that the UGE is detrimental to the stream and the existing trees which line the stream. Mr. Leffner was not clear in his testimony as to the depth necessary for drilling the UGE but acknowledged the horizontal distance would be greater than 200 ft. Mr. Streit admitted that it would be more expensive to connect the two solar facilities above-ground.
>
> The Site Plan shows the forest buffer setback for the stream between Parcels 144 and Parcel 121 running along each of the wire fences to be installed around each facility. <u>We find that the placement of the wire fences along the forest buffer setback shows unnecessary interference by the solar facilities in these environmentally sensitive areas</u>.
>
> We were also alerted to Mr. Kulis' admission on cross[-]examination that while an Alternatives Analysis is legally required under BCC § 33-3-112(c)(1), that provision would be not enforced by EPS based on an unwritten policy, as long as the stream which bisects the solar facilities is not disturbed. While Mr. Kulis stated that this issue would be addressed at the

> time of the grading permit, we find the stream will be disturbed and EPS should have required an Alternatives Analysis. Mr. Kulis further acknowledged that vegetation will be cleared and soil will be disturbed in the forest buffer when the UGE is drilled in violation of BCC § 33-3-112(b)(2)(ii) and (iii). Thus, while E[PS] concedes that there will be impacts to the environment in this case and views these as minimal, this Board does not.

(Emphasis added.)

After the Board rejected the petitioners' request for a special exception, it turned its attention to the petitioners' request for a variance. The Board said:

> Petitioners requested a variance from BCZR § 1A01.3.B.3, if necessary, to permit a solar facility to be as close as 0 feet to an internal lot line. This request is a direct result of the desire to install a second solar facility on Parcel 144/121. Given that this Board has denied the special exception relief requested, we need not address the variance issue. However, we will do so in the event that our decision in regard to the special exception is reversed.
>
> We find it ironic that, in support of its position that Parcels 144 and 121 are unique, Petitioners rely on the environmental factors which they discount as existing and which served as one of the basis for this Board to deny the special exception request. We further find that the Petitioners will not suffer a practical difficulty if the solar facilities are not permitted. Indeed, the evidence did not suggest that the only use of this land was as a solar facility. *McLean v. Soley*, 270 Md. 208 (1973); *Trinity Assembly of God v. People's Counsel*, 407 Md. 53 (2008). The Court of Special Appeals[6] in *Montgomery County v. Rotwein*, [169] Md. [App.] 716, 732-33 (2006) citing *Cromwell* [*v. Ward*, 102 Md. App. 691 (1995)], held that economic loss alone does not satisfy the 'practical difficulties' test:
>
>> Economic loss alone does not necessarily satisfy the 'practical difficulties' test because, as we have previously observed, 'every person requesting a variance can indicate some economic loss.' *Cromwell* [102 Md. App.] at 715. . . . Indeed, to grant a variance application any time economic loss is

[6] Because of an amendment to the Maryland Constitution that became effective on December 14, 2022, the Court of Special Appeals name was changed to the Appellate Court of Maryland.

> > asserted, we have warned, 'would make a mockery of the zoning program.'
>
> In addition, we find that the proposed plan is entirely self-imposed and therefore does not meet the criteria for a variance. The law is clear that self-inflicted hardship cannot form the basis for a claim of practical difficulty. Speaking for the Court in *Cromwell v. Ward*, 102 Md. App. 691, 722 (1995), Judge Cathell noted:
>
> > Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively, not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. We hold that practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted.
>
> The Petitioners desire for two (2) solar facilities is driven by their economic restrictions as controlled by non-petitioners, and therefore the Site Plan is entirely self-imposed.

On May 27, 2020, petitioners filed a motion for reconsideration. Movants stated that upon consideration of the Board's opinion, they, through their consultants, redesigned the proposed solar facilities "to directly resolve the Board's articulated grounds for denial[.]" According to the Movants, the Redesigned Project, as shown by a new site plan, "will reduce its [the solar facility's] bulk and intensity, so as to make it more compatible with the surrounding area, as well as to correct other purported deficiencies." Later in its motion, movants stated:

> 9. The Redesigned Project is intended to reduce the overall project footprint and avoid purported environmental impacts. The Redesigned Project will remove Parcel 121 from the Special Exception area and be located entirely on Parcel 144. The Redesigned Project will feature one array field (eliminating the second array area). The Special Exception area of the Redesigned Project will be 6.46 acres (originally 9.15 acres). The Redesigned Project will remove the secondary access road (which originally fed the higher portion of the solar facility, as shown on site plan). The

Redesigned project will include one interconnection line to BG&E and eliminate Petitioners' need for an UGE conduit under the stream. The Redesigned Project will reduce grading, environmental, and visual impacts.

10. It is appropriate to file this Motion for Reconsideration, rather than a new zoning Petition for Special Exception, and to include an amended site plan (attached). The original site plan, legal description and other documents filed with the original petitions are all still relevant and applicable to this amended project design. The Special Exception relief requested remains the same; to wit, approval of a solar facility pursuant BCZR 4F.

> Pursuant to BCZR § 500.12:
>
> "If a . . . special exception petition has been denied, the Zoning Commissioner may not accept for filing any . . . special exception petition with respect to the same property . . . until at least 18 months have passed from the date of the final order relating to the previous petition, whether that order is issued by the Zoning Commissioner or . . . by the Board of Appeals."

In the interest of judicial economy and fairness to the parties, there is no reason to require the Petitioners to wait 18 months to file yet another petition and repeat the process. The Redesigned Project is a reduction in the intensity of the use rather than any substantive change in use. By providing a copy of this Motion and amended site plan, all interested parties are given notice of this amended request. This Board can properly reconvene its public hearing on this matter to allow all interested parties to participate and allow the Board members with the opportunity to review the amended proposal and question the Petitioners' consultants and principals.

11. There are no codified procedures or processes to amend a zoning petition. Unlike the Circuit Court and District Court rules in the Maryland Rules, there are no rules in the BCZR or elsewhere governing amending a zoning petition in instant case. But the Maryland Rules, by analogy, are instructive. Assuming that the petition is a zoning case is akin to a pleading in a court case, the following is noted. Md. Rule 2-341 governs amendments in the Circuit Court. That rule has been interpreted thusly: "the objective of this Rule is to facilitate the attainment of a just, speedy and inexpensive determination of all disputes between the same parties." *Robertson v Davis*, 271 Md. 708, 710 (1974). Moreover, an "amendment should be freely allowed to serve the ends of justice." *Stoewer v. Porcelain Enamel & Mfg. Co.*, 199 Md. 146, 151 (1952). The intent of the law to freely allow amendments is manifest. Maryland's appellate courts have held that the

> parties must have reasonable notice of what is to be litigated. *See Cassidy v. County Board of Appeals of Baltimore County*, 218 Md. 418, 424 (1958). The fact of the matter is that the question of the size and scope of the solar facility has been at issue since it was discussed during the Board's proceedings. If Protestants need a postponement of the Board's reconvened hearing because they can't determine the request and need additional time to prepare, then the Petitioners will willingly consent. But absent that, a reconvened hearing should proceed on the requests sought by the Petitioners.

After the Board met on July 15, 2020, to consider the motion for reconsideration, it concluded that after "thorough review of the facts and law in the matter, the Board unanimously agreed to DENY the Motion for Reconsideration." That ruling was later reduced to writing in an opinion dated August 3, 2020. The Board said:

> The Board held its deliberation on the Motion to Reconsider on July 15, 2020. The Board, for the reasons that follow, concluded that no hearing was warranted and denied the Motion,
>
> The Board noted that the plans submitted with the Motion were the third such plans filed by Petitioner and substantially differed from those considered at the hearings before the CBA [County Board of Appeals]. The Board further noted that its authority to consider a special exception petition, once denied, was limited by statute under Baltimore County Zoning Regulation Section 500.12, prohibiting acceptance of such a petition at least eighteen (18) months have passed from the date of the final order of the prior petition.
>
> The Board members also agreed with the legal points raised by Protestants counsel in Protestants' Response to Motion for Reconsideration including, but not limited to, that the Petitioner's only new facts were the amended site plan and that there was no new law, ordinance or other regulation since the [Board's] decision that would provide the Petitioner with the relief it seeks.
>
> Similarly, the Board members noted that the Board's revisory power is limited by its Rule 11, which states "the [B]oard shall have revisory power and control over the order in the event of fraud, mistake or irregularity." The Motion for Reconsideration did not allege any fraud, mistake or irregularity.

Conclusion

> After reviewing the Motion and the case record, the Board unanimously finds none of the issues raised warrant a hearing on the Motion or relief on part of Petitioner and agrees the Motion should be denied.

VII.

STANDARD OF REVIEW

In its brief, the appellant succinctly and accurately set forth the applicable standard of review as follows:

> In an appellate court's review of the [c]ircuit [c]ourt's action on a Petition for Judicial Review of the Board, the appellate court repeats the task of the [c]ircuit [c]ourt and directly evaluates the administrative agency's decision. *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore City*, 407 Md. 53 (2008). The standard of review to be applied by the Court in its review of the decision of an administration agency (i.e., the Board) is well settled. In reviewing the decision of the Board, a Court's discretion is limited to "determining if there is substantial evidence in the record as a whole to support the agency's [factual] findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Lee v. Maryland Nat. Capital Park and Planning Commission*, 107 Md. App. 486, 492 (1995), (quoting *United Parcel Serv., Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 577 (1994)). The standard of review thus depends upon the nature of the agency finding being reviewed. *Gray v. Anne Arundel County*, 73 Md. App. 301, 308 (1987).
>
> The reviewing court must determine whether the agency interpreted and applied the correct principles of law governing the case, and no deference is given to a decision based solely on an error of law. *See*, *e.g.*, *State Admin. Bd. Of Election Laws v. Billhimer*, 314 Md. 46, 59 (1988), *cert. denied*, 490 U.S. 1007 (1989). In fact, where an administrative decision is premised upon an erroneous legal conclusion, the reviewing court is under no constraints and may substitute its own judgment. *People's Counsel for Baltimore County v. Maryland Marine Mfg. Co.*, 316 Md. 491, 497 (1989) ("[t]he issues with which we are concerned in this case present purely legal questions, such as the proper interpretation of § 417 of the BCZR"); *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n., Inc.*, 192 Md. App. 719, 734 (2010) (holding that reviewing an administrative agency's decision regarding the

> applicability of *res judicata* is a question of law, and the appropriate standard of review is de novo).

Additionally, as pointed out in the seminal case of *Schultz v. Pritts*, 291 Md. 1, 15 (1981) "[t]he appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."

VIII.

RESOLUTION OF ISSUE NUMBER ONE

Appellant contends that the Board erred when it held that the proposal to build two solar facilities would cause adverse environmental impact and violate BCZR § 502.1.H and 502.1.I.

In support of that contention, appellant starts out by providing what it contends is a summary of the Board's findings. We shall refer to the paragraph that follows as appellant's summary. In its summary, appellant quotes part of the Board's opinion:

> "In the Board's view, ***the removal of trees and vegetation is substantial and unnecessary, and directed by the Petitioners' own interests***. Further, it is only because of the Petitioners' desire for two solar facilities rather than one, that the UGE [(underground utility electric line)] is even needed; it is entirely self-imposed. The Board finds the ***UGE is detrimental to the stream and the existing trees which line the stream . . .*** We find that the placement of the wire fences along the forest buffer setback shows unnecessary interferences by the solar facilities in these environmentally sensitive areas . . . we find the ***stream will be disturbed and EPS should have required an Alternative Analysis.***"

After the summary, appellant goes on to argue:

> Notwithstanding Mr. Kulis's (EIR Section of [ ]EPS) extensive review of the proposed solar facility project and his unrefuted testimony that the Site Plan is compliant with all environmental regulations, the Board denied the Special Exception, citing environmental concerns (e.g. tree/vegetative clearing, stream impacts, disturbance).
>
> The Board's rejection of the analysis by EIR is without basis. None of the findings and conclusions in the Board's Opinion are supported by actual/reliable facts proven in the administrative record. Instead, they are conclusory statements that ignore the evidence presented. Simply stated, the Board's findings do not hold up under the "substantial evidence" test. As is well settled, that test requires that reasoning minds could reasonably reach a conclusion from the facts in the record produced by the agency. *People's Counsel v Mangione*, 85 Md. App. 738 (1991). Indeed, the expert testimony collectively offered through the testimony of Kulis and the [a]ppellant's site engineer (Nicholas Leffner) was not rebutted or even contested by any witness.

Appellant's assertion that the Board's findings were based upon a group of conclusory statements might be convincing if its summary of the Board's findings was complete. But it is not. Appellant's summary omits, and takes out of context, what the Board actually said. We have quoted the Board's findings verbatim, *supra*, at pages 15, 16 and 17, but the only findings cited in appellant's summary are the parts that we have emphasized on pages 16-17, *supra*. Appellant's summary reduces the length of the actual quote of the Board's findings from 69 lines to 10. Those deletions by the appellant makes it appear that the Board did not have substantial evidence to support its findings, but read in context, the substantial basis for the findings become obvious.

Read in context, the Board's view was that it was only because of petitioners' desire to "maximize return on investment" that a second solar facility was proposed. The Board found that by use of more efficient solar panels, less environmental damage would be

caused. The site plan showed that to be true, and subsequently, by submitting a "Redesigned Project," petitioners impliedly conceded that environmental damage and damages to vegetation could be substantially reduced. One solar facility, rather than two, as the Board found, would: 1) eliminate the need for a UGE underneath the 100 foot buffer and the unnamed stream; and 2) eliminate the driveway that was to service the 144/121 facility. If the 'U' shaped driveway were eliminated, the root systems to the trees, including specimen trees, would be protected.

In its brief, appellant ignores the Board's finding that in four areas of the property, some of the damage to vegetation and the environment could have been reduced but for petitioners' desire to maximize investment return by proposing to build two solar facilities rather than one.

Additionally, the Board's finding that petitioners were required to, but did not, submit an alternative analysis was supported by substantial evidence. As mentioned, page 9, *supra*, solar facilities are allowed in the "forest buffer" provided that an alternative analysis has clearly shown that no other feasible alternative exists and that minimal disturbance will take place. Here, a feasible alternative did exist because, as the Board found, one facility rather than two, would eliminate the need for a UGE through the buffer and under the stream.

It is true, as Holly Springs points out, that the protestants did not call any experts to contradict its experts. But the Board was not required to accept the testimony of any expert. Moreover, the Board did not need expert testimony to support its factual findings. Those factual findings were supported by the appellant's own site plan along with other exhibits

that clearly showed where the solar facilities were to be built and the damage to vegetation and the environment if the two facilities were built according to Holly Springs' proposal.

We hold that the Board's findings that we have quoted verbatim at pages 15-17, *supra*, contrary to appellant's argument, were supported by substantial evidence.[7]

IX.

OTHER MATTERS

Although we have discussed at length the issue of whether the Board erred in denying the special exception, the issue appears to be moot. Holly Springs could not build the two solar facilities it proposed, even if we agreed with appellant that the Board's denial of the special exception was not based on substantial evidence. We explain.

The petitioners could not build a solar facility on Parcel 144/121 unless it obtained a variance from the requirement that a facility not be built within 50 feet of an interior lot line. The facility Holly Springs proposed to build on lot 144/121 was zero feet from the interior lot line. As already mentioned, the Board denied the variance and explained why. In neither its opening nor its reply brief did appellant contend that the Board erred in denying that variance. We, of course, have no authority to reverse the decision of the Board (as to the variance issue) when the appellant did not request such a reversal. *See Klauenberg v. State*, 355 Md. 528, 552 (1999) (argument not presented in a brief or not presented with particularity, will not be considered on appeal).

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[7] It is difficult to give credence to appellant's contention that the Board was wrong when it said, in effect, that much of the environmental damage and destruction of vegetation was unnecessary when the petitioners, in their Redesigned Project, showed that this was true.

X.

DENIAL OF THE MOTION FOR RECONSIDERATION

Holly Springs argues that the Board erred in failing to either hold a hearing on its motion for reconsideration or to approve the Redesigned Project. Appellant relies upon Rule 10 of the Board's rules which it says confers: "broad authority to revisit issues raised by the Board in its opinion and order." According to Holly Springs, it was "manifestly improper" for the Board to reject the motion without a hearing. We disagree.

The "Redesigned Project, as set forth in the motion for reconsideration, proposes an entirely new project. Although captioned as a "motion for reconsideration" what petitioners filed for was, in essence, a new special exception petition. As the Board found, the motion to reconsider had attached to it plans that were substantially different from the plans considered by it at the initial hearing. The Redesigned Project reduced the overall project footprint by removing the 144/121 facility; it reduced the area to be covered by the special exception from 9.15 acres to 6.46 acres and removed the secondary access road that, in the prior site plan, was to service the facility on Parcel 144/121. Also, the Redesigned Project proposed to reduce the environmental and visual impact of the solar projects and decrease the amount of vegetation destroyed. Therefore, what the petitioners asked for was not a reconsideration but a consideration, for the first time, of a new plan. Put another way, Rule 10 was inapplicable because by attaching to its motion a Redesigned Project, the Board was not asked to "revisit issues" previously decided by the Board.

The Board was correct when it held that the provisions of BCZR § 500.12 prohibited it from considering the new Redesigned Project. Section 500.12 reads:

> If a . . . special exception petition has been denied, the Zoning Commissioner may not accept for filing any . . . special exception petition with respect to the same property . . . until at least eighteen months have passed from the date of the final order relating to the previous petition, whether that order is issued by the Zoning Commissioner or . . . by the Board of Appeals[.]

The Redesigned Project concerned the same property as the property for which the special exception was denied. There were so many changes in the Redesigned Project from the site plan considered by the Board, that it amounted to a new petition and, under BCZR 500.12 a new petition could not be considered until eighteen months had elapsed.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELANT.