

**BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND**

IN THE MATTER OF THE APPLICATION OF *
CITIZENS UB SOLAR, LLC FOR A *
CERTIFICATE OF PUBLIC CONVENIENCE * Case No. 9483
AND NECESSITY TO CONSTRUCT A 9.9 MW *
SOLAR PHOTOVOLTAIC GENERATING *
FACILITY IN THE TOWN OF UNION BRIDGE *
AND CARROLL COUNTY, MARYLAND *

* * * * *

MOTION TO STRIKE THE DIRECT TESTIMONY OF EDMUND R. CUEMAN

Citizens UB Solar, LLC (the “Applicant”) submits this Motion to Strike the Direct Testimony of Edward R. Cueman (the “Motion”) in its entirety and in support states as follows:

I. INTRODUCTION

The Town of Union Bridge (the “Town”) has offered the Direct Testimony of Edmund R. Cueman as a Land Use and Planning and Zoning Expert in this case. Mr. Cueman’s testimony is supposed to explain that the Citizens UB Solar Project (the “Project”) “is not consistent with ‘the comprehensive plan and zoning of each County or municipal corporation where any portion of the generating station is to be located.’”¹ This statement – and therefore the entire premise of Mr. Cueman’s testimony – is legally incorrect. The Project is a permitted use in the proposed location, and thus under Maryland law it is automatically deemed consistent with Carroll County’s Comprehensive Plan.² Furthermore, the Town’s Comprehensive Plan is irrelevant because the Project is outside of the Town except for a fence and fire access road that are not prohibited by the Town’s zoning ordinance.

¹ Direct Testimony of Edmund R. Cueman (“Cueman Dir.”) at 2:51-54.

² *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 96 (1988) (a use by right is “tantamount to a legislative finding that the use [is] in harmony with the general zoning plan”).

Accordingly, the Commission must exclude Mr. Cueman's testimony in its entirety as a matter of law.

II. ARGUMENT

Two elements must be understood from the outset. First, how the Project is situated, both as allocated between Carroll County and the Town of Union Bridge, and the respective zoning designation for the Project within each jurisdiction. Second, the legal relationship between zoning and comprehensive plans. Understanding that the Project is permitted as of right, which establishes that the Project is *de facto* consistent with the comprehensive plan as a matter of law, Mr. Cueman's testimony attempting to establish otherwise is irrelevant to this proceeding. Simply put, the consistency of the Project with the County's Comprehensive Plan cannot be refuted through testimony – it is a legal matter that has already been decided. And the Town's Comprehensive Plan is irrelevant because the perimeter fence and access road located within Town are not prohibited by the Town's zoning ordinance.

Under state and federal law “[e]vidence that is not relevant is not admissible.”³ There is no exception for expert testimony. Irrelevant expert testimony is not admissible.⁴ The Commission has applied this evidentiary principle when striking expert testimony.⁵ Accordingly, Mr. Cueman's irrelevant testimony must be stricken.

³ Md. Rule 5-402, Md. Code Ann., Evidence § 5-402. *See also* Fed. R. Evid. 402 (“[i]rrelevant evidence is not admissible”).

⁴ *See, e.g., United States v. Lee*, 589 F.2d 980, 990 (9th Cir. 1979) (expert testimony on document classification properly found inadmissible because it “was totally irrelevant to the issues of [the] case and of no help to the jury”); *Saldana v. Kmart Corp.*, 260 F.3d 228, 233 (3d Cir. 2001) (expert “opinion that [store] violated [OSHA] worker safety requirements” was inadmissible because it was not relevant to issue of whether store acted negligently).

⁵ *In re the Application of Dominion Cove Point LNG, LP for a Certificate of Pub. Convenience & Necessity to Construct a Generating Station With a Name-Plate Capacity of 130 MW at the Dominion Cove Point Liquefied Natural Gas Terminal in Calvert Cnty.*, Case No. 9318, Order No. 86372, slip op. at 8 (May 30, 2014).

A. The Project is permitted by right in its proposed location.

Except for a perimeter access road and fence, the Project is within Carroll County's Industrial-General ("I-G") and Industrial-Restricted ("I-R") districts, where utility scale solar facilities are permitted by right as a principle use.⁶ A small portion of the Project's perimeter access road and fence are located within the Town on land zoned Industrial Restricted ("I-R"). The Town's zoning ordinance does not restrict the use of this parcel for the installation of a perimeter access road and fence in the I-R zone. Thus, both County and Town zoning permit the Project as of right.

B. Uses permitted by right are *de facto* consistent with a jurisdiction's comprehensive plan as a matter of law and comprehensive plans are non-binding guidance.

In Maryland, "when a use district is established, the zoning regulations prescribe that certain uses are permitted as of right (permitted use), while other uses are permitted only under certain conditions (conditional or special exception)."⁷ Allowing a use by right (*i.e.*, as a permitted use) is absolute and demonstrates *de facto* consistency with the jurisdiction's comprehensive plan. Precedent is clear on this point: "[a]n expressly permitted use by zoning designation is tantamount to a legislative finding that the use [is] in harmony with the general zoning plan."⁸ In other words, including a use within a zoning district, the jurisdiction has

("Commission granted ... Motion to Strike ... concluding that [expert's] testimony ... [was] outside the scope of [the] proceeding").

⁶ See Carroll County Code §158.153(D)(1).

⁷ *Schultz v. Pritts*, 291 Md. 1, 20-21 (1981) (internal citations omitted).

⁸ *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 96, (1988) (internal citations omitted). See also, *Schultz v. Pritts*, 291 Md. 1 at 20-21 ("In determining which uses should be designated as permitted in a given use district, a legislative body considers the variety of possible uses available, examines the impact of the uses upon the various purposes of the zoning ordinance, determines which uses are compatible with each other and can share reciprocal benefits, and decides which uses will provide for coordinated, adjusted, and harmonious development of the district.").

predetermined that the use is appropriate for the given location and is consistent with its comprehensive plan. Furthermore, this is true regardless of any impacts the use could have on surrounding properties.⁹

Maryland courts “have repeatedly noted that, generally, Master Plans, Comprehensive Plans, and the like, are advisory, guides only, and not normally mandatory.”¹⁰ Such plans “represent only a basic scheme generally outlining planning and zoning objectives in an extensive area, and are in no sense a final plan; they are continually subject to modification in the light of actual land use development and serve as a guide rather than a strait jacket.”¹¹

Although a local jurisdiction is not bound to follow its comprehensive plan, Maryland law does mandate that jurisdictions implement the land use policies outlined in their comprehensive plans when adopting local zoning ordinances.¹² The Court of Appeals has explained, “[z]oning provides a tool by which to establish general areas or districts devoted to selected uses. Indeed, the very essence of zoning is the territorial division of land into use districts according to the character of the land and buildings, the suitability of land and buildings for particular uses, and uniformity of use.”¹³

⁹ See e.g., *People’s Counsel for Baltimore County v. Loyola Coll. in Maryland*, 406 Md. 54, 71 (2008) (“A permitted use in a given zone is permitted as of right within the zone, without regard to any potential or actual adverse effect that the use will have on neighboring properties.”) This contrasts with a use permitted by special exception or conditional use approval.

¹⁰ *Trail v. Terrapin Run, LLC*, 403 Md. 523, 528 (2008).

¹¹ *Mont. Co. v. Woodward & Lothrop*, 280 Md. 686, 704 (1977).

¹² See Md. Land Use Article § 4-202(a) (providing that a local legislative body must adopt zoning regulations “in accordance with the [comprehensive] plan”); *Id.* at § 3-303(b) (providing that a local jurisdiction must “implement its comprehensive plan through the adoption of ... zoning laws”).

¹³ See *Schultz v. Pritts*, 291 Md. 1, 20 (1981) (internal citations omitted).

A local jurisdiction's zoning ordinance is the legal mechanism by which it implements the policies outlined in its comprehensive plan. And when that zoning ordinance permits a use by right, it "is tantamount to a legislative finding that the use [is] in harmony with the general zoning plan," establishing *de facto* consistent with the comprehensive plan as a matter of law.¹⁴ This principle is further supported by statute. The Land Use Article ("LUA") § 1-301, *et seq.* governs the consideration by a local jurisdiction of whether a proposed action is "consistent" with a comprehensive plan under specifically delineated review criteria under LUA § 1-303. Section 1-302, which sets forth the jurisdictional scope of these requirements, specifies this review is necessary for the issuance of a special exception.¹⁵ However, this review is not applicable to a use permitted by right, which is presumed consistent with the jurisdiction's comprehensive plan as a matter of law.

C. Because a use permitted by right is *de facto* consistent with a jurisdiction's comprehensive plan as a matter of law, Mr. Cueman's testimony is irrelevant to this proceeding and must be excluded.

Turning to the Project and the Town's direct testimony, Mr. Cueman, argues that the Project is inconsistent with Carroll County and the Town's Comprehensive Plans, focusing on

¹⁴ *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 96, (1988) (internal citations omitted). *See also Schultz v. Pritts*, 291 Md. 1 at 20-21 ("In determining which uses should be designated as permitted in a given use district, a legislative body considers the variety of possible uses available, examines the impact of the uses upon the various purposes of the zoning ordinance, determines which uses are compatible with each other and can share reciprocal benefits, and decides which uses will provide for coordinated, adjusted, and harmonious development of the district.").

¹⁵ In contrast to a permitted use, a "special exception,...is merely deemed *prima facie* compatible in a given zone. The special exception requires a case-by-case evaluation by an administrative zoning body or officer according to legislatively-defined standards. That case-by-case evaluation is what enables special exception uses to achieve some flexibility in an otherwise semi-rigid comprehensive legislative zoning scheme." *People's Counsel for Baltimore County v. Loyola Coll. in Maryland*, 406 Md. 54, 71-72 (2008). This discretionary decision involves a determination that a project is or is not consistent with a comprehensive plan, or otherwise compatible with surrounding properties. However, this is not the case for a permitted use.

the purported intent of both plans and the Project's location within the growth area identified by the Town. This argument fails for at least three reasons.

First, these factual arguments are irrelevant. When a use is permitted by right, it constitutes a *de facto* finding by the jurisdiction that the use is consistent with the jurisdiction's Comprehensive Plan. Carroll County has done just that by zoning the project site I-G and I-R and making utility scale solar facilities a permitted use by right in those zones.¹⁶ This presumption of consistency applies irrespective of any impacts the Project may have on the Town and surrounding area.¹⁷ Carroll County has implemented its comprehensive plan by zoning the land on which the Project is proposed to be located as Industrial-General ("I-G") and Industrial-Restricted ("I-R") Utility scale solar facilities are permitted by right in both zones.¹⁸ This authorization is "tantamount to a legislative finding that the use [is] in harmony with the general zoning plan."¹⁹ By making utility scale a permitted use in the I-G and I-R zones, Carroll County has determined that the Project is permitted and appropriate for its proposed location, "without regard to any potential or actual adverse effect that the use will have on neighboring properties."²⁰ The Commission has no discretion on this point. The Project is a permitted use and is automatically deemed consistent with Carroll County's Comprehensive Plan.

Second, the Town's Comprehensive Plan is irrelevant because the Project is located within Carroll County. The Project is permitted as of right in Carroll County and as such there is

¹⁶ See *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 96, (1988).

¹⁷ See *People's Counsel for Baltimore County v. Loyola Coll. in Maryland*, 406 Md. 54, 71 (2008).

¹⁸ See Carroll County Code §158.153(D)(1).

¹⁹ *S.E.W. Friel v. Triangle Oil Co.*, 76 Md. App. 96, (1988) (internal citations omitted).

²⁰ *People's Counsel for Baltimore County v. Loyola Coll. in Maryland*, 406 Md. 54, 71 (2008).

no legal mechanism to apply the Town's Comprehensive Plan to a proposed development outside of its borders. While a small portion of the Projects' perimeter access road and fence are proposed to be located within the Town on land zoned I-R, the Town's zoning ordinance does not restrict the use of this parcel for the installation of a perimeter access road and fence.

Finally, while the Town focuses on its desire to annex to the Project site, Maryland law provides a separate process by which it could seek to initiate such an annexation, provided it receives the consent of a minimum threshold of registered voters and property owners in the area proposed to be annexed.²¹ This CPCN proceeding is not an appropriate forum to circumvent a statutory process that requires the direct consent of the property owners and voters to be impacted. The Commission does not have authority to order an annexation, and any testimony advocating for such a requirement is wholly irrelevant to this case.

III. CONCLUSION

Zoning exists to provide local jurisdictions with reasonable control over land uses while notifying citizens what they may or may not do with certain property. Through their prior legislative actions, Carroll County and the Town of Union Bridge have explicitly authorized the Applicant to build this solar project on the Applicant's property. The Project is permitted by right where it is proposed to be located, which under Maryland zoning law establishes comprehensive plan consistency. The Commission cannot now allow the Town to overrule itself and the County simply by pointing to unenforceable guidance that is rendered irrelevant by black letter land use law. Mr. Cueman's testimony seeks to do just that and therefore must be stricken.

²¹ Under Maryland law, for a municipality to initiate an annexation it must obtain consent from (1) at least 25% of the registered voters who are residents in the area to be annexed; and (2) the owners of at least 25% of the assessed valuation of the real property in the area to be annexed. Md. Local Government Article § 4-403(b).

The Applicant respectfully requests that the Commission strike Mr. Cueman's Direct Testimony in its entirety.

Respectfully submitted,

/s/

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