

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1238

September Term, 2020

DAN'S MOUNTAIN WINDFORCE, LLC

v.

JENNIFER SHAW, *et al.*

Fader, C.J.,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: April 14, 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.

For more than a decade, appellant Dan’s Mountain WindForce, LLC (“WindForce”) has sought to construct a windfarm on Dan’s Mountain in Allegany County, Maryland. Although the history is complicated, the current appeal pertains only to three filings that WindForce has made with the PSC:¹ (1) a 2008 request for an exemption from the requirement to obtain a CPCN,² which we will refer to in this opinion as “the 2008 CPCN exemption” and which WindForce eventually abandoned; (2) a 2016 application for a CPCN, which we will refer to as “the 2016 CPCN application” and which was rejected by the PSC; and (3) a 2020 request for an exemption from the requirement to obtain a CPCN, which we will refer to as “the 2020 CPCN exemption,” which was approved and which is at issue in this appeal. Appellees argue that approval of the 2020 CPCN exemption was precluded by the PSC’s previous rejection of the 2016 CPCN application.

The legal questions presented here are not difficult. The PSC’s decision with respect to WindForce’s 2016 CPCN application cannot and does not preclude a favorable decision on WindForce’s 2020 CPCN exemption. We will, therefore, reverse the decision of the Circuit Court for Baltimore City and reinstate the decision of the PSC to approve WindForce’s 2020 CPCN exemption.³ The harder part of this case is explaining the

¹ The PSC is the Maryland Public Service Commission. MD. CODE, PUB. UTIL. (“PU”) § 2-101, *et seq.*

² A CPCN is a Certificate of Public Convenience and Necessity. PU § 7-207(b)(1)(i).

³ In administrative appeals, we look through the decision of the circuit court and review the decision of the administrative agency. *Mid-Atl. Power Supply Ass’n v. Md. Pub.*

cognitive dissonance created by this result. Appellees correctly note that the PSC, the administrative agency responsible for supervising and maintaining our State’s electrical system, has declared that the Dan’s Mountain project was not in the public interest. *In the Matter of the Application of Dan’s Mountain WindForce, LLC for a Certificate of Pub. Convenience & Necessity to Construct a 59.5 MW Wind Energy Generating Facility in Allegany Cty, Md.*, No. 88260, 2017 WL 2694943 at 6 (Md. P.S.C. June 16, 2017). How, then, can we affirm a decision that allows the project to be built? The answer lies in the difference in the statutory standards required for a CPCN application and a CPCN exemption.

STATUTORY FRAMEWORK

To construct a power generation plant or transmission lines, an applicant must obtain a CPCN from the PSC, which acts as a “one-stop shop” for all regulatory approvals. The process for obtaining a CPCN from the PSC is detailed and extensive, and is set out in MD. CODE, PUB. UTIL. (“PU”) § 7-207 and in COMAR 20.79.03.01 *et seq.* Thus, a CPCN application requires: a detailed description of the proposed generating station, COMAR 20.79.03.01; a detailed explanation of how the proposed generating station will comply with all environmental laws, COMAR 20.79.03.02; a detailed description of how the

Serv. Comm’n, 143 Md. App. 419, 432 (2002). With respect to the PSC, because of its expertise in public utility law, the General Assembly has mandated, and we apply, an extra-deferential standard of review to its decisions. PU § 3-203; *Md. Office of People’s Counsel v. Md. Pub. Serv. Comm’n*, 461 Md. 380, 392-94 (2018). As noted above, in applying these standards, we will reverse the determination of the circuit court and reinstate the PSC’s approval of WindForce’s 2020 CPCN exemption.

proposed generating station will affect the State’s natural resources, COMAR 20.79.03.03; a detailed description of the socioeconomic effects of the proposed generating station, COMAR 20.79.03.04; a description of the environmental justice issues that are effected by the proposed generating station, COMAR 20.79.03.05; a description of efforts made by the applicant at public engagement and participation, COMAR 20.79.03.06, and, if necessary, a detailed description of any condemnation that is required, COMAR 20.79.03.07. Notice of the CPCN application is sent to all possible interested parties including those living near the proposed project, state and local governments, and the public. PU § 7-207(c). The PSC must coordinate its review to maximize public participation. PU § 7-207(d). And, at the end of this process, the PSC is solely responsible for approving or denying a CPCN application.⁴

⁴ In considering whether to approve or deny a CPCN application, the PSC is required to give “due consideration” to four statutory factors:

- (1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station, overhead transmission line, or qualified generator lead line is proposed to be located;
- (2) the effect of the generating station, overhead transmission line, or qualified generator lead line on:
 - (i) the stability and reliability of the electric system;
 - (ii) economics;
 - (iii) esthetics;
 - (iv) historic sites;
 - (v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;

The General Assembly also created a CPCN exemption process, which is a simplified process for certain facilities, including, as relevant here, smaller wind-powered electric generating stations. PU § 7-207.1. The purpose of this alternate process is to facilitate and simplify regulatory approvals by transferring responsibility from the statewide PSC to the local governments.⁵ As a result, under PU § 7-207.1, an applicant

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- (vi) when applicable, air quality and water pollution;
and
 - (vii) the availability of means for the required timely disposal of wastes produced by any generating station;
 - (3) the effect of climate change on the generating station ... based on the best available scientific information ...; and
 - (4) 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;
 - (ii) the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located;
 - (iii) the impact of the generating station on the quantity of annual and long-term statewide greenhouse gas emissions ...; and
 - (iv) the consistency of the application with the State's climate commitments for reducing statewide greenhouse gas emissions[.]

PU § 7-207(e).

⁵ There is, of course, some tension between the processes. That is, the CPCN application process was intended to create a simplified, unitary process at the PSC to prevent local government interference from slowing regulatory approvals. Meanwhile the

must seek an exemption from the CPCN process described above. In the CPCN exemption process, notice must be given to the stakeholders, PU § 7-207.1(c), and limited public hearings must be held. PU § 7-207.1(f). In deciding whether to grant a CPCN exemption, the PSC must be satisfied that the proposed construction satisfies the statutory requirements for the exemption, PU § 7-207(b)(1)(ii), and the PSC must:

- (1) ensure the safety and reliability of the electric system;
- (2) require the person constructing the generating station to notify the [PSC] 2 weeks before the first export of electricity ...; and
- (3) conduct its review and approval in an expeditious manner.

PU § 7-207.1(d). After a CPCN exemption is granted, it becomes the local government's job—not the PSC's—to approve construction.

We hope it is clear from this description that a CPCN application is a complex and detailed process that happens almost entirely under the supervision of the statewide PSC. By deliberate contrast, a CPCN exemption is a simplified process that requires minimal

CPCN exemption process was created to allow those seeking to build small electrical generating stations a means to avoid the regulatory complexity of the PSC in favor of a simplified process of local governmental regulatory approvals. Of course, different applicants, in different parts of the State, at different times, might see these choices in different ways. This tension also helps explain WindForce's choices here. When it looked at first like local approval would be easier to obtain, WindForce sought a CPCN exemption. When obtaining local zoning approval looked as if it presented an insurmountable problem, WindForce changed course and sought a CPCN from the PSC. When the PSC declined to grant a CPCN, local approval became more likely and WindForce changed course again and sought a CPCN exemption.

supervision by the statewide PSC before being sent to the local governments for substantive regulatory review.

ANALYSIS

With those statutory differences firmly in mind, we turn to Appellee’s three specific legal questions: (1) whether the PSC’s denial of WindForce’s 2016 CPCN application precluded it from approving WindForce’s 2020 CPCN exemption; (2) whether the evidence submitted by WindForce in connection with its 2020 CPCN exemption was legally sufficient; and (3) whether the PSC adequately explained its decision granting WindForce’s 2020 CPCN exemption.

I. ESTOPPEL BY JUDGMENT

Appellee’s principal argument is that the PSC’s denial of WindForce’s 2016 CPCN application precludes it from approving WindForce’s 2020 CPCN exemption. The Appellees present this argument in two forms: *res judicata* (also referred to as claim preclusion) and collateral estoppel (also referred to as issue preclusion). Both of these legal doctrines are predicated on the same idea: “avoid[ing] the expense and vexation of multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibilities of inconsistent decisions.” *Weatherly v. Great Coastal Express Co.*, 164 Md. App. 354, 368 (2005) (quoting *Colandrea v. Wilde Lake Cmty. Ass’n*, 361 Md. 371, 387 (2000)). Moreover, although both of these doctrines originated in judicial proceedings, they also apply to the quasi-judicial decisions of administrative agencies. *Boyd v. Goldman-Gable-Gould Co.*, 251 Md. App. 1, 21 (2021). We will address each in turn.

A. *Res Judicata*

The doctrine of res judicata “bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.” *Weatherly*, 164 Md. App. at 368 (quoting *Lizzi v. Washington Metro. Area Transit Auth.*, 384 Md. 199, 206 (2004)). For res judicata to apply as a bar, the party asserting the defense must show that: (1) the parties to the second action are the same (or in privity) with the parties from the first action; (2) both the first and second actions present the same claim or cause of action; and (3) in the first action, there was a final judgment rendered on the merits by a court of competent jurisdiction. *Weatherly*, 164 Md. App. at 368. When these three elements are present, “the first claim is merged into the judgment and bars the second claim.” *Boyd v. Bowen*, 145 Md. App. 635, 655 (2002); *see also Hughes v. Insley*, 155 Md. App. 608, 611 (2003). Moreover, a “claim” is broadly considered to be all the rights one party has against the other for any part of the matter at hand, thus, “the doctrine of res judicata bars subsequent litigation not only of what was decided in the original litigation of the claim but also of what could have been decided in that original litigation.” *Weatherly*, 164 Md. App. at 369 (emphasis omitted).

We focus, as the parties do, on the second step, whether the 2020 CPCN exemption presents the same “claim” as the 2016 CPCN application. WindForce argues that the claims at issue in the two processes are different. Appellees argue that they are more or less the same. In support of that, Appellees argue that a CPCN exemption is, essentially, an abbreviated CPCN application, sort of a “CPCN-light.” Appellees emphasize the

procedural similarities between the two processes, including that both actions were initiated with an application to the PSC, both actions involved much of the same evidence about the proposed project, and both actions were part of WindForce’s ongoing effort to obtain approval for the project. While true that there are procedural similarities, these procedural similarities don’t overcome the substantive dissimilarities.

As described above, when it grants a CPCN application, the PSC is exercising its exclusive authority to preempt the local government and it is granting every regulatory approval necessary for the siting and construction of a power generating station. *Bd. of Cty. Comm’rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610, 643 (2019). The grant of a CPCN application includes within it every siting and regulatory decision that has to be made for the completion of the project. But in the CPCN exemption process, the PSC makes none of those decisions. Rather, it only considers whether the proposed project is qualified for exemption under PU § 7-207(b)(1)(ii) and meets the specific statutory requirements outlined in PU § 7-207.1. *Perennial Solar*, 464 Md. at 623 n.14. If those minimum standards are met, the PSC then transfers the authority to approve the siting and construction of the proposed project to the local governments.

We, therefore, hold that the “claims” presented in the two processes are entirely different. Though broadly related in subject matter, by definition and design, a CPCN application and a CPCN exemption do not present the same claim. Each process asks very different questions, and each is comprised of elements that are distinct and do not overlap. *Res judicata*, therefore, does not preclude the PSC from considering a CPCN exemption after denying a CPCN application, and vice versa.

B. Collateral Estoppel

Collateral estoppel applies “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment ... and the determination is essential to the judgment.” *Weatherly*, 164 Md. App. at 369 (quoting *Colandrea*, 361 Md. at 387). A party asserting collateral estoppel must show that the issue to be precluded (1) is identical to the one previously litigated, (2) was actually determined in the prior proceeding, (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding, (4) the prior judgment was final and valid, and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Weatherly*, 164 Md. App. at 369. If these conditions are met, “the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Id.* (quoting *Colandrea*, 361 Md. at 387); *see also Boyd*, 145 Md. App. at 657.

In the collateral estoppel analysis, the parties focus on the first step. WindForce argues, as before, that the issues decided in a CPCN exemption are different from the issues raised in a CPCN application. Appellees argue specifically that, having previously found that there was no public benefit to building the windfarm, the PSC could not reverse its finding on that issue without a significant change in the facts and circumstances of the project.

We hold, however, that “public benefit” is simply not an issue in a CPCN exemption. As such, the previous finding of “no public benefit” in the 2016 CPCN application does not operate to collaterally estop the PSC from granting the 2020 CPCN exemption.

We hold, therefore, that the PSC’s previous rejection of WindForce’s 2016 CPCN application does not preclude it from approving WindForce’s 2020 CPCN exemption.

II. SUFFICIENCY OF THE EVIDENCE SUPPORTING THE EXEMPTION

Appellees next argue that, having found that the proposed project wasn’t “necessary” or “in the public interest” in the 2016 CPCN application, the PSC lacked sufficient evidence to reverse that finding in connection with WindForce’s 2020 CPCN exemption.

This argument, however, starts from a faulty premise. WindForce’s evidentiary obligation, as described above, was to demonstrate that it was entitled to a CPCN exemption. *See supra* at 4-5 (discussing statutory requirements for CPCN exemption, including entitlement to exemption under PU § 7-207(b)(1)(ii) and three additional elements under PU § 7-207.1(d)). It was not required to somehow “overcome” the PSC’s prior finding or prove that it was “necessary” or “in the public interest.” The record contains WindForce’s 2020 CPCN exemption request to the PSC, verified under oath and with supporting exhibits, showing that all of the statutory requirements for an exemption were met. In addition, the staff of the PSC and the Maryland Office of People’s Council reviewed the request for a CPCN exemption and submitted letters to the PSC stating that the requirements were met. In the letter memorializing its decision to grant the 2020 exemption, the PSC stated that it had considered WindForce’s CPCN exemption request and other materials in making its decision. We, therefore, conclude that there was substantial evidence to support the PSC’s decision. *See Motor Vehicle Admin. v. Sanner*, 434 Md. 20, 31 (2013).

III. SUFFICIENCY OF THE COMMISSION’S EXPLANATION

The Appellees’ final argument is predicated on the same faulty premise—their belief that to grant the CPCN exemption, WindForce had to overcome the prior denial and establish that the project was “necessary” and “in the public interest.” As discussed in Section II, however, that was not WindForce’s evidentiary burden. There is no increased burden because of a prior application. And, as a result, the PSC did not err by not writing an explanation sufficient to demonstrate this alleged obligation. Rather, WindForce was only required to prove that it qualified for the exemption and the PSC was only required to write an explanation that demonstrated that WindForce qualified for the exemption. As discussed above, there is substantial evidence in this record to demonstrate that WindForce complied with this obligation.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
REVERSED. COSTS TO BE PAID BY
APPELLEES.**