No. 12-1443

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WASHINGTON GAS LIGHT COMPANY *Plaintiff, Counterclaim Defendant, Appellant* v. THE PRINCE GEORGE'S COUNTY COUNCIL SITTING AS THE DISTRICT COUNCIL; PRINCE GEORGE'S COUNTY, MARYLAND *Defendant-Counterclaimant Appellee*	CASE NO: 12-1443

On Appeal from the United States District Court for the District of Maryland in Case No. 08-CV-00967 (Hon. Deborah K. Chasanow, Chief Judge)

BRIEF OF DEFENDANT-COUNTERCLAIMANT APPELLEE

Rajeshanand Kumar
ACTING PRINCIPAL COUNSEL TO THE DISTRICT COUNCIL
Room 2055
County Administration Building
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772-3050
301.952.3921

Scott H. Strauss
Peter J. Hopkins
David E. Pomper
Law Offices of:
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
202.879.4000

June 22, 2012

CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1443 Caption: Washington Gas Light Co. v. Prince George's County

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Prince George's County Council sitting as the District Council and Prince George's County
(name of party/amicus)

---

who is Appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

None known except as identified in disclosure statement of Appellant Washington Gas Light Company.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on June 22, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David E. Pomper
(signature)

June 22, 2012
(date)

Print Save Reset Form

11/17/2011
SCC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL AND STATE COURT CASES

FEDERAL AND STATE AGENCY CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL ADMINISTRATIVE REGULATIONS

STATE ADMINISTRATIVE REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Contrary to the Brief of Appellant Washington Gas Light Company ("WGL" or the "Company") — which we cite as "Br.*n*," here Br.1 — WGL's "mandatory referral" claim does not "arise under the laws of the United States." That claim asserts Maryland law, specifically Maryland's National-Capital-Area zoning statute, the Regional District Act ("RDA").

STATEMENT OF THE CASE

The District Court — over the course of more than three years' deliberation, through four memorandum opinions and associated multiple rounds of briefing and oral argument — resolved all of the claims raised by WGL and the County. Of greatest significance, the District Court held that (1) the Natural Gas Act ("NGA") does not dictate how states should govern the siting of utility facilities whose siting is not federally regulated; (2) the Pipeline Safety Act ("PSA") does not address or override pipeline routing or location parameters other than safety standards; and (3) WGL's citation of the "mandatory referral" provision of Maryland's RDA, which provides only that government entities immunized from zoning by other law must obtain an advisory land use planning opinion before authorizing construction in the national capital area, failed to state a claim for which relief could be granted.

Accordingly, the District Court dismissed WGL's complaint, granted the County's request for a declaration that "County land use law governs the Chillum site, prohibits WGL from altering the site so as to construct an LNG peak shaving facility, and is not preempted by the Natural Gas Act, 15 U.S.C. § 717, et. seq., [or] the Pipeline Safety Act, 49 U.S.C. § 60101, et. seq. …,"[1] and explained again its earlier dismissal of WGL's "mandatory referral" count.[2] WGL raises challenges related to each of these rulings.

STATEMENT OF THE FACTS

In 1933, 1940, and 1955, WGL sought zoning approvals from Prince George's County, Maryland, to site natural gas storage facilities in a stream valley located off the County's Chillum Road, just outside the District of Columbia and near today's West Hyattsville Metro Station. A68, A165, A168-69, A19 ¶ 6, A33. The County, acting as the "District Council" pursuant to Maryland's RDA zoning statute, certified the need for those facilities and authorized their construction, after which they were built. *Id.* and A171. In 1999, WGL removed those facilities, without seeking or obtaining abandonment approval from federal or state utility regulators. *See* A172. Shortly thereafter, however, WGL decided to build a new Liquefied Natural

---

[1] A596, A1044-45.

[2] A1044.

Gas ("LNG") liquefaction, storage, and vaporization facility on the same site. Accordingly, in August 2004, WGL asked the County for a Special Exception[3] from the site's Open Space zoning classification. In directing its siting application to the County rather than utility regulators, WGL retraced its prior applications for County authorization of facilities at Chillum, its contemporaneous zoning application for another Maryland facility,[4] and the zoning applications that WGL and other utilities routinely submit[5] when proposing projects in Maryland.

The zoning procedures initiated by WGL took some time, largely because WGL originally filed for only a "minor" exception. After the County's Zoning Supervisor found a "major" exception to be necessary, A163, WGL pursued one in September-November 2005 County Planning Board proceedings (A182-A195) and December 2005-August 2006 Zoning Hearing Examiner proceedings (A33-A43). Contemporaneously but separately, a Transit District Development Plan ("TDDP"), anticipated in the County's 2002 General Plan

---

[3] WGL (at 9) calls this Special Exception application "mandatory referral documents," but it was expressly filed "pursuant to Section 27-325 of the Zoning Ordinance," A170, which governs Special Exceptions, *see* A176. WGL reserved but did not then invoke any mandatory referral claim. A179.

[4] Petition of Washington Gas, Case No. S-2596 (Montgomery Cnty. Bd. of Appeals June 25, 2004); *see also* A768 (WGL acknowledging this contemporaneous application).

[5] *Compare* A659-660, A709-713 (Category 1) *with* A767-68.

(A190), was underway. In July 2005, the County's professional planning staff mapped the area under consideration for TDDP zoning, expanding it to include WGL's parcel. *See* A204. The TDDP was then considered through multiple proceedings over succeeding months, leading to the March 2006 introduction and May 2006 adoption of a District Council resolution adopting the planners' recommendations. *See id.* As the District Court recited, A1032-33, the TDDP was enacted to further "transit-oriented development," and "create a sense of place consistent with the neighborhood character areas," by "[e]nsur[ing] that all new development … in the transit district is pedestrian-oriented," "protecting environmentally sensitive areas," "expanding recreational opportunities and trail and bikeway connections," and "[m]aximiz[ing] residential development within walking distance of the Metro station."

The TDDP's enactment mooted WGL's special exception application, because changing transit-oriented zoning would instead require Plan Amendment under §27-548.09.01. A260. The Zoning Hearing Examiner, District Council, and state courts so ruled, A43, A45, A209-211, and WGL abandoned further appeal of those rulings. Nor did WGL seek a Plan Amendment. Instead, WGL pursued this federal case.

In parallel with the foregoing proceedings concerning land use, WGL also appeared before the Maryland Public Service Commission ("MDPSC") on

two sets of distinct and additional issues.[6] First, MDPSC's Engineering Division reviewed the safety of WGL's proposed facility, pursuant to the PSA, 49 U.S.C. §60105. That review was expressly limited to safety. A744. Second, the MDPSC initiated a "portfolio plan" review of whether WGL, in planning to rely on Chillum, was planning for sufficient and economically reasonable resources to meet peaking needs over the next five years. That reliability review expressly did not encompass zoning issues,[7] and the District Court held that it neither "include[d] authority to make siting decisions," A1040, nor "obviated [the County's] need separately to review whether the proposed facility will conform to the County's established land use policies." *Id*. The MDPSC's review terminated with no ruling on whether WGL should have included Chillum in its portfolio planning, and thus no ruling as to whether WGL's

---

[6] WGL's recitation of the "first reason" that "Washington Gas is before the MDPSC," Br.13, is incorrect. As the District Court held, "Gas Portfolio reviews are conducted by the MDPSC pursuant to its authority to regulate fuel rates as set forth in Md. Code Ann., Pub. Utilities § 4-402," A1040, not pursuant to the NGA as WGL contends.

[7] A785-87, A871, A891 & n.30, A990.

disputed cost estimates were correct,[8] because Chillum would in any event not be completed within the five year planning horizon at issue.[9]

SUMMARY OF ARGUMENT

WGL's appeal invokes three separate statutory provisions. None of them say what WGL claims. The Court should dismiss the appeal and affirm the District Court.

Natural Gas Act §7(f). WGL distributes natural gas across state lines to retail consumers in the District of Columbia and its Maryland and Virginia suburbs. FERC has designated the national capital area as WGL's "service area" under NGA §7(f),[10] and thus does not regulate WGL's facilities or gas transportation service in that area. Contrary to WGL's contention, this designation does not give the MDPSC exclusive jurisdiction over where WGL may build. The siting and land use authority that Maryland counties exercise over other natural gas distributors applies to WGL as well.

---

[8] WGL submits Chillum cost estimates, Br.9, that at the MDPSC portfolio plan hearing were both changed and challenged, A720-731. Those estimates are thus subject to factual dispute that is genuine, but not germane.

[9] *See* A891-92.

[10] NGA §7(f) is codified as 15 U.S.C. §717f(f). The codified numeration appears in the District Court's opinions, but most record references use the Act's simpler internal numeration, as we do here.

WGL claims that the facility jurisdiction that FERC ceases to exercise due to the NGA §7(f)(1) service area designation is "instead" somehow given to the MDPSC pursuant to NGA §7(f)(2), and that the two provisions therefore conjunctively give the PSC exclusive jurisdiction over where WGL may build. In fact, §7(f) contains no such language.

Section 7(f)(1) operates negatively, as an exemption from FERC regulation, enabling WGL to build facilities without obtaining FERC approval. Nothing in its language or operation constitutes an affirmative grant of regulatory power to states that creates MDPSC jurisdiction over siting of new facilities. Section 7(f)(2) is limited to the issue of gas transportation. While this provision leaves to the MDPSC regulatory jurisdiction over the rates and terms of WGL's transportation services to Maryland retail customers, nothing in its language or operation creates MDPSC jurisdiction over siting of new facilities. WGL's claims to the contrary are baseless.

The NGA's history, FERC's interpretation of §7(f), and the MDPSC's actions remove any possible doubt. The statute's history establishes that the siting authority abjured by FERC under §7(f)(1) and the transportation service regulation authority assigned to the MDPSC under §7(f)(2) are distinct; that neither preempts County zoning; and that WGL recognized the County's continuing authority by seeking County zoning approvals for predecessor

facilities on the same site now at issue. FERC holds that facility siting within a designated NGA §7(f) service area is subject to otherwise applicable local police powers. The MDPSC regulates safety, economics, and reliability, but has never claimed or exercised authority to regulate the siting of WGL's facilities, under NGA §7(f) or otherwise. By contrast, WGL fails to proffer any legislative history, case law, or regulatory practice that supports its reading of §7(f).

Pipeline Safety Act §60103. WGL's PSA preemption argument fares no better. The PSA is limited to matters of pipeline safety. The PSA creates no authority over pipeline facility location or routing, and that limitation is express. The District Court found that the PSA does not comprehensively address the siting of pipeline facilities. The Fifth Circuit, in the one reported appellate decision addressing the issue, found that the PSA does not preempt the application to pipeline facilities of local zoning that is primarily related to aesthetics or other non-safety police powers. As the District Court correctly found, the County's TDDP meets this standard. It has the legitimate purpose of promoting transit-oriented development, and the uncontroverted record evidence is that WGL's proposal to build a 15-story LNG complex on WGL's proposed site — in a stream valley, near a transit station, surrounded by existing and planned residences, parkland, and light commercial land uses — clashes with the zoning plan's aesthetic, economic development, and environmental

objectives. The County's zoning does not conflict with safety regulation because WGL admits that it can operate a safe and reliable system without constructing an LNG storage facility at Chillum.

Regional District Act §7-112. WGL's appeal regarding "mandatory referral" under Maryland RDA §7-112 is frivolous. The District Court properly dismissed the underlying count for failure to state a claim. Because the Maryland Court of Appeals has established that the §7-112 mandatory referral provision creates no zoning immunities and applies only to governmental entities, the provision cannot provide WGL a cause of action. The District Court was also correct to find, alternatively, that *Burford* abstention was appropriate, to the extent that a private gas utility's status under the RDA constitutes a novel question of state law.

In sum, WGL's various claims are meritless, and the District Court should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

While the Court reviews grants of summary judgment *de novo*, viewing the facts in the light most favorable to the nonmoving party,[11] this case centers

---

[11] *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 329 (4th Cir. 2006).

on disputes over law, not fact. In WGL's words, "[t]he preemption question presented in this case is a pure question of law." A265.

In questioning whether a federal statute preempts local zoning, WGL confronts a presumption to the contrary. Local zoning is a traditional police power. *See, e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328-29 (11th Cir. 2001). Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This presumption against preemption applies in determining "whether Congress intended any pre-emption at all," as well as "questions concerning the *scope* of its intended invalidation of state law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("*Medtronic*") (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545-46 (1992)).

II. THE NGA DOES NOT TRANSFER SITING JURISDICTION FROM THE COUNTY TO THE MDPSC

WGL asserts that NGA §7(f) "grants exclusive power to the MDPSC to approve or disapprove, in lieu of FERC, proposed enlargements or extensions of Washington Gas' facilities in the Maryland portion of its service area." Br.21. WGL never squares that theory with the statutory text, and no court or

agency has ever adopted it. No language in §7(f) grants siting jurisdiction over natural gas facilities to the MDPSC. To the contrary, abundant legal authority — statutory text, statutory history, and case law — establishes that NGA §7(f) does not preempt local zoning. Rather, it does two other things: it exempts certain facilities from FERC's NGA §7 regulation of facilities, and it provides that utility regulation of transportation over such exempted facilities is left to utility regulators other than FERC.

A. NGA §7(f) Contains Two Distinct Provisions, Neither of Which Dictates How States May Govern Siting

NGA §7(f) appears within NGA §7, most of which concerns the requirement that FERC-regulated interstate pipelines obtain a FERC "Certificate of Public Convenience and Necessity" before building or operating new facilities. Section 7(f), however, provides that if FERC has established a service area, no FERC certificate is required. That is *all* that §7(f) says about facility siting; it leaves to other law whether and where new facilities may be sited, and what state-authorized bodies may govern such siting. Here, Maryland state law gives the County zoning authority over WGL's plan to build a 15-story-tall industrial complex. This straightforward interpretation of §7(f), in addition to being shared by FERC and the District Court, is fully supported by the statutory text, and essentially conceded by WGL.

NGA §7(f) consists of two subparts. Subpart (1) speaks to facility construction, but only by addressing what FERC approvals are or are not required. Nothing therein dictates how or through what governance Maryland must exercise its retained authority over facility construction or provides a basis for WGL's theory that the MDPSC has such authority but the County does not. That much WGL gets right when it states (Br.19, emphasis added) that "if FERC has determined a service area for a public utility, then the enlargement or extension of the public utility's facilities within that service area occurs without further authorization *from FERC*." At a June 16, 2009 hearing before the District Court, WGL conceded the same key point, even more clearly: "(f)(1) … [d]oes not say anything more than 'you do not need to have FERC approval.' It does not expressly state that you must go to the, here the Maryland PSC, for any kind of regulatory oversight at all." A1096.

Subpart (2) likewise says nothing to support WGL's theory: it says nothing about jurisdiction over facilities, and therefore says nothing about jurisdiction over the siting of facilities. At the same hearing, WGL counsel conceded this point too. "What gets regulated under f(2)[?] … Not the facilities, Your Honor. Facilities cannot be governed by this section, were never intended to be governed by this section." A1094.

Thus, as WGL admits, neither subpart speaks to what bodies other than FERC may govern facility siting. That should be dispositive. WGL is left to contend that §7(f) is more preemptive than the sum of its parts. WGL's brief never comes to grips with the statutory text, or even identifies which specific NGA provision contains WGL's supposed "grant of exclusive jurisdiction to the Maryland Public Service Commission over the enlargement or extension of Washington Gas' natural gas facilities," Br.1. The closest WGL comes to a textual exegesis is when it reads §7(f) as providing that "Washington Gas' facilities are not subject to the jurisdiction of FERC [7(f)(1)] and are *instead* subject to the exclusive jurisdiction [7(f)(2)] of the state in which the gas is consumed." *Id*. 6 (emphasis added). This artful paraphrase conflates §7(f)(1), which limits federal regulation of facility siting, with §7(f)(2), which assigns responsibility for regulating transportation service. By using its own conjunction "instead" (or at 21, "in lieu of"), rather than the actual statutory conjunction, WGL implies that whatever authorities FERC does not exercise due to §7(f)(1), the MDPSC must have and have exclusively due to §7(f)(2). WGL then attributes that statutory fabrication to the District Court. *Id*. 5-6, 20.

But the District Court did not read the statute that way. It was careful to point out that §7(f)(1) and §7(f)(2) are distinct provisions, linked by "and" rather than "instead": "Plaintiff fails to recognize that there is an 'and'

connecting §§ 7(f)(1) and [7](f)(2). Section [7](f)(2) does not, as Plaintiff argues, create a regulatory vacuum in which Plaintiff may expand its facilities with no oversight." A519-520. The District Court thus recognized that §7(f) has no preemptive effect not found within either subpart (1) or subpart (2). Because neither provision read independently preempts County zoning, WGL's NGA preemption claim lacks statutory basis, cannot overcome the presumption against preemption,[12] and necessarily fails.

1. NGA §7(f)(1) Exempts In-Service-Area Facility Siting from Further FERC Review

Nothing in WGL's status under §7(f)(1) dictates where Maryland may place its retained authority over facility construction. Rather, NGA §7(f)(1) provides that FERC's authority to issue an NGA §7 Certificate authorizing facility construction (*i.e.*, an "authorization under this section"), also empowers FERC to determine a "service area" within which the subject natural gas company may enlarge or extend its facilities "without further authorization." This provision uses the word "authorization" twice, and the second instance refers back to the first, such that "without further authorization" means "without further authorization by FERC" rather than "without further authorization by any other entity." WGL concedes this threshold point, correctly paraphrasing

[12] *See* Part I above.

the second instance as "without further FERC approval" and "without further authorization from FERC." Br.16, 19. This concession was necessary: the MDPSC's safety authorization is incontestably required, as are other approvals, *see AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009).

FERC reads §7(f)(1) the same way. FERC has found that §7(f) service area designations leave in force "all applicable federal, state, *and local* environmental and safety laws governing … facilities [the service area designee] may decide to *construct* and operate in the future within the service area." *City of Toccoa*, 125 FERC ¶61,048, P 22 (2008) (emphasis added). Toccoa operates a natural gas pipeline that crosses the North Carolina/Georgia border. When it applied for a §7(f) service area designation, the Fish & Wildlife Service raised a concern that the designation might immunize future projects from environmental review. As just quoted, however, FERC explained that §7(f) service area designations do not preempt local laws governing the construction of new facilities. *Id.* Just as FERC held as to Toccoa, WGL's §7(f) service area designation does not preempt local environmental or land use[13] laws governing facilities that WGL decides to construct.

---

[13] Any attempt to distinguish *Toccoa* on the ground that it involved local environmental rather than local zoning laws would be spurious. The TDDP has explicit environmental purposes, commended by the U.S. Environmental Protection Agency. A325-26.

FERC's decision in *Northern Lights, Inc.*, 84 FERC ¶61,117, at 61,631 (1998) is similar. Therein, FERC designated a §7(f) service area for a cooperative not subject to any state utility commission's jurisdiction. FERC explained that "Section 7(f) does not specifically require state regulation for a grant of service area determination," and relied on the area's individual cities continuing to secure their citizens' general "welfare." *Id*. In short, FERC held that §7(f) does not preempt local governments' police power.

FERC's predecessor construed and applied §7(f) the same way in designating WGL's service area. That designation is expressly limited to establishing "a service area within which Washington would be permitted, without further authorization *from the Commission*, to enlarge or expand its facilities …" *Washington Gas Light Co.*, 28 F.P.C. 753 (1962) ("*WGL*") (emphasis added); *see also Washington Gas Light Co.*, 74 FERC ¶61,048 (1996) (§(7)(f)'s "purpose … is to enable local distribution companies to enlarge or expand facilities to supply market requirements without further Commission approval").

FERC's consistency in equating "further authorization" to "further Commission authorization" is doubly significant. First, it establishes FERC's statutory construction. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *R.J. Reynolds Tobacco Co. v. Durham*

Cnty., 479 U.S. 130, 149 (1986), FERC plays a lead role in construing the NGA for preemption purposes. Second, it means that even if §7(f) were read, implausibly, to give FERC statutory *power* to exempt service area designees from all further facility authorizations by any other entity, FERC has not *exercised* such power. WGL's §7(f) designation can have no preemptive effect that FERC does not ascribe to that designation.

WGL has sought to impute such an effect by asserting incorrectly that "pursuant to [7](f)(1) … we go to the PSC, in which event because FERC's jurisdiction over the facilities is preemptive, Maryland's authority over the facilities must likewise be preemptive." A1104. WGL's theorizes that if FERC has preclusive authority to site facilities that remain subject to its §7(c) certificate jurisdiction, then the MDPSC must have the same preclusive authority as to facilities FERC exempts from §7(c).

But FERC's lack of siting authority is just that — a limitation on what FERC does, not an affirmative grant of authority to the MDPSC. Had Congress wished to provide such an affirmative grant, it would have said so. True, NGA §7(c) provides that if facilities are to be used for FERC-jurisdictional transportation, the siting of those facilities generally is subject to FERC's siting jurisdiction over "facilities therefor." But the NGA's legislation of FERC jurisdiction to site facilities used for FERC-regulated service does not give the

MDPSC (or its Virginia or D.C. counterparts) jurisdiction to site facilities used for services regulated by those jurisdictions. FERC and the Maryland, Virginia, and D.C. commissions are each creatures of their own, quite different, organic statutes. *See, e.g., Chenoweth v. Pub. Serv. Comm'n*, 143 Md. 622, 623, 123 A. 77, 78 (1923) ("The Act of 1910 … created and established the Public Service Commission, [and] prescribed its powers and duties … . [T]he Public Service Commission can exercise only such powers as the law has conferred upon it."). Here, the Maryland Public Utilities Article contains no counterpart to NGA §7(c), and Maryland law therefore leaves the siting of natural gas facilities (to the extent not federally preempted) to local zoning. The District Court so held,[14] the cases collected by the District Court so hold as well,[15] and WGL has conceded that important point by failing to argue it here.[16]

Moreover, WGL's analogy lacks mathematical correspondence. As there is only one FERC, its jurisdiction to certificate facilities used for FERC-

---

[14] A1033-041 (listing "Maryland Public Utilities Law and accompanying regulations" provisions cited by WGL, and holding, at 1034-35, that the MDPSC certificates certain electricity facilities, but not natural gas facilities).

[15] *See* A1039-41 (citing *Kahl v. Consolidated Gas, Elec. Light & Power Co. of Balt.*, 191 Md. 249, 262 (1948), *Cnty. Council v. Potomac Elec. Power Co.*, 263 Md. 159 (1971); *Deen v. Balt. Gas & Elec. Co.*, 240 Md. 317 (1965); *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 352 Md. 645 (1999)).

[16] *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (appellant's failure to argue and support a claim in its opening brief "triggers abandonment of that claim on appeal").

regulated services leads to unified siting decisions. But imputing analogous jurisdiction to each consuming-state regulatory commission would, in WGL's case, give multiple jurisdictions certificate authority over the same facility. In combination and correctly understood, NGA §7(f) and Maryland law avoid that multiplicity problem by placing land use authority as to a given Maryland site in the single set of hands that is provided for under Maryland's zoning statutes. In this case, the authority rests with the District Council.

2. NGA Section 7(f)(2) Gives the DC, VA, and MD Commissions Exclusive Regulatory Jurisdiction Over the Rates and Terms of "Transportation" to Their Respective Retail Customers, But Says Nothing About What State-Authorized Bodies Govern Siting

Because NGA §7(f)(2) does not reach facility siting, it cannot privilege the MDPSC over the County as to facility siting. The "exclusive jurisdiction" that NGA §7(f)(2) commits to state utility commissions is expressly limited to jurisdiction over "transportation to ultimate consumers." Siting and transporting are different acts. Siting involves building new facilities, and transporting involves using them after they are built. Jurisdiction over one does not necessarily entail jurisdiction over the other. The distinction between facilities and services permeates the NGA. For example, NGA §7(c) distinguishes "transportation or sale of natural gas, subject to the jurisdiction of the Commission," from "facilities therefor." Similarly, NGA §7(b) distinguishes

"facilities subject to the jurisdiction of the Commission" from "service rendered by means of such facilities."[17]

WGL has conceded that NGA §7(f)(2) has nothing to do with jurisdiction over facilities. "What gets regulated under f(2)[?] … Not the facilities, Your Honor. Facilities cannot be governed by this section, were never intended to be governed by this section." A1094 (WGL counsel at June 2009 hearing). That is, "(f)(2) … was enacted … to clarify the transporta[tion] of natural gas to consumers … is a matter within state jurisdiction and subject to regulation by the state … . [I]n particular for rate regulation." A1065 (WGL counsel at February 2009 hearing). Because NGA §7(f)(2) concerns transportation service, it says nothing about what state-authorized bodies govern siting. Rather, the provision says only that whatever state-authorized bodies regulate rates for bundled sales to ultimate consumers in each state shall also regulate the rates

---

[17] Also consider interstate high-voltage electric transmission facilities under the Federal Power Act ("FPA"), on which WGL relies, Br.21. Whereas FERC had no role in siting such facilities before the 2005 FPA amendments, and now has only a narrow backstop role after extended state-level inaction, it has long had plenary statutory jurisdiction over the use of completed facilities to provide transmission service. *Compare Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) *with N.Y. v. FERC*, 535 U.S. 1 (2002) and *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) ("*Appalachian*").

and terms of unbundled transportation service to ultimate consumers in that state.[18]

Forgetting the elementary difference between facilities and services would make NGA §7(f)(2) absurd, by giving each of multiple state commissions exclusive jurisdiction to site the same facility.[19] WGL agreed with this logic, stating before the District Court that "[i]t makes no sense to have facilities located in all of the various jurisdictions governed by where the gas is consumed." A1092. WGL therefore conceded that "It makes no sense to have section 7[](f)(2) apply to facilities, because it never has, first of all. It does not by it's very words apply to facilities." *Id*. On appeal, however, WGL elides this

---

[18] Thus understood, the "exclusive" jurisdiction conferred by §7(f)(2) is exclusive only of FERC; it does not privilege one state-authorized body over another, because the bodies given exclusive jurisdiction over rates by §7(f)(2) are defined by NGA §2(8) as whatever regulatory bodies have rate jurisdiction under extrinsic state law. Consequently, only those bodies set rates to use the pipeline's facilities. It was in this sense that the County made a passing and imprecise reference to NGA §7 giving the MDPSC "exclusive jurisdiction" over "facilities," A493.2, which WGL quotes, Br.20 n.9. Immediately thereafter, SA004, the County made clear that "the MDPSC's organic statute leaves siting of natural gas facilities principally to local governments," and that "an MDPSC decision in favor of Chillum would not preempt local zoning."

[19] In WGL's case, the Maryland, D.C., and Virginia commissions each regulate transportation through the same pipes to ultimate consumers residing in their respective domains. But while a single pipe can be used to provide transportation services at varying rates to consumers residing in multiple states, it remains a single pipe that can have only one site. If §7(f)(2) had been intended to confer exclusive jurisdiction over siting as distinct from

problem by simply referring to "federal law" without specifying either provision of §7(f), and then assuming that the one state having exclusive jurisdiction over siting is the state in which the facilities are located (hereafter, the "host" state). Br.21 ("federal law grants exclusive power to the MDPSC to approve … facilities in the Maryland portion of its service area"). But §7(f)(2) provides no basis for assigning jurisdiction to the host state. It plainly assigns whatever jurisdiction it covers to "the State in which the gas is consumed," not the host one, as FERC recognizes.[20] That makes sense because, and only because, the assigned jurisdiction is limited to gas transportation service, not gas facility siting.

B. The Two Provisions of NGA §7(f) Were Enacted Separately, and Neither Was Enacted to Dictate How States Should Govern Siting

In analyzing the preemptive reach of a federal statute, "'[t]he purpose of Congress is the ultimate touchstone.'" *Medtronic*, 518 U.S. at 485. Here, the purposes of the two distinct provisions of NGA §7(f) manifestly do not include preempting local zoning.

---

transportation, it would have been necessary to specify which single state commission had that jurisdiction.

[20] *See, e.g., Louisville Gas and Elec. Co.*, 120 FERC ¶62,031, at 64,167 (2007).

1. NGA §7(f)(1) Was Enacted in 1942 to Preserve the Regimen Under Which the County, Not FERC's Predecessor, Conducted the 1940 Siting Review for a Chillum Storage Facility

As originally enacted in 1938, NGA §7 authorized the Federal Power Commission ("FPC," FERC's predecessor) to review ("certificate") the public convenience and necessity for new interstate natural gas pipeline facilities, but only as to "facilities to a market in which natural gas is already being served by another natural-gas company," and "*Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates." 15 U.S.C.A. §717f(c). While this proviso stood, WGL's affiliate decided to build a second Chillum tank, and consistent with the proviso it did not seek an FPC certificate.[21] Instead, it applied to the County's District Council, which on January 2, 1940, granted a "public convenience and welfare" order authorizing that facility. A168.

But the 1938 statute required difficult, multi-factored judgment calls to identify a pipeline's existing service territory,[22] and left the FPC unable to

---

[21] FERC's order at 39 FERC, cited below, collects the relevant certificate orders; none covers storage facilities (as distinguished from pipelines) at Chillum.

[22] *See Kan. Pipe Line & Gas Co.*, 2 F.P.C. 29, 35-36 (1939).

resolve through certification disputes over proposals to enter virgin territory.[23] In 1942, Congress amended NGA §7 to address both deficiencies. It extended federal certification to all markets and territories, unless designated as a "service area" under new §7(f). That exception, today's §7(f)(1), simply preserved and clarified the 1938 proviso that "a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates." That is, it substituted "determined" service areas, as an administrative, bright-line delineation of exempted territories, for the 1938 proviso's vague "operat[ing]" territory. In that context, the "without further authorization" clause, which was added in turning 1938's proviso into 1942's §7(f), simply made clear that the expanded scope of federal §7(c) certification did not reach designated service areas. It no more exempted service area designees from state or local law than had the 1938 proviso.

---

[23] Letter from Leland Olds, FPC Chair, to Clarence Lea, House Interstate and Foreign Commerce Committee Chair, reporting on H.R. 5249, Aug. 2, 1941, 77th Cong. Hearing Report of House Committee on Interstate and Foreign Commerce on H.R. 5249 (July 10-11, 1941), 81, available as F.V. Roach and W.E. Gallagher, A Compilation of the Legislative History of the Natural Gas Act, Vol. II, 791 (1968).

2. NGA §7(f)(2) Was Enacted in 1988 to Identify Which Regulatory Jurisdiction Should Regulate the Rates and Terms of Transportation Service

The 1988 NGA amendment that added §7(f)(2) did not alter the conclusion, explained above, that any new gas storage tank at Chillum needs zoning approval. Again, it concerns "transportation," not "facilities." The legislative history of §7(f)(2) makes that difference clear: "*The provisions of this Act do not affect State jurisdiction over existing or new facilities constructed in the 7(f)(1) service area*." S. Rep. No. 100-486, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2692, 2694 (emphasis added). Thus, in Maryland, where local governments rather than the utility regulatory commission had the in-service-area siting authority before the 1988 amendment,[24] that amendment did not transfer that authority to the MDPSC.

The fact that the 1988 amendment reaches only "transportation," not "facilities," reflects the limited scope of the WGL-specific dispute that led to its enactment. In 1987, certain Washington, D.C. hospitals sought unbundled transportation of customer-owned gas through WGL's existing facilities. No new facilities were at issue. *Washington Gas Light Co.*, 39 FERC ¶61,119 (1987), *on reh'g,* 40 FERC ¶61,361 (1987), *further reh'g denied*, 42 FERC

---

[24] *See* the District Court holding at A1033-043, which WGL's brief does not contest, and the cases cited therein.

¶61,278 (1988). FERC read the NGA, as it then stood, as requiring it to regulate such unbundled "transportation" service provided through WGL's existing facilities. *Id.*, 39 FERC at 61,470. NGA §7(f)(2) was enacted to assign transportation regulation jurisdiction to the commission for the consuming state — in the hospitals' case, the D.C. Public Service Commission, which was already regulating WGL's bundled sales to those same customers. 1988 U.S.C.C.A.N. at 2693. Thus, the 1988 amendment did as WGL's President testified: "restore[d] the status quo as it pertains to regulatory jurisdiction which existed prior to the advent of end-user transportation." A439-440. Before the District Court, WGL conceded that the 1988 amendment did nothing more than reverse FERC's 1987 decision: "the bottom line with respect to [7](f)(2), while the language could be clearer, it[]s intention was always to allow and to govern only the situation that was raised in the 1987 FERC decision." A1093.

But as summarized above, that restored status quo ante included WGL's 1933, 1940, and 1955 applications to the County for zoning permissions for its Chillum storage facilities. The current statute therefore requires WGL to do now what it did then: seek County zoning permissions for its Chillum storage facilities.

C. The NGA §7(f) Reading Shared by the District Court, FERC, and the County Makes Sense; WGL's Doesn't

The straightforward interpretation of §7(f) that is shared by the District Court, County, and FERC leaves intact sensible governance over the siting of what amount to local distribution facilities,[25] by leaving local governments the same traditional police powers over §7(f) designees that they have over single-state local distribution companies. In contrast, ruling for WGL's position would create a legal vacuum, in which no government body would evaluate whether WGL's land use preferences serve broader interests.

1. NGA §7(f) as Read by the District Court, County, and FERC Preserves Sensible Governance over the Siting of Local Distribution Facilities

The District Court explained that NGA §7(f) avoids creating a regulatory vacuum by providing that local distributors whose facilities happen to extend across state lines will be treated just like single-state distributors. *See* A519 ("designation of a service area" meant that "although crossing state lines, … Washington Gas [is treated] as a local distribution company"); A1094-95 (NGA "differentiate[s] between the interstate transportation hub type of facilities and the local distribution, and didn't really want FERC to be involved in the day-to-day facilities or transportation of what's considered local distribution.").

---

[25] In testifying for §7(f)(2), WGL's President assured Congress that WGL still "functions solely as a local distribution company." A443.

That explanation followed the statutory path marked by the FPC in designating WGL's §7(f) service area. The FPC explained that it singled WGL out to receive a §7(f) service area designation, and the resulting jurisdictional exemption, because WGL is, in substance, a local distributor rather than an interstate pipeline. *WGL*, 28 F.P.C. at 755, 757 (WGL's "essential functions are solely those of a distribution company"). The resulting §7(f) differentiation between transmission pipelines and local distributors has been recognized by this Court, *Atl. Seaboard Corp. v. Fed. Power Comm'n*, 397 F.2d 753 (4th Cir. 1968), and remains the basis on which FERC designates §7(f) service areas.[26]

Federal law thus intends that §7(f) distributors be governed just like single-state distributors. The County demonstrated before the District Court, with no response by WGL there or here, that single-state distributors routinely apply to Maryland local governments for zoning approvals,[27] and the District Court so found.[28] As a §7(f) distributor, WGL is equally subject to local zoning.

---

[26] *See, e.g., Piedmont Natural Gas Co.*, 136 FERC ¶62,037 (2011).

[27] *See, e.g.*, A660 & nn.9, 11.

[28] A1042. Also see cases cited by the District Court and collected in note 15 above.

2. WGL Seeks to Create a Legal Vacuum Wherein WGL Could Unilaterally Site Its Facilities With No Governmental Review for Land-Use Compatibility

In contrast to the commonsense and commonly held reading discussed above, WGL's position is that §7(f) bars Maryland from placing siting authority anywhere other than the MDPSC, which reviews WGL's plans only for supply sufficiency and economics, Br.22, and safety, Br.29. That position would disrupt Maryland's longstanding state law assignment of siting authority to local zoning bodies and create a legal vacuum, even though the NGA must be read to prevent such vacuums.[29]

WGL's position is unsupported and illogical. WGL offers no reason why Congress would have wanted to disrupt state law by mandating that only industry-specific regulators, instead of general-purpose local governments, could balance competing land use priorities. Here, whether to use a stream valley near a Metro station for athletic fields and wetlands to support a transit-oriented development plan is a quintessentially local issue. The Metro system to which the TDDP relates extends neither over Maryland alone nor over all of Maryland, and is not regulated by the MDPSC. It is a national-capital-area system. Before the District Court, WGL suggested that substituting the MDPSC

---

[29] *See, e.g., Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 335 (1951) (in enacting the NGA, Congress "was meticulous to take in only territory which this Court had held the states could not reach").

for County siting would better protect D.C. and Virginia gas consumers. A1142. But as *Appalachian* indicates, 812 F.2d at 905, there is no reason to expect the MDPSC, headquartered in Baltimore with a Maryland-only constituency, to weigh D.C. and Virginia interests more heavily than would the government of a county embedded in the national-capital-area economy.

To obscure how its position would disrupt state law, WGL (Br.22) suggests that the MDPSC already subjects siting plans to comprehensive and "particular location" review resembling what FERC would apply under NGA §7(c). It does not.

As the District Court held, A1034-35, and as WGL does not dispute, the MDPSC lacks statutory certificating authority over natural gas facilities. The District Court found that the MDPSC's powers over WGL are "far less comprehensive" than would "evidence an intent to overturn the traditional role of local governments in land use decisions," and in particular, MDPSC portfolio reviews, which "are not general reviews of all aspects" and exclude "thorough reviews of a public utility's conformity with local land use plans," do not include "authority to make siting decisions." A1039-041.

The hearing that the MDPSC convened in March 2009 to consider WGL's Gas Portfolio, including Chillum's role therein, was far from comprehensive. WGL there asserted, the County agreed, and the Hearing

Examiner held, that land use was not at issue.[30] Accordingly, neither WGL nor the County litigated it there. The County testimony that WGL now cites (Br.22) as if it called for comprehensive MDPSC review of whether WGL's Chillum plan was "appropriate" actually recited that "this proceeding … does not extend to resolution of … land use, zoning, and pre-emption issues." A871 (capitalization altered). Rather, that was a narrow, economic regulatory proceeding in which the reliability and rate consequences of using Chillum for peaking supply were compared to those of peaking resources imported from (e.g.) Pennsylvania, with no review of the environmental impacts of either.

WGL's claim that the MDPSC performs a siting review is baseless. WGL counsel correctly informed the District Court that "*there is no law section that says … you need to go to the … state commissions*" for siting approval. A1109 (emphasis added). Nor can WGL identify any case holding that the MDPSC, rather than local governments, has authority over the siting of gas distribution facilities, whether pursuant to Maryland law, or NGA §7(f), or otherwise.

WGL seeks to retain its exemption from federal certificate review of interstate pipeline siting (and the consideration of local land-use interests that

---

[30] *See* A890-92 (citing sources); A983-84; A1002-04.

such review would entail[31]), while also wielding the NGA to avoid local review.[32] But WGL cannot have it both ways. In 1962 and again in 1988, it convinced the federal government that it functions as, and should be regulated as, a local distribution company. As the District Court held, "Accordingly, neither the specific provisions of the NGA nor its broad goals and objectives apply to the construction or modification of Washington Gas's natural gas facilities in Prince George's County."[33] The District Court did not err in rejecting WGL's attempt to avoid both the FERC siting regulation that applies to interstate pipelines and the local siting regulation that applies to local distribution companies.

---

[31] *Cf. AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 123 (4th Cir. 2008), *cert. denied sub nom. Smith v. AES Sparrows Point LNG, LLC*, 129 S. Ct. 310 (2008) (certificate applicants "must comply with the NGA's requirements as well as complete FERC's extensive pre-filing process … [and] consult … on numerous state and local issues.").

[32] When WGL complains that County zoning hinders a "national policy of ensuring an adequate supply of natural gas at reasonable prices," Br.32 (quoting *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 52 (D.R.I. 2000) and other cases), and paraphrases that policy, Br.17, it is referring to the NGA, not the PSA. *Compare E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) (ascribing that purpose to the NGA), *with Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552, 555 (4th Cir. 1999) (PSA's purpose is "to ensure the safe functioning of natural gas pipelines and facilities").

[33] A1021. *See also* A1032 ("In exempting certain facilities from FERC jurisdiction, Congress decided that it could ensure a uniform system and a national policy of access to natural gas without complete regulatory authority over local facilities.").

III. THE PSA GOVERNS SAFETY, NOT COMPREHENSIVE SITING, AND THUS ACCOMMODATES THE CHILLUM NEIGHBORHOOD'S TRANSIT-ORIENTED ZONING

The District Court properly rejected WGL's PSA preemption argument. The PSA preempts only safety standards; the TDDP is not a safety standard; and compliance with the TDDP does not thwart compliance with the PSA.

A. The PSA Addresses Only Safety, Leaving Myriad Other Siting Considerations to Others

WGL claims that the PSA "includes a comprehensive structure for determining the location of LNG facilities." Br.24. But the District Court correctly held that "Upon close review, it is not accurate to characterize the PSA's treatment of location as comprehensive." A1029. The Pipeline *Safety* Act has as its express purpose "provid[ing] adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. §60102(a)(1), *i.e.*, "ensur[ing] the safe functioning of natural gas pipelines and facilities."[34] Accordingly, this Court has held that while the PSA preempts "the field of safety," outside that field it does not preempt states' "inherent power[s]."[35]

---

[34] *Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552, 555 (4th Cir. 1999).

[35] *Tenneco Inc. v. Pub. Serv. Comm'n of W. Va.*, 489 F.2d 334, 336, 339 (4th Cir. 1973).

The PSA expressly circumscribes the domain of pipeline safety by withholding from the Secretary of Transportation authority "to prescribe the location or routing of a pipeline facility." 49 U.S.C. §60104(e). This provision restricts authorizations under the entire "chapter" codified at 49 U.S.C. §§60101 *et seq*. It thereby makes clear that the PSA is *not* intended to occupy the field of siting pipeline facilities. Rather, it is intended to operate alongside other bodies of law that govern pipeline siting. For example, as WGL admits, "Congress placed authority regarding the location of interstate pipelines … in the FERC." Br.27, quoting *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm. of the State of N.Y.*, 894 F.2d 571, 579 (2d. Cir. 1990). For pipelines that, like WGL, are "intrastate" under the PSA (Br.13), the PSA likewise leaves siting to other laws. WGL's contrary and previously rejected claim that all siting authority withheld from the Secretary of Transportation must belong to WGL "[i]nstead"[36] is unfounded. Construed together, §§60104(e) and 60103(a) mean that other laws governing LNG facility siting can affirmatively permit them only in locations that satisfy PSA safety requirements. In other words, whatever body(ies)[37] bear

---

[36] *Compare* Br.28 (employing the same conjunctional contrivance as is discussed in Part II.A above) *with* A1030-31.

[37] Nothing in the PSA dictates that a state may have only one safety enforcement program, provides that only a body that serves as the pipeline siting authority may serve as the safety enforcer for intrastate pipelines, dictates

responsibility for "deciding on the location" of new LNG facilities must not fall below PSA-based safety standards in implementing any routing, siting, or other approval that falls within their province.

The Fifth Circuit, the only prior U.S. Court of Appeals to face a claim that the PSA preempted local zoning, had no trouble reading the PSA the same way. It held that "the PSA itself only preempts *safety* standards," *Texas Midstream Gas Services v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) ("*Texas Midstream*") (emphasis in original), and that agency actions under the PSA "cannot expand the unambiguously expressed preemptive scope set by Congress," *id*.

WGL characterizes *Texas Midstream*'s elucidation of the PSA as "dicta," because it involved a setback requirement rather than a complete prohibition. Br.30. But the Fifth Circuit held that the PSA does not preempt zoning restrictions unless they are safety regulations, and nothing in its reasoning supports a distinction between setback and other zoning restrictions. Moreover, WGL's distinction is ephemeral. The power to impose a setback requirement includes the power to preclude, in whole, any given land use that cannot comply

---

that a local government must qualify as the safety enforcer in order to retain its land use regulation powers, or otherwise attempts to marry these disparate roles.

with the required setback[38] on a particular parcel of land. The distinction between moving a land use within a large area or barring it entirely from a smaller area elides both the uncontested facts[39] and the main point. *Texas Midstream* shows that local zoning can restrict natural gas facility siting without constituting a safety standard, and thus without encountering PSA preemption.

Texas Midstream is sound. The Office of Pipeline Safety has long made clear that PSA regulation does not preempt local requirements that serve a "bona fide" non-safety purpose "such as zoning or planning," even if they have "an incidental safety" aspect.[40]

Moreover, while WGL's PSA preemption claim is so novel as to be unprecedented outside *Texas Midstream*, federal courts frequently face parallel issues, with parallel results. For example, a utility proposing a nuclear power plant would need both NRC radiological safety approval and non-federal

---

[38] The zoning affirmed in *Texas Midstream* required up to 300′ of setback, materially limiting siting options. *Tex. Midstream Gas Servs. v. City of Grand* Prairie, No. 3:08-CV-1724-D, 2008 U.S. Dist. LEXIS 95991, at *18 (N.D. Tex. Nov. 25, 2008).

[39] The District Court found that "Defendants have not argued that LNG storage facilities are prohibited everywhere in the County, nor do the applicable local land use regulations bar such facilities in all locations." A1041. WGL takes no issue with these findings.

[40] Interim Minimum Federal Safety Standards for the Transportation of Natural and Other Gas by Pipeline, 33 Fed. Reg. 16,500, at 16,501 (Nov. 13, 1968) (preamble to 49 C.F.R. §190.6). The Office's understanding that local zoning was not preempted has interpretive significance. *See* Part II.A.1above.

approvals, and the latter's validity would turn on "whether there is a nonsafety rationale."[41] Federal standards regulating mobile home safety preempt "standards that protect consumers from various hazards associated with manufactured housing," but not local zoning that restricts mobile home sites to "control the aesthetic quality of a municipality's neighborhoods."[42] The FAA's safety-oriented regulation of airfield layout and location does not preempt local zoning that further restricts where airports may be sited.[43] State courts facing analogous issues have likewise upheld local zoning that complemented state regulation of particular industries' facilities.[44]

Thus, as the District Court noted, A1030, the PSA reserves to the state-authorized land-use planners all of the land-use powers as to intrastate facilities that it reserves to FERC as to interstate facilities. It thereby preserves local authorities' power to reject a proposed site based on "community dislocation

---

[41] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983).

[42] *Ga. Manufactured Housing Ass'n, Inc. v. Spalding County, Ga.*, 148 F.3d 1304, 1310 (11th Cir. 1998).

[43] *Faux-Burhans v. County Comm'rs of Frederick County*, 674 F. Supp. 1172, 1173-74 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988).

[44] *See, e.g.*, *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 414 Md. 1, 40, 994 A.2d 842, 865 (2010); *Huntley & Huntley, Inc. v. Borough Council*, 600 Pa. 207, 223-24. 964 A.2d 855, 867-68 (2009); *City of Richmond v. S. Ry. Co.*, 203 Va. 220, 225, 123 S.E.2d 641, 645 (1962).

and the impact of the proposed construction on sites of historic importance or scenic beauty."[45]

MDPSC review of utility proposals pursuant to the PSA is strictly limited to safety. The Maryland Attorney General's Office of Counsel to the General Assembly ("AGOCGA") has opined that although the MDPSC "has jurisdiction over the 'operational safety' of LNG facilities, ... it does not exercise authority over siting decisions. … [I]t defers such matters to local zoning authorities." A392. Maryland has empowered the MDPSC to "adopt regulations to ensure to the greatest extent practicable the operational safety of liquefied natural gas facilities," Md. Code Ann., Pub. Util. Cos. §11-101(b), while saying nothing about review for land use compatibility. The Maryland statute that expanded PSC safety jurisdiction to encompass hazardous liquids reiterated that the Commission's authority under the PSA "extends only to pipeline safety and enforcement."[46] The MDPSC's PSA supervision of non-utility hazardous materials pipelines and of intrastate natural gas pipelines are similar. Both concern (as has been held specifically as to WGL) only "the authority to

---

[45] H.R. Rep. No. 90-1390 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3223, 3251-52.

[46] Md. Code Ann., Pub. Util. Cos. §11-202(c).

prescribe safety standards and enforce compliance with such safety standards."[47]

The PSC itself describes its role under these statutes as follows: "assumes safety responsibility with respect to intrastate gas facilities. … has statutory authority to establish and enforce safety standards for intrastate facilities."[48] The MDPSC's PSA-based regulations are detailed when it comes to the safety aspects of location, but they plainly do not address the non-safety aspects of location at all, much less comprehensively. One need only compare 49 C.F.R. Part 193 to the panoply of location considerations embodied in 18 C.F.R. §380.12 (containing FERC's "Resource Report" requirements for NGA Certificate applications) and Md. Code Regs. §§20.79.04.03-04 (containing the PSC's comparable requirements for state-issued electric facility certificates) to see the PSA-based regulations' narrowness. Nothing in the PSA or the regulations thereunder prevents a pipeline facility from being located in precious habitat, or in a historic site, or in a graveyard, or where noise from its compressors or other operating equipment would disturb sleep or education, or in a location that interferes with future land-use plans without creating a safety

---

[47] *Dominion Cove Point, LNG, LP*, 126 FERC ¶61,238, PP 25-26 (2009), *pet. for review denied sub nom. Washington Gas Light Co. v. FERC*, 603 F.3d 55 (D.C. Cir. 2010).

[48] *See* A455.

incompatibility, or in other locations that raise land use concerns irrespective of pipeline safety issues.

Accordingly, the Engineering Division's review on which WGL relies (Br.14) was expressly limited "to its opinion regarding compliance with Code of Maryland Regulations for WGL's thermal radiation and vapor dispersion exclusion zone analyses" and "does not state Technical Staff's position on any other matter pertaining to the proposed Chillum facility." A744-46. This narrow review did not, for example, consider the TDDP's future plans for the same neighborhood. This review's narrowness contrasts sharply with the in-depth consideration of local preferences and land use compatibility in which the MDPSC engages when it sites the electricity facilities that fall within its certificating authority.[49]

The PSA's narrow scope cannot be widened by the wordplay in which WGL engages when it says (Br.28) that federal law "characterize[s] the location of the facility as a safety standard." As the District Court held, in a passage that WGL fails to address, "This argument is based on a tortured interpretation of §60104 of the PSA and cannot withstand scrutiny." A1029. "When the same statute simultaneously authorizes one entity to set safety standards and does not

---

[49] *See, e.g., In re Panda-Brandywine L.P.*, Order No. 71529, Case No. 8488, 1994 Md. PSC LEXIS 246, at *26 (Md. Pub. Serv. Comm'n Oct. 27, 1994).

authorize that entity to make siting decisions, the only logical interpretation is that location is not a safety standard." A1030.

In short, the PSA and its MDPSC implementation do not establish "a comprehensive structure for determining the location of LNG facilities," Br.24. They address pipeline safety alone, leaving other siting considerations to other governmental bodies. Accordingly, the determinative question in assessing the preemptive effect of the PSA on local zoning like the TDDP is "whether the [local zoning] is a 'safety standard,'" *Texas Midstream*, 608 F.3d at 211 (quoting 49 U.S.C.A. §60104(c)), meaning that regulating safety is its purpose or direct, substantial, and non-incidental effect, *id*. As we show next, the TDDP is not a safety standard.

B. The Transit-Oriented Zoning of WGL's Neighborhood Has Legitimate, Non-Safety Purposes

The District Court properly distilled the foregoing legal framework, holding that "[d]espite Washington Gas's creative arguments, the only plausible way in which Prince George's County's land use laws could be preempted by the PSA is if the land use regulations could properly be classified as safety standards." A1032. The TDDP cannot be so classified.

The TDDP is a bona fide zoning and planning enactment, for which any effect[50] on safety is, under the *Texas Midstream* test, merely "incidental."[51] It is a land use regulation of general applicability, years in the making,[52] that organizes compatible development in a broad area surrounding WGL's Chillum parcel. Far from targeting WGL's facility, it precludes most development in that stream valley, other than recreational, entertainment, social and cultural uses. Br.11 n.4; A812. Far from targeting natural gas, it applies equally to similar structures holding inert materials, such as a water tank. A329 ¶9c. Maryland municipalities have long restricted the locations of similar structures, because the structures themselves have land use consequences.[53] Here, setting safety entirely aside, building a 15-story tank and associated liquefaction machines, security fencing and lighting, dikes, tree-free strips, etc., would be undisputedly incompatible with the TDDP's plans for recreational and environmental amenities supporting an attractive residential and commercial neighborhood.[54]

---

[50] WGL's brief nowhere asserts that the TDDP has any safety effect, much less a direct and substantial safety effect. Accordingly, we focus hereinafter on its purpose.

[51] 608 F.3d 211.

[52] *See* A335-38, A323.

[53] *St. Clair v. Colonial Pipeline Co.*, 235 Md. 578, 202 A.2d 376 (1964).

[54] A328-29 ("The Greenway uses at the WGL property will promote transit-oriented development … . Natural gas storage at the property will not."); *see*

The TDDP's express purposes, centered on maximizing residential development near a Metro station, were recited at length and relied on by the District Court. A1032-33. These express statements of the TDDP's purpose are legally conclusive in establishing that purpose.[55] Moreover, they are amply documented in the record, which includes both the TDDP itself[56] and three supporting affidavits submitted by the County's professional land-use planners (A312-14, A315-331, A332-38), which present, *inter alia*, their professional opinion that Chillum "will not constitute transit-oriented development and will not be consistent with the goals, principles, and objectives of the TDDP,"[57] whereas "[t]he Greenway uses that the TDDP envisions for the WGL property are integrated into and compatible with the TDDP uses recommended elsewhere in the Transit District."[58] WGL submitted no contrary affidavit or identification of a specific factual issue, as would have been required under

---

also A102 ("it is not feasible to make the proposed tank and accessory buildings have a residential appearance").

[55] *See, e.g., City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 377 (1991); *Morgan v. United States,* 313 U.S. 409, 422 (1941); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985); *Penn Adver. of Balt., Inc. v. Mayor of Balt.*, 862 F. Supp. 1402, 1419 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *reaff'd*, 101 F.3d 332 (4th Cir. 1996); *Tex. Manufactured Housing Ass'n, Inc. v. City of La Porte*, 974 F. Supp. 602, 604-05 & n.6 (S.D. Tex. 1996).

[56] Supplemental Appendix, SA009-SA145.

[57] A329 ¶10b.

[58] *Id.* ¶10c.

Fed. R. Civ. Pro. 56(c)(1) in order to create a genuine issue of material fact.[59] In short, it is established and incontrovertible that the TDDP serves, and is expressly directed to, legitimate purposes that have no non-incidental relationship to pipeline safety.

Despite the TDDP's express purpose, the uncontested affidavits explaining that purpose, and the District Court's considered finding of that purpose, WGL claims that the TDDP is a "ploy" actually directed to improperly regulating pipeline safety. Br.33-34. In support, WGL relies entirely on snippets from four documents: A47, A152-53, A107, and A191. Read in context, none creates a genuine dispute.

District Council Order (A47). The District Council addressed WGL's petition for a Special Exception from the Chillum site's longstanding Open Space zoning classification, which as explained above (at 3) preceded the TDDP. The County's zoning ordinance requires a finding of no adverse effect on "health, safety or welfare" before allowing any Special Exception. A51 (reproducing County Zoning Ordinance §27-314(a)(4). The Zoning Hearing Examiner therefore addressed that element, finding that WGL failed to satisfy it. A43. However, the Examiner immediately proceeded to hold that this finding

---

[59] *See, e.g., Yarnevic v. Brink's, Inc.*, 102 F.3d 753 (4th Cir. 1996) (summary judgment opponent "must set forth specific facts and may not rely on mere

was moot, because the TDDP had superseded the prior Open Space zoning classification. *Id*. The safety finding that would have been required for a Special Exception is not a listed element for TDDP amendment. A260. At A47, the District Council agreed with the Examiner that the Special Exception and its required elements were moot. It also noted with approval the Examiner's finding that if the Special Exception merits had been reached, the safety element would not have been satisfied. *Id*. However, that was acknowledged *dicta*, cannot be the basis for a collateral attack on the District Council's ruling, and falls far short of creating a reasonable basis to conclude that the TDDP constituted safety regulation in disguise.

Intra-Staff Memorandum (A152-53). A May 10, 2005 intra-staff memorandum addressed whether WGL's then-pending application for a Special Exception would be consistent with the then-pending TDDP. The memorandum's principal conclusions were unrelated to safety. Rather, the memorandum found that "additional piping and processing equipment" would "introduce a production/manufacturing aspect to the branch operation" and would "not meet the goals and objectives of the 2002 General Plan to develop high-density, pedestrian-oriented development around Metro stations." A152. It therefore determined that WGL's Special Exception application was "not

---

allegations contained in the pleadings").

consistent with the 2002 General Plan Development Pattern policies," A150, which envisioned "a network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium-to high-density neighborhoods," A151, and nonconforming "to the land use recommendations in the draft …TDDP," A150. The memorandum proceeded to also note safety issues, which, again, were germane to the then-pending Ordinance §27-314(a)(4) "health, safety, or welfare" Special Exception issue, and mooted by the subsequent adoption of the TDDP.[60]

Quotation of Intra-Staff Memorandum (A107). WGL also quotes from a July 13, 2005 Technical Staff Report. However, WGL fails to note the internal quotation marks in the passages it quotes. These show that A107 was merely quoting the May 10, 2005 memorandum reproduced at A152-53.[61] The July 13, 2005 report also notes that "it is not feasible to make the proposed tank and accessory buildings have a residential appearance," A102, and proceeds to

---

[60] In the course of that discussion, the intra-staff memorandum expressed its author's belief that the draft TDDP's prohibition of public utility fuel storage tanks in the area it then covered showed a recognition of the safety issues inherent in storing fuel in populated areas. A152-53. That author was not the more senior staffer responsible for drafting the TDDP, A322, much less a decision-maker responsible for adopting the TDDP. Their belief as to one purpose of the then-draft TDDP does not change the controlling facts: the express purposes of the subsequently adopted TDDP all go to transit-oriented development and make no reference to natural gas safety.

conclude that "[t]he proposal is not consistent with the 2002 General Plan Development Pattern policies," A110, which envisioned "a network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium-to high-density neighborhoods," *id*. Thus, WGL's reference to A107 adds nothing to its reference to A152-53, which was addressed above.

Second Quotation of Intra-Staff Memorandum (A191). The fourth passage cited by WGL appears within a November 17, 2005 Planning Board Resolution. As with the July 13, 2005 report, the Resolution was merely quoting the May 10, 2005 memorandum reproduced at A152-53. And it too concludes by finding the requested Special Exception inconsistent with the General Plan's call for "transit-supporting … pedestrian-oriented" neighborhoods. A194. While it also found the record insufficiently developed to allow the safety finding required for a Special Exception, A194, that finding was mooted as discussed above.

In short, WGL relies on two out-of-context snippets (and reprints thereof), both of which went to a moot point, and can point to nothing in the TDDP itself that has the purpose or non-incidental effect of regulating pipeline safety. Those snippets do not overcome the TDDP's express purposes, which

---

[61] *See* A104 (citing "Community Planning Division (memorandum dated May 10, 2005)," after which quotation marks begin each paragraph).

are legally conclusive (*see* note 55 above), and on which the District Court properly relied.[62]

C. The PSA and County Zoning Do Not Conflict

Concluding its PSA argument, WGL tacks on a contention that the TDDP is "preempted by conflict." Br.35 n.12, citing *Chenoweth v. PSC*, 143 Md. 622, 123 A.2d 77 (1923) and *Mayor & Common Council of Westminster v. Consol. Pub. Utils. Co*., 132 Md. 374, 103 A.1008 (1918). But those cases held only that PSC rate orders preempt local decisions setting different, conflicting rates for the same service. Here, "[t]here is no conflict between the TDDP and the PSA," because WGL "can comply with both statutes simultaneously." A1033. The MDPSC did not command WGL to build Chillum, and WGL has formally admitted that it has alternatives.[63] Although WGL's admission was qualified by a claim that the alternatives would cost more,[64] that qualifier is legally

---

[62] *A fortiori*, the TDDP meets the test of the only case that WGL cites (at 34) in connection with its "ploy" claim: "a rational nexus exists" between its "standards … and the County's general welfare." *Cnty. Comm'rs of Queen Anne's Cnty. v. Days Cove Reclamation*, 122 Md. App. 505, 530, 713 A.2d 351, 363 (1998).

[63] *Compare* A594 ¶6 (alleging that WGL has "utility gas system alternatives") *with* A600 ¶6 (admitting that "from an engineering standpoint there are technical alternatives to the construction of the proposed LNG facility"). *See also* A736 ("[w]ith respect to the Chillum facility, whether or not that plant comes on line, we have alternatives that would meet that need").

[64] A600 ¶6. The County has disputed this cost comparison, *see* A720-733, but for present purposes all that matters is the conceded fact that alternatives exist.

irrelevant. A higher cost would not give rise to preemption; such a constraint "may cost [the natural gas company] money, but it does not thwart the full purposes and objectives of Congress." *Texas Midstream*, 608 F.3d at 211 (internal quotation omitted). WGL can comply with both the PSA and County zoning.

IV. THE DISTRICT COURT PROPERLY DISPOSED OF WGL'S "MANDATORY REFERRAL" COUNT

A. WGL's Invocation of "Mandatory Referral" Failed to State a Claim For Which Relief Could Be Granted

The District Court dismissed Count Two of WGL's initial complaint,[65] wherein WGL had invoked the "mandatory referral" process, "because Washington Gas had failed to state a claim, and any claim that could arise regarding the mandatory referral process warranted Burford abstention." A1044. WGL concedes that the District Court's dismissal rested primarily on "not stat[ing] a state law cause of action," Br.4, *see also* A773 n.13. Nonetheless, WGL never contests the District Court's primary ruling, and instead argues only that this case did not "warrant *Burford* abstention" (Br.36, referencing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

---

[65] *See* A17.

The District Court rightly dismissed Count Two pursuant to Fed. R. Civ. Pro. 12(b)(6). WGL claimed therein that RDA §7-112[66] gave it zoning immunity, but as shown below, §7-112 neither creates zoning immunity nor applies to WGL, and WGL's complaint included no explanation as to how it could. Faced with that opaque complaint, the District Court issued a memorandum opinion presenting tentative legal views, for consideration at a motions hearing.[67] Therein, it expressed reluctance to entertain WGL's mandatory referral claim on multiple grounds. Before even reaching *Burford*, the District Court stated that "there is no state law cause of action delineated." A281. The District Court explained that this failing constituted its principal ground for dismissal both prospectively, when it explained that Count Two was "subject to a 12B(6) dismissal, never mind abstention, and that's what I [intend] to do,"[68] and retrospectively, when it explained that Count Two had been dismissed because WGL had "failed to state a claim."[69] The District Court was right — and WGL has so conceded for appellate purposes, by failing to argue otherwise on brief.

---

[66] Md. Code Ann., Art. 28 §7-112.

[67] A269, A306.

[68] A1056.

[69] A1044.

This ruling was clearly correct, under controlling Maryland case law that resolved a §7-112 issue raised before the District Court and certified by this Court to the Maryland Court of Appeals. In the mid-1990s, an international organization sought to build a new headquarters in another Maryland county subject to the RDA. When the organization purchased land, the county responded by enacting contrary zoning legislation. The organization sued, claiming zoning immunity under §7-112. The District Court found that provision applicable only to political subdivisions of the State of Maryland or the United States. *Pan Am. Health Org. v. Montgomery Cnty.,* 889 F. Supp. 234, 238-39 (D. Md. 1994). This Court determined, however, that the §7-112 issue "presented a threshold inquiry and required interpretation and application of Maryland substantive law in circumstances not addressed in published opinions of the Maryland courts," and therefore certified it to Maryland's Court of Appeals.[70] That court proceeded to explain §7-112, in a ruling that definitively[71] establishes Maryland law:

> Section 7-112 provides that proposals for certain development projects must be referred to the M-NCPPC. The statute goes on to say that if the M-NCPPC rejects a proposal, it 'shall communicate its

---

[70] 1995 WESTLAW 371575, *1, *table*, 59 F.3d 167 (4th Cir. 1995) (provided herewith).

[71] *Comm'r of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 465 (1967) ("the State's highest court is the best authority on its own law").

> reasons to the *State, federal, county, municipal, or district* board, body, or official proposing to locate, construct, or authorize such public … building.' Art. 28, § 7-112 (emphasis added). By indicating that only State, federal, county, municipal, or district governments can receive answers from the M-NCPPC regarding land use proposals, § 7-112 makes clear that only those entities will be submitting such proposals.
>
> * * *
>
> We have concluded that the word public encompasses only the federal, State, and local governments, as indicated in the text of § 7-112. The salient characteristic of these entities [only the federal, State, and local governments], in this context, is that all are already exempt from the enactments of the district councils. …
>
> If § 7-112 is construed to apply only to land use decisions by the governments of the United States, Maryland, and the local governments within the Regional District, then the statute does not create any immunities, but instead encompasses only those governments that are already beyond the reach of the district councils' authority. In other words, rather than conferring any additional exemptions, the statute merely imposes precatory limitations on the land use decisions of those entities that are not bound to comply with zoning laws.

Pan. Am. Health Org. v. Montgomery Cnty., 338 Md. 214, 223-26, 657 A.2d 1163, 1165, 1168-69 (1995) ("*PAHO*") (emphasis retained). The County cited *PAHO* in its memorandum, A112, supporting the motion that the District Court referenced in dismissing Count Two, A310.

PAHO is dispositive. It establishes that "mandatory referral" does not "confer[] any additional exemptions" from zoning; it merely requires governments that are exempted on other bases to seek M-NCPPC advisory review. That is, rather than countermanding zoning, mandatory referral simply mandates referral. Because §7-112 does not create any zoning exemption, merely citing it states no claim for a declaration of exemption.

Federal court complaints must contain more than "[t]hreadbare recitals … supported by mere conclusory statements," but instead must provide 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). WGL therefore was obliged to present some intelligible theory that would square its §7-112 claim with each of *PAHO*'s holdings, quoted above, that (a) "the statute does not create *any immunities*," and (b) it "encompasses only those *governments* that are already beyond the reach of the district councils' authority." WGL failed on both prongs.

Because *PAHO* conclusively establishes that §7-112 creates no zoning immunities, there is no need to even consider the implausible parsing by which WGL, Br.38-39, now characterizes itself as an "official." But in any case, *PAHO* further establishes that in §7-112, "official" is not a free-floating category that can encompass private utility officials. It plainly refers only to

officials of a "State, federal, county, municipal, or district" government entity.[72] It is equally clear, and *PAHO* so holds, that only entities on this list of communicants can qualify as "submitting" entities that can overrule a disapproval. WGL is not on that list. WGL's Count Two, which the District Court dismissed, included no explanation to the contrary.[73]

Before this Court, WGL now points out that the provision's first sentence refers to the authorization of privately-owned utility structures. WGL views that reference as superfluous[74] unless such utilities are included in the list of communicants. But that view is inconsistent with *PAHO* and textually insupportable. The first sentence refers, rather, to the fact that certain public officials have siting authority to authorize certain privately-owned utility structures, as where the MDPSC sites high-voltage electric transmission lines pursuant to Md. Code Ann., Pub. Util. Cos. §7-207(d)(1). The authorizing public official then becomes a mandatory referral communicant. The words that

---

[72] The list of entities identified in the sentences of the provision that matter — namely, the second and third sentences — cannot reasonably be parsed in any way other than "the {State, federal, county, municipal, or district} {board, body, or official}. The "or"s act as such brackets, the adjectives "federal" and "municipal" so dictate, and *PAHO* so holds, as its italics show.

[73] *Compare* A29 ¶38 (Count Two asserting unexplained conclusion that "the governmental entity or utility may still proceed") *with* A233 (lengthier paper filed by WGL earlier in state court).

[74] Br.38-39 (citing *Branigan v. Bateman*, 515 F.3d 272, 278 (4th Cir. 2008) for the proposition that statutes should be construed to avoid superfluities).

WGL misleadingly omitted in quoting §7-112[75] make clear that the provision references utility facilities only because public officials can "locate[], construct[], or authorize[]" them. The AGOCGA re-affirmed this explanation and specifically applied it to WGL's Chillum proposal, explaining that the power to override the M-NCPPC's disapproval "is conferred on public entities not a privately owned utility." A392.

Against these controlling authorities, WGL can cite only generalized authorities standing for the proposition that public utilities are not just ordinary private enterprises, Br.39-40. Upon examination, however, those authorities are fully consistent with the foregoing analysis.

- Charles S. Rhyne, THE LAW OF LOCAL GOVERNMENT OPERATIONS (1980) notes that as a general rule, absent a statutory prohibition or ordinance exemption, "public utilities are subject to zoning regulations."[76]
- *Cassidy v. Cnty. Bd. of Appeals*, 218 Md. 418, 431146 A.2d 896, 903 (1958) applied a Maryland county's zoning rules to Baltimore

---

[75] WGL's statutory quotation (Br.37) has an unidentified material omission, namely the clause "proposing to locate, construct, or authorize such public way, ground, building, structure or utility" following the list of public official communicants. The full text appears at Add.38.

[76] *Id*. §26.86. Rhyne adds the qualifier "which are reasonable and which do not impede service to the utility's customers," but this generalized treatise does not discuss Maryland's particular statutes, *cf*. A1041-42, and in any event, WGL admits that it has other ways to serve its customers, *see* note 63 above.

Gas & Electric without applying "any principle of preferred treatment for the public utility."

- Opinion No. 89-025, 74 Md. Op. Att'y Gen. 221, 1989 WL 503626, construes Md. Code. Ann., Art. 66B §3.08, which somewhat resembles RDA §7-112 but applies to other counties. The Opinion construes §3.08 as reaching only "facilities … that are generally exempt from planning and zoning controls." *Id*. at *4. Within the scope of an existing exemption, it enables planners "to apprise *a government* if *its proposal* contravenes the master plan." *Id*. (emphasis added). Accordingly, the §3.08 reference to public utilities means that where the MDPSC has comprehensive authority to site a particular public utility facility (e.g., a high-voltage transmission line), making that facility one "constructed under government direction," it must submit such directives for planners' non-binding evaluation. *See id*. at *3. Opinion No. 89-205 and *PAHO* are thus consistent, as *PAHO* expressly holds.
- *People of the State of N.Y. v. McCall*, 245 U.S. 345, 347-48 (1917) holds that the New York Court of Appeals' "interpretation of the statutes of New York is conclusive." *PAHO* likewise conclusively establishes what §7-112 means.

Finally, WGL retreats to an unavailing policy argument. It contends that §7-112 should be read such that localities impose "reasonable conditions" instead of "flatly prohibit[ing] a needed public utility use." Br.40-41. Even if it

were properly before this Court,[77] the argument cannot be reconciled with *PAHO*, is illogical,[78] and has no basis in the cases on which WGL relies.[79]

For all these reasons, the District Court's dismissal of WGL's mandatory referral claim on Rule 12(b)(6) grounds should be affirmed.

---

[77] This argument was not presented below as a basis for maintaining Count Two, and therefore provides no basis for appealing its dismissal. After the District Court asked WGL "are you willing to concede that Count two will go to state court, whatever it is[?]," WGL responded by taking mandatory referral "off the table," A1055, and grounding its claims solely in "federal law." A1059.

[78] If §7-112 empowered privately-owned utilities to proceed notwithstanding local zoning, they could ignore conditions and prohibitions alike. By declining to pursue the TDDP amendment recourse to which Maryland's courts pointed WGL in 2007, A209, WGL has demonstrated that it would ignore either. Moreover, conditioning and prohibiting are simply two aspects of the same police powers. *See generally S. Pac. Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922).

[79] WGL (Br.40-41) cites *Kahl v. Consol. Gas, Elec. Light & Power Co.,*191 Md. 249, 60 A.2d 754 (1948) ("*Kahl*"); *Transcon. Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm*., 464 F.2d 1358 (3rd Cir. 1972) ("*Hackensack*"); *Cnty. Comm'rs of Queen Anne's Cnty. v. Soaring Vistas Props*., 121 Md. App. 140, 167, 708 A.2d 1066, 1079 (1998) ("*Soaring Vistas*"), *rev'd under amended statute*, 356 Md. 660, 741 A.2d 1110 (1999); and 57 Md. Op. Atty Gen. 121 (1972) ("*Annapolis*"). *Kahl* holds that Maryland's public utility statute does not preempt local zoning, and yielded a decree completely "enjoining [the utility] from proceeding with construction of its line, until it has obtained the necessary permits from the county zoning authorities." *Kahl* at 760. In *Hackensack,* the degree of regulation bore on a constitutional claim. *Hackensack* at 1362 & n.14. WGL's parallel claim was dismissed. A548. *Soaring Vistas* holds that health-and-safety laws limiting locational options preempt zoning only where they, unlike the PSA, comprehensively govern all siting considerations. *See* A1036-37. The *Annapolis* sentence truncated by WGL states that "one political unit will be held subject to the zoning regulations of another political unit" where there are "alternatives available." WGL is not a "political unit" and has alternatives.

B. Had the Mandatory Referral Claim Been Properly Presented to the District Court, Discretion to Abstain Under Burford Would Have Applied

This Court evaluates abstention decisions under a deferential "abuse of discretion" standard. *MLC Automotive, LLC v. Town of S. Pines*, 552 F.3d 269, 280 (4th Cir. 2008) ("*MLC*"); *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007). Moreover, as this Court has "repeatedly indicated," *MLC* at 282, "cases involving questions of state and local land use and zoning are a classic example of situations where *Burford* should apply, and … federal courts should not leave their indelible print on local and state land use and zoning law by entertaining those cases and sitting as a zoning board of appeals." *Id*. (quoting *Pomponio v. Fauquier Cnty. Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) (en banc)). *Compare Browning-Ferris, Inc. v. Balt. Cnty.*, 774 F.2d 77, 79 (4th Cir. 1985) ("land use questions … are the peculiar concern of local and state governments, and traditionally, federal courts have not interfered with state courts in the area of land use policy") *with Educ. Servs. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 173-74 (4th Cir. 1983) (abstention on federal constitutional question improper); *see also Neufeld v. City of Balt.*, 964 F.2d 347, 350-51 (4th Cir. 1992) (although federal "constitutional claims are … poor candidates" for it, "*Burford* abstention is often appropriate where land use issues are present."). Federal courts' usual reluctance to intrude into local land

use planning and the procedures governing such planning applies with special force here, where the only relief that WGL sought under its dismissed Count Two was a request for a declaration of Maryland law, and where WGL actually abandoned its direct appeal from a zoning board decision to bring that declaratory action.

WGL asserts that federal intrusion was warranted because extending mandatory referral to privately owned public utilities would not raise a "policy problem[] of substantial public import whose importance transcends the result in the case then at bar." Br.41 (invoking *Burford*'s "transcends the result" standard). But under WGL's §7-112 theory, WGL could build virtually at will wherever pipeline safety allowed. No planning in the Maryland portion of the national capital area would then be securely under governmental supervision. Indeed, given WGL's eminent domain power, Br.40 n.17, privately-owned land throughout the area would be at increased and constant risk of being either taken for WGL's use or beset by an incompatible neighboring use, and the latter risk would threaten the capital area's public lands as well. The radical change in

law that WGL is seeking would have substantial public import, beyond the present case.[80]

To be sure, the state law basis for rejecting WGL's mandatory referral claim is so clear, as shown in Part IV.A above, that the range of sound discretion would also have allowed a published opinion holding that no privately-owned Maryland entity could ever rely on mandatory referral as a basis for zoning immunity. But the District Court could see in the published judicial decisions that no litigant has ever previously claimed that §7-112 exempts privately-owned utilities from local zoning. Accordingly, the District Court, A288, recited this Court's *PAHO* guidance that federal courts should where feasible avoid establishing an "interpretation and application of Maryland substantive law in circumstances not addressed in published opinions of the Maryland courts." By ruling narrowly — by holding that this particular plaintiff had not stated a relievable claim, instead of authoring a new published opinion further explaining how §7-112 applies to privately-owned utilities — the District Court respected that standard. And by referring to *Burford*, in the subjunctive, as an alternative basis on which it would have avoided publishing

---

[80] WGL relies on *Transdulles Ctr., Inc. v. USC Corp.*, 976 F.2d 219 (4th Cir. 1992), but the public import of this case is far greater than the mere contract damages at issue there.

such an opinion, the District Court simply made clear that even if WGL had stated a relievable claim, rather than issuing a declaratory opinion, the District Court would have deferred to the Maryland courts to provide further elaboration of how the Maryland Court of Appeals' *PAHO* opinion applies to WGL.

In these circumstances, the District Court did not abuse its discretion by exercising "restraint"[81] instead of reaching out to divine, and then address by declaration, a state law cause of action under §7-112.

---

[81] *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 721 n.4 (1999), *reh'g en banc denied*, 204 F.3d 573 (4th Cir. 2000).

V. CONCLUSION

From 2004 onward, WGL has litigated its plans to site an LNG facility at Chillum before the Zoning Hearing Examiner, Planning Board, District Council, Maryland Circuit Court, District Court, and now this Court. After being afforded six forums over eight years to build a case, WGL has failed to identify a single persuasive basis for disturbing the District Court's rulings and extending this litigation. The District Court's well-considered rulings properly rejected WGL's belief that it has the unilateral authority to site a 15-story LNG complex where it is incompatible with local land-use planning. WGL's appeal should be rejected, and the District Court's rulings affirmed.

Respectfully submitted,

/s/ David E. Pomper

ATTORNEY FOR
PRINCE GEORGE'S COUNTY, MARYLAND
AND THE DISTRICT COUNCIL
Together with other counsel
listed on the cover

June 22, 2012

APPENDIX OF UNPUBLISHED OPINION

The accompanying brief cites *Pan Am. Health Org. v. Montgomery Cnty.,* 1995 WESTLAW 371575, *1, table, 59 F.3d 167 (4th Cir. 1995). Because this opinion was unpublished and predates 2007, it is subject to Circuit Rule 32.1. However, both the District Court (A288) and WGL (Br.38) have discussed it, and for that reason and others it meets the Circuit Rule 32.1 standard; it has "precedential value in relation to a material issue in a case," and "no published opinion…would serve as well." A copy is therefore provided in the following appendix.

59 F.3d 167, 1995 WL 371575 (C.A.4 (Md.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 59 F.3d 167, 1995 WL 371575 (C.A.4 (Md.)))

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.
PAN AMERICAN HEALTH ORGANIZATION, Plaintiff-Appellant,
v.
MONTGOMERY COUNTY, MARYLAND; County Council for Montgomery County, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Defendants-Appellees.
MARYLAND DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT; The Chevy Chase Coordinating Committee; Town of Chevy Chase; Chevy Chase Village; Village of North Chevy Chase; Chevy Chase Section 3; Chevy Chase Section 4A; Chevy Chase Section 5; Martin's Additions; Chevy Chase Hills Citizens Association; Coquelin Run Citizens Association; East Bethesda Citizens Association; Hamlet Citizens Association; Rollingwood Citizens Association; Rock Creek Hills Association; Chevy Chase Valley Citizens Association; Friendship Heights Coordinating Committee; Bethesda-Chevy Chase Coalition; Town of Somerset; Town of Garrett Park; Patrick Fagan; Theresa Fagan; Ira Shesser; Kay Titus; General Secretariat of the Organization of American States, Amici Curiae.

No. 94-1486.
Argued Sept. 26, 1994
Decided June 21, 1995

Appeal from the United States District Court for the District of Maryland, at Baltimore. Deborah K. Chasanow, District Judge. (CA-93-3982-DKC)
ARGUED: James Thomas Lenhart, SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C.; John Joseph Delaney, LINOWES & BLOCHER, Silver Spring, Maryland, for Appellant. Angela Katherine Hart, Senior Assistant County Attorney, Rockville, Maryland, for Appellees. ON BRIEF: Deborah B. Baum, SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C., for Appellant. Joyce R. Stern, County Attorney, Edward B. Lattner, Assistant County Attorney, Rockville, Maryland, for Appellees. J. Joseph Curran, Jr., Attorney General of Maryland, Michele J. McDonald, Rachel K. Nunn, Lawrence P. Fletcher-Hill, Baltimore, Maryland, for Amicus Curiae Maryland Department of Economic and Employment Development; James H. Hulme, Christopher Van Hollen, Helen L. Gemmill, ARENT, FOX, KINTNER, PLOTKIN & KAHN, Washington, D.C., for Amici Curiae Chevy Chase Coordinating Committee, et.al; William M. Berenson, Secretariat for Legal Affairs, OAS GENERAL SECRETARIAT, Washington, D.C., for Amicus Curiae General Secretariat of the Organization of American States.

D.Md.

AFFIRMED.

Before LUTTIG and WILLIAMS, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

PER CURIAM:

***1** Appellant, the Pan American Health Organization ("PAHO"), a public international organization, brought this action against appellees, Montgomery County and the County Council, sitting as District Council for the portion of the Maryland Washington Regional District located in Montgomery County (collectively, "the County" or "District Council"), to challenge Zoning Text Amendment No. 93014 ("the ZTA").

The litigation arose in connection with PAHO's efforts to relocate its headquarters to 18.5 acres of residentially-zoned land in Montgomery County. PAHO believed that it was permitted to locate in the residential zone because under the Montgomery County Zoning Ordinance, "publicly owned or publicly operated uses" are permitted as matter of right in all zones. Chapter 59, Montgomery County Code 1984, as amended ("Zoning Ordinance"). After receiving repeated assurances from County representa-

59 F.3d 167, 1995 WL 371575 (C.A.4 (Md.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 59 F.3d 167, 1995 WL 371575 (C.A.4 (Md.)))

tives, PAHO executed a purchase agreement for the property in August 1993.

In the Fall of 1993, the District Council adopted the ZTA, which provides, *inter alia*, that international organizations are "not publicly owned or publicly operated use[s] for purposes of this chapter," thereby precluding PAHO's planned relocation.

PAHO filed suit, claiming that (1) the District Council did not have the authority to enact the ZTA because the state's "mandatory referral process," under which public entities are required to go through a non-binding land-use review process but may not be excluded from any zone, preempts the local zoning authority; (2) the ZTA violates the equal protection guarantees of the Fourteenth Amendment and the Maryland Declaration of Rights, by creating an unjustifiable classification under which public international organizations are denied the rights of their domestic counterparts solely on the basis of their non-domestic or alien status; and (3) the ZTA impermissibly intrudes on the unique federal authority over foreign relations. With no facts in dispute, both parties moved for summary judgement.

On March 14, 1994, the district court granted judgment in favor of the County. The court found that the District Council had the authority to enact the ZTA and that the ZTA was not an impermissible intrusion into foreign relations but was within the realm of permissible state legislation which only incidentally influences foreign affairs. The court also found that the ZTA does not create a classification violative of the Equal Protection Clause since it addresses the only group over which the County has zoning authority (its domestic counterparts being exempt from zoning regulation as sovereigns), and, even if PAHO could be construed as similar to federal, state, or local entities, any different treatment here does not defy rational explanation. PAHO appealed, arguing that the court erred in all of its conclusions.

Because we believed that the first issue presented a threshold inquiry and required interpretation and application of Maryland substantive law in circumstances not addressed in published opinions of the Maryland courts, we certified the following question to the Court of Appeals of Maryland:

> ***2** Whether the County Council for Montgomery County, sitting as the District Council, had the authority under state law to enact zoning legislation that had the effect of prohibiting the Pan American Health Organization from locating its headquarters in a residentially-zoned area in Montgomery County.

The Court of Appeals for Maryland recently responded and answered in the affirmative. *Pan Am. Health Org. v. Montgomery County, Md.*, Misc. No. 30 (Md. May 11, 1995). In brief, the court concluded that, although the state's mandatory referral provision requires that all "public" building projects be submitted to a council for non-binding review, and thus are not governed by County zoning laws, the term "public" in that provision does not include public *international* organizations. Rather, "public" in that statute refers to only federal, State, and local governments, entities that are already exempt from the enactments of district councils. Therefore, the County Council had the authority to enact the ZTA.

We now must consider PAHO's two remaining claims. PAHO argues that, contrary to the district court's conclusion, the ZTA does treat similarly situated persons differently and that differentiation, between international public organizations and domestic public entities, is not simply an acknowledgment of the exemption of sovereign governmental actors, as demonstrated by the Zoning Ordinance's broad exemption of all "publicly owned or operated uses" and by the fact that certain domestic public entities are not exempt from zoning regulation. PAHO also contends that the district court erred in concluding that the ZTA was a permissible, incidental intrusion into the federal government's conduct of foreign policy. Having reviewed the record, we affirm the district court's disposition of both of those claims on the reasoning of that court.

AFFIRMED

C.A.4 (Md.),1995.
Pan American Health Organization v. Montgomery County, Md.
59 F.3d 167, 1995 WL 371575 (C.A.4 (Md.))

END OF DOCUMENT

CERTIFICATE OF COMPLIANCE

RESET FORM

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1443 **Caption:** Wash. Gas Light Co. v. PG County Council

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 13,738 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using Word 2010 [*identify word processing program*] in 14 Point Times New Roman [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) David E. Pomper

Attorney for PG County Council

Dated: 6/22/12

CERTIFICATE OF SERVICE

I certify that on June 22, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David E. Pomper
Signature

6/22/12
Date