

BEFORE THE BOARD OF ZONING APPEALS
FOR ALLEGANY COUNTY, MARYLAND

In the Matter of: :
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 : Application of :
 : BZA CASE NO. 942
DAN'S MOUNTAIN WIND FORCE, LLC : BZA CASE NO. 943
 :
 : for a :
 :
 : SPECIAL EXCEPTION AND VARIANCE :
 :

VOLUME II

PUBLIC HEARING

Wednesday, October 28, 2015

Whereupon, a Public Hearing was held before the Allegany County Board of Zoning Appeals on Wednesday, October 28, 2015, commencing at 9:02 a.m., at the Allegany County Fairgrounds, Multi-Purpose Building, 11400 Moss Avenue, Cumberland, Maryland 21502, reported by Sheryl L. Gasparik, RPR.

A P P E A R A N C E S

BOARD MEMBERS PRESENT:

JULIA WILLIAMS, Chairperson

WILLIAM POWELL, Member

RODGER UPHOLD, Member

JOHN BRANT, Alternate Member

WES MCKEE, Board Counsel

JAMES A. SQUIRES, JR., Secretary,
Division Chief, Land Development Services

ON BEHALF OF THE APPLICANTS:

GORMAN E. GETTY, III, ESQUIRE
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ON BEHALF OF THE APPLICANTS:

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ON BEHALF OF THE APPLICANTS:

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CUMBERLAND, MARYLAND

WEDNESDAY, OCTOBER 28, 2015

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P R O C E E D I N G S

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CHAIRPERSON WILLIAMS: I will now call to order the Zoning Appeals Board hearing on Cases No. 942 for a special exception with Dan's Mountain Wind Force and 943 for a variance or for several variances.

Again, the members of the board who will be hearing this case: Rodger Uphold; Bill Powell; myself, Julia Williams. Our attorney is Wes McKee. Our alternate is John Brant, who will be actively listening, not actively participating, unless one of us should not be available when the decisions are made.

We have a court steno, Sheryl Gasparik. Jim Squires is secretary to the board and Division Chief. With that, I think all the introductions up here have been made.

Please again, silence your cell phones. Exits on either side of the building. No smoking in this building. Restrooms are through that door and to your right.

1 That's about it, and I will turn it over
2 to our attorney for the procedural outline, if we
3 need a reminder.

4 MR. McKEE: Thank you.

5 You know, I don't -- I am not going to
6 go through the entire procedure speech again this
7 morning. I think that most of the parties who were
8 actively participating yesterday are present again
9 here this morning. I think we should just probably
10 pick up where we left off.

11 Mr. Brewer, you understand you're still
12 under oath? Is that correct?

13 MR. BREWER: I do.

14 MR. McKEE: Thank you.

15 And I believe where we left off was this
16 young lady here wanted to come forward and she had
17 a question.

18 Ma'am, I am going to ask you if you could
19 give us your name and address.

20 MS. LUCA: I will. So my name is Heather
21 Luca. I live at 2816 North Tuckahoe Street in
22 Arlington, Virginia. I am here to speak on behalf
23 of my mother, Edie McKenzie Bohanan, over here,
24 who is a property owner at 176 -- 17 -- 16706 Kens
25 Lane.

1 For a point of reference, I was wondering
2 if we could bring up the maps that were shown
3 yesterday that show the full array of the
4 windmills, so that I could direct a question
5 to Mr. Brewer about the map.

6 MR. GETTY: I don't -- I am not sure I
7 know what map. They are part of the maps that are
8 here. If you have a particular map, I can try to
9 locate it.

10 MS. LUCA: So, first, just to be -- so
11 you know which property I am talking about, I don't
12 know if you all can see this or not. This is from
13 the presentation that you all showed yesterday.
14 It's the...

15 MS. STARK: Does that help at all? Well,
16 yeah, so this is...

17 MR. GETTY: Map numbers are in the lower
18 right-hand corner.

19 MS. LUCA: So this is Sheet F? Is that
20 the number? No? Lower left?

21 MR. GONTRUM: I'll take a look at it.

22 MS. LUCA: Yeah, Sheet Exhibit F. This is
23 the school setback one, but...

24 MS. STARK: Does this one help at all?

25 MS. LUCA: Yeah, actually, that one is

1 perfect.

2 MS. STARK: So this would be C-06.

3 MR. GONTRUM: Oh, C-0.6.

4 MS. STARK: Yeah, that one will work.

5 - - -

6 CROSS-EXAMINATION OF MATT BREWER

7 BY MS. LUCA:

8 Q. All right. So this is C-0.6, and you can
9 see which property I am going to be referencing.
10 It's this horseshoe-shaped property that is right
11 smack at the hub of where all the windmills are
12 going to be located. Here is one array. Here is
13 another, here is another, and here is -- here is
14 the property, our property right here, and Kens
15 Lane runs alongside of it which is what our address
16 is on.

17 So the other question I have is actually
18 in reference to Map C-2, and on Map C-2, you said
19 that you plan to construct Turbines 1 through 5
20 using Kens Lane; is that correct?

21 MR. McKEE: Let the board have an
22 opportunity to get to C-2 --

23 MS. LUCA: Sure.

24 MR. McKEE: -- because we have no idea
25 what you're talking about.

1 MS. LUCA: Okay. No problem. Sorry.

2 MR. GONTRUM: 0.6 is up. (Pointing to
3 projector)

4 MS. LUCA: Sorry?

5 MS. STARK: They've got it on the
6 projector over there.

7 MS. LUCA: Okay.

8 MR. McKEE: Is that -- is that it?
9 Because we can't --

10 MR. GETTY: This is 6.

11 MR. GONTRUM: 0.6.

12 MR. GETTY: Yeah. They were keyed to
13 his testimony, so I don't have them --

14 MS. LUCA: Or if you have C-3. You
15 definitely had that one up on the screen, C-3,
16 if you go backwards, I think.

17 MR. GETTY: I understand, but they were
18 keyed to his testimony. I don't have them in
19 order.

20 MS. LUCA: Okay.

21 MR. GETTY: I have them in the order of
22 which he addressed them, but I can't tell you to
23 find them.

24 MS. LUCA: Okay. Well, I can ... this
25 one. So this one is C...

1 MR. SQUIRES: It's under the 360 -- do
2 you still have the PowerPoint presentations up
3 there they handed out yesterday, the PowerPoint
4 presentations?

5 MR. POWELL: It's in the PowerPoint?

6 MR. McKEE: Do you have the big map there?

7 MS. STARK: Yeah, right here.

8 MS. LUCA: Yeah, I do.

9 MR. McKEE: Why don't you come forward,
10 we'll have counsel come forward, and you
11 can bring --

12 MS. LUCA: Okay.

13 MR. McKEE: -- we'll give you a mic, and
14 you can come up here and show us on the map what
15 you're talking about.

16 MS. LUCA: Okay.

17 MR. McKEE: I think it would be easier
18 than us trying to figure this out any other way.

19 MS. LUCA: Great. Sorry. I know there
20 is a lot of maps. It's confusing for me too.

21 BY MS. LUCA:

22 Q. So on this map, I was wondering if you
23 could tell me, Mr. Brewer -- I don't know if you're
24 looking at the same map as I am.

25 MR. GONTRUM: Mr. Brewer, you have to go

1 up to the map.

2 MS. LUCA: C-3.

3 MR. McKEE: Mr. Brewer, you can come
4 forward, if you want, to see what she is -- so you
5 can see what she's referring to, with Mr. Getty.

6 BY MS. LUCA:

7 Q. So the first question was whether -- just
8 to confirm that you said yesterday that you plan
9 to use Kens Lane to access and build Turbines 1
10 through 5?

11 A. Yes.

12 Q. Okay. And can you tell me, according to
13 the legend on this or according to what you know
14 about this map, what the dotted line that goes down
15 the middle of Kens Lane and the yellow highlighting
16 means.

17 A. So the yellow line on here was the --

18 AUDIENCE MEMBERS: He's not on mic. We
19 can't hear.

20 THE WITNESS: Oh.

21 A. The yellow line on this exhibit was
22 intended to indicate the project perimeter.

23 BY MS. LUCA:

24 Q. And the dotted -- where you have a long
25 dash and two small dashes that goes down the middle

1 of Kens Lane?

2 A. What's the question?

3 Q. Well, I'm asking you to tell me what that
4 indicates, according to, you know, the various
5 legends and the maps.

6 A. It's the project perimeter of the
7 participating parcels.

8 Q. The dotted line, the long dash and the
9 small dashes, according to the legends that I
10 read on your maps, indicate a property line, as
11 in my family's property line, down the middle of
12 the road that you intend to use.

13 A. So I believe that Ken's Lane is designated
14 as an open road. There are -- it's another public
15 road in the county, and we do not intend to expand
16 it in any way beyond the limits of the existing
17 property.

18 Q. So, yesterday, you said that you would --
19 in order to get in the cranes, you would have
20 to have a road that is 34 feet wide. That's not
21 the case here? You don't need to get a crane
22 in to put up the windmills?

23 A. Yeah, that's correct. So at this
24 particular location, the cranes would be
25 transported by truck back to where they would

1 be assembled on the site. They would be
2 disassembled and taken back out. So they
3 would not actually be driving back and forth
4 in this particular area, that's right.

5 Q. The cranes you're saying?

6 A. Yes.

7 Q. So that road won't be widened. Okay.

8 It's not my understanding that that road
9 is a public road. It's my understanding it's a
10 private lane; and that's, I suppose, a conversation
11 for another time. I just want you to go on the
12 record saying that.

13 And the other thing I just wanted to make
14 a point is that this land, this horseshoe-shaped
15 land right here, my family's property, I just
16 wanted to clarify, had you -- are you aware that
17 this family has signed a lease with Dan's Mountain
18 Wind Force?

19 A. Which family?

20 Q. This property right here, this
21 horseshoe-shaped.

22 A. Do I believe they have signed a lease --

23 Q. Right.

24 A. -- with Dan's Mountain?

25 Q. Have they? Yeah.

1 A. I do -- I believe they have not.

2 Q. But -- right, okay.

3 And so the other thing that I wanted to
4 find out is you -- yesterday, you gave the variance
5 distances from the various, you know, houses on the
6 plan, and I would like to know what the distance is
7 from Windmill 6 and Windmill 5 from the residences
8 on this parcel.

9 A. If you give me a couple minutes --

10 MR. McKEE: Can you pick up the mic.

11 AUDIENCE MEMBER: Yeah, please.

12 MR. McKEE: They can't hear you.

13 A. I would have to make a measurement. I
14 can do that.

15 Q. I think that would be good.

16 A. Okay. So which ones in particular?

17 Q. Windmill No. 6 and Windmill No. 5. Wait,
18 is this 5 over here?

19 A. Yes. So I can determine that, but I can
20 say that they are at least 2,000 feet away which is
21 the separation distance required by the ordinance.

22 Q. Okay. But with -- you know, you said
23 you would need to make a measurement. So I think
24 we should be sure that they are, in fact, the
25 measurement.

1 A. Okay.

2 MR. POWELL: Take your measurement.

3 (Short pause)

4 MR. POWELL: I didn't catch your mother's

5 name.

6 MS. LUCA: Edie McKenzie Bohanan.

7 MR. POWELL: McKenzie?

8 MS. LUCA: Uh-huh.

9 MR. POWELL: And she lives on Kens Lane?

10 MS. LUCA: No, she does not live there

11 full-time.

12 MR. POWELL: Lives where?

13 MS. LUCA: She owns that property, but she

14 does not live there full-time.

15 MR. POWELL: She owns the property on --

16 MS. LUCA: Yeah.

17 MR. POWELL: -- Kens Lane?

18 MS. LUCA: Uh-huh.

19 MR. POWELL: But she doesn't live there?

20 MS. LUCA: No, but we use the property

21 quite a bit. There is four co-owners.

22 A. So the distance from --

23 MR. GETTY: Use your mic.

24 MR. GONTRUM: Use your mic. Sit down and

25 use your mic now.

1 could you kind of paint a mental picture of what
2 that area looks like for us for these 150 units.

3 MR. GETTY: I would object to the
4 relevancy.

5 MR. McKEE: And I am going to agree, sir.

6 MR. O'HARA: Okay.

7 MR. McKEE: That is not relevant to this
8 hearing.

9 MR. O'HARA: Okay. That's fine.

10 MR. McKEE: If you have something that's
11 relevant to the ongoing project, go ahead.

12 MR. O'HARA: Okay. That's fine. Thank
13 you.

14 BY MR. O'HARA:

15 Q. The next question I have, after working
16 with the project, have you visited the Pinnacle
17 wind project?

18 A. No.

19 Q. Okay. The next question I have too,
20 you said you've got a great deal of questions
21 on looking at the bat -- or the Allegheny -- the
22 habitat, wildlife habitat, plant habitat, wetlands,
23 and studies.

24 Did you do any studies or look at in your
25 GIS on noise issues within the area?

1 A. Yes.

2 Q. Could you kind of describe a little bit
3 more.

4 A. So the project has completed a litany
5 of studies of different scale and type by a number
6 of different professional consultants. That is
7 not my particular area of expertise, but it has
8 been addressed, yes.

9 Q. Were those noise studies put into the
10 new GIS for the 17 turbines?

11 A. I'm not sure I understand.

12 Q. What I am trying to figure out, I know
13 there was some noise studies done. Has there been
14 any recent noise studies done? There was noise
15 studies done back in 2008.

16 A. Oh, yes, yes.

17 Q. There is recent noise studies?

18 A. Yes.

19 Q. And those noise studies have been
20 submitted to the board for review?

21 A. No.

22 Q. Okay. Also, you indicate that you have
23 specialties in GIS. Did you do any GIS-ing on
24 shadow flicker?

25 A. Yes.

1 Q. And are those studies part of the record
2 of hearing on shadow flickers?

3 A. I believe they are not.

4 Q. Okay. Why weren't they kind of included
5 in that issue?

6 MR. GETTY: Objection.

7 MR. McKEE: I am going to go ahead and
8 agree with counsel on that. They are set -- the
9 code sets forth what they have to -- what they
10 are required to file, and I believe the testimony
11 has been they have filed everything that they are
12 required to file. If they want to elicit studies
13 for their purposes in going forward, I don't
14 believe that that's necessarily something that
15 has to be or should be or even has to be presented
16 to the board. They simply don't have to do that.

17 MR. O'HARA: Okay. Thank you.

18 BY MR. O'HARA:

19 Q. The next question I have is, when you were
20 doing the placement of the turbines, because you
21 had to move them back and forth and the multiple
22 variables that you had, was any consideration given
23 to noise for those residents that are -- have not
24 agreed to become co-defendants?

25 A. Yes, sir.

1 Q. How is that, please?

2 A. So as we talked about yesterday, the
3 site planning process is -- consists of multiple
4 iterations whereby all of the different constraints
5 and variables are considered in an aggregate. So
6 as we talked about yesterday, the final turbine
7 locations include consideration of all of those
8 different issues comprehensively; the environmental
9 considerations for plants and animal habitat,
10 noise, communication beam paths, you know, mining
11 activities. All of those things are considered
12 together. So it's not just one thing, noise
13 or one thing, habitat, that dictates the final
14 configuration of the project. It's all those
15 things considered in aggregate.

16 Q. Okay. Does Maryland have a noise code?
17 Do they have an ordinance on dealing with noise?

18 A. They do.

19 Q. Pardon me?

20 A. They do.

21 Q. And what is the decibels for daylight?

22 A. I don't know offhand, but I know that the
23 professional consultants who have expertise in that
24 matter have taken that into consideration.

25 Q. Okay. Thank you very much. That's all

1 for now. Thank you.

2 A. You're welcome.

3 MR. McKEE: Any other questions? Sir,
4 here in the front.

5 MR. RIDENOUR: My name is Randy Ridenour.
6 I am a resident of Harwood Subdivision. 16345
7 Harwood Drive is my address.

8 Just a couple points, a couple questions,
9 but I do think that -- and I will make a statement
10 to the board. I do believe --

11 MR. McKEE: This isn't the time for the
12 statements.

13 MR. RIDENOUR: Okay.

14 MR. McKEE: If you want to ask questions,
15 this is just for questions.

16 MR. RIDENOUR: Okay.

17 - - -

18 CROSS-EXAMINATION OF MATT BREWER

19 BY MR. RIDENOUR:

20 Q. My second point here then is, Mr. Brewer,
21 have you ever talked to any of the homeowners
22 living near the projects that you have been a
23 part of planning? Have you ever gone back and
24 followed up with the project that you planned to
25 see how it was fulfilled and what impacts it's had

1 on the people living there?

2 A. I have encountered some of those folks
3 along the way, yes.

4 Q. And what were those encounters like?

5 A. Most of them are relatively positive.

6 Q. Okay. Let me ask you this: What is
7 General Electric's recommended setback distances
8 for the turbines that you plan to place at this
9 location?

10 A. I don't know that the manufacturer sets
11 that. In this particular case, we're following the
12 guidelines in the Allegany County zoning ordinance.

13 Q. Does 1300 feet ring a bell to you?

14 A. No.

15 Q. Not at all, okay.

16 What is the planned distance of fencing
17 around the wind turbines that are being planned
18 for this project?

19 A. The fencing? Is that what you said?

20 Q. Fencing, fencing.

21 A. If you're referring to security fencing,
22 there will be fencing included around the
23 substation. There will be temporary fencing
24 and temporary and permanent gates for security
25 control and access during and after construction.

1 Beyond that, I don't know that there are any other
2 fences.

3 Q. So nothing to protect the public from
4 hearing damage or anything that could be thrown
5 off of the wind turbine if they happen to venture
6 onto the property?

7 MR. GETTY: Objection.

8 MR. RIDENOUR: It's a question.

9 MR. MCKEE: Yeah, I am going to allow him
10 to answer the question.

11 A. So is your question over constructing a
12 fence around the entire project perimeter?

13 Q. Yes.

14 A. No.

15 Q. What -- let me ask --

16 A. I guess I would add to that, that this
17 is private property, and if members of the public
18 are there, they shouldn't be. Access is not
19 permitted on private property without consent
20 of the landowner.

21 At points where the access roads intersect
22 the public way, there are gates and barriers and so
23 forth that would prevent someone from accidentally
24 driving in there without, you know, going through
25 a gate or something.

1 Q. But you don't consider this project an
2 attractive nuisance, something like a swimming
3 pool, where you have some legal responsibility to
4 protect people from entering the area and incurring
5 any kind of health or safety issues?

6 A. No. This project is constructed entirely
7 on private property.

8 Q. So is a swimming pool.

9 The next question is: What is the
10 distance between Dan's Rock and Turbine 16 and 17?

11 A. I would have to measure that.

12 Q. That's fine. We'll wait.

13 (Short pause)

14 A. So the point on Dan's Rock you're
15 referring to, I assume, is the -- kind of the
16 walkway where you go up?

17 Q. Yes.

18 A. Seventeen is about 1400 feet away from
19 that. Sixteen is a little more than 1900 feet
20 away.

21 Q. Okay. What are the projected sound levels
22 at that point of the steps going to Dan's Rock?

23 A. My expertise is in civil engineering and
24 land planning. I am not qualified to answer that
25 question, but --

1 Q. But you are the professional engineer
2 providing expert testimony here today --

3 A. Yes.

4 Q. -- and you manage this project. You
5 should know all about the --

6 MR. GETTY: Objection.

7 BY MR. RIDENOUR:

8 Q. -- every aspect.

9 MR. McKEE: I agree, but you can ask the
10 question.

11 MR. RIDENOUR: Okay. And I think for
12 public record, we deserve a copy of the sound
13 studies so that that can be -- that can be studied.
14 You know, there is times at Dan's Rock that many
15 tourists go up there, hundreds on given days in
16 the fall and at other times. That has to be a
17 consideration in the decisions for this, these
18 special exceptions and variances.

19 MR. McKEE: Actually, I am going to
20 clarify the record. It's not something that we
21 would be considering at this point. There are
22 specific things we have to make a determination
23 on as to a variance and the special exception
24 issues, and they are not required to provide those
25 sound studies. So we are not going to require them

1 to provide sound studies, unless the board decides,
2 as a whole, they want to reopen this and go back
3 and do these sound studies. It's not a requirement
4 under the code.

5 MR. RIDENOUR: But is the County not
6 concerned that they are actually meeting the
7 Maryland laws? Is that not a concern at all?
8 There are laws for sound levels in the state of
9 Maryland. I just can't believe we wouldn't want
10 to make sure that this project is in compliance
11 with those.

12 MR. McKEE: Well, I don't want to find
13 myself in a position of arguing on their behalf,
14 but the response would be, if you want to have a
15 sound study done, have a sound study done.

16 Their sound studies are not required to
17 be presented in this application. So unless --
18 the board is not going to consider them, and they
19 certainly are not going to require them to provide
20 them here. So we can keep talking about the sound
21 studies, but there is nothing that is going to
22 require them to provide them to us. That's all --

23 MR. RIDENOUR: Okay.

24 MR. McKEE: I understand your question.
25 I am just saying they are not required to do it --

1 MR. RIDENOUR: I understand.

2 MR. McKEE: -- even if you make it a point
3 and ask and insist that they provide those to us.

4 MR. RIDENOUR: Okay. I am just going to
5 go back --

6 MR. GETTY: And if I can, it is presumed
7 that we will comply with Maryland law as a part of
8 the application.

9 MR. RIDENOUR: But I would go back and
10 say, Mr. Getty, I would like to see objective
11 evidence. There is a lot of statements early on
12 about how upfront this company is and what they
13 plan to do and they're going above and beyond.
14 If you are going truly above and beyond, I think
15 you would submit those sound studies to the public.
16 Thank you.

17 MR. McKEE: Thank you, sir. Any other
18 cross-examination? Yes, sir.

19 MR. BOYD: My name is Allen Boyd. I live
20 at 14220 North Bel Air Drive, Cumberland, Maryland
21 21502. I live in the Bel Air Subdivision of
22 Allegany County.

23 I suspect I will be able to look out my
24 back windows and look up from my back deck and see
25 these windmills towering over me. So I think that

1 All of the separation distance variances
2 that were discussed yesterday are, in fact, to
3 residences who are co-applicants to this request
4 for a special exception. So, in other words,
5 the relief being sought is being requested by
6 that party. So these folks who are here, these
7 landowners, residents who own and live in that
8 house, are asking the Board of Zoning Appeals to
9 grant a variance to their own house.

10 None of these variances are to another
11 property beyond the -- beyond the project. These
12 are all interior. They're right in the middle.
13 They're not -- you know, it's on private property.

14 Q. So if these variances are granted, would
15 that act as a precedent for future requests for
16 variances?

17 A. Absolutely not. Each variance is
18 considered on its own merit --

19 Q. You can only speak to your company.
20 What about other companies that are --

21 MR. McKEE: Sir, allow him to answer the
22 question --

23 MR. BOYD: Excuse me.

24 MR. McKEE: -- before you cut him off.
25 Thank you.

1 A. In my experience and my understanding
2 of this process for a special exception and the
3 variance, in particular, each variance request,
4 not just for this project, but for any project,
5 is considered on its own merit because each has
6 peculiar circumstances.

7 BY MR. BOYD:

8 Q. Okay. So what are the hazards to the
9 public that prompt the need for setback distances?

10 A. What are the -- the hazards?

11 MR. GETTY: I am going to object because
12 that's a legislative determination made by the
13 County in passing the ordinance, not something
14 Mr. Brewer --

15 MR. BOYD: Well, shouldn't it be something
16 that is considered --

17 MR. McKEE: I believe --

18 MR. BOYD: -- by the board?

19 MR. McKEE: If he knows the answer, I
20 am going to allow him to give the answer. If he
21 doesn't know, he doesn't know.

22 A. Well, what is -- could you restate that,
23 please. What is it?

24 BY MR. BOYD:

25 Q. What are the hazards to the public that

1 prompt the need for setback distances?

2 A. In this case, I would suppose the presumed
3 hazard -- and, statistically, I don't -- I don't
4 know, you know, what the likelihood of that is,
5 very small -- if a turbine were to, in fact,
6 collapse and fall straight over, that it would
7 fall within the project area and not on to someone
8 else's property. The setbacks in this case are
9 far greater than the distance that -- within that,
10 where that could occur.

11 So I guess the danger to the public would
12 be the public being somewhere beyond a project
13 perimeter and a machine that could impact them in
14 some way. So I believe that would be the impetus
15 for the setback.

16 Q. Sound levels, ground-transmitted
17 vibration, shadow flicker, lubricant spray,
18 that kind of things aren't -- aren't something
19 that would be considered, that this board should
20 consider in allowing lower setback distances than
21 allowed by county code?

22 MR. GETTY: Objection.

23 MR. McKEE: Yes. As I just indicated
24 prior, there is -- the code -- there is only so
25 much that we can consider, as far as they are

1 required to submit to us by the code that sets
2 that forward, and that's been provided to us.

3 So I understand your question is do you
4 think it should be, but the reality is, if it's
5 not required by the code, they are not required
6 to provide it. So...

7 MR. BOYD: Well, I apologize, I haven't
8 really studied the code.

9 MR. McKEE: Certainly.

10 MR. BOYD: I don't know what exactly is --
11 is all the concerns to the public to this contained
12 in the code.

13 BY MR. BOYD:

14 Q. You are a licensed professional engineer?

15 A. Yes, sir.

16 Q. So am I. I am licensed in the State of
17 Pennsylvania. So please don't offer me -- ask
18 me to offer a professional opinion in this state
19 because I don't have a license here.

20 The purpose of professional engineering
21 licensure is to protect the public primarily?

22 A. Yes.

23 Q. Okay. Is two-and-a-half times the height
24 for the diameter of the setback or the radius,
25 is that -- that's a question. Is the setback

1 of two-and-a-half times -- you mentioned that
2 yesterday -- is a typical setback?

3 A. Yes, sir. So the application has been
4 prepared in accordance with Section 360-92 of the
5 Allegany County zoning ordinance. The setbacks are
6 calculated based on the height of the structure, so
7 they're not just arbitrary. They would correspond
8 to the height.

9 So there are three different categories
10 in the code. The lesser category, which applies
11 to three of the turbines for this site, is
12 one-and-a-half times the height; and the other
13 one is ... yeah. So, in short, what that -- of
14 course, in distance, that corresponds to 545 and
15 955 feet. Is that --

16 Q. Yeah.

17 A. -- your question?

18 Q. How many turbines could fit in this area
19 and have no variances needed, and what height would
20 they -- could they be?

21 MR. McKEE: Let's try to limit it to one
22 question at a time.

23 MR. BOYD: Okay.

24 BY MR. BOYD:

25 Q. How many turbines could fit into this area

1 and have no variances needed?

2 A. I don't know that -- that's not a simple
3 question or answer. So we talked at length
4 yesterday about the planning process and all
5 the different variables and constraints that are
6 taken into account.

7 So as we portrayed in some exhibits
8 yesterday, would it be possible to achieve the
9 necessary separation distance by pushing part
10 of the project back into the buffer of a species
11 of concern and going through some mitigation
12 process and, you know, trying to get that permitted
13 somehow? Could that be done? Possibly. Is that
14 more desirable than what we have proposed? No.

15 Q. Why is it not more desirable?

16 A. Because it would result in additional
17 environmental impacts that, in my opinion --

18 Q. Less turbines would cause more
19 environmental impact?

20 A. No.

21 MR. GETTY: If you would allow the witness
22 to answer.

23 A. So what I am saying is, could -- what
24 we have presented here is a plan that's been
25 comprehensively designed to produce the smallest

1 footprint possible on the landscape, the least
2 environmental impact, and at the same time, seek
3 the least amount of relief necessary to accomplish
4 the project.

5 So your question is "how many could be
6 constructed without a variance," that's not an
7 easily quantifiable answer. Again, relocating
8 them in such a way that would either be in
9 compliance or more in compliance with the
10 separation distance would result in additional
11 environmental impacts which are not -- not
12 desirable or interfere with communication
13 facilities, which is also not desirable, or
14 push them into an area -- you know, a previous
15 mining area or something.

16 There are a lot of different things
17 that went into that. So just applying that
18 distance from the residence to the structure,
19 it's just not quite that --

20 Q. So is it --

21 A. -- quantifiable.

22 Q. Are you finished?

23 A. Yes, sir.

24 Q. So is it your testimony you don't know
25 how many turbines would be able to fit into this,

1 this area for the project?

2 A. No. My testimony is that we have proposed
3 17 turbines which have comprehensively considered
4 all of the variables and various constraints and
5 prioritized those, such that the project represents
6 the least environmental impact possible and
7 requests the least relief possible to accomplish
8 the project.

9 Q. So I don't -- I don't think you have
10 answered my question.

11 MR. GETTY: Objection.

12 A. I have tried to.

13 MR. McKEE: Yeah, I think he has. He
14 has basically said it's not something that is
15 quantifiable at this point without going back and
16 looking at all the factors involved. I believe he
17 said he cannot do that at this point, so...

18 MR. BOYD: Well, this is hard to do a site
19 design for these windmills, I'm sure, but these
20 windmills present a risk to the public. That's all
21 I have for my line of questioning.

22 MR. McKEE: Thank you, sir. Is there any
23 other cross-examination? Yes, ma'am.

24 MS. RIDENOUR: Hi, my name is Elaine
25 Ridenour. I live at 16345 Harwood Drive in

1 Frostburg.

2

- - -

3

CROSS-EXAMINATION OF MATT BREWER

4

BY MS. RIDENOUR:

5

Q. Mr. Brewer, could you please clarify the
6 height of the wind turbines from the ground to the
7 top of the blade in feet, please.

8

A. Sure. So there are two models of the GE
9 turbines that we employed for this project. The
10 smaller of the two, from the ground level to the
11 very top of the blade, let's say, you turned it
12 straight up so that one of the blades was parallel
13 to the tower, would be 426 feet; and the taller
14 of the two units in the same scenario, with the
15 blade turned, if it were straight up, parallel to
16 the tower, would be 484 feet.

17

Q. And are these the measurements that were
18 used in the electromagnetic interference analysis?

19

A. Yes, ma'am.

20

Q. Are these the measurements that were used
21 and submitted to the FAA?

22

A. Yes, ma'am.

23

Q. Okay. Thank you.

24

MR. McKEE: Thank you, ma'am. Any other
25 cross-examination?

1 (There was no response.)

2 MR. McKEE: All right. Since I don't see
3 any other hands, I am going to ask the board. Do
4 the board members have any questions?

5 MS. WILLIAMS: I believe we do. Do you
6 want to go first?

7 MR. POWELL: No, you can go ahead and go
8 first.

9 - - -

10 EXAMINATION OF MATT BREWER

11 BY MS. WILLIAMS:

12 Q. As we look at each property requiring
13 a variance and compare one to the other, can you
14 tell us what their uniqueness is, a property owner,
15 a co-applicant to another co-applicant?

16 A. I'm not -- I'm not sure I -- the
17 uniqueness of each residence relative to...

18 Q. You have described the project as being --
19 the placement of the turbines as being subject
20 to the uniqueness of habitats and subject to the
21 uniqueness of the topography and so forth --

22 A. Yes.

23 Q. -- but I haven't heard anything that
24 compares the uniqueness of each property owner
25 of all the variances that are being requested.

1 A. Well, the uniqueness of each location
2 would be their proximity relative to all the other
3 constraints that are being considered.

4 So, for example, you know, let's say
5 the Lashbaugh residence may be closer to a wetland
6 area that we were trying to avoid, and so that
7 particular constraint may have a larger impact
8 on the location of that turbine than, say, the
9 Willison residence that may be closer to the
10 potential woodrat habitat, and that constraint
11 would have more bearing on the location of, you
12 know, the next turbine down the row. Again, all
13 those things are considered together. Does that...

14 Q. But I am still seeing that whole area as,
15 you know, there was strip mining there. There is
16 landfill there. There is the habitats. There is
17 the wetlands. All of the property owners there are
18 subject to the same characteristics of that --

19 A. That's correct.

20 Q. -- property.

21 A. That's right.

22 Q. I am not seeing a uniqueness between the
23 Lashbaugh property and the Willison's property
24 and the Cesnicks because they're all up there
25 together.

1 A. Yes. I would say that they are -- the
2 uniqueness is, is all of their proximity to all
3 of those different things which occur in the
4 vicinity of their individual residence. So is,
5 you know, one of those two houses different from
6 the other? You now, I don't know if they're unique
7 in that way --

8 Q. Uh-huh.

9 A. -- but the unique circumstance is the
10 position of each of those existing residences
11 relative to all the constraints that are being
12 considered.

13 Q. I totaled the footage of the variances
14 being requested for the property owners, just the
15 residence, and there is a total of 13,352 feet
16 being requested of variances. Of that, the three
17 Willison properties constitute 9,684 feet or 73
18 percent.

19 As I look at the array, if you eliminated
20 the towers that are most -- that require the most
21 variances are 8, 9, 11, 12, 13, and 14. So it
22 seems to me that those, that's your trouble spot.
23 That's where 73 percent of your variances are being
24 requested.

25 A. Uh-huh.

1 Q. Going back to what you said yesterday,
2 you're building to the greatest extent possible
3 to maximize the profit.

4 What would happen if the board denied
5 some or all of those variances in that particular
6 region?

7 A. I would guess -- I don't know that I
8 can fully answer that. That's probably a better
9 question for Dan's Mountain Wind Force, but if
10 you were to eliminate half of the turbines, I
11 would say, in my experience, that the project
12 would probably not be feasible.

13 It would also, you know, deprive the
14 applicants here of the use of their property.
15 If they can meet the requirements set forth in
16 the ordinance for a special exception for this use,
17 then they should be able to develop their property
18 in that way.

19 Q. Are you -- did you say --

20 A. And, again, I guess, you know, to me,
21 having done quite a number of variance and special
22 exception cases in various jurisdictions, this
23 is -- this is a very unusual situation. I don't
24 think that I have ever been part of a project where
25 the individuals or entities requesting relief for

1 a variance were, in fact, the same party that was
2 being impacted. I mean, typically, the variance
3 is being requested from, you know, an adjoining
4 property or to an adjoining property. That's --
5 that's not the case here.

6 So you rightfully observed that, you know,
7 the Willison's property, you have quite a bit of
8 relief necessary, but that is at their consent;
9 and, you know, they are, in fact, asking you for
10 the variance which is not typical of this process.

11 Q. So what is the hardship, the unreasonable
12 hardship, that the co-applicants would suffer if
13 there were no wind towers in that area?

14 A. Well, again, the hardship is that,
15 assuming they can meet all the other provisions
16 of the ordinance in Section 360-92, then they
17 should be entitled to a special exception for
18 this use. So, essentially, they would not be
19 receiving the full use and benefit of their
20 property.

21 Q. So you're saying -- so the full benefit
22 and use of their property would include the
23 remuneration that they are receiving?

24 A. Yes.

25 Q. Okay. So if the windmills don't -- if

1 the windmills are denied, the property owner, the
2 harm the co-applicants suffer will be a lack of
3 monetary benefit for leasing the property; is that
4 correct?

5 A. Yeah, not unlike any other use. If this
6 were a request for, let's say, a continuation
7 of the surface mining activity there, they're
8 releasing their property to a mining company,
9 they would expect to receive royalties or some
10 sort of compensation for that. I don't think it
11 would be unreasonable to expect anyone to enter
12 into a business transaction and not be compensated
13 in some way.

14 Q. Do you think that the loss of that lease
15 would be -- pose an unreasonable hardship, I mean,
16 in terms of amount of money? I expected \$10,000
17 this year and I'm not getting it or 3,000 and I'm
18 not getting it? I guess that's too open-ended.

19 A. Yeah, relative to the amounts, I mean,
20 I am not --

21 Q. You don't know?

22 A. -- qualified to answer that. I don't
23 know those details, but, yeah, certainly loss of --
24 again, if they can meet all the other requirements,
25 all the other code provisions, they should be

1 entitled to a special exception use on their
2 property for this particular activity, and by
3 not being able to do that, they would have, you
4 know, loss of income and...

5 MS. WILLIAMS: That's all I have.

6 MR. POWELL: That's all you have?

7 MS. WILLIAMS: Hmm?

8 MR. POWELL: Is that all you have?

9 MS. WILLIAMS: That's all I have.

10 MR. McKEE: Mr. Powell, do you have some
11 questions?

12 MR. POWELL: Yes.

13 MR. McKEE: Very well.

14 - - -

15 EXAMINATION OF MATT BREWER

16 BY MR. POWELL:

17 Q. I'm glad I had the overnight to kind of
18 reorganize this and whatever, because the last part
19 of the testimony yesterday, I don't know whether
20 you were trying to overwhelm us with all this
21 paperwork and all these exhibits and everything,
22 but you almost did.

23 MR. POWELL: But, no, I looked at it
24 as this way because Mr. Brewer has been before
25 this board numerous times. He does an excellent

1 job. We have never had any problems with him
2 not crossing all the T's and dotting all the I's,
3 looking at all the regulations, and he does a
4 great job with that.

5 BY MR. POWELL:

6 Q. So our problems are not with -- I think
7 we all see that you have done a proper job with
8 this to come up with a presentation and meet
9 all specified terms of all the regulations and
10 everything, except that you're trying to fit
11 this project in to this particular area.

12 I think probably you found that to be
13 a pretty good challenge, right?

14 A. Very challenging, yes.

15 Q. And let me -- and what I visualize is,
16 what your challenge was, and you made a statement
17 back at the very beginning here that these 17
18 towers, they constitute something like -- in
19 relationship to area, they constitute about 150
20 acres.

21 A. Yes, sir.

22 Q. Did I hear that correctly?

23 A. Yes, sir.

24 Q. But then the total scope of the project
25 is about 2900 acres. Is --

1 A. "Scope" meaning the -- so the total, you
2 know, leased area or the area of the participating
3 property owners is about 2900 acres. So, yes,
4 that's correct.

5 Q. Okay. The 2900 acres, did you have --
6 do you have some boundaries that you had to start
7 with, with this project, to try to fit those --
8 fit it in?

9 A. Yes.

10 Q. What are those boundaries that -- you
11 know, trying to think about how your process would
12 go as an engineer --

13 A. Sure.

14 Q. -- you know, you're starting with a plot
15 of ground.

16 A. That's right.

17 Q. What were your boundaries that drew you
18 into this 2900 acres?

19 A. Sure. So the project perimeter, when --
20 you know, at the point we would start our planning
21 process is really -- that part of it is determined
22 by the applicant. So the applicant would come
23 with, you know, we have leased these, you know,
24 "X" number of parcels and here are the, you know,
25 provisions that you need to follow to provide these

1 things to the landowner and so forth; and so as far
2 as the project area that has actually been leased,
3 that's, you know, determined by the applicant and
4 their negotiations with the individual landowners.
5 So we start with that.

6 We look at that then for a very -- kind
7 of as part of the process. While that's going
8 on, we're going through the kind of site selection
9 type evaluation that we talked about yesterday,
10 kind of a high-level thing, you know, existing
11 at the structure and all that kind of stuff.

12 So we begin then to overlay all the
13 various constraints that would impact and
14 ultimately dictate the final configuration of
15 the site plan. So, first and foremost, we begin
16 with an evaluation of all the environmental
17 assets and natural resources on the property.
18 So we kind of have this boundary.

19 So we overlay that with, you know,
20 the habitats for plants and animals, wetlands,
21 floodplains, you know, for -- not just for this,
22 but for any project, whatever those features
23 might be, so the ones we talked about here
24 for the woodrat and the Mountainrice and so
25 forth. Those happen to be on this project, but

1 on a different project, it could be, you know, a
2 different kind of animal or some other issue that
3 would have environmental, you know, consequence.

4 So those are important, and as we talked
5 about, it's part of the environmental site design
6 process. That's kind of really the core, you know,
7 guideline is to preserve those resources and avoid,
8 minimize impact to those to the greatest extent
9 possible. That's really kind of the most important
10 thing and can and should really drive everything
11 else.

12 So we start with that, and then, you know,
13 in order to quantify and document those, that's the
14 point where, you know, all these hundred different
15 studies get done by, you know, all these different,
16 you know, folks who study the birds and the bats
17 and the plants and animals and so forth.

18 So all that begins to form sort of a
19 database or matrix that we -- you know, we continue
20 to overlay these kind of layers of, you know,
21 areas. We can't go over here because of this.
22 We can't, you know, go over here because of that.
23 So you begin to form sort of an envelope --

24 Q. Yeah.

25 A. -- and that is --

1 Q. Let me just stop you just a second,
2 because, really, the point of my question is,
3 you start -- you started with a boundary that
4 was determined by the leases that were obtained
5 to begin with by Dan's Mountain Wind Force?

6 A. Yes, sir.

7 Q. What if they would have gotten more
8 leases, have obtained a larger area for you,
9 and wouldn't that -- that would have certainly
10 gave you more area to work with, and then you
11 could have started with fitting that into a larger
12 area, but your restriction was the boundaries that
13 they gave you by obtaining what leases they could
14 obtain?

15 A. To a certain extent.

16 So the only thing that -- what you just
17 described, let's just say they leased, you know,
18 one more additional parcel. The only thing that
19 that would really change would be the setback to
20 the property line. That doesn't change the natural
21 habitats, the wetlands --

22 Q. No.

23 A. -- the microwave beam paths. All of those
24 things would remain the same. The only variable,
25 which is one of, you know, a hundred variables that

1 would change by that, would be, you know, you would
2 have a little bit more room for a property line
3 setback and that's really all.

4 Q. Well, wouldn't it -- if other leases and
5 other areas would have been obtained, you could
6 have plotted another tower, maybe another tower,
7 and then eliminated some of these that you had to
8 try to fit in to these areas which were restricted
9 by wetlands and wildlife and that kind of thing.
10 So you could have spread out over a larger area
11 if more area could have been provided for you?

12 A. I don't know that that's -- that that's
13 true. Many of the constraints that we are dealing
14 with, for example, setbacks to residents or, you
15 know, the microwave beam paths, you know, it
16 doesn't matter if, you know, that plant habitat
17 is on our property or the next property over.
18 We are staying out of that buffer, no matter what.

19 For example, the communication beam paths
20 are, you know, from the existing telecommunication
21 towers. You know, if we had leased the property
22 all the way up to Frostburg, it's not going to
23 change that. We still have to consider those
24 impacts and kind of go between them or under them
25 or over them. It wouldn't really matter how big

1 that envelope is. So...

2 Q. Well, if the envelope is larger, couldn't
3 you fit another tower in someplace? I mean,
4 couldn't you get more towers in a larger envelope?

5 A. It would, I guess, depend on the other,
6 you know, constraints.

7 Q. Yeah.

8 A. There are -- so I guess to answer your
9 question, of the 2900 acres, there are large
10 portions of that that are totally unusable for
11 some reason or another, mining activity, you know.
12 So we see more area that, you know, with old strip
13 mines on them, that's not really going to help us
14 any, for example.

15 Q. I can't -- I have a hard time saying that
16 if, you know -- if I am trying to plot something
17 within an area, I can't visualize, if I don't
18 expound the area and have a larger area, it doesn't
19 give me the benefit of being able to place those
20 more efficiently or even more towers in a larger
21 area.

22 A. What --

23 Q. I guess, really, what I am -- what I
24 was trying to get at is that -- and I think you
25 answered that by saying that the project, when

1 it was delivered to you, you began with what Dan's
2 Wind Force gave you as the area that they were able
3 to lease and that property was given to you, and
4 that's where you started with your project to fit
5 these towers into that particular area.

6 A. That's true, but I -- and I understand
7 the point you are trying to make, and I guess I
8 would say, you know, theoretically, you know,
9 it would completely depend on the shape of that
10 envelope. You know, if the initial parcel they
11 leased was kind of a triangular shape, you know,
12 maybe, it can't fit in there anyway. You know,
13 I don't know. I don't know that there is a
14 way that you can really answer that question
15 definitively.

16 I would see that as in a typical variance
17 case, where I would say, well, you know, we need
18 to violate this building setback for some reason
19 or another. That would be like saying, well,
20 if the person who had subdivided this property
21 originally had done it in a different way before
22 I got it, then I wouldn't need a variance. That
23 would be almost impossible to -- you know what
24 I mean -- go back and kind of recreate that
25 situation, if you will.

1 Q. Okay. I won't belabor that, but you
2 have found this to be very challenging because
3 of the area that you're dealing with and the
4 different definitions that are in there that
5 you had to deal with, with trying to place these
6 17 towers in that area?

7 A. Yes, sir.

8 Q. Okay. Let me go back before I forget,
9 because I had some -- as you started your
10 testimony and went down through -- first of
11 all, the transmission lines that will be affected
12 going to the relay stations and from the towers,
13 are they all placed underground?

14 A. Yes, sir. So each of the towers has
15 an individual transformer, and it's connected
16 to that, and then there is an underground
17 collection line that typically is installed
18 in the access road itself and would follow
19 that over and, eventually, it would enter
20 the substation, you know, underground. So
21 the collection system, the electric collection
22 system is entirely underground, yes.

23 Q. Okay. We have talked about the cell
24 towers and that kind of thing, but how about TV
25 and radio interference, is there any interference

1 created by these towers or these windmills or the
2 transmission lines? Is there any interference
3 that's created for TV reception or radio reception?

4 A. So the electromagnetic interference
5 analysis was prepared as a comprehensive study
6 which evaluated all of the various communication
7 types and signals that emanate from those 20
8 towers. So as part of that -- I don't know --
9 exhibit pie over here, the distribution list,
10 you know, there were 147 folks on there. Nearly
11 all of them, I believe, were a provider. So that
12 study was sent out to every single company who
13 either owns or leases space on those towers.

14 So on the towers, you know, typically,
15 there is more than one, you know, dish or antenna
16 or whatever, so there might be multiple companies
17 doing multiple things. It was sent to all those
18 folks for their review and comment, if you have
19 a problem with this, do you have anything to say
20 about it; and you can see the comments that were
21 received were sent directly to the County, and I
22 do not believe there are any issues resulting from
23 that study or the review of that study by those
24 communication entities.

25 Q. Okay. I wasn't really referring to the

1 interference of the people that use those towers.
2 What I was thinking of was interference of incoming
3 signals in the area to the residents within the
4 area, incoming signals coming from a satellite
5 dish, Dish Network, DirecTV, or any transmissions
6 from outside radio stations, you know, signals
7 coming -- signals coming in that is not coming
8 off those, those particular towers.

9 A. Well, I don't know that the signals
10 that are not emanating from those towers would
11 be impacted by the wind. So that was -- the study
12 was to include all those different kinds of signals
13 that are either being sent to or coming from those,
14 and what would the impact of this project be, does
15 it disturb them or alter them in any way. If there
16 are signals that would come, go to a -- I don't
17 know -- a house somewhere in the vicinity, I don't
18 know that they're impacted by this.

19 Q. You just don't have the expertise to say
20 whether they are or are not affected by...

21 A. I am not an expert in electromagnetic
22 interference analysis, but I believe they are not.

23 MR. POWELL: We have another witness
24 coming for electromagnetic?

25 MR. GETTY: Yeah, we do, and we make

1 the proffer that that is actually included in the
2 EIA report itself.

3 MR. POWELL: Oh, okay.

4 MR. GETTY: That is a part of that
5 analysis.

6 MR. POWELL: Okay. I will give -- I will
7 give up on that.

8 BY MR. POWELL:

9 Q. Okay. There are 24 property owners
10 that are involved in this project and considered
11 co-applicants; is that correct?

12 A. Yes.

13 Q. Okay. All 24 of these have entered into
14 some type of lease agreement in this project?

15 A. Yes, sir.

16 Q. How many of the 24 applicants or
17 leaseholders of these properties actually live
18 on the properties? Do you have a number for that?
19 Do they all 24 live on their property or...

20 A. No. Some of the properties don't have
21 any improvements on them at all. So the ones
22 that are vacant, obviously, don't have any. I
23 do not -- I could find that out and provide that
24 information.

25 Q. Okay.

1 A. I don't know right offhand what that
2 number is.

3 Q. I would like to know that.

4 In respect to the eight property owners
5 that are affected or requesting these variances,
6 how many of those property owners live on those
7 properties?

8 A. To my knowledge, every single one of them.

9 Q. All, all eight of those applicants live
10 on those properties?

11 A. Yes.

12 Q. I think you stated that there was one
13 that didn't have a residence built on it.

14 A. Well, yes. We included one in an
15 abundance of caution. There is nothing there
16 at this point.

17 Q. Yeah, there is nothing there --

18 A. Right.

19 Q. -- but -- okay.

20 Forgive me, this may seem scattered,
21 but how precise are you in the placement of these
22 towers in relationship to how they are plotted
23 on the map?

24 A. Very.

25 Q. Very? The technology is such that you

1 can pinpoint and place those towers --

2 A. Down to --

3 Q. -- specifically where you've got them on
4 the map, right?

5 A. -- to the hundredth of a foot.

6 Q. That is pretty precise.

7 There was one question that was asked,
8 I think, by Ms. Stark in relationship to any of
9 these towers that were going to be placed on --
10 in an area of 25 percent grade level, 25 percent --
11 greater than 25 percent grade level.

12 Is there any of those towers that were
13 being placed on that type of grade level?

14 A. I don't know that the towers themselves.
15 There are small areas within, you know, the
16 roadways and so forth within the disturbed area
17 of the project that would be -- that would exceed
18 that.

19 That is not -- the requirement is
20 that the project have a buildable area beyond
21 a 25 percent grade, and the point of that is to
22 focus development, you know, kind of away from
23 steeper areas, if possible, and that's exactly
24 what we've done. All disturbance, cutting,
25 filling, all the earth-work activities will

1 be completed in accordance with 2011 Maryland
2 standards for sediment erosion control which
3 provide guidelines for all of that.

4 Q. Okay. But to be more specific, more
5 specific, are there any other towers that are
6 built on 25 percent grade or greater than, greater?
7 How about the -- let me -- how about the tower,
8 when you're standing at Dan's Rock, what is the
9 tower that's right down off of Dan's Rock?

10 A. Seventeen.

11 Q. Seventeen?

12 A. Uh-huh.

13 Q. That goes pretty steep down over there,
14 I mean, from what I can see --

15 A. Uh-huh.

16 Q. -- but is that tower built on a pretty
17 steep grade or any -- if you take 17, 16 then, are
18 they on a steeper grade?

19 A. There -- well, there are -- there are
20 places within the disturbed area that are -- exceed
21 that as, you know, the area is very mountainous.
22 So, you know, you could be at a 10 percent grade
23 and there is a little anomaly there, you know,
24 in the terrain that might be 20 percent and then
25 it goes right back. So is the majority of the

1 area exceed that, no; but are there little kind
2 of anomalies within the disturbed area, yes.

3 Q. But none of the towers will be built on
4 a --

5 A. All the towers -- when the towers are
6 constructed, they will be on a pad that has a cross
7 slope of about one (1) percent.

8 Q. All right. I think it was brought -- and
9 another, just a correction, I think, for Ms. Stark.

10 MR. POWELL: You had asked a question
11 about the short towers and the tall towers. I
12 think that was just corrected by Ms. Ridenour
13 where she asked what the actual height was on
14 those towers.

15 BY MR. POWELL:

16 Q. So the short tower, including the blade,
17 is 426 feet?

18 A. Yes, sir.

19 Q. And the tall towers, including the blade,
20 is 484 feet.

21 You mentioned, you know, and I was
22 corrected earlier, I thought the short towers
23 were 1, 4, and 6. They are 1, 5, and 6. Is that
24 not correct?

25 A. Yes, sir.

1 MS. STARK: Thank you.

2 MR. POWELL: Just as a correction for you.

3 BY MR. POWELL:

4 Q. On another thing that was brought up
5 here then by Mr. Ridenour, I think, these towers
6 themselves then, they are not going to be fenced?
7 There is no fencing around each tower?

8 A. No.

9 Q. They are open.

10 Will the property surrounding this whole
11 array, will that be posted as "No Trespassing,"
12 or will there be no trespassing where access
13 areas, roads, or whatever have you, will there
14 be "No Trespassing" signs posted around?

15 A. Yes. So one of the provisions of the
16 ordinance -- and I can look it up, if you would
17 like -- is that the project include various warning
18 signs and so forth. That's actually written into
19 the code. We will comply with that.

20 The entire project is located on private
21 property. There will be access points from the
22 project to the public road in certain places,
23 and at those places, there will be a gate that's
24 locked and so forth.

25 All of the equipment, the transformers

1 and the tower itself, you know, it does have a
2 door on it, so the maintenance technician can go
3 in there. It's locked. There really isn't any
4 unsecure part of the project.

5 Again, it is on private property. If
6 someone from the general public is up there
7 wandering around, they shouldn't be. Could
8 you walk up and, you know, put your hand on it
9 and touch it? Yes, you could.

10 Q. Well --

11 A. You shouldn't be on there, and if the
12 security people find you there, they will escort
13 you away, but, you know, is that possible? Well,
14 I suppose it is.

15 I would say that none of the projects
16 that I have personally worked on have a perimeter
17 fence. I don't know that I have ever even seen
18 a wind farm with a perimeter fence anywhere.

19 Q. Now, I -- a perimeter fence around the
20 total scope of the area, I am not looking for a
21 Donald Trump fence or wall or anything of that
22 nature. I'm just -- you know, there is a lot of
23 hunters up around in that area.

24 A. Yes, sir.

25 Q. In fact, I would probably think that some

1 of these owners and property owners lease some
2 of this ground for hunting or allow friends for
3 hunting and so forth. So I am just visualizing
4 these hunters in the area, you know, coming in
5 contact. I have to agree with you, it's private
6 property; they shouldn't be there.

7 I am just wondering if these property
8 owners shouldn't post these areas, particularly
9 where a tower is located and post it particularly
10 with "No Trespassing" signs to eliminate any hunter
11 there or whatever have you, you know, getting into
12 the area, just as a safety precaution.

13 A. Well, I believe that I can commit on
14 behalf of the applicant that we would stipulate
15 to it as a condition to the permit that the
16 perimeter of the wind farm itself would be posted
17 with "No Trespassing" and warning signs at a
18 regular interval. I don't think that's any problem
19 at all.

20 Q. Yeah, and I -- and during construction, of
21 course, you will have security people involved --

22 A. Yes.

23 Q. -- during construction.

24 A. Yes.

25 Q. I am just thinking down the road when the

1 construction is over with, and they were there,
2 and, you know ... and that kind of thing.

3 A. I agree.

4 Q. One other -- forgive me. (Perusing)
5 One other question there -- I forget who it was,
6 because I think it was yesterday -- asked in
7 reference to the Summit Subdivision, and I think
8 the question was how close was a tower to the
9 Summit Subdivision.

10 I think the answer was that the closest
11 tower or -- the closest tower was 2100 feet from
12 the closest residence --

13 A. Yes, sir.

14 Q. -- at Summit Subdivision --

15 A. Yes, sir.

16 Q. -- but that's to the closest current
17 residence.

18 Is there a possibility in that subdivision
19 that someone may want to build a house -- I don't
20 know where that boundary line is of the Summit
21 Subdivision. How close is that tower to the
22 boundary of the Summit Subdivision?

23 A. Hmm, I don't know exactly, but I do know
24 that it meets the setback requirement as set forth
25 in the code. So it's -- whatever it is, it's

1 further than that.

2 Q. To the -- to the --

3 A. To the property line.

4 Q. To the property line?

5 A. Yes, sir.

6 Q. But, currently, a resident is -- a
7 residence is built within 2100 feet of that tower
8 that's there.

9 A. Yes, sir.

10 Q. So it is a possibility then that probably
11 maybe in the future, another person may want to
12 build a residence that would get within that 2,000
13 feet. Is that a possibility?

14 A. I suppose it's possible, and I don't know
15 that there would be anything that would prevent
16 that. The code provides a separation distance for
17 an industrial wind turbine to a residence. I think
18 if someone voluntarily chose to build their house
19 closer to that, I don't think the code prevents
20 that.

21 Q. Okay. I just -- you know, I am asking
22 that question because I am looking at or
23 visualizing that Summit Subdivision and where
24 the boundary line would be, and I'm -- and, you
25 know, there is more development still going on

1 in that subdivision. There is more development
2 going on. So I am wondering if the placement of
3 that one tower then --

4 A. Prohibits someone from building their
5 house?

6 Q. -- yeah, prohibits --

7 A. No, it does not.

8 Q. Well, wouldn't -- from the code, wouldn't
9 it -- I mean, the tower being there wouldn't
10 prohibit them from building a residence, but
11 they would have to -- wouldn't they have to get
12 a variance then if they wanted to get within 2 --
13 inside 2,000 feet?

14 A. No. The code is for a wind turbine
15 to a residence. I don't believe there is any
16 part of the subdivision ordinance or the zoning
17 ordinance that prevents a residence from being
18 constructed any distance from a wind turbine,
19 if they so choose.

20 Q. Not if they so choose, but, I mean,
21 isn't that part -- that's part of our variances
22 that we're looking at with these property owners
23 where the towers are being placed now that
24 the towers do not meet the 2,000-foot variance.
25 So --

1 A. But they are existing.

2 Q. Yeah.

3 A. Right.

4 Q. Well, what I am saying is, if I want
5 to build a house in Summit Subdivision and I want
6 to build it up on the -- you know, the furthestest
7 point of wherever that boundary is, it's got to
8 be probably beyond this one that's 2100 feet.
9 So wouldn't that bring me within the 2,000 feet
10 of the tower?

11 A. Theoretically, but I don't think that's
12 prohibited by the code. I don't think that --

13 Q. Well, it's not -- no, I am not saying
14 it's prohibited by the code, but if I want -- if
15 I want to be that property owner and I want to
16 build that residence there, then I am going to
17 have to kind of enter into one of these agreements
18 like one of the property owners that are here
19 seeking these variances.

20 A. I don't think so.

21 Q. You don't think so?

22 A. No.

23 Q. You are certain -- I mean, they certainly
24 wouldn't want to give me a lease or give me some
25 kind of an agreement that would allow me to build

1 within that 2,000 feet, I guess, but that's up to
2 me. If I want to live within the 2,000 --

3 A. That's right. So the way the -- the
4 way the code is set up, there is a property line
5 setback that was deemed by the County to be the
6 appropriate setback from the property line that
7 would allow someone to build a house anywhere
8 they choose on that adjoining property without
9 harm. So we are meeting that property line
10 setback.

11 The separation distance is from an
12 existing residential structure to a proposed
13 wind turbine site. Once the wind turbine were
14 constructed, if someone so chose to build something
15 closer than that, I don't think there is anything
16 that prevents them from doing that.

17 MR. GETTY: If I can, Mr. Powell, I will
18 just point out, I think that's a legal question
19 in terms of the application and the ordinance. I
20 would proffer that that has a legal issue. There
21 is nothing in the code that prohibits someone
22 deciding to build a house closer. The application
23 of this ordinance is as to the wind farm. It
24 doesn't work in reverse --

25 MR. POWELL: Yeah.

1 MR. GETTY: -- at least as drafted.

2 MR. POWELL: Yeah, I'm not -- I really
3 wasn't inferring that, you know. I am just trying
4 to visualize some future property owner, you know.

5 I am not pinning that as saying that's a
6 restriction for you or for that tower or whatever.
7 I am just saying that that's -- that's something
8 that somebody may have to deal with someplace along
9 the line.

10 MR. McKEE: If I may clarify, if I am
11 following what you're asking, if the purpose of
12 the ordinance, as designed, is for the protection
13 of the health, safety, and welfare of the citizens
14 of Allegany County, what you are suggesting is if
15 a citizen decides to build a lot in there, after
16 you grant the variance, aren't you, in fact, now
17 putting the health and safety of potential building
18 for people in jeopardy? Is that really what you're
19 trying to get at?

20 MR. POWELL: Amen, and that's why you're
21 a lawyer.

22 (Laughter)

23 MR. GETTY: And the answer is, there is
24 nothing in an ordinance that applies. It doesn't
25 disqualify that tower --

1 MR. POWELL: I understand that.

2 MR. GETTY: -- and it doesn't disqualify
3 the owner. The owner can build the house under the
4 Allegany County ordinance.

5 MR. POWELL: I understand that, and that's
6 why he can explain it better than I can because he
7 is a lawyer.

8 BY MR. POWELL:

9 Q. But what I am looking at and what I
10 want to specifically state from this is that the
11 ordinance is set up with a 2,000-foot variance.
12 That 2,000 foot has to be adhered to for the public
13 safety, and that's specifically an example of why.
14 Understand what I'm saying?

15 MR. GETTY: No.

16 BY MR. POWELL:

17 Q. It's not a restriction to you. You've
18 met your restriction. It's 2,000 feet.

19 A. Yes.

20 Q. So if some property owner in that
21 subdivision wants to move in there and get within
22 that 2,000 feet, then he does it at his own risk;
23 but the ordinance is set up that it's a 2,000-foot
24 restriction for that simple reason, for his safety
25 and his well-being, and that's why we're here,

1 really here, because of these variances.

2 A. Well, I would respectfully add a little
3 flavor to that. I think the ordinance is --
4 was created so that the separation distance is
5 for proposing a wind farm project to an existing
6 residence. That's quite a different situation
7 than once the tower is existing and someone is
8 choosing to put their house somewhere closer
9 than that, if they -- you know, if that's the
10 way they want to do it; and there would be no
11 way to anticipate that, you know, where they want
12 to do that. I mean, that would be impossible.

13 Q. That's exactly right and, you know, I
14 don't intend to belabor that point or whatever
15 have you. What I am trying to make from that point
16 is that the zoning ordinances and restrictions are
17 set up specifically for that protection to all
18 landowners and all property owners.

19 A. Right.

20 Q. Okay?

21 MR. McKEE: Mr. Powell, there has been a
22 request made to take a break.

23 MR. POWELL: Okay.

24 MR. McKEE: So it's 10:30. Can we take --
25 do you want a ten-minute break?

1 CHAIRPERSON WILLIAMS: Ten minutes, yes.

2 MR. McKEE: We will reconvene at 10:40.

3 (At 10:32 a.m., break taken until
4 10:45 a.m.)

5 CHAIRPERSON WILLIAMS: If we could come
6 to our seats, please, so we can resume.

7 MR. McKEE: Mr. Powell, do you have
8 additional questions?

9 MR. POWELL: Yes.

10 MR. McKEE: Very well. You may continue.

11 MR. POWELL: Am I making a nuisance of
12 myself?

13 MR. McKEE: No, sir. I just wanted to
14 make sure that I would recognize you appropriately.

15 - - -

16 CONTINUED EXAMINATION OF MATT BREWER

17 BY MR. POWELL:

18 Q. Let me try to figure out where I'm at
19 here. I think we just covered about future
20 residences in the Summit Subdivision and how
21 they may be impacted or whatever have you. The
22 next note that I have is, that I want to refer
23 to is what was given to us as Exhibit MMMM, four
24 M's, and also then on the page in the section of
25 360-92, the page which is entitled "Electromagnetic

1 Interference Analysis, Chronological History of
2 the Associated Work."

3 I think these two, these two things,
4 would you say, kind of go hand in hand? These
5 are some of the responses from some of the people
6 that are affected by the electromagnetic or am I
7 wrong?

8 A. I wouldn't say they are affected by it.
9 I would say they responded to the EIA.

10 Q. Yeah, the respondents --

11 A. Yes, sir.

12 Q. -- to --

13 A. Yes, sir.

14 Q. -- the EIA --

15 A. Yes, sir.

16 Q. -- and everything.

17 Now -- and the only question I really
18 have about this is that, you know, we're talking
19 about -- I think it was established early on that
20 there were like 18 towers in this array. I only
21 count like eight respondents here on MMMM, and
22 there is like seven respondents here on the thing
23 that's given to us here on the -- on this portion
24 of this presentation here.

25 My question is: Have all the affected

1 people in that array of towers been heard from,
2 one way or another?

3 A. So this study, as required and detailed
4 in the ordinance, was submitted to all those
5 different parties, and they had a 90-day review
6 period. I know that there were meetings with
7 those folks. They had at least two opportunities
8 for them to come and ask questions, get additional
9 information and so forth, if they wanted to.

10 So they have had the opportunity to
11 review and come in on the study. They also had
12 the opportunity to come and physically ask more
13 questions of the consultant that did the study
14 and so forth. Have all, every single one of them
15 written, written a letter back? No, they haven't.

16 Q. They had their opportunity. If they
17 didn't take advantage of it or whatever, they
18 had the -- they had their opportunity?

19 A. That's correct.

20 Q. Then if they're affected at some point
21 in time or whatever have you, you intend, I'm sure
22 you intend to deal with those complaints as they
23 come in or whatever?

24 A. Yes, sir, that's correct, and it's not
25 just an intent. It is a requirement of Section

1 360-92, with which we will comply, that should
2 there be any issues that would arise in the future,
3 that they will be addressed by the applicant; and,
4 in fact, the applicant has to post a bond for any
5 future electromagnetic interference work that, you
6 know, would occur. So, you know, the County would
7 have that money in place to do that. If for some
8 reason, the applicant didn't do it, they could do
9 it themselves; but, yeah, should any issues arise
10 in the future or whatever, you know, associated
11 with this project, then they would be addressed,
12 yes.

13 Q. Okay. Okay. Now I am going to get into
14 what I consider the nitty-gritty of this thing
15 that affects us as a board, and that's these
16 requested variances; and I might make a speech
17 and say that, you know, this total project,
18 however you look at it, whether you're pro or
19 whether you're con, against it, you know, if we
20 took a survey or whatever of everybody, I think
21 we're all in agreement, we're all or 90 percent
22 of us for sustainable energy, green energy, a
23 project that's typically of this nature.

24 But what we have to deal with, here,
25 the board, we don't deal with the pros and cons

1 of whether it's a -- I want to look at them or
2 whether I think they're an eyesore or whether
3 this or that. We have to deal with these variances
4 that are requested and the special exception. I
5 want to just make that clear to the proponents,
6 as well as the opponents. So my intent in here
7 is to get to this, and I think it was brought up
8 by one of Ms. Stark's questions here.

9 These variances have been brought up
10 before us and said we're requesting ten variances,
11 right?

12 A. Yes.

13 Q. Okay. There are eight property owners
14 and then the other -- the other two entities,
15 U.S. Cellular and the State of Maryland that are
16 affected with slight setbacks or whatever have you.

17 Now, you did answer my question a while
18 ago that each one of these eight property owners,
19 with the exception, I think it is, of the Judy
20 [sic] and Agnes Moffitt property, they do not live
21 there on that property; there is no structure there
22 that is affected?

23 A. That's right.

24 Q. But yet we're asking for variances for
25 that property. The reason being?

1 A. The reason being that that individual,
2 I believe, had made a building permit application
3 to the County at that location, and they just never
4 followed up on it.

5 Q. Okay. Like I say, there is ten or ...
6 ten variances requested by the applicant, and I
7 think Ms. Stark brought out that actually there
8 are 26 variances requested here because some of
9 these properties are affected by more than one
10 tower and multiple setbacks. So, exponentially,
11 would you agree that we are now looking at 26
12 variances?

13 A. No. I believe that interpretation of
14 the code, in my opinion, the variance request is
15 to a residence, a residential structure, and there
16 are eight of those we have and so we have eight
17 requests.

18 Q. But there are eight property owners --

19 A. Yes.

20 Q. -- and each of those eight property owners
21 are affected by multiple towers.

22 A. But there are only eight residential
23 structures which are being impacted.

24 Q. I know, but if this was -- if this was
25 brought to this board by these property owners, if

1 they brought that, brought this to this board, they
2 could not bring that as saying we're coming as
3 eight property owners and we want eight variances.
4 We would have to look at that as how many variances
5 we had to give them, each property owner.

6 MR. GETTY: If I can, Mr. Powell, and I
7 don't mean to interfere in your thought process
8 at all.

9 MR. POWELL: No, feel free.

10 MR. GETTY: This ordinance is a little
11 bit different than the other ordinances, I
12 believe, in Allegany County. This one specifically
13 addresses the variances as variances from the
14 residence. It's not variances from the tower
15 locations.

16 It could have been. The ordinance
17 could have been written that a variance has to
18 be obtained from every tower to a residence.
19 For whatever reason, the county commissioners
20 chose to do it in a different direction.

21 So in the applicant coming forward to
22 identify for you what is being requested, we are
23 using what we believe the ordinance actually says,
24 and that is a variance from a residence. It's
25 semantics to the extent that there are multiple

1 towers that conflict with the residence, but I
2 think in -- I think that's just as an explanation
3 as to why we're here this way.

4 I don't disagree, there are residences
5 that have more than one issue and more than one
6 tower. We are simply addressing it and presenting
7 it to you as we understand the ordinance to be,
8 a variance from the residence.

9 MR. POWELL: Okay.

10 MR. McKEE: But I think --

11 MR. POWELL: But I -- I agree with what
12 you're --

13 MR. McKEE: Oh, I'm sorry. I was just
14 going to say, I think what you're -- what you're
15 trying to get to is, as part of the board's
16 decision-making process, when we look at each
17 one of the Willison property requests for a
18 variance, the board has got to look at this and
19 say they want 500 feet, they want 900 feet, they
20 want -- so you were saying you would have to make
21 an analysis of five different distances from the
22 towers --

23 MR. POWELL: Right, right.

24 MR. McKEE: -- in determining one variance
25 request.

1 MR. POWELL: Right, and I am not
2 disagreeing with what you say, but whether it's
3 from the residence to the tower or whether it's
4 from the tower to the residence, there are --
5 let me take it, for example, the -- is it the
6 Keiter property, Keiter or Keeter, Keiter property,
7 this property needs one variance from Tower 5 in
8 the amount of 304 feet.

9 That's another thing we haven't discussed
10 at any of this as to what, how much or what
11 distance any of these variances have been. Some
12 of them are minor, but some of them are major. So
13 the Keiter property needs a variance from Tower 5
14 of 304 feet.

15 When we get to the Henry and [sic] Loar
16 property, that property needs one variance,
17 and it's from Tower 11 for 224 feet.

18 We get to the Lashbaugh property. There
19 are two towers that affect the Lashbaugh property,
20 Tower 11 and Tower 12. They have to have a
21 variance of 998 feet from Tower 11. They only
22 have to have 66 feet variance from Tower 12.
23 Now that doesn't make any difference whether
24 it's from the towers to the property. It's from
25 the property to the tower. So there is two.

1 The Michael Williams property --

2 MS. WILLIAMS: Willison.

3 MR. POWELL: -- that property -- that
4 property --

5 MS. WILLIAMS: Willison.

6 MR. POWELL: Oh, Willison. I'm sorry.

7 The Michael Willison property, this
8 property needs five variances between itself
9 and Tower 8 of 440 feet, Tower 9 in the amount
10 of 252 feet, Tower 12 in the amount of 867 feet,
11 Tower 13 in the amount of 1,113 -- 1,013 feet,
12 Tower 14 in the amount of 547 feet.

13 The Paul and Joann Willison property,
14 that property needs five variances between itself;
15 Tower 8 in the amount of 570 feet, Tower 9 in the
16 amount of 544 feet, Tower 12 in the amount of 541
17 feet, Tower 13 in the amount of 794 feet, and Tower
18 14 in the amount of 574 feet.

19 The Dan, Daniel Willison property, that
20 property needs five variances between itself and
21 Tower 8 in the amount of 152 feet, Tower 9 in the
22 amount of 552 feet, Tower 13 in the amount of 619
23 feet, Tower 14 in the amount of 942 feet, Tower 15
24 in the amount of 411 feet.

25 The Eugene and Stephanie Cesnick property,

1 that property needs one variance and the separation
2 distance between it and Tower 17 of 520 feet.

3 And then the John and Agnes Moffitt
4 property that we have discussed, requesting four
5 variances there: Tower 6 of 477 feet; Tower 7,
6 919 feet; Tower 8 of 159 feet; Tower 11 in the
7 amount of 192 feet.

8 Then the only other two incidents or
9 affected properties is the U.S. Cellular property
10 which needs a setback variance of 65 feet or 68
11 feet, and the State of Maryland property which
12 was on the map showing they need a setback variance
13 of 402 feet from Tower 17. The tower -- the U.S.
14 Cellular tower was from Tower 16.

15 BY MR. POWELL:

16 Q. Now, do you not agree then that we, as
17 a board, we have to address 26 variances?

18 A. I believe there are -- my understanding
19 was that we have one variance request for each
20 residence with some of which have more than one
21 location of relief, I guess is how we look at that.

22 MR. GETTY: We will stipulate that within
23 the eight variances that we are submitting, there
24 are sub-issues. There are sub-issues, and if
25 you add the sub-issues, if you use Willison as

1 an example with the need for five variances, as
2 to our application for a variance as to Willison,
3 you all have five issues to decide.

4 MR. POWELL: Okay.

5 MS. WILLIAMS: Five what? I didn't hear
6 him.

7 MR. GETTY: Issues. I'm sorry.

8 MR. POWELL: He is stipulating that --

9 MR. GETTY: We have not --

10 MR. POWELL: -- we, as a board, we have
11 five issues. They are looking at it as one.

12 MR. GETTY: Yeah, it's -- I don't want
13 to get tied up in semantics, and I don't want to
14 make it difficult for you all.

15 We acknowledge that in each, in each
16 application for a variance, as Mr. Brewer went
17 through them yesterday, when he described Willison
18 as an example, he was indicating the towers that
19 he needed -- you know, that variances were required
20 from the residence to the tower, showing the
21 distance and describing why; and we acknowledge
22 that if you're looking at Willison, although we
23 have one application, which we think is correct
24 under the ordinance, you are going to have multiple
25 issues to determine in respect to that application.

1 MR. POWELL: Amen, and that's what makes
2 this very difficult for this board. I have been
3 on here a long time and have addressed a lot of
4 variances and residential variances and that kind
5 of deal.

6 Where one comes to mind -- and I am just
7 using this as an example as trying to show you what
8 my problem is -- we had an elderly couple come with
9 a -- requesting a two-foot variance from a on-paper
10 alley that was not open. It was -- there was no
11 alley there. It was on paper, but because they had
12 built their carport within two feet of the limit of
13 this, they were asking for a variance of two feet
14 from a non-existing alley.

15 That variance was denied. Hated to do
16 that, but it's in respect of protecting these
17 zoning ordinances from whatever is going to happen
18 in the future or whatever kind of programs are
19 going down the road or whatever have you.

20 I think one of the other questioners a
21 while ago asked a question -- I think Mr. Boyd
22 asked a question -- well, he asked a question
23 about reducing the variance distances and how
24 many towers would not be affected, how many towers
25 would you have in existence if we denied all the

1 variances; and I think I did, earlier, a projection
2 where it leaves six towers. I think 11 of the
3 17 towers in this project are affected with these
4 variances, 11 of the 17. That's 65 percent of
5 the total project.

6 I think Mr. Boyd asked a question, you
7 know, if this board allowed all these variances,
8 would that not be setting precedence. Now I think
9 your reaction to that was, no, that would not be
10 setting precedence; but, in my opinion, I think
11 it would be, because all of these cases -- and you
12 can bet your life at the end of this case, this
13 case will be used by other zoning boards and other
14 litigation or whatever have you. So I want to just
15 stipulate how difficult this is for us to allow
16 26 variances, not just ten.

17 A. Well, if I can -- I am still on the stand
18 here --

19 BY MR. POWELL:

20 Q. Yeah.

21 A. -- if you would allow me just to make a
22 couple comments about that, and I appreciate your
23 viewpoint and experience as a longstanding member
24 on this board.

25 I would just like to reiterate though,

1 the example, you know, you cited of the variance
2 to the alley, and I think I can say with certainty,
3 every single variance that the board members here
4 have ever evaluated were to a property that was
5 beyond the control of the applicant.

6 So in other words, the folks in that
7 example, they were asking for a variance to a
8 property that they didn't own. Correct?

9 Q. Yes.

10 A. They had no rights beyond their own
11 property line or beyond the building envelope
12 they're entitled to under the ordinance.

13 This is a very different situation. We,
14 the co-applicants, are not asking for a variance
15 to someone else's property because the setbacks
16 were in the place, in this case, the residential
17 separation distance, to protect someone who --
18 it could be anywhere, to protect someone who does
19 not voluntarily want to be part of this, leave me
20 alone, and in that case, you must stay back so far.

21 We are not asking a variance from any
22 of those folks or from any property that doesn't
23 voluntarily want to be part of the project, and
24 I think the reason that both in the section of
25 the code that talks about the setback requirements

1 and the separation requirements, both of them
2 specifically allow the applicant to request a
3 variance from the board with authorization of the
4 property owner, I think recognizing the practical
5 difficulty of meeting the very large setbacks that
6 are established in the ordinance, which I consider
7 certainly larger than they would be in other --
8 in a lot of other places.

9 I think that that's evidence that when
10 the ordinance was created, they recognized that
11 this was going to be an issue and we need to put
12 provisions for a variance right into the ordinance,
13 and so it kind of tells you how to do that.

14 So I think that the variance, variances,
15 that you are considering today are not like the
16 ones that have been considered in the past. We
17 are not infringing on someone else's rights in any
18 way, not another property owner, not the general
19 public. These folks are part of this application,
20 and they are asking you for a variance to their
21 own house that they live in, and they willingly
22 take part in this process.

23 So I think that is different and relative
24 to, you know, what the future might be. You know,
25 I don't know if there is a written directive for

1 the board, but I believe that all cases should be
2 evaluated independently on their own merit. That's
3 how I have always done it, I guess, in the past.

4 Q. I agree. I agree with exactly what you're
5 saying, but in relationship to my answer with these
6 individuals coming before us, asking for this
7 variance, does not relieve us of our responsibility
8 to the general public or to the spirit of the
9 zoning ordinance.

10 Just because these individuals will, so
11 to speak, take the risk of having this turbine
12 closer to their residence, I don't have any problem
13 with that, that's their risk; but if something
14 happens or whatever have you and we have given
15 these variances, that might play with my mind down
16 the road a little bit; but in getting back to this,
17 these applicants have to enter into this agreement
18 and request these variances or you wouldn't be
19 here. That just --

20 A. That's correct.

21 Q. That just --

22 MS. WILLIAMS: If I am --

23 BY MR. POWELL:

24 Q. -- gives you the benefit of bringing
25 this case before us, but it doesn't say that that

1 relieves us of our responsibility to react to the
2 variance.

3 A. Certainly not, and I wasn't suggesting
4 that. I was just suggesting in this particular
5 case, which is different than I think every other
6 case that has come before this board, we don't
7 have a presumption of infringing on or impacting
8 the public. The only persons that are affected in
9 this case -- so, for example, in the example you
10 gave before, you're pushing the building closer to
11 the public way or someone else's property. That's
12 impacting someone else. In this case, the only
13 persons that are being impacted are not the general
14 public or not another property owner. It's -- the
15 only impact is on their own, their own residence.

16 MS. WILLIAMS: If I may, with due respect
17 to Mr. Powell, I think we have looked at this
18 with an unbiased eye. I see this application as
19 different because you are asking for a variance
20 from itself, the co-owner or the co-applicants
21 from themselves. I have not looked at this case
22 in a bias way, but I have been trying to listen
23 to both sides.

24 I agree with Mr. Powell, it is a very
25 hard decision to make with all that it has been

1 involved; but, again, I just want to iterate that
2 I have been trying -- and I think the board
3 generally tries to listen to both sides before
4 some decision is made.

5 MR. BREWER: Absolutely, and I -- if
6 I could, I think the other, you know, important
7 factual consideration here is I hope that and
8 I believe that we have demonstrated to the board
9 the amount of care and consideration and effort
10 that has been put into this application.

11 MS. WILLIAMS: Absolutely.

12 MR. BREWER: The configuration that's
13 presented to you and the relief sought is not the
14 result of kind of throwing this thing together at
15 the last -- I mean, this is 18 month's worth of
16 work to achieve a configuration with the least --
17 you know, that this is the best scenario after all
18 of that; and so we are not asking for more than
19 what we absolutely need with, you know, the kind
20 of background dialogue, all the other constraints.
21 To lessen some of the relief sought, you would
22 impact some of the other things, you know, in a
23 way that's worse.

24 MR. GETTY: And if I can, just the
25 realization that there is a record of these

1 proceedings and not to burden this discussion
2 any longer, I do need to point out that there is
3 also a legal issue that is associated with this
4 very unique variance provision, and Mr. Brewer
5 has referred to it as, and I have, as "a variance
6 from ourselves for ourselves" --

7 MS. WILLIAMS: Right.

8 MR. GETTY: -- and that's because the
9 ordinance, the ordinance envisions in that in order
10 to get to a variance, we have to get permission.
11 That's the residential permission from each of the
12 owners of a house, that we need to obtain their
13 permission to apply for the variance. That's what
14 the ordinance says.

15 I simply want to point out for purposes
16 of the record that we have also done something
17 else, and that is that these individual residential
18 owners are applicants, and it wasn't done to be
19 cute. It wasn't done, you know, just simply
20 because we could.

21 In zoning law, there is a concept called
22 "merging," and in 1999, the Court of Appeals was
23 caused to look at an issue where someone had two
24 lots, built a house in the middle, straddling the
25 line between the two lots, and then decided to

1 tear down the house and wanted to sell the two
2 lots; and the zoning principle that the court
3 said was, when you did that, when you combine
4 the properties in that fashion, that you have
5 merged those interests and you now have one lot.

6 So what does that have to do with this?
7 When these individual residential owners become
8 applicants along with Dan's Mountain Wind Force,
9 there is a legal issue, and our proposition is
10 that, legally, as a matter of zoning, we have
11 merged their properties with our properties,
12 and we look at the greater boundaries, the only
13 ordinance that talks about variances, and we
14 are here in honor of that and to produce evidence;
15 but we also have a legal proposition that,
16 notwithstanding what the ordinance says, there
17 is one applicant here, in terms of this property,
18 and that those internal interests, the distances
19 that are associated with the ordinance and from
20 these residences, when the people have not only
21 consented to the variance but also joined as a
22 co-applicant, that they, in effect, have caused
23 a merger as that concept exists in law.

24 I simply wanted to make sure the record
25 reflected, you know, that is a part of the

1 position, but we respectfully have produced it.
2 I am going to go back through with Mr. Brewer each
3 of the -- each of the variance requests, just to
4 make sure that we have honored and respected the
5 difficulty that you all are going to have in
6 addressing this issue. Thank you.

7 MS. WILLIAMS: Any other questions
8 of Mr. Brewer?

9 MR. UPHOLD: I have just one.

10 MS. WILLIAMS: Okay.

11 - - -

12 EXAMINATION OF MATT BREWER

13 BY MR. UPHOLD:

14 Q. This is basically on a safety issue on
15 one variance particularly that brings it down to
16 less than a thousand feet away from the proposed
17 residence.

18 Hypothetically, if a blade or a turbine
19 itself would come down, do you know the distance
20 that that could possibly fall?

21 A. Yes. So the subjects -- well, with the
22 exception of the Keiter property, all of the other
23 property, residential structures, are adjacent
24 to the taller units, and so that would be the
25 worst case. So the height of those, if somehow

1 that occurred and one of the blades was perfectly
2 perpendicular with the tower and had some
3 catastrophic failure and it went straight down,
4 so that would be 484 feet. So the separation
5 distance we are proposing is much, much further
6 than that.

7 Q. Thank you.

8 A. Yes, sir.

9 MR. POWELL: I just want to state that
10 I don't know what I said that led anybody to think
11 that I am bias because I am not. I just was trying
12 to describe the difficulty, the difficult issue
13 that we have is with the variances.

14 MR. GETTY: Please, please understand, at
15 no point have I inferred you are bias at all.

16 MR. POWELL: Okay. I just --

17 MR. GETTY: That is not what I was trying
18 to do. I have a job in terms of preserving an
19 interest for my client.

20 MR. POWELL: Well, I understand that.
21 I just want to go on record, I in no way am bias.
22 I just want to --

23 MR. GETTY: And I didn't --

24 MR. POWELL: -- I have in my mind, it's
25 narrowed down to my focus is the variance issue,

1 and I just want to cover that to the greatest
2 degree that we can to have it justified.

3 MR. GETTY: Mr. Powell, if you took
4 anything from anything I said, then I apologize
5 for it. That was an unintended consequence. That
6 was not what I meant, certainly.

7 MR. POWELL: Okay.

8 MR. McKEE: Are there any other questions
9 from any members of the board?

10 (There was no response.)

11 MR. McKEE: Mr. Getty, do you want to
12 redirect?

13 MR. GETTY: Please.

14 - - -

15 REDIRECT EXAMINATION OF MATT BREWER

16 BY MR. GETTY:

17 Q. Mr. Brewer, I am going to show you --
18 well, let's back up for a second.

19 There was a question with respect to a
20 residence on Kens Lane that is not a participant
21 in this project. Do you recall that?

22 A. Yes.

23 Q. And you responded in respect to your
24 opinion as to the status of Kens Lane, correct?

25 A. Yes.

1 Q. As a background to your investigation of
2 Kens Lane, did you have occasion to review a report
3 prepared by Lowell Chapman?

4 A. I did.

5 Q. And Lowell Chapman is regarding a survey;
6 is that correct?

7 A. Yes.

8 Q. And is it also correct that Mr. Chapman,
9 who is a property line surveyor, in fact, was
10 the author of a plat representing a subdivision
11 adjacent to Kens Lane?

12 A. Yes, sir.

13 (Exhibit RRRR was marked/entered into
14 evidence.)

15 BY MR. GETTY:

16 Q. Okay. I am going to show you what has
17 been marked as Exhibit RRRR and ask if you can
18 identify that.

19 A. Yes. This is the letter signed by Lowell
20 Chapman, dated October 20, 2014.

21 Q. And if you would, could you read for the
22 board what Mr. Chapman has provided, in terms of
23 information as to the status of Kens Lane and his
24 intent as to the status of Kens Lane.

25 A. Yeah, I will just read this --

1 Q. Yes, please.

2 A. -- verbatim.

3 "I am writing in reference to the
4 subdivision plat I prepared for Mary Marsha
5 Keiter and others, recorded as Plat No. 1475
6 among the Allegany County plat records. The
7 plat is dated July 1, 1997. It is a subdivided
8 parcel considering -- consisting of 185.35 acres,
9 located on Dan's Mountain, into four lots.

10 "The plat shows a right-of-way labeled
11 'Kens Lane' that extends from Burning Mines Road
12 into the northern part of the subdivision, along
13 the boundary line between Lot 1 and Lot 2, and
14 provides access to a proposed driveway that led
15 to the proposed dwelling on Lot 1. It also
16 provides access to a proposed driveway that led
17 to the proposed dwellings on Lot 2 and Lot 3.
18 The plat includes a 65-foot building setback
19 from the center line of Kens Lane on each side
20 of it.

21 "Note 2 to the plat states that the
22 right-of-way is dedicated to public use. A
23 question has arisen about whether the intent
24 of the plat was that Kens Lane was part of the
25 right-of-way being dedicated to public use.

1 "I am writing to confirm that my intent,
2 when creating the plat, was that Kens Lane was
3 being dedicated to public use as a right-of-way.
4 It would -- excuse me. It was intended as the
5 means of access for the proposed driveways that
6 would lead to the residences on all three northern
7 lots. That is why I included the 65-foot setback
8 from the center line on each side of Kens Lane.
9 Please let me know if you have any questions about
10 this, signed Lowell Chapman."

11 (Exhibit SSSS was marked/entered into
12 evidence.)

13 BY MR. GETTY:

14 Q. I have just handed you what I believe is
15 marked as SSSS and ask if you can identify that.

16 A. Yes, this is a letter from the office of
17 Robin Walsh, authored by Jamie Walsh, to me, dated
18 October 23, 2015.

19 Q. And what information is being conveyed to
20 you as a part of that letter?

21 A. This is a legal opinion as to the status
22 of Kens Lane, in general.

23 Q. And have you relied on the opinion that
24 Mr. Walsh has provided you in respect to forming
25 any opinion as to the status of Kens Lane?

1 A. Yes.

2 Q. And have you relied upon the information
3 provided to you by Mr. Chapman in forming any
4 opinion as to the status of Kens Lane?

5 A. I have.

6 Q. And with respect to Kens Lane, do you
7 have an opinion as to the status of Kens Lane as
8 a public right-of-way?

9 A. I believe it is a public right-of-way,
10 yes.

11 Q. And as a public right-of-way, is it
12 available for use as a part of this project,
13 as proposed and outlined by you in your earlier
14 testimony?

15 A. Yes.

16 Q. Mr. Brewer, Mr. Powell asked you a
17 question or a series of questions about the
18 ability to essentially make the project larger
19 than it already is. I have ... hopefully, here
20 in a second, we will...

21 I have pulled up on the screen an aerial
22 photo, which I think will come into clear focus
23 here in just a second, which I would indicate has
24 numbers down in the lower right which I believe
25 are the locations of the proposed turbines. Do

1 you see those?

2 A. I do.

3 Q. Specifically, with respect to Mr. Powell's
4 questions to you, if you look to the north, that
5 is north of Unit 1 at the northern part of the
6 array, is there available property associated with
7 being able to push or expand the overall property
8 available for this project to the north?

9 A. No, there is not. It's bounded on that
10 side by the Summit.

11 Q. Okay. If you can stay closer to the
12 microphone.

13 A. No, there is not.

14 Q. Okay. And is that the area of Summit,
15 the Summit Subdivision?

16 A. It is.

17 Q. And the -- at that point, do I recall your
18 testimony to be that Unit No. 1 is approximately
19 2100 feet from the nearest residence within
20 Harwood?

21 A. That's correct.

22 Q. Okay. And if we are to look at what
23 would be the east of the array that's there, can
24 you describe what available property, what property
25 would be available for use on to the east of the

1 project as proposed?

2 A. None really. This is the ridgeline right
3 here of Dan's Mountain, and this is where all the
4 existing telecommunication towers are located.

5 Q. Indicating down by the 17, the No. 17;
6 is that correct?

7 A. That's correct.

8 Q. If you were to move the project or expand
9 the project to the south, is that something that
10 is available for development?

11 A. No. This property is owned by the State
12 of Maryland and is not available for use.

13 Q. And immediately to the south of 17, am
14 I correct that that's where we were talking about
15 Dan's Rock, the Dan's Mountain communication
16 towers?

17 A. Yes, yes.

18 Q. And if we are to look to the west, in
19 the area west of the units that are shown there,
20 is there -- what development could be added, if
21 any, to the project laying to the west?

22 A. I don't believe any. That property is
23 occupied by the Mountainview landfill.

24 Q. Okay. And to the west, is that also
25 downgrade, downhill?

1 A. It is, it is. And, obviously, for, you
2 know, functionality, performance of the turbines,
3 you know, moving them down the hill, down an
4 elevation is, you know, obviously not desirable.

5 Q. Would expanding the project beyond the
6 scope of the some 2900 acres that now comprise
7 this project, would that be consistent with the
8 environmental design criteria?

9 A. No.

10 Q. And is that because the concept of
11 environmental design that has been employed is
12 the littlest footprint is what you're looking for?

13 A. Exactly, the smallest impact possible.

14 Q. If we can go back -- and I apologize --
15 here a second...

16 MR. POWELL: I thank you for that,
17 Mr. Getty. That was exactly what I was trying
18 to get at, but I couldn't visualize it.

19 BY MR. GETTY:

20 Q. If we go back to the variance application,
21 that's what we went through, and whether we're
22 talking about eight with a bunch of subparts or
23 26, there are requests for relief as to a number
24 of properties?

25 A. Yes.

1 Q. Okay. And yesterday, am I correct that
2 we went through, this is a generalized exhibit
3 showing all of the areas where relief is being
4 sought; is that correct?

5 A. For the separation distance, yes.

6 Q. And the first one that we talked about
7 yesterday was Keiter?

8 A. Yes.

9 Q. Okay. In terms of Keiter, and as a
10 follow-up to Board Member Powell's inquiries,
11 as to Keiter, am I correct that we need one,
12 we need relief from the residence to one tower?

13 A. Correct.

14 Q. And what tower is that?

15 A. No. 5.

16 Q. And in your graphic representation on
17 the panels as to the request for variance, you
18 have shown what is required by the code in each
19 instance; is that correct?

20 A. Yes.

21 Q. And in each instance on each panel, that
22 is the 2,000-foot setback to a residence; correct?

23 A. That's correct.

24 Q. And then you have demonstrated what the
25 actual separation is; is that correct?

1 A. Yes.

2 Q. Mr. Powell has gone through the math to
3 subtract what the actual separation is from the
4 separation distance. Did you hear the numbers
5 that he provided?

6 A. Yes.

7 Q. Do you agree that they are accurate math?

8 A. I didn't add them up, but I don't dispute
9 that that's correct.

10 Q. Okay. You chose not to represent it in
11 terms of exactly how many feet you were requiring;
12 is that correct?

13 A. Yeah. Well, actually, this, this box
14 right here tells you the difference --

15 Q. Okay.

16 A. -- and then this is what's required and
17 this is what it is.

18 Q. Okay. So on -- just so you can orient
19 me and orient the board, on each of the panels,
20 you have shown exactly the number of feet that
21 are comprised in the request for relief; correct?

22 A. That's correct. They are all up here in
23 this red box there.

24 Q. In the residential structure block, can
25 you describe for us what information is contained

1 in that representation.

2 A. It has the name of the property owner,
3 the required code separation distance, and
4 then the requested variance from that minimum
5 separation.

6 Q. Okay. And with respect, again, and
7 not to belabor, but as to Unit No. 5 and, in
8 particular, the Keiter residence, can you point
9 to those conditions that make this, this property,
10 unique and the specific hardship and/or practical
11 difficulty associated with this structure, the
12 residential structure, and the request for a
13 variance.

14 A. Sure. So, again, all of these variance
15 requests are the result of numerous constraints
16 and overlays that impact the final location in
17 a number of different ways.

18 In this particular case, you can see
19 that this turbine site is immediately adjacent
20 to these wetland areas here that were identified
21 in the delineation. Forcing this unit further
22 away to meet this separation requirement would
23 result in additional environmental impacts which,
24 in my opinion, are not warranted.

25 Q. In addition to what is shown graphically

1 on this Panel A-1, would you agree that moving the
2 unit further away from the Keiter residence, in
3 order to obtain the 2,000-foot separation called
4 for in the ordinance, would also have a residual
5 effect on the other turbines --

6 A. Yes.

7 Q. -- in the array?

8 A. Yes.

9 Q. And that's a part of what you testified
10 to yesterday as the coalition -- a collate of all
11 of the factors coming together, even though I can't
12 say the word?

13 A. That's correct.

14 And so, again, it's -- I know sometimes
15 it appears like that, but these are not just
16 kind of dots on the paper. So there is an access
17 road that connects them. There are stormwater
18 management structures and grading slopes and all
19 sorts of other considerations that -- that come
20 in, into play there.

21 Q. So if we go back one slide to (A), this
22 is the overall layout --

23 A. Yes.

24 Q. -- and do I understand correctly that
25 any time you are moving any of the towers, you are

1 affecting each of the other towers in relationship
2 to all of the design criteria that you have to
3 consider?

4 A. Yes.

5 Q. In terms of not just a cover, but each
6 of -- each of the requests that are associated
7 with variances, so we're clear, each of those
8 persons have signed a variance authorization;
9 correct?

10 A. They have.

11 Q. And each of those persons have signed as
12 a co-applicant to this project?

13 A. They have.

14 Q. If we can then go to the next panel, if
15 I've got it right, this is the Loar property?

16 A. Yes.

17 Q. And, again, with respect to the Loar
18 property, the panel in the upper right in red
19 indicates the number of feet which represent the
20 request for relief in terms of the variance?

21 A. That's correct.

22 Q. And, again, this depiction shows the
23 physical characteristics associated with the
24 property, including the wetlands area immediately
25 to the -- to, I believe, the west of that tower --

1 A. Yes.

2 Q. -- that property?

3 A. The wetland area is here. This is the
4 area that begins the potential woodrat habitat
5 and associated buffer. This was the stream channel
6 over here. So there are a number of different
7 constraints.

8 Q. And yesterday, you went through each of
9 the factors, each of the characteristics that are
10 associated with that request; correct?

11 A. Yes, sir.

12 Q. The next one would be Lashbaugh's.

13 And, again, with Lashbaugh's and the ones
14 we just went through, there is only one requested
15 relief in each of those panels, each of those
16 residences, leading up to this one; is that
17 correct?

18 A. Yes.

19 Q. Okay. So for Lashbaugh, what is the
20 distance that we are, again, looking for as relief
21 from, in terms of the ordinance?

22 A. So the black line here is the required
23 separation, and then the -- you know, this is the
24 actual distance between the unit and the residence
25 that is over in this box here. You can see that

1 we are requesting a 66-foot variance and 988 for
2 the closer one.

3 Q. And, again, the physical characteristics
4 involve the woodrat habitat; is that correct?

5 A. Yes, the woodrat habitat, and then, of
6 course, there are a lot of things that aren't
7 shown in here on this particular diagram that
8 are a consideration; microwave beam paths, you
9 know, setbacks from the property lines, all those
10 kinds of things.

11 You can see that -- so this is kind of
12 the top of the ridge here. You know, pushing the
13 turbine out beyond this would be down over, 400
14 feet down over the side of the mountain, you know,
15 on this side.

16 Q. There was another question from Board
17 Member Powell having to do with construction of
18 a 25 -- more than a 25-degree grade. Do you recall
19 that?

20 A. I do.

21 Q. In the area immediately to the east of
22 the tower, and I can't... (Pointing) Is it Tower
23 11?

24 A. Yes.

25 Q. What is the topography there?

1 A. Substantially steeper. This is sort of
2 the top of the ridge right here, and this is where
3 you would drop off and go down over the side of
4 the...

5 Q. And in answer to his question, you have
6 kept tower locations off that type of a grade;
7 correct?

8 A. Yes, yes.

9 Q. The next, which is Willison, and this was
10 the subject of significant inquiry having to do
11 with the number of requests that are comprised as
12 a part of the relief from the Willison residences.
13 Do you recall that?

14 A. Yes, yes.

15 Q. Let's go to -- if we can go in a clockwise
16 fashion, beginning with the actual separation of
17 1133. Do you see that?

18 A. Yes.

19 Q. Okay. So if we're looking at the
20 Willison -- this particular Willison residence
21 is in the center of the clock, and we look at
22 actual separation, the 1130.

23 What are the unique characteristics
24 associated with this request that, in your
25 professional opinion, demonstrate and warrant

1 a variance?

2 A. Well, the unique conditions here would
3 be the proximity of the potential woodrat habitat.
4 Primarily, it is the difficulty pushing this
5 further away. You can also see here, even if
6 this habitat didn't exist, which it does, this
7 is really the top of the ridge here, so you would
8 be pushing it down over the side of the mountain.

9 In general, the easterly side of the
10 Dan's Mountain ridge is much, much steeper than
11 the opposite side of the ridge. So this is the
12 point where you would just drop off over the hill
13 there which is unconstructable.

14 Q. So if we're looking -- again, looking
15 at it as a clock face, there is the separation
16 of 1133 and then all the way down to 980 -- do
17 you see that? --

18 A. Yes.

19 Q. -- the Tower 13 and then down to Tower
20 14 --

21 A. Yes.

22 Q. -- with a 1453 separation.

23 So the question would be: Why not just
24 move that array, those towers, 12, 13, and 14
25 further to the east?

1 A. Well, they can't be moved further to the
2 east. We have identified habitat here, again,
3 working with the Maryland Department of Natural
4 Resources; and you have very steep slopes here
5 which are, for all practical purposes, unbuildable.

6 And so as we discussed yesterday, given
7 all of the other factors and consideration, if the
8 choice is to request this variance or impact this
9 buffer and approach the State for some mitigation
10 agreement or something, this is -- this is the
11 correct choice.

12 Q. Would you agree with me that with respect
13 to not just this Willison residence, but all of
14 the Willison residences that comprise a part of
15 the application for a variance, that as a part of
16 their consent and as a part of their co-applicant
17 application, they have given up or waived any
18 right to object to the distance between their
19 residence and these proposed tower locations?
20 They specifically waived from that part of this?

21 A. Yes.

22 Q. So let's then go to -- on the clock, I
23 guess it's about ten o'clock, actual separation
24 to 7 -- 1748 to Tower 5 or 9?

25 A. Nine, uh-huh.

1 Q. What are the physical characteristics
2 that exist on this property, uniquely to this
3 property, that have the location and distance
4 as shown?

5 A. Sure. So you can see that this array
6 is sort of constructed on this spine here, so
7 to speak, and we have wetland areas here. This
8 particular location is where the --

9 Q. Mountainrice?

10 A. -- the rare plant, the Black-fruited
11 Mountainrice, was observed and documented.

12 Moving either one of these would change
13 the road configuration and push this whole area
14 further down the hill on to steeper slopes and
15 impacting that protected area.

16 Q. Then to Panel A ... 5? Apparently, I
17 can't see it.

18 A. Yes, A-5, that's right.

19 Q. This is an additional Willison residence?
20 This is Paul and Joann?

21 A. That's correct.

22 Q. And is there any difference between
23 the issues that are presented on this Willison
24 application for a variance and that on the earlier
25 panel?

1 A. No. The two residences are right next
2 to each other and really have the same -- the same
3 issues.

4 Again, just for the record, I will point
5 out that there are a lot of other considerations
6 that really don't appear on this, the microwave
7 beam paths and so forth.

8 Q. And, again, in summary, what other
9 consideration? What other -- you did it yesterday,
10 but I am going to ask you, just in summary, if you
11 would do it again.

12 A. This would be the slopes; the, again,
13 communication beam paths passing through the site.
14 This was carefully designed to avoid impacts to
15 all those facilities.

16 You have the wetland areas which are
17 regulated waterway areas identified throughout the
18 property and their buffers. You have the potential
19 Allegheny woodrat habitat here and its buffer. You
20 have these protected plants here and their buffers,
21 and you also have, you know, technical position
22 requirements between the units themselves for them
23 to function properly.

24 Q. And then the next separation, Cesnick.

25 A. Yes, this is Eugene Cesnick here, for a

1 variety of reasons. This is a wetland area that
2 was identified here, this location, 17, versus also
3 surrounded by a number of communication beam paths,
4 and those things in aggregate really determine the
5 location of that.

6 Q. If I can go back, and I am not sure what
7 I have done in the world of technology ... if I
8 can close this out for a second. I apologize.

9 In addition, if you would go to Panel
10 A-6 --

11 A. Uh-huh.

12 Q. -- while my technology fails me.

13 Specifically as to A-6, this is Daniel
14 Willison; is that correct?

15 A. Yes.

16 Q. And as to Daniel Willison -- which I
17 believe him to be the southernmost of the Willison
18 residences; is that correct? --

19 A. Yes.

20 Q. -- and looking at this particular panel
21 in this exhibit, again, going around, we appear to
22 need relief of -- from Tower 13; is that correct?

23 A. Yes, 13, which would be kind of at three
24 o'clock there.

25 Again, this Willison residence is almost

1 right next to the other two that we discussed
2 moments ago, and this configuration is the result
3 of those same overlapping and constraining issues
4 of habitat, communication paths, and so forth.

5 Q. And a general question with respect to
6 the Willisons in particular or perhaps the whole
7 property, but we'll do the Willisons in particular,
8 just as Mr. Powell asked about expanding the
9 project, essentially broadening of that, if you
10 look to the east of the project array in 12, 13,
11 and 14, can you move these towers further away
12 from the Willisons and preserve the towers, the
13 windmills themselves?

14 A. They would -- they would then encroach
15 on the protected habitat, so no.

16 Q. And we can't do that, correct?

17 A. Correct.

18 Q. That's not a -- the blessing we got from
19 the State was with an understanding that there is
20 a delineated buffer, and that we have to stay out
21 of and we have agreed to stay out of that buffer;
22 correct?

23 A. Yes, correct.

24 Q. And if we are then compressing it to the
25 west, if we're moving a tower location to the west,

1 are we then getting closer, not further away, from
2 the Willison's property?

3 A. That's correct.

4 Q. And we're closer then to each of the
5 residences --

6 A. Yeah, we are.

7 Q. -- rather than further?

8 A. Yes.

9 Q. And if we are on the array of -- which
10 would be Units 8, 9 -- 8 and 9 in particular on
11 the Willisons, if we move them further to the west,
12 that is further away from the Willison residence,
13 we are then encroaching, going downhill on the
14 Chamber property; is that correct?

15 A. Downhill on to a much steeper surface,
16 and it would be encroaching into the protected
17 plant habitat there that has been identified.

18 Q. And with each of these changes, we also
19 then have to accommodate all of what's reflected
20 in the electromagnetic analysis and study; correct?

21 A. Absolutely.

22 Q. Not just the beam paths, which are easy
23 for most of us to look at and figure, but all of
24 the other environment, when I say environment,
25 all of the other electromagnetic broadcasts that

1 are coming through that area; correct?

2 A. That's right. That's right.

3 MR. GETTY: And indulge us, the board, for
4 just a moment, please.

5 (Discussion held off the record.)

6 MR. GETTY: That would be all I have.

7 Thank you.

8 MR. McKEE: Very well. I would ask very
9 quickly, based upon the redirect, does the board
10 have any additional questions?

11 MR. POWELL: Yeah. Can I --

12 MR. McKEE: You can ask --

13 MR. POWELL: -- ask some questions of
14 Mr. Brewer?

15 MR. McKEE: Certainly. The board can
16 always ask, is always allowed to ask questions.

17 MR. POWELL: On your -- can you bring
18 those slides back up?

19 MR. GETTY: As long as we don't do the
20 one that I somehow screwed up.

21 MR. POWELL: Beginning with the Keiter
22 property.

23 MR. GETTY: Yeah, let me ... I am
24 apparently now demonstrating my ... this should
25 be right.

1 MR. POWELL: Okay.

2 - - -

3 FURTHER EXAMINATION OF MATT BREWER

4 BY MR. POWELL:

5 Q. So the tower involved there is Tower
6 No. 5?

7 A. (Witness nodded head.)

8 MR. GETTY: You have to say yes or no.

9 BY MR. POWELL:

10 Q. Okay.

11 A. Yes.

12 Q. Is Tower No. 5 totally on the Keiter
13 property? Is it placed totally on the Keiter
14 property?

15 A. I don't think it is, no.

16 Q. So it doesn't exist on the Keiter
17 property, but the Keiter people are asking for
18 a variance to allow it to be placed where it is?

19 A. Yes.

20 Q. The next slide on the Henry Loar property
21 involving Tower No. 11, is Tower No. 11 on the
22 Henry Loar property?

23 A. No.

24 Q. The next property, the Lashbaugh property,
25 there are two towers there involved, Tower 11 and

1 Tower 12. Are they on the Lashbaugh property?

2 A. No.

3 Q. The next one, Michael Willison property,
4 there are five towers there involved. Are any
5 or all of those towers located on the Willison
6 property?

7 A. No.

8 Q. The next one is the Paul and Joann
9 Willison property. There are five towers there
10 involved. Are any of those five towers located
11 exclusively on the Willison property?

12 A. No.

13 Q. The Daniel Willison property, there are
14 five towers involved; 8, 9, 13, 14. My question,
15 again, are they located on the Willison property?

16 A. No.

17 Q. And on the Cesnick property, Tower No. 17,
18 is that located on the Cesnick property?

19 A. No.

20 Q. Okay. And then the Moffitt property,
21 Towers 6, 7, 8, and 11, are they located on the
22 Cesnick -- or Moffitt property?

23 A. No.

24 Q. Okay. So all of those towers, they
25 are not really located on the property of these

1 individuals that are asking for the variances;
2 is that correct?

3 A. That is true, yes.

4 MR. POWELL: That's it.

5 MR. GETTY: But the towers are located on
6 the property of the co-applicants, correct?

7 MR. BREWER: Yes.

8 MR. POWELL: Beg your pardon?

9 MR. GETTY: The towers are all located on
10 the property of co-applicants.

11 MR. POWELL: Yes, I agree.

12 MR. McKEE: Very well. If you have
13 nothing further as a result of that...

14 MR. BREWER: Yeah, I would --

15 MR. McKEE: Thank you, sir.

16 MR. BREWER: I would just like to say,
17 as I am leaving here, I do understand this is a
18 difficult and sort of unusual situation here.

19 I can say is, some of us expended a great
20 deal of time and effort working on this. When we
21 get to this point with respect to the variances,
22 this is the very last thing that we want to do.
23 I would rather be coming here and not asking for
24 any variance, if that was at all possible. This
25 is not something that we just start off and say,

1 well, we will just have to get variances and ...
2 you know, that's not kind of how this has been
3 put together. I appreciate your time and
4 consideration.

5 MR. POWELL: Likewise.

6 MR. GETTY: Before he steps down, I simply
7 just want to move into evidence all of the exhibits
8 that he has identified in the course of his
9 testimony. I think they are in, but I do not have
10 the formal way of --

11 MR. McKEE: I believe they are in --

12 MR. GETTY: Okay.

13 MR. McKEE: -- but I will -- I will accept
14 them at this time --

15 MR. GETTY: Just as a technical issue.

16 MR. McKEE: -- all the exhibits.

17 Thank you, sir, and I believe that at
18 the conclusion of your testimony, this is a good
19 time naturally to take a lunch break. It's five
20 to twelve, and we will reconvene at one o'clock.

21 (Witness, Matthew Brewer, excused.)

22 (At 11:57 a.m., lunch break taken until
23 1:07 p.m.)

24 (Exhibit TTTT was marked/entered into
25 evidence.)

1 I was employed with the Maryland Department of
2 Planning as the Director of Planning Services.
3 I am currently in a retirement mode but available
4 for consulting work.

5 Q. All right. What is your educational
6 background?

7 A. I have a Bachelor of City Planning degree
8 from the University of Virginia, and I am also
9 a member of the American Institute of Certified
10 Planners which is a certification program for
11 professional planners.

12 Q. And before working at the Maryland
13 Department of Planning, what was your employment
14 background?

15 A. Well, before I worked for the Maryland
16 Department of Planning, and I was there for six
17 years, I worked as the Deputy Planning Director
18 for the City of Alexandria, Virginia. I was there
19 for about five years.

20 Prior to that, I was -- worked in Anne
21 Arundel County, Maryland. I was the combination
22 of a planner, a zoning administrator, and
23 long-range planning administrator, and I worked
24 in Anne Arundel County for 18 years.

25 Q. And also then, before you went to

1 work at the Maryland Department of Planning,
2 what familiarity, if any, did you have with
3 comprehensive plans?

4 A. Well, my work with Anne Arundel County,
5 particularly, when I was responsible for long-range
6 planning, I oversaw the preparation of the County's
7 comprehensive plan in the late 1990s.

8 Following that, the County embarked on
9 a process of developing 16 sub-area county plans,
10 and my responsibilities were to oversee that, that
11 process, and that took about six years, between
12 1998 and 2004, and we actually were able to prepare
13 and have adopted 16 sub-area plans in Anne Arundel
14 County.

15 Q. What is the purpose of comprehensive
16 planning?

17 A. Well, comprehensive plans are documents
18 that kind of lay out what the future land use,
19 transportation, natural resources, other key
20 elements of a jurisdiction should be over a period
21 of time.

22 The normal horizon for a planning document
23 is about 10 to 20 years. Plans are updated
24 normally about every 10 years as conditions change,
25 as demographics change, as economic conditions

1 change, as technology changes, as a variety of
2 things change.

3 Q. Well, in your previous employment, I
4 believe you mentioned that you were also the
5 zoning administrator in Anne Arundel County,
6 but did you have occasion to review zoning and
7 development proposals with respect to comprehensive
8 plans?

9 A. I did. In my role as a zoning
10 administrator and even prior to that, I would
11 often appear before a zoning hearing officer
12 and oftentimes appear before the Board of Appeals
13 on special exception cases, on rezoning cases,
14 not so much development proposals in that role,
15 but certainly special exceptions, rezonings, and
16 even variance cases.

17 Q. Okay. Now, how long were you employed
18 by the State of Maryland?

19 A. I was with the State of Maryland for a
20 little bit over six years.

21 Q. And when did you start at the State?

22 A. I started with the State of Maryland in
23 2009.

24 Q. And was 2009 an important year for the
25 enactment of planning legislation in Maryland?

1 A. I would say it was. In 2009, the General
2 Assembly probably adopted the most planning-related
3 legislation than they have had adopted probably,
4 I would say, over the past 20 years.

5 The package of planning legislation was
6 known as "smart, green and growing," but it also --
7 but it included things like the update of the
8 planning visions. In the early '90s, there were
9 seven planning visions. Those were later changed
10 to eight visions, but in 2009, the General Assembly
11 determined that it was appropriate to have some
12 new visions that addressed a wider variety of
13 topic areas. So they adopted these 12 planning
14 visions that were to be incorporated into local
15 comprehensive plans.

16 Part of that package of legislation
17 also included indicators. Local jurisdictions,
18 current at that time, were required to submit
19 annual reports on progress towards locating
20 development in and out of priority funding areas.
21 The indicator, there was something called an
22 "Indicator Bill" that honed in on some more
23 specific metrics that local jurisdictions should
24 be looking at relative to planning and development.

25 There was also a adoption of a Planning

1 Commissioner and Board of Appeals Education Course,
2 and some of you may have even taken that course.
3 It was prepared -- an online course was prepared
4 by the Maryland Department of Planning. My office
5 and myself, in particular, participated in course
6 offering at the MACo and MML conferences every year
7 in Ocean City. So if I look somewhat familiar,
8 you may have seen me at that.

9 And then in 2009, the General Assembly
10 also strengthened the relationship between
11 comprehensive plans and their implementation
12 tools, particularly zoning, and said that those
13 implementation tools, like zoning, water and
14 sewer plans, other functional planning elements,
15 development regulations, needed to be consistent
16 with and not contrary to the comprehensive plan.

17 Q. Now, you mentioned earlier that as part
18 of your education that you had basically been
19 accepted as a member of the American Institute
20 of Certified Planners.

21 A. That's correct.

22 Q. What is the significance of that?

23 A. It's kind of an ongoing education platform
24 for planners. It requires that you get a certain
25 number of credits every two years. So you have to

1 take courses on ethics. You have to take courses
2 on law. Those are the two required courses, and
3 then the rest of the courses that you take really
4 are kind of elective, at your own choice, but it's
5 a way to kind of keep planners up with what's going
6 on in the profession.

7 Q. So that in order to maintain your skill
8 or expertise as a planner, you have to become
9 familiar with the ongoing changes in the rules
10 and regulations that pertain to the plans that
11 you are reviewing?

12 A. In general. I mean, this is -- this is
13 a national certification program. So it doesn't
14 necessarily mean you have to know everything about
15 what's going on where you work in particular, but
16 you have to kind of have a good general knowledge
17 of planning principles and practices and keep up
18 to date on them; and most planners want to be kept
19 up to date on new things that are coming down the
20 road in planning, like complete streets and newer
21 traditional development, things like that.

22 Q. What generally were your responsibilities
23 in the Maryland Department of Planning?

24 A. Well, as the Director of Planning
25 Services, I was responsible for all of our

1 regional planners; and the way we operated at
2 MDP, Maryland Department of Planning, was we had
3 planners assigned to different regions of the
4 state, and those planners were responsible for
5 being the liaison between those local communities
6 and our office.

7 So we had a Western Maryland Division,
8 an Eastern Shore Division, Central Maryland,
9 Southern Maryland, etc., and those planners
10 would kind of be the eyes and ears of the office
11 and provide technical assistance to the local
12 jurisdictions, as they requested it. They would
13 review local comprehensive plans. They would
14 review water and sewer plans and amendments.
15 They would really kind of be there to help the
16 local planners in any way that they could.

17 But in addition to that, the division
18 section I was responsible for also did
19 environmental planning. We did the Maryland
20 Agricultural Land Preservation Foundation work,
21 MALPF, which is responsible for preservation of
22 farmland. There is an easement program that the
23 State operates. We did all of the work related
24 to helping keep the Chesapeake Bay clean relative
25 to working with other state agencies.

1 We also -- my division, people I was
2 responsible for, also worked on a couple of the
3 facility plans. So we would look at schools and
4 transportation facilities and provide advice and
5 comments to other state agencies.

6 Q. And did you -- you, in fact, had the
7 opportunity, I believe, to even comment on the
8 Allegany County Comprehensive Plan?

9 A. Well, our office did, yes.

10 Q. And letters would go out under your
11 signature to Allegany County Planning commenting
12 on the plan?

13 A. That's correct.

14 Q. Now, what is the interplay, if you will,
15 or your familiarity, if you know, with the "Land
16 Use Article" of the Annotated Code of Maryland and
17 how it impacts local plans?

18 A. Well, the Land Use Article is kind of
19 the -- is the Maryland code requirements that --
20 that specify some of the things that need to be
21 considered or included when a local jurisdiction
22 is completing comprehensive planning. So, for
23 example, the 12 visions that I just mentioned,
24 those are to be included and incorporated into
25 all local, county, and town comprehensive plans.

1 There are a number of required plan
2 elements that are being -- that are to be included
3 in a comprehensive plan, and those -- for example,
4 natural resources, land use, sensitive areas are
5 some of the required elements that are to be in
6 a local comprehensive plan.

7 Then there are some optional elements
8 that it's up to the local jurisdictions as to
9 whether or not they want to include it in the
10 local comprehensive plan, and those would be
11 things like housing would be an optional element
12 and economic development.

13 Q. What is the relationship of special
14 exceptions and development plans to the local
15 comprehensive plans?

16 A. Well, special exceptions and development
17 regulations are things that are included in
18 the local development regulations, the zoning
19 regulations, and in order to follow the consistency
20 rule that the -- is included in the Land Use
21 Article, those regulations need to be or are
22 supposed to be consistent with or their
23 implementation is supposed to be consistent
24 with the comprehensive plan.

25 Q. And have you ever had the occasion to

1 present as a speaker on the topics of comprehensive
2 plans and how they relate to future development?

3 A. I --

4 (Outside noise interruption)

5 MR. JOSEPHSON: Is that the rain that's
6 coming?

7 MR. GONTRUM: I think it's a turbo faucet.

8 MS. WILLIAMS: I have an umbrella.

9 MR. GONTRUM: We'll find out if the place
10 leaks.

11 A. On numerous occasions, I have had the
12 opportunity to speak about comprehensive plans,
13 both in my position as a planning administrator
14 and in Anne Arundel County where we did a lot
15 of public outreach on comprehensive planning to
16 citizens that were on planning committees that
17 actually helped work with the staff and other
18 county agencies in developing a comprehensive
19 plan. In Anne Arundel County, I spoke to a lot
20 of environmental groups, business groups, civic
21 groups.

22 And then in my role as the Planning
23 Services Director with the State of Maryland,
24 fairly extensive public participation or public
25 speaking with regard to the preparation of

1 the State Development Plan which was a little
2 over three-year effort to develop a policy
3 document that, for the most part, other state
4 agencies could use to help guide how they could
5 encourage more good growth around -- around the
6 state. So...

7 And then just as a normal course of my
8 work, just went to a lot of county meetings and
9 spoke to familiarize folks in different parts
10 of the state with the things that the Maryland
11 Department of Planning did and how they could
12 assist them, how they could help work with them
13 to accomplish their comprehensive plan.

14 (Exhibit UUUU was marked/entered into
15 evidence.)

16 BY MR. GONTRUM:

17 Q. Mr. Josephson, I want to show you a copy
18 of a CV, résumé, curriculum vitae, if you will,
19 and ask if this is your CV.

20 A. Yes, it is.

21 Q. All right.

22 MR. GONTRUM: I would offer this in.
23 I believe this is 4 T's on the enumerating system,
24 numbering system, the next exhibit.

25 MR. JOSEPHSON: Four U's.

1 MR. GONTRUM: (Inaudible)

2 MR. SQUIRES: No, U.

3 MR. GONTRUM: U, four U's? Okay. Very
4 well.

5 MR. SQUIRES: You just have one, one
6 Exhibit U?

7 (Discussion held off the record.)

8 MR. GONTRUM: I would offer Mr. Josephson
9 as an expert and ask the board to accept him
10 as an expert in the field of land planning on
11 the requirements of consistency with Maryland
12 comprehensive plans.

13 BY MR. GONTRUM:

14 Q. Now, Mr. Josephson, as an expert, will
15 you accept that what I am asking you to express
16 an opinion on, I am only asking for opinions that,
17 based on your education, training, and experience,
18 you hold to a reasonable degree of certainty as
19 an expert in your field?

20 A. Yes.

21 Q. Okay. Now, with respect to the Allegany
22 County Comprehensive Plan and the wind turbine
23 proposal that is before the board, have you had
24 the occasion to become familiar with the Allegany
25 County Comprehensive Plan adopted last year?

1 A. Yes, I have.

2 Q. And have you had occasion to become
3 familiar with the special exception and variance
4 requests as part of the development proposal for
5 the 17 wind turbines and a substation on Dan's
6 Mountain?

7 A. Yes, I have.

8 Q. And have you been able to formulate an
9 opinion on whether the special exception and
10 variance requests are in compliance with the
11 Allegany County Comprehensive Plan as required
12 by state and local regulations?

13 A. Yes, I have.

14 Q. What is that opinion?

15 A. My opinion is that the special exception
16 request is consistent with the County's
17 comprehensive plan, and I say that based on a
18 number of things.

19 Within the Allegany County Comprehensive
20 Plan, as I mentioned, are an enumeration of the
21 12 visions, and the 12 planning visions are
22 actually planning policies that the General
23 Assembly adopted and wanted or required every
24 jurisdiction to incorporate it into their local
25 comprehensive plans.

1 There are four of -- four of the planning
2 visions or planning policies, I think are relevant
3 to this particular special exception request.
4 Those would include the policy on sustainability,
5 the policy on economic development, the policy
6 on resource conservation, and the policy on
7 stewardship; and if you look, those are kind
8 of the main titles of those policies.

9 If you look in the comprehensive plan,
10 you will see a further kind of elaboration of
11 what those are, but in my review of those planning
12 policies, I think because of this request's
13 relationship to sustainability, because of its
14 relationship to economic development, because
15 of its relationship to natural resources, and
16 its stewardship, it makes the request consistent
17 with those visions which is a part of the county
18 comprehensive plan, and I can elaborate on that
19 a little bit.

20 Also, if you look at the "Economic
21 Development" chapter of the comprehensive plan,
22 there is language -- actually, I think one of
23 the goals states that economic development should
24 use natural resources to an advantage; and I think
25 if you consider the natural resources of Allegany

1 County, which there are many, and if you consider
2 the ridgetops and the potential for wind energy
3 to emanate from those ridgetops, that -- providing
4 that type of energy not only is -- satisfies the
5 sustainability vision and the stewardship vision
6 but also satisfies, I think, the goal of the
7 "Economic Development" section of the plan.

8 But probably most significantly, when
9 you are looking for consistency between a special
10 exception use like this and a comprehensive plan,
11 you look at what the comprehensive plan talks about
12 or how it addresses land use; and so if you look
13 at the "Land Use" chapter of the comprehensive
14 plan, and you look at the designation for this
15 area of the county, and this is in the Greater
16 Frostburg planning area, you will see that the
17 designation, the future land use designation for
18 this property is preservation and preservation
19 of agriculture.

20 And if you look at the associated zoning
21 categories that correspond with those land uses,
22 you will see that those zoning categories that
23 correspond to those are the "A" zone -- the "A"
24 and "C" zones, the Agriculture and the Conservation
25 Zones; and in both of -- in both the "A" and the

1 "C" zones, the special exception use is permitted
2 in both of those zones. The special exception use
3 that is being considered today is permitted in both
4 of those zones.

5 Q. What is the significance of the fact that
6 the zoning in both the "A" and in the "C" zones
7 allows this use by special exception? What is
8 that nexus between -- if you can, maybe a better
9 way to put it, between the zoning code and the
10 comprehensive plan?

11 A. Well, as I mentioned before, with regard
12 to the Land Use Article and the legislation that
13 the General Assembly passed in 2009 stating that
14 the implementation tools -- the tools have helped
15 implement the comprehensive plan, and those are
16 the zoning tools; and within the zoning tool, the
17 zoning regulations, and the zoning map are uses
18 contained within the zoning regulations, and the
19 special exception use is one of the tools that
20 helps implement the comprehensive plan.

21 So I think to that extent, that since
22 the zoning is consistent with the language
23 classification of the comprehensive plan, there
24 is consistency between the special exception
25 use proposed and the comprehensive plan.

1 Q. Now, I want to direct your attention to
2 what I think is before the board as Exhibit W,
3 which is a memorandum dated July 29, 2015, to
4 James W. Squires, Jr., Secretary to the Board
5 of Zoning Appeals, from David A. Dorsey, Planning
6 Coordinator, pointing out that the, quote, only
7 sections of the plan pertinent to the pending
8 BOZA case are Plan Section 8:11 and SAE Goal 4
9 found in the sensitive areas, unquote.

10 Do you have a response to that comment?

11 A. Well, as I just said, it is my opinion
12 that there are other sections of the plan that
13 are relevant to the special exception, and I just
14 mentioned them, that the visions, the economic
15 development section and, particularly, the land
16 use element of the comprehensive plan.

17 Q. Well, how does the -- what is the impact
18 of the scenic vista provisions in the comprehensive
19 plan with respect to this proposal's compliance
20 with the plan?

21 A. Well, the plan does talk about scenic
22 vistas; however, it talks about it in an
23 aspirational way. You know, it says that scenic
24 vistas are important, that Dan's Mountain is
25 an important area to consider for, among other

1 potential areas in the county, to consider for
2 scenic vistas; however, it doesn't -- and it
3 does make some recommendations that there be
4 considered an overlay zone to address some of
5 the issues related to scenic vistas; however,
6 it doesn't go beyond that, so it remains
7 aspirational.

8 Apparently, the County has not adopted
9 regulations that either identify specific scenic
10 vistas in the county or have adopted regulations
11 that would provide for what needs to be done to
12 maintain those scenic vistas.

13 Q. Now, Mr. Josephson, you have had the
14 opportunity to sit here yesterday and today through
15 the testimony, and you have had the opportunity to
16 listen to the testimony and some of the questions
17 that have been asked of the witnesses, have you
18 not?

19 A. I have.

20 Q. How does the request for the variances
21 in this case impact the special exception request
22 and its basic compliance with the comprehensive
23 plan?

24 A. Well, it's -- the variance, variances
25 that are being requested are inherent within the

1 special exception. This is not what you would
2 consider a kind of a typical variance situation
3 where somebody is looking for a variance to a
4 setback from a side yard in order to build a
5 garage or to build a shed. These are actually --
6 in some ways, variances may be an incorrect term
7 for this. These are specific performance standards
8 that are included within the special exception.
9 These don't apply to any other use other than
10 the special exception.

11 So in order -- a special exception comes
12 along with the specific performance standards,
13 that you have to have a certain separation distance
14 that you have to be set back from, from property
15 lines, a certain distance. So it's kind of the --
16 the variances, the variance elements and the
17 special exception are intertwined together, and
18 the special exception, because it is a permitted
19 use with those conditions in the zoning ordinance,
20 would be consistent with -- the use itself is
21 consistent with the comprehensive plan, and I
22 think that the performance standards are just
23 really kind of conditions that need to be addressed
24 during the public process.

25 Q. Do you feel that by asking a variance,

1 if you will, or a change from, let's say, the
2 2,000-foot setback buffer area, if you will,
3 to a residence internal to the property, do you
4 feel that that in any way will detract from these,
5 compliance of the special exception to the overall
6 comprehensive plan?

7 A. No, I don't.

8 Q. Does that in any way detract from the
9 permission, if you will, in the code or saying
10 that the use of an industrial wind energy
11 conversion system under the Allegany County
12 Zoning Code as a permitted use within the "A"
13 and "C" zones is diminished by virtue of the
14 variances requested?

15 A. No, I would say not.

16 Q. Why not?

17 A. Because it's really the use that you're
18 being considered. It's -- as I said before, I
19 think the variance, variances being requested
20 are more performance standards. It's the use
21 that is -- the use that is being considered,
22 the wind energy conversion systems, is what's
23 already permitted by the zoning, and so one need
24 only look at whether or not that's supported by
25 the comprehensive plan.

1 just said.

2 A. Oh, the comprehensive plan was adopted
3 in 2014 --

4 Q. 2014, okay.

5 A. -- and so I don't know whether -- at
6 what point the scenic vista language was included,
7 whether it was there.

8 Q. You don't recall it being there in the --
9 when you were working with the planning back in
10 2008, did you say, or 2009, when you left?

11 A. Well, I have been with the planning --
12 Maryland Department of Planning since 2009.

13 Q. Okay. Excuse me, clarification.

14 A. Right.

15 Q. Okay. And you don't recall that language
16 being there before?

17 A. Right, I couldn't tell you whether it was
18 there in the prior plan or not.

19 Q. Okay. You were mentioning the 12 visions,
20 and I understand those are the 12 things that you
21 would review smaller county's plans to make sure
22 that those 12 visions were all included in that?
23 Is that correct? Did I understand that correctly?

24 A. Well, the visions are actually policies
25 that the General Assembly adopted and said every

1 single comprehensive plan in the state, regardless
2 of size, is to consider and to incorporate those
3 visions or those policies into local -- into
4 their local comprehensive plan.

5 So it applies to counties, cities, towns.
6 Anybody who has planning and zoning authority
7 in the state is required to incorporate the
8 12 planning policies or visions into their
9 comprehensive plan.

10 Q. Okay. Is there any other restrictions
11 to this, individual counties about additional
12 things they want to expand upon inside their own
13 plan?

14 A. No, no, not at all.

15 Q. Okay. So would you say that the only
16 thing, when you're looking at a comprehensive plan,
17 is to understand if it complies with or it's in
18 agreement with, are we only looking at the 12
19 required elements or are we looking at the plan
20 as a whole?

21 A. Well, I think they are two different
22 things. If you -- certainly, a local jurisdiction
23 can tailor their plan to include whatever is
24 important to them, and I mentioned before that
25 there are optional elements that the State had

1 identified that local jurisdictions can include
2 in their comprehensive plan --

3 Q. Right.

4 A. -- but when it comes to compliance, the
5 Land Use Article is fairly clear, and that is
6 that it says that when they are implementing your
7 comprehensive plan, the tools that you use --
8 and these are tools that every jurisdiction uses
9 to implement comprehensive plans, and they are
10 particularly zoning, subdivision regulations,
11 water and sewer plans, etc. -- those tools, the
12 zoning maps, the zoning regulations need to be
13 consistent with what is in, what is said, is what
14 included -- what is included in the comprehensive
15 plan.

16 Q. Okay. So in this situation, the fact that
17 agriculture and conservation lands fall under this,
18 that is what you're telling us is consistent with
19 the comprehensive plan?

20 A. Right, the zoning --

21 Q. Okay.

22 A. -- the zoning that's been adopted for
23 this area is consistent with the land use map in
24 the comprehensive plan.

25 Q. Okay, good enough. Thank you.

1 MR. McKEE: Any other cross-examination?

2 (There was no response.)

3 MS. WILLIAMS: You mean the board?

4 MR. McKEE: Does the board have any
5 questions?

6 - - -

7 EXAMINATION OF RICHARD JOSEPHSON

8 BY MS. WILLIAMS:

9 Q. Okay. You used the term "performance
10 standards." Can we find that in the code anywhere?

11 A. That's my term. I guess I'm used to
12 using that term. When I was a planner in Anne
13 Arundel County, I think we used that term to
14 describe some of the requirements that were in
15 special exceptions, not unlike Allegany County.

16 Special exceptions were listed in the
17 zoning code, and there were standards by which an
18 applicant had to meet in order to be considered
19 affirmatively for that special exception. So I
20 think I have come to use that term as a performance
21 standard.

22 Q. So if we substitute "variance" for
23 "performance standard," can -- is that what
24 you're saying?

25 A. Well, no, no, no. They are -- I don't

1 think I'm saying that. The performance standards
2 are the requirements within a special exception.
3 The variances from the performance standards,
4 what I think I was -- what I was trying to say
5 are different than under the normal variances that
6 the Board of Zoning Appeals consider, one, because
7 for this type of a use, they are contained within
8 that special exception, so they only apply to that
9 special exception.

10 So if you're looking for -- you wouldn't
11 normally find a 2,000-foot setback in your zoning
12 regulations for a particular use. Maybe -- maybe
13 you would, maybe you wouldn't, but it's probably
14 not something you would normally find. You
15 would find normal side yard, front yard setbacks,
16 setbacks from a major highway. You would have
17 height and parking regulations, those kinds of
18 things you can seek variances from through the
19 process.

20 I think what I was saying is that these
21 variances, these variances being sought here are
22 unique to this special exception. They are not --
23 they are not applicable to the entire zoning
24 regulations as a whole for the county.

25 Q. So if a performance standard can't be

1 met, how would you protect the health and welfare
2 of the citizens that have residences in that area?

3 A. Well, if the variance -- if the
4 performance standard can't be met and you seek
5 a variance and you -- and I think as has been
6 testified, you -- I mean, you first try to
7 avoid, minimize, and then the last thing is
8 to mitigate for the impacts of that, approving
9 that variance.

10 So variances aren't necessarily contrary
11 to the health, safety, and welfare of the public.
12 I mean, I think they are contemplated in all
13 zoning regulations, and there are conditions by
14 which variances can be met; and if you can meet
15 the conditions by which the variance can be met,
16 then I think you satisfied the task for meeting
17 the kind of larger issues of health, safety,
18 welfare, impact, impact to property owners, etc.

19 Q. But are you addressing the steps to decide
20 whether a variance is compliant or not, like the
21 uniqueness and hardship?

22 A. Yeah, I think you are. Yes, I would
23 agree with that. Practical difficulty, uniqueness,
24 exceptional circumstance, you know, I think that's
25 some of -- that's a -- a lot of the testimony that

1 I have heard has addressed that.

2 MS. WILLIAMS: I am still confused.
3 Do you have other questions that maybe you can
4 clarify?

5 MR. POWELL: Okay.

6 - - -

7 EXAMINATION OF RICHARD JOSEPHSON

8 BY MR. POWELL:

9 Q. Just two things. I am a little confused
10 too, but in reference to the wording in the
11 comprehensive plan about protecting the viewshed,
12 now you seem to -- or this is the impression I
13 got, you seem to be saying that -- you kind of --
14 you kind of dismissed that as being in -- relating
15 to this particular project, you kind of dismissed
16 that as saying it doesn't pertain to this
17 particular use in that area, or what was your
18 explanation --

19 A. Yeah, I guess what I am --

20 Q. -- of saying --

21 A. I guess what I am saying is that you --
22 I am saying that the idea of having scenic vistas
23 is aspirational. It's a good thing to have, and
24 it's a good thing to address in the comprehensive
25 plan, but until you adopt regulations that tell

1 you how you are going to protect that scenic vista
2 and where that -- where those scenic vistas are
3 going to be located in an ordinance, similar to
4 what you may have done with regard to surface
5 mining, similar to what you may have done with
6 regard to other uses, then it just remains
7 aspirational.

8 It doesn't really relate to this
9 particular application because there is really
10 nothing to grab on to. It doesn't say, you know,
11 in this specific area of the county, in order
12 to maintain the scenic vista, you have to do X,
13 Y, and Z. There is nothing in the county zoning
14 or development regulations that I am aware of
15 that governs how you develop in an area that's
16 considered a scenic vista. So the language is
17 aspirational.

18 It's a good -- it's a good goal. I
19 mean, some jurisdictions have scenic road elements,
20 and they follow up with that with requirements on
21 what you can do along the frontage of those roads,
22 and they implement that through their subdivision
23 regulations. They limit -- they limit how much
24 you can widen the road, because scenic roads are
25 nice because they're windy and they go through

1 pretty areas, but that's an example of how you
2 would implement kind of -- it's an aspirational
3 goal. You would regulate it. You would regulate
4 it through specific requirements and standards in
5 your zoning and development regulations.

6 Q. So really, in effect, what you are saying
7 is, as far as the board, we can't really consider
8 that because it being aspirational, we don't have
9 any definitive guidelines to go by to protect that
10 scenic vista?

11 A. That's exactly what I'm saying.

12 Q. In other words, the planners that set that
13 language into the comprehensive plan, they didn't
14 go far enough to say, hey, don't put a wind turbine
15 in my view, in this viewshed?

16 A. Or if you put a wind turbine here, then
17 here is -- here are the -- here are the things that
18 you need to do relative to the scenic vista --

19 Q. Yeah.

20 A. -- just relative to the scenic vista.

21 Q. Yeah. So they just -- in other words, for
22 our purposes, they didn't go far enough to give us
23 definitive terms to judge --

24 A. Yes, I would agree with that.

25 Q. -- that viewshed. Okay. I am trying to

1 think here.

2 Variances, on the variances, if I heard
3 you correctly, the 2,000-foot variance, is that
4 part of a zoning code that says on a wind tower,
5 there must be a 2,000-foot variance or there must
6 be a 2,000-foot relief between a residence? Is
7 that actually part of the code?

8 A. Yeah, all I was trying to do is make a
9 distinction between kind of the normal, everyday
10 type of variances I think that you mentioned
11 before and the variances that are being requested
12 here, which are internal to or only applicable
13 to this particular use; whereas, the other types
14 of variances that are sought frequently apply
15 to any use.

16 You know, if you have a house in a
17 residential zone and you want to build a shed,
18 it doesn't really matter, you know, where that
19 house is or what part of the county it's located
20 in. As long as that's -- that house is permitted,
21 you need to comply with whatever that setback
22 requirement is in that zone or obtain a variance.

23 Q. Yeah, what I was -- what I kind of heard
24 you say was that the variance that -- the variances
25 that these -- that's before us here and the board,

1 they're part of this project and they're not really
2 part of the zoning ordinances?

3 A. No, I didn't -- if I said -- if I said
4 that, I didn't mean to say that.

5 Q. Okay.

6 A. No, they are definitely part of the zoning
7 ordinance.

8 Q. And the zoning ordinance, in the zoning
9 ordinance, there is an ordinance there that says
10 that a wind turbine must have a 2,000-foot setback
11 from --

12 A. Correct. You are correct.

13 Q. -- a residence? Right, okay. All right.

14 - - -

15 FURTHER EXAMINATION OF RICHARD JOSEPHSON
16 BY MS. WILLIAMS:

17 Q. So from what I envision what you are
18 trying to explain to us is that this project
19 should be in its bubble, in a bubble, because
20 the parameters are different from me to Bill
21 in our neighborhood, because we are co-depend --
22 co-applicants, and this is a bubble.

23 A. I guess I wouldn't use the term "bubble."
24 I am just -- I guess I am trying to characterize
25 it in another way, a different perspective that

1 you may want to consider.

2 Q. Uh-huh.

3 MS. WILLIAMS: Anybody else?

4 (There was no response.)

5 MR. McKEE: Mr. Gontrum, do you have any
6 redirect?

7 MR. GONTRUM: Yes.

8 - - -

9 REDIRECT EXAMINATION OF RICHARD JOSEPHSON

10 BY MR. GONTRUM:

11 Q. Basically, as I understand it, because
12 these variances that we are seeking are from
13 sections of the code that are unique to industrial
14 wind energy conversion systems, that the variances
15 from these provisions are looked at perhaps
16 differently or should be looked at perhaps
17 differently than a general side yard setback of
18 an accessory structure from an adjoining property.
19 Is that basically what you're saying?

20 A. That's pretty much what I am saying.
21 They're really -- they relate to the use. Even
22 though you still have to satisfy the criteria
23 for variances, this is still kind of a unique
24 circumstance.

25 Q. And in looking at satisfying the unique

1 circumstances of this particular application for
2 a variance, do you have an opinion as to whether
3 this applicant has minimized or mitigated -- and
4 I think you used those terms "minimized" and
5 "mitigated" -- the need for a variance in its
6 variance application?

7 A. Well, based on -- based on what I have
8 seen and heard, I would say that they went
9 through the -- went through the proper process
10 of avoidance, minimize and --

11 Q. Avoidance. I'm sorry. I forgot
12 avoidance, number three.

13 A. -- avoidance, minimization, and then --
14 and mitigation.

15 Q. Let me ask you this, Mr. Josephson,
16 and if you can answer it, I mean, you hear from
17 the protestants or you might hear your argument,
18 well, you have asked for 17 turbines, why didn't
19 you just ask for 14 turbines, you know, or I
20 guess ask for 12 turbines, and, of course, if
21 you didn't -- or only five, and then you wouldn't
22 need any variances. What is the response to that,
23 insofar as, you know, why not just eliminate the
24 uses?

25 A. Well, it's an interesting proposition.

1 I think, in this case, you have a -- you basically
2 have a project area, a defined project area, and
3 I think it's been shown that through some of the
4 questioning that's gone back and forth, it would
5 be difficult to expand there.

6 So you have got a given area. You
7 have got a given number of wind turbines that,
8 obviously, is requested to make this project
9 feasible and -- and I think it's been shown that
10 you've been able to satisfy the requirements,
11 based on the topography, based on the exceptional
12 circumstances, based on all of the criteria that
13 is required to obtain a variance to allow this
14 to move forward.

15 MR. POWELL: Did that answer the question?

16 MR. GONTRUM: You sound like you want to
17 follow up, Mr. Powell. Go ahead.

18 MR. POWELL: No, I am asking, did that
19 answer your question?

20 BY MR. GONTRUM:

21 Q. Well, I guess the question is, there is
22 a statement, I believe, in the variance application
23 which I will refer you, Mr. Josephson, that said,
24 as I recall, that the 17 turbines are -- that less
25 than that, the project doesn't become feasible.

1 FURTHER EXAMINATION OF RICHARD JOSEPHSON

2 BY MR. POWELL:

3 Q. Why does it meet with practical
4 difficulty? Why -- in other words, his question
5 is why can't you reduce from 17 turbines down
6 to six which don't require variances? Why can't
7 you reduce this and still be a practical --

8 A. Well, I think --

9 Q. -- project?

10 A. I think it goes to two points. One is
11 the feasibility of the project which is -- has --
12 I think has been stated as that number of turbines,
13 and the second point is that the regulations allow
14 you to put forward your reasons as to why, why
15 you need the variances, why it poses practical
16 difficulties, and I think they -- I think that
17 has been shown.

18 I think based on the testimony we've
19 heard, based on the -- you know, the topography,
20 based on the location of some of the environmental
21 resources, based on the location of some of the
22 other infrastructure that existed prior, I think
23 all of those things together provide that practical
24 difficulty that's needed to satisfy the variance
25 requirement.

1 Q. Okay. It provides a practical difficulty
2 for 17 turbines, but if you reduce it to six, is
3 there a practical difficulty to this project?

4 A. Well, but I don't think that's the
5 question. I mean, you could -- you could apply
6 that -- you could apply that standard to anything.
7 You could say, well, all you need to do is -- you
8 know, if I have a thousand acres and I want to
9 build, you know, a hundred houses, you could say,
10 well, why don't you just build 50 houses because
11 it will have -- it will have less impact than the
12 hundred houses.

13 Well, but I can still build a hundred
14 houses, if I can accommodate those hundred houses,
15 even though -- and if I can show that I -- by
16 doing so, I can -- there are practical difficulties
17 that I need variances from to do that, then I
18 should be entitled to and should be approved for
19 those hundred houses, and I think it's the same --
20 I think the analogy is similar in this case.

21 The applicant is asking for the 17
22 turbines, and I think if they can show, and I
23 think they have today, that they can satisfy the
24 requirements for the variances, then they should
25 be able to move forward with those number of

1 turbines, the 17 turbines.

2 MR. GONTRUM: Okay.

3 - - -

4 FURTHER EXAMINATION OF RICHARD JOSEPHSON

5 BY MS. WILLIAMS:

6 Q. Tell me again what -- your definition of
7 "practical difficulty."

8 A. Well, practical difficulty is -- you know,
9 most zoning regulations talk about the physical
10 characteristics of the property, so you're looking
11 at limitations due to slopes or due to the location
12 of environmental resources.

13 I think, in this case, the practical
14 difficulty is -- also includes some of the other
15 requirements of the application with regard to the
16 electromagnetic field and the -- some of the --
17 the rat's habitat, as well as the vegetation that's
18 been considered a sensitive area.

19 Q. I guess I am going back to what Mr. Powell
20 was saying. There is a practical difficulty in 17,
21 17 turbines. There is no practical difficulty in,
22 I think, six of them.

23 Whose practical difficulty is it that I
24 can't fit 17 in when the shoe size is 6?

25 A. But the code contemplates that through

1 the allowance of the variances provided, you can
2 show practical difficulty to allow you to get to
3 the 17 is what I'm saying. Anybody -- I mean,
4 obviously, you could build six, and if you did,
5 you may not have a project.

6 The idea is that the request is for "X"
7 number, 17, and as the applicant, if I can show
8 that because of the location of those 17, this is
9 really the only place I can put them because of
10 these practical difficulties, then what I am saying
11 is, you satisfy that, you should be able to move
12 forward with that number.

13

- - -

14 FURTHER EXAMINATION OF RICHARD JOSEPHSON
15 BY MR. POWELL:

16 Q. But haven't you created your own practical
17 difficulty?

18 A. I don't think so. I think those
19 practical -- I think those -- I think those
20 characteristics exist. You know, you have a
21 particular site area. You're working with that
22 site area. You haven't really -- I wouldn't
23 consider those self-created.

24 MR. GONTRUM: Mr. Powell, if I may,
25 sir, I think you're addressing a legal issue

1 that the court has reviewed. There is a case
2 called *Stansbury vs. Jones* -- and I am sure that
3 Mr. McKee is familiar with it -- that basically
4 where the applicant purchased a piece of property
5 to build a home, knowing that he would need
6 variances in order to do that, and he willingly
7 came on this property with the knowledge that he
8 would need variances in order to accomplish his
9 goals. The court said that's not a self-inflicted
10 hardship.

11 What would have been self-inflicted is
12 had -- is in the case like you cited earlier,
13 the person goes ahead and builds the garage, then
14 comes back and finds that they needed a variance
15 that they didn't ask for. That's where he is
16 basically -- the applicant has put themselves in
17 a position of self-inflicted hardship, as opposed
18 to where an applicant comes in to a vacant site
19 and says I have a right to do this under the
20 code but for variances that I would need in the
21 placement of the structure.

22 The courts have said that's not a
23 self-inflicted hardship, and I believe Mr. McKee
24 can look at this and go back and look at it and
25 see if I am correctly stating what the court

1 decision said, but the distinction between
2 self-inflicted hardship is the applicant makes
3 some action on the property that actually puts
4 them in violation of a code for which they then
5 need a variance, as opposed to the applicant
6 coming to a piece of property, whereby use of
7 the property, to the extent allowed by law as
8 a permitted use, they cannot utilize it but for
9 getting the variances.

10 And that's sort of the position we
11 are in here, where we are basically seeking
12 variances because of what we consider to be the
13 unique characteristics of the property and the
14 relationships of the uses to some of the standards,
15 if you will, set forth in the code, and that's
16 why it's a legal sort of...

17 MR. McKEE: I have to say, if I may follow
18 up on that, he is correct in the assertion of the
19 cases you indicate.

20 Self-created, when you start talking about
21 a self-created hardship, that is for the legal term
22 of art. There are cases specifically addressing
23 that on point.

24 I don't know that you were, in your
25 examination or your questioning, trying to get to

1 that term of art. You were just asking a general,
2 haven't you created your own problem.

3 MR. POWELL: Yeah.

4 MR. McKEE: But he is correct that there
5 are cases out there that clearly indicate that this
6 particular situation would not be a self-created
7 hardship. Just because he bought the -- they
8 acquired the property with the intent. Knowing
9 that the variance would be necessary doesn't mean
10 it's a self-created hardship. We would agree on
11 that. I think that's very clear.

12 So I don't think that's -- I don't -- I
13 just don't think that you meant to try to make
14 that a term of art. You were just asking a general
15 question is that it was...

16 So just for the distinction, I don't think
17 he was trying to make the allegation that that
18 is the issue. He is just asking the question
19 generally. I know it's --

20 MR. GONTRUM: I am well aware of the fact
21 that what we use in zoning has no relationship to
22 common sense and the common usage of words.

23 (Laughter)

24 MR. GONTRUM: You know, I always feel
25 like, you know, you say the right word, the duck

1 will drop down from the ceiling, which is an old
2 TV reference, but at any rate, it's all about magic
3 words and how we use them.

4 MR. McKEE: Yeah, and I can assure that
5 in an analysis, that would be very -- explained to
6 them before that would be a part of any analysis
7 in deliberation.

8 MR. GONTRUM: Thank you, sir.

9 MR. McKEE: Yes, sir.

10 MR. POWELL: Thank you.

11 MR. GONTRUM: I have no further questions.

12 MR. McKEE: Very well, sir. Thank you.

13 MR. RICHARDSON: Thank you.

14 MR. McKEE: You may step down.

15 (Witness, Richard Josephson, excused.)

16 MR. McKEE: If you would like to call your
17 next witness.

18 MR. GONTRUM: Mr. Davis.

19 MS. STARK: Wes.

20 MR. McKEE: I'm sorry?

21 MS. STARK: Were you going to open up for
22 questions of anyone in the crowd for this witness?

23 MR. McKEE: I already had.

24 MS. STARK: Oh, okay. I'm sorry. I
25 didn't notice.

1 MR. McKEE: I initially had asked if
2 anybody had any additional questions and I didn't
3 get any.

4 MS. STARK: Okay. Sorry.

5 AUDIENCE MEMBERS: No, you did not, sir.
6 You just asked them. You asked them. He had his
7 hand up several times.

8 MR. McKEE: I may stand corrected. Did I
9 give them --

10 MR. GETTY: No, you asked them.

11 MS. STARK: I thought you just asked me.

12 MR. GETTY: No, you asked the remaining --

13 MR. McKEE: I thought I had asked if there
14 was any additional questions, and then I turned --
15 then the board asked me if I could proceed.

16 MS. STARK: Okay.

17 MR. McKEE: I'm sorry, Mr. Squires. Could
18 you --

19 MR. SQUIRES: I mean, if she has her
20 hand up for -- if she has a question and wants to
21 cross-examine ... I mean, that's up to you. I saw
22 her waving her hand back there. It's up to you.
23 It's your call.

24 MR. McKEE: I don't remember if I did
25 or didn't, but because this is -- I am going to

1 allow her to ask the question. It's a public
2 hearing.

3 Sir, I am going to ask if you could
4 come back up and be subject to additional
5 cross-examination.

6 I apologize if I did not. I thought I
7 did make that -- and in the future, if I don't,
8 please stop me. I am dealing with -- I am juggling
9 a lot of different questions --

10 MS. STARK: Yeah.

11 MR. McKEE: -- including the board asking
12 me. So...

13 (Mr. Richard Josephson resumed the witness
14 stand at this time.)

15 MR. McKEE: I am sorry, sir. You are
16 still under oath.

17 May I ask -- please step forward. Yes,
18 that's fine.

19 MS. PARK: My name is initial K, Darlene
20 Park.

21

- - -

22 CROSS-EXAMINATION OF RICHARD JOSEPHSON

23 BY MS. PARK:

24 Q. And I have a question to ask you
25 concerning, in Anne Arundel County -- in Anne

1 Arundel County, were you -- do you live in Anne
2 Arundel County and work?

3 A. No.

4 Q. Okay. What county do you work in?

5 A. Pardon me?

6 Q. What county did you work in?

7 A. Oh, I worked in Anne Arundel County.

8 Q. Okay. And what county did you live in?

9 A. I live in Montgomery County.

10 Q. Is Montgomery County and Anne Arundel
11 County a Code Home Rule government?

12 A. They are both charter counties.

13 Q. Okay. Are you familiar with express
14 powers with Code Home Rule government?

15 A. I am somewhat familiar with -- they are
16 similar to charter counties but...

17 Q. Okay. Only because in your testimony,
18 I got the feeling that you thought our Code Home
19 Rules here should be subservient to the planning,
20 and I want you to understand that we do have
21 express powers to directly legislate ourselves,
22 when we have a need to legislate, and that's what
23 was done in 2009 with Code Home Rule 2-09 --

24 MR. McKEE: Ma'am, are you asking a
25 question or are you making a statement?

1 MS. PARK: Well, I was asking him the
2 question if he was familiar with the Code Home
3 Rule.

4 MR. McKEE: If you could just keep it to
5 the questions without lecturing him on what Code
6 Home Rule is.

7 MS. PARK: Yeah, okay.

8 BY MS. PARK:

9 Q. But are you -- have you been involved with
10 any county with Code Home Rule?

11 A. Yes, but I am --

12 Q. Have you personally sought legislation to
13 work on Code Home Rule?

14 A. I haven't personally sought legislation.

15 Q. Okay. Well, thank you very much.

16 A. You're welcome.

17 MR. McKEE: Any other questions? Yes,
18 ma'am. Please step forward.

19 MS. RIDENOUR: My name is Elaine Ridenour,
20 16345 Harwood Drive, Southwest, in Frostburg.

21 May I be permitted to quote from the
22 comprehensive plan before I ask my question?

23 MR. McKEE: Certainly.

24 MS. RIDENOUR: Okay.

25 - - -

1 CROSS-EXAMINATION OF RICHARD JOSEPHSON

2 BY MS. RIDENOUR:

3 Q. The 2014 Allegany County Comprehensive
4 Plan was initiated in July 2012 and formally
5 accepted by the Planning Commission on May 21,
6 2014, after input from several county agencies
7 and citizens.

8 Chapter 1, Section 5, the Maryland State
9 Planning Legislation discusses a Smart Growth
10 Initiative which was passed in 1997 by the General
11 Assembly and provides guidance for new development.

12 I quote, one of the principles of smart
13 growth that Maryland has adopted is to preserve
14 open space, farmland, natural beauty, and critical
15 environmental areas, unquote.

16 In addition, the Smart, Green, and Growing
17 Legislation was passed on July 1, 2009, and
18 includes a vision of, quote, resource conservation,
19 waterways, forests, agricultural areas, open space,
20 natural systems, and scenic areas are conserved.

21 The State of Maryland's Planning
22 Legislation is the principal source of land use,
23 environmental and growth policy for all 23 of
24 Maryland's counties and the City of Baltimore.
25 Counties must ensure that comprehensive plans

1 and other adopted plans are consistent with and
2 support the state's visions and goals, unquote.

3 Chapter 8, Section 1.1, Economic Growth,
4 Resource Protection, and Planning Act of 1992 was
5 passed in response to decades of environmental
6 damage to state resources. It requires each county
7 to adopt a sensitive areas element which includes
8 the protection of, quote, scenic vistas and unique
9 geologic features, unquote, within Allegany County.

10 Chapter 8, Section 11, scenic vistas
11 and geologic features, quote, are important as
12 attractions for tourists, vacationers, naturalists,
13 and hiking/biking enthusiasts. They are also
14 often associated with many features of landscapes
15 that society values for their beauty, rarity, and
16 historic significance.

17 Chapter 8, Section 11.1, Scenic Vistas
18 and Unique Geologic Features of Allegany County;
19 quote, the eastern boundary -- boundary of the
20 George's Creek Region is the escarpment or
21 ridgeline of the Allegheny Front, locally known
22 as Dan's Mountain.

23 How can you say that the board cannot
24 look to the comprehensive plan to make the decision
25 on these variances and special exceptions?

1 A. Well, I am not saying that the board can't
2 look at the comprehensive plan. I am saying that
3 the comprehensive plan language on scenic vistas
4 does not translate into appropriate consideration
5 of this use because there is nothing that specifies
6 in regulation where scenic vistas should be located
7 and what should happen or how those scenic vistas
8 should be protected.

9 There is nothing in regulation, and the
10 law requires that the regulations be consistent,
11 that regulations implementing the comprehensive
12 plan be consistent with the comprehensive plan.
13 There is no regulation on scenic vistas in Allegany
14 County.

15 Now, I will agree with you on the resource
16 conservation language that you cited in the
17 comprehensive plan, but I would argue that clean
18 energy via wind energy probably does more to
19 help resource conservation certainly than other
20 more conventional forms of energy, i.e., coal
21 or petroleum.

22 Q. Okay. All right. Thank you.

23 MR. McKEE: Any other cross-examination?
24 I am going to go with ... here in the red.

25 MS. HITES: Dana Hites, 12309 Henry Drive,

1 Southwest, in LaVale.

2

- - -

3

CROSS-EXAMINATION OF RICHARD JOSEPHSON

4

BY MS. HITES:

5

Q. First, I want to thank the -- the

6

witness -- whoops, sorry about that -- I want

7

to thank the witness because he has actually

8

helped clarify some questions that I had with

9

the comprehensive plan, but I have a few, if

10

you would indulge me, that I am still trying to

11

reconcile.

12

I read the plan, the 2014 plan, and within

13

it -- Section 5-4 is what I have here -- it states

14

that it wants to support the development of trails

15

and provide safe, convenient, and efficient bike

16

and pedestrian travel throughout the county.

17

There were two Dan's Mountain trails

18

listed under Section 5.1.6.2.3, Maryland DNR

19

Greenways at List 2000, Table 5-11. One was

20

a 12-and-a-half mile ecological greenway and

21

a 9-and-a-half mile recreational greenway. My

22

understanding is those were in the plan to be

23

created to connect in with other areas.

24

Now, how does that work with changing

25

the topography, the aspect of Dan's Mountain with

1 a wind farm on top of it, because I heard previous
2 testimony about "No Trespassing" signs and all of
3 these other things. So I am confused in how the
4 plan works with you're saying that there is no
5 definition of this or that. I don't...

6 A. Well, what I would -- with regard to
7 trails and greenways, the first thing I would look
8 at would be the recreation and open space plan to
9 see if there were actually mapped areas for those
10 trails and greenways.

11 The second thing I would look at would be
12 the County's capital budget or capital improvement
13 program to see if there was any plans for funding
14 any improvement of those trails and greenways,
15 and then I think we could have a discussion as
16 to whether or not that those actually exist or
17 are just an idea; and the recreation open space
18 plan would -- hopefully would show where those
19 were contemplated, where those are contemplated
20 to be located.

21 Q. Well, sir, isn't that what a comprehensive
22 plan is for, is planning for the future?

23 A. It is, and then it's followed up by more
24 functional plans. The comprehensive plan is --
25 kind of gives you the direction for how you want

1 to grow, develop, preserve in the future.

2 Q. Uh-huh.

3 A. Oftentimes, the comprehensive plans are
4 followed up by more what planners like to call
5 functional plans.

6 Q. Uh-huh.

7 A. So the transportation plan provides more
8 detail as to where the roads go. The greenways,
9 the master plan -- the recreation open space
10 plan provides more detail as to where pedestrian,
11 bicycle, greenways trails would go; and then
12 from there, you start creating things like
13 capital projects to actually implement those,
14 those improvements.

15 So the plan, the comprehensive plan kind
16 of provides the big picture, but that's not the
17 end of the story. You have to follow up by doing
18 a good number of things and actually implement that
19 comprehensive plan.

20 Q. Sir, you have worked in government a lot?

21 A. I have, uh-huh.

22 Q. Okay. Sir, has anything in the government
23 ever moved quickly?

24 A. Unfortunately, no, but, you know, as a
25 planner who has worked in the field for almost

1 40 years, I know that things do take time; but
2 things do change, and a lot of times, they change
3 for the better. I have seen -- I have seen areas
4 in different parts of where I have worked change
5 for the better. It just sometimes does take time.
6 It takes political will. It takes money.

7 Q. Uh-huh.

8 A. It takes citizen participation. It takes
9 somebody, you know, wanting to get something done.

10 Q. Oh, and I understand that, but it's a 2014
11 plan. I doubt they would even have the committee
12 yet to see if they can get those trails going.

13 I have other questions. The -- you made
14 comment about no definition of a scenic vista
15 and -- or unique geological features. There is
16 a lot of that flying around, and I am not totally
17 conversant on it; however, I read in the plan that
18 it says -- and Dan's Mountain is listed all through
19 this plan, and not once is it listed with wind
20 turbine next to the name, but that's beside the
21 point.

22 This statement here says that Dan's
23 Mountain includes Dan Rock, Dan's Rock, elevation,
24 2,898 feet. The highest point --

25 MR. GONTRUM: Can we get a reference?

1 BY MS. HITES:

2 Q. -- in the region and possibly the best
3 viewpoint --

4 MR. GONTRUM: Where is she reading from?

5 BY MS. HITES:

6 Q. -- along the Allegany front in Maryland --

7 MR. McKEE: Ma'am, just for the -- are you
8 reviewing the comprehensive plan? Is that what
9 you're looking at?

10 MS. HITES: Yeah, that's -- that is from
11 the plan, sir.

12 MR. GONTRUM: What section?

13 MS. HITES: That's a direct quote out of
14 the plan.

15 MR. McKEE: What section?

16 MS. HITES: Section 8.1 -- or Section
17 8.11.1. I'm sorry.

18 MR. GONTRUM: Okay. Thank you. I'm
19 sorry.

20 MS. HITES: My apology for not putting
21 that quote out there with the section.

22 BY MS. HITES:

23 Q. Sir, with that distinction, do you not
24 call that then a scenic vista, since it's the
25 highest point in the region and possibly the best

1 view, and that's in the plan?

2 A. Well, I may call that or any other area
3 scenic vista, but let me compare it a little bit
4 to other requirements.

5 We have something in Maryland called
6 the "Chesapeake Bay Critical Areas" and that's
7 a thousand feet from mean high tide, and prior to
8 the adoption of regulations, you could do pretty
9 much what you wanted within a thousand feet of
10 high tide in the Chesapeake Bay Critical Area.
11 It wasn't until the state and local jurisdictions
12 adopted regulations that limited or regulated
13 what you could do within that thousand feet of
14 the Chesapeake Bay Critical Area, and so it really
15 didn't mean anything until the regulation was
16 adopted, and that's kind of what I am saying here.

17 I am saying it's all good to talk about
18 scenic vistas. It's good to talk about wanting
19 to do these things, but until you actually adopt
20 regulations that specify exactly where you are
21 talking about doing something and exactly what
22 it is that you need to do, it's really -- it's
23 just aspirational. It's something that it is --
24 it's good to talk about, but let's do something
25 about it, let's follow up and do something about

1 it, and what I am saying is that no ordinance has
2 been adopted to specify or regulate scenic vistas
3 in Allegany County.

4 Q. Okay. Okay, one moment. (Perusing)
5 Sorry.

6 In what you are saying, if I am
7 understanding it correctly, there is -- let me
8 see if I can phrase this question to make sense.
9 I am having some problems like Mr. Powell, I am
10 having trouble trying to get my mouth around a
11 question I want to ask.

12 So you're saying the comprehensive plan,
13 2014, that's supposed to be guiding Allegany County
14 and the zoning board and so forth is great, but
15 it can be ignored because, since it was adopted
16 in 2014, they haven't got all the regulations in
17 place yet?

18 A. No, I am not saying that at all. I am
19 saying that one of the key ways to implement a
20 comprehensive plan is through the tools that you
21 normally use to implement a plan, and that I
22 mentioned the zoning ordinances, zoning ordinance
23 and zoning regulations. I mentioned subdivision
24 regulations, water and sewer plan.

25 Those are tools that are traditionally

1 used to implement the plan, and in this case, the
2 zoning that exists on the subject property is
3 consistent with the comprehensive plan, and because
4 the zoning allows the use, the special exception
5 being requested, there is consistency between
6 the special exception, the zoning, and the
7 comprehensive plan.

8 Q. The plan allows for special exceptions,
9 and since the special exception, you want -- and
10 the board hasn't totally implemented regulations
11 from the 2014 plan yet...

12 A. Well, let me put it this way. I think
13 you, yourself, said government works slowly --

14 Q. Yeah.

15 A. -- I think. Implementing plans sometimes
16 takes time.

17 Q. Uh-huh.

18 A. So it is possible that at some point in
19 the future, the County will determine that it's
20 appropriate to adopt other regulations that do
21 other things that are included in the comprehensive
22 plan. Just because you have -- the comprehensive
23 plan is the basis for all of those tools that
24 subsequently become adopted. Some happen sooner
25 than others.

1 MS. HITES: Thank you.

2 MR. McKEE: Are there any other questions?

3 Yes, sir.

4 MR. MERRILL: Walter Merrill, Rawlings,
5 Maryland.

6 - - -

7 CROSS-EXAMINATION OF RICHARD JOSEPHSON

8 BY MR. MERRILL:

9 Q. As I understand the gentleman, the board
10 will not be able to consider this scenic vista
11 in their consideration for your request for a
12 variance. Is that what you believe?

13 A. That's what I believe.

14 Q. Okay. And you walked the mountain ridge
15 yourself?

16 A. Yes.

17 Q. Okay. And was there any place along there
18 that you found exceptional --

19 A. I think --

20 Q. -- personally?

21 A. I think there is a lot of beautiful places
22 in Allegany County. I have ridden on the Great
23 Allegheny Passage Trail. I love being in Allegany
24 County. There are a lot of beautiful places here.

25 Q. And the fact that there isn't one Allegany

1 County resident or Frostburg State graduate that
2 probably hasn't used that rock for a date, romance,
3 engagement, marriage, taking your children up there
4 on a Sunday for a swim and a picnic, do you know
5 anything about that?

6 A. I know about the rock, yes.

7 Q. Thank you.

8 MR. McKEE: Are there any other questions?

9 Yes, sir.

10 MR. BRODE: Members of the Board, Counsel,
11 we weren't asked if we wanted to ask Mr. Brewer any
12 questions either.

13 My name is David Brode. I live at 16332
14 Harwood Drive, Frostburg. It's on Dan's.

15 I have a -- I would like to bring up a
16 question about the first hearing. The gentleman
17 that seemed to be the spokesman then was much
18 more strong-armed, it seemed to me. During that
19 hearing, he not only strong-armed the county
20 commissioners, threatened them with --

21 MR. McKEE: What hearing are you referring
22 to?

23 MR. BRODE: -- he threatened them with
24 litigation, to my recollection.

25 My question specifically is, he stated,

1 during that hearing, that if one more turbine was
2 eliminated, that the project at that time would
3 not -- would no longer be profitable, and I seem
4 to remember --

5 MR. McKEE: We're missing a lot of
6 background here. I don't know which hearing.
7 I don't know who "he" is, and it's very hard for
8 us to follow your question if we don't --

9 MR. BRODE: Well, I apologize.

10 MR. McKEE: Yes, we need to know who, who
11 and when.

12 MR. BRODE: The hearing in '08 or '09,
13 the first hearing, prior to the implementing of
14 the Code Home Rule. I don't know if you were with
15 the County at that time, sir.

16 MR. McKEE: I was. I would have been at
17 the hearing. I guess that's what I am trying to
18 get at.

19 MR. BRODE: Okay.

20 MR. McKEE: So it was at the hearing
21 when they were implementing the Code Home Rule
22 Bill. This was the hearing before the County,
23 the commissioners, or the planning and zoning
24 commissioners?

25 MS. STARK: Was this Mr. Friend?

1 MR. BRODE: I don't recall the gent's
2 name. I just remember he was with the wind
3 turbine.

4 MR. McKEE: Okay. I can't -- yeah.

5 MR. BRODE: I don't know how significant
6 or how much meaning that has to my question.

7 My question was, at that time, it was
8 stated that if one more turbine was eliminated
9 from the project, it would no longer be profitable;
10 and I seem to remember they originally had proposed
11 around 30, and the number that I remember that was
12 like the killer was 27, between 27 and 28.

13 My question, the question I would like
14 to be brought up is now how, all of a sudden, the
15 project would no longer be profitable at 27 or
16 28, whichever it was -- I'm sure that that is on
17 record somewhere -- now we're at 17, and I am just
18 curious -- I assume that Mr. Brewer would have been
19 the one to ask this question. We weren't allowed
20 after lunch.

21 MR. McKEE: Well, I am going to stop
22 you right there, sir. First of all, Mr. Brewer,
23 we took two hours of letting anybody who had a
24 question for Mr. Brewer --

25 MR. BRODE: No, sir, you did not.

1 MR. McKEE: Yes, we did.

2 MS. STARK: Yes, he did.

3 MR. McKEE: Yes, we did.

4 MR. BRODE: Oh, I apologize.

5 MR. McKEE: We did. So we're not going to
6 entertain --

7 MR. BRODE: All right.

8 MR. McKEE: -- what we did or didn't do
9 with Mr. Brewer.

10 MR. BRODE: Wow.

11 MR. McKEE: And, secondly, if you have a
12 question that's directed to this witness, that's
13 fine, but --

14 MR. BRODE: You keep addressing me. I
15 apologize for -- it seems to me it's become this.
16 I didn't mean for it to be.

17 - - -

18 CROSS-EXAMINATION OF RICHARD JOSEPHSON

19 BY MR. BRODE:

20 Q. Sir, could you address my question. How
21 is it that we were at, let's say it was 27 versus
22 28 was the magic two numbers for the turbines,
23 and now we're at 17. I am just curious as to how
24 it's profitable at 17, and now it seems to be the
25 same sort of a scenario where -- you know, six,

1 we wouldn't -- I assume we wouldn't even be having
2 this hearing, but you guys want 17. How is it
3 that 17 now are profitable where a number, not
4 that long ago, 27 was not a profitable number?
5 Can you address that?

6 MR. GONTRUM: I am going to object to the
7 question being asked of this witness as to what is
8 profitable and what is not. This witness has given
9 no testimony as to what is profitable. The only
10 thing to which he --

11 AUDIENCE MEMBER: (Inaudible)

12 MR. GONTRUM: -- has testified is to what
13 is in the various application itself, there is a
14 statement. He has not testified as to anything
15 along those lines, only with respect to compliance
16 with the comprehensive plan and in compliance with
17 state law requirements.

18 MR. McKEE: I am going to sustain your
19 objection. I agree with you. I believe that
20 that specific question was asked of Mr. Brewer
21 on several occasions when he was taking the stand
22 in this case. So we've been down this road.

23 MR. BRODE: We have?

24 MR. McKEE: We have been down this road.
25 I believe the board will all --

1 is that correct?

2 A. That's correct.

3 Q. Even though there were changes proposed
4 for other areas?

5 A. That's correct.

6 MR. GONTRUM: I have no further questions.

7 MR. McKEE: Very well. Thank you, sir.
8 You may step down.

9 (Witness, Richard Josephson, excused.)

10 MR. McKEE: All right. This could be a
11 good time to take a ten-minute break, so we're
12 going to take ten minutes. Thank you. We will
13 reconvene at 2:40.

14 (At 2:32 p.m., break taken until
15 2:45 p.m.)

16 CHAIRPERSON WILLIAMS: If we could come to
17 our seats, please. Okay. We're back in session.

18 MR. McKEE: Madame Chairwoman, just as
19 one quick point, I do want to, before -- it's a
20 housekeeping matter -- before I forget. During
21 the break, we were provided with an exhibit. It's
22 a letter from Dan James. It's been marked Exhibit
23 TTTT. It's been filed. I would simply indicate
24 we're going to put that into the record at this
25 time.

1 MS. WILLIAMS: Thank you.

2 MR. McKEE: Very well. You're prepared?
3 Are you ready to call your next witness, sir?

4 MR. GONTRUM: Yes. I would call Mr. Sean
5 Davis.

6 - - -

7 SEAN DAVIS,

8 APPLICANT'S WITNESS, SWORN

9 - - -

10 DIRECT EXAMINATION OF SEAN DAVIS

11 BY MR. GONTRUM:

12 Q. Mr. Davis, would you please state your
13 full name and address for the record, please.

14 A. Sean Davis, 1414 Key Highway, Suite 201-P,
15 Baltimore, Maryland 21230.

16 Q. And are you currently employed?

17 A. I am.

18 Q. And by whom?

19 A. Morris & Ritchie Associates.

20 Q. And what is your title?

21 A. I am a principal and Director of Land
22 Planning.

23 Q. And what is that Morris & Ritchie does?

24 A. We are architects, engineers, planners,
25 surveyors, landscape architects, a variety of the

1 professions associated with land development.

2 Q. And what are your duties at Morris &
3 Ritchie?

4 A. I oversee planning for the vast majority
5 of the larger community projects that we're
6 involved in.

7 Q. And what is your educational background?

8 A. I have an undergraduate degree in
9 Landscape Architecture from Texas Tech, and I
10 have a JD, a law degree from the University of
11 Baltimore.

12 Q. And have you had the opportunity to
13 serve on the boards or currently head of any
14 organizations dealing with land planning?

15 A. I am the Chair of the Urban Land
16 Institute, Baltimore District Council, which
17 includes all of Maryland, except the four counties
18 surrounding Washington, DC. I served on a ULI,
19 Urban Land Institute, National Product Council.

20 I am on the Maryland Building Industry
21 Association, the Board of Directors, as a Life
22 Director, as past president of the Baltimore City
23 Chapter of the MBIA.

24 Q. I want to show you a résumé and ask if
25 you can identify this as your résumé.

1 A. Yes, that's my résumé.

2 MR. GONTRUM: I would offer this as
3 Petitioner's Exhibit 4V.

4 MR. SQUIRES: We're getting close to the
5 end of letters. D?

6 MR. GONTRUM: V.

7 MR. SQUIRES: Is this the only stamp?

8 MR. GONTRUM: No, there is --

9 MR. SQUIRES: Oh, okay. Do you want it
10 back?

11 MR. GONTRUM: No.

12 MR. SQUIRES: Okay.

13 (Exhibit VVVV was marked/entered into
14 evidence.)

15 BY MR. GONTRUM:

16 Q. Mr. Davis, have you ever been qualified
17 as an expert in the fields of land planning and
18 development before a court or administrative board?

19 A. Yes.

20 Q. And have you had occasion to present in
21 any bodies, for any bodies, generally, on issues
22 of land planning and how they relate to zoning?

23 A. Yes, throughout the state of Maryland,
24 Delaware, New Jersey, New York, Pennsylvania, and
25 Virginia.

1 Q. And when you have been qualified as an
2 expert before any court or administrative board,
3 what courts or administrative boards have you been
4 qualified as an expert from?

5 A. Through a variety of administrative
6 judicial bodies in a variety of different counties
7 and municipalities across the various states as an
8 expert witness relating to land planning, landscape
9 architecture, and land development.

10 MR. GONTRUM: All right. And I would
11 offer the witness as an expert in the fields of
12 land planning and development.

13 MR. McKEE: All right.

14 BY MR. GONTRUM:

15 Q. Now, Mr. Davis, as an expert, will you
16 accept that when I am asking you to express an
17 opinion, I am only asking for those opinions that,
18 based on your education, training, and experience,
19 you hold to a reasonable degree of certainty as an
20 expert in your field?

21 A. Yes.

22 Q. Now, as an expert, when you have testified
23 as -- when you had the opportunity to testify as
24 an expert, have you ever had the opportunity to
25 testify as an expert in a zoning hearing for

1 special exception hearings?

2 A. Yes --

3 Q. Okay.

4 A. -- numerous times.

5 Q. Now, have you had the opportunity to
6 familiarize yourself with the Allegany Code -- the
7 Allegany County Comprehensive Plan adopted in 2014?

8 A. I have.

9 Q. And have you had the opportunity to review
10 the Allegany County Code as it pertains to special
11 exceptions and, in particular, as it pertains
12 to the use of land for industrial wind energy
13 conversion systems?

14 A. I have.

15 Q. All right. Now, you have brought with
16 you, I believe, planning notes, a report to the
17 Planning & Zoning Commission of Allegany County,
18 "The Regulations and Management of Wind Energy
19 Devices," a report dated January 2009?

20 A. I have.

21 Q. I show you this report.

22 A. Yes.

23 MR. GONTRUM: And I would like to put this
24 in as 4W's.

25 MR. SQUIRES: Correct.

1 (Exhibit WWWW was marked/entered into
2 evidence.)

3 THE WITNESS: Like you said, we're almost
4 at the end of the W -- or the alphabet again.

5 MR. GONTRUM: We've got X, Y, Z yet.

6 BY MR. GONTRUM:

7 Q. What is the significance of this report?

8 A. My understanding, that the report, which
9 was published in January of 20 -- of 2009 predates
10 the legislation that ultimately became 360-92.

11 Q. And how does this report relate to that
12 legislation, and in particular, how would it relate
13 to this current proposal?

14 A. Well, fundamentally, what had happened
15 was, as I understand it, what had happened was
16 that the Board of County Commissioners had asked
17 the Planning Committee -- the Planning and Zoning
18 Commission had asked Planning and Zoning staff
19 to evaluate rules and regulations associated with
20 industrial wind energy conversion systems, and
21 the staff had gone through a rather exhaustive
22 system or an exhaustive analysis, and those were
23 ultimately published in 2009, culminated in a
24 publication over 2009, which then was used to
25 create the legislation that became 360-92 which

1 are the special exception rules for industrial
2 wind energy conversion systems.

3 Q. Okay. So will you accept then for the
4 purposes of my questions, that when I use the term
5 "project," I am speaking about the application of
6 Dan's Mountain Wind Force where the location of
7 an industrial wind energy conversion system on the
8 applicant's properties on Dan's Mountain is here
9 in Allegany County?

10 A. Yes.

11 Q. Now, have you visited the project site?

12 A. I have.

13 Q. And are you familiar with the project
14 zoning?

15 A. Yes, I am.

16 Q. How did you go about your work in
17 analyzing this project as a land planner?

18 A. We go through a rather systematic process
19 which has been tried-and-true and tested over many
20 decades. The process begins with a site analysis.
21 We then move to a regulatory review, and then I
22 understand a program was to be placed on the land.
23 Collectively, that results in, ideally, the ideal
24 site plan.

25 From the site analysis standpoint, we

1 visit the property, first and foremost. There is
2 nothing more important than understanding the site
3 and surrounding neighborhoods, spent the day here
4 several weeks ago. It was a beautiful day. We
5 went up on top of the mountain, drove around all
6 the neighborhoods, drove into Frostburg, drove
7 down to Midland, really tried to understand the
8 context of the site within the community.

9 We did a pretty exhaustive search
10 with aerial photography to understand what had
11 happened, what's happened with the property
12 over the years; evaluated MERLIN, which is
13 the Maryland Environmental Resource and Land
14 Information Network, which identifies general
15 things, such as wetlands and whatnot, just to
16 get an understanding of what was happening
17 there; looked at the USGS topography map which
18 is available online through the County's website;
19 reviewed all the work that was done by Bennett
20 & Brewer Associates.

21 That was ultimately the combination of
22 the special exception application and variance
23 requests; and through that, we kind of came to
24 a conclusion regarding the site, and I think this
25 is illustrated on the aerial photograph that you

1 see here. For a point of orientation, we have got
2 68 and we have 36 here. We have got Burning Mine
3 Road here. We have got Old Dans Rock Road here.
4 We have the 17 wind turbines that are located right
5 here.

6 And one of the things that came out
7 very, very quickly, when we visited the site
8 and then when we really took a look at the aerial
9 photography, is there are a lot of land uses
10 surrounding this proposed development that really
11 kind of impact it; and the first and foremost, we
12 have the landfill which is immediately to the west
13 of this site and down the hill from the site. We
14 have the top of the ridge which has been cleared,
15 as actually has most of this mountain been used for
16 forestry over the years. This has been cleared and
17 it has been mined. So if you will, the disturbance
18 to that land has already taken place which is very,
19 very important.

20 We have utility lines that criss-cross
21 the property here and over here, and we also
22 have the utility lines crossing over the property
23 just to our north. We have the surface mine, the
24 active surface mine, which you see on the opposite
25 side of Route 36 which is very visible from the

1 road. We have the old surface mine which is now
2 a gravel parking lot immediately to our north;
3 and, obviously, we have the cell tower cluster
4 immediately to our south.

5 So, collectively, there is a lot of things
6 that have happened around this site that from my
7 perspective, from a planning perspective, make this
8 kind of an ideal location for a potential wind farm
9 because there are so many uses of similar character
10 and nature to it, in terms of what has happened
11 from a land -- from a land disturbance standpoint
12 and land development standpoint.

13 So that was kind of a culmination of
14 the site analysis, and then we went through our
15 regulatory review, and we looked at the comp plan.
16 First and foremost, we do an evaluation, you know,
17 the comp plan is at -- the comp plan is at 10,000
18 feet and zoning is at 8,000 feet, and then you
19 get subdivision regulations down around 3,000
20 feet, and then you get things such as landscape
21 ordinances that are down around a thousand feet.
22 That's kind of a hierarchy of how I view the land
23 development regulations.

24 So we start off with the comprehensive
25 plan, get an evaluation of the comprehensive

1 plan, which I think was adequately -- more than
2 adequately testified by Mr. Josephson. Went
3 through the zoning, looked, first and foremost,
4 at Section 30 -- 360-83 which is the agriculture,
5 forestry, and mineral. It's not just ag. It's
6 agriculture, forestry, and mineral zone, which
7 is really important, because on the forestry
8 and mineral extraction site, we're talking about
9 resource harvesting; and, obviously, in 360-83,
10 Section B(13), industrial wind energy conversion
11 systems are permitted as a special exception. So
12 like from a planning and zoning standpoint, the
13 use is permitted as a special exception.

14 Then that really kind of directs you
15 through 360-92 which, obviously, is an incredibly
16 detailed section of the zoning code, probably the
17 most detailed section of the zoning code that I
18 read which really spells out the specific criteria
19 that govern the location of an industrial wind
20 energy conversion system for the property.

21 And then we go back to that January 2009
22 report, and I think one of the things that was
23 really kind of very interesting -- there is a
24 couple of things that were very interesting about
25 that.

1 First, it was a very well-written report
2 which really tried to strike a balance between the
3 pros and cons of industrial wind energy conversion
4 systems, trying to understand all aspects from both
5 different sides, really trying to identify, based
6 on all those different aspects, what are rules and
7 regulations that would govern this use here in
8 Allegany County, and it went through and identified
9 very specific criteria, most of which were wrapped
10 up in 360-92.

11 A couple changed a little bit, but for
12 the most part, they were all wrapped up into the
13 ultimate ordinance that governs this use, but
14 probably most importantly from my standpoint,
15 when I went back and looked at the two things
16 that really kind of popped out, first off, that
17 report and the ordinance were adopted in 2009.
18 The comprehensive plan was adopted in 2014.

19 So there was a lot of discussion regarding
20 industrial wind energy conversion systems in 2009,
21 and then in the 2014 comprehensive plan -- when we
22 talked about the scenic vistas -- there was very
23 little talk about them, in terms of preserving the
24 scenic vistas in relationship to these uses, even
25 though there had been a large discussion, a report

1 which ultimately resulted in an ordinance.

2 So I think probably everybody felt --
3 either, one, everybody felt comfortable that they
4 have been protected through the ultimate adoption
5 of 360-92 and how it applies throughout the county,
6 or that there was probably still some work that
7 needed to be done which was identified in the
8 comprehensive plan.

9 The second thing that was kind of striking
10 about the ordinance from my perspective is, it
11 is, as I said, very, very detailed, and when we
12 talk about the setbacks that are established in
13 it, those are kind of very, very large setbacks.
14 I think they -- there is two sets of setbacks.

15 One is talking about kind of the health
16 and use an enjoyment of the surrounding properties,
17 hence the buffer, zones of 1,000, 2,000, 5,000
18 feet, and then there are the specific safety issues
19 regarding the area around the -- you know, 1, 2,
20 or 3 times the tower height, but those were very,
21 very specific and very, very large, I mean, very
22 large setbacks. I have never in my 30-year career
23 seen a setback that kind of dictates 2,000 feet,
24 2,000 feet from a particular use.

25 The second thing that was identified in

1 there, which again I thought was very interesting,
2 was the variance standard which, as Mr. Josephson
3 had testified to, was specifically identified in
4 the ordinance, and I am going to call them variance
5 or variance requests, which were specifically
6 identified, required the property owners who
7 would be impacted to sign off before the variance
8 could even be asked for, because in my history in
9 this field, variances are -- the variance process
10 is used to protect people who otherwise would not
11 have a voice. It is I have to ask for a variance
12 to set back from my neighbor who wouldn't have a
13 voice but for this process.

14 In this particular instance, what they've
15 done is they've come back and they said, well, not
16 only do you have a voice, you have to sign off on
17 this before it ever goes before the Board of Zoning
18 Appeals which is very, very big. In my opinion,
19 it's a very, very high threshold.

20 So I've got a very specific ordinance
21 and a very high threshold for variances, and I
22 think what that ultimately did was it said, you
23 know, we want to be very protective of these, but
24 we recognize from a planner's perspective, when
25 you develop an ordinance that has those types of

1 setbacks and it's done in the abstract without
2 a specific piece of property, as it has to be
3 done in an abstract because it's applicable to
4 all agriculture, forestry, and mineral extraction
5 zones and your conservation zone throughout all
6 of Allegany County, when it's done like that,
7 it's almost impossible to understand the impacts
8 and then intend the consequences until you have
9 a specific application which is what we have here.
10 Now we have a specific application in which this
11 is being applied, and now we understand why the
12 reason for the variances.

13 So I think, collectively, the way that
14 this has been drafted was very, very comprehensive,
15 and I really think that it's been taken into --
16 it's taken into account a number of very specific
17 things to protect surrounding residents and so --
18 from the variance standpoint. So I think I've
19 gone through the analysis and the evaluation of
20 the special exception criteria that were included
21 in all the materials, as well as the variance
22 materials that you have received, and I believe
23 that they fully comply with Section 360-92.

24 Q. Mr. Davis, are you familiar with the
25 concept of "zoning merger"?

1 A. Yes.

2 Q. And the idea of internal variances as
3 opposed to external variances?

4 A. Yes.

5 Q. How does that apply to this case?

6 A. Well, obviously, what we're talking about
7 is, when you draw the site boundary, now we're
8 talking about what's happening within that site
9 boundary. These variances apply to within the
10 property, not around our periphery.

11 Q. Well, as you read the report leading up
12 to the legislation, did it really talk about people
13 who were applicants seeking variances, or were
14 it for adjoining property owners and residences
15 outside, let's say, the project boundary?

16 A. I think it was for anybody who would be
17 impacted, including anybody who was within the
18 property or anybody who was outside. It really
19 didn't draw a distinction, but the way I always
20 look at variance requests is it's to protect
21 somebody who otherwise wouldn't have a voice
22 in the discussion, and I think in most of those
23 instances, it's somebody who is on the periphery,
24 outside of the project.

25 Q. You were mentioning the balancing test

1 or the balancing that you saw in the report
2 between the people behind an industrial wind
3 energy conversion system and then the community
4 that would be impacted --

5 A. Right.

6 Q. -- and you thought that there was a
7 balancing between that.

8 A. I think there was.

9 Q. And I wasn't sure whether, in looking
10 at that report, whether it was really looking
11 at the adjoining communities or the adjoining
12 residences like up at Harwood or Bel Air or those
13 communities as to how they would relate to the
14 project as opposed to, let's say, the Willisons
15 which are part of the project.

16 A. I think it's probably more focused on
17 someone who is outside of the boundaries of the
18 property; but, remember, when that report was
19 written, it was again when the ordinance was
20 adopted. It was adopted in the abstract. There
21 was no specific proposal before it.

22 Obviously, this proposal had been heard
23 before, and so I am sure this was in somebody's
24 mind, but when they were adopting this, it's
25 applicable throughout the "A" and "C" zones.

1 So, again, you know, the vast majority of Allegany
2 County is in the "A" and "C" zones, so they
3 really -- they have to look at it in the abstract.

4 Q. Well, you have opined that it meets the
5 criteria of a special exception in Allegany County.
6 Could you describe how it meets that criteria.

7 A. Well, if you go through the specific
8 sections that Mr. Brewer went through as part
9 of 360-92 in identifying, you know, all of the
10 very specific setback requirements, the buffer
11 requirements, the specific elements that were
12 included in the electromagnetic interference
13 analysis, the decommissioning bond, the groundwater
14 protection bond, all those things that are
15 specifically enumerated in 360-92, I think have
16 been addressed and they were included in it.

17 Q. Are you familiar with what they call the
18 *Schultz v. Pritts* test?

19 A. I am generally, yes.

20 Q. And does this particular property or
21 proposal meet the test for *Schultz v. Pritts*?

22 A. I believe it does.

23 Q. As a special exception?

24 A. I believe it does.

25 Q. And why is that?

1 A. Because I believe that the impact of this
2 particular use and this particular property is no
3 greater here than it would be in any other part of
4 Allegany County. I believe that based on the site
5 conditions surrounding this property that this is
6 an appropriate location for this use in Allegany
7 County.

8 Q. You heard Mr. Brewer testify to the
9 use that this was basically trying to be an
10 environmentally sensitive design to the greatest
11 practical extent --

12 A. Yes.

13 Q. -- and I have heard environmentalists
14 call it, what, ESDs to the --

15 A. MEP.

16 Q. -- MEP?

17 A. Right.

18 Q. And does this site qualify, in your
19 opinion, as one that would be a ESD?

20 A. Well, impact development or environmental
21 site design, absolutely. If you look at the
22 number of criteria that Mr. Brewer had to go
23 through in siting the proposed turbines from the
24 topography to the natural vegetation, protected
25 natural vegetation to the wetlands, to the

1 Allegheny woodrat habitat, to the subsurface mines,
2 to the surrounding properties, all of those things
3 go in -- come into effect. The electromagnetic
4 interference criteria, not only the specific siting
5 of those, but how they've come back in, and they
6 have also, in terms of the future, not only the
7 construction of this, but also the future, how
8 they're going to come back in and remove paving,
9 how they're implementing stormwater management
10 for the site, and I fully -- I think it fully
11 complies with environmental site design and low
12 impact development.

13 Q. Now, you also heard testimony with
14 respect to the variances that are being required
15 or requested rather with respect to the units,
16 and you have heard the questioning back and forth
17 of Mr. Brewer and Mr. Josephson with respect to
18 that.

19 A. Yes.

20 Q. Do you believe that this meets the
21 various criteria with respect to unique properties
22 contributing to a practical, difficult, or undue
23 hardship?

24 A. Yeah, and I look at variances, I guess,
25 slightly different. For me, it is --

1 Q. Slightly different how?

2 A. In terms of it is the unique
3 characteristics that were the practical
4 difficulties of a particular piece of property
5 and what undue hardship they have on the proposed
6 use there, not necessarily the owners. Okay?
7 It's not about the applicants.

8 It's about, okay, based on the site
9 characteristics, the topography, the environmental
10 features, the subsurface mining, the specific
11 issues associated with the use, which is why we
12 go through that program evaluation in our process,
13 and I look at those and I say, okay, based on
14 all of those unique characteristics of this, is
15 there an undue hardship in siting that use on this
16 because of those, and I think the answer is yes,
17 primarily because of the setback requirements and
18 the way they're established, and so that's -- and
19 then that ultimately becomes undue hardship on the
20 applicant.

21 Q. Why isn't elimination of the turbines,
22 let's say, down to six turbines an elimination of
23 the practical difficulty?

24 A. Well, I think it was clearly identified
25 in the actual variance request, that I think

1 it was written, in part, it specifically says,
2 "Absent the requested variance, it is not
3 practically feasible to construct the project.
4 Given the nature and extent of the various
5 design constraints, the turbines cannot be
6 moved such that a variance is not required.
7 The only alternative would be to eliminate the
8 units altogether, in which case the project is
9 not viable."

10 That's specifically stipulated in the
11 variance request. So reducing it down below 17
12 makes the project not viable.

13 Q. And is that a hardship of the applicant
14 or a hardship of the property?

15 A. It's a hardship of the property. It's
16 the unique characteristics of the property that
17 are creating a hardship in identifying and locating
18 this proposed permitted use on this land in such a
19 way.

20 Q. What is the significance of the fact that
21 it is permitted, a permitted use?

22 A. We're not asking for a variance of a land
23 use. This is -- you know, when we talk about land
24 uses generally, we talk about permitted uses or
25 non-permitted uses. Non-permitted uses need a

1 variance, and I am sure this board has heard plenty
2 of those, or they need a rezoning. Well, we don't
3 need a rezoning because this use is permitted as
4 a special exception, and the special exception
5 criteria have been met but for the variances that
6 are requested. Those variances are based on the
7 unique characteristics of this land and siting that
8 use on that land.

9 MR. GONTRUM: I have no further questions.

10 MR. McKEE: Cross-examination?

11 MS. STARK: Yes, please.

12 - - -

13 CROSS-EXAMINATION OF SEAN DAVIS

14 BY MS. STARK:

15 Q. So just a point of clarification, you
16 are listed as an expert witness related to the
17 land use; is that correct? Do you have any
18 qualifications as an expert witness related to
19 wind turbines?

20 A. No.

21 Q. Okay. Thank you.

22 On this report, I am taking a look at
23 it and maybe I am missing it, but do you know who
24 the author of the report is?

25 A. I don't, but the way it was written, I

1 believe it was the staff, because if you see, if
2 you look at the report, specifically throughout
3 it -- I can read you a couple excerpts from it.

4 Q. The staff of where?

5 A. The planning staff.

6 Q. The planning staff?

7 A. The Allegany County planning staff.

8 Q. I am getting head nods over here that's
9 who it's from.

10 A. Yes.

11 Q. Okay, okay. That I just couldn't tell
12 who it was from.

13 Okay. Now, related to, say, conservation
14 land, what kind of natural topography do you
15 anticipate -- or how does land get set as
16 conservation land? Are there certain elements
17 to the land that make that conservation over
18 agriculture over residential?

19 A. No, it's a local determination. For some
20 reason, the local jurisdiction has decided that
21 they would like to identify this as an area of
22 conservation and this as an area of agriculture,
23 forestry, and mineral extractions.

24 Q. And conservation land, is it pretty
25 typical to find, say, areas where you've got rare

1 or threatened, endangered plants/animals; hence,
2 that's why it ends up as a conservation situation?

3 A. That could be -- sure, that could be one
4 of the criteria.

5 Q. Okay. In areas, such as at the top of
6 Dan's Mountain, you have pointed out a number of
7 different ways that you've got, you know, mining
8 over in one area and different uses in the fact
9 that Frostburg and the area surrounding it has a
10 lot of agricultural land. Are there general things
11 that are common in agricultural land, like former
12 mining areas and...

13 A. I think I said -- and correct me if I'm
14 wrong -- but I think I said that they have a lot
15 of agriculture, forestry, and mineral extraction.

16 Q. You did say it that way, yes.

17 A. Because, in fact, it's my understanding,
18 looking at prior photographs, that Dan's Mountain
19 has been timbered before and --

20 Q. Yes, I would say that's accurate.

21 A. -- okay, and that there is a very large
22 open mine immediately across Route 36 from the
23 property.

24 Q. Right.

25 A. There is a -- there was a mine that was

1 now a surface parking lot.

2 Q. Uh-huh.

3 A. There were mines at the top of the
4 mountain. So in this particular instance, I
5 don't think it really has to do with agriculture
6 as much as it has to do with forestry and mineral
7 extraction.

8 Q. Okay. And you made a comment then -- you
9 were looking at the site constraints -- in your
10 analysis that there is no difference here at this
11 location than anywhere else in Allegany County?
12 Did I catch that right?

13 A. No, that's --

14 Q. You felt this was unique in Allegany
15 County. So can you tell me what you were looking
16 at that you felt was specifically unique about this
17 property?

18 A. The confluence of a variety of different
19 land uses, such as a landfill, mining operations,
20 the timber clearing, the cellular cluster, the
21 overhead transmission lines that criss-cross the
22 property, all of those things, in my opinion, are
23 unique to this property.

24 Q. Did you take into account the Dan's
25 Mountain overlook and the Rock and the scenic

1 vista, that area?

2 A. Yes.

3 MS. STARK: That's all. Thank you.

4 MR. McKEE: Does anyone else have
5 questions? Yes, ma'am.

6 MS. HITES: Dana Hites. I gave my address
7 previously.

8 - - -

9 CROSS-EXAMINATION OF SEAN DAVIS

10 BY MS. HITES:

11 Q. Sir, I just have a couple questions from
12 your testimony.

13 MR. McKEE: Ma'am, you are very
14 soft-spoken. We need you to speak up.

15 MS. HITES: Oh, my apologies, my
16 apologies. You are right. I am soft-spoken.
17 I apologize. It's not the first time I've been
18 told to get closer to a mike.

19 BY MS. HITES:

20 Q. Okay. You made a statement that the
21 setbacks of 2,000 foot from a residence were the
22 largest setbacks you had ever seen.

23 A. Yes.

24 Q. Okay. Sir, you also made the statement
25 that you felt that 360-92 was adopted in the

1 abstract but then made a comment that Dan's
2 Mountain project had been in the works and may
3 have been thought of while it was being generated?

4 A. Yes.

5 Q. Okay. Sir, have you done any research
6 on wind turbines, just direct research on wind
7 turbines and the recommended setbacks by experts
8 in wind turbines and scientists, doctors, all those
9 types of things?

10 A. No, other than what I've read in the 2009
11 report from the planning staff.

12 Q. Okay. And those were what eventually
13 became the setbacks that the planning staff adopted
14 into 360-92?

15 A. Almost.

16 Q. Almost. I haven't read the report that
17 was put in evidence, so I can't speak to that.
18 That was the question I had is whether or not
19 you had done research on wind turbine recommended
20 setbacks.

21 A. Thank you.

22 Q. So thank you.

23 MR. McKEE: Any other questions? Yes,
24 sir, in the blue, if you want to come forward.

25 MR. RIDENOUR: Randy Ridenour. I gave my

1 previous address.

2

- - -

3

CROSS-EXAMINATION OF SEAN DAVIS

4

BY MR. RIDENOUR:

5

Q. Just one quick question. I would like

6

to know, if you haven't done that research on

7

wind turbine setbacks, how can you stand here as

8

an expert testimonial and make that statement about

9

the setbacks that are in the current code?

10

A. If you have a chance to review the 2009

11

report, I think you will realize that it

12

specifically states what the regulations were in

13

2002 and where they are in 2009.

14

Q. But how can you -- how can you give that

15

judgment in this area? You have admitted that you

16

don't have that experience.

17

A. Based on the material that I've read.

18

Q. Okay. Thank you.

19

MR. McKEE: Yes, sir, if you want to come

20

forward.

21

MR. MERRILL: Walter Merrill.

22

- - -

23

CROSS-EXAMINATION OF SEAN DAVIS

24

BY MR. MERRILL:

25

Q. You said that you drove around a good bit

1 and you noticed, you observed the Harwood and the
2 Bel Air developments.

3 A. No, I said I went into Frostburg and
4 Midland. If I went into Harwood and Bel Air, I
5 didn't necessarily know it, but I spent the entire
6 day driving up and down the mountain and around in
7 the neighborhood.

8 Q. Okay. The only reason I said about you --
9 you said about the various elevations, that you
10 went from zero or the badger zone, valley floor,
11 all the way up to zero.

12 You may have missed it. Do any of the --
13 do you know of any other large developments beyond
14 Bel Air?

15 A. No.

16 Q. Thank you.

17 A. Thank you.

18 MR. McKEE: Are there any other questions?

19 (There was no response.)

20 MR. McKEE: Do the members of the board
21 have any questions?

22 MS. WILLIAMS: I do.

23 MR. POWELL: Just one or two here, I
24 guess.

25

- - -

1 EXAMINATION OF SEAN DAVIS

2 BY MR. POWELL:

3 Q. This particular area, I mean, I think
4 she asked it, Ms. Stark asked a question about
5 what makes this particular area unique, I think
6 she asked ... due to all the mining and everything.

7 The cellular towers that are that cluster
8 of cellular towers there, is that not a unique
9 feature for this particular area?

10 A. Yes, I believe I said that, but if I
11 didn't, yes, it is.

12 Q. Okay. So now if that's a particular
13 unique feature, would the towers themselves not
14 serve as a possible adverse effect to that
15 particular feature?

16 A. Not from a land use standpoint, in my
17 opinion.

18 Q. Okay. Let me see...

19 That's the only -- you know, when I am
20 visualizing that and, you know, when we get into
21 site specific adverse effect in addressing that,
22 when we get down to that, then there is always the
23 tests that we have to do and you look at it and you
24 say, okay, if this particular use were placed any
25 other place in the area, and it could be placed in

1 any other particular area, as far as I can see, but
2 the specific site, specific adverse effect would be
3 to that tower and how it affects that tower; right?

4 A. Well, as I understand the electromagnetic
5 interference analysis, as evaluated, that it does
6 not interfere with that; but in going back real
7 quickly to the statement that you made, this use
8 is acceptable in the entire "A" and "C" zone of
9 the county. So it's not just this particular
10 area. It's everywhere in the county as a special
11 exception as enumerated in your zoning ordinance.

12 What makes this specific site, in my
13 opinion, better than any other area in the county
14 is the cluster of land uses that are happening
15 around it; a landfill, mines, the cellular towers,
16 the ridgetop that's been cleared and mined already.
17 All of those things collectively say this is an
18 appropriate location for this use within Allegany
19 County and a better location than the vast
20 majority, if not all, the remaining portions
21 of Allegany County.

22 MR. POWELL: Okay.

23 MR. McKEE: If there is no other
24 questions, is there any redirect?

25 MR. GONTRUM: I have nothing.

1 MR. McKEE: Very well.

2 MR. DAVIS: Thank you very much.

3 MR. McKEE: Thank you, sir.

4 (Witness, Sean Davis, excused.)

5 MR. McKEE: Mr. Getty, do you have any
6 other witnesses? Mr. Gontrum?

7 MR. GETTY: We would call Robert Miller,
8 please.

9 - - -

10 ROBERT MILLER,

11 APPLICANT'S WITNESS, SWORN

12 - - -

13 DIRECT EXAMINATION OF ROBERT MILLER

14 BY MR. GETTY:

15 Q. Mr. Miller, would you state your full name
16 and professional address, please.

17 A. Yes, it's Robert Miller, 9 Plainsboro Road
18 in Cranbury, New Jersey.

19 Q. Are you currently employed, sir?

20 A. I am, by Broadcast Wind, LLC.

21 Q. And what is Broadcast Wind?

22 A. Broadcast Wind is a RF interference
23 company, work specifically within the wind energy
24 business. We are also a technical writing
25 facility. We are a small group that pulls together

1 large projects, and this was a large project.

2 Q. For those of us who don't know, what is
3 "RF"?

4 A. Radio frequency.

5 Q. And what has been your involvement and the
6 involvement of Broadcast Wind in the Dan's Mountain
7 Wind Force Project on Dan's Mountain?

8 A. We were called over a year ago to help
9 pull together and bring a -- put together what was
10 summing up to be a very, very large report, a very
11 thorough and comprehensive report. There were
12 already a couple of engineering, RF engineering
13 firms involved, and we were called for our ideas,
14 our technical expertise, some of the research that
15 we've done in the wind energy industry to date,
16 and also our broadcasting in electronics background
17 to see if we could come in and herd everything into
18 a solid comprehensive report and to make sure, in
19 the lack of guidance, I would say, in the lack of
20 guidance being there weren't any specifics spelled
21 out in the ordinance as to what you needed to place
22 into a report.

23 So what we were asked to do is come in,
24 pull together everything that's there to make sense
25 of it, to make order of it, to make it easier to

1 read, and also add our expertise in television
2 and radio RF to the report. So it's kind of a
3 quarterbacking job, if you will.

4 Q. And as part of that quarterbacking job,
5 did you work with technical professionals in the
6 field who had become involved in the generation
7 of the underlying study?

8 A. Yes. There were four firms involved.
9 Comsearch, ourselves, a group called CME. It
10 actually went out, and you never see this -- well,
11 many times you won't see this done in RF surveys --
12 where the firm went out and confirmed every single
13 tower's actual location versus the FCC database.
14 They went out and confirmed that the towers where
15 were the FCC said they were, and in many, many
16 cases, they aren't, and then confirmed every
17 antenna on top of it.

18 Comsearch who has done 2 to 300 of these
19 wind surveys, they worked on the microwave piece
20 of this. That's the point to point where you see
21 all those lines going through the wind turbines;
22 and ourselves with the RF and on FM and television,
23 and that was...

24 And also a group called Meintel, Sgrignoli
25 & Wallace, out of Washington, DC. They are the

1 guys that the FCC goes to when they need help.
2 They're the guys that have been involved longer
3 than we have on wind energy research and putting
4 and pulling together big reports like this one.
5 So what their expertise on this report was, was
6 putting together the prediction of, if there is
7 going to be interference with television and/or
8 FM radio, where would that fall, and that gives
9 us guidance into reporting the report that you see
10 here.

11 Q. So what is your -- what's your background
12 that brought you to Broadcast Wind?

13 A. Well, I am a -- my career is 25 years
14 with General Electric. So General Electric has
15 had a number of communications businesses, the
16 first being out of Penn State College. I went
17 into RCA Broadcast Systems and had a big interest
18 in it until they got put out of business by a
19 foreign interest, but I moved on to GE American
20 Communications. They own, owned and operated
21 domestically-located satellites, so it's satellite
22 communications. I was there until 1989 when I went
23 to National Broadcasting Company where I stayed
24 for 20 years until 2009.

25 (Exhibit XXXX was marked/entered into

1 evidence.)

2 BY MR. GETTY:

3 Q. And I am going to show you what's been
4 marked as Exhibit XXXX -- we're getting close
5 to numbers -- and ask you is that a copy of
6 your résumé with respect to your professional
7 credentials and work experience?

8 A. Yes, it is.

9 Q. Now, in respect to the EIA, I am going
10 to suggest to you that the EIA is Exhibit I to
11 the application for a special exception which has
12 already been filed in these proceedings, and do
13 you have a copy of that EIA in front of you?

14 A. Yes, I do.

15 Q. Okay. If you go to the very first page
16 under Tab I or looking at your -- actually, if
17 you look at the cover before we get to the first
18 page --

19 A. Okay.

20 Q. -- am I correct that this represents an
21 electromagnetic interference analysis dated May 1,
22 2015; is that correct?

23 A. Yes, it is.

24 Q. Now, this is not, in fact, the first
25 EIA that was done with respect to this project;

1 correct?

2 A. Correct.

3 Q. There was an earlier EIA in the fall of
4 2014; is that correct?

5 A. Yes.

6 Q. And then after the issuance of that first
7 EIA, did there come a point in time when the
8 guidelines were issued by Allegany County with
9 respect to what was to be contained within the EIA?

10 A. Yes, there were.

11 Q. Okay. And did they come out at
12 approximately -- on approximately April 24, 2015?

13 A. Yes.

14 Q. And as a result of the guidelines that
15 were issued, were you then able to view -- when I
16 say "you," Broadcast Wind -- were you able to then
17 produce what appears as the final EIA, May 1, 2015?

18 A. That is correct.

19 Q. Generally, can you describe, in terms that
20 the rest of us might understand, what this EIA is.
21 What does it do?

22 A. It addresses all radio waves that could
23 potentially be impacted by the construction of a
24 17-turbine wind facility on Dan's Mountain.

25 Q. Okay. For those of us who know nothing

1 of what these people do, we think of radio waves
2 as being AM and FM broadcast.

3 A. Okay.

4 Q. Is radio wave something broader than that?

5 A. Yes. AM is in -- they are very, very
6 large waves, and FM are smaller and then 98 -- or
7 97 to 108 megahertz spectrum. What's in the report
8 here goes well up and through the 35 gigahertz
9 spectrum for those point to point, through the --
10 for those point-to-point connections.

11 Q. So it's fair to say what is represented
12 by this study isn't what somebody like me would
13 think of as radio waves; it's the entire spectrum
14 of used -- that is used --

15 A. Yes.

16 Q. -- in this case, in broadcast; is that
17 correct?

18 A. In broadcasts, in communications, in
19 emergency communications, yes, AM, television.
20 It's all in here ... radar. I mean, it is all
21 in here.

22 Q. Okay. I am not going to ask you to go
23 through what is more than a hundred pages of each
24 document.

25 A. 373.

1 Q. If they thought it was more than
2 yesterday, look at that one.

3 But if you would, if you would turn
4 to page 2 of the EIA, which I believe appears
5 following the executive summary --

6 A. Uh-huh --

7 Q. -- and the findings, if we look at what's
8 on page 2, 3, and then over to page 4 --

9 A. Yeah.

10 Q. -- does this represent a general summary
11 of what is actually contained in the EIA itself?

12 A. Yes, it does.

13 Q. And if you would, if you would go through
14 this with me to highlight for the members of the
15 board what it is that comprises the EIA, and if you
16 would begin just with Section 1 on point-to-point
17 microwave.

18 A. Absolutely. Point to point in the trade,
19 they will call it "backhaul." It's getting a
20 signal from one place to another. For example,
21 television stations or radio stations will use it
22 to take what's going on at their studio and then
23 take it up to the transmitter for transmission.
24 It's just like a backhaul. Fiber can also be used.

25 So point-to-point microwave, there are

1 68 licensed facilities on Dan's Mountain. So
2 that's the point-to-point piece. That's the
3 licensed piece, but there are also what's called
4 "unlicensed." That doesn't mean it's illegal.
5 It means that the FCC allows it to be used for
6 a point to point, like Wi-Fi, it's an unlicensed
7 RF. So point-to-point microwaves, they range from
8 900 megahertz, that's like a gigahertz, on up past
9 25 gigahertz.

10 So there is 68 licensed point-to-point
11 microwave beam paths. We examined each and every
12 one of them to see if and where there were any
13 touches to, in simple terms, the turbine blades
14 or the turbine pedestals. If there were going to
15 be problems, the -- a process called "micrositing"
16 is done where the turbine is moved over several
17 meters this way, this way, this way, or that way,
18 so that it's -- it's not going to interfere with
19 the beam path.

20 The same thing for the unlicensed
21 point-to-point microwave paths. There are several
22 of those, and any issues there have been addressed.

23 Q. Okay. And of the 68, am I correct that
24 there was only one point-to-point beam path that
25 needed to be realigned; is that correct?

1 A. Now one that was realigned or replaced
2 with fiber optic.

3 Q. Okay. It's not -- I misspoke because it
4 wasn't realigned, but there is one section, I think
5 Mr. Friend talked about it, where they are actually
6 using microfiber -- or fiber optics to --

7 A. Yes.

8 Q. -- to realign that.

9 A. Correct.

10 Q. With respect to -- you have
11 identified point to point. Is there also a
12 point-to-multipoint --

13 A. Sure.

14 Q. -- microwave beam?

15 A. Yes. There aren't any licensed point
16 to multipoint, but there are two on the mountain
17 that needed to be realigned, and they were
18 realigned in order -- in the plan to make sure
19 that there wasn't any interference.

20 Q. If you know, what's the difference or the
21 significance between a licensed or an unlicensed
22 beam path?

23 A. Licensed, you have to keep a license with
24 the FCC. You have to pay fees. You have to -- you
25 will have a designated channel. You have to keep

1 a -- the maintenance of the transmitter, exactly
2 as to that specification, and reporting to the FCC.
3 That's a big piece of it to maintain your license.
4 It's like owning a radio station or something like
5 that.

6 Unlicensed is something that the FCC is
7 getting more and more liberal or prolific with,
8 where they want -- they believe that -- if I allow
9 you to have the ability to have a long-distance
10 Wi-Fi panel, for example, so that you could get
11 your Wi-Fi in your house down to your barn that's
12 a hundred meters, 300 meters away, that would be
13 an unlicensed path, but it's a point-to-point path
14 that the FCC now allows, and it's becoming less and
15 less expensive and much more available to average
16 consumers.

17 Q. And was it part of the work of Comsearch
18 to figure out who the unlicensed, as well as the
19 licensed, owners were --

20 A. Yes.

21 Q. -- or operators were of these beam paths?

22 A. Yes.

23 Q. And if you would just flip, behind page
24 22, there appears to be a fold-out graph in the
25 EIA.

1 A. Is this EIA 22 or 23?

2 Q. It's EIA 22.

3 A. Okay. I got it. I got it.

4 Q. Other than looking like a --

5 A. Spaghetti.

6 Q. -- yeah, some type of test, what is --
7 what's represented by this whole...

8 A. Well, what this is, is a representation
9 of all of those 68 licensed and unlicensed beam
10 pads [sic] emanating from the broadcast towers in
11 that structure -- in that cluster on the mountain
12 to various receive points throughout Cumberland
13 and Frostburg and other places.

14 Q. Is this a document which is produced,
15 essentially, representing these beam paths in
16 two dimensions?

17 A. Correct.

18 Q. In addition to considering the two
19 dimensions of basically direction, is there also
20 information within the report that considers it
21 in a third dimension?

22 A. Yes. Do you want -- can I take a second
23 to explain?

24 Q. Absolutely.

25 A. When you are looking straight down from

1 a satellite view, from a satellite view, you might
2 see one of these beam pads going into or over
3 or what appears to be over the wind turbine.

4 (Indicating) Okay?

5 Well, you don't know if it's really going
6 over, into, or under, unless you come down to the
7 ground level and create a three-dimensional view
8 and then have that beam path going and -- going
9 into this three-dimensional, three-dimensional
10 imaging and informing you as to whether it's going
11 under the blades, over the blades, or right into
12 the blades or into the high line. So that's the
13 3-D analysis. That's the additional analysis that
14 we had to do.

15 Q. And in addition to the -- and we, really,
16 in the course of these proceedings, that's what
17 we've been seeming to talk about, but this EIA is
18 much more than microwave beam paths; isn't that
19 correct?

20 A. Yes, sir.

21 Q. Okay. And then if you would go on, in
22 terms of the document, this other -- what else was
23 included in the analysis that led to this EIA?

24 A. Oh my, well, the beam path analysis, that
25 was a huge piece.

1 Television, FM stations. There are, I
2 believe, 11 television stations that if you're
3 up on Dan's Mountain, actually on Dan's Mountain,
4 you will get a fairly good signal from most of
5 them; but the television stations, for example,
6 are between 40 and 85 miles or kilometers away,
7 and as you may recall from the old aerial days,
8 you won't get much of a signal from -- from here,
9 here, unless you're on a mountain or if you have,
10 obviously, satellite television. So that was a
11 piece of it. It was a piece of -- in particular,
12 with respect to television, finding where the
13 potentially impacted homes would be; in other
14 words, would there be any blockage of signals
15 to homes.

16 We're at an advantage here versus other
17 places. Here, you're well above 95 percent cable,
18 slash, satellite saturated in this market because
19 your television stations are so far away, and
20 you're in Frostburg, Cumberland, or in -- oh, we
21 call it "shadow areas" of any kind of significant
22 television signal.

23 And as for television, another piece of
24 work that we were able to complete was we have
25 placed television probes within Frostburg, Eckhart

1 Mines and ... sorry ... but in the Frostburg area,
2 and we have -- are establishing a baseline just
3 to make absolutely certain that for those 2 to 3
4 percent that might have television aerial service,
5 that if there is an impact, we will see it, because
6 we are establishing a baseline now with these
7 probes, and we will be able to, once the -- if
8 the project is approved, we will be able to see
9 if there was any impact whatsoever to television.

10 On to FM, same thing.

11 Q. Let's do --

12 A. Okay.

13 Q. Let's do this so I don't lose track.

14 A. Okay.

15 Q. If you go back to page 2, we had talked
16 about point to point and then point to multipoint.

17 A. Uh-huh.

18 Q. Land to mobile emergency services, to
19 what extent was consideration taken into the
20 production of the EIA as it relates to land and
21 mobile emergency services?

22 A. Quite a lot. We were working with
23 Comsearch on this as well. You know, there is
24 nothing better than, you know, having data, and
25 Comsearch has had 200 and more of these wind

1 turbine specific studies done, and we have not
2 been able -- we have not found an issue with land
3 mobile.

4 It's a very robust set of -- it's a very
5 robust RF. I hate using that word, but I don't --
6 but it's in the 700-, 800-, 900-megahertz range,
7 and I guess what I will do is, it just gets in,
8 it gets around. No matter what you do, you can't
9 block it.

10 Take a look at your cell phones. We are
11 in a corrugated steel building with a steel roof
12 and concrete blocks, and I am still getting three
13 bars, and that is in the 800-megahertz realm. It's
14 just a very, very robust set of RF.

15 Q. In the analysis that is reflected for land
16 and mobile, does that also extend then to mobile
17 phone and personal communication systems --

18 A. Yes, it does.

19 Q. -- in the study that was done?

20 A. Yes, absolutely.

21 Q. I have shown my ignorance and talked about
22 RF only in the context of AM and FM, and under Item
23 5 in the summary, was consideration -- were AM and
24 FM broadcast part of the consideration that was
25 undertaken by Comcast and others who contributed

1 to the production of the EIA?

2 A. Yeah. AM and FM and TV, television, along
3 with Comsearch and Meintel, Sgrignoli & Wallace --
4 we call them "MSW" -- we -- those are our -- that's
5 our mainstay. We've done a lot of research in this
6 area, and AM is -- AM, as I mentioned at the top
7 of this, AM is really tough long waves, and their
8 transmitters, some of you probably see them every
9 day, but their transmitters and their antennas,
10 there aren't any on the mountain, and if -- with
11 AM, once the beam gets out, it's good, but if you
12 put a turbine in its array or within a kilometer
13 of its antenna, if it's a single array or a single
14 antenna AM station, the turbine itself becomes
15 part of the antenna array and it alters their
16 signal, so it kind of bounces off and goes in
17 the wrong direction, and these are licensed AM
18 stations.

19 So we have to watch out -- kind of a long
20 story -- but we have to make sure that there is
21 proper spacing between any AM array or AM antenna
22 and any proposed turbine. In this case, they are
23 several ... 20-some kilometers away, I believe, for
24 AM. So they're within the -- they're well outside
25 of 30 kilometers, so we're -- we're fine there.

1 Q. In respect to, you mentioned the off-air
2 stations already in terms of those being, you said,
3 off-air television stations.

4 Did you also or is consideration made
5 of satellite? You mentioned that we have a high
6 density of cable and satellite. To what extent is
7 satellite taken into consideration with the EIA?

8 A. Yeah, fortunately, with satellite, unless
9 your home is within the wind farm, there will not
10 be any interference because of its -- it's a direct
11 line of sight to the satellite which is out on
12 the -- out in the cosmos, 22,000 miles out into
13 the cosmos.

14 Q. So even if I were in the wind farm, as
15 long as I am able to locate my dish in a manner
16 that's not obstructed by a tower, I am going
17 to be able to receive my satellite TV; is that
18 correct?

19 A. That's correct.

20 Q. Okay. With respect to government radar
21 systems, is that a part of what is included in the
22 analysis reflected in the EIA?

23 A. Yeah. So for defense, if you are within
24 the -- if your wind turbine blades are within
25 the -- if they can be seen on the horizon from

1 that radar system, it can cause what they call
2 "clutter" on the -- on their radar. They will
3 know what it is but it's a nuisance.

4 In this case, we are well beyond the
5 radar line of sight from any defense contractor,
6 who I believe we have received letters indicating
7 that as well.

8 Q. And the vetting process with respect to
9 the federal government defense extended to include
10 the Department of Defense itself, correct?

11 A. That's correct.

12 Q. As well as NEXRAD systems?

13 A. Yes, weather.

14 Q. Weather systems, and as well as the
15 Federal Aviation Administration; is that correct?

16 A. That's correct.

17 Q. And based upon the analysis and based upon
18 the conclusions that were ultimately reached, which
19 we will get to, there were no issues with respect
20 to those facilities; is that correct?

21 A. That is correct.

22 Q. In addition to the government systems,
23 all of us who watch TV and watch weather on TV see
24 Doppler radar systems --

25 A. Yes.

1 Q. -- did this report, did this study take
2 into consideration commercial Doppler radar?

3 A. Yes, it did.

4 Q. And what was done in order to look at
5 the impact it had on a commercial Doppler radar
6 system?

7 A. Again, it's one of these clutter issues,
8 so it -- the wind turbine blades can give any
9 Doppler or NEXRAD system, as well as the defense
10 systems, this clutter that interprets or gives
11 them false readings. That's given that it's within
12 the radar line of sight which means you can see it
13 over the horizon, you know, with the blades coming
14 up. Well, we're beyond that. We're that far away
15 from any of these. So, yes, we are fine there as
16 well.

17 Q. Okay. And they are not something that
18 we are imposing -- when I say "we" -- this
19 project is imposing interference or anticipated
20 interference; is that correct?

21 A. That is correct.

22 Q. And with regard to telecommunication
23 towers, can you describe what the report reflects
24 in terms of telecommunication towers.

25 A. It's not just the 18 telecommunication

1 towers on the mountain, but it's -- we took a look
2 at 54 structures throughout, throughout the area
3 and found no interference with those, with those
4 towers.

5 Q. In terms of the 54 towers, if I ride up
6 68, I will see towers that appear to have multiple
7 facilities on them. In the 54 towers, am I correct
8 that that actually represents some 167 active
9 communication towers?

10 A. That is correct and --

11 Q. Okay.

12 A. Yes.

13 Q. And, again, with respect to those
14 telecommunication towers, the conclusion ultimately
15 was that they do not -- this project does not
16 appear to present any interference with that
17 communication; correct?

18 A. That is correct.

19 Q. There has also been a listing of other
20 governmental systems. Can you describe what those
21 are, or were there any -- were there any objections
22 from any other governmental communication agencies?

23 A. Yeah, it's giving the FAA, here is our
24 notice, and they come back with a Notice of No
25 Interference. So they have a whole database of

1 their own where we have been given clearance by
2 a letter from the FAA.

3 Q. And, in fact, on June 12, 2014, the FAA
4 gave a no hazard...

5 A. Correct.

6 Q. Now, there will be -- and it doesn't
7 relate to this -- but there is a lighting component
8 that deals with the FAA. That's not what this
9 relates to, correct?

10 A. Correct.

11 Q. There is a provision, Title 41, Chapter 1,
12 of the Code of Federal Regulations. Is there a
13 representation that this proposed development on
14 Dan's Mountain will be in compliance with that
15 provision of the FCC regulations?

16 A. Yes, there is.

17 Q. Now, the conclusion that is here, am I
18 correct, it's the conclusion of this EIA that the
19 wind farm can operate at its proposed location
20 without negatively impacting existing and proposed
21 electromagnetic surfaces? Is that the conclusion?

22 A. That is correct.

23 Q. Those concerns which have been identified
24 in the EIA, am I correct that they have, in fact,
25 been addressed through agreements reached with the

1 providers?

2 A. Yes, movement, micrositing, and these --
3 any other mitigation measures have been addressed
4 in the EIA.

5 Q. And you were present when I went through
6 a series of questions with Mr. Brewer about the
7 issuance of the EIA; that is, its publication to
8 those agencies that were required as a part of
9 the guidelines; and, first of all, in terms of
10 the conclusion that's reached, the opinion that's
11 reflected in it, am I correct that this particular
12 EIA, it was done in conformance with the guidelines
13 of the County established?

14 A. Yes.

15 Q. And to your knowledge, based upon the
16 publication and the running of the 90 days from
17 its publication, am I correct that you are not
18 aware of any objection to the analysis that is
19 reflected in this EIA from any of the people
20 who would be affected by these determinations?

21 A. That is correct.

22 MR. GETTY: I have no other questions
23 of the witness.

24 MR. McKEE: Cross-examination?

25 MS. STARK: Yes.

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CROSS-EXAMINATION OF ROBERT MILLER

BY MS. STARK:

Q. Taking a look at the EIA study on No. 5, it's talking about the AM/FM broadcast radio stations, and the comment is while unlikely the signals of the five stations -- and it lists them all -- have the potential to be impaired, and then if it does impair it, there are established mitigation methods. Can you elaborate on that, what might impair it, why it -- like, do you know for a fact it's going to be impaired, do you know that it may or may not, and why are you not sure?

A. Okay. We did a three-year study with the USDA, for the USDA, and part of that study entailed standing out by FM stations and wind farms and measuring differences, if any, that we could find at a distance, and I can state that we found nothing that could be statistically significant as for FM.

So what we are doing is we are -- we have -- we had these probes established, so that if there are going to be areas of -- if there is any kind of long-term lessening of signal, we'll know what it is; and I will tell you that if the

1 signal does get -- is reduced, it's probably not
2 going to be discernible by the listener over the
3 long term.

4 It's just -- but we have yet to see, we
5 have yet to find this, and having these probes in
6 place is a very good measure to see to it that --
7 so that we can show statistically with a probe
8 that is measuring FM signals on the other side,
9 on the Frostburg side of the turbine wind farm,
10 that, statistically, we can show if there was a
11 long-term reduction, but to date, we haven't been
12 able to find it. We are still looking.

13 Q. So I am just curious -- this might be
14 in the weeds here -- but probes, explain to me
15 the probes. What is it? I can't picture this.

16 A. That's perfectly all right.

17 It's something that we developed during
18 our contract with the USDA. The standard way of
19 measuring RF is what we also do, but it's to go
20 out with a truck, you raise an antenna, depending
21 upon what frequency you're trying to find. You
22 aim the antenna, and then you take a measurement
23 for several minutes at 30 feet, with the antenna
24 at 30 feet, and then that's your baseline, but
25 what that doesn't account for is wind, weather,

1 snow, foliage on the trees or off of the trees.

2 If you place an automated, basically a
3 box with an antenna and take those readings over
4 a long period of time, in this case, every six
5 hours -- I take a two-minute reading of all of
6 the FM stations up on Dan's Mountain every 6 hours,
7 365 days a year. So when -- if the project is
8 approved, we will then be able to see with the
9 same probe that's sitting in the same spot taking
10 these readings if, statistically, there is a
11 reduction in signal level; and then if we know
12 that and if there is a problem, then we will be able
13 to confirm whether or not it's a problem by real
14 baseline data and we could address it, and you
15 can address it in mitigation.

16 That basically means if somebody is in
17 a situation where that station that they were
18 listening to on the hill was -- is no longer
19 receivable, we could work with the wind developer
20 to see to it that they have upgraded facilities
21 or whatever it is that's needed to receive the
22 signal.

23 Q. That's interesting that you say that
24 because I know when the wind turbines went up
25 in Pennsylvania, now at our homes on Harwood,

1 we have a lot of difficulty receiving the same
2 signals that we used to.

3 A. Television?

4 Q. No, it was more radio, I think.

5 A. It was radio? Now -- well --

6 Q. Yeah, there is a radio issue.

7 A. -- television, yes. Radio, probably not,
8 but I'm -- I'm all ears. Okay?

9 Q. Were you involved in the -- in the --

10 A. In Pennsylvania?

11 Q. -- the Pennsylvania, north of Allegany?

12 A. MSW was. Meintel, Sgrignoli & Wallace
13 was, and that was in the '90s, and that was back
14 in the analog television days when you would adjust
15 the rabbit ears and get the ghost out or adjust
16 the rabbit ears -- I'm sorry -- you're not familiar
17 with this.

18 Q. Oh, no, I remember rabbit ears.

19 A. And, you know, you would keep getting the
20 line going up the TV. Those are all analog issues.
21 Well, digital television is a lot more robust,
22 and as you may know with digital television, when
23 you -- it has something called the "cliff" effect.
24 When it's working, it's working fine, and when
25 it's not, it's pixelated and then it just falls

1 apart.

2 But the reason it works and works fine
3 versus analog which used to get those ghosts or
4 lines going up, the reason it works fine is because
5 it has circuitry in there to stop the -- to stop
6 these things from happening on your screen. If it
7 sees an echo, which is shadow that you would adjust
8 the channels or the antenna for, it makes those
9 adjustments for you.

10 Q. No, I am thinking more of the recent.
11 Are we talking the same wind turbine, the recent
12 ones that went up in the last --

13 A. In Pennsylvania were you talking about?

14 Q. Just north here of Frostburg area.

15 A. Okay.

16 Q. It's right over the line. So I am talking
17 about this --

18 A. Yeah, I was not involved with that wind
19 farm, no.

20 Q. Okay. So is that the reason that -- I
21 was noticing on your website -- that you have pre-
22 and post-construction site reviews?

23 A. Absolutely. Television is what it is
24 about, yes.

25 Q. Okay. So what --

1 A. And, again, I would --

2 Q. So you're saying different things can
3 impact different ways. The weather can impact
4 it. What else were you saying? Snow can impact
5 it. Different -- different --

6 A. Television waves, yes, yes, and it
7 reduces -- it reduces your signal level or the --
8 you know, how much power or field of energy is
9 getting to your receiver.

10 Q. Okay. Maybe --

11 A. Now --

12 Q. -- I misunderstood. Did you not just
13 say that the FM radio waves were also impacted
14 in different signal strength by the weather?

15 A. I said that we are still looking for that.
16 We have not found an instance of FM being impacted.

17 Q. Okay.

18 A. We have been involved with taking readings
19 and representing clients who were being told that
20 there was potential issues, there were potential
21 issues, but we have done field research for the
22 clients and made determinations that in the cases
23 of FM, that there was no discernible difference.

24 Q. Okay. I know in your testimony they had
25 asked you specifically if anyone that had received

1 the EIN [sic] study had any issue with the analysis
2 performed on the EIN study, and the answer was
3 that, no, no one had any --

4 A. The EIA?

5 Q. The EIA, sorry, the EIA study.

6 -- and so the answer had been no.

7 A. Yeah, there aren't any -- I haven't seen
8 any, anything that -- any letters.

9 Q. Okay. But that wasn't really what I was
10 just drawing at.

11 A. Okay.

12 Q. That was just part one.

13 Part two was while I don't think -- I'm
14 looking at Applicant's Exhibit T, and it's from
15 Maryland First, and it's submitted by Mr. Kenneth
16 Coppage, the Director of Operations & Maintenance
17 from the Maryland First Responders Radio System.

18 A. Uh-huh.

19 Q. And while I didn't take issue with your
20 analysis that you performed on the EIA study,
21 let me quote from his report, since it's not
22 even...

23 It says, "One major point of concern..."
24 So, here, we have a major point of concern from
25 the 911 Maryland First. "...and it's to the

1 potential of electromagnetic interference from
2 the proposed wind turbine generators..." At that
3 time, his report thought there were 19. "...to
4 land mobile radio equipment operating on the
5 700-megahertz frequency as identified. Maryland
6 First understands that all of the devices will be
7 acquired in the FCC Part 15, incidental radiators
8 and certified to manage the emissions of spurious
9 and undesired electromagnetic emissions. There
10 are various thoughts expressed in the meeting..."
11 Apparently, this was a report after a meeting.
12 "...in a manner in which emission compliance would
13 be maintained. Maryland First would encourage
14 Dan's Mountain to develop its maintenance protocols
15 and procedures to the extent practical and
16 reasonable to identify proactively emission
17 levels and take corrective action to remain within
18 compliance of the FCC rules before public safety
19 systems may be affected."

20 A. Wow.

21 Q. Was there a --

22 MR. GETTY: What's the date of that
23 letter?

24 MS. STARK: The date of this letter is
25 February 20, 2015.

1 BY MS. STARK:

2 Q. So my question is, was there a follow-up
3 analysis done on maintenance, protocols, and
4 procedures to address the concerns of Maryland
5 First specifically here, because I hadn't seen
6 anything submitted into evidence that address this.

7 A. The -- their concern was related to
8 electromagnetic emissions from the system itself,
9 not -- and what we've been talking about so far
10 is waves being blocked or somehow not reaching
11 places they used to reach from broadcasters or
12 for point to point, and what they're addressing
13 there is EMF which is, in fact, addressed in the
14 report, in the EIA.

15 Q. Was it updated since February 20th?

16 A. Yes.

17 Q. Okay. Where is that in the report?

18 A. Well, let me get it for you. (Perusing)

19 Page 55, but I would ask you to look at --
20 there is a little set of page numbers, and then
21 there is a bigger set of page numbers. Look at
22 the EIA, page 55 --

23 Q. Okay.

24 A. -- and you will see --

25 Q. I see it.

1 A. -- an EMF report --

2 Q. Yeah.

3 A. -- there that addresses all of the EMF
4 concerns.

5 Q. (Perusing) Okay. I don't think I...

6 A. I'm sorry. It's the bigger 55.

7 MS. WILLIAMS: Fifty-five?

8 THE WITNESS: It's the bigger 55. I
9 apologize. It's page 55, not EIA 55.

10 MS. WILLIAMS: Okay.

11 A. And then so there is an EMI report written
12 in here discussing what, if any, interference
13 could be caused by the wind turbines to any of the
14 emergency response, etc.

15 I would also say that there is concern,
16 and it's been -- it's either been addressed or
17 it's in the process of being addressed, regarding
18 operating procedures in the event of emergencies,
19 any kind of interference that could be caused while
20 their emergency staff is on site. These are all,
21 you know, working hand in hand with NEEMS over the
22 course of the next couple of few months, assuming
23 that the project is approved.

24 MS. WILLIAMS: I am having a hard time
25 hearing. Would you repeat that answer, please.

1 THE WITNESS: Yes. There is a -- how far
2 back do you need me to rewind here? So the EMI
3 portion of this report addresses any -- they wanted
4 to know if the EMI -- if the wind turbines actually
5 produced interfering great RF themselves.

6 For example, there is corona, which some
7 of you may know, is if there is a static discharge
8 at a point of where the electricity is, can that
9 interfere with our radio communications on the
10 mountain, if there is an emergency, etc. So we
11 are -- so this part of the report was written to
12 address those concerns.

13 MS. WILLIAMS: And the answer is?

14 THE WITNESS: No.

15 MS. WILLIAMS: Definitive no?

16 THE WITNESS: The answer is -- I'm sorry.
17 The answer is, no, there is no EMF that's going
18 to be produced that would interfere with radio
19 communications or emergency radio communications.

20 MS. WILLIAMS: Okay.

21 BY MS. STARK:

22 Q. Okay. The next question I have is related
23 to No. 1 when you were doing the -- the front page,
24 page 2 of the report, and it's talking about one
25 of the 14 unlicensed point-to-point microwave beam

1 paths will need to be realigned and that you're
2 going to replace it with fiber optic link.

3 Now, what is a fiber optic link and why
4 are you replacing it with that instead of what was
5 there before?

6 A. Simply because it was a point to point --
7 instead of this point to point going from the top
8 of the mountain to Frostburg or Cumberland, this
9 point to point was going from one point on Dan's
10 Mountain to another point on Dan's Mountain; and,
11 economically, it was just easier, since there is
12 fiber optic cable being laid anyway, as a part of
13 the project, it was easier just to say, well, as
14 we pass by, we'll hand off that signal to you on
15 fiber instead of realigning dishes.

16 Q. So what's the difference between, say,
17 a fiber optic system and a -- is it more reliable?
18 Does it go underground? What's -- what's the
19 difference?

20 A. Well, as a broadcaster, we would always
21 have both, you know, from our studios to our
22 transmitters, but we were always on top, the top
23 ten markets. When you get in -- when you get into
24 the smaller markets, it will probably only just
25 be the radio or point-to-point microwave that gets

1 the STL or studio transmitter link to where it
2 needs to be.

3 The reason you use both is because fiber
4 is -- fiber is a good way to go because the antenna
5 can't get blown off of the tower or something like
6 that, and if it does, if you have a backup, then
7 you can run it via fiber.

8 Which one is better? The point-to-point
9 microwave is a little more -- economically, it's
10 less expensive. Fiber, if the fiber is already
11 there, it's competitive, but you still have to
12 have receivers on both sides; but if the fiber
13 is not there to begin with, it's a whole different
14 cost equation. So I think it depends is probably
15 the answer to your question.

16 Q. Okay. Hold on one more second. Sorry.
17 (Perusing)

18 Have there been any discussions, when
19 you were forming this survey -- I am also looking
20 again at the same study or same report and request
21 for information from Maryland First. They had
22 discussed in here that they believe the optimal
23 solution for preventing a potential of public
24 safety of microwave interference would be to work
25 cooperatively with Dan's Mountain and the design

1 of a mutually beneficial fiber optic plan to
2 transport data for both the State and Dan's
3 Mountain purposes through fiber as opposed to
4 microwave paths.

5 I know when I asked this of Mr. Brewer
6 yesterday, he wasn't aware of this, but it's two
7 or three pages of discussion about the fiber optics
8 and how they think that's the better way to go,
9 how they would like the Dan's Mountain project
10 to look into doing that.

11 A. I have not been involved with those
12 discussions because that's really more of a owner
13 discussion. They are discussing a whole --
14 wholesale -- well, they are discussing building
15 a 330-foot tower, I believe, and that is a part
16 of some of the confusion that you might have
17 heard, the 19 towers versus 18 versus 20.

18 Well, what it is, is you have 18
19 communication towers right now on the hill.
20 You also have a very rusty fire tower that is --
21 that has some antennas on it, that's 19, and
22 that's also in the study; and then 20 is the
23 NEEMS tower which would be a place where the
24 State could bring all of its communication needs
25 to one comprehensive tower to be built and, you

1 know, it -- developer, if you're already laying
2 fiber, can we talk about cooperating.

3 I think that's what that letter is about,
4 but I have not been involved with any discussions
5 on it. I have no idea what the status of that is.

6 Q. Speaking of the tower that is yet to be
7 built, has the analysis been --

8 A. Yes.

9 Q. -- performed on -- do they know precisely
10 where --

11 A. Yes.

12 Q. -- they have to place the tower --

13 A. Yeah, yes.

14 Q. -- so that it does not interfere?

15 A. Correct, and they -- they didn't at first,
16 but we asked them to, you know, give us a solid
17 set of coordinates, which they kind of had to do
18 anyway because they had to get the tower -- well,
19 go through the motions of what you need to do in
20 order to build the tower; and, obviously, they are
21 still going through those motions, but they needed
22 to know where they wanted to put it, and they gave
23 us coordinates. We built those coordinates in the
24 report, reviewed those coordinates with them or
25 the report with them, and it's all -- it's all in

1 there.

2 Q. Okay. So now they're -- they're set?
3 As long as they place the tower exactly where
4 they have planned right now, they're good to go?

5 A. Yes.

6 Q. Okay. But if they move it or need to move
7 it for any reason, then they're going to basically
8 have to deconflict with 17 wind turbines to make
9 sure that it's not an issue?

10 A. I don't know if that's something that they
11 would do at this point. I don't know whether it
12 is or whether it isn't. I have no idea. I can't
13 really speculate on that.

14 Q. Okay. Thank you. That's all I have.

15 A. Certainly.

16 MR. McKEE: Very well. I believe at this
17 time, it's a quarter after four. We're going to
18 go ahead and conclude today's session. We will
19 reconvene at 9 a.m. tomorrow morning and will begin
20 with the questions, any additional questions from
21 the members of the audience. All right. Thank
22 you.

23 (Proceeding concluded for the day at
24 4:16 p.m., to be continued.)

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CERTIFICATION OF NOTARY

I, SHERYL L. GASPARIK, RPR, the officer
before whom the foregoing proceeding was taken,
do hereby certify:

That the above and foregoing contains a
true and correct transcription of the proceedings,
all of which were reported by me.

I certify that I am neither counsel for,
related to, or employed by any of the parties to
this action; and I further certify that I am in
no way interested, financially or otherwise, in
the outcome of this matter.

SHERYL L. GASPARIK, RPR
Notary Public - State of Maryland
Commission Expires: December 13, 2016