

BEFORE THE BOARD OF ZONING APPEALS  
FOR ALLEGANY COUNTY, MARYLAND

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

Friday, November 13, 2015

Whereupon, a Public Hearing was held before the Allegany County Board of Zoning Appeals on Friday, November 13, 2015, commencing at 9:04 a.m., at the Allegany County Office Complex, Room 100, 701 Kelly Road, 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  
GETTY LAW OFFICES  
23 Washington Street  
Cumberland, Maryland 21502

ON BEHALF OF THE APPLICANTS:

JOHN B. GONTRUM, ESQUIRE  
Whiteford Taylor Preston  
Towson Commons, Suite 300  
One West Pennsylvania Avenue  
Towson, Maryland 21204-5025

ON BEHALF OF THE APPLICANTS:

JAMES E. WALSH, ESQUIRE  
ROBB & WALSH, LLC  
18 North Centre Street  
Cumberland, Maryland 21502

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CUMBERLAND, MARYLAND

FRIDAY, NOVEMBER 13, 2015

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P R O C E E D I N G S

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CHAIRPERSON WILLIAMS: Good morning,  
and we are now going to call to order the Allegany  
County Board of Zoning Appeals to hear Cases  
No. 942 and 943.

The board members are John Brant, who  
is the alternate, who is not participating in the  
decision unless one of us would critically fall  
ill today; Rodger Uphold; myself, Julia Williams;  
Bill Powell; and our attorney, Wes McKee. Jim  
Squires is the Secretary to the Board and Division  
Chief. Other staff members here are Dave Dorsey  
and Linda Simpson, who is in the back recording.  
We also have a court steno.

The exits in this room are on either side.  
The restrooms are to your right, and then when you  
go down to the right, they're on the left. There  
is no smoking in this room, not only in this room,  
but not only in our -- no smoking in this building.  
Please turn off your cell phones and any beepers or  
silence them.

1            Depending upon how lengthy our session  
2 will be this morning, we will possibly take a break  
3 around 10, 10:30. We are not sure if it will go  
4 into an afternoon session or not. We will just  
5 have to play that by ear.

6            And when you speak, come to the  
7 microphone, state your name, spell your name,  
8 give us an address, so that we have a clear record  
9 in the transcript.

10           With that, I will turn it over to our  
11 attorney who will give us more details on today's  
12 protocol.

13           MR. McKEE: Thank you.

14           Good morning, everyone. As I recall where  
15 we left off was we put in -- both parties have put  
16 in their case-in-chief. At that time, there was no  
17 rebuttal presented by the applicant.

18           We did leave the record open for a 10-day  
19 period, so that anybody who wanted to submit  
20 anything in writing would have that opportunity  
21 to do that, and that would be considered by the  
22 board.

23           What I anticipate is if there are  
24 any objections or any rebuttal to any of the  
25 submissions in the last 10 days, everybody will

1 have an opportunity to be heard on that.

2           Once we do that, we will then be closing  
3 the open session and go into executive session.  
4 When we go into executive session, the board is  
5 going to deliberate. We are going to discuss this  
6 matter, look at the evidence that's been presented  
7 and hopefully get a decision today at some point.

8           I would ask that -- I would indicate that  
9 once we go into executive session, the board is  
10 not going to be taking any more questions. They  
11 are not going to be discussing this with anyone.  
12 It will simply be a matter of, the only discussion  
13 or consideration will be what's discussed among the  
14 board during the deliberation process.

15           As Ms. Williams indicated, hopefully, we  
16 will be able -- we anticipate trying to get this  
17 done, I would anticipate probably this afternoon.  
18 If we do go into the afternoon, obviously, we're  
19 going to take a break at lunchtime. There will  
20 probably be a mid-morning break as well.

21           With that, at this time, I am going to  
22 call Mr. Squires. Mr. Squires, if you will be  
23 sworn in, please.

24           (Mr. Squires was duly sworn at this time.)

25           MR. McKEE: All right. Mr. Squires, since

1 the conclusion of the last hearing, have you  
2 received additional documentation and evidence  
3 in this case?

4 MR. SQUIRES: I have.

5 MR. McKEE: And could you please submit  
6 that to the board.

7 MR. SQUIRES: Yes, it is -- collectively,  
8 we have gotten 223 exhibits that were processed,  
9 and those exhibits are behind the board on that  
10 table, collectively known as Exhibit 224.

11 MR. McKEE: Thank you, sir.

12 MR. SQUIRES: One other administrative  
13 thing I would like to say too is that anybody who  
14 had -- who somehow missed the process upstairs when  
15 they signed in and gave full name and address, we  
16 want to make sure that anybody who is present here  
17 in the room that didn't have it, if you want the  
18 findings of this proceeding, we have to know who  
19 signed in.

20 MR. McKEE: All right. Thank you, sir.  
21 Mr. Getty.

22 MR. GETTY: I am not certain I -- I am  
23 not certain I understand what the protocol is.  
24 I understand we had discussed at the last hearing  
25 that we would have an opportunity to make final

1        comments.  From what Mr. McKee has said, I  
2        didn't know whether you were also affording  
3        that opportunity to the members of the public,  
4        and if that's the case, I would expect they would  
5        go first before us in the context of rebuttal.

6                MR. McKEE:  They would, if they -- and  
7        I intended to do that.  I guess where I was going  
8        with it is if -- I guess what I am looking for,  
9        initially, are there objections to what's been  
10       presented?  Let's deal with the objection issue  
11       first.  All right?

12               MR. GETTY:  I do have an objection in the  
13       context of a request I made on Tuesday morning,  
14       early, for copies of those exhibits.  We have been  
15       picking up copies.  We had come through and there  
16       was a flurry of activity on Monday with significant  
17       numbers.  Unfortunately, when I went to obtain  
18       those copies, they were not there, so I have not  
19       had the opportunity to see the exhibits that were  
20       filed after, I believe, 155.  Ms. Mackey indicated  
21       that she had delivered or you had picked --

22               MR. McKEE:  On Tuesday?  I --

23               MR. GETTY:  You picked them up and they  
24       didn't come back, so I was not able to obtain  
25       copies.  I haven't seen them.  I haven't seen

1 anything that was filed between 155 and then  
2 apparently 224.

3 MR. McKEE: Okay. Well, I am certainly  
4 going to afford you that opportunity. Do you want  
5 that opportunity this morning to take -- to look  
6 at these exhibits?

7 MR. GETTY: I think it's appropriate, yes.

8 MR. McKEE: I absolutely do.

9 MR. GETTY: Okay.

10 MR. McKEE: I have no problem with that.

11 Can you indicate by looking what were the  
12 documents that he has not had an opportunity to  
13 review?

14 MR. SQUIRES: Sure.

15 MR. McKEE: Not that I have an objection  
16 to any of them --

17 MR. GETTY: I just need to see what --

18 MR. McKEE: Certainly, absolutely.

19 MR. SQUIRES: So you want everything after  
20 155?

21 MR. GETTY: Yeah. We had picked up  
22 through 155 on Friday or as of Friday, and I  
23 apologize, but we just didn't have --

24 MR. SQUIRES: No, and --

25 MR. GETTY: -- a chance to see them.

1                   MR. McKEE:   And I will indicate, I did get  
2   your email yesterday afternoon, but by that point,  
3   it was --

4                   MR. GETTY:   Understood.

5                   MR. McKEE:   -- it was -- that's where  
6   we're at.   So that's why I will give you the  
7   opportunity this morning.   In fact, I will give  
8   you -- maybe I will even suggest maybe we take a  
9   brief recess and allow him an opportunity to review  
10  these.

11                  MR. GETTY:   I think that makes sense,  
12  rather than doing it --

13                  MR. McKEE:   Absolutely.

14                  MR. GETTY:   -- while you all are sitting  
15  and staring at me.

16                  CHAIRPERSON WILLIAMS:   Okay.   So we are  
17  now in recess.

18                  (At 9:11 a.m., break taken until  
19  9:47 a.m.)

20                  CHAIRPERSON WILLIAMS:   Everybody be  
21  seated.   The Zoning Appeals Board is now back  
22  in session and it is 9:40 ... 9:47.

23                  MR. GETTY:   First, let me just thank  
24  the board for your patience and your indulgence  
25  while we went through those exhibits.   It is very

1 much appreciated. I do have -- and I am going to  
2 address this to the board, but I am going to hand  
3 them to Mr. McKee as we go through them.

4 The first would be Exhibit 158 which is  
5 from Ann Bristow, 92 Carey Run Road, Frostburg,  
6 Maryland. It is a piece which represents opinions  
7 as to impact on property value.

8 I also -- in the nature of full  
9 disclosure, she lives behind me. I actually  
10 live in front of her on Old Frostburg Road.  
11 The property that she owns, she purchased from  
12 me, just so that you know. I point that out.

13 I don't believe that consistent with  
14 the Court of Appeals decision, it is possible  
15 or appropriate for a lay person to be expressing  
16 opinions as to value.

17 MR. McKEE: I agree.

18 MR. GETTY: The next would be Exhibit 162.  
19 It's a letter from Mark Heltzel, H-E-L-T-Z-E-L.  
20 Again, it represents opinions with respect to  
21 property values. It also appears to represent  
22 the recitation of expert opinions through the  
23 World Health Organization. We don't believe they  
24 are admissible for purposes of the hearing.

25 MR. McKEE: I will sustain the objections.

1                   MR. GETTY: The next would be 163 from  
2 John H. Rephann. Mr. Rephann is a resident of  
3 Summit at Harwood. He appears to be expressing  
4 an opinion as to the impact on his property value,  
5 and we would move to strike that.

6                   MR. McKEE: (Perusing) I guess my only  
7 concern, Mr. Getty, with this is all he is saying  
8 is it's going to hurt my house; it's going to hurt  
9 my value. I mean, he is testifying -- there is no  
10 specifics. There is no -- other than I personally  
11 feel like I am going to lose value in my house.  
12 I think I am going to allow it in for what it says  
13 which is...

14                   MR. GETTY: Understood.

15                   Exhibit 175, which is from Edward -- and  
16 I am going to apologize, I am going to mispronounce  
17 his last name -- Guigliano, who I believe testified  
18 at the earlier hearing in this, purports to  
19 represent opinions. He has a bachelor's degree  
20 in chemical engineering, an MBA. He is the  
21 gentleman who worked at Orbital ATK Rocket Center  
22 and previously with AES. He is expressing opinions  
23 about the efficiency of wind energy among others.  
24 He has not been qualified to express expert  
25 opinions, so he is not subject to cross-examination

1 in respect to those opinions. It's also not  
2 relevant.

3 MS. WILLIAMS: If I recall correctly, he  
4 also offered verbal --

5 MR. McKEE: I was just going to say,  
6 didn't Mr. Guigliano, he testified as well.

7 MR. GETTY: He did. He testified.

8 MS. WILLIAMS: Edward Guigliano.

9 MR. POWELL: Yeah.

10 MR. McKEE: All right. I will sustain it.  
11 He already testified to this anyway.

12 MR. GETTY: Mr. Gontrum, I'm going to --  
13 yeah. Thanks.

14 Next, 190. 190 is correspondence,  
15 together with attachments, from Richard R. James,  
16 E-Coustic Solutions, a noise control sound  
17 measurement consultant.

18 If you may recall, documentation earlier  
19 in our proceeding was offered with respect to his  
20 opinions. He was purporting to be an expert. He  
21 is not subject to cross-examination, and we do not  
22 have the ability to determine his qualifications.

23 MR. McKEE: I had reviewed this prior and  
24 I agree. I will sustain the objection.

25 MR. GETTY: Next would be 207, Eileen

1 Stoger, S-T-O-G-E-R, correspondence. She appears  
2 to be expressing opinion as to an impact on health  
3 and, in particular, her health. She purports to  
4 be -- and I have no doubt she is -- living near  
5 Fourmile Ridge in Garrett County. As I think I  
6 indicated, so do I. I don't think she can express  
7 the opinions that she is purporting to express,  
8 and I don't think it's relevant in terms of that  
9 particular project and this project.

10 MR. McKEE: I am going to overrule the  
11 objection. I am going to allow it. She is  
12 testifying as to her own condition; and she, in  
13 fact -- this is -- I find this is no different  
14 than the testimony from the other two witnesses.

15 MR. GETTY: I understand.

16 The next are two submissions. It's 214 --  
17 213 and 214, Diane McKenzie Sapp. It contains  
18 significant printed material purporting to express  
19 opinions about health, property values, pretty much  
20 every issue that a lay person is unfortunately not  
21 able to express an opinion on. She also takes  
22 exception to almost everything that the applicant  
23 and the board have done.

24 MR. McKEE: I will sustain the objection.

25 MR. GETTY: Next would be Exhibit 217

1       which is correspondence dated November 9, 2015,  
2       from Allen D. Boyd. Mr. Boyd represents that he  
3       is a professional engineer and then goes on to  
4       express opinions with respect to the project. He  
5       is not subject to cross-examination.

6               MR. McKEE: I am going to overrule the  
7       objection. Even though he does indicate it again  
8       that he is an expert, he really -- he is not  
9       providing expert testimony, as I see it here.  
10      In fact, he even acknowledges in one paragraph  
11      he is no expert. So having said that, I am going  
12      to...

13             MR. GETTY: What he gave, he took away.

14             So, finally, Exhibit 223 is correspondence  
15      received by the board on November 9, 2015, from  
16      Frank O'Hara. It appears to be a compilation  
17      of significant information having to do with  
18      the Pinnacle Project in West Virginia. It also  
19      contains opinion evidence, but I don't think  
20      it's relevant to the proceedings in Maryland.  
21      Mr. O'Hara did have the opportunity to appear  
22      before the board and did testify.

23             MR. McKEE: I am going to sustain the  
24      objection.

25             MR. GETTY: That would be all we would

1 have preliminarily.

2 MR. McKEE: Thank you, sir.

3 With that, as I indicated earlier, we  
4 are going to give an opportunity for rebuttal for  
5 anybody who wanted to have an opportunity to be  
6 heard with regard to the submittals that we've  
7 gotten in the last few days.

8 The applicant has the burden of proof.  
9 The applicant is going to get the last word in  
10 this.

11 Is there anybody who wants to provide any  
12 rebuttal information on behalf of the opposition?

13 (There was no response.)

14 MR. McKEE: Let the record reflect nobody  
15 stepped forward.

16 Mr. Getty, I am going to give you your  
17 opportunity for rebuttal at this time.

18 MR. SQUIRES: Mike, can you wait one  
19 second.

20 MR. GETTY: Sure.

21 (Discussion held off the record.)

22 MR. SQUIRES: Okay. I'm good.

23 MR. McKEE: I'm sorry, Mr. Getty, if you  
24 want to go to the microphone maybe, that may be a  
25 little easier.

1                   MR. GETTY: Thank you.

2                   May it please the Members of the Board,  
3                   Madame Chairwoman, first of all, thank you.  
4                   You have been incredibly indulgent of the public  
5                   process in dealing with clearly a controversial  
6                   issue in the community. We understand and  
7                   appreciate that, do not envy you, what you're  
8                   being asked to do; had a series of discussions  
9                   with someone who said to me, "You mean they do  
10                  this and don't get paid?" And that's always  
11                  followed by the question "why," but we do  
12                  appreciate what you have done and the burdens  
13                  that we, as a community, have placed on you and  
14                  appreciate the opportunity to appear before you.

15                  I began the hearing and I get to end  
16                  the hearing, making observations with respect to  
17                  the issues that are before -- and, apparently, I  
18                  am not speaking close enough -- that are before  
19                  you. At the outset, I pointed out to you that  
20                  in June of 2009, the county commissioners enacted  
21                  what we now have as Code Home Rule Bill 2-09,  
22                  Section 360-92 of the Allegany County Code; and,  
23                  importantly, as you all know probably better than  
24                  anyone, that act did not prohibit the development  
25                  of wind energy in Allegany County. It simply

1 sought to regulate it.

2           What the board did, in the context of  
3 its action in 2009 and then in the Comprehensive  
4 Plan in 2014, was to continue the ability of  
5 wind power companies to come before this board  
6 and ask for consideration of a special exception.  
7 Now, frequently, as people appeared before you  
8 and testified, they talked about it as a special  
9 exemption, and it's not that. It has never been  
10 that.

11           The applicant, Dan's Mountain Wind  
12 Force, together with the individuals who are  
13 co-applicants, are not asking for an exemption.  
14 They are simply making application, as the  
15 ordinance provides, for the ability to undertake  
16 and construct a project which they believe is  
17 consistent with all of the requirements of 360-92,  
18 as well as the original Code Home Rule Bill;  
19 and, more importantly, it is also consistent  
20 with the study that was done by the committee  
21 appointed by the county commissioners who  
22 determined that wind energy development was  
23 appropriate.

24           What the folks in that study did was  
25 to attempt, and I think successfully, to reconcile

1 all of the issues that relate to wind development;  
2 and in the written report, and I am paraphrasing,  
3 but essentially in the written report, the  
4 committee said they are attempting and, hopefully  
5 successfully, undertaking to wade through the  
6 confusing flood of issues, non-issues, information,  
7 misinformation, and disinformation in trying to  
8 arrive at a common-sense approach to establishing  
9 guiding principles for the development of wind  
10 energy in the county. They understood how  
11 difficult it is, and I think you all have clearly  
12 come to understand how difficult it is.

13           The issues that the opponents to this  
14 project want to raise, want to debate, and actually  
15 want you all to decide are matters of policy.  
16 Is wind energy a good idea? Are the towers too  
17 visible, too tall? Are they efficient in the  
18 production of energy? As you know, that's not  
19 what we're here to do. That's not what 360-92  
20 does.

21           That issue has been answered by the  
22 Board of County Commissioners when they adopted  
23 360-92. They have affirmatively stated that a  
24 wind turbine array is a permitted use, not only  
25 in an agricultural, forestry, and mining district,

1 but also in a conservation district, and they  
2 have said that if an applicant satisfies the  
3 other specific requirements of the ordinance,  
4 that through this legislation, they have declared  
5 that wind energy and windmills do promote the  
6 health, safety, and general welfare of the  
7 community.

8 So, broadly, there are two issues that  
9 are being presented or have been presented to  
10 you. The first is those relating to the special  
11 exception itself and the second as to the  
12 variances. Now I am going to take them in the  
13 reverse order. I am going to start with the  
14 variances.

15 The question becomes: Should the  
16 variances be granted? When you look at the issue  
17 of variances under the code, there are actually  
18 two issues or two sections of the code that we  
19 have to look at. One is 360-92, we know that,  
20 that is very specific, but we also have 360-88,  
21 and I bring that up because it's the provision  
22 that you all deal with every other time that you  
23 have ever had an issue dealing with setbacks for  
24 property, because in 360-88, we have all the other  
25 land uses except wind energy, and I bring it up

1 because those, the setback requirements of the  
2 code are very different in 360-88.

3 For general structures, including  
4 industrial structures, they need to be set  
5 back from a residence generally by only 50 feet.  
6 That's the general provision. That would include  
7 a coal preparation plant and handling facilities,  
8 as well as landfills. They also provide an  
9 airport. An airport is a thousand feet from a  
10 residence; an open surface mine, 300 feet, if you  
11 get the permission. Now, I bring that up because  
12 360-92 is vastly different. It is significantly  
13 larger than the requirements that generally apply  
14 and apply to every other industry.

15 So the question, one of the questions  
16 that is buried within the issues presented to  
17 you in the context of the variances is, "Are the  
18 variances sufficient," because you are given some  
19 discretion in terms of that.

20 And we suggest to you that the variances,  
21 the separations, the buffers, if you will, the  
22 buffers between the residences and the wind  
23 turbines and then the setbacks, which there are  
24 two setback variances, the USCOC of Cumberland  
25 property and the DNR property, both of which the

1 owners of the property, the State of Maryland and  
2 USCOC, have consented.

3 When we look at our requirements, as it  
4 relates to the buffer, the code was established  
5 on the recommendation of the study committee as  
6 a common-sense approach, and it's 2,000 feet,  
7 and they believed, and they recommended to the  
8 commissioners, and the commissioners adopted the  
9 belief that 2,000 feet was more than enough to  
10 protect adjoining dwellings.

11 So given the fact that a cell tower, as  
12 an example, has only a setback of its own height  
13 from an adjacent lot, it is clear that the county  
14 commissioners when they looked at windmills became  
15 very aggressive and very protective, and that is  
16 within their right to do.

17 Now, in this particular case, perhaps  
18 the commissioners didn't anticipate it, but I  
19 think that they allowed for it to occur. We have  
20 internal buffers, we have internal separations,  
21 and as in all of the affected property owners  
22 who are subject to those separation buffers are  
23 co-applicants. They're not strangers to this  
24 process.

25 The ordinance says they have to consent.

1 These people changed the role that they have.  
2 They're not just here just to consent and  
3 present it to you as a variance issue. They  
4 changed the overall dynamic of this by becoming  
5 co-applicants, and what that does is brings into  
6 play a significant legal issue which relates to  
7 a zoning doctrine called "merger."

8 We have had the opportunity and we brought  
9 it to your attention during the course of the  
10 hearing, the Court of Appeals of Maryland, our  
11 highest court, in a case called *Friends of the*  
12 *Ridge vs. Baltimore Gas & Electric Company*, found  
13 that because properties in that case had been  
14 combined into a single project, that there wasn't  
15 a reason to have variances and no variances were  
16 necessary.

17 The issue had come before a Board of  
18 Appeals and ultimately found its way to the court  
19 because the variances were requested by the  
20 petitioner, just as we have requested the variances  
21 here, but the court noted that they did it, and  
22 I will suggest to you we have done it because we  
23 thought that was what we were being required to  
24 do under the ordinance; but the court said we hold  
25 that a landowner who clearly desires to combine

1 or merge several parcels or lots of land into one  
2 larger parcel can do so. One way he or she may do  
3 so is to integrate or utilize contiguous lots in  
4 the service of a single structure or project, as  
5 the respondents had done in that case, and as the  
6 petitioners, the applicants, have done in this  
7 case.

8           What the court said is, for title  
9 purposes, everybody still owns their property.  
10 We are not changing boundaries, we are not changing  
11 deeds, but -- and the plot, the plotted land that  
12 each of these applicants has remains, but for  
13 zoning purposes, we now have one project. Zoning  
14 merger does not impact the fact that the parcels  
15 remain divided, it's not an adjustment of lot  
16 lines, but it is a zoning requirement; and this,  
17 I simply bring it up -- not just simply -- it's  
18 a big deal. The co-applicants in this, and I said  
19 it during the course of the hearing, essentially  
20 are asking for a variance from themselves for  
21 themselves. It becomes -- the doctrine of merger,  
22 I believe, applies, and I urge you to find that  
23 it applies, because if it applies, there is not  
24 a basis and there is not a requirement for the  
25 internal buffer variances.

1           We count them as eight. We know that they  
2 can be counted as 26. We count them as eight in  
3 our application because there are eight residences  
4 and then distances from towers, but we suggest to  
5 you that if it, as we suggest, the doctrine of  
6 zoning merger occurs, even if you choose to look  
7 at variances and get to that issue, we think the  
8 nature of the merger of the interests between  
9 the owners of the individual residences and Dan's  
10 Mountain Wind Force also demonstrate that the  
11 variances cannot be unreasonable. The variances  
12 that we are asking for are, by definition,  
13 reasonable because everyone who is affected by  
14 it has agreed to it.

15           Now, the ordinances that govern  
16 variances are defined by your code at 360-63  
17 as a modification of zoning regulations, being  
18 permissible where physical conditions of the  
19 lot or parcel are not the result of the applicant  
20 and would make strict enforcement of the  
21 regulations unreasonable which is why I use  
22 that term. So given the fact that the variances  
23 are from dwellings owned internal to the site,  
24 owned by the applicants themselves, and occurs  
25 with agreement of all of the owners, I suggest

1 to you they can't be unreasonable.

2 Legally, when you are looking at a  
3 variance, you are looking at a question as to  
4 whether or not granting the variance would be  
5 consistent with the spirit and intent of the  
6 ordinance. If you have applicants who have come  
7 before you and said we're all joining together,  
8 and we suggest that's merger, but if you're getting  
9 to the analysis of whether or not the variances  
10 can be granted, you've gotten beyond that; but  
11 it is important to understand that when we are  
12 looking at all of these things, if the affected  
13 property owner is in favor of granting the  
14 variances, and the variances are only being  
15 opposed by people who are not affected by the  
16 variance, as defined in the code, then we suggest  
17 to you that the relief we're asking for, the  
18 variances we're asking for, are just -- they're  
19 reasonable. They have to -- there is no other  
20 explanation that can come.

21 Now, this proceeding, these proceedings  
22 as to both the special exception and the variance,  
23 are driven by evidence; and the only evidence  
24 that was presented in the context of the variances  
25 themselves, both the separation variance on the

1 internal eight and the setback variance, was the  
2 evidence that was presented by the applicant.

3           When we are looking at what is going on,  
4 we need to understand that the site conditions  
5 that Mr. Brewer testified to at length and actually  
6 twice are the very reasons that drive the variance  
7 issue because the conditions that exist are not  
8 the result of anything the applicant has done.  
9 If you remember the exchange when we were actually  
10 talking about self-inflicted during the course of  
11 the hearing, Mr. McKee and the members of the board  
12 had a discussion about what "self-inflicted" is.

13           We haven't done anything with respect  
14 to this property. We didn't build a garage too  
15 close to the line and then come in and ask for  
16 a variance. Self-inflicted is when you have  
17 physically done something, and that's not what  
18 this is about. This is about site conditions  
19 which drive the location of this particular project  
20 and the location of all 17 of the towers that are  
21 a part of the project.

22           Now, I am going to present to you,  
23 and I will acknowledge, this is not intended  
24 to be evidence. In lawyer's worlds, this is  
25 demonstrative. It is an attempt to depict for

1       you what the testimony that came through Mr. Brewer  
2       and through others really reflects.

3               Mr. McKee, I am going to start this way  
4       with you.   (Handing)

5               MR. McKEE:   Thank you, sir.

6               MR. GETTY:   And what I have handed to  
7       Mr. McKee to distribute to the board is ... is,  
8       I believe, a graphic representation of the site  
9       conditions that Mr. Brewer testified to.

10              If you remember, there was an exchange  
11      and, Mr. Powell, you were part of the exchange  
12      having to do with the pressures.  If you go to the  
13      east, what happens, if you go to the west or the  
14      north or the south, and this graphic representation  
15      deals with that aspect of the application and the  
16      request for variances and why the individual towers  
17      are located where they're located, and this is a  
18      two-dimensional representation of all of that  
19      information.

20              So we have black lines.  We have a legend  
21      that shows what the black lines are which are the  
22      beam paths of communication.  We have the blue  
23      which represents residential setbacks.  We have  
24      the red which represents property line setbacks.  
25      We have areas of prior deep mine activity.  We

1 have areas of prior surface mine activity. We  
2 have steep slopes. We have endangered species.  
3 We have the vegetation, the Mountainrice. We have  
4 all of those factors graphically represented, and  
5 when you look at what is left, you see a very small  
6 area for the towers which comprise this project.

7 We believe that this evidence and this  
8 information --

9 AUDIENCE MEMBER: He just called this  
10 evidence?

11 MR. GETTY: Excuse me. I will take that  
12 back.

13 The evidence upon which this graphic  
14 representation is based demonstrates that we have  
15 done everything that we can do and demonstrates  
16 that in the context of Mr. Brewer's testimony,  
17 you can understand why it took him some 25 drafts  
18 to deal with the environmental issues, the site  
19 condition issues, and to present that to the board.

20 We believe that all of those circumstances  
21 demonstrate, together with all of the evidence that  
22 you've heard, that the separation variances, that  
23 is for the residents themselves, first, shouldn't  
24 exist because of merger, but, secondly, clearly  
25 should be granted in the context of the evidence

1 that was actually presented.

2 As to the setback, the two properties,  
3 there is no -- there was no evidence in opposition  
4 to those two, this Tower 16 and 17, to those two  
5 issues. The landowners consented which allows us  
6 to request the variances. There are no occupied  
7 structures that are involved. The properties from  
8 which the variances are sought are not occupied,  
9 except by the equipment associated with their uses  
10 by DNR and USCOC. We believe that the variances,  
11 we have satisfied the legal obligations, and we  
12 believe that all the variances should be granted.

13 There are some setback issues that were  
14 raised by individual people, in particular,  
15 Mr. Dale Allen and Andrea Baker, who appeared  
16 as lay witnesses before the board.

17 Mr. Allen testified as to how the  
18 closest turbines would come. We identified in  
19 our post-trial submissions the actual measurements  
20 that are there, and what I want to do is simply and  
21 quickly just identify for you, as to Mr. Allen's  
22 issues, that there are a number of turbines which  
23 may relate to Mr. Allen's property, but they would  
24 be as follows:

25 Turbine No. 6 which is required to be

1 twice -- set back twice the height of that  
2 particular turbine which is 545 feet, that appears  
3 on Sheet -- Exhibit C, Sheet 02.0 -- or excuse  
4 me, 0.2, and that particular turbine is actually  
5 greater than that from his property line at 600  
6 feet.

7 Turbine 7 is required to be set back  
8 955 feet from the property line because it's three  
9 times that particular turbine height. In fact,  
10 instead of the 955, it's over 1500 feet from the  
11 property line.

12 Turbines 8, 9, and 10 are each more than  
13 2,000 feet from Mr. Allen's property line.

14 Turbine 5 is over 3,800 feet, and all  
15 of the remaining turbines in the array are more  
16 than 3,000 feet from the turbines [sic].

17 There are no turbines which infringe  
18 upon the setbacks, and no turbines interfere with  
19 the buffer separation from Mr. Allen's dwelling.

20 Mr. Allen also provided testimony  
21 concerning the qualification of his property  
22 for the National Register of Historic Places.  
23 He also indicated he intended to make application,  
24 and there is a difference. If his property,  
25 in fact, had been on the National Register, a

1 5,000-foot setback separation would be required  
2 from any turbine, but it is not on the National  
3 Register.

4 That is something that is verified by  
5 county staff as a part of their review, and if  
6 you will remember, the concept plan was given  
7 approval, evidencing their validation of that,  
8 as well as the evidence which was presented by  
9 the applicant, verifying that there are no sites  
10 on the National Register within 500 -- or 5,000  
11 feet of the proposed project.

12 The other specific information that was  
13 presented by Ms. Baker had to do with the fact that  
14 she homeschooled her children, and she believes she  
15 was entitled to a school buffer separation of 5,000  
16 feet under the specific provisions of 360-92(a)(3)  
17 of the code.

18 As the evidence demonstrates, her dwelling  
19 is over 2,000 feet from the closest turbine; but,  
20 more importantly, a "school" is defined in the  
21 existing Allegany County Code as an institutional  
22 use and not a residential use. Her homeschool  
23 does not qualify as a school from which the greater  
24 buffer distance is required.

25 One of the things that I would ask you

1 to do, and I know you will, because you all have  
2 been doing this for a while, these are tough cases  
3 to deal with in the context of lay witnesses and  
4 expert witnesses, and I appreciate and I think  
5 everyone can appreciate the passion of the opinions  
6 of lay witnesses, but there is a distinction.

7           The courts have looked to lay witnesses  
8 in a manner very different than experts, and in  
9 the context of these proceedings, when we are  
10 talking about issues of health, when we are talking  
11 about issues of property value, these are things  
12 that are beyond the lay opinion, and no matter how  
13 passionate the people can be, when we are talking  
14 about the issues that this board is to decide, it  
15 is dependent upon evidence, and we suggest that  
16 the evidence that has been presented is consistent  
17 with the granting of the variances as well as the  
18 special exception.

19           We believe that the expert testimony  
20 and the evidence that has been produced by the  
21 applicants demonstrates that the proposed special  
22 exception meets all of the County's standards.  
23 We comply with the county comprehensive plan, and  
24 we meet the criteria of *Schultz v. Pritts* which  
25 is the controlling legal authority.

1           The comments from the Allegany County  
2 staff have indicated that the concept plan,  
3 which is a part of this process, reflects the  
4 environmental site design that I talked about  
5 at the beginning and Mr. Brewer spoke about in  
6 the site selection. In fact, in the evidence  
7 that has been presented, I suggest to you that  
8 the protestants made no attempt to demonstrate  
9 that the county code requirements have not been  
10 met. They have been.

11           Richard Josephson and Sean Davis, who  
12 are professional planners, each testified that  
13 this project is absolutely in conformance with  
14 the comprehensive plan. It's in conformance  
15 with both the current zoning, as applied to the  
16 property and the zoning proposed for the property,  
17 and there is no expert testimony at variance with  
18 that.

19           When we appear before you in the context  
20 of a special exception application, we enjoy a  
21 presumption that the use that we are making or  
22 intend to make of the property is valid. Once we  
23 demonstrate that we have met the requirements of  
24 the code, then the use of the site should receive  
25 a special exception, and at that point, the burden

1 of proof shifts to those who are opposed to the  
2 project to show some unique characteristics of the  
3 land which impose a greater burden than that which  
4 is inherent in the use.

5 In this case, the protestants have not  
6 done that. They have not demonstrated that there  
7 is some unique characteristic of this land where  
8 this project at this location imposes a greater  
9 burden than that inherent with the use itself.

10 A conditional use or a special exception,  
11 as the courts have told us, is a part of the  
12 comprehensive zoning plan, sharing a presumption  
13 that, as such, it's in the interest of the general  
14 welfare and therefore valid. The special exception  
15 is a valid zoning mechanism that delegates to this  
16 administrative board the limited authority to allow  
17 those uses which the legislature has determined to  
18 be permissible, absent any fact or circumstances  
19 negating that presumption.

20 We submit that there is no evidence that  
21 negates that presumption. There has been an  
22 absolute failure by the protestants to address  
23 any specific reason to deny this special exception.

24 The courts have told us that the test  
25 is whether there are facts and circumstances that

1 show a particular use at a proposed particular  
2 location would have any adverse effects above and  
3 beyond those inherently associated with a special  
4 exception use, irrespective of its location in a  
5 zone. That's *Schultz v. Pritts*.

6 What does it mean? It means, as I said  
7 at the outset, we're not here to decide whether  
8 wind energy projects are a good idea. We're  
9 not here to decide if they look good or whether  
10 we think the towers are too tall, too visible.  
11 We're not here to decide whether or not the tax  
12 structure established by the federal government  
13 is appropriate. We're not here to talk about the  
14 wind industry.

15 What we are here to talk about, what  
16 you have heard over the course of three days of  
17 testimony, what the evidence is that we're here  
18 to talk about, this project and this property,  
19 and in doing that, if we have satisfied the  
20 specific requirements of the code, then Allegany  
21 County has told us that this use at this location  
22 will promote health, safety, and the general  
23 welfare of the community.

24 We are now at the conclusion of this  
25 hearing, and we believe that the evidence has

1 demonstrated that the site selection, the design,  
2 the concept of approval -- concept approval by  
3 the County has presented a project to you that  
4 is consistent with the concepts of environmental  
5 site design, consistent with the provisions of  
6 Maryland law that apply, and that the applicants  
7 have satisfied and embraced the provisions of  
8 360-100, 101, and 360-92 of the Allegany County  
9 Code, and that the applicants are entitled to  
10 a special exception and the variances that they  
11 have applied for. Thank you.

12 MR. McKEE: Thank you, Mr. Getty.

13 At this time, we are going to go ahead  
14 and close the open portion of this hearing. We  
15 are now going to move into executive session.

16 I would ask quickly, do you want to take  
17 a -- I know we got a little break there, but --

18 CHAIRPERSON WILLIAMS: I think it would  
19 be appropriate at this time to take a break...

20 MR. McKEE: All right. We're going to  
21 go take a ten-minute break. We're going to come  
22 back and we're going to go into executive session.  
23 Thank you.

24 (At 10:31 a.m., break taken until  
25 10:43 a.m.)

1                   CHAIRPERSON WILLIAMS: All right. If we  
2 can get back to order, please. Before we go into  
3 executive session, I do want to thank everybody  
4 who has participated. We must all be aware of  
5 how inordinate this hearing has been in thoughtful  
6 preparation and expenses that have gone into it;  
7 renting the facility at the fairgrounds, the court  
8 steno, the thoughtful staging, just a listing of  
9 exhibits. We went through the alphabet four times,  
10 and we're up to 224, I think.

11                   So it's been quite an extraordinary  
12 effort, and I congratulate Jim Squires and  
13 his staff, Dave Dorsey, Linda Simpson, Sierra  
14 Woodfield, who was with us out at the fairgrounds,  
15 and all those people in the background who I don't  
16 have names for.

17                   Regardless of the decision today, we  
18 want to also compliment the applicant for their  
19 professionalism, for the detailed information  
20 that we have been given, the opponents for their  
21 testimony. It's heartfelt. It may have been a  
22 little emotional, but it was heartfelt and sincere,  
23 worthy testimony.

24                   Especially, I want to commend Matt Brewer  
25 as well, who was able to pull together an

1 inordinate amount of information in a comprehensive  
2 way to present to this board. It certainly was  
3 beyond what I think I could ever do.

4 With all that, we are going to go into  
5 executive session. You are not bound to stay.  
6 We will have a written decision to those people  
7 who have provided us with names and addresses.

8 If you do stay, you must be quiet. We  
9 can't hear any more testimony. I have a hearing  
10 impairment, so it's real important for me to be  
11 able to focus on what is being said at the table.

12 Anybody else have anything to add to that?

13 MR. McKEE: Maybe John Brant ... John,  
14 maybe mention John.

15 CHAIRPERSON WILLIAMS: Oh, John Brant,  
16 sorry.

17 MR. McKEE: No, that's all right.

18 CHAIRPERSON WILLIAMS: It's my hearing.

19 MR. McKEE: I'm sorry.

20 CHAIRPERSON WILLIAMS: Since John cannot  
21 be part of the deliberation, he has excused  
22 himself. So he has been a faithful alternative  
23 for us, alternate, in case one of us should fall  
24 ill and was unable to complete this task. So we  
25 thank John as well. Thank you.

1           MR. McKEE: Well, I guess we probably  
2 should begin by looking at the exhibits that have  
3 been presented in the last ten days. Mr. Squires  
4 can...

5           Hey, Jim, did you give us the last ten  
6 days?

7           MR. SQUIRES: I am organizing that right  
8 now. It's on its way.

9           MR. McKEE: All right.

10          MR. SQUIRES: Somewhat organizing it.

11          MR. POWELL: Where is the -- did they  
12 start with just the same -- yeah, here it is,  
13 ending in an alphabetical order exhibits and then  
14 starting the numbers.

15          MR. SQUIRES: Linda...

16          MR. POWELL: Is that the order that ...  
17 as far as the numbering?

18          MR. McKEE: Jim is going to give them all  
19 to us in a second.

20                 (Discussion of board inaudible.)

21                 (Discussion held off the record.)

22          MR. McKEE: Now, you did receive copies  
23 of all the memoranda, legal memoranda; isn't that  
24 correct?

25          MR. POWELL: Yes.

1 MR. UPHOLD: Yes.

2 MS. WILLIAMS: Correct.

3 MR. McKEE: So, really, what we're  
4 looking at is just the letters in the exhibits,  
5 I believe --

6 MR. UPHOLD: Right.

7 MS. WILLIAMS: Right.

8 MR. McKEE: -- the letters that are in  
9 there.

10 MR. SQUIRES: Okay. This is relatively  
11 organized. (Handing)

12 MR. McKEE: Thank you, sir.

13 MR. SQUIRES: Okay. So you want the last  
14 ten days, right?

15 MR. POWELL: Yeah.

16 MR. SQUIRES: Basically, in this batch,  
17 215 ... there is another one. So there is that.  
18 This is the last ten days.

19 MR. McKEE: I am just going to simply pass  
20 them around. You guys can ... as you give them  
21 back to me, we'll see what you've got there.

22 MR. POWELL: And those that are -- those  
23 that have been stricken, we don't consider them?

24 MR. McKEE: They're not here.

25 MR. UPHOLD: They're not?

1 MR. McKEE: I pulled them out.

2 MR. POWELL: They have been pulled?

3 MR. McKEE: Yeah.

4 MR. POWELL: Okay.

5 MR. SQUIRES: Here's another one. I'll  
6 put those in there. This one goes to the end of  
7 this list.

8 MS. WILLIAMS: All right.

9 MR. SQUIRES: I think.

10 MR. POWELL: I was going to say, do you  
11 think it would be beneficial if we divide these up  
12 or whatever --

13 MR. UPHOLD: Yeah.

14 MR. POWELL: -- anything in our opinion  
15 that has some semblance of importance to the case?

16 MS. WILLIAMS: Yeah.

17 MR. POWELL: Otherwise, if it's just out  
18 on the periphery...

19 MS. WILLIAMS: Well, if we all agree.

20 MR. SQUIRES: I'll just stick this  
21 underneath, and so when you're done with that one,  
22 then we can pass that package along. (Handing)

23 (Board members perusing documents.)

24 MR. McKEE: Is there a pile you want to  
25 put things that we should discuss? I mean, is

1       there something -- because I do have a letter  
2       from the Allegany County Public Schools. That's  
3       probably something we need to -- we're going to  
4       have to make a decision on with regard to this,  
5       so I am going to set this here.

6               MR. SQUIRES: I am going to run down --  
7       you can leave it there. I am going to run down  
8       and I am going to get a blank one. So you can  
9       stick them in that box, and then as you circle  
10      them around, you stack them, give them back to me  
11      and I will try to put them back in order, if you  
12      went through and...

13             MR. McKEE: All right. Thank you.

14             MR. SQUIRES: So I'll be back.

15             MS. WILLIAMS: Rephann talks about his  
16      opinion on the value of his property and it  
17      decreased.

18             MR. McKEE: That's the one that's just  
19      a -- that's a general -- that's just a general  
20      opinion though.

21             MS. WILLIAMS: Right, yeah.

22             MR. McKEE: Yeah.

23             MS. WILLIAMS: And this Stoger, Tom,  
24      expects us to provide a dramatic opinion of the  
25      towers.

1 (Board perusing documents.)

2 MR. SQUIRES: Set that there for  
3 discussion, stick them in there and... (Handing)

4 MR. McKEE: Thank you, sir.

5 MR. SQUIRES: Your struck pile, other than  
6 what you gave me ... you gave me that pile down  
7 there, didn't you?

8 MR. McKEE: That's the -- that was the  
9 only one.

10 MR. SQUIRES: That was the only one?

11 MR. McKEE: That was the one, so...

12 (Perusing)

13 Well, Brian is in support of the  
14 windmills. He just signed it "Brian."

15 MS. WILLIAMS: Good.

16 MR. McKEE: So we know Brian is in...

17 MS. WILLIAMS: Yeah, I know Brian.

18 MR. SQUIRES: Here's another one.

19 (Handing)

20 MR. McKEE: Oh, thank you.

21 MR. SQUIRES: Here is your stuff here.

22 MR. McKEE: Oh, thank you.

23 (Board perusing documents.)

24 MR. SQUIRES: Did you examine this pile  
25 then too? It should be anything after 120. I am

1 going to go look at my sheet again.

2 MR. McKEE: Yeah.

3 MR. SQUIRES: Yeah, 120 and after.

4 Everything that is 120 and after was taken in  
5 after the hearings. So that stack there should  
6 be them too.

7 MR. POWELL: Where is the stack that  
8 everybody is...

9 MS. WILLIAMS: Did you need these?

10 MR. POWELL: Yeah.

11 MS. WILLIAMS: Which ones are you finished  
12 with, these?

13 MR. POWELL: I guess.

14 MS. WILLIAMS: I think I read that one.  
15 You read this one?

16 MR. UPHOLD: Yeah, uh-huh. You can go  
17 through both of those.

18 (Board perusing documents.)

19 MS. WILLIAMS: Finished that one.

20 MR. UPHOLD: Did you read that signature?

21 MR. McKEE: Is that Brian?

22 MR. UPHOLD: Uh-huh.

23 MR. McKEE: I thought that's cute.

24 (Board perusing documents.)

25 MR. McKEE: Can I see the exhibit list?

1 MS. WILLIAMS: I didn't hear you.

2 MR. McKEE: Your exhibit list. Can I see  
3 your exhibit list? Yes. I'm sorry. I don't mean  
4 to whisper. We've been quiet for so long that...

5 (Document handed to Mr. McKee.)

6 MR. McKEE: Oh, thank you. I appreciate  
7 it.

8 MR. SQUIRES: Is there anything you need  
9 me to make copies of?

10 (Board members shook heads.)

11 MR. SQUIRES: You're good?

12 MR. POWELL: Maybe that's the same Brian.

13 MR. UPHOLD: Yeah, but the writing is  
14 different.

15 MR. POWELL: The writing is different.  
16 I think I've seen some of these twice.

17 MR. UPHOLD: Yeah, it's kind of along --

18 MS. WILLIAMS: They're just a common  
19 theme.

20 MR. UPHOLD: Yeah.

21 MR. POWELL: Oh, yeah.

22 MR. UPHOLD: I think they just...

23 (Board members perusing documents.)

24 MS. WILLIAMS: I think Jim has...

25 MR. UPHOLD: The ones you want to discuss?

1       Yeah, we can do that.

2                   MS. WILLIAMS: Well, I don't know that I  
3       want to discuss them, all of them.

4                   MR. UPHOLD: Yeah, he only wants the ones  
5       put in there to discuss.

6                   MS. WILLIAMS: Okay.

7                   MR. McKEE: Other than the one that was  
8       from the school board, was there any other ones  
9       that you wanted to specifically discuss?

10                  MR. UPHOLD: I didn't.

11                  MR. McKEE: Okay.

12                  MR. POWELL: Is that it?

13                  MR. UPHOLD: Yeah.

14                  MS. WILLIAMS: Uh-huh.

15                  MR. McKEE: Yes, sir. Everybody had a  
16       chance to review all of it then?

17                  MS. WILLIAMS: Yes.

18                  MR. McKEE: All right.

19                  All right. So I guess, jumping right into  
20       this, the first thing, the one letter that jumps  
21       out that we probably need to have some resolution  
22       on is Andrea Baker and the letter we received from  
23       the school board regarding ... I guess the issue  
24       is whether or not it's a school or not, and if it  
25       is, whether or not the setback limits apply to a

1 school. All right?

2 I will just be the one to go out because  
3 I'm sure you're going to ask me anyway, what's the  
4 law say? I do not believe the law would indicate  
5 that this would be a school under the zoning code.

6 MR. UPHOLD: I agree.

7 MR. McKEE: So I don't believe we can --  
8 that you really can consider an additional  
9 setback just as a result of the fact there is  
10 homeschooling. The definition --

11 MR. UPHOLD: Well, and other schools,  
12 other people too, you couldn't consider all of  
13 them schools because it would be all over the  
14 county.

15 MR. McKEE: I mean, I understand the  
16 argument. Clearly, the letter here does indicate  
17 that -- I mean, that children are in a school and  
18 they go there, and they go through the Board of  
19 Education --

20 MR. UPHOLD: Yeah, I agree.

21 MR. McKEE: -- but when you get into the  
22 physical definition of what that is --

23 MS. WILLIAMS: Right.

24 MR. McKEE: -- they don't fall under that  
25 physical definition of a building, school, plant.

1           So for that purpose, I just want to  
2     indicate to the board that I do not believe we  
3     should consider that in this as an issue in regard  
4     to setbacks. All right?

5           MR. UPHOLD: I agree.

6           MS. WILLIAMS: I agree.

7           MR. McKEE: Any other questions regarding  
8     that?

9           MR. POWELL: I think Mr. Getty's  
10    memorandum here of evidence in this submission  
11    covers that pretty fully --

12          MR. McKEE: Yeah.

13          MR. POWELL: -- that it's a residence and  
14    it's not considered a school in itself.

15          MR. McKEE: While we're on that topic,  
16    do you want to go ahead and address Mr. Allen and  
17    the Historic Register as well?

18          MR. POWELL: Yeah, because those were --  
19    those were two of the things that I picked out  
20    in my notes that I -- that kind of involve the  
21    adjoining property owners. Those were the only  
22    two things that stuck out in my mind as where  
23    there was an infringement on adjoining property  
24    owners, and that was the Baker residence where  
25    she is homeschooling her children and Mr. Allen's

1 residence where he stated, you know, he was trying  
2 to get approval to get on the Historical Register,  
3 the National Register of Historic Places, but it's  
4 not there.

5 Mr. Feldstein gave testimony that he said  
6 it qualified, but, again, it's still not there.  
7 So if it's not on the registry, my opinion, it  
8 would be just like if the wind towers were there  
9 now and suddenly he applies for application to  
10 the registry, you can't go back and say, now  
11 place the wind turbines someplace else. So I  
12 don't think either one of those properties enter  
13 into our consideration for denying or whatever  
14 those setbacks.

15 MR. McKEE: Is there agreement on that?

16 (Ms. Williams nodded head.)

17 (Mr. Uphold nodded head.)

18 MR. McKEE: All right. I agree with you.  
19 I agree with you as well. I think that the --  
20 it's a prerequisite for them to determine who is  
21 on the National Register, Historic Register, prior  
22 to filing an app, and if you get put on there after  
23 it, it doesn't affect. So that will be a non-issue  
24 as well.

25 MR. POWELL: Well, let me --

1 MR. McKEE: Let me just address one --

2 MR. POWELL: Okay.

3 MR. McKEE: -- thing real quick.

4 MR. POWELL: Okay.

5 MR. McKEE: I think that we have two --  
6 technically, there is two cases in front of us, 942  
7 and 943.

8 MR. UPHOLD: That's right.

9 MR. McKEE: 942 is filed as a special  
10 exception, and 943 was filed as the --

11 MS. WILLIAMS: Variance.

12 MR. McKEE: -- as the variances. I  
13 think the case law is pretty clear. When you  
14 tie these together, you have to do a determination  
15 on the variance issues because they are basically  
16 the conditions necessary to get to the special  
17 exception. So I am going to suggest that we --  
18 our consideration be on -- be 943 before we go  
19 to 942. Do we all agree that that's probably the  
20 correct order to do this?

21 MS. WILLIAMS: I agree.

22 MR. UPHOLD: I would agree with that.

23 MR. POWELL: Yeah.

24 MR. McKEE: All right.

25 MR. POWELL: I think even Mr. Getty in his

1 summation pointed to that also.

2 MR. UPHOLD: Yeah.

3 MR. McKEE: So then when you get to that,  
4 I guess you have to look at what their findings are  
5 that you are required to make and what the standard  
6 is when you're making a determination as to whether  
7 or not variances are warranted.

8 In this particular case, I believe there  
9 are -- as we are aware, there is ten -- there is  
10 ten total variance requests, two of which are for  
11 setbacks and the other eight are for separation  
12 distances.

13 MR. UPHOLD: Separation.

14 MR. McKEE: Okay. I think the standard  
15 is set forth pretty well in the case of *Cromwell*  
16 *vs. Ward*. The first step is there has got to be a  
17 finding by the board that the property whereon the  
18 structures are to be placed or where the use is  
19 conducted, as in this case, is, in and of itself,  
20 unique and unusual in a manner different from the  
21 nature of the surrounding properties such that the  
22 uniqueness or peculiarity of the property causes a  
23 zoning provision to impact disproportionately upon  
24 the property.

25 That's your threshold question: Is the

1 properties unique? Once we get through, do an  
2 analysis of that, then we get into the issue of  
3 the second step which is a determination as to  
4 whether or not there was any unreasonable hardship  
5 or practical difficulty resulting from the  
6 disproportionate impact of the ordinance caused  
7 by the property's uniqueness; and I am actually,  
8 I am quoting that right out of the decision in  
9 *Cromwell*. So I think that's -- initially, that's  
10 the breakdown where you have to go, and then we  
11 have to begin by discussing whether or not the  
12 properties are unique.

13 MR. POWELL: Well, that's --

14 MS. WILLIAMS: Do we begin by talking  
15 about the doctrine of the zoning merger?

16 MR. POWELL: Yeah, that's --

17 MS. WILLIAMS: Because I think that  
18 defines our discussion.

19 MR. McKEE: Okay.

20 MR. POWELL: Yeah, that's -- that's my  
21 biggest hurdle when I start to focus on this. You  
22 know, we have all this peripheral stuff about the  
23 economics and what's good for and all that, and  
24 that's -- and, again, I think Mr. Getty brought  
25 it right down to, in summation, we disregard all

1 that peripheral stuff and we get down to looking  
2 at these variances.

3 Well, the biggest hurdle that I have in  
4 first starting to look at these is the so-called  
5 "merger" as he brings it out in his memorandum  
6 here, his post-memorandum here, but in the  
7 testimony that was given in the whole proceedings,  
8 you know, I looked at that and I also asked  
9 questions about it.

10 These towers, this -- and correct me  
11 if I'm wrong -- but these towers are placed  
12 specifically around -- Mr. Brewer placed these  
13 towers specifically around to meet the criteria  
14 of all the ordinances, as far as setbacks and  
15 whatever from, you know, wildlife lands or wetlands  
16 or whatever have you and the distances required,  
17 and he fit that into a -- how he fit that baby in  
18 there, but he fit that baby in there and came up  
19 with trying to comply with all the criteria and  
20 meet all the regulations and everything, according  
21 to the ordinance; but what it then did was created  
22 this pocket of variances for these particular  
23 landowners, these eight landowners, and they enter  
24 into -- now they get brought into the project, and  
25 they buy into the project or stakeholders in the

1 project, and so we are presented with this as these  
2 are landowners asking for these variances from  
3 themselves, but -- so my question to you is: What  
4 is the legality of that?

5 I mean, just because these landowners then  
6 ask for these variances for themselves, does that  
7 absolve us of our responsibility in now proceeding  
8 to look at the variances and the extent of the  
9 variances and how they were formed and, you know,  
10 bringing the questions up and the tests about how  
11 we get to the variances?

12 MS. WILLIAMS: I think before we go there,  
13 I think --

14 MR. POWELL: What do we do?

15 MS. WILLIAMS: -- there was a case law,  
16 and I can't cite it right now, that spells out  
17 or doesn't spell out but specifically points that  
18 the merger concept is for landowners, one owner.  
19 These individual homeowners do not own this  
20 project. They might be co-applicants, but even  
21 today, Mr. Getty said they did not relinquish  
22 their titles to their property. So they are not --  
23 they are still holding on to their own land --

24 MR. UPHOLD: They still own their personal  
25 property. It's not a part of --

1 MS. WILLIAMS: -- their personal property.

2 MR. POWELL: Well, here it is, here is in  
3 his memorandum, and this is the quoted statement  
4 from that memorandum, it says, "We shall hold  
5 that a landowner who clearly desires to combine  
6 or merger several parcels or lots of land into a  
7 larger parcel may do so."

8 Now, to me -- and the case that was cited  
9 is *Friends of the Ridge and Baltimore Glass* --  
10 *vs. Baltimore Gas & Electric*. That involved one  
11 property owner who had three parcels of land, and  
12 there was an infringement there. So he was allowed  
13 to take his three parcels of land and lump them  
14 into one to satisfy the variances, but what I see  
15 here, I see here eight property owners trying to  
16 merge eight different properties that they don't  
17 have -- I mean, they only have control over their  
18 one, their own property, but they're trying to  
19 converge and merge these eight properties into  
20 this project so that the variances may be excused  
21 or granted from that point. I don't know the  
22 legality of that.

23 MR. McKEE: Okay. I guess what you're  
24 basically asking me to give my opinion as to my  
25 reading of the cases. I have read *Friends of the*

1 Ridge. I have also read the *Reams* case. *Friends*  
2 *of the Ridge* is the one that really introduced the  
3 doctrine "zoning merger" to the State of Maryland.

4 I don't disagree with your reading of  
5 this. It appears to me in, not only the *Friends*  
6 *of the Ridge* case, but *Friends of the Ridge* goes  
7 into great detail and it looks at all other  
8 jurisdictions when they were deciding this; and  
9 in just reviewing that, in reviewing it, they  
10 cite a New Jersey case, *Loechner vs. Campoli*.  
11 They have another New Jersey case, *Somol vs.*  
12 *Board of Adjustment*; Connecticut case, *Iannucci*  
13 *vs. Zoning Board of Appeals*; a Rhode Island case,  
14 *Skelley vs. Zoning Board of Review*.

15 In reviewing these, the one common theme  
16 through all of this is they were common landowners.  
17 They owned the land. I didn't see anything, after  
18 reviewing these cases, and I did some research  
19 because I knew this was going to become an issue,  
20 I couldn't find one case anywhere where leaseholds  
21 become common ownership.

22 MR. POWELL: Right.

23 MR. McKEE: So if you're asking do I think  
24 that we lump this into one big project and say it's  
25 just one big project, I don't. I mean, that --

1 it's an interesting argument. I understand the  
2 argument, but that argument is probably something  
3 that somebody wearing a very black robe is going  
4 to have to make a decision on as to whether or  
5 not leaseholds are the same as common ownership,  
6 because I think "common ownership" is a legal  
7 definition, "ownership" is a definition, and I  
8 don't believe that gets there.

9 To follow up with that too, if you  
10 review -- I reviewed the leases, the leases  
11 that were -- they're Exhibit A, and the leases  
12 seem to indicate that they gave an easement  
13 over the property. I don't see anything in the  
14 lease agreements themselves which say they have  
15 ownership.

16 So to answer that question, I would say  
17 that we have to consider these as individual lots,  
18 and we have to look at the uniqueness and the  
19 individual characteristics individually --

20 MR. UPHOLD: Each and every one of them.

21 MR. McKEE: -- at each and every one, not  
22 as one unit. I just -- I think that would be --  
23 you would be taking a big leap to decide that you  
24 are going to treat this as that, because I don't  
25 think the case law supports it, at least at this

1 point. It's very new.

2 MR. POWELL: And the other part of that,  
3 I mean, just because they are asking for these  
4 variances and taking it upon themselves to ask  
5 for these variances, that doesn't absolve us of  
6 our responsibility to look at these variances and  
7 see what they -- see whether they are really in  
8 harmony or they're in spirit to the code.

9 MS. WILLIAMS: I don't see how that could  
10 happen. We're supposed to look at the health and  
11 safety and welfare of all citizens, not just these  
12 specific landowners.

13 MR. McKEE: Again, if you're asking -- if  
14 you're asking -- I mean --

15 MR. POWELL: Yeah, I am asking you because  
16 what they're doing is they are presenting this as  
17 a case where these landowners are asking this, and  
18 they are saying, okay, you can forgive -- you can  
19 get -- give these variances because you're forgiven  
20 of any responsibility to the zoning ordinances or  
21 codes.

22 MR. McKEE: What I would suggest is, even  
23 if -- even if you would decide that the zoning  
24 merger doctrine does apply and you should merge  
25 these, the zoning merger cases that I have seen

1 deal with setbacks. These are separation distance  
2 variances. They're put in there for a reason.  
3 I mean, it's -- it was all part of the, what,  
4 Code Home Rule Bill 2-09 that set forth, put  
5 in for the health and safety of the citizens  
6 of Allegany County. It was an emergency bill.

7 I would -- I would argue that even if  
8 it is all merged together, if there is residential  
9 structures, they have to be 2,000 feet away from  
10 them or --

11 MR. UPHOLD: Right.

12 MR. McKEE: -- a thousand feet away from  
13 them, if you would decide that; but the point is,  
14 whether you merge them or don't, I mean, how do you  
15 get around the fact that it says 2,000 feet from a  
16 residential structure.

17 So either way, I don't think -- I don't  
18 think merger applies. I don't think that's --  
19 that's what you have to look -- what you should be  
20 looking at. I think you have to look at these as  
21 individuals, but if you did get into that bigger  
22 picture, then you have to ask yourself: What's  
23 the difference? The difference is, in the merger  
24 cases, there are setback, there are lot line issues  
25 and setback property line issues. This is --

1 these issues, the separation variances are more  
2 health/safety issues.

3 MR. UPHOLD: Right.

4 MR. POWELL: Well, that's the way I was  
5 looking at it. I just -- looking at it from my  
6 standpoint and from my conscience, I didn't want  
7 to just say, okay, you are absolved of and you  
8 can go ahead and grant these variances without  
9 even looking at -- at seeing what the -- you  
10 know, what the clarification and see what the  
11 qualifications are and see how close they come  
12 to meeting. That's -- that's been my problem  
13 with this from day one is just looking at it to  
14 say, hey, forget it because I am asking for it,  
15 and I don't think that's the intent of the code.

16 MR. McKEE: Well --

17 MR. POWELL: I mean, the specific code  
18 was set up and said -- and it states in the code  
19 that the minimum separation from a residence is  
20 2,000 feet, and that's the minimum separation.

21 Now, I think it was testified, you know,  
22 by some of the Wind Force people that, you know,  
23 our code seems to be more stringent or whatever  
24 because they -- I think they testified that, you  
25 know, in the industry standard, our code is a

1 little bit more strict than what the industry  
2 standard code is, but our code is adapted because  
3 our commissioners have said in these, in our  
4 instances here with Wind Force, they need to be  
5 these codes. So if I'm not absolved from --

6 MR. McKEE: Well, it's not Wind Force  
7 directly. You're referring to wind energy projects  
8 as a whole.

9 MR. POWELL: Yes, yeah, yeah. So, you  
10 know, if that doesn't -- if the merger deal doesn't  
11 absolve me of my responsibility of upholding the  
12 Allegany County Code, then I need to look at the --

13 MR. McKEE: Well, you do understand  
14 though, the code does give you the leeway though.  
15 Even though they say it's 2,000 feet from the  
16 residence --

17 MR. POWELL: Oh, yeah.

18 MR. McKEE: -- it gives you the leeway to  
19 say, well, you know, under the circumstances, I can  
20 reduce that by 50 percent.

21 MR. POWELL: Yeah.

22 MR. McKEE: That's really the whole --  
23 their answer in a nutshell.

24 MR. POWELL: Yeah.

25 MR. McKEE: So it's not -- I don't want

1 you to be operating under the misunderstanding that  
2 you can't; because it's 2,000, it has to be 2,000.  
3 It does not. That is what they're asking for you  
4 to consider --

5 MR. POWELL: I understand.

6 MR. McKEE: -- but I think what you're  
7 getting at, if I am getting it right, is the reason  
8 the Code Home Rule Bill was put into place, when  
9 it was put into place, is for that safety and  
10 protection --

11 MR. POWELL: Right.

12 MR. McKEE: -- and you're looking at it  
13 as a whole, not as --

14 MR. POWELL: That is my responsibility;  
15 safety, welfare, and health issues of the total  
16 project and how it -- how we fit that into the  
17 code or how it meets into the code, and I don't  
18 think you can do that without looking at all the  
19 variances that are requested. Okay?

20 MR. McKEE: Well, let me -- I want to try  
21 to keep this on some kind of a track because we do  
22 have to go through the standards, and we have to  
23 address these.

24 So the first thing is, we have made a --  
25 you have made an initial determination, it's my

1 understanding, we're all in -- that the board is  
2 in agreement that the merger doesn't apply at this  
3 point, and we have to look at the properties as  
4 individuals.

5 MR. UPHOLD: That's how I look at it.

6 MR. POWELL: That is my feeling.

7 MR. McKEE: So the first question becomes:  
8 How are these properties unique, in and of  
9 themselves, from the surrounding areas; and,  
10 specifically, what testimony was presented?

11 What do you have? What is your opinions?  
12 What is the opinion of the board?

13 MR. POWELL: Well, visually, looking at  
14 them and going out and on our trip out to visit  
15 the sites and everything, I mean, I didn't --  
16 I don't see anything visually that stands out  
17 to me that makes them unique in any fashion.  
18 I mean, these were all adjoining property owners  
19 within the same area, the same -- you know, the  
20 same topographic area, and the soil is the same.

21 Everything seems to be the same, and I  
22 think I did ask the question during the testimony  
23 if there was something that stuck out that made  
24 these properties unique from one another or unique  
25 in any setting, and I don't think there was. I

1 don't think there was any...

2 MR. McKEE: Whose testimony are you  
3 referring to?

4 MS. WILLIAMS: Mr. Brewer's.

5 MR. POWELL: Mr. Brewer's.

6 MR. McKEE: Okay. I believe, are you  
7 referring -- you are referring to when you asked --  
8 you were asking questions on direct -- or on  
9 cross-examination of Mr. Brewer?

10 MR. POWELL: Yeah.

11 MR. McKEE: Okay.

12 MR. POWELL: Yeah. (Perusing) It seems  
13 I had so many questions of Mr. Brewer. I asked  
14 about the scope and the boundaries.

15 MS. WILLIAMS: Well, as a whole,  
16 Mr. Brewer said the area had been impacted by  
17 prior uses such as the towers and the mining  
18 and so forth. So he said in that way, that area  
19 was not unique. The cutout for the wind turbines  
20 were not unique. The area for them is not unique  
21 because the area had already been impacted.

22 I think he also said, when you did  
23 question him, about specific to each property  
24 that, no, generally, they were the same; Lashbaugh  
25 compared to Willison compared to Cesnick, that

1 they were all basically on the same geographical,  
2 topographical platform.

3 MR. POWELL: Yeah, that's -- that's what  
4 I recall too. I don't have any other specifics  
5 about that, except that I cannot find anything  
6 unique between the properties.

7 MR. McKEE: Well, was there ever --  
8 I mean, was there ever any evidence presented  
9 comparing the individual properties?

10 MR. UPHOLD: In my opinion, no.

11 MS. WILLIAMS: Huh-uh.

12 MR. McKEE: Or did it -- if the applicants  
13 were operating under the theory that this was a  
14 merger case, they wouldn't have put that evidence  
15 in because they thought it was as a whole. If you  
16 determine merger doesn't exist, then I guess the  
17 problem is, is there really isn't much evidence as  
18 to the uniqueness to the surrounding areas. Is  
19 that a fair assumption?

20 MS. WILLIAMS: Uh-huh.

21 MR. UPHOLD: That would be right.

22 MR. POWELL: Yes.

23 MR. McKEE: And, you know, in going to  
24 your point in some of the notes, I think Mr. Brewer  
25 made many points as to unique characteristics of

1 the property as a whole.

2 MS. WILLIAMS: Uh-huh.

3 MR. McKEE: He talked about the mining,  
4 and he talked about the different things there, but  
5 it was always -- and I have a quote in here, it was  
6 always "unique to the project," and he discussed  
7 the various project constraints, but it was always  
8 unique to project.

9 MS. WILLIAMS: Uh-huh.

10 MR. McKEE: I don't think, if you take  
11 it out, if you take the project out of it, I don't  
12 think there -- I didn't see -- I don't -- and  
13 you are the decision-maker here -- I don't know  
14 that I saw any testimony where they talked that,  
15 well, gee, Mr. Willison's property is different  
16 than Mr. Keiter's property or different than  
17 Mr. Lashbaugh's property. I mean, technically,  
18 they're all -- all those properties are the  
19 surrounding area. They're all the surrounding  
20 properties.

21 MS. WILLIAMS: Right.

22 MR. McKEE: And I understand their  
23 argument. It only works if you accept the  
24 proposition of the merger.

25 MS. WILLIAMS: Uh-huh.

1 MR. POWELL: Yeah.

2 MR. McKEE: Are we -- is the board in  
3 agreement with that?

4 MR. POWELL: That's in agreement, yeah.

5 MS. WILLIAMS: Yeah.

6 MR. POWELL: Yeah, that's what I was  
7 pointing at, yeah.

8 MR. McKEE: Mr. Powell, you were also,  
9 you were discussing -- I don't know if you want  
10 to -- if you had any more you wanted to add. You  
11 were -- you had some concerns, you were saying,  
12 about the spirit and intent of the ordinance. I  
13 didn't know if there was anything...

14 MR. POWELL: Well, you know, when I --  
15 what I was leading to was that, you know, if we  
16 get into looking at all the variances required,  
17 and I think we've all come up with the same number  
18 as 26 different variances that we're looking at  
19 as a whole. So then I start looking at that and  
20 saying, you know, when I start looking at each  
21 and every one of them and we get into these, each  
22 and every property -- and I think I went on record  
23 with pointing out how many different variances were  
24 involved in each of the properties.

25 You know, the Keiter property was -- I

1 will go through these again, if you want, but the  
2 Keiter property is involved with a variance from  
3 Tower No. 5 of 304 feet; the Henry Loar property  
4 is involved from Tower 11 with requiring a variance  
5 of 224 feet; the Lashbaugh property is -- it has  
6 two towers that require a variance, and one of  
7 those towers, Tower 11, is 998 feet. That's almost  
8 50 percent of the setback -- of the separation  
9 there, and then Tower 12 is only 66 feet.

10 But then you get into the Michael Willison  
11 property and there we are looking at five towers  
12 that are involved there. Tower 8 requires a  
13 440-foot variance. Tower 9 requires a 252-foot.  
14 Tower 11 requires, again, 867 feet; and Tower 13  
15 is in the amount of 1,013 feet. That's over 50  
16 percent from Tower 13. Tower 14 is in the amount  
17 of 547 feet.

18 And we go to the Paul and Joann Willison  
19 property, and again they're involved with eight --  
20 or with five towers. Tower No. 8 requires a  
21 variance of 570 feet; Tower 9 in the amount of  
22 544 feet; Tower 12 in the amount of 541 feet;  
23 Tower 13 in the amount of 794 feet; Tower 14 in  
24 the amount of 574 feet. That's a lot of variance  
25 in that particular property.

1           The Dan --

2           MS. WILLIAMS: Three times the 986 feet.

3           MR. UPHOLD: Yeah.

4           MR. POWELL: Yeah. I think you specified  
5   13,352 feet in total variance.

6           The Daniel Willison property is involved  
7   with eight towers -- or five towers. I'm sorry.  
8   Tower No. 8, 152 feet; Tower No. 9, 552 feet;  
9   Tower 13 in the amount of 619 feet; Tower No. 14  
10   in the amount of 941 feet, almost 50 percent;  
11   Tower 15 in the amount of 411 feet.

12           And the Eugene and Stephanie Cesnick  
13   property, they are involved with Tower 17 of 520  
14   feet.

15           Now -- and then the John and Agnes Moffitt  
16   property, and I have a separate issue with that,  
17   but they are involved in Tower 6, 7, and 8 and 11:  
18   6 with 477 feet; Tower 7, 919 feet, which is almost  
19   50 percent; Tower 8, 159 feet; Tower 11 in the  
20   amount of 192 feet.

21           MR. McKEE: I am going to interrupt you  
22   there very quickly, Mr. Powell. I don't want  
23   you to be confused with regard to the Moffitt  
24   properties. There is no residential structure  
25   on the Moffitt property.

1           MR. POWELL: Well, that was -- that was  
2 the other thing I said --

3           MR. UPHOLD: With the Moffitt property,  
4 it's not there.

5           MR. POWELL: -- I have another issue with  
6 that, there is no structure there.

7           MR. McKEE: If there is no structure  
8 there, you can't grant a variance.

9           MR. POWELL: There is no way --

10          MR. McKEE: Case -- I mean, that --

11          MR. POWELL: Case closed.

12          MR. McKEE: Case closed.

13          MR. POWELL: Case closed.

14          MR. McKEE: There is no -- you can't grant  
15 a variance on something that doesn't exist. You  
16 can't try to stem a future variance request by  
17 granting it. You can't do it.

18          MR. POWELL: No.

19          MR. McKEE: So that one is a non-issue.

20          MR. POWELL: In 20-some years, I have  
21 never tried to --

22          MR. McKEE: Although, frankly, they don't  
23 need it. So it's not -- I mean, they were putting  
24 that variance request in, my reading of it is  
25 because they were -- in case somebody -- in case

1 the Moffitts decided to build in this process, they  
2 wanted to cover themselves. That hasn't occurred,  
3 so it -- it's a non-issue.

4 MR. POWELL: Or adjoin the project, right?

5 MR. McKEE: Excuse me?

6 MR. POWELL: Or adjoin the project.

7 MR. McKEE: Well, I think the Moffitts  
8 have joined the project --

9 MR. POWELL: Okay.

10 MR. McKEE: -- but they were anticipating  
11 they may build, and what they did not want to occur  
12 is have them break ground in the middle of this  
13 hearing and then have somebody say that, well, we  
14 have to include them; but the reality is, since  
15 they have not broken ground, there is no structure  
16 there, you can't grant a variance to them; and,  
17 frankly, if the variances are granted and they  
18 decide to build later, there is nothing that says  
19 they can't build. I mean, they are only going to  
20 be subject to the setbacks, to the normal setbacks.  
21 It's not as if, if they decide to build now, they  
22 can't still operate the existing tower that's  
23 there.

24 MR. POWELL: Right.

25 MR. McKEE: All right. So it doesn't

1 hurt -- it doesn't swing either way, but just to  
2 clarify to you, any vote on variances wouldn't  
3 include the Moffitts because you can't do it.

4 MR. POWELL: Okay. Well, you know, in  
5 summation of all that, that affects 11 towers of  
6 the 17. That's almost 65 percent of the total  
7 project, 65 percent of the total project we are  
8 being asked to grant variances for.

9 As Ms. Williams stated, the total is  
10 13,352 feet of variances. That's, to me, pretty  
11 stringent, pretty large and, to me, it doesn't  
12 meet the spirit. You know, this relief, I mean,  
13 if we grant it, it just -- it just doesn't meet  
14 the spirit of the ordinance and to observe the  
15 public safety and welfare that's involved with  
16 this.

17 MS. WILLIAMS: Without the Moffitt  
18 property, it's -- without the Moffitt property,  
19 it's 11,796.

20 MR. POWELL: Still --

21 MS. WILLIAMS: Significant.

22 MR. POWELL: -- significant, yes. What  
23 is it, 11,000?

24 MS. WILLIAMS: 11,796.

25 MR. POWELL: So right off the bat, we take

1 the Moffitt property is a no-go. It's a non-issue.

2 MR. McKEE: It's a non-issue, and it's  
3 also a non-issue for them whether we grant or deny  
4 it, that variance, because the structure, if it's  
5 not ever been -- it's not an issue. There is no  
6 structure there.

7 Any other remarks from any of the board  
8 regarding Mr. Powell's remarks regarding the spirit  
9 and intent of the ordinance?

10 MS. WILLIAMS: Well, I guess I go back  
11 to the county commissioners too that they have  
12 this, developed a Home Code Rule in an emergency  
13 with the emerging intent of wind turbines. I think  
14 they specifically wanted to protect the health and  
15 safety of all citizens by requiring a 2,000-foot  
16 separation or setback to protect the citizens.

17 It may be stringent, but I think that's  
18 the rule that we go by. We can't go by what  
19 happened in West Virginia, what happens in Garrett  
20 County, what happens in manufacturer standards.  
21 I think we have what we have, and I think that  
22 they intended to be strict for the protection of  
23 citizens.

24 MR. UPHOLD: I agree with that. There  
25 was a lot of work put into that ordinance when it

1 was prepared, and this is Allegany County. We're  
2 not Garrett County or whatever. If we're not going  
3 to follow the -- our own ordinance, then why do we  
4 even have one.

5 MR. POWELL: The other thing that I will  
6 just throw out there about the safety issue, I  
7 mean, if these property owners -- you know, they  
8 are willing to give up their rights of following  
9 this ordinance and they are willing to have these  
10 variances, but --

11 MR. McKEE: Are you referring to the  
12 variance authorizations they signed?

13 MR. POWELL: Yeah.

14 MR. McKEE: Okay.

15 MR. POWELL: Yeah. They are willing  
16 to give up that and -- or that risk, because I  
17 do see it as a risk. I mean, you look at that  
18 map and those -- that group of properties is  
19 sitting right there in the middle of this wind  
20 farm, and so all these variances are coming in  
21 from all these towers. So it is a risk and, I  
22 mean, the setbacks and separations were set up  
23 to protect the citizens. Now, they are willing  
24 to sign off on that and accept the risk, but  
25 what about people that come on their property,

1 delivery boys, mailman, you know, the utility guy  
2 or whatever have you --

3 MS. WILLIAMS: Family members, other  
4 family members, children.

5 MR. POWELL: -- other family members,  
6 guests or whatever have you. I don't think they  
7 may be willing to absorb the risk or whatever have  
8 you, but that's just one of the things I see as why  
9 we are asked to protect the ordinance because it is  
10 for, you know, the safety and welfare of all of the  
11 citizens of Allegany County, not just those that  
12 are involved in this project.

13 MR. McKEE: You know, if I can paraphrase  
14 that, since I have to try to keep track of this,  
15 what you are saying is if an individual landowner  
16 wants to waive their rights, that's their personal  
17 choice --

18 MR. POWELL: Yes.

19 MR. McKEE: -- but the board's position  
20 is, your job is to protect the citizens of the  
21 county as a whole --

22 MR. POWELL: Exactly.

23 MR. McKEE: -- and you don't think that  
24 an individual landowner can -- while they can  
25 waive their rights, they can't waive the rights

1 of guests, occupants, anybody else who would come  
2 on there --

3 MR. UPHOLD: No.

4 MR. McKEE: -- and that you believe it's  
5 your job to oversee -- to sort of -- the reason  
6 the ordinances are in place is to protect those  
7 individuals.

8 MR. POWELL: Right.

9 MS. WILLIAMS: Nor did the applicant give  
10 any testimony saying there is no health risk here;  
11 there is no safety risk. I don't -- didn't hear  
12 any expert testimony saying you guys don't need  
13 to consider these issues.

14 MR. POWELL: No, there was -- you know,  
15 there was two opponents that testified, I think  
16 it was a ... I think Mrs. McKenzie, wasn't it?

17 MS. WILLIAMS: But didn't we strike her?

18 MR. McKEE: You're referring to the two  
19 people that testified -- that basically lived and  
20 testified that they lived under or near a windmill  
21 and they were -- is that what you're referring to?

22 MR. POWELL: Yeah.

23 MR. McKEE: Okay.

24 MR. POWELL: Yeah, and, you know, her --  
25 her home was within 1640 feet of a turbine and, you

1 know, I found that video that she showed and the  
2 testimony to be pretty convincing to me that there  
3 is a possibility -- a possibility -- for risk or  
4 health factors. So that just brought it on me to  
5 say to myself, hey, you bear the responsibility  
6 for the health and welfare of all the citizens of  
7 Allegany County, not just these landholders.

8 You know, if it's just the landholders  
9 and they want to give up their risk, then fine,  
10 I can find for the variances; but I've got to  
11 find -- I've got to rule on the variances on  
12 the basis of everyone in Allegany County and the  
13 ordinances as they are stated, or else, those  
14 ordinances don't hold much water.

15 MS. WILLIAMS: If the applicant says that  
16 this wasn't expert testimony from Ms. McKenzie, I  
17 think we also have to go back to --

18 MR. McKEE: I don't think it has to be  
19 expert. It was opinion testimony.

20 MR. POWELL: Yeah, and I am not taking it  
21 as expert testimony --

22 MS. WILLIAMS: But they didn't provide  
23 anything to the contrary.

24 MR. POWELL: -- or whatever have you. No,  
25 I am just -- I am just stating that that was pretty

1 convincing to me that there is a possibility for  
2 risk.

3 MS. WILLIAMS: Uh-huh.

4 MR. McKEE: Just as you saw with regard  
5 to what your responsibility is in doing that --

6 MR. POWELL: Yeah.

7 MR. McKEE: -- not so much -- we are  
8 not -- you are not going down any special exception  
9 road with that.

10 MS. WILLIAMS: Right.

11 MR. McKEE: Is that my understanding?

12 MR. POWELL: No.

13 MR. McKEE: You're just talking about it  
14 as what you glean from it for your purposes and --

15 MR. POWELL: And judging on how I should  
16 react to these variances, whether I should uphold  
17 these variances to the letter or should I start  
18 bending a little bit or granting all the variances  
19 or -- and I am going to -- this has been pretty  
20 extensive, but let me sum up my feeling on this.

21 Looking at this, where we're asked to fit  
22 this thing in with variances that affect 65 percent  
23 of the project, I am here to tell you, when you  
24 build something or whatever have you, you put a  
25 jigsaw puzzle together, if it doesn't fit, you

1 can't force it. It's just that simple to me.

2 I don't know how anybody else feels,  
3 but, I mean, that's -- that gets down to the nuts  
4 and bolts -- and I've been thinking about this now  
5 for two months, two or three months, to see how  
6 to --

7 MR. McKEE: I am trying to get --

8 MR. POWELL: -- to treat that.

9 MR. McKEE: Was there any -- is there any  
10 discussion or does the board want to address any  
11 issues regarding the property itself, as far as any  
12 hardship or practical difficulty or undue hardship?  
13 Was there any determination as to whether the board  
14 felt there was -- that any practical difficulty or  
15 undue hardship existed? I will put it that way.

16 MS. WILLIAMS: The homeowners still have  
17 use of their homes.

18 MR. UPHOLD: I don't see where there is  
19 any hardship. Whatever hardship is being brought  
20 on by themselves.

21 MR. POWELL: Well, the only hardship is  
22 that they're not -- you know, if we don't grant  
23 the variances or whatever, that they can't remain  
24 part of this project and whatever have you. So  
25 it's denying the use of the project and -- but,

1 again, these landowners that were affected here in  
2 requesting the variances, none of those windmills  
3 are placed on their property. So, again, it's not  
4 denying them of anything that I can see, except  
5 that the windmill project just doesn't fit in their  
6 area, in this particular area.

7 MR. UPHOLD: Well, looking at it as a  
8 hardship, since there isn't any windmill actually  
9 going on their property, we are not -- there is  
10 nothing there stating that they have a hardship,  
11 that we are creating a hardship by not letting  
12 them do it because there is -- they can still --  
13 they still have the use of their property, the  
14 same as before.

15 MR. POWELL: Oh, yeah, they can do  
16 anything they want.

17 MR. UPHOLD: So there is no hardship  
18 created there though.

19 MR. McKEE: So, Ms. Williams, I believe  
20 you said that, if I am -- again, I am paraphrasing  
21 you, but didn't you indicate that they still  
22 have -- as far as you were concerned, they still  
23 had use of their lots?

24 MS. WILLIAMS: Yes.

25 MR. McKEE: Because the homes that existed

1 on their lots were existing.

2 MS. WILLIAMS: Right.

3 MR. McKEE: And your belief is it was  
4 basically a financial loss --

5 MR. POWELL: Yes.

6 MR. McKEE: -- not a total loss?

7 MR. POWELL: No, not a total loss because  
8 they -- they could do something else with it or  
9 something else may move in or whatever.

10 MR. McKEE: Any other topics of discussion  
11 at this point?

12 MS. WILLIAMS: Going back to the safety,  
13 even Mr. Getty said, the commissioners became very  
14 protective, and I think that it is our duty to be  
15 very protective as well.

16 MR. UPHOLD: Well, I agree with that.  
17 That's a part of our job as being on an appeals  
18 board.

19 MR. POWELL: I think there was -- isn't  
20 there -- isn't there three tests for looking at  
21 practical difficulty?

22 MR. McKEE: Yes, sir. Actually, I can  
23 refer that to you. It's *Montgomery County vs.*  
24 *Rotwein* is the case, and that deals with area  
25 variances versus use variances; and just for your

1 purposes, we don't -- there is no use variances  
2 on the county. All of our variances are area  
3 variances, and that's variances to height, height  
4 setback, those type of issues, and that's what  
5 these are, area variances.

6 Area variances are actually looked at  
7 less strict than the use variances are, but in  
8 that case, in the case of *Rotwein* where they're  
9 dealing strictly with the area variances, what the  
10 tests seem to be or the factors you would have to  
11 consider is, "No. 1, Whether compliance with the  
12 strict letter of the restrictions governing the  
13 area, setbacks, frontage, height, bulk or density  
14 would unreasonably prevent the owner from using the  
15 property for a permitted purpose or would render  
16 conformity with the restriction unnecessarily  
17 burdensome; (2) Whether a grant of the variance  
18 applied for would do substantial justice to the  
19 applicant, as well as to the other property owners  
20 in the district, or whether a lesser relaxation  
21 than that applied for would give substantial relief  
22 to the owner of the property involved and be more  
23 consistent with justice to the other property  
24 owners"; and then No. 3 is, "Whether that relief  
25 can be granted in such a fashion that the spirit of

1 the ordinance will be observed and public safety  
2 and welfare secured."

3 MR. POWELL: And that's the one that  
4 bothers me, whether relief can be granted in such  
5 a fashion that the spirit in the ordinance will be  
6 observed and the public safety and welfare secured.

7 MR. McKEE: I would indicate that, in  
8 general, all zoning is local, and when you look  
9 at any of the appeals cases, most of them go back  
10 and they specifically go back to, well, here is  
11 what this is; however, Montgomery County statute  
12 says "X" or PG County statute says "X", and they  
13 always give great deference to the local statute,  
14 local ordinances.

15 While this test indicates it has to be  
16 an "unreasonably prevent the owner from using the  
17 property for a permitted purpose," I think if you  
18 look at the code, the variance under Allegany,  
19 in the Allegany County one, it's much different.  
20 It's, I think -- I think it's simply preclude  
21 the use of the lot. It doesn't have -- it doesn't  
22 have to -- it doesn't indicate it has to be  
23 unreasonable, not that I'm not saying it's not.  
24 I think it's -- let me get it for you. I think  
25 it's better...

1 MS. WILLIAMS: Yeah, I didn't bring my  
2 copy.

3 MR. McKEE: I think it's better to take  
4 a look at it. I don't want you to be operating  
5 under the -- I want you to make sure you're at  
6 least operating under the right standard.

7 MS. WILLIAMS: But then again, the  
8 cases are citing property owners, not wind farm  
9 developers.

10 MR. McKEE: No, but I am referring --  
11 well, but I am talking about, I am just referring  
12 to what the definition of the variance is and  
13 the difference between -- while these cases talk  
14 about -- you know, this particular case which was  
15 dealing with these in -- let me see where we're  
16 at here... (Perusing)

17 This particular county zoning ordinance in  
18 this is in the Montgomery County zoning ordinance,  
19 and it listed these three factors. When you get  
20 to the Allegany County ordinance under variance,  
21 it simply indicates that a variance is a change  
22 of density, bulk area requirements, with respect  
23 to the location of a building or use on a lot of  
24 record where the physical natural character of the  
25 lot would otherwise preclude the use of the lot.

1 I think that's -- you know, that's a lot different,  
2 precluding the use of a lot versus --

3 MS. WILLIAMS: Uh-huh.

4 MR. McKEE: -- unreasonably preventing --

5 MR. UPHOLD: Unreasonable preventing.

6 MR. McKEE: -- the use for a permitted  
7 purpose.

8 MR. POWELL: Yeah.

9 MR. UPHOLD: Right.

10 MR. McKEE: And even with that, you  
11 could -- if you so choose, building a home on  
12 it is a permitted purpose.

13 MR. POWELL: And we are not precluding  
14 the use of that lot.

15 MS. WILLIAMS: No, no.

16 MR. McKEE: I just wanted to point  
17 that out for the record though that our statute  
18 would probably -- is really what's going to be  
19 controlling probably in any decision that would  
20 be -- that's what you have to consider, what  
21 does our code say. I mean, these other cases  
22 are guidelines that sets the test, but I think  
23 you still have to go back and -- initially, and  
24 look at what our code says and go off of that.

25 I don't think that you weren't doing that,

1 but I just wanted to put that on the record that  
2 we are not strictly following what this Montgomery  
3 County case says. You have to attach it to our  
4 code and that's...

5 MR. UPHOLD: Right.

6 MR. McKEE: Lunch is here. Do you want  
7 to break? It's already -- lunch is sitting in the  
8 lunchroom.

9 MR. UPHOLD: Lunch is here.

10 MS. WILLIAMS: Lunch is here?

11 MR. McKEE: I don't know if you want to  
12 take it or not.

13 MR. UPHOLD: Do you want to take a lunch  
14 break, or do you want to...

15 MR. McKEE: It's up to you.

16 MS. WILLIAMS: How far along do you think  
17 we are on this particular segment? I think we have  
18 considered variances generally, sufficiently. Is  
19 everybody in agreement on --

20 MR. McKEE: If you want to go forward,  
21 let's -- we can go forward and this can wait.

22 MS. WILLIAMS: I'll break, as far as that  
23 goes. I am trying to get a consensus here of what  
24 we --

25 MR. POWELL: What's that? You're what?

1 MS. WILLIAMS: I am hungry, but how far  
2 along are we in this particular segment? Do we --  
3 is it going to be an unnatural stop at this point,  
4 do you think, or do you think we have discussed  
5 pretty much and we need to step away?

6 MR. POWELL: Well, we discussed --

7 MR. McKEE: Well, we have discussed --

8 MR. POWELL: -- practical difficulties.

9 MR. McKEE: That's what we were in the  
10 process of discussing.

11 MR. POWELL: Have we got down to really  
12 addressing each of these properties or do you think  
13 we need to address each property individually?

14 MS. WILLIAMS: I think we need to address  
15 them individually, and I...

16 MR. McKEE: Yeah.

17 MS. WILLIAMS: It seems like we're about  
18 there.

19 MR. UPHOLD: Well, why don't we take the  
20 lunch break and then come back and do that.

21 MR. McKEE: And do it individually?

22 MR. UPHOLD: Yes.

23 MR. McKEE: Very well. Let's go ahead and  
24 do that.

25 MR. POWELL: Fine with me.

1                   CHAIRPERSON WILLIAMS:   Lunch break.   How  
2   long do we need?   Twenty?

3                   MR. McKEE:   Thirty-minute lunch break?

4                   CHAIRPERSON WILLIAMS:   Thirty minutes?  
5   Thirty minutes.   Reconvene at 12:45.

6                   (At 12:12 p.m., lunch break taken until  
7   12:48 p.m.)

8                   CHAIRPERSON WILLIAMS:   The County Board  
9   of Zoning Appeals back in session.

10                  I believe we were talking about the  
11   different prongs for the variances and...

12                  MR. McKEE:   Practical -- I think you  
13   were discussing practical difficulties and undue  
14   hardship of the -- and we were discussing the  
15   *Rotwein* case and the issues regarding practical --  
16   what are the practical difficulties that exist in  
17   an area variance, which is what we have, and I  
18   believe we left off where Mr. Powell was indicating  
19   he did not think that -- there was no way that  
20   relief could be granted within the spirit and  
21   intent of the ordinance.

22                  MR. POWELL:   Right.

23                  MR. McKEE:   And I think we were talking  
24   too about -- about loss, what was lost, what amount  
25   the individual property owners suffered loss, I

1 guess.

2 MS. WILLIAMS: Well, they still have use  
3 of their homes --

4 MR. McKEE: Yeah.

5 MS. WILLIAMS: -- but Mr. Lashbaugh's  
6 testimony was that he would lose a road, access  
7 to, for emergency vehicles to come up to the road,  
8 but that's not really his property.

9 MR. McKEE: Did he say he was going to  
10 lose a road? They are not taking a road from him.

11 MS. WILLIAMS: No.

12 MR. McKEE: It's that they were going to  
13 put a road in --

14 MS. WILLIAMS: No, they were going to  
15 put a road in.

16 MR. UPHOLD: He was going to lose an  
17 improved --

18 MR. McKEE: -- and he would lose that.

19 MR. UPHOLD: -- interest.

20 MS. WILLIAMS: Then there was another  
21 gentleman saying he was going to lose an income  
22 which would help support his farm, but I -- and  
23 I think Mr. Brewer's testimony also was that the  
24 loss to the property owners generally would be  
25 financial because of the lease agreements.

1 MR. UPHOLD: Yes.

2 MR. McKEE: That's your understanding?

3 MR. UPHOLD: That's my understanding of  
4 it.

5 MR. POWELL: Yes.

6 MR. McKEE: Any other issues with regard  
7 to practical difficulties that you want to address,  
8 we haven't addressed?

9 MS. WILLIAMS: Well, I -- go ahead.

10 MR. UPHOLD: Go ahead.

11 MS. WILLIAMS: Oh, I was just thinking  
12 about Mr. Lashbaugh. He chose to live up there.  
13 So putting a road in is not really a loss.  
14 He chose to be isolated. So I don't see an  
15 improvement to get to his home as a real loss.

16 And I don't remember the gentleman's  
17 name that testified he would lose income to support  
18 his farm.

19 MR. McKEE: I believe that was Mr. Loar.

20 MR. POWELL: Loar.

21 MS. WILLIAMS: Mr. Loar?

22 MR. McKEE: I believe he indicated \$10,000  
23 a year.

24 MS. WILLIAMS: I think it was --

25 MR. McKEE: I think it was 10,000 a year.

1                   MS. WILLIAMS:  -- 10,000 a year was his  
2 testimony which, you know, again, it's his choice  
3 in life to have a farm.

4                   MR. McKEE:  Well, it's financial loss,  
5 not use --

6                   MS. WILLIAMS:  Financial, not the use of  
7 his land.  He would still have a farm.

8                   MR. McKEE:  Yeah.  Well, I guess at some  
9 point, we need to -- we should probably start going  
10 down through the properties since the board has  
11 made the decision that these really are individual  
12 properties; the properties should be treated  
13 individually.  We should probably go down through  
14 them individually.

15                   I guess we will begin with the Lynn and  
16 Mary Keiter property.  Has the board made any --  
17 any discussion as to whether they find that that  
18 property is, in and of itself, unique and different  
19 from any of the characteristics of the surrounding  
20 property?

21                   MR. UPHOLD:  No.

22                   MS. WILLIAMS:  No.

23                   MR. POWELL:  No.

24                   MR. McKEE:  Do you find that Mr. and  
25 Mrs. Keiter suffered any practical difficulty or

1 undue hardship by the application of the zoning  
2 ordinance?

3 MR. UPHOLD: No.

4 MS. WILLIAMS: No.

5 MR. POWELL: No.

6 MR. McKEE: Do you believe they were  
7 denied any reasonable use of their land?

8 MR. UPHOLD: No.

9 MR. POWELL: No.

10 MS. WILLIAMS: No.

11 MR. McKEE: All right. I will go with  
12 John and Betty Loar, same situation. Do you  
13 find that the John and Betty Loar property is,  
14 in and of itself, unique and different from  
15 the characteristics in any of the surrounding  
16 properties?

17 MR. UPHOLD: No.

18 MS. WILLIAMS: No.

19 MR. POWELL: No.

20 MR. McKEE: With regard to practical  
21 difficulties or undue hardship, do you find they  
22 suffer any practical difficulties or undue hardship  
23 in regard to how they are treated by the ordinance?

24 MS. WILLIAMS: No.

25 MR. UPHOLD: No.

1 MR. POWELL: No.

2 MR. McKEE: Do you believe they have been  
3 denied any reasonable use of their land?

4 MR. UPHOLD: No.

5 MR. POWELL: No.

6 MR. McKEE: With regard to John and  
7 Deborah Lashbaugh, do you find that that property  
8 is, in and of itself, unique and different from  
9 the characteristics of the surrounding properties?

10 MR. UPHOLD: No.

11 MR. POWELL: No.

12 MS. WILLIAMS: No.

13 MR. McKEE: Do you think they have  
14 suffered any undue hardship or practical  
15 difficulties?

16 MR. POWELL: No.

17 MR. UPHOLD: No.

18 MS. WILLIAMS: No.

19 MR. McKEE: Do you think they have been  
20 denied the unreasonable use of their land?

21 MS. WILLIAMS: No.

22 MR. UPHOLD: No.

23 MR. POWELL: No.

24 MR. McKEE: Okay. I am going to ask  
25 this question based on your comments earlier,

1 Mr. Powell. Do you believe that the request for  
2 the multiple variances, do you believe it violates  
3 the spirit and intent of the ordinance --

4 MR. POWELL: Um...

5 MR. McKEE: -- or is that an opinion you  
6 have as to the whole --

7 MR. POWELL: It's the opinion that I have  
8 about the whole process.

9 MR. McKEE: Okay. All right.

10 With regard to Michael Willison, do any  
11 of the members of the board find that that property  
12 is, in and of itself, unique and different from the  
13 characteristics of the surrounding property?

14 MR. UPHOLD: No.

15 MS. WILLIAMS: No.

16 MR. POWELL: No.

17 MR. McKEE: Do you think that those owners  
18 have been denied reasonable use of their land?

19 MS. WILLIAMS: No.

20 MR. UPHOLD: No.

21 MS. WILLIAMS: Mr. Powell?

22 MR. POWELL: No.

23 MS. WILLIAMS: Okay.

24 MR. McKEE: I want to make sure I asked,  
25 you do not believe they suffered any practical

1 difficulty or undue hardship?

2 MR. UPHOLD: No.

3 MS. WILLIAMS: No.

4 MR. POWELL: No.

5 MR. McKEE: With regard to Paul and Joann  
6 Willison, does the board find that the Willison  
7 property is, in and of itself, unique and different  
8 from the characteristics of the surrounding  
9 properties?

10 MR. UPHOLD: No.

11 MS. WILLIAMS: No.

12 MR. POWELL: No.

13 MR. McKEE: Do you believe those owners  
14 have been denied any reasonable use of their land?

15 MS. WILLIAMS: No.

16 MR. POWELL: No.

17 MR. UPHOLD: No.

18 MR. McKEE: Do you think those property  
19 owners have suffered any practical difficulties or  
20 undue hardship?

21 MR. UPHOLD: No.

22 MR. POWELL: No.

23 MS. WILLIAMS: No.

24 MR. McKEE: All right. I will go to  
25 the Daniel Willison property. Do you find that

1 those properties are unique and different from  
2 the characteristics of any of the surrounding  
3 properties?

4 MR. UPHOLD: No.

5 MR. POWELL: No.

6 MS. WILLIAMS: No.

7 MR. McKEE: Do you think that that  
8 property owner has suffered any practical  
9 difficulty or undue hardship?

10 MR. UPHOLD: No.

11 MS. WILLIAMS: No.

12 MR. POWELL: No.

13 MR. McKEE: Is it your opinion that  
14 they have not been -- or I will ask, have they  
15 been denied reasonable use of their land?

16 MR. UPHOLD: No.

17 MR. POWELL: No.

18 MS. WILLIAMS: No.

19 MR. McKEE: With regard to Eugene and  
20 Stephanie Cesnick, do you find that that property  
21 is unique and different from the characteristics  
22 of the surrounding properties to the extent -- to  
23 any extent?

24 MR. UPHOLD: No.

25 MR. POWELL: No.

1 MS. WILLIAMS: No.

2 MR. McKEE: Do you believe those property  
3 owners have been denied the reasonable use of their  
4 land?

5 MR. UPHOLD: No.

6 MR. POWELL: No.

7 MS. WILLIAMS: No.

8 MR. McKEE: Do you think they suffered any  
9 practical difficulty or undue hardship?

10 MR. UPHOLD: No.

11 MS. WILLIAMS: No.

12 MR. POWELL: No.

13 MR. McKEE: Has that covered all of the  
14 property owners? Is anybody -- have I missed  
15 anyone?

16 MR. POWELL: Just Moffitt.

17 MS. WILLIAMS: Well, we are going to  
18 exclude them.

19 MR. McKEE: Well, we will include that in  
20 there as a matter of law.

21 With regard to John and Virginia Moffitt,  
22 we are denying -- the vote is going to be denied  
23 as a matter of law because there is no residential  
24 structure; is that correct?

25 MR. POWELL: Right.

1 MR. UPHOLD: Right.

2 MS. WILLIAMS: Correct.

3 MR. McKEE: So with regard to the  
4 co-applicants, the Lynn and Mary Keiter, John  
5 and Betty Loar, John and Deborah Lashbaugh,  
6 Michael Willison, Paul and Joanne Willison,  
7 Daniel Willison, and Eugene and Stephanie Cesnick,  
8 it's my understanding that the board is ready to  
9 vote on all of those eight --

10 MR. POWELL: Yeah.

11 MR. McKEE: -- as a whole?

12 MR. UPHOLD: Yes.

13 MS. WILLIAMS: Yeah.

14 MR. POWELL: Yeah.

15 MR. McKEE: All right. All those in favor  
16 of granting the variances requested to those eight  
17 properties, please signify by saying "aye."

18 (There was no response.)

19 MR. McKEE: All those opposed?

20 MS. WILLIAMS: Aye.

21 MR. UPHOLD: Aye.

22 MR. POWELL: Aye.

23 MR. McKEE: All right. Let the record  
24 reflect that the board has voted 3-0 to deny the  
25 variances requested by Lynn and Mary Keiter, John

1 and Betty Loar, John and Deborah Lashbaugh, Michael  
2 Willison, Paul and Joann Willison, Daniel Willison,  
3 and Eugene and Stephanie Cesnick.

4 The next, the next obvious step in this  
5 would be, we would have to go to Case 942 which was  
6 the special exception. Unfortunately, case law  
7 makes it pretty clear, and the cases -- I am only  
8 speaking as counsel -- if you deny the variance,  
9 there has to be a denial of the special exception.

10 MR. UPHOLD: Right.

11 MR. McKEE: So I guess to make it  
12 official, I will put that to a vote.

13 Do you find -- this being the test on  
14 this, do you find that the special exception  
15 requested in Case 942 meets the criteria of the  
16 zoning ordinance as it is written?

17 MS. WILLIAMS: No.

18 MR. UPHOLD: No.

19 MR. POWELL: No.

20 MR. McKEE: As a result, you are denying  
21 the special exception, Case 942?

22 MR. POWELL: Yes.

23 MR. UPHOLD: Yes.

24 MS. WILLIAMS: Yes.

25 MR. McKEE: Very well. Is there anything

1 further from any members of the board?

2 (There was no response.)

3 CHAIRPERSON WILLIAMS: No? Okay. We are  
4 finished?

5 MR. McKEE: Yeah.

6 CHAIRPERSON WILLIAMS: Okay.

7 MR. McKEE: The camera is shut.

8 CHAIRPERSON WILLIAMS: This concludes the  
9 hearing on Cases No. 942 and 943.

10 (Proceeding concluded at 12:57 p.m.)

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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.

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SHERYL L. GASPARIK, RPR  
Notary Public - State of Maryland  
Commission Expires: December 13, 2016