

IN THE ALLEGANY COUNTY BOARD OF ZONING APPEALS

IN RE: *
DAN'S MOUNTAIN * Cases Nos 942 and 943
WIND FORCE, LLC, et al., *
FOR VARIANCES & SPECIAL EXCEPTION *

**ORDER CORRECTING ERRATA
IN THE BOARD'S NOVEMBER 2019
FINDINGS OF FACT AND OPINION**

Upon review of the Board's prior November 2019 decision, the record of testimony and documentation, and the applications of the Applicants, the Board finds that:

1. Certain distance descriptors were erroneously transposed in the Board's Findings of Fact and Opinion;
2. It is in the interest of accuracy for the correct distances from the Applicants' submissions (Exhibits A1-A8) to be recited in the Findings of Fact and Opinion;
3. The errors and corrections are as follows:

		<u>Error</u>	<u>Correction</u>
A.	Sec. IV(C) (page 9, line 4):	"1943 feet"	"1934 feet"
B.	Sec IV(D) (page 10, line 3):	"565 feet"	"547 feet"
C.	Sec. II (page 4)	"542 feet"	"544 feet"
D.	Sec. II (page 4)	"547 feet"	"574 feet"
E.	Sec. IV(E)(page 11, line 2)	"542 feet"	"544 feet"
F.	Sec. IV(E)(page 11, line 3)	"547 feet"	"574 feet"
G.	Sec. II (page 5)	"199 feet"	"159 feet"

4. A version of the Findings of Fact and Opinion with corrected descriptors is attached to this Order.

5. That the November 2019 Findings of Fact and Opinion of the Board is amended to correct the aforementioned errata.

ATTEST

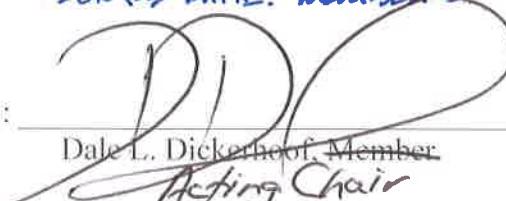
BOARD OF ZONING APPEALS



By: 

Mark Farris, Chairperson

DONALD WHITE, MEMBER

By: 

Dale L. Dickerhoof, Member

Acting Chair

By: 

John Brant, Alternate Member

SETH BERNARD

EXECUTIVE SESSION OF JUNE 8, 2022
VOTE 3-0

Distribution List
BOZA Case 942-943 Remanded -FoF Errata
June 8, 2022

FLYNN PAUL D. ESQUIRE
100 NORTH COURT STREET-THIRD FLOOR
FREDERICK, MD 21701

GETTY GORMAN E III ESQUIRE
P.O. BOX 1485
CUMBERLAND, MD 21533-1485

Allegany County Commissioners
County Office Complex
701-Kelly Road
Cumberland, Maryland 21502-3401

ERRATA CORRECTED JANUARY 2022

IN THE ALLEGANY COUNTY BOARD OF ZONING APPEALS

IN RE:	*	
DAN'S MOUNTAIN	*	Cases Nos 942 and 943
WIND FORCE, LLC, et al.,	*	Hearing Dates: 10/9/2019
FOR VARIANCES & SPECIAL EXCEPTION	*	10/16/2019

FINDINGS OF FACT AND OPINION

I. PROCEDURAL BACKGROUND

Dan's Mountain Wind Force, LLC, and several property owners (identified below) (collectively, "the Applicant") have applied for several variances from Allegany County's requirements of set-backs from property lines, and separation of wind turbines from homes. See Case 943. All property owners affected by the variances have given written permission, as required by Allegany County Code, sec. 360-107(A)(8), and are co-Applicants.

The Applicant has also applied for a special exception to operate an Industrial Wind Energy Conversion System (IWECS), pursuant to Allegany County Code sec. 360-107. See Case 942. The Board has elected to consider the two cases together. Allegany County Code, sec. 360-107(A)(8) ("at the discretion of the Board of Appeals, variance applications may be heard in conjunction with the special exception hearing").

Hearings were held, initially, in October and December of 2015. At that time, the Board voted against all of the variances. The Applicant appealed to the Circuit Court for Allegany County, Maryland, which affirmed the decision of the Board. The Applicant further appealed to the Court of Special Appeals. On April 3, 2018, the Court of Special Appeals reversed the

ERRATA CORRECTED JANUARY 2022

decision of the Board, and remanded the matter for reconsideration on the record by the Board, outlining the correct legal tests to be applied to the evidence that was presented. See Dan's Mountain Wind Force, LLC, v. Allegany County Board of Zoning Appeals, 236 Md.App. 438 (2018).

Upon remand, the Board¹ conducted a site inspection on October 4, 2019, which was open to the public. On October 9, 2019, the Board held a public hearing for the Applicant and other interested parties to address the evidence in the record. No additional evidence was taken by the Board. However, arguments were heard from Applicant's attorney, Gorman E. Getty, III, Esq., and from Paul Flynn, Esq., Counsel for ANCHOR, Limited (a community organization). Comments from speakers from the community were also heard.

On October 16, 2019, the Board met in executive session, pursuant to Allegany County Code, sec. 360-141(G)(1), to consider the testimony and documentary evidence and to deliberate on a decision. At said deliberation, the Board considered each property and variance sought by the Applicant, and granted said variances under Case No. 943. The Board also granted the Applicant the Special Exception sought in Case No. 942.

II. FACTS

This recitation of the facts is from the prior decision of the Board.

"The Applicant has proposed to construct 17 wind turbine generators (the "turbines" [or "WTG's"]]) on leased property located on Dan's Mountain. This property is located within the Agricultural, Forestry, and Mining ("A") Zone and Conservation ("C") Zone. The Allegany

¹ The membership of the current Board has changed from 2015. Mr. Bernard C. Wolters and Mr. Dale L. Dickerhoof were appointed by the Allegany County Commissioners to the Board prior to this hearing. The current Board chairperson, Mr. Mark Farris, recused himself and alternate member Mr. Brian Alderton took his place in these cases. The Board, so constituted, elected Mr. Wolters as Acting Chairperson for these cases.

ERRATA CORRECTED JANUARY 2022

County Code requires that wind turbines have a minimum separation distance of two thousand (2000) feet from any residential structure and a setback to the property line distance of “three times the height of the unit” which, in this case, is nine hundred and fifty five (995) feet.

(Allegany County Code, 360-92(A) (2) and 360-92(B) (3)). A review of Applicant’s development proposal found that in order to meet the criteria of the zoning code, a variance to the separation distance is required for eight (8) residences and a variance to the setback requirements are necessary at two (2) locations. All of the subject property owners requesting a variance to the separation distance are co-applicants and have executed variance authorizations.

(See Exhibit ZZZ). These owners are as follows:

1. Lynn S. and Mary M. Keiter, Trustees; Liber 1552, folio 434; Tax Map 36, Parcel 104.1.
2. John R.H. and Betty J. Loar; Liber 1385, folio 10; Tax Map 36, Parcel 12.
3. John R. and Deborah L. Lashbaugh; Liber 588, folio 215; Tax Map 36, Parcel 169.
4. Michael P. Willison; Liber 2089, folio 233; Tax Map 48, Parcel 103.
5. Paul C. and Joann Willison; Liber 1470, folio 595; Tax Map 48, Parcel 102.
6. Daniel C. Willison; Liber 2089, folio 238, Tax Map 48, Parcel 104.
7. Eugene R. and Stephanie R. Cesnik; Liber 641, folio 577; Tax Map 48, Parcel 35.
8. John T. and Virginia Agnes Moffitt; Liber 658, folio 553; Tax Map 36, Parcel 104.4.

All of the subject property owners requesting a variance to the property line set back requirements are also co-applicants and have executed variance authorizations. (See Exhibit ZZZ). These owners are as follows:

1. USC OC of Cumberland, LLC; Liber 608, folio 504.
2. Maryland DNR; Liber 329, folio 281 and Liber 599, folio 573.

That five (5) of the eight (8) co-applicant property owner’s variance requests involve residential structures within the 2000 foot separation distance of multiple wind turbines. As such, while only ten co-applicants have filed for variance, evidence presented indicated that the Board

ERRATA CORRECTED JANUARY 2022

will have to review and grant twenty-six (26) separate variance requests and the related turbines to illustrate:

The Keiter Property

This property needs one (1) variance to the separation distance between it and Turbine 5 in the amount of 304 feet.

The Loar Property

This property needs one (1) variance to the separation distance between it and Turbine 11 in the amount of 224 feet.

The Lashbaugh Property

This property needs two (2) variances to the separation distance between it and Turbine 11 in the amount of 998 feet and it and Turbine 12 in the amount of 66 feet.

The Michael Willison Property

This property needs five (5) variances to the separation distance between it and Turbine 8 in the amount of 440 feet; Turbine 9 in the amount of 252 ft.; Turbine 12 in the amount of 867 ft.; Turbine 13 in the amount of 1013 ft.; and Turbine 14 in the amount of 547 ft.

The Paul & Joann Willison Property

This property needs five (5) variances to the separation distance between it and Turbine 8 in the amount of 570 feet; Turbine 9 in the amount of 544 ft.; Turbine 12 in the amount of 541 ft.; Turbine 13 in the amount of 794 ft.; and Turbine 14 in the amount of 574 ft.

The Daniel Willison Property

This property needs five (5) variances to the separation distance between it and Turbine 8 in the amount of 152 feet; Turbine 9 in the amount of 552 ft.; Turbine 13 in the amount of 619 ft.; Turbine 14 in the amount of 941 ft.; and Turbine 15 in the amount of 411 ft.

ERRATA CORRECTED JANUARY 2022

The Gene and Stephanie Cesnik Property

This property requests one (1) variance to a separation distance between it and Turbine 17 in the amount of 520 feet.

The John & Agnes Moffit Property

This property needs four(4) variances to the separation distance between it and Turbine 6 in the amount of 477 feet; Turbine 7 in the amount of 919 ft.; Turbine 8 in the amount of 159 ft.; Turbine 11 in the amount of 192 ft. For the record, no residence is currently built on the site.

The USCOC of Cumberland Property

This property is subject to a property line setback variance request of 68 ft.

The State of Maryland Property

This property is subject to a property line setback variance request of 533 ft.

Absent the Board's granting of these twenty six (26) variances, the Applicant has indicated that the proposed wind turbine array will not be economically viable and the subject property owners will not be able to utilize the full use of their land."

III. APPLICABLE LAW FOR VARIANCES

The Court of Special Appeals, in Dan's Mountain Wind Force, LLC, v. Allegany County Board of Zoning Appeals, 236 Md.App. 483 (2018), found Applicant had presented evidence of several factors affecting the properties: (a) topography, (b) property boundaries, (c) proximity of buildings and dwellings, (d) stream channels, (e) the habitat of the Allegheny Woodrat, (f) the habitat of Black-fruited Mountain Rice, (g) existing wetlands areas, (h) prior strip mining in the area, (i) communication beam paths from radio and microwave towers passing through the area, and (j) technical requirements of the WTG themselves. Id. at 488-489.

ERRATA CORRECTED JANUARY 2022

The appellate court determined that the Board had applied the incorrect legal test to the evidence before it. The Court held the proper test to be applied by the Board in this case was as follows:

“[f]irst, the Board must determine whether the unusual factors identified by the Applicant are, in fact, features of that particular property..... second, the Board must determine whether the effect or effects those features have on the property, taken together, have a nexus with the part of the zoning law from which a variance is sought....[] third, the Board must determine whether the effect of those factors on the property is unique as compared to similarly situated properties.

Dan's Mountain Wind Force, 236 Md.App. at 498.

If this uniqueness is found, the Board must then determine whether the uniqueness forms a “practical difficulty” to the use of the property. Dan's Mountain, supra at 501 (relying on Montgomery Co. v. Rotwein, 169 Md.App. 716 (2006)). Applied here, the Board should consider whether (a) whether strict compliance with set-back or separation requirements would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome...”, (b) whether a variance would do “substantial justice to the applicant as well as other property owners..,” and (c) whether a variance allows “the spirit of the ordinance [to] be observed and public safety and welfare secured.” Id. at 729-730. A factor to be considered under the “less-stringent” practical difficulties test is whether “it is impossible to secure a reasonable return from, or to make a reasonable use of such property.” Rotwein, supra at 733.

IV. THE INDIVIDUAL PROPERTIES AND TURBINES (CASE 943)

The Board considered the eight properties for which separation distance variances were sought. In its deliberations, the Board considered the testimony previously presented in the 2015

ERRATA CORRECTED JANUARY 2022

hearings, the exhibits introduced at all hearings, the Board's own site inspection, the arguments of counsel and the instructions of the reviewing courts.

The evidence adduced for each property, and the findings of the Board for each property (by a 2-1 vote),² are as follows:

(A) The Keiter Property. The Applicants seek a reduction in the separation distance from the Keiter home to the site of Wind Turbine Generator (WTG) #5 from the required 2000 feet to 1696 feet (304 foot reduction).

Applicant adduced evidence that the property in question is affected by the wetlands identified by the State Department of Natural Resources, the slope and grade of the location, and by the location of the other WTG's, limiting the placement of WTG to a very limited "footprint." T. at 191-194. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing WTG 5 in any location other than the one requested.

Weighing the evidence, the Board finds

1. The Keiter Property, and the site of WTG #5, are affected by the locations of protected wetlands and their buffer zones, by the grade of the land and by the locations of other WTG's;
2. Those described features affect the location of WTG #5 and therefore have a direct nexus with the request to reduce the required separation from a home;
3. Those described features have a unique effect on the Keiter Property, and a unique effect on the location of WTG #5, when compared to similarly situated properties; and
4. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights

² Board Member Brian Alderton dissented from the decision of the Board for the separation variances, as described below.

ERRATA CORRECTED JANUARY 2022

on the rights of non-Applicants and (c) the variance preserves the spirit of the ordinance and the public safety.

(B) The Loar Property. The Applicants seek a reduction in the separation distance from the Loar home to the site of Wind Turbine Generator (WTG) #11 from the required 2000 feet to 1776 feet (224 foot reduction).

Applicant adduced evidence that the property in question is affected by the wetlands identified by the State Department of the Environment, the habitat of the Allegheny Woodrat, and by the “beam paths” of communications from nearby radio and microwave towers. T. at 196-197. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing WTG 11 in any location other than the one requested, due to the potential damage to natural resources. T. at 197.

Weighing the evidence, the Board finds

5. The Loar Property, and the site of WTG #11, are affected by the locations of protected wetlands and their buffer zones, by the habitat of the Allegheny Woodrat and by radio and microwave transmissions.

6. Those described features affect the location of WTG #11 and therefore have a direct nexus with the request to reduce the required separation from a home;

7. Those described features have a unique effect on the Loar Property, and a unique effect on the location of WTG #11, when compared to similarly situated properties; and

8. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights

ERRATA CORRECTED JANUARY 2022

on the rights of non-Applicants and (c) the variance preserves the spirit of the ordinance and the public safety.

(C) The Lashbaugh Property. The Applicant seeks two variances here: a reduction in the separation distance from the Lashbaugh home to WTG) #11 from the required 2000 feet to 1002 feet (998 foot reduction), and a reduction in the distance from the Lashbaugh home to WTG #12 from 2000 feet to 1934 feet (66 foot reduction).

Applicant adduced evidence that the property in question is affected by the wetlands identified by the State Department of the Environment, by the habitat of the Allegheny Woodrat, by the location of the other homes in the area, and by radio and microwave beam paths, limiting the placement of WTG #11 and #12 to limited locations. T. at 200-201; see also T. at 183. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing WTG #11 and #12 in any location other than the one requested.

Weighing the evidence, the Board finds

9. The Lashbaugh Property, and the site of WTG #11 and 12, are affected by the locations of protected wetlands and their buffer zones, by the habitat of the Allegheny Woodrat, by radio and microwave beam paths, and by the locations of other homes;

10. Those described features affect the location of WTG #11 and 12 and therefore have a direct nexus with the request to reduce the required separation from a home;

11. Those described features have a unique effect on the Lashbaugh Property, and a unique effect on the location of WTG #11 and 12, when compared to similarly situated properties; and

ERRATA CORRECTED JANUARY 2022

12. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variances sought would not infringe on the rights on the rights of non-Applicants and (c) the variances preserve the spirit of the ordinance and the public safety.

(D) The Michael Willison Property. The Applicant seeks five (5) variances: a reduction of 440 feet from WTG #8, a reduction of 252 feet from WTG #9, a reduction of 867 feet from WTG #12, and reduction of 1013 feet from WTG #13 and a reduction of 547 feet from WTG #14.

Mr. Brewer testified that the property in question is affected by the wetlands identified by the State Department of Natural Resources, the habitat of Black-fruited Mountain Rice, the beam paths of communication towers, and the Woodrat habitat, limiting the placement of WTG's. T. at 202-203. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing these WTG's in any location other than the one requested.

Weighing the evidence, the Board finds

13. The Michael Willison Property, and the sites of WTG #8, 9, 12, 13 and 14 are affected by the locations of protected wetlands and their buffer zones, the natural habitats of protected Black-fruited Mountain Rice and the Allegheny Woodrat, and the emissions of communications towers;

14. Those described features affect the location of WTG #8 through #14, and therefore have a direct nexus with the request to reduce the required separation from a home;

ERRATA CORRECTED JANUARY 2022

15. Those described features have a unique effect on the Michael Willison Property, and a unique effect on the location of WTG #8, 9, 12, 13 and 14 when compared to similarly situated properties; and

16. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variances sought would not infringe on the rights on the rights of non-Applicants and (c) the variances preserve the spirit of the ordinance and the public safety.

(E) The Paul & Joann Willison Property. The Applicant seeks five variances: a reduction of 570 feet from WTG #8; a reduction of 544 feet from WTG #9; a reduction of 541 feet from WTG #12; a reduction of 794 feet from WTG #13; and a reduction of 574 feet from WTG #14.

Mr. Brewer testified that the property in question is affected by the wetlands identified by the State Department of Natural Resources, the habitat of the Black-fruited Mountain Rice, the beam paths of communication towers, and the Woodrat habitat, limiting the placement of WTG's. T. at 203. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing these WTG's in any location other than the one requested.

Weighing the evidence, the Board finds

17. The Paul & Joann Willison Property, and the sites of WTG #9, 12, 13 and 14, are affected by the locations of protected wetlands and their buffer zones, the natural habitats of protected Black-fruited Mountain Rice and the Allegheny Woodrat, and the emissions of communications towers;

ERRATA CORRECTED JANUARY 2022

18. Those described features affect the location of WTG #8, 9, 12, 13 and 14, and therefore have a direct nexus with the request to reduce the required separation from a home;
19. Those described features have a unique effect on the Paul & Joann Willison Property, and a unique effect on the location of WTG #8, 9, 12, 13 and 14, when compared to similarly situated properties; and
20. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights on the rights of non-Applicants and (c) the variances preserve the spirit of the ordinance and public safety.

(F) The Daniel Willison Property. The applicant seeks five (5) variances: a reduction of 152 feet from WTG #8; a reduction of 552 feet from WTG #9; a reduction of 619 feet from WTG #13; a reduction of 941 feet from WTG #14; and a reduction of 411 feet from WTG #15.

Mr. Brewer testified that the property in question is affected by the wetlands identified by the State Department of Natural Resources, the habitat of the Black-fruited Mountain Rice, the beam paths of communication towers, and the Woodrat habitat, limiting the placement of WTG's. T. at 203-205. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing these WTG's in any location other than the one requested.

Weighing the evidence, the Board finds

21. The Daniel Willison Property, and the sites of WTG #8, 9, 13, 14 and 15, are affected by the locations of protected wetlands and their buffer zones, the natural habitats of

ERRATA CORRECTED JANUARY 2022

protected Black-fruited Mountain Rice and the Allegheny Woodrat, and the emissions of communications towers;

22. Those described features affect the location of WTG #8, 9, 13, 14 and 15, and therefore have a direct nexus with the request to reduce the required separation from a home;

23. Those described features have a unique effect on the Daniel Willison Property, and a unique effect on the location of WTG #8, 9, 13, 14 and 15, when compared to similarly situated properties; and

24. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variances sought would not infringe on the rights on the rights of non-Applicants and (c) the variances preserve the spirit of the ordinance and public safety.

(G) The Cesnick Property. Applicant seeks a single variance here, reducing the separation distance of the Cesnick residence from WTG #17 by 520 feet.

Mr. Brewer testified that the property in question is affected by the wetlands identified by the State Department of Natural Resources, as well as the beam paths of communication towers, limiting the placement of WTG's. T. at 206. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing these WTG's in any location other than the one requested.

Weighing the evidence, the Board finds

25. The Cesnick Property, and the site of WTG #17, are affected by the locations of protected wetlands and their buffer zones, and the emissions of communications towers;

ERRATA CORRECTED JANUARY 2022

26. Those described features affect the location of WTG #17, and therefore have a direct nexus with the request to reduce the required separation from a home;
27. Those described features have a unique effect on the Cesnick Property, and a unique effect on the location of WTG #17, when compared to similarly situated properties; and
28. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights on the rights of non-Applicants and (c) the variance preserves the spirit of the ordinance and public safety.

(H) The Moffitt Property. Applicant seeks four (4) variances: a reduction in the separation distance from WTG #6 of 477 feet; a reduction in the distance of 919 feet from WTG #7; a reduction in the distance of 159 feet from WTG #8; and a reduction in the distance of 192 feet from WTG #11. This property is unusual as there is no home on the Moffitt Property at this time; the owner hopes to build one in the next few years and provided Applicant with its proposed location. As the Applicant has applied for variances here, the Board will consider the evidence as if the home was in existence.

Mr. Brewer testified the property in question is affected by the wetlands identified by the State Department of Natural Resources and the habitat of Black-fruited Mountain Rice. T. at 207-208. Mr. Matthew Brewer also produced evidence that these unique factors produced a practical difficulty in placing these WTG's in any location other than the one requested.

Weighing the evidence, the Board finds

ERRATA CORRECTED JANUARY 2022

29. The proposed home on the Moffitt Property, and the sites of WTG #6, 7, 8 and 11, would be affected by the locations of protected wetlands and their buffer zones, and the natural habitats of protected Black-fruited Mountain Rice;

30. Those described features affect the location of WTG #6, 7, 8 and 11, and therefore have a direct nexus with the request to reduce the required separation from a home;

31. Those described features have a unique effect on the Moffitt Property, and a unique effect on the location of WTG #6, 7, 8 and 11, when compared to similarly situated properties; and

32. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variances sought would not infringe on the rights on the rights of non-Applicants and (c) the variances preserve the spirit of the ordinance and public safety.

Therefore, upon the evidence, the Board GRANTS the separation variances sought by the Applicant.

Board Member Brian Alderton dissented from the decision of the Board. In his judgment, the Applicant had *not* shown that the effect of the factors described had a “unique effect” on the properties justifying a variance. While each property had a specific configuration of factors (such as wetlands or microwave beam paths), the type of factors facing each property were the same. Thus, he believed the properties had similar features and issues such that general relief by legislation from the County Commissioners was appropriate. See Dan's Mountain Windforce, supra at 494 (“if the allegedly restrictive effect of the zoning law is not unusual, and a characteristic is shared by many properties, the problem ought to be addressed by legislation”).

ERRATA CORRECTED JANUARY 2022

The Board also considered two variance requests regarding property line setback requirements. The Board's unanimous decision is as follows.

(I) The USCOC property. Applicant here seeks a variance from the property-line setback requirement of 68 feet.

Mr. Brewer testified that WTG #16 could not be located further back from the USCOC property-line due to the habitat of the Allegheny Woodrat. Additionally, moving WTG #16 in any direction would impinge on the beam paths of communications towers in existence. T. at 211-212; see also Exhibit 230 (Map of beam paths). Therefore, Mr. Brewer concluded that it would be almost impossible to site WTG #16 and not infringe on the property setback. T. at 214.

Weighing the evidence, the Board finds

33. The USCOC Property, and the site of WTG #16, is affected by the locations of protected animal habitats and their buffer zones, and the emissions of communications towers;

34. Those described features affect the location of WTG #16, and therefore have a direct nexus with the request to reduce the required property-line setback;

35. Those described features have a unique effect on the USCOC Property, and a unique effect on the location of WTG #16, when compared to similarly situated properties; and

36. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights

ERRATA CORRECTED JANUARY 2022

on the rights of non-Applicants and (c) the minor variance to the set-back requirement preserves the spirit of the ordinance and the public safety.

(J) The State of Maryland Property. Applicant here seeks a variance from the property-line setback requirement of 402 feet.

Mr. Brewer testified that WTG #17 could not be located further back from the State property-line due to the wetlands and their buffer zone, as well as the grade and slope of the location. Additionally, moving WTG #17 in any direction would impinge on the beam paths of communications towers in existence. T. at 213; see also Exhibit 230 (Map of beam paths). Therefore, Mr. Brewer concluded that it would be almost impossible to site WTG #17 and not infringe on the property setback. T. at 215.

Weighing the evidence, the Board finds

37. The State of Maryland Property, and the site of WTG #17, is affected by the locations of protected wetlands and their buffer zones, the topography of the property, and the emissions of communications towers;

38. Those described features affect the location of WTG #17, and therefore have a direct nexus with the request to reduce the required property-line setback;

39. Those described features have a unique effect on the State of Maryland Property, and a unique effect on the location of WTG #17, when compared to similarly situated properties; and

40. That uniqueness forms a practical difficulty in the use of the property, as (a) it severely limits the placement of WTG's, (b) the variance sought would not infringe on the rights

ERRATA CORRECTED JANUARY 2022

on the rights of non-Applicants and (c) the variance preserves the spirit of the ordinance and the public safety.

Therefore, upon the evidence, the Board GRANTS the set-back variances sought by the applicant.

V. THE SPECIAL EXCEPTION (CASE NO. 942)

As described above, windmills are a permitted use within districts zoned Agricultural (“A”) and Commercial (“C”). However, said use must be approved by the Board of Zoning Appeals as a special exception. Allegany Code, sec. 360-170.

The test as to whether to grant a special exception was described in Schultz v. Pritts, 291 Md. 1 (1981). The Court of Appeals there held

the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use....”

Id. at 22-23.

The Applicant presented expert testimony from Mr. Matthew Brewer, who testified that the Project’s design was in compliance with all site design criteria required by the Allegany County Code. T. at 121-142. He further testified that the Project, and its variances, caused no “risk or harm to the health, safety or welfare of the general public.” T. at 209. Mr. Richard Josephson provided expert testimony that the Project, and the requested special exception, was consistent with the Allegany County Comprehensive Plan. T. at 383. Mr. Sean Davis provided expert testimony that the Project would have no greater impact on Dan’s Mountain than

ERRATA CORRECTED JANUARY 2022

anywhere else in the County, T. at 455, and that the Project was designed to be low-impact. T. at 458.

Opposing the special exception were numerous community comments regarding the impact the Project would have on the views of Dan's Mountain, the "scenery" of the area, and on the property values and livability of adjoining developments and property owners, such as Harwood Development. T. at 560-732. There was also public comment regarding the health effects of windmills and wind farms. See, e.g., T. at 646 (Statement of Tammy McKenzie); See, e.g., T. at 679-687 (Statement of Dr. Wayne Spiggle, M.D.). No expert testimony regarding these claims was presented, however.

Board Member Brian Alderton voted against granting the special exemption. He believed that the community testimony, including, but not limited to, that from doctors (T. at 679 – Statement of Dr. Wayne Spiggle, M.D.) and professional builders (T. at 722 – Statement of Walter Merrill), demonstrated the Project would have additional adverse impacts placed on Dan's Mountain beyond that of a normal IWECS.

Weighing the evidence presented, the Board finds (by a 2-1 vote):

41. The Project is consistent with the County's Comprehensive Plan;
42. The Project has been designed to have the least impact possible on the site; and
43. The Project would not have any adverse effects above and beyond those

inherently associated with windmills.

Therefore, Applicant's request for a special exception in Case 942 is GRANTED.

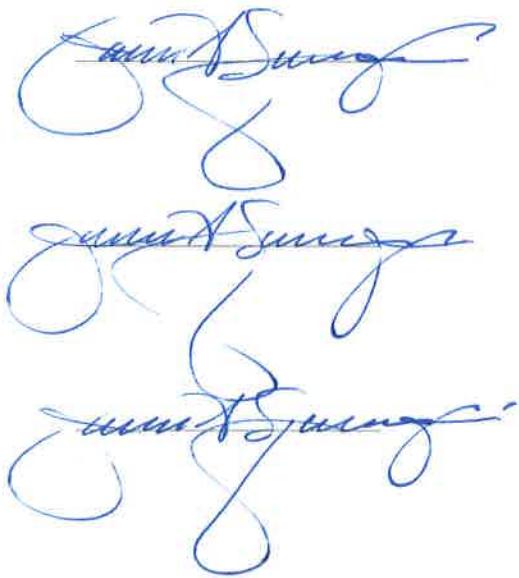
ERRATA CORRECTED JANUARY 2022

CONCLUSION

For the reasons explained above, the Board (by 2-1 vote) hereby **GRANTS** the separation variances sought by the Applicant. The Board (by 3-0 vote) further **GRANTS** the set-back variances sought by the Applicant. Finally, the Board (by 2-1 vote) **GRANTS** the special exception sought by the Applicants.

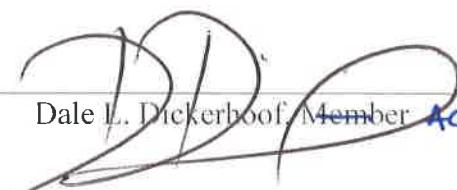
ATTEST

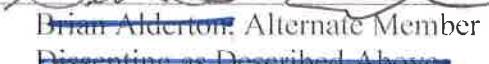
BOARD OF ZONING APPEALS



Attachments: Exhibit List

By: 
Bernard C. Wolters, Acting Chairperson
Dorothy White, Member

By: 
Dale L. Dickerhoof, Member ACTING CHAIR.

By: 
Brian Alderton, Alternate Member
Dissenting as Described Above
SETH BERNARD.

EXECUTIVE SESSION OF JUNE 8, 2022
VOTE 3-0

Distribution List
BOZA Case 942-943 Remanded -FoF Errata
June 8, 2022

FLYNN PAUL D. ESQUIRE
100 NORTH COURT STREET-THIRD FLOOR
FREDERICK, MD 21701

GETTY GORMAN E III ESQUIRE
P.O. BOX 1485
CUMBERLAND, MD 21533-1485

Allegany County Commissioners
County Office Complex
701-Kelly Road
Cumberland, Maryland 21502-3401