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3 APPEARANCES:

4 KENNETH T. KRISTL, ESQUIRE
Widener Environmental and Natural Resources Law Clinic
5 4601 Concord Pike
Wilmington, DE 19803
6 Attorney for the Appellants

7 SHERRY HOFFMAN, ESQUIRE
Appellant (representing self)

8

MAX B. WALTON, ESQUIRE
9 Connolly Gallagher, LLP
267 East Main Street
10 Newark, DE 19711
Special Counsel for the City of Newark

11

RICHARD A. FORSTEN, ESQUIRE
12 MICHAEL A. DENOTE, ESQUIRE
Saul Ewing, LLP
13 222 Delaware Avenue, Suite 1200
Wilmington, DE 19801
14 Attorney for Data Centers, LLC

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1 (Note: Due to the many factors
2 adversely affecting acoustics in the room,
3 e.g. the number of people, background
4 noise, microphones not working properly,
5 placement of court reporter off stage from
6 Board and attorneys, there are numerous
7 "inaudibles" in the transcript. The
8 reporter has transcribed only that which
9 was audible during the hearing and from
10 backup audio.)

11 MR. BERGSTROM: Ladies and gentlemen, I
12 would like to call the special meeting to order.

13 (Audience is yelling that they can't
14 hear him.)

15 MR. BERGSTROM: I'm sorry. Is that a
16 little better?

17 (The audience is yelling that they
18 still can't hear.)

19 MR. BERGSTROM: If you would stop
20 talking, perhaps you might be able to hear me better.

21 UNIDENTIFIED SPEAKER: If you talk
22 louder!

23 MR. BERGSTROM: We are going to call
24 the meeting to order. Just I would like to introduce

1 the Board members. If you could each speak in the
2 microphone and please introduce yourself.

3 MR. MCKELVEY: I'm Jim McKelvey.

4 MR. PARADEE: I'm John Paradee, counsel
5 to the Board.

6 MR. BERGSTROM: I'm Jeff Bergstrom,
7 Chairman of the Board.

8 MR. HUDSON: My name is Kevin Hudson.

9 MR. BEDFORD: Curt Bedford.

10 MR. BERGSTROM: What I am going to do
11 now is introduce our attorney, our consult who sets
12 the ground rules and protocol. John Paradee is going
13 to take a few moments and explain to everyone what's
14 going on.

15 MR. PARADEE: Thank you all for coming.
16 This hearing has been convened for the purpose of
17 adjudicating an appeal from a zoning certification
18 letter issued on January 17, 2014, by the City of
19 Newark's Director of Planning and Development,
20 wherein the Director concluded that, based upon
21 information submitted by The Data Centers, LLC, a
22 gas-fired combined heat and power plant qualifies as
23 a permitted accessory use for a data center in the
24 Science and Technology Campus zoning district,

1 because on-site power generation is, "customarily
2 incidental and subordinate" to the proposed data
3 center.

4 Two appeals from the zoning
5 certification letter have been filed, the first by
6 Sherry Hoffman, Esquire, on her own behalf, and the
7 second by Kenneth Kristl, Esquire, on behalf of five
8 individuals and two organizations.

9 This proceeding, although open to the
10 public, is not a public hearing but rather an
11 adversarial proceeding, much like a trial before a
12 court of law. Accordingly, no public comment will be
13 taken. And, instead, the Board will hear
14 presentations from the parties to the appeal; namely,
15 the Appellants, the City, and Data Centers LLC.

16 In accordance with the Board's standing
17 rules of procedure, and pursuant to a March 5, 2014
18 stipulation amongst the parties, the Board shall hear
19 first from the City and Data Centers LLC, each of
20 whom shall be accorded 45 minutes and no more than 90
21 minutes combined to make their presentations.

22 Thereafter, the Board shall hear from
23 Ms. Hoffman and Mr. Kristl, each of whom shall
24 likewise be accorded 45 minutes each and no more than

1 90 minutes combined to make their presentations.

2 If the members of the Board should have
3 any questions during the presentations, they should
4 feel free to ask the questions at that time.

5 At 9:15 p.m., or thereabouts, the
6 hearing will be closed, and the Board shall then
7 deliberate and render an oral decision, provided that
8 no decision of the Board shall be final until the
9 same is reduced to writing, approved by the Board,
10 and filed with the City Secretary.

11 The Board is presently comprised of
12 four members, as the fifth member of the Board has
13 previously recused himself due to a potential
14 conflict of interest.

15 Accordingly, three votes shall be
16 required in order to carry any motion. Provided,
17 however, that in the event of any stalemate, the
18 decision from which appeals have been taken shall
19 stand.

20 The Chairman of the Board shall preside
21 over these proceedings. Any witnesses called by any
22 party shall be sworn before presenting their
23 testimony, with the exception of the lawyers who are
24 members of the Delaware Bar need not be sworn.

1 All those present tonight who wish to
2 observe these proceedings are certainly welcome to do
3 so, provided that outbursts of applause, booing,
4 heckling, or other disruptions will not be tolerated
5 and will result in removal from the hearing room.
6 Out of respect for the parties and the Board, we ask
7 that the observers remain quiet and maintain a
8 respectful demeanor at all times.

9 Mr. Chairman, that concludes my
10 remarks.

11 MR. BERGSTROM: Then we are ready to
12 hear from the Appellees. First from the City of
13 Newark.

14 MR. WALTON: Good evening, members of
15 the Board. Can you hear me?

16 (The audience is yelling that they
17 can't hear.)

18 MR. WALTON: Let's try a different
19 microphone. My name is Max Walton, and I represent
20 the City of Newark. And I have represented the City
21 of Newark as special counsel since around 2006.

22 On behalf of the City, I thank all
23 members of the Board for your service on this
24 important case. As board members, you provide a

1 great service to our city. And I'm sure this matter
2 has taken you away from your normal lives, as you
3 have probably spent countless hours poring through
4 the hearing materials. And it's a mountain of them.

5 I can tell you without hesitation,
6 having represented state, county, and municipal
7 governments for many years -- for the past 14 years,
8 specifically -- this is the most detailed set of
9 submission plans I have ever seen in a Board of
10 Adjustment appeal.

11 So, to start, as you look out in the
12 crowd behind us, you see hundreds of people, both for
13 and against the data center proposal. This is not a
14 popularity contest. First the City and now the Board
15 must make a decision on the law, not based upon some
16 mathematical count of who is for and who is against
17 the project.

18 Taking the law and the applicable facts
19 into consideration, it is clear that the City's
20 zoning verification should be affirmed. It is clear
21 that the proposed on-site power facility known as
22 CHP, which I am going to call the "chip" for short,
23 is an accessory use to the proposed large-scale data
24 center, because the facility is customarily

1 incidental and subordinate toward the data center
2 use.

3 Now, let's talk about format just for a
4 minute for today. I only have 45 minutes to state
5 the City's case, and this is a pretty expansive
6 record. In an effort to condense things and
7 hopefully to assist the Board in wading through the
8 mountain of materials, I will give a 20 or a
9 25-minute presentation by Power Point. I will
10 withhold 15 minutes for the rebuttal, again.

11 Members of the Board, please
12 understand, in this format there is no way I could
13 touch on all the arguments that have been made; so I
14 will have to rest on our papers or what was written
15 in our brief if I don't touch on anything today.

16 And I would like to start with an
17 effort to help the Board because, as I read through
18 the materials, it became clear to me that an
19 explanation of how the CHP, or the chip, works might
20 be in order.

21 So, if you don't mind, members of the
22 Board, I am just going to point you up here. I am
23 going to try to give you some of the terminology that
24 is used in all these papers to try to explain it to

1 the best of my ability.

2 First, the first term is IT Critical
3 Load. Before I get started, let me preface this.
4 This chart is directly attached to the zoning
5 verification, and it is the chart which was relied
6 upon by the City when it made its zoning
7 verification. And it was submitted to the City by
8 TDC.

9 So, with that being said, some of the
10 key terms are IT Critical Load. Now, what is IT
11 Critical Load? That is the amount of power that the
12 computer facilities or computer cues, servers,
13 modules, whatever you want to call it, that's the
14 power they are going to use. If you look at the
15 chart, there is a phase one and a phase two, so it
16 goes across.

17 What is the Ancillary Load? Okay.
18 Ancillary Load, that term means that's the additional
19 power that is needed for the facility, itself, for
20 heating, cooling, running it.

21 Okay. The next term is Redundant
22 Capacity. And so I can explain that. Redundant
23 Capacity is -- and I'm going to call it, for lack of
24 a better term, additional power that's needed by the

1 data center so that the computer facilities don't go
2 dark. Okay? And so it's a little bit more, as you
3 can tell, than the ancillary load plus the IT
4 Critical Load. All right?

5 The Maintenance Capacity, which is
6 called the N+1, that maintenance capacity is power
7 that's not available, where it's cold; it's not
8 running at the time.

9 And then the Operating Capacity
10 Required, which I will briefly call the Required
11 Operating Capacity, if you look at it, that figure,
12 okay, is essentially the IT Critical Load and the
13 Ancillary Load and the Redundant Capacity, so, as you
14 go through.

15 So let's talk about the "chip" and how
16 it works so you guys have familiarity. This is just
17 a phase one depiction of the "chip," and it's based
18 upon a chart I just had up there.

19 In phase one there is going to be one,
20 two, three, four, running gas-fired turbines which
21 have the capacity for 23.2 megawatts each.

22 Okay. Now, how the CHP or "chip" works
23 is these turbines, which are hot -- they create
24 steam, they create by-product -- that hot or that

1 steam, that by-product is used to power what they
2 call the steam turbines down here.

3 Okay? So, in other words, these guys
4 are the running once, and then they power,
5 simplistically, the steam turbines through their
6 waste product.

7 And then we talked about the standby
8 capacity or maintenance capacity. This is what's
9 going to be installed in phase one.

10 So I hope that gives you a better
11 understanding of how a CHP or a "chip" works.

12 Okay. Now, I tried to sort through all
13 this material, and I tried to come up with what I
14 believe are undisputed facts. Because there is lots
15 of them. There is lots of facts. But I believe
16 these are undisputed.

17 Data centers must have power at all
18 times because the servers can never stop running.
19 Right? And data centers are electric hogs. I don't
20 mean to use that term, but they use a lot of power to
21 make sure they are running.

22 And the other point is that a loss of
23 power for a data center, even for a very few seconds,
24 can cause damage to the servers, and it can cause

1 severe financial consequences.

2 And just so we are clear, Mr. Angle, we
3 submitted his affidavit, and he is one of the leading
4 data center designers in the United States. He has
5 designed over 1,500 data centers. Also confirmed by
6 Mr. Clifford McCann's affidavit. Again, I do not
7 believe these points are disputed, so this is where
8 we are starting.

9 I thought, since it is in the paper a
10 lot, and they talk about N+2, I want to go over N+2.
11 N+2 is the power needed by the data center, all
12 right, in order to operate the capacity. It's more
13 power than computer servers use, but that extra power
14 is used in case one of the turbines would go down or
15 they would have a power failure or a mechanical
16 failure at sometime.

17 This N+2 configuration is used in
18 virtually every data center, and it has been
19 around -- this kind of configuration has been around
20 since 1994. And the Internet just turned 25, so it
21 has been around a long time.

22 All right. So the zoning official's
23 job was to first determine whether or not the
24 principal use was a permitted use. Okay? And the

1 principal use is a data center. And, again, there
2 doesn't appear to be any dispute that data centers
3 are permitted uses in the Science and Technology
4 Zoning Center District. All right? And there is the
5 language from the code. Okay?

6 So what is the proposal at issue here?
7 The proposal is for a 900,000 square foot data center
8 on 43 acres of the former Chrysler site.

9 So I tried to give you guys some
10 benchmarks about how big that is. That's three
11 quarters of the size of Christiana Mall. That is a
12 lot bigger than a football stadium.

13 And here is the point: It's still
14 permitted, because there is not a size limitation in
15 the Science and Technology Center Zoning District.
16 It's going to be on 42 acres. I want to get across,
17 this is a really big facility.

18 All right. Why we are here is because
19 of the question of "accessory use." And that's what
20 this hearing has been brought about.

21 Accessory use: Again, it's undisputed
22 that accessory uses are permitted in the district.
23 And the code defines "accessory uses" as uses that
24 are "customarily incidental and subordinate." All

1 right? The key term to this is the use. The use
2 needs to be accessory.

3 So the parties have tossed out all
4 kinds of different definitions of what it means to be
5 customarily incidental. And they are up there. And
6 I just cut them out of the different parties' briefs,
7 and I put them up there for you to see.

8 Ultimately, it doesn't matter which of
9 these definitions you pick, because on-site power
10 generation is customarily incidental to a data center
11 use. And it's commonly longstanding practice. And
12 we list here just a few of the examples that are in
13 the papers where on-site power generation -- and
14 that's either the backup power or the primary
15 power -- is a customary use.

16 So, now, there have been arguments that
17 have said that the data center use is not -- or
18 excuse me -- the CHP use is not customary because all
19 data centers or most data centers do not have a CHP
20 in association with it. The argument is usually data
21 centers have backup power. Right?

22 But if you look at the definition of
23 accessory uses and the way courts have interpreted
24 accessory uses, even if the use is only associated

1 with a small percentage of the primary uses, it's
2 still accessory or customarily incidental.

3 So let me give you some examples that
4 the courts have found. And I have the cases if you
5 guys need that. But, for example, a tennis court has
6 been found to be accessory use to a residential
7 facility. Why is that? Well, obviously, everybody
8 doesn't have a tennis court in a residence. But it's
9 a use that's customary. It doesn't mean that it
10 happens at every single residential property, but
11 it's a customary use.

12 Another example is churches. Churches
13 have been found -- okay, churches who have daycare
14 centers as an accessory use -- certainly, every
15 church doesn't have a daycare center associated with
16 it, but that has been held to be an accessory use.

17 And as far as the "chip" goes, there is
18 The Citizens Coalition case. And in The Citizens
19 Coalition case, which is cited in the papers and
20 cited in my papers -- it's attached to the zoning
21 verification itself -- it makes it clear that a CHP
22 was an accessory -- was found to be a permitted
23 accessory use for Georgetown University even where
24 they sold power.

1 So my point is you can't, as the
2 appellants have found, do a mathematical count to
3 determine whether or not a CHP is an accessory use.
4 You just can't. You have to look at whether or not
5 it's customarily incidental. And it is. Okay?

6 In 2007, the EPA identified 14 data
7 centers with a "chip." There are a bunch of other
8 examples that we have, and you guys have seen those
9 in papers.

10 All right. So one of the other things
11 that has been said, the "chip" isn't customarily
12 incidental because it's too big. That's going to be
13 an argument, it's too big; the other CHPs are smaller
14 than this one.

15 You have to correlate the size of the
16 CHP to the size of the data center. This is a
17 900,000 square foot data center building which will
18 be built in two phases -- I'm sorry -- two 450,000
19 square foot buildings. And TDC claims it's going to
20 be one of the largest data centers in the country.
21 And Mr. Angle, just so you are aware, backs that up.
22 He attaches a chart to his affidavit, which he shows
23 the average size of data centers. This one is
24 literally off the chart. We put it up here because

1 of that.

2 Because this is a very large data
3 center, there has to be a corresponding size to the
4 power generation of this facility. And so it's not
5 too big for the data center.

6 Your job is to look at it and find out
7 if the use is customarily incidental. All right? We
8 will concede that the other "chips" are smaller in
9 size than the proposed "chip." But under Delaware
10 law -- and this is a case the appellants site --
11 Wiggin -- makes it very clear that each accessory use
12 case must be decided on its own facts. And the
13 bigger the data center, the bigger the power
14 generation required, and "chip" is customarily found.

15 One of the other claims that has been
16 made in this case is that a "chip" is not customary
17 because usually data centers have backup generators,
18 diesel, that kind of thing, which they use as their
19 backup power for their N+2 or their required
20 operating capacity.

21 All right. And I just thought that we
22 ought to take a look at what that would entail for
23 this particular data center. If you had to generate
24 170 megawatts, you would need at least 68

1 2.5-megawatt cat generators, which are the big ones,
2 the biggest one we could find. And that would
3 require thousands of battery backups.

4 Because, if you're familiar with
5 generators, what happens is the generator starts --
6 or excuse me -- the power goes out. The generator
7 then starts because of the delay, so you have to have
8 batteries to carry you over to make sure that there
9 isn't a period where the data center is without
10 power. And TDC estimates -- and the City doesn't
11 know for sure, but we know, based upon general
12 calculations -- that it would take 12 and a half
13 acres of batteries. It would take 12 and a half
14 acres of batteries to have enough battery backup for
15 this data center. So that's a ton of generation
16 backup storage. And I would submit that it would be
17 just -- it would be actually bigger than what's going
18 to be built now.

19 The "chips'" operating hours is another
20 question that was raised. I think in the papers
21 where Appellants have talked about the outrageous
22 hours because the "chip" runs longer than the backup
23 facilities; therefore, it's somehow different. But
24 they haven't cited a single case that holds that.

1 There is not a single case that we have found that
2 linked the time that the use runs to determine
3 whether or not it's accessory.

4 Again, your job and the City's job is
5 to determine whether or not the use, the on-site
6 power generation, whether or not it's customary. And
7 the overall hours of operation don't factor into
8 that.

9 Now, I do not have a slide about the
10 claim that there was a patent pending so that made it
11 unique. But I would like to use this coffee cup to
12 demonstrate my point why a patent pending doesn't
13 matter. And this is a coffee cup that my colleague
14 got from McDonald's.

15 And, as you read the top of the coffee
16 cup, it says, right along the top, "patents pending."
17 What that means is this coffee cup may, in and of
18 itself, be -- or this coffee cup lid may, in and of
19 itself, be unique, but the use of covering up the
20 coffee so you don't spill it on yourself is common or
21 habitually associated with the coffee cup.

22 So, ultimately, the idea that because
23 there is a patent pending that makes the process
24 clearly unique, that's not the case. You have to

1 look to see whether or not that "chip" and the
2 on-site power generation is customarily incidental to
3 the data center use.

4 So the City has read cases on the way
5 that you identify customarily incidental. And they
6 really go together as customarily incidental. That's
7 the test. Appellants have said, "Well, we are going
8 to -- we would like to use a different definition for
9 the word "incidental." And they say it's
10 "non-essential." They say, if you look at the
11 definition in Webster's, it says "non-essential."
12 That's only one of possible definitions. Right? And
13 they haven't cited any single case, not a single case
14 in the entire country that holds that for a use to be
15 incidental, it must be non-essential.

16 And, in fact, under Delaware law it
17 defines "incidental" as something having a
18 "reasonable relationship or connection with the
19 primary use."

20 And guess what? That comes right back
21 to the Wiggin case they cite. So the bottom line is
22 you do not have to be incidental -- excuse me. To be
23 "incidental," you do not have to be "non-essential,"
24 and no court has found that.

1 So the last prong in the test is
2 subordinate. It has to be customarily incidental and
3 subordinate. Right? Here, I think we can all agree
4 that the dominant use is the data center, because the
5 data center requires a massive amount of power. And
6 the power which supplies the "chip," obviously, most
7 of the power being used is going to be used by the
8 data center as part of the data center's need.

9 All right? And why do they have that
10 need? They need constant, uninterruptible power,
11 and. That constant, uninterruptible power is in the
12 form of extra power or stored reserves that keep it
13 so, for example, if one of the turbines goes down or
14 breaks down and there is a mechanical failure, the
15 other ones immediately fill in without delay.

16 That's the required operating capacity
17 or the N+2 that we discussed earlier. If there is
18 any question about that, Mr. Angle's affidavit and
19 Mr. Vitelli's affidavit both confirm that this power
20 is needed, that the data center needs to have extra
21 redundant power.

22 But for an accessory use, we agree -- I
23 think the Appellants and the City agree that the use
24 cannot be the dominant use of the property. This CHP

1 cannot become a commercial power plant under any set
2 of circumstances.

3 So, to assure that this use is always
4 subordinate to the principal use, e.g. it's a data
5 center, the City, in the zoning verification, made a
6 limitation. It said that extra power that you are
7 going to be producing but not actually using which is
8 part of your need, you can sell it, but it has got to
9 be limited to 30 percent of the required operating
10 capacity.

11 All right? And what did the City do,
12 right, to make sure that the CHP "chip" was always
13 subordinate? If you look at the zoning verification,
14 the City said only 30 percent can be sold. TDC is
15 not allowed to start selling power until the first
16 client has entered the data center. Again, so that
17 there isn't a power plant running without the primary
18 data center use.

19 The power sales have to be phased. In
20 other words, you can't build a "chip" all the way out
21 at the very beginning to maximum capacity and only
22 have a little bit of a power center. It has to be
23 phased.

24 If, ultimately, the required operating

1 capacity turns out to be less -- let me tell you why
2 that's important -- because this zoning verification
3 is sort of the first phase to the regulatory process,
4 so we don't know for sure, absolutely sure what the
5 ultimate power need is going to be. If it turns out
6 to be less, the corresponding amount of power that
7 can be sold must go out.

8 And what did the City do to make sure
9 it remains subordinate? It monitors power generation
10 and sales numbers so they don't exceed that
11 30 percent threshold. So, ultimately, I don't think
12 there is going to be any question based upon these
13 additions that are placed on the CHP by the zoning
14 official that the "chip" is subordinate.

15 So I think it's pretty clear that the
16 "chip" is customary, incidental, and subordinate to
17 the data center use under these tasks.

18 But we have to go to neighborhood. And
19 there is a definition of a neighborhood in the City
20 Code which says, "An accessory use cannot impair the
21 neighborhood."

22 Really, if you think about "impair the
23 neighborhood," it has three elements. All right?

24 There must be impairment of the

1 neighborhood where the accessory use exists. There
2 must be an actual impairment of some kind, and that
3 impairment must be objective instead of subjective.

4 In other words, there actually has to
5 be a harm that occurs. And merely because I believe
6 there is going to be a harm that may occur is
7 subjective, but an actual harm has to be there for
8 impairment.

9 All right. So let's take the first
10 prong and figure out what the phrase "the
11 neighborhood" means.

12 And Appellants say that the phrase "the
13 neighborhood" should include surrounding
14 neighborhoods. That's not what the Code says. The
15 neighborhood means a single neighborhood, not from
16 the neighborhood or the surrounding neighborhood.

17 So I'm sorry about the small print.
18 But one of the things that we came up with, we had a
19 dispute about the definition of what the word
20 "neighborhood" meant. So I used the Appellants'
21 definition here. Up here it's their Exhibit 245. Do
22 you see that?

23 And if you look here, this is what they
24 want -- this is how they want you to interpret the

1 word neighborhood. "The quality or state of being
2 immediately adjacent to or relatively near something,
3 in proximity, the neighborhood of the earth and the
4 sun."

5 That makes sense if you think about it.
6 If I want to buy my car from you, how much is it
7 going to cost me? Well, that's going to cost you in
8 the neighborhood of \$10,000. That makes sense.

9 But when you are talking about a
10 residential neighborhood, that's not the right
11 definition. So let's use their definition. All
12 right? And it's number four. Okay. And it means,
13 "a relatively small section or district." Okay? And
14 that's one definition. All right? Kind of the
15 phrase here where they describe it says, "The whole
16 neighborhood would hear about it." All right? So
17 it's a limited definition.

18 Another definition is, "the particular
19 section of a district that is lived in by these
20 people and that is marked by individual features (as
21 type of homes and public establishments) that
22 together establish a distinctive appearance or
23 atmosphere." Right?

24 Everyone knows what a neighborhood is.

1 I live in a neighborhood. And we talked about that a
2 lot. So let's talk about what the neighborhood
3 entails.

4 And this is over -- I believe this map
5 was attached to the Appellants' -- excuse me -- not
6 the initial appellants, but the appellants following.
7 And it talks about the neighborhood, or it talks
8 about what uses are around.

9 And if you guys aren't aware of this,
10 this is the old Chrysler site. And this is the
11 Amtrak line. And there is the storage and transit
12 yard here, that Norfolk Southern piece where they
13 have tanker cars and other things that go on. This
14 is Route 4, what I call Route 4. And this is also
15 896 that goes in front of the stadium. Okay?

16 Now, the contention here is that if you
17 look at the plain meaning of the definition of
18 "neighborhood" that we just said, this is a huge
19 neighborhood. It's a Chrysler site. It's bounded by
20 definitive characteristics. And this is what the
21 neighborhood is.

22 You guys remember what the neighborhood
23 was. You guys are local. And that's the Chrysler
24 site. And that's the neighborhood that was there

1 until 2008. And that's what this neighborhood looked
2 like back in 2008. All right?

3 And this is what the neighborhood looks
4 like today. I make a left on Elkton Road and come
5 over to Route 4 to take my son to school every day,
6 and I pass by exactly this photo, which is the Citgo,
7 and that's the back side.

8 And if you look in all the pictures I'm
9 going to show you, this is the water tower, the old
10 Chrysler water tower that everyone is familiar with,
11 and that will be a point of reference.

12 So over here, this is Bloom Energy and
13 some outbuildings that are on the site. This is kind
14 of over by where the Amtrak DART -- or where the
15 Amtrak passenger station is. And if you look in the
16 back, this is a picture from along the same line of
17 the tanker cars that are parked out here. That's the
18 neighborhood. It's the STC Zoning District.

19 All right? There is no allegation, and
20 no one from STAR Campus District -- or the STAR
21 Campus, which, to be fair, includes SCC, a little
22 piece of manufacturing or MI district -- none of
23 those neighborhoods -- they are the neighborhood.

24 The appellants here do not have

1 standing or they cannot bring a right to claim that
2 the neighborhood is impaired because they don't live
3 in the applicable neighborhood.

4 So, next, let's talk about the second
5 prong. Remember we talked about impairment. Right?
6 And the alleged harm is that the neighborhoods in the
7 vicinity are harmed by this use. Okay? And they
8 are, just generally, air pollution, noise ordinance
9 violations, loss of property value, and emotional
10 distress.

11 We can read the city code pretty hard.
12 But, actually, if you look, if you look very closely
13 at the City of Newark's Comprehensive Plan, it says
14 that DNREC deals with air quality emissions. I think
15 that's pretty clear, and I think that's undisputed.
16 And DNREC has a detailed set of air regulations that
17 must be followed that are adopted pursuant to the
18 Clean Air Act, Federal Clean Air Act. All right?

19 The point is, whether something is
20 correctly zoned has nothing to do with whether or not
21 DNREC or EPA's Air Quality Standards will be met.
22 All right? And if those standards are met, it's my
23 contention that, for air emission, there isn't a
24 neighborhood impairment because the law has been set.

1 As I said from the beginning, the law has been set
2 what you can and cannot do.

3 So what the Appellants are asking you
4 to do, they are claiming even if those standards are
5 met, the City should -- and the zoning verification
6 is the initial step anyway -- they should deny the
7 project.

8 Well, it's disturbing to me that we are
9 all here in this contentious thing. And I certainly
10 don't mean to offend anyone. But DNREC has submitted
11 an affidavit in this case. And DNREC, Mr. Foster who
12 works in the Air Quality Section, he said, "Before
13 any air permit can be issued, all air quality
14 standards need to be met. There has to be a net air
15 quality benefit."

16 So what the Appellants say is, "That's
17 not good enough, because DNREC is not going to follow
18 the law." That's what they said.

19 So that contention has to be rejected
20 for several reasons. The first is there is a
21 presumption that a government agency, right, a
22 government agency which is represented by the
23 Attorney General's Office, has to faithfully execute
24 the law. That's a presumption. And if they don't --

1 and if they don't -- there is an appeal process. It
2 doesn't come to this board. It goes to the
3 Environmental Appeals Board.

4 But the idea that ultimately that the
5 City Council and the City would allow air standards
6 not to be met, the City has taken the unprecedented
7 step in this case -- they have hired their own air
8 consultant -- to make sure that all DNREC standards
9 are met, all Clean Air Act standards are met.

10 While there is a concern about air
11 quality, and it is a concern, it's not a basis to
12 deny a zoning verification.

13 So the next is noise. How about noise?
14 And we say again, right, it's my -- I think it's
15 pretty plain law that if all legal standards are met,
16 it cannot be denied.

17 And the Appellants' contention is that
18 the ambient noise standards might be, might be, too
19 high so you could be able to hear noise beyond the
20 property line and it would be audible.

21 How do we know that at this point? How
22 can the City know that, because it's got to be
23 audible beyond the Amtrak lines, the Norfolk Southern
24 lines.

1 And here is the other point: There are
2 features, sound-deadening features, that will be put
3 in during the construction phase which we haven't
4 even gotten to yet, because we do not know right now
5 if there will be sound outside the building
6 (inaudible)

7 And if you look at their expert to say,
8 "Look, if it's 52 decibels, you can hear it outside.
9 If it's 52 decibels of the property line, you should
10 be able to hear it on down the road."

11 We don't know if it's going to be 52
12 decibels at the property line. We can't tell. And
13 that should be a basis, a potential that air quality
14 laws -- excuse me -- that noise laws would be
15 violated. The potential for that to happen isn't a
16 basis to overturn the zoning verification.

17 Home Values: I represented the city
18 very proudly for a very long time, and I certainly
19 wouldn't want to advocate for anything that would
20 allow home values to go down. Right? But ultimately
21 we don't know, again, if home values will go down.

22 There are conflicting affidavits in the
23 record. And I submit to you the City should not have
24 to go out every time there is an accessory use and

1 hire an appraiser to try to figure out if home values
2 will go down.

3 But the bottom line is that under
4 Appellants' theory that if you are going to have air
5 emissions from a power plant, the value of the homes
6 will go down. Right? Well, if that's indeed the
7 case, when Chrysler closed, the property values
8 should have gone up because you didn't have the
9 emissions anymore. But guess what? We had an
10 economic downturn, so we don't know what's going to
11 happen. Everybody knows that with the Chrysler
12 closing, there was no tremendous increase in home
13 values.

14 But here is the point: The theoretical
15 possibility that home values might decrease is not a
16 basis for the denial of a zoning verification which
17 otherwise meets all standards in the code.

18 All right. Members of the Board, the
19 City's job first, and now your job, is to apply the
20 law that's written. And the claims of neighborhood
21 impairment at this stage of the game are speculative.

22 There is no conclusive proof on this
23 record that overall air quality will be reduced.
24 There is no conclusive proof that there will be any

1 reduction to home values. There is no conclusive
2 proof that the "chip" will be audible beyond the
3 property line.

4 So my point to you is you should make
5 an objective determination not based upon what one
6 might think that "might be" to give an objective
7 determination. And if you make that objective
8 determination, you will look and see that for you to
9 make your decision here, you have to determine if the
10 "chip" is customarily incidental and subordinate to
11 primary use to be established (inaudible)

12 So, just to sum up, I thought I would
13 give you what the law said and what the Delaware
14 Supreme Court said. Because what I said at the very
15 beginning is it's our job to make sure that the law
16 is followed. That's our job. This isn't a
17 popularity contest. All right?

18 The City and the Board are required to
19 apply the law regardless of an individual's
20 preference. Right? And individual land use
21 decisions, there have been three of them. I'm sure
22 Council knows these decisions well.

23 Applications that comply with the law
24 cannot be denied outright. That's rule one.

1 If there is ambiguity in the zoning
2 law, it must be construed in favor of the free use of
3 land.

4 And, three, idiosyncratic treatment of
5 property owners is not something that's permitted.

6 And if you think I'm kidding, here are
7 the cases. Tony Ashburn says you can't make -- you
8 can't prevent development based upon non-Code related
9 ad hoc determinations.

10 Ultimately, in this case, denying an
11 application which fully complied with all provisions
12 of the Code, Kent County exceeded its statutory
13 power. So, if you find it customarily and
14 subordinate, you need to approve.

15 This is a case that really gets under
16 my skin, because I'm going to tell you why: Because
17 I argued this case on behalf of Board of Adjustment
18 for the Town of Dewey Beach, and I lost. And I
19 argued that it shouldn't be -- the statute shouldn't
20 be construed in favor of the landowner.

21 And Delaware Supreme Court said that
22 any doubt must be resolved in favor of the landowner
23 when making a land use decision. That means if there
24 is ambiguity in any term in the land use ordinance,

1 like, for example, the term "neighborhood," it must
2 be construed in favor of the free use of land.

3 Finally, going to Gibson versus Sussex
4 County, this is an opinion that was written by our
5 now Chief Justice -- he was not Chief Justice at the
6 time -- "The singling out of particular owners for
7 idiosyncratic treatment is not acceptable."

8 And the fact is that in all papers, no
9 one has cited -- no one has cited to any decision by
10 the City at anytime where it would deny a zoning
11 verification based upon non-Code facts.

12 So let's put it all together. The
13 plain meaning -- the plain meaning of the definition
14 of "accessory use," the City correctly concluded that
15 the "chip" is customarily incidental and subordinate
16 to the data center.

17 And we already talked about the
18 theoretical possibilities. All right? And if there
19 was any doubt in your mind, under J.N.K. LLC, it
20 makes it clear that you need to defer to the zoning
21 official's determination if there is doubt in your
22 mind to the interpretation of its own code. So
23 ultimately because this use is customarily incidental
24 and subordinate to the proposed use, the zoning

1 verification should be affirmed.

2 I am going to reserve my remaining ten
3 minutes for rebuttal. Thank you.

4 (Applause)

5 MR. PARADEE: Please. It only detracts
6 from the proceedings and delays this from being over.
7 So please hold your applause or other outbursts until
8 later.

9 You have ten minutes remaining,
10 Mr. Walton. Are there any questions from the members
11 of the Board for Mr. Walton at this time?

12 MR. BERGSTROM: No.

13 MR. PARADEE: If not, then we will hear
14 next from Mr. Forsten. Thank you. Mr. Forsten,
15 before you get started, I believe one of the members
16 of the Board does have a question for Mr. Walton.

17 MR. HUDSON: I just wanted to ask, is
18 the procedure at the end for questions, or do we ask
19 questions right now and take away from their time?

20 MR. PARADEE: You should ask questions
21 now. And, unfortunately, that's the only way to
22 manage it. We will have to take from their time.

23 MR. HUDSON: Good evening.

24 MR. WALTON: How are you, Mr. Hudson?

1 MR. HUDSON: Doing well. How about
2 yourself? I have a question for you. The power use
3 that was prepared for the use --

4 MR. WALTON: I'm sorry. I can't hear
5 you.

6 MR. HUDSON: Sorry. The power use, the
7 City mentioned 30 percent.

8 MR. WALTON: Correct.

9 MR. HUDSON: That would be on the
10 projected output, the projected use of the facility?

11 MR. WALTON: Correct. The required
12 operational need -- that's correct -- which includes
13 the use plus the necessary redundant power. Correct.

14 MR. HUDSON: But my question is under
15 Wiggin it's decided based on the facts of the
16 particular situation. It seems here that they are
17 projected to not necessarily what's going to be used
18 at the instant moment. And I was wondering if you
19 could speak to that?

20 MR. WALTON: Again, that is kind of
21 correct, if you don't mind me saying that. There are
22 projections that have been provided to the City as we
23 stand here right now. And those projections are what
24 the City based its 30 percent number on.

1 If you read what the City did, the
2 power sale numbers aren't locked into that. It says
3 "up to 30 percent" of the required operational need.
4 So if it's determined later that the required
5 operational need is less, the corresponding power
6 sale numbers will go down as well.

7 So, in other words, it's an initial
8 projection, but it's "up to." I think it's very
9 clear in the zoning verification letter.

10 MR. HUDSON: My other question is what
11 additional -- why 30 percent is the critical amount?

12 MR. WALTON: Yes. If you look again in
13 Feeney Roser's affidavit in the applied submissions,
14 she goes through how she came to the decision of
15 30 percent. And it goes through it. And I don't
16 have that here. But it's in there. She goes through
17 different sections of the Code. She is trying to
18 apply legislative intent, essentially looking at
19 different sections of the Code where there is 25 or
20 30 percent limits.

21 Now, you can say subordinate, at least
22 in theory, you know, would be up to 49 percent.
23 Right? It's one percent less than 50. And she went
24 through the Code and tried to determine legislative

1 intent. Because there was a percentage upon this
2 particular accessory use. But you look at the other
3 ones, and it terms it 30 percent was the appropriate
4 number.

5 MR. HUDSON: Now, when did the City --
6 what is the City's position on when does the power
7 sale threshold -- when does it become the dominant
8 use?

9 MR. WALTON: When it no longer counts
10 for the primary use of the property -- when power
11 sale numbers exceed the 30 percent of required
12 operating capacity.

13 MR. HUDSON: I know that's what the
14 City placed on it. But when does it actually,
15 regardless of the City's condition on it, when does
16 it become dominant?

17 MR. WALTON: In the commercial power
18 plant scenario, for example, if you had a -- for
19 example, if somebody just said (inaudible) --

20 THE REPORTER: Mr. Walton, can you hold
21 the microphone closer?

22 MR. WALTON: I will. I'm sorry. I was
23 trying to talk. In a commercial power plant
24 scenario, if there wasn't a data center that was

1 being built and it wasn't a required operational need
2 of the data center -- for example, let's say the
3 power -- that the CHP or the "chip" was built and the
4 data center shut down for some reason. It would be
5 the primary use of the property would be the sale of
6 power. So you get that 30 percent limitation on
7 there. So that couldn't happen. That is precisely
8 why those limitations are put into the zoning
9 verification which said that it has to be tied to the
10 data center.

11 MR. PARADEE: Mr. McKelvey has a
12 question.

13 MR. MCKELVEY: Mr. Walton, do I
14 understand is it your position that the on-site power
15 generation which is customary in this particular case
16 is to produce island mode, that it is not, in fact,
17 different in kind or extent or nature from all the
18 other examples of on-site generation which are used
19 just for backup?

20 MR. WALTON: There is a difference.
21 There is a difference, to be candid with you. If you
22 look at the other data centers that are out there,
23 certainly the large majority of them are not going to
24 use the term "island mode." They have some

1 connection to the grid. When you're looking at
2 accessory use, that's not what you are looking at.
3 You look at the actual use, the power generation,
4 on-site power generation at that time.

5 And, for example, whether or not the
6 "chip" would be an accessory use doesn't change if
7 there were, for example, a line that came in and some
8 power was used for the grid and used for backup. You
9 are still using the same use with the data center.

10 MR. MCKELVEY: Thank you. My second
11 question is about impairment to the neighborhood.

12 MR. WALTON: Yes, sir.

13 MR. MCKELVEY: I understand that
14 documents have been provided about the air quality
15 that's required by the State has to do with the
16 ability of a pollutant to buy credits to make this
17 thing balance out.

18 And my question is, does the fact that
19 this (inaudible - baby crying in audience) that are
20 both from the amount and only becomes legal by virtue
21 of credits bought, does that not, in fact, still
22 net -- does that still net out as damage to the
23 neighborhood?

24 MR. WALTON: I am no expert on the

1 DNREC process, so please bear with me in my
2 understanding of that process. The idea is, because
3 New Castle County is in a nonpayment zone -- because
4 New Castle County is in a nonpayment zone, you have
5 to buy back credits, not just (inaudible) to what you
6 can do. It has got to actually see increase.

7 Actually, if you look at the -- and I
8 can pull the citation for you. If you look at some
9 of the affidavits that were submitted by the real
10 estate experts that Appellants had, they say, "Look,
11 that doesn't really factor in because that emission
12 is up really high. And so in order to get to factor
13 it in the region as a whole, so to speak.

14 So, to answer your question, yes, there
15 needs to be credits that are purchased. DNREC has
16 said there has to be a net air quality benefit as you
17 go through the process. And that's the process that
18 they have.

19 MR. MCKELVEY: Thank you.

20 MR. PARADEE: Thank you, Mr. Walton.
21 You have two minutes remaining.

22 MR. FORSTEN: Can you hear me?

23 (The Board is shaking their heads.)

24 MR. FORSTEN: Can you hear me? Good

1 evening, members of the Board. My name is Richard
2 Forsten here on behalf of the applicant. Can you
3 hear me, Mr. McKelvey?

4 MR. MCKELVEY: Speak up or stay closer.

5 MR. FORSTEN: How is that? Better?

6 MR. PARADEE: Yes.

7 MR. FORSTEN: Okay. Members of the
8 Board, my name is Richard Forsten. I'm here on
9 behalf of the applicants, The Data Centers LLC, or
10 TDC. And with me is my colleague Michael DeNote. I
11 will try to be brief.

12 Let me start by saying that, while I
13 think Max Walton and the City gave TDC a hard time
14 this past fall -- I guess a lot of questions took a
15 lot of time and demanded a lot of information, and
16 they were tough -- it will probably not surprise you
17 to hear me say that I agree with everything he just
18 said.

19 The proposed cogeneration facility is
20 an accessory use under the City Zoning Code.

21 (A baby is crying loudly in the
22 audience just behind the court reporter.)

23 MR. FORSTEN: Now, I also observed that
24 there are a lot of people in the room here tonight.

1 There are those who think this is bad for Newark.

2 There are those who think this is important to the
3 future of Newark, the future of the University, the
4 future of the state.

5 But my job tonight is to just talk
6 about the zoning code, which is the law, and talk
7 about the facts and how they apply.

8 One thing, incidentally, which I did
9 point out in my opening papers, this has been
10 approved as an accessory use. And that's fine. I
11 mean, we are happy to get approval. But there is
12 case law at one site that says that the production of
13 electricity is a manufacturing use. This is
14 industrial zone.

15 And so this could have been approved as
16 a primary use as a permitted use and not as an
17 accessory use. And, if it were so inclined, it could
18 affirm the planning director's decision to issue the
19 verification on that basis.

20 And, interestingly, the City Zoning
21 Code otherwise cited about (inaudible) reduction. So
22 I think it's pretty clear that this could have been
23 approved as a conditional (inaudible), but it was
24 approved as an accessory use, and that's good enough

1 for us.

2 And, by the way, when this Code was
3 adopted, this particular zoning code provision in
4 2011, the planning director at the time (inaudible --
5 baby crying loudly) for years was the planning
6 director, a good guy, said that he was asked a
7 question. And he said that if a use in the STC
8 zoning wanted to have a cogeneration facility, that
9 would be permitted as an accessory use.

10 And that appears in the town exhibit at
11 Tab 20 -- I'm sorry -- it's at Tab I on Page 20 for
12 that particular (inaudible). He also testified that
13 power generation is a (inaudible) use, and that's at
14 the same page.

15 And you heard the definition of
16 accessory use as written in Newark's Zoning Code,
17 that it's customarily incidental and subordinate to
18 the principal use or building and located on the same
19 lot with the principal use or building.

20 And then elsewhere in the Code is the
21 language, "Accessory use should not impair the
22 neighborhood."

23 And when you apply these definitions --
24 and maybe I'm biased, but I think it's clear. Every

1 data center has power-generated equipment in one form
2 or the other, every data center. And both the City,
3 in the affidavits they submitted way back when
4 Christina Thompson, as well as TDC, submitted an
5 affidavit by Bruce Myatt, also giving data center
6 history. They provided numerous examples of data
7 centers, data centers with backup facilities. But,
8 more importantly, quite a few examples, a number of
9 examples of facilities that had their own
10 cogeneration facilities and are essentially off the
11 grid. And that, by the way, is the trend now in the
12 data center industry.

13 So I don't think anybody can really
14 argue that power-generated equipment isn't customary.
15 Every day someone has one. And once you can see it's
16 customary, it really doesn't matter whether it's
17 backup or whether it's primary.

18 So then the question is, is this
19 incidental or subordinate to the primary use. And
20 the applicant -- the appellants here have said,
21 "Well, it's not subordinate, it's not incidental."
22 But that just can't be true. And common sense should
23 tell you that, without the data center, there
24 wouldn't be this cogeneration facility. It's really

1 as simple as that.

2 Of course a cogeneration facility is an
3 accessory to the data center. It is subordinate, and
4 it is incidental to that use.

5 Now, someone expressed concern during
6 the process about how do we know this isn't some sort
7 of a back-door arrangement where it's really a secret
8 plan just to build a power plant. That's just not
9 the way this facility is designed, and it's not the
10 way we have gone about this.

11 And you heard Mr. Walton talk about the
12 limitations that we suggested in the brief
13 (inaudible) power grid.

14 Because the way that this system is
15 designed, there is going to be a number of turbines,
16 a whole lot of turbines. They are all relatively
17 small.

18 I know there is one turbine that we are
19 going to have -- we have to get an air permit for
20 it -- but it's never even going to run. It's going
21 to be a backup just in case the other turbine fails.

22 The idea is you are generating power
23 with these turbine, and you are generating extra
24 power with one or two of the turbines. But if a

1 turbine goes down, it's just a small turbine. And
2 there is already extra power being generated so that
3 the Internet and computer equipment never see
4 interruption in power.

5 And that's the point. Data centers can
6 never go down, never, ever go down. It costs tons of
7 money when they go down. It causes lots of problems
8 when they go down. Customers will pay a premium, a
9 real premium, because they don't want their data
10 center to ever go down.

11 That's why we are building these
12 turbines. That's why we are building these extra
13 turbines. That's why we are sending in extra power.
14 Now, we can sell that extra power back to the grid.
15 Well, I don't know. You could run it into the
16 ground. But why do that? I mean, we want to try to
17 be environmentally friendly and get the benefits of
18 the extra power.

19 But the money is in the data center.
20 And the revenue from the electricity that gets sold
21 back to the grid is only about 7 percent of the total
22 revenue of the data center. So it's pretty
23 incidental in the grand scheme of things.

24 So the cogeneration facility is

1 customary, it's incidental, and it's subordinate.

2 So, then, does it impair the
3 neighborhood? Well, you heard Mr. Walton describe
4 "the neighborhood." But, even if you look at the
5 complaints that people are raising, they are really,
6 I don't think, very unique. Let's talk about the
7 complaints.

8 No one has suggested that the noise
9 that this facility would generate is not going to
10 meet the requirements of the Newark Zoning Codes.

11 It will meet those requirements. It
12 must meet those requirements. And if we don't meet
13 the requirements of Newark's noise ordinance, we are
14 not going to be allowed to run.

15 Now, I want to just hand out another
16 copy of Exhibit 18 from our file. And the copy that
17 we had on Friday was a little dark. This is still a
18 little dark, but it's at least a little clearer.
19 This is an aerial photograph. It was Exhibit 18 to
20 our papers. (Handing to Board)

21 This is an aerial photo of the site.
22 And the nice thing about this photo is that it's got
23 a circle. In the center of that circle is where the
24 turbines are going to be. And that circle is

1 approximately a quarter-mile radius.

2 So you can see that in a quarter-mile
3 radius there is not even any residential houses
4 within a quarter-mile radius of the turbines,
5 themselves.

6 Those turbines, by the way, will be
7 housed in a (inaudible). They are going to be housed
8 in a building. That building will be surrounded by
9 24-foot high or better. And as you look at the photo
10 here, you can see that the rear of the property has a
11 very thick treeline, and you can't see where these
12 turbines are actually going to sit from Route 4, and
13 you can't see them from the bridge.

14 And then, if you go on the other side
15 where the turbines are going to be, with 900,000
16 square-foot buildings, the data center building,
17 itself, which is 65 feet tall -- they're big
18 buildings, I mean, 900,000 square feet. So they are
19 going to block the view of the wall behind the
20 buildings and those turbines.

21 My point simply being, there is going
22 to be a lot of noise-deadening features when this
23 site gets built. And, as I say, nobody has been able
24 to demonstrate that we won't be able to comply with

1 the Code.

2 Now, there are going to be some
3 (inaudible) stacks that go up for exhaust purposes.
4 They are actually four stories shorter than the water
5 tower that is still on site. So they are not as tall
6 as the water tower.

7 Really, when you think about it, that's
8 the only thing people are going to see. Because, by
9 the time you have the trees and the railroad and the
10 northeast corridor and the (inaudible - baby crying
11 again) and the buildings and the wall, you are going
12 to have to really strain just to get a glimpse of the
13 wall, itself.

14 But we are going to meet the noise
15 requirements. And that really should be the end of
16 that discussion. It's not going to impair the
17 neighborhood.

18 Now, as to the air emissions, there is
19 actually a lot of good news. And we put this in our
20 papers, so I won't take up a lot of your time. First
21 is the CHP technology or "chip" technology, itself.
22 And we included the letter from the EPA that we got
23 which touts that technology, because it is very
24 environmentally friendly. And the EPA estimates that

1 using the "chip" technology versus conventional
2 technology saves 1,400 tons a year in nitrous oxides,
3 9,200 tons a year in SOX emissions, and over a
4 million tons a year of CO2, which isn't regulated,
5 but it's greenhouse gas, so that's important.

6 And they say that's the equivalent
7 emissions that will be generated for 128,000 homes in
8 an annual year. So that's the amount of emissions
9 that are avoided by the use of CHP technology. So
10 that's pretty good. That's nice. But it gets
11 better.

12 If you look at Chrysler, and you look
13 at the emissions that were occurring the last 13
14 years -- just the last 13 years Chrysler was in
15 operation -- TDC is going to be a lot better.

16 Chrysler was permitted to emit over
17 1,100 tons of VOC -- volatile organic compounds, they
18 are called. They averaged 477 tons a year. TDC is
19 only going to do about 12 percent of that.

20 With respect to SOX, TDC is going to be
21 roughly 25 percent of that. I put all these figures
22 in our papers.

23 One of the things that the opponents
24 have talked about is ozone. Well, when you look at

1 what Chrysler was doing, Chrysler was putting up, on
2 an average, 550 tons of carbon monoxide, NOx, and
3 VOCs, which are precursors to ozone.

4 The data center is going to do less
5 than half of that. So, on the regulated emissions
6 (inaudible -- baby crying) the data center is better.
7 But it gets even better when you look at the grid,
8 itself.

9 And we are going to put this in. By
10 using this "chip" technology and natural gas, if you
11 took this power off the grid instead, it would be
12 about 2,100 tons a year of sulfur emission. But with
13 the TDC cogeneration facility, it's going to be 9
14 tons. 2,100 tons; 9 tons.

15 The same story with nitrogen oxides.
16 809 down to 64. That's a savings or an avoidance of
17 745 tons. And for carbon dioxide emissions,
18 greenhouse gas, we are avoiding 100,000 more tons
19 than the power justified by the grid.

20 So some of the affidavits provided by
21 Appellants question our assumptions. And they say,
22 "Oh, you are being awfully generous" and whatnot.
23 But the bottom line is we are going to be better than
24 the grid. And that's important.

1 And don't take our word for it, because
2 DNREC recently provided a Coastal Zone formula to
3 (inaudible) electrical generation facility. And here
4 is what DNREC said about PJM, the operator of the
5 grid. "PJM's generating sources now cause much of
6 the air pollution in Delaware, and reducing the use
7 of these sources will improves Delaware's air
8 quality. Thus, the facility's use will clearly and
9 demonstratively improve Delaware's air quality."

10 Now, for that grid to say that they
11 were only avoiding about 1,100 tons a year of sulfur
12 dioxide, we are going to avoid twice as much as that.
13 And that facility is only going to avoid 281 tons of
14 nitrogen oxide. We are going to avoid almost three
15 times as much as that.

16 And so what did DNREC say? DNREC said
17 that the use will clearly demonstratively improve
18 Delaware's air quality.

19 And, by the way, the evaluation study
20 which the opponents submitted and relies upon
21 heavily, that study actually said that air emissions
22 aren't a factor that really affect nearby home
23 values, because they get it really high up and they
24 get blown away.

1 So we are improving Delaware's air
2 quality with these emissions in that this technology
3 will make things better than off the grid. Someone
4 said, "Why don't you just put the data center on
5 power off the grid?"

6 Well, as we know, last Friday night the
7 power was out, so that's a problem. But, more so
8 than that, by having this facility, we will actually
9 make air quality better.

10 And somebody also said -- this was said
11 in the papers that got filed Friday -- "well, you are
12 misrepresenting the grid because GMAC, which is power
13 company that was (inaudible) in Newark, they will buy
14 cleaner power than the grid, and so you won't avoid
15 as many emissions as you claim."

16 Well, the problem with that theory is
17 that even if GMAC buys cleaner energy, that means
18 that somebody else can't buy that cleaner energy and
19 they have to buy dirty energy.

20 We know that PJM have their power
21 percentages for coal and gas and wind and nuclear and
22 all that stuff. And it doesn't really matter what
23 you really buy so much, because the mix is going to
24 stay the same.

1 So we did an assessment correction and
2 used the PJM emissions. Again, the facility's use
3 will clearly demonstrative improve Delaware's air
4 quality.

5 So I have talked about noise, and I
6 have talked about air quality. I don't think either
7 of these things can be said to impair the
8 neighborhood.

9 So then that leaves us with value. And
10 on that particular issue, there was a study called
11 The Affect of Power Plants on Local Housing Values
12 and Rents. It was done by a professor out in
13 California, and he studied power plants. And he
14 found that power plants can have an affect on
15 (inaudible -- people coughing in background).

16 But he says something very important in
17 his study. He says, "Cogeneration plants, i.e.
18 plants that produce both electricity and heat,
19 typically in the form of steam," which is what we are
20 doing, "are excluded from this study because it can
21 be constructed simultaneously with industrial plants,
22 large commercial buildings, and other facilities."

23 So he didn't even look at what this
24 facility is. He looked at standalone power plants.

1 And if you read his study carefully, it's clear that
2 he was looking at power plants that tended to be
3 often -- I want to say -- virgin undeveloped ground,
4 redevelopment on a brownfield.

5 And it just doesn't make sense. You
6 can't use a study which, by its terms, says it didn't
7 look at the type of facility that is being evaluated.

8 And we submitted two affidavits with
9 our papers on Friday, one by Richard Voith and one by
10 David Wilk, both expert appraisers and evaluation
11 experts, explaining why that study just doesn't apply
12 here. It just doesn't apply.

13 Also, Rick Beringer, our project
14 engineer who did all the air calculations, submitted
15 an affidavit explaining why much of what was said in
16 that study doesn't apply here. And so we won't even
17 talk about that.

18 The study identifies a lot of things
19 which it says cause diminution in value with power
20 plants. And it says that, "There would be increased
21 truck traffic from coal deliveries." We don't have
22 any coal. There is no coal here.

23 It talked about fly ash and ash. That
24 doesn't happen. This is a natural gas and CHP

1 facility. So that doesn't apply here.

2 It talks about radioactive emissions
3 such as uranium and thorium; which, by the way, there
4 is uranium and thorium in coal, but very minor
5 amounts. That's what they are getting at. Not an
6 actual gas. It doesn't apply here.

7 The study talked about the visual
8 disamenities that the power plants can cause. And
9 that's another reason why I wanted to hand out that
10 Tab 18 again, which I thought was a little bit
11 better. Because, when you look at that, when you
12 look at the cogeneration facility, it's located
13 behind the building, surrounded by trees. You are
14 just not going to be able to see it.

15 So, with that, I don't think there is
16 any evidence at all to find that there is going to be
17 any affect on value from this particular facility.
18 And, certainly, there has not been any evidence
19 introduced other than the study, which, by its terms,
20 doesn't apply. And then folks said, "Well, the study
21 says (inaudible) essentially diminution in value, so
22 I got some home values off of Zillow and applied
23 47 percent, and there will be a reduction."

24 But that's not a study. Nobody went

1 out and actually looked at the market. And you heard
2 Mr. Walton say that there is no evidence that before
3 Chrysler, you know, before Chrysler closed, home
4 values were X, and they went up to Y, and now they
5 are going to go down to Z. There is no evidence.

6 And, in fact, but for the publicity
7 here, when the data center building gets built, as I
8 said, you have got turbines in a building surrounded
9 by a 24-foot wall, blocked by trees, blocked by a
10 data center building, blocked by the northeast
11 corridor railroad and the northeast -- and the
12 switching (inaudible) adjacent to that.

13 It's just not going to have the affect
14 that people think. Look at those trees in the aerial
15 photo.

16 And, finally, when we are talking about
17 impairing the neighborhood, it's not enough -- In
18 fact, Delaware courts tell us, "You can't say, well,
19 there is nothing there now; so, obviously, something
20 is worse than nothing." That's not right, and that's
21 not fair.

22 What our Delaware -- what now Chief
23 Justice Strine, and he was Vice Chancellor Strine,
24 said in the Gibson case was you have to look at other

1 permitted uses. And if they can have the same
2 affects, then the particular use you are looking at
3 cannot impair a neighborhood.

4 And that's Gibson cited in our papers
5 and cited in the City's papers. It was not discussed
6 in the papers from the Appellants.

7 I cited a few other ones, just for the
8 fun of it, including one from New York that talked
9 about noise. But the court specifically said that
10 the use that was approved was not any noisier than
11 other uses that could go there. And so, if a
12 particular use isn't going to be any noisier, then
13 that's good enough.

14 So here, it's zoned manufacturing
15 industrial use. We can think of any number of
16 manufacturing industrial uses that could go at that
17 site. A car plant.

18 At this point I've used about 22 or so
19 minutes. And so I think I'm going to reserve the
20 balance of my time for rebuttal.

21 I do want to, I think, respond to some
22 things that the opponents are going to say. I
23 understand they are going to have a witness or two,
24 so I don't know what he is going to say.

1 There have been a lot of unfortunate
2 things or untrue things said during the process.
3 Some of the opponents to this project actually filed
4 a complaint with the Delaware Association of
5 Professional Engineers trying to claim that our
6 project engineer, Rick Beringer, was somehow not
7 qualified, the engineer for this project.

8 On Monday we got a letter from DAPE,
9 it's called, Delaware Association of Professional
10 Engineers, stating that not only was he qualified; he
11 was uniquely qualified to be handling this project.

12 Someone showed up at a meeting once
13 saying that she didn't want a nuclear power plant
14 built in Newark. We told her this wasn't a nuclear
15 power plant. So that made her happy.

16 One of the affidavits that was filed by
17 one of the opponents here said that the City has
18 "completely abdicated all responsibility" when it
19 granted this zoning verification, that it isn't doing
20 its job. I don't think that's fair at all. In fact,
21 I know it's not fair, because they kept asking us
22 questions and made us give more information. And you
23 saw the very thorough information from that. I think
24 the notion that the City has completely abdicated all

1 responsibilities is (inaudible).

2 Other opponents claim in some of their
3 affidavits that DNREC isn't going to be able to do
4 its job here, and they claim DNREC is not in
5 compliance with the Clean Air Act. EPA is the
6 backstop of everything DNREC done. First of all, I
7 don't think that's true. I agree with the City. I
8 don't think that's fair either.

9 But, even if there was questions about
10 DNREC, as part of the air permit process, you do have
11 EPA with you, as well.

12 And, by the way, if people don't like
13 what DNREC does with the air permit, there is a whole
14 other proceeding involved with that, and they can go
15 and have their, you know, be heard by DNREC. If they
16 don't like what DNREC does, then there is the
17 appellate process for air permits.

18 So that's an issue for another day. I
19 told you this, and the facts bear out, that this will
20 actually improve Delaware's air quality.

21 And, finally, some opponents -- or one
22 of them, I should say, at least, claims that the
23 State of Delaware supports this project because
24 Governor Markell is a secret investor in it. That's

1 not true. Let me just say for the record so it's
2 clear, it's not true.

3 The bottom line is this: I understand
4 there are folks who don't like this project. There
5 are always folks who don't like projects. But a
6 cogeneration facility is permitted. It's a primary
7 use that is certainly permitted as an accessory use.

8 Roy Lopata, Planning Director at the
9 time, said as much when this particular zoning code,
10 the ST Zoning, was adopted: "The noise must comply
11 with the Code," and it will comply with the Code.
12 The air emissions, as I said, will comply with State
13 and Federal law. We have to go through a rigorous
14 process with DNREC. They are not going to impair the
15 neighborhood.

16 And so I ask that you uphold the
17 carefully considered decision of the City is the
18 result of a long and, at times, difficult process.
19 But I do ultimately commend the City for the very
20 (inaudible) that it did take.

21 The City said in its papers that you
22 can only reverse the decision here if it was clearly
23 erroneous, which is a high standard. It's not
24 erroneous. In fact, it's correct. I'm asking you to

1 uphold it. Thank you very much. I will answer any
2 questions.

3 MR. PARADEE: Mr. Forsten, if I may ask
4 that the exhibit that you presented to the Board,
5 would you please provide a copy to the court
6 reporter. And we will have is that marked as TDC
7 Number 1.

8 And I would also ask that Mr. Walton
9 could provide a copy of the Power Point that he
10 handed out to the court reporter. And we will mark
11 that as City Number 1. Do any members have of the
12 Board have questions of Mr. Forsten.

13 MR. FORSTEN: I assume -- and,
14 actually, all counsel talked about this earlier:
15 Everything we have already submitted is in the
16 record. So it's merely a better copy of the
17 Exhibit 18 I submitted previously.

18 MR. HUDSON: Regarding the impairment
19 of air quality, you spoke about regulations by DNREC
20 and the agencies. Does it need to rise -- does the
21 air quality issue need to rise to a level of
22 violation of DNREC for there to be an impairment?

23 MR. FORSTEN: Um, I think the answer
24 there is probably yes. And I say that only because,

1 again, you have to look at -- you can't just look at
2 this particular use in a vacuum. You have to look at
3 all the other uses that are submitted, as well.

4 And you can't say that, you know, right
5 now there is just an empty field where the data
6 center is going to build its facility, so that
7 doesn't really have any emissions, and so it's going
8 to impair the neighborhood as a result of this
9 project. That's not the standard. That's not the
10 approach.

11 You have to look and say is this going
12 to be worse than other permitted uses. It's not
13 going to be. In fact, under the same logic, which
14 DNREC granted to a (inaudible) coastal zone -- I mean
15 I love the language. I will just read it one more
16 time. "PJM's generating sources now cause much of
17 the air pollution in Delaware, and reducing the use
18 of these sources will improve Delaware's air
19 quality."

20 That's not me talking. That's DNREC.
21 "Thus, the facility's use will clearly and
22 demonstratively improve Delaware's air quality."

23 And that facility was only going to
24 have half the affect that this facility will have in

1 terms of reducing sulfur dioxide emissions and only a
2 third of the affect in reducing the nitrogen oxides.

3 Now, the opponents want to quibble with
4 that and say, "Well, you are overestimating PJM." I
5 don't think so. We were very careful and rigorous in
6 the way we did it. If they want to quibble that we
7 are off 10 percent or 15 percent, it will still have
8 a tremendous effect and is still better than that
9 facility.

10 MR. PARADEE: Thank you, Mr. Forsten.
11 You used 30 minutes of your time, leaving you 15
12 reserved. So next we will hear from the opponents.
13 I believe Ms. Hoffman will go first.

14 UNIDENTIFIED SPEAKER: Give them ten
15 more minutes -- twenty -- they're union!

16 MS. HOFFMAN: Good morning, Board
17 members. I'm sorry. Good evening, Board members.
18 My name is Sherry Hoffman. And I appealed this
19 zoning verification decision because I believe it's
20 not a correct implementation of Newark law.

21 I did not appeal it because I want some
22 kind of idiosyncratic treatment. The power plant is
23 not an accessory use, and that will be addressed in
24 more detail by Mr. Kristl.

1 I'm going to talk about how it is an
2 impairment. It's an impairment, not an "alleged"
3 impairment to the neighborhood.

4 If it's an impairment to the
5 neighborhood, as you know, it cannot be an accessory
6 use and, therefore, the application fails.

7 Before I get to the issue of
8 impairment, I have a couple of comments to make on
9 part of what you have heard today. Some of that
10 relates to a case that was raised by the City. It's
11 in your Power Point. It's Tony Ashburn versus Kent
12 County Regional Planning.

13 I want to quote from that case that's
14 actually, I think, at Tab Number 25 in the City's
15 compendium. This is a quote that wasn't part of the
16 Power Point. And I think you will see why I am
17 drawing your attention to it.

18 The quote is that 9 Delaware Code,
19 Section 4811, empowers the Commission to approve, to
20 approve with conditions, disapprove, table the
21 subdivision application.

22 And the reason I want you to hear that
23 language is because that's the kind of language that
24 I want to hear from the City with respect to a zoning

1 official.

2 What I haven't heard yet is where the
3 zoning official gets the authority to impose
4 conditions in the same way that those conditions are
5 authorized and enabled under 9 Delaware Code for the
6 Kent County Commission.

7 I also want to address the issues
8 raised regarding DNREC before I get to my impairment
9 issues.

10 First of all, this is a zoning hearing.
11 It has nothing to do with DNREC. Nobody is going to
12 ask you to issue a permit. Nobody is going to ask
13 you to measure pollution. Nobody is going to ask you
14 to sanction anybody for violating a permit. You are
15 not DNREC. This is about zoning. And it's about
16 whether the emissions, the admitted emissions, are in
17 violation of Newark's Zoning Code because they impair
18 the neighborhood.

19 And Mr. Hudson made a distinct
20 observation, and he asked whether if satisfying
21 DNREC's standards, if that was enough to say that it
22 didn't impair the neighborhood. But it's not. This
23 is an entirely different matter than what DNREC looks
24 at.

1 Let me point out that I believe -- and
2 the affidavit will speak for itself. But I believe
3 the affidavit for from Paul Foster from DNREC that
4 was presented by the City was not correctly quoted.
5 I don't think that the DNREC standard is, "Is there a
6 net air quality benefit," which is the way it's been
7 quoted to you. I think the standard is that there is
8 no net increase. And I think that's very different.

9 One other reference to DNREC that's
10 been made is the Bloom Energy, the Bloom Energy
11 permit. And I want to quote something from Secretary
12 O'Mara in the approval of that permit.

13 Secretary O'Mara said if a facility
14 displaces 59 percent PJM coal-fired generation or
15 even gas-fired generation, then the air improvements
16 would be even greater.

17 Gas-fired generation is fossil fuel
18 burning, which is not what Bloom boxes do. Gas-fired
19 generation may be cleaner than coal-fired generation,
20 but there are still emissions and they are admitted
21 emissions, and that's what I want to talk to you
22 about when I talk to you about impairment in the
23 neighborhood.

24 The City has agreed that the power

1 plant is not a primary use under the zoning code. It
2 can only be an accessory use. Here is what emissions
3 have been admitted in the application to DNREC for
4 emission permits: The estimated emission of nitrogen
5 oxides is almost 74 tons per year. The threshold is
6 25 tons.

7 And, as Mr. McKelvey pointed out, the
8 way to make up the difference is through emission
9 credits, emission reduction credits, which I call
10 "permission to pollute." But I digress.

11 The estimated emissions of volatile
12 organic compounds is almost 68 tons. And the
13 threshold is 25 tons. The admitted estimated
14 emission of particulate matter less than 2.5 microns
15 is almost 98 tons, and the threshold is 100 tons.

16 The nitrous oxides and the VOCs combine
17 in sunlight to make ground-level ozone. We all know
18 what ground-level ozone is, and you know it's not
19 good for your health because you see red alerts from
20 DNREC and from EPA. And you know, when you see red
21 alerts, that people who are susceptible ought to stay
22 inside.

23 According to the EPA Green Book numbers
24 from December of 2013, Delaware is in marginal

1 attainment status for ozone and in non-attainment
2 status for the particulate matter of 2.5 microns.

3 Historically, Delaware has been in
4 non-attainment status for ozone. And that's also
5 something that Mr. Foster from DNREC addressed in his
6 affidavit that was presented to the City.

7 The emissions are relevant because they
8 have a negative impact on health. It's not an
9 "alleged" negative impact on health; it's an
10 unrebutted impact on health.

11 The ground-level ozone causes
12 irritation in the respiratory system. It causes
13 reduced lung function. It aggravates asthma. That's
14 from DNREC's public information flyer.

15 The 2008 threshold attainment for the
16 eight-hour ozone was lower because it was more
17 evident that the health affects were more adverse
18 than thought. Children and elderly and those with
19 respiratory disease are more likely to suffer when
20 ozone reaches critical levels. The VOCs and the
21 nitrogen oxides that I spoke about earlier, these are
22 precursors to ozone.

23 Particulate matter under 2.5 microns is
24 inhaled deep into the lungs, and it stays there.

1 According to the EPA, it can cause an increase in
2 premature death, particularly in the elderly or those
3 with prior lung disease.

4 These facts have not been rebutted
5 either by the company or by the city.

6 The particulate matter causes
7 aggravation of cardiovascular illnesses and
8 hospitalizations for children and people with lung
9 disease. It causes decreased lung function,
10 particularly in children and asthmatics. It leads to
11 increased loss of work, injuries, loss of school, and
12 more emergency visits. These are not alleged
13 impairments. These are facts.

14 The impairments are facts. The
15 emissions are facts. The negative health affects are
16 undisputed.

17 Here is the dispute. And this is a
18 dispute about the definition of the word
19 "neighborhood." The City has described "the
20 neighborhood" as something that is bordered by the
21 artificial zoning borders.

22 "Neighborhood" is supposed to be
23 defined according to Webster's unabridged dictionary,
24 and that's because municipal code says that you look

1 to Webster's Unabridged Dictionary for the definition
2 of terms used therein.

3 And here is what the dictionary says,
4 the Webster's Unabridged Dictionary says: It says,
5 "the quality or condition of being a neighbor. The
6 state of being or dwelling near. Proximity. A place
7 near. Vicinity. Adjoining district. A region, the
8 inhabitants which may be counted as neighbors, as he
9 lives in my neighborhood."

10 This is the dictionary definition. You
11 can view this when you are deliberating and you are
12 thinking about where is the neighborhood. Because
13 the neighborhood isn't -- the neighborhood isn't the
14 STAR Campus.

15 And, in fact, the neighborhood that the
16 City is describing is not even the STAR Campus,
17 because part of the STAR Campus is still zoned
18 industrial. Bloom Energy is on an industrial zoned
19 parcel.

20 So, according to the City, the
21 neighborhood for this power plant is -- nothing is
22 STAR minus the Bloom Energy, which only leaves
23 University Health School, School of Health Science.

24 Appellants Exhibit Number 7 shows the

1 neighborhood. It shows the schools that are in the
2 neighborhood. It shows the homes that are in the
3 neighborhood.

4 If you look at the exhibit, I think it
5 was Exhibit 18, but the one that was presented today
6 to you, you can see all the homes around the STAR
7 site. That's the neighborhood. The neighborhood is
8 not -- and you won't find any dictionary that says
9 the neighborhood is based on the zoning laws.

10 There is a lot of information that is
11 not helpful. And that information relates to what
12 the emissions at Chrysler was, were. Nobody cares.
13 Because Chrysler isn't there anymore, and that has
14 nothing to do with the law in terms of whether there
15 is impairment to the neighborhood because of the
16 accessory use.

17 This is enough. You have enough in
18 front of you right now to find that the accessory use
19 impairs the neighborhood, because it's unrebutted
20 that the health affects result from the emissions
21 that are going to -- that are admittedly going to
22 flow from this site.

23 Now, the remainder of my time I want to
24 give to the additional appellants who have a

1 presentation, unless there is any questions. I would
2 like to save ten minutes for rebuttal.

3 MR. PARADEE: Any questions of
4 Ms. Hoffman?

5 MR. WALTON: May I pose an objection?
6 As far as rebuttal goes, it should only be the City
7 and the parties who went first who have rebuttal.
8 It's not a continuous rebuttal.

9 MS. HOFFMAN: No surrebuttal?

10 MR. WALTON: No surrebuttal.

11 MR. PARADEE: Mr. Chair, the question
12 is about whether or not the Board will allow the
13 Appellants to present a surrebuttal. And it's not
14 something I had contemplated. How does the Board
15 feel about it?

16 MR. HUDSON: It would be my
17 understanding that the Appellants are the ones
18 bearing the burden in this case. Given that factor,
19 I believe that the Appellants should have the right
20 for rebuttal. It seems that, in my opinion, that we
21 give it based on that.

22 MR. BERGSTROM: So rebuttal.

23 MR. PARADEE: Mr. Walton, I believe you
24 will receive allowed time for rebuttal. So, Ms.

1 Hoffman --

2 MS. HOFFMAN: Thank you.

3 MR. PARADEE: By my count, you began at
4 7:35. It's now 7:48, so you have used only 13
5 minutes of your time. Thank you.

6 MS. HOFFMAN: Thank you.

7 MR. PARADEE: Mr. Kristl is next.

8 MR. KRISTL: Thank you. Members of the
9 Board, good evening. My name is Kenneth Kristl. I
10 represent the individual known as Michael Griffin,
11 Anne Willing-Solan and Barry Solan, John and Sarah
12 Milbury-Steen, Newark Residents Against the Power
13 Plant, and the Delaware Audubon Society.

14 And I want to start my presentation
15 actually with some testimony, very brief testimony
16 from two of the people who submitted affidavits
17 responding to submissions by TDC attacking their
18 affidavits.

19 So first I want to call Carr Eberbach,
20 who had done an affidavit on the issue of noise.

21 MR. EBERBACH: Good evening.

22 MR. PARADEE: Would the witness please,
23 for the record, state your name and spell it.

24 MR. EBERBACH: Yes. My name is Erich

1 Carr Eberbach. Erich is spelled E-R-I-C-H. Carr is
2 C-A-R-R. Eberbach is E-B-E-R-B-A-C-H.

3 MR. PARADEE: Thank you very much. Do
4 you swear that the testimony you are about to give is
5 the truth, the whole truth, and nothing but the
6 truth, so help you God?

7 MR. EBERBACH: I do.

8 MR. PARADEE: Thank you. You may
9 proceed, Mr. Kristl.

10 BY MR. KRISTL:

11 Q Thank you. Mr. Eberbach, where are you
12 currently employed?

13 A I am a professor, a tenured professor, at
14 Swathmore College. I am also chairman of the
15 Engineering Department there.

16 Q Did you prepare the affidavit which is
17 Appellants' Exhibit 25 describing the sound studies
18 around TDC's proposed power plant site?

19 A Yes, I did.

20 Q Have you reviewed TDC's filings on the issue
21 of noise, including the affidavit from Cindy Shepeck
22 from Hills-Carnes regarding a sound study done by
23 Seismic Service?

24 A Yes, I have.

1 Q Are there any industry standards that one
2 should follow when conducting a sound survey?

3 A Yes. It is important. For acoustic measures
4 of noise, the American National Standards Institute,
5 ANSI, promulgates consensus standards to recognize
6 methods and calibration methods for measuring noise.
7 Those are required for good practice in acoustic noise
8 engineering.

9 Q When you did your noise studies, did you
10 follow the ANSI standards?

11 A Yes, rigorously.

12 Q Based on your review of TDC's filings and
13 other information you have on the sound study done by
14 them, can you tell if those industry standards were
15 followed by the seismic survey people in doing their
16 assessment?

17 A The documents presented in the brief did not
18 reference any ANSI standards. In fact, they reference
19 no standards whatsoever. ANSI standards require that a
20 sound study refer to the standard measure.

21 So, because there is no standards mentioned
22 in the seismic surveys, quote the study or the
23 Hills-Carnes documents, there is no information that
24 indicates that they followed the procedure for making a

1 study.

2 Q Are there any industry recognized
3 organizations to which sound engineers and testing
4 companies can belong?

5 A Yes. The Acoustical Society of America is
6 the international organization for acousticians, the
7 people who deal with noise and measure it.

8 There is also the Institute of Noise Control
9 Engineering, INCE. And, finally, The National Academy
10 of Acoustical Consultants.

11 Those organizations together constitute the
12 qualifications of people measuring noise.

13 Q Do you belong to any of these organizations?

14 A Yes, I do. And I am a fellow of The
15 Acoustical Society of America, which is a recognition
16 of my status at (inaudible).

17 Q Based on your review and research,
18 can you tell if anyone from seismic survey or the other
19 TDC companies belong to any of these organizations?

20 A I did my best due diligence to discover
21 anyone who did seismic surveys, or Phyllis Carnes, who
22 has qualifications in either The Acoustical Society of
23 America and The Institute of Noise Control Engineers,
24 or a member of the National Academy of Acoustical

1 Consultants. I could find no evidence of anyone in
2 those companies belonging to those organizations. I'm
3 not saying they don't, but it's not obvious.

4 Q Were you able to determine the location of
5 the sound studies that were done by seismic survey?

6 A Yes. There was a document provided to the
7 public in the fall that showed locations of the eight
8 measurable locations made by seismic surveys. And so I
9 was able to revisit those, and five of those measured
10 at the (inaudible)

11 Q And you actually tested those?

12 A Yes.

13 Q Are other sites similar to or different from
14 the residential sites that you have tested as part of
15 preparing your affidavit?

16 A With two exceptions, six of the sites, the
17 seismic surveys were chosen on busy, noisy
18 thoroughfares, roads. And I indicated measurements
19 there, as well as making some in the back yards of
20 neighbors who live in the neighborhood north of the
21 proposed site.

22 Q Would selected sites near busy highways or
23 intersections, for example, would that affect the noise
24 numbers that might be measured?

1 A Yes, absolutely. My measurements show that
2 the noise along the roadways was much higher than the
3 backyards of the residents, the neighbors, not
4 surprisingly.

5 Q Did the materials in TDC's filings that you
6 reviewed alter your opinion as you expressed in the
7 affidavit?

8 A No, it did not. It is clear that
9 measurements of noise that are made along busy roadways
10 tend to increase the measurements of the (inaudible)
11 and relative to what neighbors would experience in
12 their homes.

13 Q I think you testified -- Nothing further.

14 MR. BERGSTROM: Does the Board have
15 anything further? I have one brief one. I'm very
16 sorry about this question: I realize this is
17 (inaudible). But did any third party, you know,
18 calibrate your equipment?

19 MR. EBERBACH: Yes. Absolutely.

20 MR. BERGSTROM: Okay.

21 MR. EBERBACH: It's required by ANSI
22 standards.

23 MR. BERGSTROM: I think that it would
24 behoove (inaudible) to this witness (inaudible) that

1 the Board (inaudible)

2 MR. PARADEE: Mr. Kristl, calling
3 eyewitnesses was not something that we had
4 contemplated when we did the stipulation. And so, in
5 the interest of fairness, I think if the other
6 parties would like to ask this witness any questions,
7 they would be allowed to do so, provided it would
8 subtract from their remaining time and it would not
9 subtract from your time.

10 MR. FORSTEN: For the (inaudible) is
11 not in evidence. Quite frankly, this isn't relevant.
12 So I don't have any questions of this witness because
13 (inaudible). The representation stands. We are
14 going to comply with the noise (inaudible) applicable
15 in Newark law.

16 And if Mr. Eberbach wants to defend or
17 criticize, we submitted a two-page letter that raised
18 some questions about it. I think that's fair. But
19 if he wants to criticize -- it's not in evidence, but
20 that's a question for the Board. But I think
21 (inaudible sentences).

22 MR. PARADEE: Mr. Forsten, I understand
23 --

24 (Applause and whistling)

1 MR. PARADEE: Please. You will be
2 asked to leave the room if we have any outbursts.
3 Mr. Forsten, I understand your point. And,
4 Mr. Walton, do you have any questions?

5 MR. FORSTEN: No questions.

6 MR. PARADEE: Thank you, Mr. Kristl.
7 You may be seated.

8 MR. KRISTL: Thank you very much. The
9 other witness that I wanted to call was Afton
10 (inaudible).

11 MR. PARADEE: I'm sorry. Would the
12 witness please state and spell his name.

13 THE WITNESS: Afton, A-F-T-O-N. That's
14 the first name. Clarke-Sather. C-L-A-R-K-E, hyphen,
15 S-A-T-H-E-R.

16 MR. PARADEE: Thank you. Thank you
17 very much. Do you swear that the testimony you are
18 about to give is the truth, the whole truth, and
19 nothing but the truth?

20 MR. CLARKE-SATHER: I do.

21 MR. PARADEE: Thank you. Mr. Kristl,
22 you may proceed.

23 BY MR. KRISTL:

24 Q Thank you. Mr. Clarke-Sather, where are you

1 currently employed?

2 A I'm Assistant Professor of Geography at the
3 University of Delaware.

4 Q And you prepared the affidavit that's
5 Appellants' Exhibit 20 describing property value
6 affects of the TDC power plant?

7 A That is correct.

8 Q Have you had an opportunity to review the
9 response to your affidavit contained in TDC's
10 (inaudible)?

11 A I have.

12 Q I want to focus on some of the criticisms
13 that TDC and Mr. Boyd have raised. The first is in the
14 Lucas Davis article, "methodology that you used
15 excluded cogeneration facilities." What does the Davis
16 article say about cogeneration facilities?

17 A Cogeneration facilities were excluded in the
18 data because they tend to be associated with other
19 industrial uses that have an equal or greater
20 (inaudible) An example of this is the (inaudible)
21 facility at Delaware City Refinery. Chemical plants or
22 the refineries (inaudible) essentially (inaudible)
23 structure (inaudible) data. It was (inaudible).

24 (The witness has his back to the

1 reporter and is not speaking into the
2 microphone. The reporter notifies Mr.
3 Paradee that this is inaudible.)

4 BY MR. KRISTL:

5 Q If a power plant is located in something that
6 isn't one of those industrial-type operations, can the
7 power plant still adversely affect property values?

8 A If a power plant is co-located in something
9 that would have no (inaudible) previous property
10 values.

11 Q Another TDC criticism is reference to things
12 like fly ash, uranium and thorium and truck traffic all
13 related as a whole. How many plants in the study were
14 natural gas-fired facilities like the TDC proposal?

15 A I will refer you to the 92 (inaudible) gas
16 study (inaudible) medium-size level 384 megawatts,
17 which is (inaudible)

18 Q Now, another thing that TDC referenced was
19 positive effects like increased tax revenues that might
20 come from having the power plant.

21 Did the data study take the positive impact
22 from power plants into account when calculating these
23 property values?

24 A Because the data study was based on

1 (inaudible) from 92 power plants, every one of these
2 power plants has employees; every one of these power
3 plants pay taxes.

4 So those affects, those positive affects, are
5 taken into the analysis. They were mitigating affects.
6 It actually looked for evidence of spillover affects
7 from (inaudible) property values (inaudible) didn't
8 find that evidence. But it was something he was very
9 acutely aware of.

10 Q One of the other things that was raised by
11 TDC was that the plants in the Davis' study were rural.
12 Does the Davis study apply only to rural power plants?

13 A Well, most power plants were sited in rural
14 areas, including (inaudible) as well (inaudible).
15 Population density was one of the variables that was in
16 the control coordinates (inaudible) that had control
17 coordinates, as were local market affects (inaudible)

18 Q And in the course of your preparation of your
19 affidavit, did you actually consult with Professor
20 Davis?

21 A Yes. I had a conversation with him.

22 Q Based on your communications with Professor
23 Davis, do you believe he thinks that his study applies
24 to the TDC power plant?

1 A I was left with the impression that he
2 doesn't believe it applies to the power plant.

3 Q Do the materials in TDC's filing affect the
4 opinions that you expressed in your affidavit?

5 A No, they do not affect my opinions at all.

6 MR. KRISTL: Nothing further.

7 MR. PARADEE: Thank you. Do either the
8 City or TDC have any questions of this witness?

9 BY MR. FORSTEN:

10 Q Mr. Clarke-Sather, thank you for being here.
11 Just so we are clear, you are a professor of geography?

12 A Yes.

13 Q So you are not a (inaudible)?

14 A No.

15 Q And you are not a (inaudible)?

16 A I do work for (inaudible).

17 Q But you are not a (inaudible)?

18 A I am not a (inaudible), no.

19 Q (inaudible - Mr. Forsten is not speaking into
20 the microphone)

21 A I am an evaluation (inaudible) but I do not
22 specialize in evaluation (inaudible), no.

23 Q And for your affidavit, did you do any
24 studies of the residential housing market in the Newark

1 area?

2 A The data that I used were based on the census
3 data from the American community survey from 2012
4 (inaudible)

5 Q I am not asking for the source. I'm just
6 asking -- I mean how did you get this (inaudible)
7 houses at (inaudible)

8 A Three houses (inaudible)

9 Q So, as I read your affidavit, I take three
10 houses, and you said they are so far from the site and
11 based (inaudible)

12 A Yes.

13 Q So it was a mechanical application of the
14 paper to 3,000 (inaudible)

15 A It was one portion of that with (inaudible)

16 Q And are you familiar at all with the site
17 plan for Davis (inaudible) survey?

18 A Insofar as I evaluated it for (inaudible) --

19 (The reporter is motioning to Mr.

20 Paradee that she cannot hear this

21 exchange.)

22 MR. PARADEE: Mr. Forsten, I'm sorry.

23 If I could just interrupt briefly, the court reporter
24 is having trouble picking up some of this. If both

1 of you could be a little more careful while speaking
2 directly into the microphone.

3 BY MR. FORSTEN:

4 Q Did you review the site plan for the
5 facility?

6 A Yes, I did.

7 Q And what did that site plan show?

8 A It shows (inaudible) sources for (inaudible)
9 associated with a (inaudible) turbines. And there was
10 (inaudible)

11 Q I'm going to show you what is attached as
12 Exhibit 18 to our document and that (inaudible) some of
13 the -- I have forgotten. I think the court reporter
14 has marked as Exhibit 1. Have you seen this aerial
15 photograph before?

16 A It does look familiar.

17 Q And so, based on this aerial photograph, do
18 you believe that any of the residents will be able to
19 see the cogeneration facility?

20 A Without performing a site design analysis,
21 which can be very easily done by (inaudible), I cannot
22 (inaudible)

23 Q So you don't know?

24 A Not without a (inaudible) survey.

1 MR. FORSTEN: I have no further
2 questions.

3 MR. PARADEE: Thank you Mr. Forsten.

4 (Applause)

5 MR. PARADEE: Please hold your
6 applause. Mr. Forsten, do you have any other
7 questions?

8 MR. FORSTEN: I do not.

9 MR. PARADEE: Okay. Thank you,
10 Mr. Forsten. Thank you, Mr. Walton. Mr. Kristl, you
11 may proceed.

12 MR. KRISTL: Now what I would like to
13 do is sort of summarize what we believe our positions
14 are. In order to do that, I have prepared (handing
15 out documents) -- I have prepared a booklet which has
16 some documents in it that I think will assist us as
17 we go forward. We have also put those documents into
18 a slide show which we will be able to show at the
19 same time.

20 The issue here is about whether or not
21 the definition of "accessory use" is met by the power
22 plant. And also the issue is about whether or not,
23 if it is an accessory use, does it impair the
24 neighborhood.

1 We believe that the project fails to
2 satisfy the ordinance in both regards. We want to
3 start first with the definition of accessory use.
4 You have seen it already. Customarily, incidental,
5 and subordinate, those are the three key concepts.
6 And so I want to go through all three of those.

7 First, the next slide, deals with
8 what's customarily? Well, the statute doesn't define
9 it. But the statute says use Webster's, so that's
10 what we did.

11 Webster's, for "customarily," says "by
12 custom, on a customary (inaudible) So those are the
13 words that really drive the definition here. And I
14 have got both of them.

15 What they say is that customary is
16 something that's commonly practiced, used, or
17 observed, familiar to long use or acquaintance.

18 Custom is a course of action
19 characteristically repeated under wide circumstances,
20 a usage or practice that is common to many.

21 Delaware law echoes this notion. In
22 the Key case, which we cited in our brief, and we
23 included a copy in our binders of exhibits, says
24 "customary, in the context of accessory use, requires

1 full scrutiny to determine whether the proposed use
2 is commonly, habitually, and by long practice been
3 established as reasonably related to the primary use.

4 The question really in this case is
5 whether or not data centers with power plants that
6 run in island mode, which is just what TDC says it's
7 going to do. Are those data centers, in the words of
8 Webster's, commonly practiced or observed?

9 In the words of McCain, is that data
10 center with the power plant the island mode, is it
11 commonly, habitually, or by long practice been
12 established? The answer is no.

13 How do we know that? Well, first TDC
14 says it. In many representations made to the City
15 and to the residents of Newark, TDC has said things
16 like, "The TDC Data Center will be the first data
17 center which is built using this combination of
18 existing technology."

19 They have said, "Using this technology,
20 this combination of a data center with a power plant
21 is so unique, we have a patent pending on the
22 design."

23 And on their website, TDC says, "No
24 other company in the world has co-located a

1 high-density data center with a high-efficiency
2 cogeneration power plant."

3 TDC says it's different. And that
4 brings us really to the next tab, which is tab three,
5 and that's the patent application. Now, why are we
6 harping on the patent application? Do I care about
7 whether or not the cup covers up the coffee or no?

8 What I care about is what the patent
9 application says. Because in order to get a patent
10 in the United States, you have to prove that what it
11 is you want a patent for is new, is novel. And
12 that's why you are entitled to the novelty that the
13 patent will give you. You have come up with a new
14 idea.

15 So the president of TDC, Mr. Robert
16 Krizman; the CEO of TDC, which is Gene Kern, they
17 filed a patent application. And what is it that they
18 say is new and novel? Well, tab three in your book
19 gives you that. And the first page is just showing
20 you that that's the cover of it. But really the page
21 I wanted to look at is the second page of the tab.

22 Here is what they claim is new and
23 novel: "An apparatus comprising a power plant and a
24 data center located on the same site." That's what's

1 new and novel according to the president and the CEO
2 of TDC. So they say this is something that hasn't
3 been done before.

4 Well, now what TDC and the City are
5 saying is, "Oh, no, no, no, no, everybody is doing
6 this," which is kind of interesting, given that the
7 president says nobody has, and TDC says "nobody in
8 the world." They say everybody does it. What do
9 they say? Everybody does power generation on the
10 site. You have got a backup generator, then that's
11 power generation.

12 And so the argument really is that it's
13 customary, it's commonly done by everybody because
14 there is power generation in some form on the site of
15 data centers.

16 And I think that that argument doesn't
17 fly. And it doesn't fly for a couple of different
18 reasons. First, TDC says it's different. Maybe we
19 shouldn't believe them. But they say it's different.
20 The president says it's so different, it's so new and
21 so novel, I should get a patent for it.

22 Second, island mode, which is what TDC
23 says they are going to do, is fundamentally
24 different. You know, in a backup situation, you are

1 running off the grid. If the power goes down, your
2 batteries kick in, and then the generators kick in to
3 provide just the IT critical load until the utility
4 comes back on. And then you turn off your backup
5 generators, and you go back to using the grid.

6 What TDC is saying, "We are not going
7 to have a connection to the grid. Instead, we are
8 going to provide all the power ourselves. So we have
9 got to build a system that is not just enough power,
10 but we gotta have all this backup power, which means
11 we have gotta have a lot more equipment, a lot more
12 facility, a lot more complicated system."

13 That's a difference in kind from backup
14 generators for data processing with a data center.
15 That's different in kind.

16 And the third reason why I think this
17 argument of generation on site is enough to justify a
18 279-megawatt power plant is because it leads to an
19 absurd result.

20 You know, every residential category,
21 every residential district in the City of Newark's
22 Zoning Code, allows accessory uses in a residential
23 district.

24 And I'm pretty confident that there are

1 people in the City of Newark who, having endured one
2 too many power outages when the storm comes through,
3 went over to Lowe's and bought themselves a nice
4 little backup generator.

5 They weren't off the grid most of the
6 time. But you know what? When the power goes down
7 because some branch knocked out the power line, they
8 fire up a backup generator that runs the refrigerator
9 and everything else. And when the grid comes back
10 on, they turn off the generator and put it away.

11 By the logic that's being used by the
12 City and by TDC, because there is a backup generator
13 happening at houses throughout the City of Newark,
14 then that means everybody in the residential zone can
15 have a power plant in their back yard. (Laughter in
16 audience.)

17 It's power generation. It's on site.
18 It's related to the use. That's a crazy and absurd
19 view of what that means. Power generation isn't the
20 issue; it's what TDC wants to do, which is an island
21 mode.

22 And nobody, nobody does it like that.
23 It's not common. It's not habitual. It's not
24 recognized by long practice. This is not customary.

1 The next issue, tab four, is about
2 incidental. You saw the definition. It's
3 subordinate; it's non-essential. That's what
4 Webster's says. And 32-4(b) tells us follow
5 Webster's.

6 But what both TDC and the City want you
7 to do is to say no, no, no, don't focus on the
8 non-essential stuff. I can't blame them. This power
9 plant is essential to the operation of this data
10 center. Without the power plant, the data center
11 doesn't work. All right? It's not non-essential.
12 It's at the very core of what TDC wants and needs to
13 do.

14 But they say, "Oh, no, no, no, that's
15 not the test. Go look at the Wiggin case, because
16 the Wiggin case has language which says there has to
17 be a reasonable relationship to the primary use."

18 That's the test they want you to apply.
19 Here is the problem: The Wiggin case relies upon the
20 case out of New Jersey called Charlie Brown of
21 Chatham versus the Board of Adjustment of Chatham
22 Township.

23 And for those of you keeping score at
24 home, that's 495 A.2d 119. And that case involved a

1 restaurant that wanted to build sleeping quarters for
2 its employees and said that sleeping quarters were an
3 accessory use.

4 The Court said, "No, it's not." And
5 here is what the Court says, that the Wiggin court
6 relied upon. "The word incidental, as employed in
7 the definition of accessory use, incorporates two
8 concepts. It means that the use must be one which is
9 subordinate and minor in significance. It must also
10 incorporate the concept of reasonable relationship
11 with the primary use."

12 Two concepts: Reasonable relationship
13 and minor insignificance. This power plant isn't
14 minor insignificance. It's the core. It's what
15 makes this data center work. And so it's not
16 incidental. It's totally essential. And, therefore,
17 it can't be that part of the definition in the Code.

18 Finally, subordinate: Tab 5.
19 Webster's definition of subordinate, "placed in a
20 lower rank, class, or order. Holding a lower or
21 inferior position."

22 The problem here is about a sale of
23 power. And I heard Mr. Walton today say, "Well,
24 don't worry about the sale of power, because we put

1 this 30 percent tab." And I think he said, in
2 response to the question that was raised by
3 Mr. Hudson, and it's clear in the affidavit of
4 Ms. Feeney Roser, who is (inaudible), that anything
5 above 30 percent sale of electricity means you are
6 starting to get towards primary use. And that's not
7 allowed as an accessory use.

8 Mr. Walton claims, "Don't worry. They
9 will never sell more than 30 percent. Because we
10 have got a provision which says, you know what, if
11 they need less power, we can adjust it down."

12 I read the letter after he said that.

13 I can't find a condition that says that. What does

14 the letter say? It says you can sell up to

15 30 percent of the required operating capacity, the

16 designing amount that you need.

17 Appellants' Exhibit 26 was the
18 affidavit of Michael Griffin, who went and looked at
19 the data about this. And what he found was that TDC
20 (inaudible) 451 research said all you are going to
21 need to do is to provide 200 watts of power per
22 square foot data center space. That's all your
23 customers are going to want.

24 But they designed it to be three times

1 as large. And if you are running off the design,
2 that means they get to have that cushion of an extra
3 400 watts per square foot that they can sell.

4 The affidavit tells you that the
5 percentage is not 30 percentage; it's more like
6 50 percent of the power that's going to be generated.
7 And by the Feeney Roser affidavit, that, itself, is
8 enough to show it's not subordinate. Look, it's not
9 customary. Nobody else does it. It's not
10 incidental, because it's essential to the operation
11 of the data center. And it's not subordinate,
12 because they are going to make a ton of money selling
13 a ton of electricity. This isn't an accessory use.

14 Okay. You might disagree with me. You
15 might say, "Well, no, we will find it is an accessory
16 use." Then that gets us to the second issue.

17 Section 3253 of the Code says that
18 accessory use shall not impair the neighborhood.
19 That raises two questions. First, what's the
20 neighborhood? The City kind of has a really
21 interesting sort of evolving view on this.

22 They started out by saying, "You know
23 what? The neighborhood is just the STAR Campus."
24 Then it hits March 14 filing, and it says, "No, no,

1 no, it's not the STAR Campus; it's the STC zone."

2 And that's kinds of important. Tab 6. Tab 6 is the
3 zoning map. It's the zoning map for the whole thing.

4 That's the first page you have there.

5 But the second page is a (inaudible). This is the
6 STAR Campus as shown on the zoning map. And you know
7 what? It's not all STC zoned. Just like Ms. Hoffman
8 said, there is this big thrusting shape that's zoned
9 MI. That's where the Bloom Energy facility is at.

10 So here is the odyssey of the City's
11 position. Imagine a person who is standing on the
12 eastern edge of that MI zone there just inside the
13 line. He is getting the sound. He is getting the
14 air pollution. He is getting all the effects of that
15 power plant. But you know what? According to the
16 City, he is not in the neighborhood. You can't talk
17 about that. (Laughter)

18 He takes one step back eastward so that
19 now he is in the orange of the map. Now those
20 impacts matter because he is in the neighborhood.
21 That's crazy! (Laughter)

22 And it's crazy because the notion of
23 neighborhood is about an area around; it's about
24 vicinity. Look, I'm not making this up. The Supreme

1 Court of Delaware, the Cooch's Bridge case -- we gave
2 you a copy of that in the appendices, binders of
3 exhibits. They said, "You know what? That
4 rock-crushing operation just outside of Newark, it
5 was going to send plumes up in the air that would go
6 a mile away."

7 It didn't say, "Gee, we only care about
8 what's in the zoning district." It said a mile away.
9 And that's enough evidence to show impairment of the
10 neighborhood. It's distance, not (inaudible)

11 And you know what? I think that there
12 are some provisions that tell us that -- oh, one
13 other thing I want to follow up on. It's the next
14 tab.

15 This is actually a picture that
16 Mr. Forsten had. Again, it's kind of dark, so I'm
17 sort of -- I apologize for that, as well. But we
18 have a concentric circle, some circles that are drawn
19 around the power plant.

20 That little green square that's on the
21 yellow line, that's the Milbury-Steen house. The
22 other green things, they are all the other named
23 appellants that I represent. That's their houses.
24 The farthest one is on the red line, which is 2,000

1 feet away.

2 Now, according to the City, their
3 impact of noise, air pollution, or whatever, doesn't
4 count. But you know what? Somebody who is to the
5 right of the red line, maybe 50, 100, 200, 300 feet
6 to the right of the red line on the STAR Campus,
7 their impacts matter because they are in the
8 district. I don't think that's what neighborhood
9 means. Not only does the case law tell us that
10 that's probably not the case, but the ordinance tells
11 us that too.

12 The next tab. We have already talked
13 about this. Let's go to the next tab, please. The
14 next tab is Tab 9. That's Section 3217 of the zoning
15 ordinance where it creates a zoning district called
16 BM, neighborhood shopping.

17 And if you look down that list, number
18 17 is something called a neighborhood shopping
19 center. Makes sense. That's what you get in a
20 neighborhood. Right? It turns out that the Code
21 actually does define what a neighborhood shopping
22 center is. That's the next tab, Tab 10.

23 It's defined in Section 32-4(a)78. And
24 there it says that a neighborhood shopping center is

1 a group of more than one retail store, personal
2 services, establishment, or offices located from the
3 central business district to serve the local shopping
4 needs of the residential area in which it is located.

5 Notice that the definition doesn't say,
6 "Well, it's the neighborhood defined by the zoning
7 district." It says it's defined by the area, the
8 people who live around the shopping center. It's a
9 definition that uses an area, a distance concept.

10 And you know what? If you apply the
11 City's interpretation that a neighborhood can only
12 refer to people who live in the actual zoning
13 district, guess what? There could be no residential
14 area because residential uses are not permitted in BM
15 districts. Nobody can live in one.

16 For the City's definition or
17 application to make sense, it ends up with a
18 (inaudible). It doesn't make any sense at all
19 because that's not what neighborhood means.

20 All right. And so we have got the
21 definition which suggests area. We've got the BM
22 district in 32.17, which suggests area instead of
23 district.

24 And you know what? Even this Board's,

1 the provisions related to this Board's operations
2 tell us something about what the ordinance is trying
3 to get at. That's the next tab, Tab 11.

4 It's Section 3270 in the zoning
5 ordinance. And this is the one that says this is
6 what the Board, you, need to do during the public
7 hearing.

8 And one of the things you need to do is
9 you need to give notice by registered mail to the
10 property owners of the five pieces of property, the
11 five parcels going out in any direction from the
12 property that is the subject matter of appeal.

13 Now, if all we cared about was
14 neighborhoods defined by districts, why would we look
15 at five properties in any direction? It's because
16 five properties in any direction are the people who
17 are most likely affected by the decision that the
18 Board is going to make. And so those are the people
19 who you most likely want to be at hearings of this
20 nature. That's not district driven. It's distance
21 driven. That's what neighborhood means.

22 And you saw back on the earlier
23 picture -- and if you go back to it, it's tab seven,
24 the appellants lived -- at least the named appellants

1 live very close to this facility. They are the ones
2 who get to hear the sounds, who can feel the effects,
3 a lot lower closer than almost half of the STC
4 zoning district that the city wants to (inaudible)

5 All right. I think neighborhood pretty
6 conclusively says you have to look at an area around
7 the plant and not look at the district.

8 So is there going to be impairment? We
9 have heard a lot of argument about that tonight, so
10 let's talk about it. First, air pollution. No one,
11 neither the City nor TDC, has disputed Dr. Power's
12 affidavit, which is Appellants' Exhibit 24, that says
13 pollution causes people to get sick and that air
14 pollution from this facility will worsen the
15 respiratory conditions that have already been
16 detected by the neighborhood's health survey, the
17 results of which are actually in the exhibits -- I
18 believe it's 35 to 100 -- that you have. Undisputed.

19 Instead, what they try to do is divert
20 your attention. The City says, "Well, look, DNREC
21 takes care of that. That's not our job." One, when
22 the city wants to enforce an air pollution, Tab 12 is
23 the idling ordinance that the City of Newark has.
24 (Laughter)

1 And, gee, when they wanted to pass this
2 clause, they said things like the, "The City of
3 Newark wishes to protect the (inaudible) of our
4 environment." They were very concerned about these
5 vehicles left idling contributing air pollutants. So
6 that's why we passed the statute.

7 If the City wants to regulate or
8 control air pollution, they can do it.

9 Secondly, the ordinance doesn't give
10 the job of enforcing zoning to anybody other than the
11 City. They don't say, "DNREC, we wants you to take
12 care of the zoning issues."

13 And, third, we don't say DNREC can't do
14 the job. We mean, A, they don't focus on the
15 neighborhood, the area around the power plant; they
16 focus on the State of Delaware -- what's the air
17 going to be for the whole state -- not the
18 neighborhood.

19 And what Appellants' Exhibit 242 tells
20 us is there aren't any monitors that DNREC has in the
21 neighborhood. DNREC couldn't tell you if there was a
22 bad impact or not. So the proof is there on the
23 book.

24 Now, TDC says we don't (inaudible) blue

1 (inaudible). Less than the grid? Well, maybe the
2 grid in D.C., because that's all they give you. They
3 don't give you anything about what happens in Newark.

4 And, secondly, wherever the grid things
5 are, they are miles away. They are not 1,000 feet
6 away from you generating those pollutants which,
7 because of low stats, means the pollution gets to the
8 ground faster.

9 The other thing they say is, "We
10 pollute less than Chrysler." Last tab. This is a
11 table from -- table three from Mr. Barringer's
12 affidavit.

13 And he gives you a chart. And so what
14 I did is I said, you know what, I will go through and
15 I will put pink for the things where the numbers are
16 higher and I'll put yellow where it's lower. Guess
17 what? Four of the six pollutants, the numbers are
18 higher under TDC. It's only VOCs and sulfur dioxide
19 where Chrysler is higher.

20 And if you look at affidavit -- I'm
21 sorry -- the Appellants' Exhibit 29, that's the
22 affidavit of Abigail (inaudible). And she says, you
23 know what, not all pollutants are the same. Some are
24 worse than others.

1 The EPA has actually come up with a
2 methodology that allows you to figure out the bad
3 ones, to give them more weight, and to give the less
4 bad ones less weight.

5 So she applied that application and
6 that methodology here. And what does she find? That
7 EPA -- that, according to that methodology,
8 Chrysler's was 6,900 tons per year; TDC's is
9 71,000 tons per year, more than ten times higher.
10 Okay? It's worse than Chrysler. If Chrysler even
11 (inaudible). I agree with Ms. Hoffman. It shouldn't
12 even have (inaudible) about that.

13 Property values: Their only argument
14 is that they have studied (inaudible). You just
15 heard Mr. Clarke-Sather tell you yes, it does. He
16 takes those things into account and still comes up
17 with an amount that shows that there is a decrease in
18 property value when you have a power plant.

19 We gave you the study from Mr.
20 Eberbach, and it's really unrebutted. They sent
21 somebody out to stand next to a busy highway and say
22 gee, the numbers are high. What did he find? That
23 in the Milbury-Steen's back yard it's 30 to 40
24 decibels.

1 They say, "Don't worry. We are going
2 to comply with the law. What the law says is it's
3 gotta be 52 decibels." And in his affidavit he
4 specifically says, if it's 52 decibels at the
5 property line, which is what the law requires, it's
6 going to impact their property because it will cover
7 over the natural sounds that they would otherwise be
8 able to hear.

9 There is air pollution and health
10 effects; there is property value loss; there is
11 noise, an increasing amount of noise levels -- all of
12 which are legitimate grounds to find an impairment.

13 Look, even if it's an accessory use in
14 compliance with the ordinance, the letter in saying
15 it complies with the ordinance is wrongly issued, and
16 that's why this should be retracted.

17 And I'm asking you to order that the
18 city retract it back, because that's what the law
19 requires. Any questions?

20 MR. PARADEE: Thank you, Mr. Kristl.
21 Any questions for Mr. Kristl? Mr. Kristl, by my
22 count, you have three minutes remaining. And at this
23 point, if the City and TDC would like to present some
24 rebuttal arguments, then, by my count, Mr. Walton,

1 in Mr. Barringer's affidavit. On page seven of his
2 affidavit, that was Exhibit 20, Mr. Beringer
3 expresses those concerns.

4 You hear about the patent allocation.
5 This is not the first (inaudible) data center. We
6 submitted an affidavit for Mr. (inaudible) where it
7 said numerous data centers that were off grid. So
8 did the City. That's not actually the patent claim.
9 It's part of the patent claim. It's not the whole
10 patent claim.

11 And, in any event, there are 20 data
12 centers that are off grid, so (inaudible).
13 Mr. Kristl referred to it. So, again, that was in
14 our papers.

15 There is no claim that noises will
16 violate city code. There just isn't. And if we
17 comply with the code, case law says if we're no worse
18 than other uses which also comply with the code, then
19 that's not a basis to say we impair the neighborhood.
20 That's what the law says. I mean, is there any noise
21 caused by this? Well, sure, there is noise caused by
22 every use. But if we are complying with the law,
23 that's all we can do.

24 They talked about the (inaudible).

1 And, again, all I can say to that point is that the
2 study says it didn't apply to cogeneration
3 facilities. The geography professor who couldn't
4 even tell you if somebody could see the cogeneration
5 facility from any direction, no less says, "Well, I
6 applied this study." That's not evidence of an
7 impairment for value. Nobody went out and looked at
8 the market to see what would or would not happen.
9 So, again, I don't know what else to say that I can
10 say about that.

11 People questioned our waste study. We
12 put our waste study in evidence. As I said,
13 (inaudible)

14 Someone said, "Well, gee, you could put
15 power generation plants -- or generators in your back
16 yard, and that means you could do power generation.
17 That's not what we are suggesting here.

18 I think, though, that if people decided
19 they wanted their house to be off grid and they had
20 natural gas generating power in their basement and it
21 didn't violate noise standards, I think that would be
22 permitted. People put solar panels on their houses.
23 Guess that they do? They produce electricity for the
24 house, and they access power that's sold back to the

1 grid. That's a power plant.

2 (Laughter in audience)

3 So, again, a lot of what was said, I
4 think, is (inaudible)

5 Let's talk about the air permit issues.
6 We are not going to be allowed to make air conditions
7 worse in a (inaudible).

8 And, again, the suggestion is, "Well,
9 PJM in Washington, D.C. may be doing something." I
10 read you the language that DNREC wrote. DNREC says
11 is that PJM is a major contributor to poor air
12 quality in Delaware. And if we can (inaudible) than
13 PJM, that's going to improve Delaware's air quality.
14 I don't know how many more times I have to say it, so
15 I will stop saying it.

16 I will just make one final summation.
17 If I have other time remaining, I will cede it to my
18 friend, Max. And that's simply this: I mentioned in
19 my opening that there are a lot of people who support
20 this project (inaudible) throughout the city, you
21 know, country, and state (inaudible) about those
22 things.

23 But there was a story last year in the
24 News Journal that the population of New Castle County

1 is 6,500 people moved out, and they weren't
2 (inaudible). Population in this county is
3 (inaudible) not (inaudible).

4 I sit on the school board. When they
5 are graduating our kids from high school every year,
6 and they are creating jobs. Now we have somebody who
7 wants to invest \$1.8 billion in this city. They are
8 bringing a tax benefit. They are bringing jobs.
9 They are bringing a cogeneration facility that's not
10 even necessary for the data center, itself, but it's
11 actually going to be cleaner than the grid.

12 If we can't get this project approved,
13 we are going to chase it out of town. I think we are
14 done, I think we can put up closed signs from I-95
15 north to I-95 south.

16 (Applause)

17 MR. PARADEE: Please hold your
18 applause. You are only taking his time.

19 MR. FORSTEN: That's just how I feel,
20 because I think this is important. And there is
21 nothing that compares the neighborhood based on
22 anything that's been shown, not noise, not air
23 quality, and not property values.

24 This is a great location for this site.

1 If you look at that chart, it is tucked in the very
2 back up against the trees (laughter). There is a
3 railroad switching yard on the one side in the
4 northeast corridor. When you are on Route 4, you are
5 not being going to be able to see it. If you are on
6 the -- if you are on 896 up College Avenue and
7 looking up at the data center across the campus, you
8 are not going to see it. It's just not going to have
9 an impact. It should be approved. It's an accessory
10 use. Thank you very much.

11 MR. PARADEE: Mr. Forsten, before you
12 sit down, I have one quick question. And I think
13 Mr. Hudson has a question, as well.

14 You indicated in your testimony -- and
15 I believe it's also in the record somewhere -- that
16 there are plenty of data centers that operate off
17 grid. Could you just very quickly identify in the
18 record where that evidence is?

19 MR. FORSTEN: Yeah. I have my papers
20 here. If you go to Tab 14, it's the affidavit of
21 Bruce Myatt. Exhibit A lists the number of data
22 centers. For example, the first one he lists is a
23 natural gas data center in Colorado that operates off
24 the grid and sells power to the grid.

1 And then it just goes on and on. HP is
2 going off grid with a data center. They are there in
3 the affidavit. And there is also an affidavit from
4 the City.

5 MR. PARADEE: Thank you. Mr. Hudson?

6 MR. HUDSON: My question is where does
7 the director get the authority to place restrictions
8 on the accessory use?

9 MR. FORSTEN: I think that you have,
10 whenever you are issuing permits as a matter of
11 general law, you have the inherent authority to say
12 to the applicant, "I'm relying on your application.
13 What you are telling me is what I am judging your
14 application on."

15 And so that's what the City has done.
16 We have said to the City that we are building this
17 cogeneration facility because our data center needs
18 an absolute uninterrupted source of power.

19 Now, we are going to be spinning extra
20 power because, if a turbine breaks down, we have got
21 to make sure that we have uninterrupted flow. And
22 you know something? We are spinning that out for
23 extra power, but we're going to be selling it back to
24 the grid. But that's not our primary purpose.

1 And so we told them how much we needed
2 to spin extra. And then, rather than waste it, we
3 are just going to sell it back to the grid. We are
4 not going to have all the turbines running.

5 MR. HUDSON: So your position is that
6 the director has inherent authority to make
7 limitations on the zoning?

8 MR. FORSTEN: When you say "limitations
9 on the zoning," this is not a -- this is basically
10 just an acknowledgment of what the zoning requires.

11 In other words, they found it to be an
12 accessory use. And in order to be an accessory use,
13 (inaudible) customary.

14 And we said to the City, this is what
15 we are planning to do. And the City said back to us,
16 "That's fine, we will take you at your word. As long
17 as you meet this condition, we agree it's customarily
18 incidental and subordinate."

19 MR. HUDSON: Let me ask you about the
20 Cooch's Bridge decision where (inaudible) out the
21 area of a mile radius. What's your position on that?

22 MR. FORSTEN: Oh, that's the rock
23 quarry case?

24 MR. HUDSON: Yes.

1 MR. FORSTEN: You know, with all fond
2 affection towards my friend, Max, I'm not -- I don't
3 think his neighborhood argument ultimately matters
4 here, because there is no impairment based on the
5 evidence, the hard data in front of you. It doesn't
6 matter whether the neighborhood is just STAR Campus.

7 Although I understand why he makes that
8 argument. You have got a railroad line and switching
9 yards on one side. You have got Route 4 on the other
10 and 896. It's a very compact and discrete area. And
11 I understand why he is making that argument. I just
12 don't think it matters, because no impairment is in
13 the evidence in front of you.

14 MR. PARADEE: Are there any other
15 questions of Mr. Forsten? If not, Mr. Forsten has
16 used all of his time. Mr. Walton has two minutes if
17 you want to use it.

18 MR. WALTON: In two minutes it's really
19 hard to say everything that I want to, so I'm going
20 to focus on just two things: Whether or not the use
21 is customary, and whether the "chip" is customary to
22 the use.

23 And, as you may recall, we gave you
24 lots of examples in the beginning. For example, that

1 a tennis court is customary to a residential use,
2 that daycares are customary to churches, that
3 (inaudible) is customary to construction. That a 56
4 megawatt generator for Georgetown University is
5 customary use.

6 And the Appellants tried to say, well,
7 this is not customary, using a dictionary definition.
8 But if you look at every case law, all the case law,
9 and you look at it based on particular facts, if you
10 will go to the slide we provided, it says the "chip"
11 is customary for data center use. It is usual that a
12 CHP is customary for a data center use.

13 Finally, with respect to the
14 neighborhood -- when I answered the Cooch's Bridge
15 question -- the Cooch's Bridge Crossing, that was a
16 (inaudible). That was prior to, as I recall, and it
17 wasn't (inaudible), it wasn't a district change. It
18 was all (inaudible)

19 So with regard to (inaudible). And
20 when Mr. Kristl was going through, and he flipped
21 over the definition of neighborhood, the one that I
22 had put up that he had talked about, because it
23 doesn't say what he says a neighborhood should be.

24 His definition of a neighborhood, the

1 one that they posited, shows that it has to be the
2 neighborhood. It has to be (inaudible)

3 So the bottom line is I would like
4 to -- I'm going to tie up my statements, because I'm
5 not going to go over it. But I would like to submit
6 two things for the record: One is I had asked -- I
7 had asked Mr. Kristl are who are the Newark residents
8 against the power plant. I never did find out. But
9 they gave me a sheet. They gave me a sheet that says
10 "Who are the Newark residents?" And they redacted
11 all the names of who they are.

12 But it's very interesting, though, when
13 it comes to the word "neighborhood," they all had
14 their neighborhood. And guess what? Not a one of
15 them lives within the STC district or the
16 (inaudible), not a one of them.

17 (Laughter and applause)

18 MR. WALTON: Finally, I want to submit
19 for the record (inaudible). It shows a 56 megawatt
20 cogeneration plant is an accessory use to the
21 Georgetown University.

22 MR. PARADEE: Thank you. Mr. Hudson
23 has a question.

24 MR. HUDSON: Just to address one issue

1 on the Georgetown case.

2 MR. WALTON: I'm sorry. I couldn't
3 hear you.

4 MR. HUDSON: I'm sorry. Just to
5 address this one question I have about the Georgetown
6 case with the "chip." In that case it was the
7 university was planning on using up to 98 percent of
8 the power generated.

9 MR. WALTON: Well, they were going to
10 use some percentage of the power. But, quite
11 frankly, I just don't remember the percentage of
12 power. But the issue in that case was (inaudible).
13 Dominion Energy actually used the energy power
14 purchased (inaudible). The power was actually used
15 by Dominion Energy and not the university.

16 MR. HUDSON: But it was only done that
17 way because the university could not physically
18 construct power to (inaudible) to them?

19 MR. WALTON: I think it was done that
20 way. I think that's a fair statement.

21 MR. HUDSON: My question is I'm having
22 issues between the Wiggin case and this, between the
23 Wiggin case and the (inaudible) case.

24 MR. WALTON: Yes.

1 MR. HUDSON: The issue was the excess
2 number of (inaudible)

3 MR. WALTON: Correct. Yes.

4 MR. HUDSON: And, like you said, in
5 Georgetown the projected use was going to be
6 98 percent of the power generated. I guess that's
7 I -- want to be absolutely clear. It seems that that
8 excess is the amount that is causing an issue.

9 MR. WALTON: I understand. You have to
10 look at it's going to require an operational need.
11 Okay? And if you take -- go back to (inaudible) and
12 what that says is 14 tow trucks for (inaudible) bay
13 repair shop. And that's what it was. They were the
14 appellant.

15 But that didn't relate to the actual
16 need of the service beds that were there (inaudible)
17 tow trucks. Here, as we explained, there is a very,
18 very detailed operational need, because the power
19 generated is also to backup or redundant capacity N+2
20 which we discussed (inaudible). That's the backup
21 power, which is much different than (inaudible).
22 It's a need.

23 MR. HUDSON: Thank you.

24 MR. PARADEE: Are there any other

1 questions of Mr. Walton? If not, by my count,
2 Ms. Hoffman has 32 minutes remaining, and Mr. Kristl
3 has three minutes remaining.

4 MS. HOFFMAN: How many did you say I
5 had?

6 MR. PARADEE: Thirty-two.

7 MS. HOFFMAN: Thirty two?

8 MR. PARADEE: Yes. You spoke from 7:35
9 to 7:48, which is 13 minutes. You, therefore, have
10 32 minutes remaining.

11 MS. HOFFMAN: I thought I was giving
12 some to Mr. Kristl. Can I give some to Mr. Kristl?

13 MR. PARADEE: That's fine.

14 MS. HOFFMAN: I just have a couple of
15 comments related to TDC's remarks. TDC said that --

16 (People in the audience are yelling
17 that they can't hear her.)

18 MS. HOFFMAN: I'm sorry. If they go
19 above the threshold, that just means they have to do
20 more. But what "doing more" doesn't mean is that I
21 have to clean it up. I have to get down to the
22 threshold.

23 They are so far over the threshold,
24 they can't bring it down to the threshold, so they

1 have to buy emission reduction credits. And emission
2 reduction credits do nothing for Newark's area, which
3 is just as polluted even though they use emission
4 reduction credits to get air permitting.

5 "Cleaner than the grid" is another
6 catch phrase. But just because they make it cleaner
7 than the grid -- and I don't know if they are or
8 not -- that doesn't do anything for Newark's area.

9 Because, as Mr. Kristl said, the power
10 going to the grid is coming from a power plant
11 someplace not in Newark. So when you're looking at
12 the impairment issue for Newark, you have to consider
13 Newark and not the overall quality of Delaware,
14 because that's not why we are looking at the power
15 plant. We are looking at the power plant in the
16 neighborhood in Newark which is close to the
17 vicinity, the proximity to the power plant.

18 MR. PARADEE: Ms. Hoffman, does that
19 conclude your remarks?

20 MS. HOFFMAN: It does. And I'm sorry.
21 I didn't ask if you had questions.

22 MR. PARADEE: That's okay. Are there
23 any questions of Ms. Hoffman? If not, Ms. Hoffman,
24 you only used two minutes of your time. That leaves

1 30 minutes that you may cede to Mr. Kristl. He also
2 has three minutes of his own.

3 MR. KRISTL: I really do not want to
4 take the entire 33 minutes. I just have a couple,
5 just to respond to some comments that you made.

6 First, there was the citation to
7 Mr. Myott's affidavit about the 29 facilities that
8 are off the grid.

9 If you are going to look at that
10 affidavit, I also suggest that you look at
11 Appellants' Exhibits 240 and 241. That's what KB
12 Gifford went and looked at every single one of those
13 citations, as well as the citations by the City and
14 found that none of them are totally off the grid.

15 Second, Mr. Forsten likes this
16 quotation from the Bloom Energy decision by the
17 secretary. But the issue of air pollution -- let's
18 make sure we are clear what we are talking about.
19 The issue of air pollution is whether or not there is
20 an impairment of the neighborhood.

21 Ms. Hoffman suggested this, but I just
22 wanted to emphasize the point. All the secretary of
23 DNREC said was that there can be a benefit to the air
24 quality of Delaware. That's not the neighborhood.

1 And we wouldn't know if there was a
2 benefit or a detriment to the neighborhood, because
3 DNREC doesn't have the monitors in place to be able
4 to answer that for you.

5 Now, Mr. Walton asks, "Well, what's our
6 definition of the neighborhood?" And I think, if you
7 draw a circle around the power plant -- just draw it
8 around there. Now, whether you call that circle
9 2,000 feet or you call it a mile or whatever, that's
10 the neighborhood; that's the vicinity. And if there
11 is impacts in those areas, then that's relevant to
12 the 32-53 question.

13 The evidence here shows that there will
14 be pollution in that neighborhood, not miles away.
15 In that neighborhood.

16 And Dr. Powder's affidavit still has
17 not been responded to. It says that will cause bad
18 health effects for people who lives around the plant,
19 who live in the neighborhood.

20 That's all (inaudible). And that, I
21 think, is the proof that shows that the January 17
22 letter was (inaudible). And that's why again I ask
23 to reverse that decision and order it to be
24 (inaudible). That's it.

1 MR. PARADEE: Questions for Mr. Kristl?

2 MR. HUDSON: When does something rise
3 to a level of impairment in these factors?

4 MR. KRISTL: When does something rise
5 to the level of impairment? Well, impairment is
6 defined in the Webster's Dictionary as being sort of
7 a reduction, a diminishment in value or strength.

8 So I think, when we talk about air
9 pollution, we are talking about, health effects. If
10 we're talking about property value, is there
11 diminution, a noticeable diminution in the value of
12 property of people who are living there.

13 And I think, with noise, we are talking
14 about what's the level now. It's 30 to 40 decibels.
15 What's the level going to be? 52 or something close
16 to 52. Can we measure that difference? That's how I
17 think we figure out impairment.

18 MR. HUDSON: So are you proposing
19 nothing that can have any emissions could be created
20 there as an accessory use?

21 MR. KRISTL: No. I don't think so. I
22 don't think so. I mean, I think that -- I can
23 certainly understand, you know, that there might be
24 some activity there.

1 The question is, is that activity
2 harming people in the neighborhood. And what I would
3 suggest to you is that the activity proposed by TDC
4 will have.

5 But I certainly concede other uses that
6 could be -- you know, this is what Mr. Forsten said,
7 gee, some other use. Of course, he never provided me
8 any other uses that would pollute as much as TDC
9 does.

10 And I think that there are uses that
11 could be done that would not adversely impact health.
12 And the University Health Center is not, I think,
13 causing any kind of adverse impacts in terms of
14 worsening people's health.

15 So I think that's the way you can
16 measure it. So I think that there are uses that can
17 be done here that would not give those impairments.
18 And I think that's where I would draw the line.

19 MR. FORSTEN: And regarding the noise,
20 it's your position that an accessory use there that
21 is within legal limits of the City of Newark is still
22 an impairment of the property?

23 MR. KRISTL: Yes. Because right now
24 the Milbury-Steens can go out in their back yard and

1 listen to birds. And after this place is built, they
2 can't go out there and hear them anymore. I think
3 that's a diminution in their ability to enjoy their
4 own property.

5 And that's what the evidence shows.
6 Because what the study said was there is 30 to 40
7 decibels in their back yard. And with this plant,
8 which they have said is going to be 110 decibels, the
9 sound of a (inaudible) at the stacks at the
10 buildings. But, by the time it gets to the property
11 line, we will make sure that it's only 52.

12 Even at 52, it still covers up those
13 sounds, masks those sounds. The language used was
14 "alter the sound scape." So, yes, I think that is a
15 change, and I think that's impairment.

16 MR. BERGSTROM: I just want to make
17 sure. So far the negative impacts (inaudible) kind
18 of disappointed in either side has tried to analyze
19 that is (inaudible). Did you have anything?

20 MR. KRISTL: I think the concentric
21 circles were -- and I'm going to plead ignorance,
22 since I didn't draw them. But they are obviously an
23 easy way to sort of show relative distance.

24 But, you know, obviously, I think it's

1 not as simple as concentric, but I think the people
2 who are close by, like Milbury-Steens and the named
3 plaintiffs that I represent will be suffering impact.

4 MR. PARADEE: Any other questions of
5 Mr. Kristl? If not, are you finished, Mr. Kristl?

6 MR. KRISTL: I am.

7 MR. PARADEE: Okay. Mr. Chairman, at
8 this point in time, having heard from all of the
9 parties, I think it would be appropriate to close the
10 hearing and for the Board to enter into
11 deliberations.

12 So I would recommend that you entertain
13 a motion to close the hearing and enter into
14 deliberations. So you need a motion to close the
15 hearing.

16 MR. BERGSTROM: Do we have a motion to
17 close the hearing?

18 MR. HUDSON: I'll make a motion to
19 close the hearing.

20 MR. BEDFORD: Second.

21 MR. BERGSTROM: All in favor?

22 MR. PARADEE: Let the record reflect
23 there was unanimous. At this point, ladies and
24 gentlemen, the hearing portion of the proceedings are

1 concluded, and the Board will now enter into
2 deliberations, which must happen in public.

3 So, for the benefit of the Board, let
4 me explain what you can and cannot do. You can
5 certainly ask questions of each other. You can ask
6 questions of me.

7 You cannot ask questions of the parties
8 who are the representatives at this point, because
9 the hearing has been closed. You may also assess and
10 argue amongst yourselves about the various positions
11 and arguments that have been presented to you.

12 I would submit, respectfully, that
13 there are four separate issues that you need to
14 decide. And I would recommend that you decide each
15 of these questions by a separate vote. And I suspect
16 that the outcome of those answers will dictate the
17 results ultimately.

18 The first question that has been raised
19 both in the pleadings and here tonight is whether or
20 not the Director of Planning and Development has the
21 authority to impose conditions when granting a zoning
22 certification letter.

23 The second question is whether or not
24 on-site power generation, as proposed by Data Centers

1 LLC, is customarily incidental and subordinate to the
2 proposed data center.

3 The third question is whether or not
4 the power generation, as proposed, would impair the
5 neighborhood.

6 And then the fourth question, which was
7 raised in the pleadings and I believe touched upon
8 briefly tonight by Ms. Hoffman, but otherwise
9 addressed primarily in the briefing, is whether or
10 not the zoning certification letter that was issued
11 in this case is contrary to the comprehensive plan.

12 So I would encourage you to begin a
13 dialogue amongst yourselves, ask whatever questions
14 or have whatever debate you wish to have answering
15 those four questions.

16 But, ultimately, somebody will need to
17 make a motion which gives the answers to those
18 questions. Mr. Chairman, I will turn it over to you.

19 MR. BERGSTROM: Thank you. Gentlemen,
20 I guess we should just take a little -- Does anybody
21 have any thoughts on the authority of the --
22 (inaudible)

23 (This is inaudible to the court
24 reporter, who is not in the vicinity of

1 the Board.)

2 MR. PARADEE: Mr. Chairman, Mr.
3 McKelvey is indicating that he cannot hear you, so I
4 would ask that you speak as loudly as possible.

5 THE REPORTER: Mr. Paradee, is this on
6 the record?

7 MR. PARADEE: Yes.

8 MR. HUDSON: Do you want to come up
9 here?

10 MR. PARADEE: Let's take just a brief
11 break. We will allow the court reporter to come up
12 on the stage so that she can hear and transcribe the
13 Board's deliberations.

14 (A short recess was taken.)

15 MR. BERGSTROM: All right. Let's try
16 to find our seats, ladies and gentlemen.

17 MR. PARADEE: Ladies and gentlemen,
18 will you please take your seats? Ladies and
19 gentlemen, please take your seat so we may begin.
20 Thank you very much.

21 Mr. Chairman, I believe now is the
22 appropriate time to reconvene, and we are in
23 deliberations and on the record.

24 MR. BERGSTROM: Thank you. Gentlemen

1 of the Commission, does anybody want to start to
2 speak their opinion on the authority of the zoning
3 director to impose conditions on the decision for the
4 Zoning Code?

5 I can start myself. I would be happy.
6 Or go ahead.

7 MR. HUDSON: I personally want to hear
8 a little more about this. I did ask one question
9 regarding this. And it seems to be the position
10 of -- and to give you a fair chance -- from the
11 representative of TDC, but that the Director has
12 inherent authority to place the limitations regarding
13 the certification.

14 I was a little troubled by that,
15 especially regarding statements that the Director was
16 attempting to -- I'm sorry, it's late -- infer
17 legislative intent.

18 I'm not sure if that's the proper role
19 for the Director to be doing. And in no way am I
20 impugning on the Director. I'm sure the Director was
21 doing the best at her job.

22 But, nonetheless, I do think that
23 limitations could possibly give rise to regulations
24 that did not go through the channels of due process.

1 MR. BERGSTROM: Well, I was actually
2 pretty pleased with the amount of effort that our
3 zoning director put into making this decision. It's
4 evidenced in the briefs.

5 And I don't see, when you don't have
6 something exactly permitted as a matter of right
7 that's 100 percent within the definition of what's
8 permitted, that it seems inherent in the position, to
9 me, that you have to make these decisions.

10 I'm trying not to interject my own life
11 into that, but that's what I have done for most of my
12 career. So I don't have any question with this one
13 at all, that if you don't have someone to interpret
14 and make decisions on the Code, itself, make
15 determinations, then the ordinance just can't be
16 effective. You do have to have a zoning
17 administrator.

18 And I think we are bound to take that
19 sort of a statement on its own merits. I don't know
20 what our learned consult thinks, but --

21 MR. PARADEE: If you ask me?

22 MR. BERGSTROM: Yeah, I'm asking.

23 MR. PARADEE: If you are asking for my
24 professional opinion, I would say that the Director

1 is being presented with a series of facts by an
2 applicant, and she is being asked whether or not this
3 particular set of facts fits within the ordinance.

4 And I think what happened here is that
5 the director was simply responding to the facts that
6 were presented to her and opining that, if you do
7 this, then it's okay; if you do that, it's not okay.

8 And it would be my view that the
9 Director does have the inherent authority to impose
10 conditions, provided they do not rise to the level of
11 changing the substantive meaning of the Zoning
12 Ordinance.

13 MR. BERGSTROM: And, in fact, she got
14 decisions -- or legal help on this matter from both
15 the City attorney and what the Council provided her
16 to study this issue; so that's where I'm inclined to
17 go.

18 MR. BEDFORD: I agree with what Jeff
19 was saying, as well. I think, provided with all the
20 information, there is somebody to make a decision
21 based on the facts that were presented, and that's
22 clearly the job of the zoning official.

23 But I think that I don't see that there
24 was anything that was done that didn't take into

1 account all sides.

2 MR. MCKELVEY: My observation of the
3 Director of Planning -- Planning Commission meetings
4 and said Council meetings is that she will often
5 describe the development that's being proposed and
6 the requirements that she or the Planning Department
7 has placed on that developer, whether it's a driveway
8 right-of-way or some more mundane things.

9 It's not the sort of thing that gets
10 here for an appeal. But that's the sort of thing I'm
11 familiar with her doing.

12 So I think I follow with John in that,
13 as long as it doesn't rise to some level of creating
14 a whole new law, it makes sense to me.

15 MR. BERGSTROM: All right, then.
16 Number one, can I have a motion? Or is it something
17 you want to continue discussions on?

18 MR. HUDSON: No, I think I will heed
19 the wise counsel of my fellow board members.

20 MR. BERGSTROM: Could someone phrase
21 that in the terms of a motion?

22 MR. PARADEE: Mr. Chairman, the Board
23 is required to make findings. And so the motion
24 should be a motion to find that the Planning Director

1 either does or does not have the authority to impose
2 conditions. And it would be appropriate to entertain
3 a motion to that effect at this time.

4 MR. MCKELVEY: I move that we approve
5 the idea of the concept that the Planning Director
6 does have the authority to make these decisions.

7 MR. BEDFORD: I will second. I will
8 second that motion.

9 MR. BERGSTROM: All right. Then
10 calling for a vote.

11 MR. PARADEE: Yes, call for a vote.

12 MR. BERGSTROM: I mean, by name, or
13 just --

14 MR. PARADEE: Yes, by name, and they
15 should state --

16 MR. BERGSTROM: Their opinion?

17 MR. PARADEE: Mr. Chairman, as each
18 member votes, he should also state his reasoning on
19 the record. Thank you.

20 MR. BERGSTROM: All right, Mr. Hudson.

21 MR. HUDSON: As I said, taking into
22 account the reasons of the other Board members,
23 as well as the advice of our attorney, despite my
24 initial reservations, I can see that this does not

1 rise to the level of regulation regarding all the
2 property.

3 And, therefore, I will approve
4 the motion -- or vote to approve the motion. And,
5 again, I do not want to impugn on the Director by any
6 sorts by my question.

7 MR. BEDFORD: I do vote to approve the
8 motion that the Director acted in good faith in the
9 scope of her position as held.

10 MR. MCKELVEY: I move to approve the
11 motion, based on my understanding of the Director's
12 job in the manner executed thus far.

13 MR. BERGSTROM: I am also going to vote
14 in favor of the motion because the -- I think it was
15 very clear to me that this director was acting within
16 the scope of her position.

17 The second point we have to vote on is
18 on-site power customarily -- what do you call it --
19 an accessory, an incidental use, and a subordinate
20 use to the data center -- or a data center. Anyone
21 want to start?

22 MR. MCKELVEY: I can start with that.
23 I'm troubled by the notion that this is customary in
24 that I see this island mode as being the basis for

1 the novel patent, for instance, or the fact that it's
2 not being done across the board, that it's unique,
3 somehow unique. And can that mean customary? That's
4 where my mind is now.

5 MR. BERGSTROM: Well, I will go next.
6 I am inclined to believe that cogeneration or
7 generation is customary for power plants. In this
8 case we have to decide if it's incidental and that it
9 has a use that's below the -- lower than the original
10 application for the data center.

11 I guess there are many ways to skin a
12 cat if you're going to build a data center. But, in
13 fact, data centers need uninterruptible power somehow
14 to put -- and I'm going to have to take the testimony
15 as word. But to put in 12 acres full of batteries to
16 tell the diesel generators to start up doesn't seem
17 like the best business plan in the world to me when
18 you have got a limited site. I'm interested in what
19 the rest of you have to say.

20 MR. HUDSON: I, too, have issues with
21 whether it's customarily incidental and subordinate
22 too. I have wavered back and forth.

23 The Appellants did bring up a point
24 which I had thought about in reading through the

1 material, that if the need for backup power is an
2 accessory use that can be expanded to a power plant,
3 any business -- and many businesses run backup power
4 for their computers and for their structures that can
5 be expanded. I do have issues regarding that and
6 whether the use of backup power can be extended into
7 the power generation on the site.

8 And also the statements that have been
9 made by TDC in these patents, I think, at a minimum,
10 do raise the question regarding whether this is
11 customarily incidental and, based on the novelty
12 requirement needed for a patent.

13 That's just some of my thoughts for the
14 moment.

15 MR. BEDFORD: Yeah, I guess I have some
16 thoughts on that. I think there were some points
17 where the customarily piece was brought up as, you
18 know, for this particular site, this is what they are
19 trying to do. You know, it presents some, in our
20 readings and stuff, you know, other power plants or
21 data centers that are like this.

22 I don't know if I am comfortable right
23 now with understanding exactly how they intend to
24 look to see where we are going with these. I think I

1 keep going back to the fact that the zoning
2 verification is preliminary and trying to look at
3 this on a case-by-case basis of what they are
4 actually asking to do, if that makes sense.

5 MR. BERGSTROM: That makes some sense
6 to me. But the zoning verification is just exactly
7 that, a verification that the project would be
8 permitted.

9 I am of the opinion that if the law
10 says -- doesn't say you can't do it, then it's
11 essentially a matter of right as an accessory use.

12 To be customary, I think, actually, it
13 was Mr. Walton's brief that talked about the actual
14 standard for what is customary and even whether or
15 not a power plant is customary, an island power
16 plant, and just totally irregardless of what somebody
17 put in the patent application, that the power plant
18 itself is a necessary and a customary and a
19 subordinate use to the data center.

20 They all have to have uninterruptible
21 power supplies. And if we don't have an ordinance
22 that says you can't do it this way, I don't see
23 why -- how we can possibly, for this point of
24 consideration, how we can possibly say that that was

1 something they shouldn't be allowed to do. Perhaps
2 our learned counsel can speak to that.

3 MR. PARADEE: Thank you, Mr. Chair. I
4 guess one point that was raised in the Board's
5 comments that struck me is that the zoning
6 certification letter is a very preliminary
7 determination.

8 And this project, were it to go
9 forward, would still have to come back for site plan
10 approval, I'm sure.

11 There is also another hurdle, if you
12 will, that the project must go through, and that is
13 they have to get an air emissions permit from DNREC.

14 And so you are being asked to review a
15 zoning certification letter that was made at a very
16 early stage in the process. In an effort to
17 determine, based upon facts presented by the
18 applicant, the question proposed to the Planning
19 Director was, assuming these facts to be true, would
20 the use be permitted under the Code as an accessory
21 use.

22 And she rendered her opinion, after
23 considering all the facts and conditions. And she
24 may -- you know, ultimately, some of her assumptions

1 may be proven wrong. And, if that's true, there will
2 be opportunities down the road to hold the applicant
3 accountable for that.

4 In the site planning process and in the
5 process with DNREC, it's very difficult, I think, for
6 the Planning Director to look into a crystal ball and
7 determine exactly what the impacts on neighborhood
8 might be. So much of this is conjecture at this
9 early stage.

10 So I guess what I am trying to say to
11 you is that you have to take this all in context, you
12 know, what information does Zoning or Planning
13 Director have which enables her to reach the
14 conclusions that she reached in her letter, and are
15 those conclusions reasonable based on the facts that
16 were presented to her.

17 I don't know if that answers your
18 question, Mr. Chair, but I hope it's of some help.

19 MR. BERGSTROM: Certainly it is. And
20 sticking to point number two for the moment, the
21 instant, I'm going to say that I am going to be
22 inclined to approve -- make a finding that the
23 Planning Director, in fact, did not err in
24 determining that this power plant was a customary and

1 subordinate use. And I just don't know what else we
2 could conclude.

3 She made that decision with advice of
4 two really good land use firms. And I don't know
5 what else anyone could expect of her.

6 MR. HUDSON: Again, one of the things
7 I'm stuck on is, besides just the claims here, is the
8 novelty of a patent. And I open this patent up again
9 to page four. And it says that what is claimed? And
10 the claim one, which is everything based off of, is
11 that an apparatus comprising a power plant having
12 redundant power sources and a data center coupled to
13 the power plant in which the data center is
14 co-located with the power plant.

15 And Mr. Walton explained his version of
16 the patenting process with the cover of a coffee cup
17 and how it might be specifically designed.

18 My issue with this claim is that it's
19 not -- it seems rather general, which would give rise
20 to the fact that it's not something that is
21 customary. And that's just something I'm still
22 having a hurdle or something that's still a hurdle
23 for me.

24 MR. BERGSTROM: Just if I can answer

1 back, just discuss that for one minute. It's a give
2 and take right now.

3 The power plant, itself, is customary,
4 incidental, and it's subordinate. And there is no --
5 what we are talking about is absolute configuration
6 of the generation system, which, in a moment of
7 opportunity, the appellant or the applicant has
8 decided to file a patent for.

9 Patent claims are not always granted.
10 And the fact is, we are determining what the big
11 picture is, not whether this particular configuration
12 is customary and incidental and subordinate, but,
13 rather, whether the concept of an on-site power
14 generation is.

15 For this point, I can't help but
16 believe that that decision is -- I have to be
17 supportive of it.

18 MR. BEDFORD: Yeah. I think that
19 counsel helped me, because I was still maybe pushing
20 back just to make sure that I heard him correctly.

21 We are at the beginning stages of what
22 was approved for the zoning verification piece. And
23 understanding what was argued here this evening and
24 things of that nature, I am in support of the process

1 at hand that's going on, that has happened so far.
2 Realizing that I didn't write the law or the
3 regulations, but I'm here trying to really look at
4 this case specifically and decide was the City Zoning
5 Manager taking into consideration the facts of what
6 was presented this evening?

7 I'm in support of saying at this point
8 in time I believe that that's the case. It's not my
9 opinion on whether I support their effort or not.
10 It's interpreting what, you know, what has taken
11 place so far.

12 And counsel can make sure that I'm on
13 the right track. Because I'm thinking -- not am I on
14 the right track, but are my thoughts making sense in
15 the process of what I am asking? I mean, am I
16 hearing right as it has been presented to us, whether
17 I believe has the process been followed correctly?

18 MR. PARADEE: I guess the question you
19 are asking me is whether or not the Planning Director
20 committed some sort of error.

21 MR. BEDFORD: Yes.

22 MR. PARADEE: Is that fair to say?

23 MR. BEDFORD: Yes.

24 MR. PARADEE: That's ultimately a

1 question that you have to answer. I think in terms
2 of the process, the process was followed properly.
3 That is, what she did, the way she went about it, I
4 think, was correct. I cannot tell you how you should
5 conclude whether she was right or wrong on the
6 merits.

7 MR. BEDFORD: Right. And I don't mean
8 for you to do that.

9 MR. PARADEE: I understand. The only
10 thing I would say in that regard is that the question
11 specifically before you is whether the use, that is
12 on-site generation of power, is customarily
13 incidental and subordinate to a data center, that's
14 the specific question.

15 MR. BEDFORD: Okay.

16 MR. PARADEE: And that's the question
17 that you gentlemen have to decide.

18 MR. MCKELVEY: We just did say that the
19 Director has the authority to make these decisions.
20 But what I don't think she had at her hands at the
21 time she was making these decisions was the kind of
22 briefing that we have all received and that has been
23 presented here to everyone tonight about the
24 customary, incidental, and subordinate features.

1 This is a very -- this is a kind of a nitpick that
2 has to be picked.

3 And I'm not persuaded that something
4 that's new and different can be customary or that
5 this large power generating facility is subordinate
6 and minor in significance.

7 So I'm (applause) -- I'm conflicted
8 over this.

9 (People in audience are yelling to
10 speak up.)

11 MR. MCKELVEY: I think that effort was
12 made perhaps in good faith. But we are talking a ton
13 of information that we have been given.

14 (Mr. Bedford hands Mr. McKelvey a
15 different microphone.)

16 MR. MCKELVEY: I'm sorry you missed all
17 that. (Laughter) I will give you the short version.
18 I think that the Director in good faith and has the
19 authority to make these decisions.

20 But I don't think she had the kind of
21 information at her hand that we have had here tonight
22 and that we have been receiving all week in these
23 briefs and case law that proposes that something that
24 hopes to be presented as novel and new can be

1 considered customary. If it's customary, it's been
2 done before and lots. Do you see?

3 MR. BERGSTROM: I understand what you
4 are saying, but I'm right back to the part where she
5 was advised by two decent land use firms as to what
6 she should proceed. And, in fact, they went on in
7 great length about just these issues.

8 You know, they were in the briefs, so
9 she had most of the information, I think, that we
10 were exposed to, and probably much more since her
11 department and she and the lawyer and the City's
12 lawyers tried to come up with a plan.

13 Otherwise, they didn't want to be here
14 any more than we did. So I think we have to -- I
15 think we just have to give it to them. I just think
16 that on-site power generation, itself, is customary
17 and incidental and subordinate.

18 And the configuration of that might be
19 a new technique, but they might have tried a variety
20 of different things to make it unique.

21 I'm certainly not going to talk --
22 speak to what I think about 300 megawatts in the
23 middle of town. But, you know, we are here to make a
24 finding whether or not she erred in making that

1 determination.

2 MR. HUDSON: Well, I think the finding
3 is not whether she erred -- I can be corrected -- but
4 whether, in fact, it is customarily incidental and
5 subordinate too. We are finding a fact, not whether
6 she erred or not. It's more a substantive issue, not
7 a procedural one. And hindsight is 20/20.

8 MR. BERGSTROM: Right.

9 MR. HUDSON: And this is anything but
10 20/20. So she was definitely at a disadvantage at
11 handling this. But, again, it's not whether she
12 personally erred or whether this fact exists or not.

13 MR. BERGSTROM: I just have to say that
14 I believe that she got good legal advice, she studied
15 the issue carefully --

16 (People in the audience are yelling.)

17 MR. BERGSTROM: -- and on this part of
18 the appeal I don't believe that I could say that, in
19 fact, she erred and that this wasn't the case.

20 It's not something we have to consider
21 lightly. But to substitute our judgment for hers
22 when this is still up in the air is certainly an
23 awful tough decision.

24 MR. HUDSON: If I may, I just wanted to

1 point out that this is for the certification. While
2 it is still early on in the phase of everything
3 that's going on, it still is an issue. And, you
4 know, I don't want us to be able to -- I'm not saying
5 anyone is -- but kicking a can down the road to say,
6 well, let's wait till later. The issue is here
7 before us now as finding this fact and whether it's
8 in existence or not.

9 And, again, I'm having issues with
10 accessory use. The only case that we have regarding
11 the cogeneration is a case where the university was
12 using almost all of the power. And that was
13 addressed by counsel regarding whether it is
14 reasonably related to. But, again, I'm just -- I'm
15 having trouble reconciling those.

16 MR. BERGSTROM: Anymore thoughts, Curt?

17 MR. BEDFORD: I still lean towards the
18 it's customary to have the power plant as a source
19 for this type of -- to support the data center. I
20 think that some -- maybe some of the things that may
21 cloud that for some of us -- and I don't know if
22 that's the case -- but the use of how much of that is
23 going to be, you know, the 30 percent type thing, or
24 if it's going to be more than that, or what they are

1 really saying.

2 But is it customary for there to be a
3 power plant that's going to generate energy to keep
4 them running? Because I don't think there is any
5 doubt about that, I think both sides. Whether we
6 agree with the amount or whatever, that's another
7 thing. But whether it's customary, yes. That's why
8 I lean that way.

9 You know, is it subordinate to the data
10 center? It's been written that way, that it wouldn't
11 be the main draw of what they are trying to do.

12 And I kind of feel like I'm there in
13 the customarily incidental piece. I just -- I think
14 that we are going around and it's not -- I want to
15 make sure that I am, you know, stating it -- is it
16 customary to have the power plant as part of the data
17 center to support it? I think that's what I am
18 thinking from the argument of what's presented.

19 Is it excessive? That's not going to
20 be for me to determine.

21 (People in the audience are yelling.)

22 MR. MCKELVEY: I think you have to, if
23 we are going to pass this and agree to it, we have to
24 agree that it's all these things.

1 MR. BEDFORD: Right.

2 MR. MCKELVEY: That it's customary and
3 it's incidental and that it's subordinate. And power
4 generation may be customary. I don't know that it's
5 not. But I don't see that it's minor in
6 significance, which is, under Charlie Brown,
7 subordinate is minor, minor and insignificant. It's
8 essential. So I think you can't have it both ways.

9 I just don't see it fitting the
10 accessory use. I don't see it fitting the accessory
11 use all the way across the board.

12 MR. HUDSON: I think that does raise a
13 good point. It's whether this is incidental too.
14 And one of the cases we talked about with Wiggin
15 regarding the, you know, tow trucks for three service
16 bays. You take away the extra tow trucks. You still
17 have the service bays, and you still have the trucks
18 to service, and everything to go along.

19 In this case, if the power plant is not
20 there, the claim is that the power plant cannot
21 survive. I think that does call into question --

22 MR. BERGSTROM: The data center.

23 MR. HUDSON: Or the data center. I'm
24 sorry. What did I say?

1 MR. BERGSTROM: The power plant.

2 MR. HUDSON: Oh, sorry. The data
3 center cannot survive. And I think that does call
4 into question whether it's incidental or not.

5 MR. BERGSTROM: Yes. Even if you don't
6 have the island mode, you still got to put that many
7 or almost that much in diesel generators. I mean,
8 12 acres of battery, if that's how big everything
9 needs to be.

10 We are getting right back to this issue
11 to find whether or not the zoning official planning
12 officer erred in making the decision, whether this
13 was, in fact, customary, incidental, and subordinate.
14 So I think we have beat this to death. Does somebody
15 want to make a motion in the affirmative so we can
16 have a logical call to question, or does anyone else
17 have more to say?

18 MR. PARADEE: Somebody should make a
19 motion.

20 MR. HUDSON: I will make a motion that
21 we find that the on-site power generation is not
22 customarily incidental and subordinate.

23 MR. MCKELVEY: Is not?

24 MR. HUDSON: Is not.

1 MR. MCKELVEY: So that's not in the
2 affirmative.

3 MR. HUDSON: That's not in the
4 affirmative.

5 MR. BERGSTROM: We can do it either
6 way. So do I have a second?

7 MR. MCKELVEY: Seconded.

8 MR. BERGSTROM: Now, so you're all
9 clear: Yeah, Jim, you understand that you seconded
10 it, and so that an affirmative vote will be to deny
11 the -- to find that there was an error in the --

12 MR. MCKELVEY: No, no. That's not what
13 he said.

14 MR. BERGSTROM: Or that an affirmative
15 vote will be to affirm that --

16 MR. BEDFORD: He said there was not.
17 He said that it --

18 MR. BERGSTROM: You said it in the
19 negative?

20 MR. HUDSON: Correct.

21 MR. BERGSTROM: And you said it in the
22 negative; is that correct?

23 MR. MCKELVEY: We are voting that --

24 MR. HUDSON: I think the issue is, I

1 think, is whether the motion -- the motion is for the
2 factual finding, not whether she erred on this fact.

3 MR. MCKELVEY: Say it again.

4 MR. HUDSON: The issue is the finding
5 of whether this fact exists or not. We are not
6 asking if the Director erred at this point in what
7 she did and what she knew. I think that is where the
8 confusion is arising.

9 MR. MCKELVEY: So you are suggesting --
10 you are moving that that power plant is not --

11 MR. HUDSON: How about we do it this
12 way? I will withdraw my motion.

13 (People in the audience are yelling
14 no.)

15 MR. BERGSTROM: If you make a motion in
16 the affirmative, it won't confuse anyone in the room.

17 MR. BEDFORD: I will make a motion that
18 we approve that the power plant is customarily
19 incidental and subordinate to the findings.

20 MR. BERGSTROM: And the chair will
21 second the motion. And we are going to call for the
22 issue. Mr. McKelvey?

23 MR. MCKELVEY: I am going to vote. I
24 believe that this is fundamentally different, not

1 customary. And I believe that the evidence that's
2 been presented tonight suggests that it's not
3 subordinate and not incidental. And so I'm voting no
4 on the basis of that, this presentation.

5 MR. BERGSTROM: Curt?

6 MR. BEDFORD: I am voting yes based
7 upon that I do believe what was presented is that the
8 power plant is customarily incidental to the fact
9 that it's a data center, and it is subordinate to the
10 data center.

11 MR. HUDSON: And I will vote no, that
12 it isn't customary and incidental and subordinate for
13 the reasons I stated before.

14 MR. BERGSTROM: And I'm going to vote
15 yes, that I believe that the power plant for the data
16 center is, in fact, customary, incidental, and
17 subordinate to the data center itself. I don't know
18 what, exactly, that means.

19 MR. PARADEE: Mr. Chair, the vote
20 reveals that the motion fails by a vote of two to
21 two. Because three votes are necessary to carry the
22 motion, and so the result is that the Board has not
23 taken any conclusive action on this issue.

24 So someone could make a motion in the

1 other direction, but I suspect the vote would go the
2 same way. And so, unless somebody is willing to
3 change their mind, I think you should move on to the
4 next issue.

5 MR. BERGSTROM: Sound good?

6 MR. HUDSON: Does anyone want to change
7 their mind?

8 MR. BERGSTROM: No. Number three. And
9 this will be one of the most (inaudible) this
10 evening. Would this impair the neighborhood? Did
11 the zoning official's issuance of the preliminary
12 zoning certification falsely suggest that this would
13 not impair the neighborhood?

14 MR. HUDSON: Um, I will first go. I
15 guess impairment, I don't think either the -- I'm
16 drawing a blank -- the noise was one issue and for
17 the home values rise to a level of impairment. I
18 have trouble saying that producing noise within the
19 limits of the city ordinance is an impairment.

20 And, likewise, even though we had much
21 testimony going around about home values and how they
22 can change, I just don't think they are concrete
23 enough as stated. You know, when Chrysler left,
24 unfortunately, the homeowners' prices, I'm sure, did

1 not skyrocket.

2 I do have issues regarding the
3 questions about the air level. And the position of,
4 I believe it's TDC, that the only way to have an
5 impairment regarding the air quality is if there is a
6 DNREC violation. That seems contrary to logic to me.
7 You can have an impairment, because you can have an
8 impairment in air quality without giving rise to a
9 DNREC or other sort of violation. You stand in any
10 sort of exhaust for too long, and you will realize
11 that.

12 The issue I have with this is the
13 interpretation of "neighborhood." I would love to
14 hear everyone else's opinion on this. There was a
15 lot of guessing of what was meant by it. Every
16 party, I think, seemed to have a different take on
17 what "neighborhood" was.

18 Given those factors, right now, I'm
19 leaning towards interpreting neighborhood in favor of
20 the landowner in this case, given how ambiguous it
21 is.

22 MR. MCKELVEY: Will you give me the
23 microphone? I'm persuaded that the "neighborhood" is
24 best judged by concentric circles. It's a distance

1 thing for me.

2 The business of zoning, if you want to
3 make a change that you identify five properties in
4 all directions, that's not just because there is a
5 line somewhere; so I say the neighborhood has to be a
6 distance thing, not just the STAR Campus.

7 And the impairment -- my biggest
8 concern is the air quality impairment, as you said,
9 not the property values or the noise where I think
10 the arguments are evenly matched.

11 But the air quality, given the tons of
12 emissions that are proposed to be emitted, and to say
13 that our neighborhood won't be impaired because they
14 are going to buy credits from somewhere else to
15 cancel that out, it won't -- it won't do anything for
16 the people who are suffering ailments and health
17 impairments.

18 So I see this as, however the wording
19 will be, an improper use of this zoning or
20 whatever -- somebody tell me how to say that -- for
21 the proposal because of the impairment to the
22 neighborhood.

23 MR. BERGSTROM: And, just to be clear,
24 you were speaking about air pollution?

1 MR. MCKELVEY: Air pollution.

2 MR. BERGSTROM: Air pollution, not the
3 noise.

4 MR. MCKELVEY: Right.

5 MR. BERGSTROM: I guess -- I'm sorry,
6 Curt. I was pretty disappointed in any sort of
7 science as far as indicating where the air pollution
8 might be. I know our air pollution generally comes
9 from the west. I'm not sure about prevailing winds.
10 But the acid green and all that stuff,
11 that's something we can't consider. But I was just
12 really disappointed that no one introduced any
13 evidence to say that the air pollution would land in
14 some concentric circle.

15 I mean, I'm inclined, with not having
16 the evidence, to be faced with having to rule in
17 favor of the landowner. I just don't believe there
18 was one thing that pointed us in the direction that
19 it could run across the tracks to the west or the
20 northwest where it's going to compare the households.
21 That's just what I am thinking right now. Curt?

22 MR. BEDFORD: I know it comes out to
23 how you define the neighborhood piece, kind of,
24 either way towards one side or the other. The noise

1 level, although I can see it being a concern, there
2 is a regulation. There is already something in
3 place.

4 MR. BERGSTROM: We have air
5 regulations, too, enforced by the State and the EPA.

6 MR. BEDFORD: And that's sort of where
7 I lean on that, although I have some reservations
8 about some of what's being presented. I have a firm
9 understanding of it.

10 I think what Kevin said, I can kind of
11 support where he was going with that. You can
12 understand that point of it.

13 So I guess I would be, in this one, I
14 think they presented, you know, figuring out what was
15 the findings of the neighborhood, whether it was the
16 campus or concentric circles.

17 I understand, from what's been
18 presented, what possibly it could impact. But based
19 upon what was here, you know, just going with the
20 same thing, the air level is a piece of concern, but
21 I don't know if I'm swayed or not to rule that.

22 MR. HUDSON: I will second your
23 comment, Jeff, about not hearing more about the air
24 pollution. I was kind of hoping to hear some

1 analysis of that and where it would fall.

2 I will say, now that I have been
3 mulling it over, the zoning interpretation of the
4 neighborhood, I'm not persuaded by.

5 One particular fact that popped into my
6 head is that at the corner of Dowling and Hillside,
7 property was getting rezoned -- not the first time it
8 went through -- but for business like, BL zoning.

9 I think changing that zoning would not
10 take that out, out of the neighborhood at all. And
11 when I put it in a context like that, I don't think
12 the zoning application would really apply to defining
13 a neighborhood. But that's my flow of consciousness.

14 MR. BERGSTROM: I take this job really
15 seriously. We have to have an affirmative reason to
16 overturn this decision. And I don't see from the
17 evidence, either in the briefs or what was presented
18 here this evening, that someone has been -- has shown
19 us that, in fact, this air pollution that's regulated
20 by the State and the Feds is some reason to try and
21 block a preliminary zoning decision.

22 I don't want to kick a can down the
23 road. But we have to really make an affirmative
24 decision, and there is, apparently, billions of

1 dollars at stake one way or the other.

2 I think we have to just vote on what
3 the information is before us to the best of our
4 ability.

5 So I can't see that this rises to any
6 kind of level where I would attempt to substitute,
7 you know, my judgment for what happened. I just
8 don't believe we still have enough information. But
9 that shall be revealed later.

10 MR. MCKELVEY: May I?

11 MR. BERGSTROM: Sure.

12 MR. MCKELVEY: Having read those briefs
13 and seen the presentation about the emissions that
14 will come from this power plant, this enormous power
15 plant, are going to be more dangerous than the
16 emissions that we used to get from Chrysler, I wasn't
17 so sure that comparing it to Chrysler made any sense
18 at all, because Chrysler is gone. But, I mean, it
19 does get -- you know, you're asking for science.

20 I'm saying, well, we are all reasonable
21 human beings. And worse than Chrysler doesn't sound
22 good to me. And all it has to be is one of these
23 impairments impairing the neighborhood to flush this
24 to make it not work.

1 And I think that's the one that makes
2 the most sense. That's the one that's most
3 dangerous, this business of health impairment.
4 That's serious.

5 MR. BERGSTROM: And I agree
6 100 percent.

7 MR. MCKELVEY: And the question of
8 where it's going to land. Gee whiz, I don't know.
9 If it's coming out of a pipe up here, where is it
10 going to land? If it's a good breeze, it won't land
11 on me today. (Laughter in audience) But, if it's a
12 quiet day, of course it's going to land where it is.
13 I'm not at all uncertain in my mind about this.

14 MR. BERGSTROM: All right. Does
15 somebody want to make a motion one way or the other?

16 MR. MCKELVEY: I move that the Board
17 deny this proposal because it impairs the
18 neighborhood. And, for that reason, the validation
19 or design approval should not be allowed.

20 MR. BERGSTROM: In other words, we want
21 to make it a finding that the Planning Director erred
22 and that, in fact, this would impair the
23 neighborhood.

24 (People in the audience began yelling

1 loudly.)

2 MR. MCKELVEY: I can't hear you.

3 MR. BERGSTROM: Okay, I'm going to
4 make a motion -- or, I mean, your motion, in other
5 words, says -- you restated and said that you want to
6 make a finding that the Planning Director erred and
7 should not have issued the preliminary approval.

8 (People in the audience are yelling
9 loudly.)

10 MR. PARADEE: Would the audience please
11 refrain from distractions? It's not helpful at all.
12 The motion has been made by Mr. McKelvey for the
13 Board to find that this on-site power plant would
14 impair the neighborhood. That's the motion. It
15 needs a second.

16 If there is no second, then the motion
17 fails, and the floor is open for another motion if
18 you so choose.

19 MR. BEDFORD: I will make the motion
20 that the on-site power plant will not impair the
21 neighborhood.

22 (The audience is yelling loudly.)

23 MR. BERGSTROM: Is that close enough?

24 MR. PARADEE: Yes.

1 MR. BERGSTROM: Do I have a second?

2 MR. HUDSON: I will second that with
3 the caveat that the only reason I'm supporting this
4 is the fact that the definition of "neighborhood," I
5 think, was just, quite frankly, poorly written and
6 concluded.

7 MR. BERGSTROM: So we have got this
8 affirmative motion. And let's just start right with
9 Mr. McKelvey.

10 MR. MCKELVEY: I vote no based on the
11 belief that the information provided to us suggests
12 that there will be an impairment to the health of the
13 neighborhood.

14 MR. BEDFORD: I vote yes based upon
15 the -- what Kevin had said, actually, making sense
16 about the description of the neighborhood. And I do
17 believe that the regulation, as written, doesn't
18 involve any impairments.

19 MR. HUDSON: Again, I will be voting in
20 favor of it. I think there is impairment, but I
21 think the statute is just poorly written. The
22 "neighborhood" definition is just too ambiguous.
23 And, given Delaware law, I have to go in favor of the
24 landowner.

1 MR. BERGSTROM: I agree with Mr. Hudson
2 that, in fact, the law says what it says. I just
3 don't think we possibly can have enough information
4 to know what the impact of either the noise, the air
5 quality, or the house evaluation is going to impair
6 the neighborhood. So I'm going to vote in favor of
7 the motion. We will call the roll.

8 MR. PARADEE: Okay. Mr. Chair, the
9 vote reveals that the motion passes three to one. So
10 the Board finds that the on-site generation of power
11 for this proposed project will not impair the
12 neighborhood.

13 (People in the audience are yelling
14 loudly.)

15 MR. PARADEE: So that leaves the last
16 issue to be decided.

17 MR. BERGSTROM: And that is whether or
18 not the zoning certification issued complies with our
19 comprehensive plan, to state it succinctly.

20 MR. PARADEE: That's correct.

21 MR. BERGSTROM: Would somebody else
22 like to start? Because it's pretty apparent to me.

23 MR. MCKELVEY: That one has to do with
24 impairing the neighborhood. The comprehensive plan

1 requires that whatever is done must not impair the
2 neighborhood. Here we go again.

3 MR. PARADEE: The claim or argument was
4 raised by Ms. Hoffman. And, essentially, her claim
5 is that the power plant would have a negative impact
6 on the region and, therefore, it's prohibited by the
7 comprehensive plan. That is the argument.

8 And so the question is whether or not
9 you agree.

10 MR. HUDSON: To start us out, I will
11 note that I view this slightly different than the
12 neighborhood argument, in that the argument is that
13 it negatively impacts the local and regional
14 environment.

15 MR. MCKELVEY: The local what?

16 MR. HUDSON: Local and regional, not
17 just regional. I will just point that out as a
18 starting point.

19 MR. BERGSTROM: Anybody else want to
20 start first? Then I will just go at it. The power
21 plant certainly complies with the zoning code, but
22 they wrote this section of the code specifically to
23 permit data centers.

24 Whether or not the power to run those,

1 that data center, whatever is in there, that power is
2 going to come from somewhere. It's going to come
3 from somewhere in this region.

4 And I guess that they have a matter of
5 right to build a power plant, and they have a matter
6 of right for the electricity they need to run it.
7 The question is how they're going to run it.

8 And, boy, I think using an argument to
9 say it doesn't meet our comprehensive plan when it's
10 so clearly spelled out as to what could be there, and
11 the fact that the electricity is coming from the
12 region anyway, it just makes me believe that I am
13 going to vote to confirm the decision about the plan,
14 the zoning, the preliminary zoning certificate
15 complying with our comprehensive plan.

16 MR. HUDSON: I understand what you are
17 saying there, Jeff. I'm sorry to take a different
18 tact, though.

19 Again, it would be negatively
20 impacting -- and I'm specifically focusing on the
21 local environment.

22 As some of us stated in the previous
23 one, the issue wasn't the question of impairment, but
24 whether the definition of "neighborhood" fit in and

1 whether the surrounding communities would be impacted
2 by that.

3 And that one, I think, on the
4 definition of "neighborhood" is too ambiguous, and I
5 had to go with the landowner. But here it's more
6 broadly defined under the Comprehensive Development
7 Plan under the Environmental Quality that the
8 paramount concern is that the growth cannot again
9 negatively impact the local and regional environment.

10 We all seem to express concerns
11 regarding the environmental impact of this stack.
12 But our question, third question before us, was what
13 the definition of "neighborhood" was.

14 I think here, as we said, there is an
15 impairment, and it's definitely going to impact the
16 local community as well as the regional environment.
17 And given that State laws requires -- Title 22,
18 Delaware Code, Section 702(d) requires that the
19 comprehensive plan shall have a force of law, I'm
20 leaning towards saying that the zoning certification
21 is contrary to the comprehensive plan.

22 MR. MCKELVEY: I would agree that the
23 implementation of this would be in opposition to the
24 requirement in the comprehensive plan that says we

1 will not harm the region.

2 MR. BEDFORD: Um, I want to hear more
3 about, Kevin, I guess what you are saying a little
4 bit more to make me understand exactly where I'm
5 going with this specifically. I mean, I'm kind of on
6 the fence here with this one, because I'm not sure if
7 I'm getting what you are saying in the last
8 statement.

9 MR. HUDSON: I guess we will start out
10 with Ms. Hoffman's brief states that under Delaware
11 law, when a comprehensive plan is approved by a
12 municipality, that it has the force of law.

13 And, to quote it, "no development shall
14 be permitted that is inconsistent with the plan." As
15 part of our comprehensive development plan, the City
16 has expressed that the paramount concern in planning
17 is that growth cannot be permitted to negatively
18 impact our local and regional environment.

19 So, again, like I said, we all seem to
20 express concern regarding impairment based upon air
21 quality. Well, an impairment based on air quality
22 would seem to necessitate that it would negatively
23 impact the air quality. And, if it negatively
24 impacts our local environment, that's in violation of

1 the comprehensive development plan.

2 And, like I said, the difference
3 between this and the question number three is "the
4 region" was defined. My issue was "neighborhood" was
5 too ambiguous to define, but here it's the local and
6 regional environment. And it seemed like everyone is
7 in concurrence that the local environment was harmed,
8 but not this ambiguous "neighborhood." Does that
9 help?

10 MR. BEDFORD: It does.

11 MR. BERGSTROM: Well, boy, I understand
12 what you are saying, and it makes a lot of sense to
13 me. But it's regional and local.

14 And I think, in the absence of any data
15 about where the pollution from this plant will be, if
16 we generate more electricity that's clearer than the
17 mix that's out there on our grid -- that that's the
18 testimony we have got -- that, in fact, that would
19 have a positive affect on the region and it would
20 just -- I honest to goodness don't know what affect
21 it's going to have inside the city limits, because
22 the city is only a few miles wide.

23 So the break has to go toward the
24 landowner.

1 MR. HUDSON: And I appreciate that. I
2 guess a few things is the question of what the
3 assessment of the pollution based on the power
4 generation. And there were questions over it was
5 based on the energy mixture out of D.C. and not our
6 local one.

7 But, again, I have to go back -- well,
8 if it's affecting our local environment, how can it
9 not affect the regional? We are going to have --
10 again, we said there is going to be impairment from
11 air quality. An impairment would seem to state that
12 it's negatively impacting our environment.

13 If it's doing that in the local region,
14 then it's also going to be affecting the regional
15 environment, as well. You know, Christina stream
16 runs right through there, as well as disbursement of
17 any output from the power plant which would go
18 through the air, which would go through the region.

19 MR. BERGSTROM: I would like to agree.
20 But if the EPA and the state air quality people are
21 going to decide that overall this is a plus, that
22 it's not impairing the neighborhood, I don't see how
23 we would change a preliminary zoning decision for
24 what pollution might or might not happen and where it

1 might or might not go.

2 I think the evidence is clear that this
3 power should be cleaner than -- not than what was
4 there on that site before -- but cleaner than the
5 typical mix for regional power. And that's what we
6 have to go on to base this decision on.

7 And I just don't believe we can make
8 that leap of faith about some potential pollution,
9 future pollution, that we don't know about.

10 I think that -- I'm not trying to kick
11 it down the road. I just think that that belongs in
12 the purview of DNREC and the EPA. And maybe this
13 would be better.

14 MR. HUDSON: I would just say, unless
15 anyone else wants to jump in, I think you can have a
16 negative impact on local and regional environment
17 without getting to the level of a DNREC or EPA
18 violation. That's not the standard that is applied
19 in the comprehensive development plan. It wasn't for
20 violation of EPA or DNREC but, rather, negatively
21 impacted.

22 MR. BERGSTROM: Well, I don't
23 understand. I guess where I was getting to is I
24 don't understand how we can decide what that negative

1 impact is when, in fact, they can put this power
2 plant here and suck the energy out of the grid that,
3 by testimony, is dirtier power.

4 I really, really, really don't
5 understand where the negative externalities of this
6 pollution are going to end up. And we have had no
7 testimony about that.

8 So how can we use that -- how can we
9 use that as a basis to overturn a preliminary zoning
10 determination that gets it to a spot where somebody
11 else will have a chance to figure that out? I just
12 don't see it.

13 MR. HUDSON: All right. The only thing
14 left I would just say to that is we are not finding
15 whether the preliminary verification was in error;
16 but, again, it's whether this fact exists. Maybe I'm
17 being too nuance about that, but that's the way I'm
18 seeing it.

19 And again, you know, if we are saying
20 that this pollution and there is an impairment of air
21 quality out of the stacks, well, if we can't define
22 the neighborhood that it's going to, it's certainly
23 going to be local and regional. I think that's been
24 clear, personally.

1 MR. MCKELVEY: I'm listening to this
2 discussion, and I think one of the things that we are
3 called to do here as a board is to interpret all this
4 information that's provided to us and make the best
5 decision from what we have learned.

6 And so, when I see the numbers of
7 emissions -- and yes, I don't know if they will land
8 in the first half mile or the next mile or the mile
9 after that. But when you speak of "region," they are
10 going to land in the region.

11 I see it as damaging or impairing the
12 region, and I think that goes against our
13 comprehensive development plan's intent.

14 MR. BERGSTROM: Just to say something,
15 Jim: I understand that they will land somewhere in
16 the region, but some other power that's dirtier,
17 according to the testimony, won't land in the region.
18 And they have a perfect right to build the data
19 center with diesel generators to back up that won't
20 be clean, but to draw 99 percent of the power from
21 the grid that's dirtier than the power they are going
22 to generate.

23 I'm just grappling with the fact of
24 that being wrong, at least at this level of the

1 request.

2 MR. BEDFORD: I guess one of the things
3 that strikes me is about the objective and the
4 subjective part. We are all kind of putting out
5 there what-ifs. And I think what was presented was
6 it wasn't something definite in design.

7 I can understand your argument, but I
8 am still grappling or struggling with where we are at
9 with this particular -- I think I can understand the
10 region and the local piece.

11 But, again, I could speculate, and I
12 understand your point. And I'm still -- I don't know
13 where I am with that.

14 MR. HUDSON: I guess the only thing I
15 have left to say is you were asking about whether
16 it's going to be dirtier whether it's going to be
17 produced somewhere else or here. The comprehensive
18 development plan is a municipality code that has the
19 force of law. That's what the City Council -- or
20 that's through the City Council. It was decided for
21 this city. Whether worse is generated elsewhere or
22 not, that, I don't see as part of the analysis. It's
23 a legal question.

24 MR. BERGSTROM: Can we give that to

1 John?

2 MR. PARADEE: If I may, Mr. Chair, I
3 just want to make sure that the Board is focused on
4 the language in the comprehensive plan that's at
5 issue here.

6 Ms. Hoffman's claim is founded upon
7 language which appears at Page 51 of the
8 comprehensive plan which states, in part, that "The
9 paramount concern in planning for future growth must
10 be that such growth cannot be permitted to negatively
11 impact our local and regional environment." And
12 that's a fairly broad statement. Okay?

13 There is also language that's a little
14 more specific at Page 53 of the comprehensive plan
15 which says, "The monitoring of air quality in
16 Delaware is the responsibility of DNREC and the EPA."
17 And then the comprehensive plan goes on to explain
18 that, "Permits for emissions into the atmosphere are
19 reviewed for compliance with State and Federal
20 regulations through DNREC. The Delaware Code also
21 includes provisions for penalties for excessive
22 atmospheric conditions, establishes a review board
23 for appeals of the Department's permit denials, and
24 establishes rules and regulations for the purposes of

1 controlling air pollution and for developing
2 statewide air resource management plans."

3 That's a direct quote from Page 53 of
4 the comprehensive plan.

5 So I think the question before you is
6 whether or not the planning director's zoning
7 certification letter is consistent or inconsistent
8 with the language that I just read.

9 You have got essentially two competing
10 provisions, the fairly broad language at Page 51,
11 upon which Ms. Hoffman bases her argument, and then
12 the other language that I quoted at Page 53 of the
13 comprehensive plan.

14 You have to decide whether this zoning
15 certification letter is consistent or inconsistent
16 with that language read as a whole.

17 MR. HUDSON: I don't quite see them as
18 contrary. It's stating that different agencies have
19 monitoring duties or monitoring, as well as they can,
20 themselves, set regulations and enforcement. That,
21 by no means, excludes the City from making any sort
22 of law or regulation regarding air quality, as seen
23 by the idling ordinance that we passed.

24 The question is, if the issue is, well,

1 then, we can't enforce anything to do with air
2 quality, well, then, neither can we do anything about
3 the idling, because that was the primary concern.

4 I mean, the fact that DNREC is the
5 monitoring enforcement for the air quality of the
6 region does not preclude the City from enforcing it
7 as well, particularly if the City would like
8 something more stringent.

9 MR. BERGSTROM: Yeah. There is that
10 pesky constitution, though. I don't know how many
11 air quality idling tickets we have written so far. I
12 just don't know. But I can understand that we wanted
13 to do the right thing.

14 In this case right now, it was the
15 responsibility of the Planning Director to decide
16 whether or not this was going to impair, as we zoomed
17 in here, air quality in the city.

18 I don't believe anybody has proved that
19 yet to my satisfaction at all, and I don't believe
20 that anybody can outthink the EPA and DNREC on that,
21 not here.

22 I just -- when you are confused, the
23 break goes to the landowner. And I just believe
24 that. It's a tough case, but I think it's going to

1 get decided somewhere else. Anyone want to make a
2 motion?

3 MR. HUDSON: I will make a motion that
4 we find that the zoning certificate was contrary to
5 the comprehensive plan.

6 MR. MCKELVEY: Second.

7 MR. HUDSON: Or the comprehensive
8 development plan.

9 MR. MCKELVEY: Second.

10 MR. BERGSTROM: Okay. I'm going to
11 vote against that resolution, because I don't believe
12 we have proved that the Planning Director's decision
13 went against the zoning ordinance or comprehensive
14 plan.

15 At this case, that hasn't been proved
16 to my satisfaction. And it requires a real amount of
17 affirmation to do that. So I'm going to vote against
18 your motion.

19 MR. HUDSON: I'm going to vote for my
20 motion.

21 MR. BEDFORD: I'm going to vote against
22 the motion based upon the same things that Jeff
23 shared.

24 MR. MCKELVEY: And I vote for the

1 motion, because I believe there is adequate
2 information to suggest that our regional environment
3 would be impaired.

4 MR. BERGSTROM: There is no further
5 business before the Board.

6 MR. PARADEE: So the result of the vote
7 is a two to two tie, which means the motion fails
8 and, therefore, the Board takes no action on that
9 issue.

10 Mr. Chairman, that would conclude the
11 issues to be resolved by the Board tonight.

12 Based on the votes that were taken, my
13 recollection, just briefly summarized, is that as to
14 the first issue, the vote is unanimous that all
15 members of the Board agreed that the Planning
16 Director had the authority to impose the issuance
17 under the zoning certification letter.

18 As to the second issue, there was a
19 stalemate. The motion was to make a finding that
20 on-site power generation is customarily incidental
21 and subordinate. That motion failed by a vote of two
22 to two, so there is no rescission as to that issue by
23 the Board.

24 On the third issue, whether or not

1 on-site power generation would impair the
2 neighborhood, the vote was three to one in favor of
3 the motion to find that it will not impair the
4 neighborhood.

5 And then, on the last issue, the motion
6 was to find that the zoning certification letter was
7 issued contrary to comprehensive plan, and that
8 motion failed by a vote of two to two.

9 I don't believe there is any other
10 business for the Board to attend to tonight.

11 MR. BERGSTROM: Motion to adjourn.

12 MR. PARADEE: Without any objection,
13 Mr. Chair, you may adjourn the meeting.

14 MR. HUDSON: I would just, before we
15 close, I would just like to thank the Director for
16 all her hard work and everything she has done. And I
17 know she has served the city in the best way she
18 could; so I just want to thank her for that.

19 MR. PARADEE: And before we close, I
20 did want to reiterate that the decision of the Board
21 is not final unless and until it is reduced to
22 writing and approved by the Board in a subsequent
23 meeting which will have to be scheduled.

24 And then that decision, once approved

1 by the Board, would be filed with the City Secretary
2 before a decision would be final.

3 Mr. Bergstrom, if there are no more
4 questions by the Board --

5 MR. HUDSON: I will make a motion that
6 we adjourn.

7 MR. BERGSTROM: I will second. All in
8 favor?

9 (All said I)

10 MR. BERGSTROM: We are adjourned.

11 (Concluded at 10:30 p.m.)

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CERTIFICATE

I, Lorena J. Hartnett, a Notary Public and
Registered Professional Reporter, do hereby certify that
the foregoing is an accurate and complete transcription
of the proceeding held at the time and place stated
herein, and that the said proceeding was recorded by me
and then reduced to typewriting under my direction, and
constitutes a true record of the testimony given by said
witnesses.

I further certify that I am not a relative,
employee, or attorney of any of the parties or a
relative or employee of either counsel, and that I am in
no way interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my seal of office on this 24th day of
March 2014.

Lorena J. Hartnett
Registered Professional Reporter