

## Attachment 3

**FINDINGS OF FACT AND DECISION**  
**ZONING BOARD OF APPEALS,**  
**TOWN OF WAWAYANDA, ORANGE COUNTY**  
**NEW YORK**

**RE: IN THE MATTER OF THE APPLICATION OF**  
**CPV VALLEY, LLC FOR AREA VARIANCES FROM**  
**THE APPROPRIATE PROVISIONS OF THE TOWN OF**  
**WAWAYANDA ZONING LAW AND THE**  
**SCHEDULE OF ZONING DISTRICT REGULATIONS IN**  
**ORDER TO ALLOW MORE THAN THE MAXIMUM**  
**PERMITTED HEIGHT OF 65 FEET ON THE PROPOSED**  
**STEAM TURBINE GENERATOR BUILDING AND THE PROPOSED**  
**COMBUSTION TURBINE BUILDING AND TO ELIMINATE REQUIRED**  
**15 FOOT SIDE YARD SETBACK ON THE PROPOSED GIS BUILDING**  
**AS DEPICTED ON THE PROPOSED SITE PLAN FOR THE**  
**PROPOSED CPV VALLEY ENERGY CENTER CURRENTLY**  
**BEFORE THE TOWN OF WAWAYANDA PLANNING BOARD**

Applicant: CPV Valley, LLC, 50 Braintree Office Park, Suite 300, Braintree, Massachusetts, 02184.

Property Owners: Barmann and Dean, LLC, 32 Old Cahoonzie Road, Sparrowbush, New York, 12780.

Premises: Section 4, Block 1, Lots 38.32, 38.33, 40.22 and Section 5, Block 5, Lot 18.1 on the Tax Map of the Town of Wawayanda, Orange County, New York and on Section 64, Block 1, Lot 1.1 of the Tax Map of the City of Middletown, Orange County, New York.

Zoning District: MC-1 (Mixed Commercial) and TC (Town Commercial)

**FINDINGS OF FACT:**

1. The applicant is the prospective owner of the premises which are the subject of this application.
  2. The applicant, CPV Valley, LLC, is an "electric corporation" under New York State Law and is a "public utility" under both Federal and State Law operating under Federal and State regulations.
  3. The applicant is proposing to construct the CPV Valley Energy Center a 630 MW Natural Gas Combined Cycle Generating Facility, GIS Substation and associated improvements at the property.
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The project will interconnect with the New York Power Authority's electric transmission system and provide an increase in electric generation capacity for the New York State power system.

4. The project represents a proposed capital investment of an estimated eight hundred million (\$800,000,000.00) dollars and shall include a proposed PILOT through the Orange County Industrial Development Agency and a Host Community Benefits package with the Town of Wawayanda, Orange County, New York.

5. That portion of the project located within the Town of Wawayanda is located between U.S. Route 6 and Interstate 84 in the Town of Wawayanda, Orange County, New York.

6. That portion of the property located within the Town of Wawayanda is located within the Town's Mixed Commercial and Town Commercial Zoning Districts.

7. The project is a permitted use as a designated "Essential Service" in both the Mixed Commercial and Town Commercial Zoning Districts.

8. The Plant portion of the project will be constructed on an approximate 21.25 acre portion of a 122 acre parcel located within the Town. The GIS Building portion of the project will be constructed adjacent to the existing NYPA power lines, along the Town of Wawayanda/City of Middletown municipal border.

9. The Town of Wawayanda Planning Board served as the lead agency under the New York State Environmental Quality Review Act ("SEQRA"). The Planning Board has spent in excess of five (5) years reviewing the proposed project under SEQRA.

10. On May 23, 2012, the Town of Wawayanda Planning Board unanimously approved a Findings Statement for the CPV Valley Energy Center in accordance with the requirements of N.Y.C.R.R. §617.11.

11. The Findings Statement is an 80 page document which is based upon the information contained in the Draft and Final Environmental Impact Statements prepared for the applicant's project (collectively, the "Environmental Impact Statement Documents") and the independent review of the Environmental Impact Statement documents conducted by the Planning Board and its consultants and advisors.

12. The Planning Board relied upon the advice, technical review and counsel of its environmental and engineering consultants and its legal counsel.

13. The Findings Statement concludes with the following:

"Further, the Planning Board agrees with, and adopts, the cumulative impact conclusions reached in the Environmental Impact Statement Documents and finds that the Project will not cause or contribute to any significant adverse cumulative environmental impacts."

14. The Zoning Board of Appeals of the Town of Wawayanda has received the copy of the aforementioned Findings Statement previously adopted by the Planning Board.

15. The Zoning Board of Appeals further did include within the record of this proceeding the application of the applicant, dated February 7, 2013, together with the cover letter submitted by the applicant's counsel, Nixon Peabody, LLP, and the Exhibits A through I attached to the application and cover letter (collectively, the "Application Materials").

16. The applicant proposes a Combustion Turbine Building approximately 113 feet in height; a Steam Turbine Generator Building approximately 102 feet in height; and no setback along one of its property boundaries.

17. The Zoning Law of the Town of Wawayanda does not permit heights over 65 feet and requires a 15 foot side setback. Accordingly, the applicant is seeking variances from these Zoning Law requirements.

18. Section 267-b of the Town Law of the State of New York provides that the Zoning Board of Appeals shall have the power to grant area variances and in making a determination with regard to such request, the Zoning Board of Appeals shall take into consideration:

a. The benefit to the applicant if the variance is granted as weighed against the detriment to the health, safety and welfare of the neighborhood of the community by such grant.

b. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

c. Whether the benefits sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance.

d. Whether the requested area variance is substantial.

e. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

f. Whether the alleged difficulty was self-created.

19. The Orange County Department of Planning has conducted a mandatory review of this proposed Action pursuant to the New York State General Municipal Law Section 239-l, m and n. The Orange County Department of Planning stated, in part, "It does not appear that intermunicipal or countywide impacts would result if the Board finds that granting relief is warranted in this matter." The Orange County Department of Planning has recommended that this matter be left for local determination. A copy of the letter from the Orange County Department of Planning to the Town of Wawayanda Zoning Board of Appeals is attached hereto and made a part hereof.

20. At the public hearing, several individuals spoke. Many of the speakers were not residents of the Town of Wawayanda and many of the statements made were not relevant to the variance requests.

**CRITERIA FOR A VARIANCE AND FINDINGS BASED**

**UPON THE CRITERIA**

1. The Board finds that there will be no undesirable change in the character of the neighborhood. The proposed use is a permitted use in both Zoning Districts. The premises are located within a Mixed Commercial and Town Commercial Zoning District within the Town of Wawayanda. The character of the neighborhood surrounding the proposed site is generally a mix of agricultural, residential, highway commercial uses and highway infrastructure. The proposed site is surrounded by Interstate 84, U.S. Route 6 and Route 17-M.

2. The Board finds that there is no feasible alternative for the applicant to achieve its objective, including purchase/lease of adjacent lands.

The equipment to be housed within the two buildings to be constructed which are the subject of this variance are at a height which exceeds the height requirements contained within the Town of Wawayanda Zoning Law. In order to house this equipment, the buildings that the applicant proposes must, therefore, exceed the height limitations contained in the Town's Law. The equipment is essential for the operation of the proposed energy plant. The location of the GIS Building straddles a municipal boundary and must be located in that location in order to permit the proper operation of the proposed plant; this is the reason for the setback variance.

3. The Board finds that the variance request is not substantial. The requested area variances will allow the applicant to construct the plant buildings and the GIS Building in the locations that the Planning Board has previously determined in order to avoid or otherwise minimize adverse environmental impact to the maximum extent practicable.

4. The Zoning Board finds that the variances will not have an adverse effect or impact on the neighborhood. The project is a permitted use within the two (2) zoning districts of the Town. The

Planning Board has approved a Findings Statement under SEQRA which concludes that there will be no substantial effect or impact on the neighborhood.

5. The Board finds that the alleged difficulty of the applicant is not self-created. There appears to be no feasible alternatives to the non-complying structures or the location of the GIS Buildings. The requested variances will allow the applicant to comply with the locations that the Planning Board has previously determined to avoid or otherwise minimize adverse environmental impacts to the maximum extent practicable.

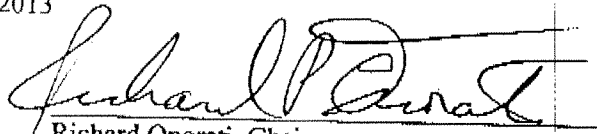
6. The Board finds that granting of the variances will preserve and protect the character of the neighborhood and the health, safety and welfare of the existing community. The Zoning Board of Appeals has relied upon and hereby adopts the 80 page Findings Statement under SEQRA adopted by the Planning Board in May of 2012 in accordance with 6 N.Y.C.R.R. §617.11 and incorporates same herein by reference.

7. In addition to complying with the traditional area variance standards set forth in Section 267-b of the Town Law, the Board also recognizes that the applicant is a "public utility" and for the reasons set forth in the Application Materials and the Environmental Impact Statement Documents, the project also satisfies the relaxed variance standards for public utilities set forth in *Consolidated Edison Co. of New York Inc. v. Hoffman*, 43 N.Y.2d 598, 611, 403 N.Y.S.2d 193, 374 N.E.2d 105 (1978); *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327 (4<sup>th</sup> Dep't 1991); *Cellular Telephone Co. v. Meyer*, 200 A.D.2d 743, 607 N.Y.S.2d 81 (2d Dept't 1994); *Mammia v. Zoning Bd. Of Appeals of town of Cortlandt*, 110 Misc. 2d 534, 442 N.Y.S.2d 689, 691 (Sup 1981); *Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup 1955); *Long Island Lighting Co. v. Village of Old Brookville*, 72 N.Y.S.2d 718 (Sup 1947).

... .. (48 ) 100' height variance for the  
Combustion Turbine Building; the thirty-seven (37') foot variance for the Steam Turbine Generator  
Building and the fifteen (15') foot variance to eliminate the side yard setback for the GIS Building are  
GRANTED.

Date of decision: March 14, 2013

Signed by Richard Onorati, Chairman of the Zoning Board of Appeals, Town of Wawayanda, Orange  
County, New York, this 21 day of March, 2013



Richard Onorati, Chairman  
Zoning Board of Appeals  
Town of Wawayanda, Orange County, New York

Copies to be sent to: Town Clerk, Town of Wawayanda  
Applicant  
Applicant's Attorney  
Town of Wawayanda Planning Board  
Building Inspector/Code Enforcement Officer  
Zoning Board of Appeals file

Filed with the Wawayanda Town Clerk this 22 day of March, 2013.

Date copies mailed to parties set forth above: March 22, 2013.

**ORANGE COUNTY DEPARTMENT OF PLANNING**

DAVID CHURCH, AICP Commissioner  
124 Main Street  
TEL: (845) 615-3840

as per NYS General Municipal Law §239-1, m, & n

**Local Referring Board:** Wawayanda Zoning Board      **Referral ID #:** WYT03-13M  
**Applicant:** CPV Valley, LLC      **Tax Map #:** 4-1-38.32, 38.33, & 40.22 & 5-1-18.1  
**Project Name:** CPV Valley Energy Center Area Variances  
**Proposed Action:** Area variances for building heights, setback, and fence height.  
**Reason for County Review:** Within 500 feet of US Route 6, State Route 17M, 1-84, an active farm in Agricultural District 2, and a municipal boundary.  
**Date of Full Statement:** February 20, 2013.

**Comments:**

The Planning Department has reviewed the submitted materials regarding the appeal for an area variance. While the Zoning Board of Appeals must weigh the local issues in balancing the needs of the appellant with the potential impacts on the surrounding area, it does not appear that intermunicipal or countywide impacts would result if the board finds that granting relief is warranted in this matter. However, our department offers the following advisory comment for your consideration:

1. We recommend the applicant plant and maintain a vegetated buffer around the entire perimeter of the proposed fence around the GIS building in addition to the proposed vegetated buffer along US Route 6 for the main power plant site.

**County Recommendation:**      **Local Determination**

**Date:**      March 14, 2013

**Prepared by:** Jennifer MacLeod  
Planner

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David Church, AICP  
Commissioner of Planning

As per NYS General Municipal Law 239-m & n, within 30 days of municipal final action on the above referred project, the referring board must file a report of the final action taken with the County Planning Department. For such filing, please use the final action report form attached to this review or available on-line at [www.orangecountygov.com/planning](http://www.orangecountygov.com/planning).