

1 ISSUES CONFERENCE VOLUME 5

2

3 In the Matter of the Applications of

4 CROSSROADS VENTURES, LLC

5

6 for the Belleayre Project at Catskill Park
7 for permits to construct and operate pursuant to
8 the Environmental Conservation Law

9

10 Margaretville Fire House
11 Margaretville, New York
12 June 10, 2004

13 B E F O R E :

14 HON. RICHARD WISSLER,
15 Administrative Law Judge

16

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1 (JUNE 10, 2004)

2 (9:30 A.M.)

3

P R O C E E D I N G S

4

ALJ WISLER: May I have appearances

5

for the record.

6

MR. GERSTMAN: Marc Gerstman, Eric

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Goldstein, Cheryl Roberts, Chris wild and

8

Karen Murphy for the Catskill Preservation

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Coalition.

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MR. ALTIERI: Vincent Altieri and

11

Carol Krebs for DEC staff.

12

MR. RUZOW: Dan Ruzow, Terresa Bakner

13

for the Applicant.

14

MR. BURGER: Michael Burger and Daniel

15

Greene for the City.

16

MR. YOUNG: Kevin Young for the

17

Coalition of Watershed Towns, Town of

18

Middletown, Town of Shandaken.

19

ALJ WISLER: It is my understanding

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we'll be dealing with the issues of

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alternatives today, and wildlife and habitat.

22

Is there anything preliminary anybody wants to

23

put on the record?

24

MR. GERSTMAN: We make a request to

25

put some forestry impact presentation today
(OPENING REMARKS)

1 because our witness unfortunately due to a
2 miscommunication from my office is here. I
3 prefer not to, but we may need another date.

4 ALJ WISSLER: Let's see how we go with
5 the two scheduled issues today. It's 9:30.
6 My intention is to stop today five o'clock at
7 the latest, and perhaps even earlier if we
8 can.

9 Alternatives up first.

10 MR. GERSTMAN: Before I do that, I did
11 want to provide copies of, I believe what's
12 been identified as CPC 30. I believe that's
13 the letter with the full attachments. I don't
14 believe I gave the attachments out yesterday
15 so I have them today. (Indicating)

16 we'd like to present the Town of
17 Shandaken Master Plan Survey that was alluded
18 to in Ms. Kopaskie's testimony as CPC Exhibit
19 31.

20 (TOWN OF SHANDAKEN MASTER PLAN SURVEY
21 2000 RECEIVED AND MARKED FOR IDENTIFICATION AS
22 CPC EXHIBIT NO. 31, THIS DATE.)

23 MR. BURGER: We just have two exhibits
24 we would like to enter, a memorandum which we
25 can enter as City Exhibit 6; and just an
(OPENING REMARKS)

1 excerpt from the scoping document entered as
2 City Exhibit 7.

3 (MEMORANDUM DATED 5-20-04 FROM CRAIG
4 SEYMOUR RECEIVED AND MARKED FOR IDENTIFICATION
5 AS CITY EXHIBIT NO. 6, THIS DATE.)

6 6-10-04crossroadsz
7 ("SCOPING DOCUMENT FOR PROPOSED
8 RESORT" RECEIVED AND MARKED FOR IDENTIFICATION
9 AS CITY EXHIBIT NO. 7, THIS DATE.)

10 ALJ WISSLER: For the record, City 6
11 is a memo dated May the 20th, 2004.

12 As Mr. Burger indicated, City 7 are
13 excerpts from the scoping document for the
14 proposed resort.

15 MR. BURGER: Your Honor, today the
16 City will brief in supplementing its offer of
17 proof.

18 ALJ WISSLER: Mr. Burger, I'm going to
19 ask you to keep your voice up.

20 MR. BURGER: The City will be brief in
21 supplementing its offer of proof on the issue
22 of alternatives. We believe this is a legal
23 issue appropriate for briefing, and we do not
24 see any issues of fact between -- we do not
25 see any issues of fact in dispute between the
City and the Applicant on this matter. Under
(ALTERNATIVES ISSUE)

1 SEQRA and the requirements of the scoping
2 documents, the Applicant was required to do
3 a -- to provide analysis of the impacts of a
4 reasonable range of alternatives. No such
5 analysis was provided, and therefore the DEIS
6 is insufficient.

7 Mr. Seymour from RKG Associates, who
8 testified yesterday, he is the co-author of
9 this memorandum, and he will walk us through
10 it.

11 MR. SEYMOUR: We were asked by the
Page 7

12 City to analyze the information contained in
13 Appendix 27, the bulk of which it is the
14 report by the HVS Consulting Services on the
15 economic evaluation for the Belleayre Resort
16 at Catskill Park. In their key conclusions of
17 that report, they stated the only logical and
18 economically feasible approach to development
19 of the subject property calls for the
20 construction of both hotels and both country
21 clubs, including all 36 holes of golf, as well
22 as both the detached lodging unit communities.

23 We were asked to look at the economics
24 that they used in this to drive that. I first
25 of all have to say that I have no question
(ALTERNATIVES ISSUE)

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1 with the report itself, the logic or economic⁹²¹
2 calculations that were done. It is a very
3 thorough, very well documented report that
4 talks about the market but also talks about
5 the economic viability of the components of
6 the Belleayre resort.

7 ALJ WISSLER: Mr. Seymour, would this
8 be Appendix 27?

9 MR. SEYMOUR: Appendix 27. What the
10 report concluded was that Scenario 1, which
11 was both hotels and both golf courses, had an
12 internal rate of return of 14.7 percent, and
13 based upon information they provided from
14 comparable luxury hotel data, that was in the
15 range of what was considered to be a market
16 rate of return, internal rate of return for

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projects like that.
The other scenarios they evaluated, which was the hotel and golf courses alone at either wildacres or Big Indian, had rates of return of around 8.3 percent, and that the hotel and golf course at one area with a hotel at the other area, in both those combinations had returns of 8.4, 10.7 percent, which was not considered to be feasible from a market

(ALTERNATIVES ISSUE)

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perspective relative to the rate of return of comparable hotel portfolios elsewhere in the country.

They also went on and separately calculated the rate of return for the detached lodging units, timeshare or interval ownership operations, at 41.6 percent at Big Indian and 33.5 percent, and indicated that according to their research, that such timeshare investments are perceived as attractive once they exceed 25 percent. These IRR's were well above that. We had no question in terms of the market data or the indication or their calculations.

What I was asked to do was to then look at the combined resort, the hotels, the golf courses and the timeshare properties in the various combinations that were proposed and potentially could be alternatives, and evaluated them. This was not done in the HVS report. I'll be very brief with this. What I did, I took their methodology, their numbers,

23 their income streams, and re-created those so
24 that I used exactly the same methodology to --
25 same mathematical methodology to obtain the
(ALTERNATIVES ISSUE)

1 numbers, and I matched them the four decimal ⁹²³
2 places. What I didn't do was take the income
3 streams from the hotel and the golf courses
4 and combined it with the income stream that
5 they reported for the timeshares, and
6 recalculated the internal rate of return on
7 that.

8 The result was, for the full build-out
9 of both resorts, hotels, golf courses and
10 timeshares at both locations, the IRR was
11 23.2 percent. Big Indian, with the hotel,
12 golf and timeshare only at Big Indian was
13 22.2 percent; and the hotel, golf and interval
14 ownership units at Wildacres only was
15 19 percent. These numbers are all above the
16 14 percent or 13 and a half to 15 percent
17 range that they said the market requires for
18 hotel resort development, and still in the
19 range of timeshare alone.

20 And so, the results of my analysis
21 indicate that these are fairly healthy
22 internal rates of returns for these kinds of
23 developments when looked at in total. And
24 that the report, the Appendix report in the
25 DEIS did not evaluate from an economic
(ALTERNATIVES ISSUE)

1 perspective the reports as a whole. They ⁹²⁴

2 looked at the two pieces separately, but
3 didn't combine them, which I ended up doing.

4 Also in my memo is a table which shows
5 what other internal rates of return are for
6 other kinds of real estate investments,
7 including regional malls, apartments and
8 warehouses, which range from 8 to 12 percent.

9 So these internal rates of return are
10 well above real estate investments,
11 opportunities in the marketplace. And I will
12 grant that hotel and resorts require a higher
13 rate of return. There's a larger amount of
14 risk associated with that, but these returns
15 are well within the range of feasibility when
16 you look at the combined properties of the
17 resorts and the timeshare.

18 MR. BURGER: A couple of follow-up
19 questions. The 14 percent IRR number they
20 identified, that number applies to, according
21 to the DEIS -- does that number apply to
22 hotels only, or does it also apply to hotels,
23 resorts with golf courses?

24 MR. SEYMOUR: I'm not too sure of
25 that, other than their Table 5.3 in Appendix
(ALTERNATIVES ISSUE)

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1 27 has Industry Surveys, Luxury Hotels, IRR
2 Standards, and it states that -- it lists
3 three different luxury hotel standards from
4 surveys that are done by real estate
5 companies, and they range -- one is 13.7, 14.6
6 and 13.8.

7 ALJ WISSLER: What part of Appendix 27
Page 11

8 are you referring to?

9 MR. SEYMOUR: Page 5-5.

10 ALJ WISSLER: In Volume 1?

11 MR. SEYMOUR: Appendix 27. They
12 concluded that based on the preceding data, it
13 appears that in today's investment
14 environment, a yield in the range of
15 13.5 percent to 15 percent is necessary in
16 order to indicate a positive feasibility
17 indication for a project such as the subject
18 property. And their analysis came out to be
19 14.7 percent, considered feasible for the
20 resorts and the golf alone.

21 MR. BURGER: Unless your Honor has a
22 follow-up question on that --

23 ALJ WISSLER: No.

24 MR. BURGER: In regards to the
25 aggregate calculus, the calculus you
(ALTERNATIVES ISSUE)

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1 performed, looking at these numbers
2 comparatively, would you conclude that these
3 alternatives are comparatively feasible?

4 MR. SEYMOUR: With the range of data
5 that was provided and the adjustments that the
6 appraiser made in the HVS report, to me these
7 are relatively comparable returns based on the
8 three alternatives. The three alternatives I
9 looked at were full build-out or the
10 individual build-out of either side. The
11 individual ones are a little lower in terms of
12 the internal rate of return, but only by a

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percent point or two.
MR. BURGER: The City would just like to clarify one point in case there was some sort of interpretation that Mr. Seymour made in terms of his accepting all the data. The analysis that he performed did use the numbers that were provided by the DEIS to reach the conclusions that we reached. In our comments and in our brief, we did note that the wages that were used at the hotels were out of proportion to those currently that are currently standard throughout the area. I don't want anything to be misconstrued today
(ALTERNATIVES ISSUE)

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that anything that Mr. Seymour made negates our position that that's the case.
Turning quickly to the alternatives, the scoping document excerpt, I want to read a portion of it. Section 5.0 alternatives: "The DEIS shall discuss the alternatives. Alternatives shall be prepared in sufficient detail so that impacts can be compared to those of the proposed action."
Our essential point is that there was no analysis done on the impacts of any of these alternatives that were identified. They were all dismissed as being economically infeasible. We believe that the analysis we have presented show that these alternatives are comparatively feasible at the least, if not economically feasible according to some industry standard that they presented. Those

19 are all subject to interpretation.

20 The decision to forgo any
21 environmental analysis of these alternatives
22 has led to a grossly insufficient DEIS. There
23 is no reasonable range of alternatives that
24 DEC can analyze, and thereby there's no
25 opportunity to choose among alternatives or to
(ALTERNATIVES ISSUE)

1 even identify appropriate mitigation measures,⁹²⁸
2 potential mitigation measures that might be
3 appropriate given the impacts to mitigate the
4 impacts of the project.

5 ALJ WISSLER: That's it?

6 MR. BURGER: That's it.

7 ALJ WISSLER: As part of your
8 presentation, are you going to do a similar
9 economic analysis?

10 MR. GERSTMAN: Yes.

11 ALJ WISSLER: I'll let you go first.

12 MR. GERSTMAN: Your Honor, we've
13 raised alternatives as a substantive and
14 significant issue which warrants adjudication
15 in this matter. As Mr. Burger has said, the
16 DEIS failed to evaluate the reasonable
17 alternatives, and we believe that the economic
18 assumptions and projections were not properly
19 utilized. We believe that reduced scale
20 alternative and alternative layouts and
21 configurations and non-golf course
22 alternatives need to be examined.

23 As you know, your Honor, the

24 Commissioner is required to find, if the
25 Commissioner wants to approve a project, that
(ALTERNATIVES ISSUE)

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1 from among the reasonable alternatives, the
2 action mitigates the adverse environmental
3 impacts to a maximum extent practicable
4 consistent with social and economic and other
5 essential considerations.

6 The alternatives analysis becomes that
7 much more important where the location of the
8 project is in such a sensitive environmental
9 area. Our experts have already started to
10 identify for you, and will continue to
11 identify, significant adverse environmental
12 impacts associated with this intense use of
13 this location related to the scale of the
14 project, including those related to traffic,
15 that you've already begun to hear about,
16 visual impacts, as we heard yesterday
17 community character. We will hear about
18 impacts to the forest preserve, to forestry
19 later this afternoon, to habitat, and later in
20 the Issues Conference, impacts to aquatic
21 habitat, water supply and surface
22 water/groundwater hydrology, including
23 stormwater runoff.

24 In light of those significant
25 environmental impacts and the extreme
(ALTERNATIVES ISSUE)

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1 environmental sensitivity of this area, the
2 necessity to evaluate reduced scale and
3 non-golf course alternatives is heightened

4 under the SEQRA responsibility for the
5 Commissioner.

6 In one of our expert's reports, Mr.
7 Alschuler has suggested that consistent with
8 what the City expert has just identified, the
9 wildacres only component, using the lodging
10 units as a basis for comparison, is an
11 absolute essential way to proceed. We also
12 suggested reduced residential as a possibility
13 or natural amenities alternative or single
14 golf course alternative. All of those are
15 critical to evaluate.

16 We also suggest the alternatives
17 analysis has to be reviewed in the context of
18 the proximity of the development projects to
19 either the Pepacton or Ashokan Reservoir. As
20 your Honor will hear, the Ashokan is a
21 terminal reservoir, and there are significant
22 adverse impacts potentially associated with
23 runoff and secondary growth associated with
24 that reservoir.

25 As Mr. Alworth testified yesterday,
(ALTERNATIVES ISSUE)

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1 the golden egg of this area is the natural
2 resources, is the skiing availability, is the
3 attraction of people to visit to take
4 advantage of those resources. You have heard
5 from our witnesses, at least in starting out
6 yesterday, about how important that is for
7 this area. We believe some of the
8 alternatives that could be examined would

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9 fulfill the identified need for lodging to
10 enable people to have access to those
11 important natural resources and to the ski
12 area, Belleayre Mountain Ski Area.

13 We believe some of the alternatives
14 may be viable provided that they are
15 consistent with community character and
16 developed consistent with sustainable and
17 quality community policies and also provided
18 that there's proper and objective
19 environmental review that takes place.

20 Your Honor, I would like to introduce
21 you to John Ellsworth of Cashin Associates.
22 Mr. Ellsworth's CV has already been submitted
23 for the record.

24 would you briefly describe your
25 background.

(ALTERNATIVES ISSUE)

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1 MR. ELLSWORTH: I've been with Cashin
2 Associates about 16 years now; and almost
3 right from the very beginning, I got involved
4 in preparation and review of environmental
5 impact statements, so I've been doing that for
6 over 15 years, and I have reviewed many EIS's,
7 prepared many EIS's over that period.

8 My education background is I have a
9 Bachelor of Science degree from the University
10 of Rochester in biology/geology, and a
11 Master's degree from Stony Brook University in
12 Environmental Sciences.

13 MR. GERSTMAN: Your Honor, I would
14 like to introduce CPC 31 and CPC 32. CPC

15 Exhibit 31 is a Summary of Deficiencies in the
16 Alternatives Analysis.

17 MR. RUZOW: Marc, CPC 31 was the
18 Shandaken Master Plan Survey.

19 ALJ WISSLER: So 32 is what?

20 MR. GERSTMAN: This will be 32 and 33.
21 CPC 32 would be the Summary of Primary
22 Deficiencies of the Alternatives Analysis.

23 ("DEIS FOR BELLEAYRE RESORT AT
24 CATSKILL PARK SUMMARY OF PRIMARY DEFICIENCIES
25 OF ALTERNATIVES ANALYSIS" RECEIVED AND MARKED
(ALTERNATIVES ISSUE)

1 FOR IDENTIFICATION AS CPC EXHIBIT NO. 32, THIS ⁹³³
2 DATE.)

3 MR. GERSTMAN: CPC 33 is the
4 Alternatives Analysis Supplemental Offer of
5 Proof.

6 (ALTERNATIVES ANALYSIS SUPPLEMENTAL
7 OFFER OF PROOF CATSKILL PRESERVATION COALITION
8 JUNE 10, 2004 RECEIVED AND MARKED FOR
9 IDENTIFICATION AS CPC EXHIBIT NO. 33, THIS
10 DATE.)

11 MR. GERSTMAN: Mr. Ellsworth.

12 MR. ELLSWORTH: CPC 32 is a summary
13 chart that I put together. I submitted a
14 document dated April 21st, 2004, regarding my
15 review of the DEIS; and in an effort to
16 summarize the key points from that, I created
17 a table that bullets the key deficiencies of
18 the alternatives analysis, and also in order
19 to understand these deficiencies since the end

20 product is going to be a determination as to
21 whether the proposed action minimizes impacts
22 to the maximum extent practicable. I went
23 basically through the whole EIS and identified
24 certain deficiencies there to show that given
25 the deficiencies in the alternatives analysis
(ALTERNATIVES ISSUE)

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1 and the deficiencies in the analysis of the 934
2 proposed action, it doesn't appear it's
3 possible to make a finding statement in
4 support of this project.

5 MR. GERSTMAN: Your Honor, Mr.
6 Ellsworth referred to his letter dated
7 April 21st, 2004.

8 ALJ WISSLER: It is part of the public
9 comment, but I don't have it as a separate
10 exhibit in this hearing. If you want to put
11 it in.

12 MR. GERSTMAN: I believe it is
13 already.

14 ALJ WISSLER: Is it in the petition?

15 MR. GERSTMAN: Yes, it is. It's
16 Exhibit P.

17 MR. ELLSWORTH: Exhibit CPC 33 is
18 similar information in a Power Point format,
19 but it also includes some pages up front with
20 citations out of the SEQRA regulations, and
21 I'm going to go mostly from CPC 33 in my
22 presentation today, and I'll pull in one of
23 the tables from No. 32 later on.

24 I think it's important to recognize
25 that although the SEQRA regulations provide

□

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1 just broad outlines for what's supposed to be
2 in an Environmental Impact Statement, with
3 regard to alternatives, it provides very
4 specific guidance as to what the criteria are.

5 Those -- the key passages from the
6 SEQRA regulations are the first two text pages
7 of CPC 33, and I would just like to, again,
8 highlight the key passages from that: "when
9 you get to the findings stage in the SEQRA
10 process, the lead agency, also all the other
11 involved agencies, because they're supposed to
12 do their own findings, must certify that
13 consistent with social economic and other
14 essential considerations, from among the
15 reasonable alternatives available, the action
16 is one that avoids or minimizes adverse
17 environmental impacts to the maximum extent
18 practicable, and that adverse environmental
19 impacts will be avoided or minimized to the
20 maximum extent practicable by incorporating in
21 its conditions to the decision those
22 mitigative measures that were identified as
23 practicable." I think it will become clear,
24 based on the full record that's introduced
25 here, that the DEIS -- you can't arrive at
(ALTERNATIVES ISSUE)

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1 that conclusion based on the information in
2 the DEIS. That section was out of the -- the
3 part of the SEQRA regulations that address
4 findings.

5 Another section of the SEQRA regs,
6 which is 617.9 (B) (V), Roman numeral 5, the
7 DEIS must include a description and evaluation
8 of the range of reasonable alternatives to the
9 action that are feasible considering the
10 objectives and capabilities of the project
11 sponsor.

12 This is the key sentence here: "The
13 description and evaluation of each alternative
14 should be at a level of detail sufficient to
15 permit a comparative assessment of the
16 alternatives discussed. The range of
17 alternatives must include the no action
18 alternative. The no action alternative
19 discussion should evaluate the adverse or
20 beneficial site changes that are likely to
21 occur in the reasonably foreseeable future in
22 the absence of the proposed action." As I'll
23 discuss later on, the DEIS didn't accomplish
24 either of those two key objects.

25 Now I'd like to jump right into the
(ALTERNATIVES ISSUE)

□

1 discussion of what I saw as the deficiencies
2 in the DEIS's analysis of the alternatives.
3 Before I get into the discussion of the first
4 slide, alternative locations, just as a
5 little -- some general background here, and
6 this was in my comment letter, the
7 alternatives section of the DEIS consisted of
8 59 pages in total. And I'm just going to go
9 through this.

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10 I don't mean to imply just by counting
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11 pages you can determine how much the quality
12 of the level of the information in the DEIS --
13 but it sort of gives an instructive first view
14 of what's going on in the DEIS with regard to
15 alternatives. 59 pages total in a
16 multi-hundred, maybe a thousand-page document,
17 41 pages of that concern project design
18 issues. Admittedly, they were part of the
19 scope and they needed to be in there, but
20 they're really focused on how the Applicant
21 can make their proposal work on this site; and
22 they concern things like water supply,
23 wastewater disposal, golf course management
24 practice, stormwater management and
25 construction phases.

(ALTERNATIVES ISSUE)

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1 That leaves 18 pages in the DEIS
2 alternative discussion to evaluate different
3 scenarios of development for the subject
4 property. 13 of those pages out of the 18
5 summarized a 700-page appendix in an effort to
6 show why alternative layouts were not
7 financially feasible. What you're left with
8 after that is five pages, and they discuss
9 three different alternatives in those five
10 pages; alternative locations, alternative uses
11 of the site, and the requisite no action
12 alternative.

13 Certainly, just at first glance, even
14 without reading the words in the document,
15 that should raise red flags. Going into the

16 specific alternatives that were discussed in
17 the DEIS -- starting with allocations. The
18 first thing is they didn't really explain the
19 criteria they used for excluding sites from
20 their analysis. They just basically gave
21 general conclusions about why a site wasn't
22 appropriate. For example, they said that they
23 excluded sites that weren't a reasonable
24 distance from Belleayre Mountain, and that's
25 not explained. So a decision-making agency
(ALTERNATIVES ISSUE)

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1 really has no idea, if they're evaluating
2 that, whether that was reasonable or not.

3 Second thing is they didn't really
4 provide details of the sites that they looked
5 at even. There was no map showing where these
6 sites were, no indication of acreages, no
7 discussion of environmental constraints and
8 things like that. They basically just said:
9 we excluded this site because of steep slopes.
10 we excluded this site because it had wetlands.
11 we excluded this site -- pick a reason, but
12 you really can't look back at the DEIS and
13 figure out if that's a valid conclusion.

14 They clearly didn't demonstrate the
15 unique suitability of this particular site for
16 the proposed project substantiated. It may be
17 the most suitable site in the region, but
18 there's certainly not enough information in
19 the DEIS for somebody else to go in there and
20 arrive at the same conclusion.

21 Finally, with regard to alternative

22 locations, the DEIS indicates that they
23 discussed this issue with Shandaken town
24 officials. There's no indication that they
25 did a similar sort of meeting or phone
(ALTERNATIVES ISSUE)

1 conference with Middletown officials to help ⁹⁴⁰
2 them identify where alternative sites might
3 be.

4 The next alternative they looked at
5 was alternative uses. They really only looked
6 at one alternative use, and that was a
7 standard subdivision. They actually drew a
8 map dividing the two properties into
9 single-family lots and included that in the
10 DEIS, and that was pretty much it. There's no
11 reference even in the text of the DEIS to that
12 map.

13 Beyond that, the fact that they didn't
14 even really look at it, it's sort of a paper
15 tiger because there's planning tools at the
16 disposal of municipalities, like clustering,
17 to avoid impacts to things like steep slopes
18 and wetlands. So even the one alternative use
19 that they looked at wasn't done in sufficient
20 detail to draw any conclusions.

21 MR. GERSTMAN: When you talk about
22 insufficient detail of the analysis in the EIS
23 on this standard subdivision, are you saying
24 that there was not any description of what the
25 potential environmental impacts would be of a
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1 standard subdivision in those locations?

2 MR. ELLSWORTH: There was just
3 conclusions that it would involve extensive
4 disturbance of steep slopes, extensive
5 disturbance of wetlands, things like that, but
6 there was no quantitative information as to
7 how many acres of steep slopes would be
8 disturbed and how many acres of wetlands. And
9 even if they did that, there would be no basis
10 of comparison to the proposed action because
11 they didn't provide acreages of steep slopes
12 disturbances to the proposed action.

13 MR. GERSTMAN: Your Honor, you recall
14 on our site visit on wildacres, you led us on
15 a hike, or Al may have led us on a hike, up
16 and down some fairly steep slopes. We have
17 introduced CPC Exhibit 3, if I might identify
18 it.

19 ALJ WISSLER: This is CPC Exhibit 3A
20 we're looking at; am I right?

21 MR. GERSTMAN: Yes. Earlier in the
22 Issues Conference, Mr. Chris Olney from the
23 Catskill Center introduced this map of the
24 slopes. He has drawn approximate locations of
25 the two project sites, and I believe he
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1 identified that the steepest slopes as
2 represented on the scale were 25 to 40 percent
3 slopes in the wildacres site, which actually
4 exceeded much of the Belleayre Ski Center.
5 And as you recall, your Honor, we walked on
6 some of the areas where the hotel would be

7 built and the golf course, in that area,
8 located in and around some of these steep
9 slopes.

10 Mr. Ellsworth, is it your professional
11 opinion that one of the bases upon which to
12 include alternatives in an Environmental
13 Impact Statement is to be able to compare
14 environmental impacts and be able to choose
15 from one of those in order to make findings at
16 the end of the process?

17 MR. ELLSWORTH: That's most one of the
18 most critical elements of the SEQRA process.

19 I think looking at this map, again
20 especially on the east parcel, the idea of --
21 the idea of doing a standard subdivision that
22 covers that entire parcel, just looking at
23 what the slopes are, you can see that that's
24 not really a reasonable alternative.

25 Also under alternative uses, they just
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1 looked at the standard subdivision, they
2 didn't look at alternatives of scaled-down
3 uses that would provide some of the
4 objectives that the Applicant indicated was
5 the purpose of this project, such as
6 additional lodging, and also to provide the
7 recreational and economic benefits; but also
8 since it would be a reduced scale alternative,
9 it would decrease the project-related
10 environmental impact.

11 They also didn't do any level of

12 detail in terms of analysis of existing golf
13 facilities to see if there's an excess demand
14 among the existing golf facilities that could
15 satisfy the demand that would be created by
16 the development of these parcels, that could
17 eliminate or reduce the number of courses that
18 are needed here.

19 MR. GERTSMAN: Before you go on, Mr.
20 Ellsworth, Mr. Alschuler from HR & A will be
21 offering further proof later concerning what
22 might be termed "a natural amenities
23 alternative"; an alternative that might
24 involve reduced scale lodging unit or
25 potentially a reduced scale residential unit
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1 that would, as part of its attractiveness, be⁹⁴⁴
2 associated with the natural resources, and as
3 Mr. Alworth termed it yesterday, the golden
4 egg of the region. would that be an
5 alternative use that you would consider
6 reasonable and should be included under the
7 scoping document that was referred to earlier
8 by DEP and under SEQRA regulations themselves?

9 MR. ELLSWORTH: I believe that when
10 the title of the alternative is Alternative
11 Uses, that that is a very reasonable
12 alternative. Although the DEIS followed the
13 scoping document, and if you go through and do
14 a checklist, they did something on everything
15 they were supposed to do, the scoping document
16 was very broad in its language, so it allowed
17 the Applicant a considerable amount of

18 latitude in what to put in the DEIS.

19 So they -- it seems that they
20 interpreted that very loosely that they just
21 needed to put something in the DEIS, and they
22 didn't really go into the level of detail
23 that's required under the SEQRA regulations.

24 Next alternative was Alternative
25 Layouts. what they did here, and it's not
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1 clear from the scoping document what this was
2 supposed to be, but it's reasonable how -- in
3 general how they approached it. They did
4 different layouts of the specific types of
5 uses that they're proposing, these world class
6 type resort facilities. Unfortunately, the
7 entire section is devoted almost entirely to
8 eliminating all of those alternatives from
9 further consideration based on the economic
10 analysis.

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11 They also said that their Reduced
12 Density Alternative is not really needed
13 because the proposed project already minimizes
14 and avoided impacts. And I think it's clear
15 from the record that that is just not true.

16 There are a number of impacts -- even
17 in their own summary section of impacts --
18 that can't be avoided. They acknowledged
19 there would be impacts to vegetation, wildlife
20 habitat, potential erosion and sediment
21 transport during construction, generation of
22 dust and increased noise levels during

23 construction, change in visual character and
24 increased traffic. Right in their own
25 document, they admitted that in a different
(ALTERNATIVES ISSUE)

1 section, and then they have a statement in the ⁹⁴⁶
2 alternative layout section saying that the
3 proposed project already minimizes or avoids
4 impacts.

5 MR. GERSTMAN: Mr. Ellsworth, you
6 hadn't been here to listen to CPC's traffic
7 expert, Mr. Ketcham, nor the visual discussion
8 from Mr. Sundell, nor community character from
9 Ms. Kopaskie. Let me just refer the Judge to
10 those sections of our record that have
11 identified that the EIS, in fact, does not
12 adequately identify those environmental
13 impacts; in fact, they minimize them. But
14 based upon your general understanding of a
15 project of this size, would alternative
16 layouts possibility reduce the visibility of
17 the project from important areas of state-wide
18 concern like state trails or hiking systems or
19 the Route 28 corridor, for instance?

20 MR. ELLSWORTH: Well, the alternative
21 layouts that at least they listed in DEIS
22 included an east only and a west only
23 alternative, and certainly either of those two
24 would reduce the visual impacts of the project
25 because you would only be developing one ridge
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1 top. And it's also possible that they could ⁹⁴⁷
2 reduce visual impacts by scaling back the

3 extent of a two-site development.
4 Unfortunately, we don't know that right now
5 because they didn't go into the detail on
6 either of those. They eliminated all of them
7 based on the economic considerations, so
8 there's no information at all in the DEIS
9 regarding what the relative impacts of these
10 alternative layouts might be.

11 MR. GERSTMAN: If you reduce the size
12 of the project and the number of lodging
13 units, presumably you reduce the number of
14 cars traveling to and from, service vehicles,
15 site disturbance, wetlands impacts, stream
16 disturbance impacts and all the rest?

17 MR. ELLSWORTH: Pretty much
18 across-the-board.

19 MR. GERSTMAN: Sorry to interrupt.
20 Please continue.

21 MR. ELLSWORTH: The DEIS comes to the
22 conclusion that two 18-hole golf courses are
23 required for the project's economic viability,
24 and they have testimony from experts to that
25 effect. And they have a massive appendix that
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1 is supposed to be in support of that
2 conclusion; however, when you look in detail
3 at what they've included in the Appendix 27 --
4 is it?

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5 MR. GERSTMAN: I believe so.

6 MR. ELLSWORTH: In Appendix 27, they
7 have a number of tables showing comparables

8 from various perspectives, comparable resort
9 facilities, comparable lodging facilities,
10 things like that. If you go to CPC 32,
11 there's a table labeled, "Summary of
12 Comparables and Economic Feasibility
13 Analysis." I looked at those tables, and
14 there were one -- two, three, four, five, six
15 sets of tables in there I looked at. There's
16 a varying number of sites. Not all of them
17 are in mountain areas. Not all of them that
18 are in mountain areas have golf. The
19 importance of mountain areas is that a lot of
20 their comparables were in warmer locations
21 where skiing isn't a factor. So they're not
22 really comparable.

23 MR. GERSTMAN: Mr. Ellsworth, explain
24 to the Judge how you prepared this chart and
25 how -- go through each of the columns and show
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1 the Judge how you got there.

2 MR. ELLSWORTH: The first column,
3 total number of sites, that's just the
4 facilities that are listed in each of these
5 categories; active timeshare, projects and
6 mountain areas. That table had 25 sites, new
7 style fractional interest projects.

8 MR. GERSTMAN: Is that your
9 traditional timeshare project?

10 MR. ELLSWORTH: Yes. It's a type of
11 timeshare. I'm not entirely familiar with the
12 terminology. I think this is a different
13 variation on the timeshare. The first column

14 is just a total number of facilities, and then
15 some of the tables included a lot of
16 facilities that are in warm weather locations
17 like Florida or southern California, and
18 what's left in the second column is the sites
19 that are in mountain areas, and that would
20 have two-season type activities, ski and golf
21 being the primary focus.

22 So you go from 108 total sites in all
23 of one, two, three, four five, six tables, to
24 76 sites eliminating the ones that are in warm
25 weather locations.

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1 when I did a look at the sites and
2 mountain areas with golf, what I had to do
3 there in a lot of cases was go to the websites
4 of the various facilities to see if they
5 advertise golf. That reduces the number of
6 sites of mountain areas from 76 to -- there
7 are only 27 with any golf at all, based on my
8 analysis.

9 Then the final step is how many of
10 these sites and mountain areas that have golf
11 have 36 or more holes of golf, and if you look
12 at the last column, it's zeros down the board
13 except there's one under the new style
14 fractional interest, and the information that
15 was available to me was indefinite. It said
16 it had two courses, I'm guessing that's 18
17 holes a golf course, but it's not certain. So
18 I'll give them that one.

19 Then there was one other one under
20 National Resort Comparable Clubs. There was
21 one site there that was listed in a mountain
22 area, which included 54 holes of golf. But if
23 you go to the website, the advertising touts
24 its mild weather, and there's no advertisement
25 of an association with winter sports.

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1 So at best, you start out with 108
2 total sites on these tables in Appendix 27,
3 and what you wind up is maybe one facility
4 that has 36 or more holes of golf.

5 ALJ WISSLER: Mr. Ellsworth, where are
6 those two sites located? Do you know the
7 names of those resorts?

8 MR. ELLSWORTH: Yes, if you hang on a
9 second, I'll go to the letter.

10 MR. GERSTMAN: Referring to Exhibit P
11 to CPC petition's for party status.

12 ALJ WISSLER: I'm referring to the
13 table on the second page of CPC 32, New Style
14 Fractional Project Interests 1.

15 MR. GERSTMAN: And I think
16 Mr. Ellsworth, for the information is
17 referring to CPC Exhibit P, petition for party
18 status.

19 MR. ELLSWORTH: The April 21st letter.
20 I'm on page 16. I'm trying to see if this is
21 the one. On the new style fractional interest
22 projects, the one with two courses is the
23 Snowmast Resort at Northstar, again one word.

24 ALJ WISSLER: Where is that?

25 MR. ELLSWORTH: This is Table VI-1 in
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1 Appendix 27.

2 ALJ WISSLER: Is that Northstar
3 Village, Tahoe, California?

4 MR. ELLSWORTH: Colorado. Then the
5 National Resort Comparable Clubs, Broadmoor
6 Golf Club is the one that has more than 18
7 holes of golf, but it doesn't appear to be
8 associated with winter activities.

9 ALJ WISSLER: This is Broadmoor as in
10 what, the Carolinas?

11 MR. ELLSWORTH: No, this is in
12 Colorado.

13 MR. GERSTMAN: Footnote 1.

14 MR. ELLSWORTH: Footnote 1 is Snowmast
15 Resort at Northstar in Colorado.

16 MR. GERSTMAN: Footnote 2.

17 THE WITNESS: That's Broadmoor Golf
18 Club, also in Colorado.

19 MR. RUZOW: You're identifying two
20 sites in Footnote 1?

21 MR. GERSTMAN: One site in Footnote 1,
22 I believe, is that what you're referring to,
23 Mr. Ellsworth?

24 MR. ELLSWORTH: Yes.

25 MR. GERSTMAN: Would be Snowmast. The
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1 second site is located in a mountain area,
2 identified 54 golf holes, and I believe you
3 just said that was Broadmoor?

4 ALJ WISSLER: National Resort
5 Comparable Club, that's the row you're looking
6 at; right?

7 MR. ELLSWORTH: Yes -- I don't know.

8 MR. GERSTMAN: Please proceed.

9 MR. ELLSWORTH: Alternative layout
10 continued. A lot of this was discussed in the
11 City's presentation, so rather than -- should
12 I just --

13 MR. GERSTMAN: You heard the City's
14 presentation. Have you had a chance to review
15 New York City DEP Exhibit No. 6?

16 MR. ELLSWORTH: No.

17 MR. GERSTMAN: If he might take one
18 moment to review that now, your Honor.

19 ALJ WISSLER: We can.

20 why don't we take five minutes.

21 (10:28 - 10:39 A.M. - BRIEF RECESS

22 TAKEN.)

23 ALJ WISSLER: If we're ready, let's
24 resume. Mr. Gerstman.

25 MR. GERSTMAN: Mr. Ellsworth.
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1 MR. ELLSWORTH: Footnote No. 1 relates⁹⁵⁴
2 to Snowmast Resort at Northstar, and that's in
3 Snowmast Village Colorado, and Broadmoor Golf
4 Club is also in Colorado. It's pretty much
5 due south of Denver in the south central
6 portion of the state.

7 MR. GERSTMAN: Mr. Ellsworth, have you
8 had a chance to review New York City DEP
9 Exhibit 6?

10 MR. ELLSWORTH: Yes.

11 MR. GERSTMAN: What is your general
12 feeling about that exhibit?

13 MR. ELLSWORTH: The comments regarding
14 this issue that I put in my letter identified
15 the issue that they didn't look at the full
16 scope of the economic analysis in a cumulative
17 manner, they just looked at the golf courses
18 and the hotels, and that was the basis of
19 their conclusion. And they left out the
20 lodging and the single-family homes. This
21 memorandum addresses the issue, and actually
22 includes an analysis.

23 ALJ WISLER: Speaking of New York
24 City Exhibit 6?

25 MR. GERSTMAN: Yes.
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1 would you generally agree with the
2 conclusions that were drawn?

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3 MR. ELLSWORTH: I wasn't able to look
4 in detail at the economic analysis, and that
5 is not my specific area of expertise. So I'll
6 defer to them on the conclusions of the
7 analysis.

8 MR. RUZOW: You have to keep your
9 voice up.

10 MR. ELLSWORTH: I can't really speak
11 to the conclusions. I just identified the
12 issue; they did the analysis. I haven't had
13 time to review the analysis; and, besides,
14 that's not really my specific area of

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expertise.
Then the final alternative, the no action alternative. Really referring back to one of the first pages in this exhibit, Exhibit CPC 33, the Section 617.9 (B), Roman numeral (V), the no action alternative is the only one that is specifically addressed in the SEQRA regulations; and again it says: "The no action alternative discussion should evaluate adverse or beneficial site changes that are likely to occur in the reasonably foreseeable
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future in the absence of the proposed action."⁹⁵⁶
And basically what they did for the no action alternative was they selected three parameters, those are really the only three that are addressed in this section of the alternatives analysis; land use, local and regional planning goals, and socioeconomic benefits. And those are the three that they're hanging their hat on as far as the alleged benefits of this particular project. There is absolutely no discussion in the no action alternative of all the other range of environmental variables, including geological and topographic resources, surface water and groundwater resources, terrestrial and aquatic ecology, soils, traffic, visual and aesthetic impact, noise and cultural resources.

So basically they selected the parameters that shed their project in the best possible light and pushed aside everything

21 else.

22 Also under the no action alternative
23 in describing the impacts that would result
24 from pursuing that course, they make a general
25 statement that the site will continue to be
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1 logged, but there's no information as to what⁹⁵⁷
2 that really involves. There's no history,
3 discussion of logging on the site. We don't
4 know when logging last occurred, if it's
5 ongoing, what the acreage is, what types of
6 areas, what types of trees are taken out,
7 things like that.

8 Furthermore, the DEIS improperly
9 assumes -- after setting up the no action
10 alternative correctly and saying that no
11 action will be taken in the future, they go
12 further in the brief discussion that they give
13 of no action alternative, they say that the no
14 action alternative may entail impacts
15 associated with future development. So they
16 are improperly assuming the no action
17 alternative entails development when by
18 definition it doesn't.

19 They also tout the benefits, so to
20 speak, of doing a comprehensive environmental
21 analysis associated with this particular
22 project, and they say you wouldn't get that
23 with the no action alternative, but this
24 argument completely ignores the requirement
25 under SEQRA to review the impacts in a
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1 cumulative manner from subsequent individual
2 actions.

3 So you still have to review all of the
4 impacts even under the no action alternative.
5 what they're talking about really, is even in
6 the absence of granting approval to the
7 proposed action, if you developed the subject
8 property piecemeal. They also stress the
9 benefits, if you will, of undertaking their
10 comprehensive analysis in terms of identifying
11 the mitigation that could be provided and
12 implying that you wouldn't get any mitigation
13 if you didn't approve this project.

14 Again, SEQRA requires that you provide
15 mitigation every time you approve an action,
16 even if it's done in small pieces over time.
17 And in a sense, a gradual development scenario
18 may be more attractive because it allows you
19 to have a little bit of development, see
20 what's really happening and then react
21 accordingly instead of approving a very large
22 project and hoping that you have enough
23 mitigation in place.

24 MR. GERSTMAN: Mr. Ellsworth, let me
25 ask you a question. In your professional
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1 opinion, gradual development as it relates
2 to -- I know you're not here to talk about
3 community character -- but can you draw any
4 conclusions between the ability to evaluate
5 environmental impacts from the gradual

6 development in an area versus a mega resort
7 project that you're seeing here?

8 MR. ELLSWORTH: Well, it applies to
9 pretty much all the environmental variables,
10 including community character. You can have
11 phased projects where each subsequent phase
12 would be dependent upon an evaluation of what
13 went before, and you can include in that
14 community character. If you approve something
15 this big, that's it, you're going to have that
16 whole development, and really there's no check
17 in the process to see if what you're getting
18 is what you approved originally.

19 overall the no action alternative
20 focuses on economic considerations and
21 basically doesn't consider local and regional
22 goals for environmental conservation, and the
23 two go -- should be addressed hand in hand.

24 Yes, it's important to have economic
25 development, but even in regard to the
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1 Watershed Compact, there are important
2 environmental considerations that were
3 expressed as goals for this area that are not
4 addressed at all under the no action
5 alternative. I'm just going to go
6 briefly -- that covers it for my summary of
7 the alternatives analysis.

8 I also looked at the -- basically the
9 entire Environmental Impact Statement
10 because --

11 MR. GERSTMAN: Let me interrupt for
12 one second.

13 MR. ELLSWORTH: Sure. In
14 consideration of time constraints, I would
15 refer you to -- there's a Summary of
16 Deficiencies in the other sections of the
17 Environmental Impact Statement --

18 MR. RUZOW: Your Honor, today is about
19 alternatives. Is there some reason why we're
20 looking at other subject areas in terms of
21 alleged --

22 MR. GERSTMAN: Your Honor, this is, as
23 we've indicated, the alternatives analysis is
24 tied very closely in the consideration of
25 whether or not it's an adjudicable issue to
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1 the significant adverse environmental impacts⁹⁶¹
2 that are associated with the project and the
3 deficiencies.

4 For purposes of efficiency of time,
5 Mr. Ellsworth is not going to testify further.
6 We're going to submit this as part of the
7 record as a summary of his analysis of the
8 DEIS and its deficiencies, and we'll move on
9 to Mr. Alschuler.

10 ALJ WISSLER: Thank you.

11 MR. GERSTMAN: Your Honor, do you have
12 any questions for Mr. Ellsworth?

13 ALJ WISSLER: No.

14 MR. GERSTMAN: I would like to
15 introduce Eric Goldstein who will present the
16 rest of CPC's offer of proof concerning

17 alternatives and Mr. John Alschuler.

18 MR. GOLDSTEIN: Good morning, your
19 Honor. Once again, my name is Eric Goldstein,
20 I'm an attorney with NRDC, the Natural
21 Resources Defense Counsel, and I'll be
22 presenting the next witness on behalf of the
23 CPC, Catskill Preservation Coalition. This
24 witness will also focus on the issue of
25 alternatives as set forth in the DEIS which is
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1 outlined in section J of our petition for
2 party status, pages 40 through 47.

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3 In short, CPC believes that the DEIS
4 alternatives analysis is deficient in that it
5 fails, among other things, to take a hard look
6 at reasonable alternative uses, including
7 lower build options that would minimize
8 adverse environmental impacts. The project
9 sponsor suggests that they don't have to
10 seriously explore these lower build
11 alternatives because such options would
12 provide less than the maximum rate of return
13 for investors. It's our contention, and we'll
14 brief this following this issues conference,
15 that that's the wrong legal standard, but even
16 if that is the correct test, we believe the
17 DEIS fails to establish that other reasonable
18 alternatives are not economically viable.

19 Finally, we note that the issues
20 surrounding the adequacy of the alternatives
21 analysis as presented by CPC's two witnesses

22 and the City's witnesses are substantive and
23 significant and are appropriate, we believe,
24 for adjudication as set forth by 6 NYCRR.

25 I'd like to introduce our next
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1 witness, Mr. John Alschuler.

2 Mr. Alschuler, can you briefly
3 summarize your educational background and your
4 professional experience.

5 MR. ALSCHULER: Yes. Your Honor, I'm
6 a graduate of Wesleyan University and have my
7 doctorate from the University of
8 Massachusetts. For the last 20 years, I've
9 been a founding partner and president of my
10 firm, HR & A. Our expertise is in land use
11 economics, real estate development and
12 financial feasibility.

13 We examine a variety of things
14 directly germane to this particular set of
15 issues. We've conducted large-scale analysis
16 for environmental impacts, including probably
17 the largest ever done for the United States
18 for the United States Air Force. We served as
19 the experts for the development of the MX
20 missile system on all financial matters.

21 We have done residential developments,
22 including those environmentally sensitive
23 areas within New York State such as the recent
24 work we did for New York City's largest
25 developer, The Related Company, for their work
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1 in Tuxedo, New York. We've dealt extensively

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2 with golf course and resort development in
3 ecologically sensitive areas. I served for
4 ten years as the advisor for a foundation for
5 the development of a 5,000-acre property,
6 including two golf courses in a very sensitive
7 area of the wetlands of Charleston, South
8 Carolina. We serve as an advisor regularly
9 for the mayor and governor of the City and
10 State of New York, of the District of Columbia
11 and other major cities in the northeast
12 corridor.

13 In addition to that, for close to 15
14 years, I've been an adjunct professor at
15 Columbia University where I teach a real
16 estate program. And finally I serve as the
17 lead outside director and member of the
18 executive committee of SL Green Realty. Our
19 company is the largest property owner in New
20 York City, with assets of well over three
21 billion dollars, and I must approve
22 acquisitions and calculations of IRR's on an
23 annual basis in excess of a half billion
24 dollars.

25 MR. GOLDSTEIN: Now, Dr. Alschuler,
(ALTERNATIVES ISSUE)

1 have you been involved in analyzing the
2 economic development opportunities in the
3 Catskills as part of your professional work?

4 DR. ALSCHULER: Yes. As a result of a
5 competitive process, we were retained by
6 Catskill Corporation, along with -- in

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7 concurrence with the City and State of New
8 York, the contract was actually held by the
9 City of New York -- and all our work product
10 was approved by both City and the State, and
11 we prepared an analysis of the economic
12 development opportunities in the watershed
13 region for that set of clients.

14 MR. GOLDSTEIN: For the Catskill
15 Watershed Corporation?

16 DR. ALSCHULER: For the Catskill
17 Watershed Corporation.

18 ALJ WISLER: Not the Catskill
19 Corporation?

20 DR. ALSCHULER: That's right, the
21 Catskill watershed Corporation.

22 MR. GOLDSTEIN: What were the overall
23 conclusions of that study, which I believe was
24 completed in 1998, if you recall? Can you
25 summarize briefly for us a couple of the major
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1 findings and conclusions of that body of work?⁹⁶⁶

2 DR. ALSCHULER: There were a variety.
3 I think the most germane here is that this
4 region, like any other, has to craft
5 development strategy based on what its core
6 competitive advantages are. The most
7 important core competitive advantage that
8 differentiates today, and I believe over time,
9 will increasingly differentiate this region,
10 the automatic standing quality of its natural
11 environment, and the very large amount of its
12 open space.

13 By virtue of its requirements to
14 maintain the watershed and the desire and
15 necessity of the City of New York to acquire
16 additional large portions of land in order to
17 maintain that watershed, this region will
18 increasingly dominate those people who choose
19 to locate in environments characterized by the
20 high quality and the natural environment.

21 If you compare this over time to
22 competitive areas, let's say, the Poconos and
23 the Berkshires, increasingly as those areas
24 become developed, they can never have because
25 they don't have a government that has
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1 purchased the very large land holdings and
2 they don't have the economics to acquire and
3 maintain a natural environment. what will
4 differentiate this area, and will continue to
5 be its primary source of economic growth, is
6 the quality of its natural environment and
7 access to what will be a major mountainous
8 area, probably the only mountainous area
9 directly adjacent to the population centers in
10 New York that has this level of open space and
11 natural character.

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12 ALJ WISSLER: The report you referred
13 to is the '98 report, the West of Hudson
14 Economic Study for the Catskill Watershed
15 Corporation?

16 DR. ALSCHULER: That is correct.

17 MR. GOLDSTEIN: CPC 18.

18 ALJ WISSELER: That study was
19 specifically directed to be undertaken
20 pursuant to the Memorandum of Agreement, the
21 Watershed Agreement?

22 DR. ALSCHULER: That is correct.

23 MR. YOUNG: Could we break for one
24 minute? I want to discuss one thing with
25 Mr. Ruzow.

(ALTERNATIVES ISSUE)

1 ALJ WISSELER: You want me to take a
2 five-minute break?

3 MR. YOUNG: I just want to go outside
4 for a second.

5 (10:57 - 10:59 A.M. - BRIEF PAUSE.)

6 ALJ WISSELER: Mr. Young.

7 MR. YOUNG: Before this witness
8 continues, your Honor, I represent the
9 Coalition of Watershed Towns which controls --
10 in essence, the CWC is a not-for-profit
11 corporation which represents those
12 communities, and they control the majority of
13 the Board of Directors in those communities.
14 I think this witness said he was retained by
15 the CWC to prepare a report, and he's now
16 testifying regarding his thoughts on that
17 report.

18 The question I have is does he have
19 CWC's permission, for work that he was
20 compensated for by CWC, to be here today. And
21 if not, I -- I would like to look at the
22 contract because I don't think people retained
23 him --

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24 ALJ WISSLER: I understand what you're
25 saying. Explain to me why he would not be
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1 able to comment on that document.

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2 MR. YOUNG: When you prepare, as a
3 lawyer or as a consultant and you're working
4 with an agency or a party, you're subjected to
5 all their personal thoughts and everything,
6 you work together and have a certain -- you
7 hear all their internal workings. He
8 is -- typically in our contracts, we don't
9 allow consultants to then go out and give
10 testimony.

11 Every single consultant contract I
12 have worked with always requires a
13 confidentiality obligation. You don't want
14 people going around talking about work they
15 did for you. He's now coming in and talking
16 about the intent and the work that he
17 submitted for the CWC. That's fine if CWC
18 says it's okay. I don't know that it's fine
19 in the absence of CWC.

20 MR. GOLDSTEIN: Your Honor, our
21 witness has no current contract with CWC. In
22 fact, if there even was a contract with the
23 CWC at all, this may well have been a contract
24 back with the City back in the mid 1990's. So
25 at this point, this is really speculation
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1 about whether, in fact, there was any existing
2 contract, and all our witness is testifying is

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3 summarizing in his view what the public record
4 as a result of that work indicates.

5 In any event, we're just about done
6 with this aspect of the history. Our purpose
7 in introducing this was to demonstrate from
8 the horse's mouth what some of the benefits
9 unique to this region were at the time of this
10 study.

11 ALJ WISSLER: The study was done in
12 `98 and revised in January `99?

13 DR. ALSCHULER: Correct.

14 MR. YOUNG: The study, I believe it
15 was commissioned by CWC.

16 ALJ WISSLER: Right, I was confirming
17 when that was done. I will allow him to offer
18 his testimony. If your investigation reveals
19 that there is something improper about the
20 testimony because of some agreement that he
21 has with CWC, I will entertain your motion
22 with respect to that, and if preclusion of his
23 testimony with respect to those aspects is
24 appropriate, I will so rule.

25 MR. GERSTMAN: Your Honor, I would
(ALTERNATIVES ISSUE)

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1 suggest that as in other issues concerning
2 potential conflicts, that we've addressed two,
3 your Honor, in terms of the possible impacts
4 on credibility. You weren't excluding
5 witnesses in that circumstance. If that is an
6 issue that Mr. Young wants to raise, it seems
7 to me this is not the proper forum to raise
8 it.

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9 ALJ WISSLER: It may be a motion he
10 can make in some final brief or something; is
11 that what you mean?

12 MR. GERSTMAN: If he's alleging a
13 breach of contract, that contract action
14 alleging a breach does not lie before your
15 Honor.

16 ALJ WISSLER: I agree.

17 MR. GOLDSTEIN: Just three more
18 questions on this point, your Honor.

19 First, Dr. Alschuler, have you
20 testified today to anything differently from
21 what you've already said on the public record
22 and public proceedings about this study?

23 DR. ALSCHULER: Absolutely. What I
24 have said is consistent with public statements
25 made in public meetings with the Corporation.
(ALTERNATIVES ISSUE)

1 MR. GOLDSTEIN: How do you feel about ⁹⁷²
2 the conclusions that were made in your 1998
3 report today as you look back in 2002?

4 DR. ALSCHULER: I think, if anything,
5 I may have some self interest in the answer to
6 the question. I feel like our conclusions are
7 more valid today than then. I think the
8 trends we predicted as to increasing home
9 price, increases in the attraction of the
10 environment have been repeatedly proven since
11 the issuance of our report.

12 MR. GOLDSTEIN: Can you give us your
13 thoughts as to the position of the economy in

14 the Catskills today and how it has changed
15 since 1998 and since September 11th, 2001,
16 your general impressions on that issue?

17 DR. ALSCHULER: They are general
18 impressions. We have not studied it with the
19 intensity we did prior to the issuance of our
20 report, but based on my regular review of the
21 real estate and professional journals and
22 material, that the trends that we had
23 anticipated of the increasing attractiveness
24 to the region due to its environmental
25 character, the increasing value in homes, the
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1 increasing desire of people within the
2 northeastern metropolitan regions to come here
3 because of the character of the environment
4 have been borne out by the published material.

5 MR. GOLDSTEIN: Thank you. Now let's
6 turn, Dr. Alschuler, to the alternatives
7 analysis in the DEIS and to the economic
8 assessment of potential development
9 opportunities.

10 In the course of your consulting work,
11 have you explored for clients whether various
12 development scenarios are economically viable
13 or not?

14 DR. ALSCHULER: That's part of our
15 work. Landowners, land investors look at a
16 variety of choices as they approach the
17 development of a piece of real estate, and it
18 is at the heart of our business to present a
19 variety of choices, or as is sometimes our

20 role, to be brought in by investors to look at
21 alternatives prepared by developers, so banks,
22 insurance companies, large pension funds,
23 investors, governments who are asking for
24 loans and the economic development system will
25 ask us to review alternative scenarios for
(ALTERNATIVES ISSUE)

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1 development.

2 MR. GOLDSTEIN: Can you walk us
3 through step-by-step what's the process; how
4 do you perform such assessments?

5 DR. ALSCHULER: We look principally at
6 four basic building blocks; first, what's the
7 market? what can you sell? what can you sell
8 for at what price, and how fast can you sell
9 it. If you're looking at single-family homes,
10 what's the average price point and how many of
11 them can you sell? Time is enormously
12 important here, as I'll talk about in a
13 minute. One of the key issues here is the
14 time value of money and velocity of the
15 product is important.

16 The second thing you look at, which is
17 the most important here, is what does it cost
18 you to earn the money. If you're going to
19 sell a home, if you're going to rent a hotel
20 room, how much does it cost the real estate
21 entity to produce that volume of revenue. The
22 analysis before you, the analysis we do
23 essentially is a relationship between what
24 does it cost you compared to what you earned.

25 And that's the relationship we look at, what
(ALTERNATIVES ISSUE)

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1 is earned, what does it cost.

2 We also look at questions of risk. At
3 the heart of an IRR analysis is what is the
4 nature of the risk and concern, and how well
5 is it compensated.

6 MR. GOLDSTEIN: An IRR analysis is
7 what?

8 DR. ALSCHULER: It's the internal rate
9 of return. It's the standard that HVS has
10 applied. We probably should talk a little
11 about what IRR means in this context. It's
12 important to understand that it's a relative
13 measure of return. Let's say I want to make a
14 million dollars. If I invest \$5 million, I
15 need a present value IRR of 20 percent. If I
16 want to make that same million on 10 million,
17 then I need an IRR of ten percent present
18 value back.

19 Taking it to a larger extreme, let's
20 say I go to a 100 million, and I get a one
21 percent IRR. So the IRR is not a set amount
22 of money you can make. You can make very
23 large and very small amounts of money and very
24 different rates of IRR. It's a measure
25 of--compared to how much I put out, how much
(ALTERNATIVES ISSUE)

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1 do I get back. And that really gets at the
2 core question which is what is the nature of
3 the risk that the investor is taking.

4 One of the things, which is clear by
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5 the Applicant's material, is they have chosen
6 a form of real estate investment -- it doesn't
7 say whether it's right or it's wrong, but it
8 is judged by the entire marketplace, including
9 the Applicant, to be substantially riskier
10 than other forms of development. It demands a
11 higher IRR in order to justify the capital.

12 Just make it a little less gibberish;
13 if I buy an office building in New York City,
14 and let's say it's occupied by City Corp. or
15 occupied by General Motors, I have a tenant,
16 they're paying money, the building is built,
17 the market will judge the risk of that, and
18 the market will say, okay, I'll invest an IRR
19 in today's marketplace 8, 9, 10, because the
20 risk is fairly perceived as low. This is
21 compared to what is perceived as a zero risk
22 of investment. A United States Treasury bill.
23 I can buy a treasury, you know, today market
24 is going up, high 3's, low 4's. I buy an
25 obligation in the State of New York, that's
(ALTERNATIVES ISSUE)

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1 riskier, now I'm in the 5's. I buy an office
2 building, I'm now close to 10. well, this is
3 now saying they want 14 or 15. They're saying
4 okay, it's a lot riskier. well, it is. And
5 people do that, and that's not bad. It just
6 is a market assessment that building starting
7 at scratch is riskier than not, and building
8 hotels is riskier than building houses.
9 You're basically running by the night, and so

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10 you're subject to much more volatility, and I
11 think the core issue here in many ways for the
12 investor and for the alternatives analysis is
13 when you have to sink out a lot of money up
14 front before you make your money back, that's
15 riskier.

16 And what the Applicant wants to do
17 here, it's not necessarily right or wrong,
18 what the Applicant wants to do is put a lot of
19 money up front. They have to build a couple
20 of golf courses and a bunch of roads and
21 infrastructure, they're out close to 25,
22 \$30 million, and there's no return on that at
23 all.

24 Now they may have to build the hotels,
25 they have to build the timeshare units, so the
(ALTERNATIVES ISSUE)

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1 level of risk here is represented by the
2 particular large amounts of capital they got
3 allocated. And they have to put that money
4 out there, and they have to get it back.
5 Since you don't make money off a road, you
6 build the road because you want to sell the
7 house or get to the hotel. My guess is -- we
8 don't have the data in front of us -- they're
9 not going to make a lot of money on the golf
10 courses. The purpose of the golf course is to
11 bring people into the houses or bring people
12 into the timeshare or the resorts.

13 So they're spending a very large
14 amount of money to amenitize and increase the
15 value of the real estate. All that money has

16 to go up front; and that, again, is not right
17 or wrong, it just increases the risk profile.

18 And what the market is telling us is
19 that these things don't work sometimes, and
20 that's why the investor wants a higher rate of
21 return, because they're going to -- presumably
22 have a diversified portfolio -- some are going
23 to work; some are going to hit a homerun, some
24 are not going to work so well. Some may not
25 work at all. So that's why over time -- very
(ALTERNATIVES ISSUE)

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1 few real estate investors will earn 15 percent⁹⁷⁹
2 over the life span of their portfolio. If
3 they were, everybody would be in real estate,
4 because that's twice what the stock market
5 does overtime.

6 why do you do that? well, you need
7 that level of return because there's greater
8 risk, and you're going to do some things that
9 are underwater or have minimal rates of
10 return. So the key question here, I think,
11 for the analysis of the IRR, and particularly
12 the alternatives, is they have chosen a
13 project -- correctly or incorrectly, that's a
14 different judgment we can talk about in a
15 minute -- that has a higher risk profile than
16 most real estate investments, and it is that
17 way because it requires a very substantial
18 outlay of capital at the front end of the
19 project with the returns coming down the road,
20 which is pretty much the source of the risk.

21 So to get back to the core of your
22 question, what we will do is look at the
23 market, what is the revenue potential, what
24 does it cost to produce it. We'll weigh those
25 two things together to help us understand what
(ALTERNATIVES ISSUE)

1 the risk is because the allocation of capital⁹⁸⁰
2 is a risk-to-price entity. If you don't want
3 to take a lot of risk, you buy bonds. If you
4 want to take more risk, you could invest in
5 Internet stock -- that's probably a risky
6 thing to do. Somewhere in the middle of this
7 is real estate.

8 And then we look at things which
9 perhaps create risk but are part of this
10 process which is can you permit it, is it
11 possible to build, and what's the time and
12 energy necessary to get the government to
13 allow you to do this. That's the basic
14 process we go through on behalf of our
15 clients.

16 MR. GOLDSTEIN: Let's see if we can
17 pull that process back into this process, and
18 you've reviewed the DEIS, the appendices that
19 dealt with the economic assessments of this
20 project. What is your opinion of the
21 financial viability of the development
22 scenarios presented in the DEIS and the
23 alternative development scenarios that were
24 outlined?

25 MR. ALSCHULER: Based on the
(ALTERNATIVES ISSUE)

1 information I have in front of me, that I have
2 reviewed carefully, which is the appendices
3 here, it is, I think, literally impossible to
4 tell.

5 MR. GOLDSTEIN: Impossible to tell
6 what?

7 DR. ALSCHULER: Whether or not they
8 have anything here that is economically
9 viable. While they have a reputable firm and
10 they have used a methodology that I presume
11 they are comfortable with, it is not a
12 methodology I would ever present to a client,
13 nor would any client that I have accept.

14 MR. GOLDSTEIN: Why is that? What is
15 the problem that you identified with the
16 methodology --

17 MR. ALSCHULER: The core issue here,
18 which is one the City's witness touched on,
19 and I completely concur with their assessment;
20 in our firm, we calculate IRR's solely on the
21 capital that is being invested. The question
22 of return is return on what. And in the
23 investment world, of which I'm an active
24 participant, the return is on the capital that
25 your entity has invested.

(ALTERNATIVES ISSUE)

1 what they have done here is calculate
2 something which I would never call an IRR,
3 others might, and maybe you're valid in doing
4 so, but this is a return on cost. Now, the
5 cost is paid for, as Mr. Donohoe has said --

6 and I concur. Most of this money is debt.
7 Most real estate development is financed
8 principally by debt, not by equity. You don't
9 calculate return on debt that the bank gets
10 paid back their interest. When you buy or
11 sell your home, you don't calculate what you
12 made or lost based on the price of your house,
13 you calculate what you made or lost based on
14 the equity you put in your home. And I have
15 bought and sold a bunch of my own houses, and
16 I never thought about, gee, what did I make on
17 the total price of the house; I said, gee,
18 what did I make on the money I put in, and am
19 I better off or worse off for my down payment
20 that I put into the house. It's a lot more
21 complicated here, but on some level it's no
22 more complicated.

23 The investment community looks at
24 return on the capital they put in. We could
25 say -- there are all kinds of projects --
(ALTERNATIVES ISSUE)

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1 roughly 20, 25 percent of the total cost of
2 the development. So it's really, I think,
3 very hard for -- is impossible for me to
4 understand whether or not the base case here
5 or the alternatives are, in fact, financially
6 rational because they have used an analysis
7 that is a return on a measure that I would
8 never recommend to a client.

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9 The second problem -- the methodology
10 I would use is I would prepare what we would
11 call a pro forma. We would take a whole

12 series of things that aren't even included in
13 this analysis. A pro forma, which I believe
14 to be a vastly superior analytic tool here,
15 does a couple of things. There are a whole
16 series of costs the developer has that aren't
17 in here. The cost of their financing is
18 implied but not explicit. The cost of
19 operating these facilities is implied but not
20 quantified. The ratio, as I referred, of debt
21 to equity is not dealt with. And the price of
22 the equity, which is really the core question
23 here, and is equity getting its proper return.

24 And then most importantly, what's the
25 time value of the money. Just to try and make
(ALTERNATIVES ISSUE)

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1 that more concrete, if building a golf course,⁹⁸⁴
2 by the time you start construction, you seed
3 it, it matures, people can play on it, is a
4 several-year process. So I have to lay out my
5 money in year one, and let's just say for the
6 sake of discussion no one can play on it until
7 year three. In anybody's IRR, I have to earn
8 money on the time that golf course is just
9 sitting there. And I have to put a lot of my
10 infrastructure in up front, but I'm not going
11 to earn money off it until I sell a timeshare
12 or a house or a hotel room in year five, six,
13 seven, eight, nine, ten.

14 So to really understand accurately
15 what an IRR is, a return on capital, you have
16 to say, okay, what's the timing of my

17 expenditure. Sadly for the investor, which is
18 why it's risky, all at the front end compared
19 to the timing of when I earn my money which
20 is -- it has to be much later down the road.
21 And I have to do a technique we call present
22 value. I have to take the time period of the
23 spending of the money, the time period of the
24 earning of the money, back it off to a
25 constant point in time, and that gives me an
(ALTERNATIVES ISSUE)

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1 IRR, or at least the kind of IRR I understand. ⁹⁸⁵

2 ALJ WISSLER: The kind of IRR you
3 understand is based upon capital of actual
4 equity invested, not based upon cost?

5 DR. ALSCHULER: Exactly. In order to
6 understand a return on capital, you have to
7 define the time in which that capital is
8 expended and the then timing of when you get
9 the money back. So you have to factor in, you
10 know, what's the priority of my debt.

11 My guess is the true equity here will
12 have something we call a mezzanine layer of
13 financing, something which is not
14 really -- it's not debt in the sense they
15 don't have a first mortgage position, they
16 can't take your property back from you, but
17 you have to pay them back before you get the
18 equity. If they actually are successful here,
19 which I have some questions about getting a
20 Ritz Carlton brand here, they're likely to
21 want to prefer a return of some kind which
22 will stand in front of equity.

23 So you have to take all your cash
24 flows, stack their priorities as to who gets
25 paid back, take all your revenues and figure
(ALTERNATIVES ISSUE)

1 it out. And that tells you exactly what you
2 said, Judge, which is, okay, what is the
3 return on what I care about, which is my
4 equity.

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5 There is no data in front of us that
6 allows us to understand that, either for what
7 they have proposed to do or those things which
8 they have suggested as alternatives or things
9 we have suggested are other alternatives worth
10 exploring.

11 The first part of the answer to your
12 question is that the form of the analysis is a
13 different one than I would use. And were I
14 representing an investor here, as we might,
15 sometimes we're asked to in circumstances like
16 this, it is not a form of analysis I would
17 ever accept as the basis for making an
18 investment. I wouldn't know what was
19 happening to my money. That's problem one.

20 Problem two gets to the core of what,
21 in fact, are the alternatives suggested.
22 Based on what I have described so far, the
23 principal risk question here is what is the
24 relationship between the required upfront
25 capital investment and its return. I would
(ALTERNATIVES ISSUE)

1 want to see, and we suggested here, were I an

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2 investor or were I in this process, an
3 examination of alternatives that are less
4 capital intensive. What the alternatives have
5 done is pare down the capital but then pare
6 down the revenue.

7 There is no systematic examination of
8 alternatives that would eliminate the golf,
9 for example, which is highly capital
10 intensive. In order to make a golf resort
11 community, which is what they suggest here,
12 has to charge a premium to pay for the golf
13 course. That's why you built it. You don't
14 build the golf course because you like golf.
15 You build it the way somebody builds a
16 swimming pool attached to a house. Whoever is
17 buying the swimming pool, they're going to pay
18 more for the house because it's got the pool.
19 You build the golf course because somebody is
20 going to pay more for the timeshare or more
21 for the room, or more people are going to
22 come. You can reduce capital intensity and
23 you go back where I started. If you reduce
24 capital intensity and your measure is IRR,
25 less capital can earn you --

(ALTERNATIVES ISSUE)

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1 ALJ WISSLER: More?

2 DR. ALSCHULER: More, the same, less.
3 So to me, the fundamental deficiency of the
4 alternative analysis is the, first of all, the
5 methodological question which looks at cost,
6 not equity. And secondly, the limitation on
7 investment scenarios, which are less capital

8 intensive, that using the Applicant's own
9 standard, which is IRR, to earn them equal or
10 superior IRR's were they able to reduce the
11 amount of capital required to earn a constant
12 dollar.

13 MR. GOLDSTEIN: Two last questions on
14 this point. Can you determine from the
15 alternatives analysis and their economic
16 assessments whether the current project as
17 currently proposed is economically viable?

18 DR. ALSCHULER: No. It may well be.
19 I respect the firm and the work that's been
20 done here, but until I see a return on equity
21 and I see a pro forma that lays out the
22 relationship of expenditures and revenue over
23 time, as opposed to what they have done here
24 which hypothesizes some minute. They discount
25 their revenues back, but by not laying costs
(ALTERNATIVES ISSUE)

1 out over time over revenues, the elements of ⁹⁸⁹
2 it, or the simplicity of it, introduces a
3 potential of very, very substantial
4 miscalculation that were I representing an
5 investor, I would believe not to be an
6 acceptable analytic construct.

7 MR. GOLDSTEIN: Have they convinced
8 you in their alternatives analysis and
9 economic analyses that the lower build
10 alternatives would not be economically viable
11 even if that were the correct legal standard?

12 DR. ALSCHULER: No. Again, absent a

13 pro forma analysis and a calculation of return
14 on equity -- I'm convinced by reading that if
15 you apply a consistent methodology to certain
16 choices, they have returns that are less. But
17 since we don't know what the return to equity
18 is in any analytical way which I find comfort
19 as an advisor, I have no ability to read this
20 material and assess a professional response to
21 that question.

22 MR. GOLDSTEIN: Let's turn finally to
23 the lower build alternatives. In your
24 statement which is attached to CPC
25 Exhibit -- CPC petition as Exhibit Q, you
(ALTERNATIVES ISSUE)

1 identified a number of lower build alternative⁹⁹⁰
2 scenarios. There was the wildacres concept
3 built development on the western portion only
4 with the eastern portion being sold to the
5 City or State; there was a high-end,
6 scaled-down residential alternative with sale
7 of the remaining land to the City or the
8 State; there was a natural amenities
9 alternative with resort and horseback riding,
10 backhill trails as opposed to golf, again with
11 the sale of remaining land to the City or
12 State.

13 You indicated in that submission that
14 these are examples of reasonable alternatives
15 that should be examined as part of an
16 environmental review process alternatives
17 assessment. Why did you make that contention?

18 DR. ALSCHULER: Again, if you can
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19 reduce the capital intensity of the project,
20 you can -- and again, because you can't
21 associate particular capital costs with
22 particular revenue sources, you're unable to
23 assess the rationality of those capital items.
24 You would want to look at those alternatives.

25 It's important, I think to put it in
(ALTERNATIVES ISSUE)

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1 context. The issue confronting this
2 proceeding is one that is reasonably common in
3 the work we've done in the Carolinas, in work
4 done in California, other places. Making real
5 estate development compatible with sensitive
6 ecological systems is a challenge that my
7 industry, I think, has been increasingly
8 sophisticated in grappling with and
9 understands they have to explore, both as a
10 matter of permitting, the subject here, but
11 also, frankly, a value statement that there
12 are ways of developing less capital
13 intensive -- and since there is, unfortunately
14 or not, a direct relationship between
15 environmental disturbance often and capital
16 intensity -- capital intensity is another word
17 for roads, golf courses, things which change
18 what is a natural system, which may or may not
19 be a problem, depending on where it's located.
20 If you reduce the capital intensity of a
21 project, you obviously can, in some cases be
22 more compatible with what is around you.

23 We have seen a very substantial

24 customer base change. You know, 15 years ago,
25 there was a much less robust customer market
(ALTERNATIVES ISSUE)

1 for developments that were designed explicitly⁹⁹²
2 and marketed themselves in their niche and
3 their communications, as deliberately designed
4 to be low capital intensive and
5 environmentally sensitive.

6 And my colleagues who developed this
7 just abutting our property in South Carolina
8 who did Spring Island, pioneered creating a
9 destination recreational community in which
10 the primary asset they were selling was the
11 preservation of the natural environment.

12 And they made -- this was for them out
13 of necessity, they didn't have a heck of a lot
14 of money when they started, so whether or not
15 they were thoughtful or making virtue of
16 necessity, they created Spring Island which
17 has been an enormously successful second home
18 and now primary home destination. Of course
19 the primary thing you are acquiring is the
20 preservation of the natural environment around
21 them.

22 Again, we don't have the data in front
23 of us that allows us to say whether or not
24 these things do or do not provide appropriate
25 returns on risk capital, but there certainly
(ALTERNATIVES ISSUE)

1 is a compelling body of examples that were not⁹⁹³
2 mentioned as comparables in the HVS work. HVS
3 chose their study on other capital

4 intensive -- they went out and looked for
5 things like what they were doing.

6 Now, that's not inherently irrational
7 if you want to learn about what you are doing,
8 but they didn't go out -- I'm not sure what
9 they did, but there's nothing in their
10 documentation available to me that says:
11 Okay, we went and looked at different
12 approaches to developing economically
13 competitive destination resort environments.
14 They plumbed an important, viable significant
15 part of the industry, but there are other
16 significant, viable important parts of the
17 second home and resort industry which were not
18 addressed, either in the alternatives, nor in
19 the examination of the natural product. Their
20 examination relates, not surprisingly, to the
21 type of product and program that they have
22 proposed.

23 MR. GOLDSTEIN: would I be
24 appropriately summarizing this aspect of your
25 testimony and your written submission on the
(ALTERNATIVES ISSUE)

1 lower build alternatives if I said that you
2 believed it made sense to take a hard look at
3 these lower build alternatives because they're
4 less likely to have adverse environmental
5 impacts and because they could well be
6 economically viable?

7 DR. ALSCHULER: Given my background,
8 you could probably put the two in reserve

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9 order. My business, for most of my clients,
10 is return on capital, and the first question,
11 if one of my clients came to me to look at
12 this investment, the first question I would
13 ask them is: Are you sure there are not ways
14 to earn a fair return here that incur less
15 risk? And can you, in fact, get a reasonable
16 return here without incurring that level of
17 risk, and can you do something that is less
18 capital intensive that will result in
19 something which is -- putting aside my
20 personal values or lack thereof -- of less
21 disturbance to the environment. But I would
22 approach it first from how do I secure from my
23 investor the right level of risk-adjusted
24 return; and before choosing something like
25 this, I would examine other alternatives that
(ALTERNATIVES ISSUE)

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1 incurred less capital, and therefore less
2 risk.

3 MR. GOLDSTEIN: Of course, you and
4 your investors would still need to comply with
5 state environmental laws, talking about the
6 environmental aspects of the economical
7 analysis, but I understand your point with
8 respect to the economics of this.

9 Two last questions. Would these lower
10 build alternatives that you talked about in
11 your written submission, would they be
12 consistent with the 1998 study you did on the
13 Catskills economy?

14 DR. ALSCHULER: Yes, because they
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15 would build off, what I believe to be today an
16 increasingly over the development horizon, the
17 core competitive advantage here, which is the
18 significant and, I believe, over time
19 increasingly scarce access to an undisturbed
20 natural ecosystem which is an amenity no
21 developer could afford to buy. The City of
22 New York has spent a substantial amount of
23 money buying that. Access to that is a very
24 powerful amenity.

25 MR. GOLDSTEIN: So would you say those
(ALTERNATIVES ISSUE)

1 lower build alternatives, would they be more
2 or less consistent with the 1998 study than
3 the current development proposal in its
4 current scheme?

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5 DR. ALSCHULER: I don't have enough
6 data that allows me to, and I'm not expert
7 enough in the environmental implications of
8 this, there are other people here. Certainly
9 as a general theory, those things which are
10 least disruptive to the natural ecosystem of
11 this region, that are, in fact, consistent
12 with the need for this region to grow
13 economically, are those that are most
14 consistent with that which we recommend in our
15 report.

16 That requires me to note two things in
17 which I feel comfortable with the professional
18 opinion on the one, namely, economics; but
19 those things most consistent with the

20 preservation of the natural ecosystem here,
21 all other things being appropriately managed,
22 would be those things most consistent with our
23 vision.

24 MR. GOLDSTEIN: Finally, did the Draft
25 Environmental Impact Statement and the
□ (ALTERNATIVES ISSUE)

1 appendices that you reviewed take a hard look⁹⁹⁷
2 at these other lower build alternatives, in
3 your judgment?

4 DR. ALSCHULER: I don't think they
5 looked at them carefully at all. There are
6 two problems. One, is the basic analysis they
7 used for the proposed development is one, as I
8 said, I consider to be not consistent with the
9 professional discipline of my firm, nor the
10 practice represented by the investors with
11 whom I -- investors I serve, and they apply
12 that consistently, they don't change it.

13 So it is as troubling to me in the
14 base case as the alternatives; and secondly, I
15 believe there would be quite serious
16 alternatives that are worth exploring as other
17 developers in other ecological sensitive areas
18 have explored that simply have not been dealt
19 with in this report at all, and I would be
20 very interested in seeing those alternatives
21 examined which -- if we were 15 or 20 years
22 ago, we hadn't seen what the industry has done
23 since 1980, we can say this is untested and
24 unchartered territory. Well, it was in 1980,
25 it's not today.

1 There is an important set of real
2 estate products built around the twin goals of
3 economic returns and fairness and rational
4 real estate investment that are -- that
5 incorporate ecological preservation as a core
6 asset and are less capital intensive, and
7 therefore less disruptive of what is here.

8 MR. GOLDSTEIN: Finally, you heard
9 this morning the presentation of the New York
10 City DEP expert regarding their assessment of
11 the economic analysis, and you have reviewed
12 that New York City DEP Exhibit 6. Can you
13 give us your assessment of the City's
14 analysis?

15 DR. ALSCHULER: I consider it to be
16 accurate, and it raises -- I haven't seen it
17 before I came here this morning -- it raises
18 some of the same points that I suggested. The
19 last paragraph here gets to the point I was
20 raising before. RKG has attempted in a way
21 that I find a reasonable methodology to
22 distinguish between return on cost and return
23 on equity. By the attempting to eliminate
24 bank debt, they were getting at the core
25 question I was raising, which is the analysis
(ALTERNATIVES ISSUE)

1 should be invested equity played out over time
2 not on cost, because cost is paid for
3 principally by debt, not principally by
4 equity. So I think it raises important

5 points, and I am in general agreement with its
6 conclusion.

7 MR. GOLDSTEIN: Thank you very much,
8 Dr. Alschuler.

9 Judge, do you have any further
10 questions of this witness?

11 ALJ WISSLER: No.

12 MR. GOLDSTEIN: Thank you very much.

13 ALJ WISSLER: Mr. Gerstman.

14 MR. GERSTMAN: Thank you, your Honor.

15 We will provide a little further on in the
16 proceeding copies of the HRA Study, Report 1.
17 we will provide a full copy for the record.

18 MR. RUZOW: What is that?

19 MR. GERSTMAN: West of Hudson Economic
20 Development Study for the Catskill watershed
21 Corporation dated June 22nd, 1998.

22 MR. YOUNG: The final study?

23 MR. GERSTMAN: Yes.

24 ALJ WISSLER: Mr. Young.

25 MR. YOUNG: Can I have a five-minute
(ALTERNATIVES ISSUE)

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1 break?

2 (11:39 - 11:51 A.M. - BRIEF RECESS
3 TAKEN.)

4 ALJ WISSLER: Back on the record.

5 Mr. Young, before we begin, I'm not going to
6 preclude you from participating in the
7 discussion of alternatives. I just need you
8 to help me where in your petition alternatives
9 is discussed, or is it tangentially related to
10 Issue D? How am I reading that? where am I

11 finding it?

12 MR. YOUNG: In our amended petition,
13 we did not identify alternatives as an issue
14 that we were going to provide witnesses on.
15 And in my petition, however, your Honor, I
16 identified Glen Neelis, Director of Delaware
17 County Economic Development, I identified as a
18 potential witness and rather than -- I
19 felt -- yesterday I made the decision that he
20 is more appropriate to address this issue of
21 alternatives because the focus of his
22 testimony is going to be on the need for a
23 destination resort. So Glen Neelis is in my
24 petition, and I identified him as part of the
25 community character, but in reality we're
(ALTERNATIVES ISSUE)

1 offering him as part of alternatives.

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2 MR. GERSTMAN: We object. This is
3 the -- we're faced with a second amendment now
4 of their petition. The Coalition of Watershed
5 Towns is suggesting now that they can put in a
6 petition. Everybody else had the obligation
7 to be filing party status on April 23rd.

8 The Coalition of Watershed Towns,
9 certainly we didn't object to their initial
10 filing because they had concerns with New York
11 City DEP's comments. Yesterday they came
12 forward with an amended petition indicating
13 additional parties and witnesses. And now
14 we're hearing beyond that, the third area that
15 they want to offer proof on. We have a

16 schedule that we've set out, we're trying to
17 meet.

18 Your Honor, our witnesses are
19 extending their day here because of the need
20 to respond to what the Applicant has said
21 about their testimony. We're now taking
22 Mr. Young, in a situation where he has not
23 indicated in advance that he wants to offer
24 proof on this issue. We object to, A, taking
25 the testimony at all; and B, taking this
(ALTERNATIVES ISSUE)

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1 testimony now.

2 MR. YOUNG: Can I read from my amended
3 petition? In my amended petition, I didn't
4 particularly characterize him as community
5 character or anything else.

6 ALJ WISSLER: Let's cut to the chase.
7 I'm going to allow him.

8 MR. YOUNG: Glen Neelis is the
9 Director of Economic Development for Delaware
10 County. We had him here yesterday. I didn't
11 have him here today. I want to summarize his
12 comments that he submitted previously and then
13 tell you what his testimony will be. I'm
14 going to read what his written comments were:
15 "As Director of Economic Development for
16 Delaware County, it is my responsibility to
17 promote economic viability of the county. In
18 our current state, that means jobs, plain and
19 simple. Delaware County is the fourth poorest
20 county in New York State, and the northern
21 most county of the federally designated

22 Appalachian which reflects the rural property,
23 long-term unemployment and lack of job
24 opportunities that exist in this region."

25 "According to the U.S. Census data,
(ALTERNATIVES ISSUE)

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1 the median family income in the Town of
2 Middletown is more than 40 percent below the
3 statewide average. Further, while real wages
4 have risen throughout the state during the
5 1900's, they have declined within the
6 watershed. In 2000, the average private
7 sector wage in Delaware County was \$25,576,
8 which was nearly 81 percent lower than the
9 statewide average of \$46,224. The result is
10 an exportation of working age population."

11 "Delaware County is the second oldest
12 county in the State of New York, second
13 oldest. And it is aging at a faster pace than
14 all other counties. This has serious
15 implications. Between 1900 and 2000, which is
16 bigger than Albany and Schenectady and
17 Rensselaer County combined, Delaware County
18 grew by only 2,055 people. Between 2000 and
19 2001, we shrank by 535. Incidentally, this is
20 slightly fewer than the number of full-time
21 jobs to be created by this project."

22 "What do 542 full-time jobs mean? It
23 is a 4.3 percent increase in the number of
24 private sector jobs throughout the county.
25 This would partially offset the 4.7 percent of
(ALTERNATIVES ISSUE)

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1 jobs lost in the region between 1990 and 2000.
2 More locally, it represents a 17 percent
3 increase in the number of jobs available to
4 the Town of Shandaken and Middletown."

5 "To put these figures in perspective,
6 the national economy shed just 1.5 percent of
7 domestic jobs during a severe recession, from
8 which the country is tentatively emerging.
9 what's more, while these jobs may appear low
10 paying to some, those familiar with the actual
11 local wage structure would disagree."

12 "As stated above, the average annual
13 private sector wage for salary in Delaware
14 County is \$25,576. The average annual wage at
15 Belleayre resort will be approximately
16 \$29,000. I would imagine that there would be
17 quite a few people that would be interested in
18 a 17 percent increase."

19 "Further, this figure excludes the tip
20 income the bellhop, the maids, the waitresses,
21 who are supposed to get tips, and also
22 excludes the locally valuable benefits of
23 health and dental insurance."

24 "As for local spending, my personal
25 experience of staying at a resort destination
(ALTERNATIVES ISSUE)

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1 led me to believe it will be considerable.
2 when was the last time you went on vacation
3 without spending money, without any interest
4 in seeing the surrounding area?"

5 "Laying aside that argument for a
6 moment, I'm just as excited about the amount

7 of local spending that will be generated as a
8 result of the 542 full-time jobs created.
9 This project is a rare opportunity, one that
10 needs to be judged strictly on the facts, and
11 one that will not come around again."

12 I have copies of this.

13 ("MAILBAG" RECEIVED AND MARKED FOR
14 IDENTIFICATION AS WATERSHED COMMUNITIES
15 EXHIBIT NO. 1, THIS DATE.)

16 MR. YOUNG: I'm submitting this as
17 Delaware County --

18 ALJ WISSLER: I just want to refer to
19 you folks collectively as a party. Tell me
20 what you want to be called.

21 MR. YOUNG: Watershed Communities.

22 ALJ WISSLER: Watershed Communities
23 Exhibit 1.

24 MR. YOUNG: What Glen Neelis is going
25 to testify to is that this area needs a
(ALTERNATIVES ISSUE)

1 destination resort, and it all comes down to ¹⁰⁰⁶
2 the issue of sustainable jobs.
3 Notwithstanding what the prior witness talked
4 about, you know, about tourism coming just for
5 the natural beauty. He's going to testify
6 that it's not working. That to have a
7 community, a surviving, sustainable community,
8 you need telephone service, you need hospital
9 service, you need doctors, you need dentists,
10 churches, restaurants, schools, drugstores,
11 supermarket, banks.

12 And that we lost our employment base.
13 We had dairies. He'll go through and identify
14 the dairies that existed and no longer exist,
15 and also testify about how impossible it is to
16 site a dairy in the New York City watershed.
17 We used to have farms, and we've lost a lot of
18 the farms. We used to have forestry; we lost
19 a lot of that. We had tourism, and we lost a
20 lot of that. As people testified
21 yesterday -- sort of the fifties and the
22 sixties and seventies passed us by. Why did
23 they pass us by? Because people built better
24 places to go to.

25 He is going to say that he
(ALTERNATIVES ISSUE)

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1 spent -- he'll talk about his efforts to 1007
2 revitalize downtown this and downtown that.
3 They spent a lot of money and effort on trying
4 to improve downtown facades, and just because
5 you improve them doesn't mean people come.
6 The businesses that are there are suffering.
7 They may be open Saturday and Sunday, but
8 they're not open Monday, Tuesday, Wednesday
9 and Thursday. Without a supermarket, we hardly
10 have a community. Without a movie theater, we
11 hardly have a community.

12 It's wonderful to have these wonderful
13 things, these five-star restaurants, but what
14 the community needs is Little League -- it
15 needs the basic things we all enjoy and need
16 for our families. And that's what we're
17 losing. And if we lose that much more of it,

18 we wouldn't exist anymore. We need
19 sustainable jobs, and it's not happening. And
20 it's not going to happen just waiting for them
21 to come to us, so we need some type of thing
22 to fill that need.

23 It could be a government prison or
24 something like that; I'm sure there would be a
25 lot of complaints about that. One thing we
(ALTERNATIVES ISSUE)

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1 identified is tourists, and in order to get
2 new tourists here, we need a destination
3 resort. That's what he will testify to. We
4 looked at it; we studied it. We need a
5 destination resort.

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6 There hasn't been anyone else, maybe
7 for the reasons the expert recommended; that
8 anyone else has come up with a destination
9 resort. Why? Because the risks are so high.
10 If you're going to come to this county or come
11 to the New York City watershed, you have to
12 deal with that group over there. That seems
13 to be extremely well funded opposition, that
14 group over there that has extremely well
15 funded opposition, and you have to still deal
16 with the DEC. You have these tremendous
17 regulatory obstacles you have to overcome. So
18 the Marriotts and the big guys, they're not
19 coming here.

20 Here is a person who is local. He is
21 willing to come here. He is willing to make a
22 capital investment. The expert clearly said

23 the big capital investment is the golf course,
24 but the golf course is the destination.

25 That's why people are coming. And the expert
(ALTERNATIVES ISSUE)

1 also said the golf course isn't where he makes¹⁰⁰⁹
2 his money, the golf course is the destination
3 to attract the people to come.

4 So they're arguing, and while maybe
5 you could build a less expensive destination,
6 maybe you could build a less expensive
7 attraction, and still get people here. If he
8 could, then he would do it, I imagine.

9 I'm not sure that Delaware County,
10 Town of Middletown or the Town of Shandaken is
11 in a position to say to this developer, we
12 think you should go with horseback riding
13 rather than a golf course. I'm not sure we're
14 in that position. But as part of our SEQRA
15 obligations, Town of Shandaken and Town of
16 Middletown, we'll have to do an alternative
17 analysis under SEQRA. That's what he is going
18 to testify to.

19 One last point that we want to make.
20 As an involved agency, we don't care what the
21 return on investment is for Investor A or B.
22 When you do a project like this that costs
23 \$100 million, some of it s going to be equity,
24 some of it is going to be debt, as the expert
25 testified.

(ALTERNATIVES ISSUE)

1 we don't know that. what we look at¹⁰¹⁰
2 is whether it's a viable project. If it's a

3 viable project, we look at what the return on
4 investment of the project is. I could have a
5 huge return on investment if I invest
6 10 percent and get 90 percent debt, and make
7 one percent on the whole project -- that's not
8 what we look at in saying what's a viable
9 alternative.

10 At this stage, we look at what's a
11 fundable project? How much money do you have
12 to invest, and how much money do you have to
13 get back out? Everyone, not just the
14 investor, but the banks. Someone has to put
15 their money in and decide to do this, and
16 particularly as an investor. We also look at
17 the fact who is going to be on line for that
18 debt. He has to secure that debt with some
19 other assets.

20 So the way the Applicant did it is the
21 way we, as involved agencies, would want him
22 to do it. That gives us the information we
23 need to know so that we know what the viable
24 alternatives are.

25 MR. GERSTMAN: Your Honor, I'm
(ALTERNATIVES ISSUE)

1 confused, and maybe Mr. Young can clarify
2 something for me. Also I'll ask Mr. Alschuler
3 to respond to the substance. Mr. Young is
4 here representing the Coalition of Watershed
5 Towns. Delaware County, I believe that is
6 included as a party to the petition separate
7 from the Coalition of Watershed Towns?

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8 MR. YOUNG: Four parts, Town of
9 Shandaken, Town of Middletown and the Delaware
10 County.

11 ALJ WISSLER: Being referred to
12 collectively as the Watershed Communities.

13 MR. GERSTMAN: The concern I have, and
14 the question I have is that, to my
15 understanding, the towns that authorized you
16 to participate in this proceeding stated,
17 please correct me if I'm wrong, generally that
18 they did not charge you with taking a position
19 in support or in opposition to the project; is
20 that a fair statement?

21 MR. YOUNG: The towns that have a
22 decision-making authority over this project
23 have not made a decision in support or in
24 opposition to this project. We're here to
25 support the concept of community character and
(ALTERNATIVES ISSUE)

1 things like whether it's a destination resort,¹⁰¹²
2 it's a local decision, not a DEC or DEP
3 decision.

4 ALJ WISSLER: If I understand
5 Mr. Young's argument with respect to
6 alternatives, you're looking for sustainable
7 growth?

8 MR. YOUNG: Right.

9 ALJ WISSLER: So a function of
10 sustainable growth, what kind of sustainable
11 growth you get will be a function of what kind
12 of project comes in. So to that extent,
13 you're interested in the alternatives issue

14 we're discussing, but it has nothing to do
15 with taking a position for or against?

16 MR. YOUNG: Correct.

17 MR. GERSTMAN: With that
18 clarification, I'll turn it over to
19 Mr. Alschuler to address the substance.

20 ALJ WISSLER: I'll let you speak very
21 shortly though. This is about his economic
22 analysis, which is somewhat opposed to what
23 you just told us. I don't need that, but if
24 you want to wrap it up a little bit, you can.

25 MR. ALSCHULER: Very briefly. The
(ALTERNATIVES ISSUE)

1 question is not whether or not jobs are a good ¹⁰¹³
2 or bad things, but what is the best way to get
3 them. More jobs and economic activity
4 produces clearly the desired goal of whatever
5 the options are.

6 There are two key points: One is,
7 there's no single definition of what a
8 destination is. The Applicant has proposed
9 one kind of a destination resort. We suggest
10 that there are others that are economically
11 viable and have not be examined. So one can
12 be in favor of a destination and also say that
13 there are other alternative types of
14 destinations which are quite different in
15 their physical form than those that are
16 proposed. So the question of my testimony is
17 not a pro or con destination, is -- are there
18 other alternative types of destinations that

19 warrant examination, and I believe there are,
20 and they were not included.

21 Secondly, I think the return on
22 investment -- there is no such thing as an
23 investor in an entire project. That investor
24 doesn't exist. There are equity investors.
25 There are pension fund investors. There are
(ALTERNATIVES ISSUE)

1 banks, mezzanine investors. From the point of ¹⁰¹⁴
2 view of liability, each looks at their
3 particular capital and the risk of return
4 associated with that. And, therefore, I
5 believe the only way to rationally understand
6 liability is to look at the capital structure
7 from the point of view of the people who are
8 actually providing the capital, for which the
9 current analysis does not allow us to do.

10 It may be a valid appraisal
11 methodology in terms of a single valuation,
12 but a development is very different in which
13 different sources of capital have to come in
14 and make a series of choices. Therefore, I
15 believe that the one-size-fits-all or
16 one-number approach is not the one that will
17 shed light on this process.

18 ALJ WISSLER: Okay.

19 MR. YOUNG: Can I respond to that?

20 ALJ WISSLER: Yes.

21 MR. YOUNG: As an involved agency, I
22 don't really care whether the bank makes money
23 or the investor makes money and how they
24 divide up that money. What I care about is do

25 I have a viable project. I don't understand
(ALTERNATIVES ISSUE)

1 how at this point in a project how they know ¹⁰¹⁵
2 exactly how it's going to be financed down to
3 the details, who is going to invest what and
4 who has to get financing.

5 So who is really at risk, it doesn't
6 matter to me as an involved agency. What
7 matters to me is if it's a viable project.
8 Whatever has to be invested in capital, is
9 there going to be a rate of return that makes
10 sense. As the expert indicated here, because
11 of the obstacles one faces, you need a higher
12 rate of return.

13 ALJ WISSLER: Mr. Ruzow.

14 MR. RUZOW: I have a number of
15 documents that I will distribute. I would
16 like to mark the first document entitled,
17 "Tourism Development Plan for the Central
18 Catskills." It was prepared by the Central
19 Catskills Planning Alliance, and it's dated
20 November 1998.

21 ALJ WISSLER: Applicant's 8.

22 ("TOURISM DEVELOPMENT PLAN FOR THE
23 CENTRAL CATSKILLS PREPARED BY THE CENTRAL
24 CATSKILLS PLANNING ALLIANCE DATED 11/-1998"
25 RECEIVED AND MARKED FOR IDENTIFICATION AS
(ALTERNATIVES ISSUE)

1 APPLICANT'S EXHIBIT NO. 8, THIS DATE.) ¹⁰¹⁶

2 MR. RUZOW: Exhibit 9 is Erich Baum's
3 from HVS International CV.

4 6-10-04crossroadsz
(CV OF ERICH BAUM RECEIVED AND MARKED
5 FOR IDENTIFICATION AS APPLICANT'S EXHIBIT NO.
6 9, THIS DATE.)

7 MR. RUZOW: Your Honor, I would also
8 like to identify for you and the parties,
9 there are portions of the draft EIS that I
10 would draw your attention to, specifically
11 Section 1.3.2, entitled, "Project Purpose Need
12 and Benefits" -- I'm sorry, that's Section
13 1.3; Appendix 29 which is a Shandaken Town
14 Board Resolution dated May 12th, 1999. It's
15 Appendix 29, Shandaken Town Board Resolution
16 dated -- it's Resolution No. 73 dated May
17 12th, 1999.

18 ALJ WISSLER: Volume 10 of the DEIS?

19 MR. RUZOW: volume 10 of the DEIS. It
20 refers to the Applicant's Exhibit 8. Also
21 DEIS Section 5 which is labeled,
22 "Alternatives." Section 5, "Figures," and
23 Section 5, "Tables".

24 ALJ WISSLER: All in Volume 1?

25 MR. RUZOW: Right, all in Volume 1.
(ALTERNATIVES ISSUE)

1 With respect to with the reference, I¹⁰¹⁷
2 believe part of it was recited earlier by
3 Mr. Cashin, I'm not sure of the entire
4 section, SEQRA regulations 617.9(B),
5 subparagraph (B), subparagraph -- Roman V
6 starts with the requirements for reasonable
7 alternatives and the language starts with: "A
8 description and evaluation of the range of
9 reasonable alternatives to the action that are

10 feasible considering the objectives and
11 capabilities of the project sponsor."

12 In Applicant Exhibit 8 on page (iii)
13 is a summary of a market analysis conducted
14 for the central Catskill Planning Alliance,
15 prepared by the office of Thomas Martin, whose
16 report is attached to the exhibit. In it, the
17 findings of that report are that: "The market
18 analysis and surveys confirm that Belleayre
19 Mountain should form the focus of further
20 development in terms of improved and expanded
21 ski trails, support facilities and four-season
22 attractions. The Revitalization of older
23 hamlets is important to create additional
24 destinations for shopping, dining, lodging and
25 night life. A resort or lodge in a natural
(ALTERNATIVES ISSUE)

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1 setting with good facilities and
2 well-organized outdoor activities (hiking,
3 golf, horseback riding, et cetera) would add
4 to the area's appeal, particularly if tied to
5 Belleayre. Preservation of the natural
6 environment is an important aspect of the
7 attractiveness of the region for potential
8 visitors, but concerns about its remoteness
9 and lack of facilities must be overcome."

10 The next section entitled,
11 "Development Policies", on page Roman IV are a
12 number of bullets. The first is that: "The
13 Belleayre Ski Center should be expanded and
14 connected with Pine Hill by new trails."

15 Just as a point of information, this
16 was issued just about the same time that the
17 1998 Unit Management Plan for Belleayre was
18 issued. "The former Highmount Ski Center is a
19 site with unique characteristics and potential
20 which should not become part of the New York
21 State Forest Preserve. To preserve its
22 potential, it should be land banked by a quasi
23 public agency, while a detailed program for
24 its future use and development is prepared. A
25 central tourist facility to provide
(ALTERNATIVES ISSUE)

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1 information and visitor services should be ¹⁰¹⁹
2 developed on the site originally selected in
3 Mount Tremper as the first stage of a
4 long-term development."

5 "The proposed watershed museum in the
6 City of New York -- in the New York City
7 watershed Memorandum of Agreement should be
8 located along the Route 28 corridor. Its
9 location near Belleayre would enhance the
10 critical mass of the region's center."

11 "Lastly, development of one or more
12 destination resorts should be encouraged on an
13 environmentally compatible site; several
14 appropriate sites along the Route 28 corridor
15 have been identified."

16 "Land use patterns and design. Land
17 use patterns in the corridor should emphasize
18 the historic pattern of concentrated hamlets
19 separated by open space and connected by
20 transportation links. Tourist-related

21 services in the corridor between hamlets
22 should be subject to design controls that
23 ensure ample landscaping and screening and
24 establish an architectural theme that enhances
25 the character of the corridor. If
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1 large-scale, tourist-related facilities cannot¹⁰²⁰
2 be located within the hamlet, they should only
3 be permitted following careful review and
4 approval of specific development proposals
5 that include details, site plans and
6 architectural designs."

7 In Section 1.3.3 of the DEIS, we find
8 Objectives. "The primary objective of the
9 proposed development is to develop a
10 recreation-oriented resort that will
11 complement the current recreational
12 opportunities at the Belleayre Mountain Ski
13 Center, and together to provide a four-season
14 destination resort in the central Catskill
15 region as outlined in various studies
16 discussed in Section 1.3.2."

17 Your Honor, in our response on
18 community character, we will provide the
19 additional reports that are referenced in
20 1.3.2 and in presentation of that, so subject
21 to connection.

22 I also want to refer, for purposes of
23 inclusion in the Issues Conference record,
24 specifically Appendix 27, there's a tab
25 labeled, "Letters" which contain a number of
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1 letters with regard to golf and golf
2 facilities in relation to support for the
3 project's inclusion of golf facilities.

4 And the report of HVS, in particular
5 which we'll talk about as has been spoken
6 about earlier.

7 In hearing from Mr. Alschuler today
8 with respect to a number of the topics, one of
9 the things that he mentioned was the
10 acquisition of additional lands by New York
11 City, and the increasing numbers. At an
12 earlier part of the Issues Conference, I had
13 indicated, based on my math, that
14 approximately 7,000 acres that had already
15 been acquired through December. You have an
16 exhibit that partially shows the Ashokan Basin
17 acquisitions. I think it's CPC's Exhibit 3B
18 which shows the New York City acquisitions
19 that were closed in a purple color as
20 of -- this is in the area of just the site --
21 by December 31st. There have been additional
22 acquisitions that we're still trying to
23 collect the precise location, and there are
24 several hundred acres of additional lands
25 under contract, both within the Ashokan Basin
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1 and Pepacton.

2 So Mr. Alschuler is certainly correct
3 that there are a large number of additional
4 land that will be taken out of development and
5 will be preserved, but I have to say that

6 public access on those lands is not consistent
7 at all. And there is great debate over the
8 scope of public access in the community that
9 the City will allow. But, yes, they are being
10 taken out of what can be available. It we go
11 to the secondary growth issue and the
12 opportunities there -- but it's relevant in
13 the context of your own comment today.

14 In examining the alternatives, the
15 outline as the representative from --
16 Mr. Ellsworth from Cashin Associates said, the
17 scoping outline presented a list of elements
18 to be included in the DEIS regarding
19 alternatives. We believe that we followed the
20 requirements. While Mr. Ellsworth disparaged
21 some of the subjects that were included in the
22 alternative section, they were required as
23 part of the scope. And considerations of
24 alternative designs and such unimportant
25 things as water supply and wastewater
(ALTERNATIVES ISSUE)

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1 treatment, we felt was important to be
2 included, and so did the Department.

3 And despite the characterization and
4 the focus of today's attention on design
5 alternatives of reduced scale, each of those
6 elements are critically important in the
7 development of this project and for other
8 reasons.

9 The alternative section in the SEQRA
10 regulations -- and the consideration of

11 alternatives is not a singular notion. It is
12 not just alternative sites, it is not just
13 alternative locations or alternative scale.
14 It depends on -- and the considerations are --
15 looking at a number of things that each
16 particular project, the relevance to which is
17 important. And I submit that as we go
18 through, which I would like to begin to do
19 now, the alternative discussion in Section 5,
20 that we have met the requirements of the SEQRA
21 regulations, and while there have been
22 additional comments, I reiterate what I closed
23 with yesterday, which is that many of the
24 comments that we have received can be the
25 subject of a response to comments, and indeed
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□

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1 perhaps some additional narrative or
2 clarifications of the considerations that have
3 occurred without resorting to adjudication
4 before your Honor in order to resolve those
5 issues.

6 The alternative locations section is
7 intended in a private project where we do not
8 have options on alternative properties. It is
9 intended to provide, in effect, an information
10 piece by an Applicant as to what was
11 considered previously, and we have done that.

12 Interesting to note, one of the
13 alternative locations initially examined is
14 described as: "A thousand acres to the west
15 of the proposed project site. These lands are
16 on and around Fleischmanns Mountain." The

17 alternative was abandoned when the owner said
18 that he wasn't interested in selling. This
19 same site is on the New York State 2002 Open
20 Space Plan as an acquisition. So our
21 avoidance of that was particularly
22 appropriate.

23 There is further discussion of two
24 other sites along Route 28, one in Greene
25 County. They're discussed here because they
(ALTERNATIVES ISSUE)

1 were considered, and they were rejected early¹⁰²⁵
2 on. It led to this site.

3 In Section 5.2, we discuss alternative
4 uses of this site. The alternative use
5 discussed, which is permitted uses under this
6 site, these are residentially zoned lands and
7 vacation resort, which is a category of uses
8 which is allowed in these same areas, is the
9 only alternative that will achieve the
10 objectives of the project sponsor which is to
11 create a destination resort to bring people to
12 the Catskills to meet the goals and objectives
13 outlined in the local plans of bringing people
14 back into the Catskills and creating the jobs
15 that the Coalition of Watershed Towns and
16 Delaware County are anxious to do. And to
17 meet those larger community objectives, no
18 amount of public funding can achieve. With
19 all of the good work that the Catskill Center
20 has done, with all of the good work that the
21 Catskill Watershed Corporation has done, the

22 funds available for not-for-profits and to the
23 Catskill Watershed Corporation are not
24 large-scale private capital investment.

25 As you will see in the Catskill
(ALTERNATIVES ISSUE)

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1 Watershed Corporation West of Hudson Report
2 that will be produced, and prepared by
3 Mr. Alschuler's firm, the Catskill watershed's
4 purpose in creating and using the funds and
5 having the West of Hudson Economic Study was
6 to focus on the things that the small fund,
7 the \$60 million that was available to the CWC,
8 to encourage and to seed money to other
9 things. Loans of last resort, microgrants and
10 loans, something that they could do with that
11 money effectively, but it would never supplant
12 or replace the opportunities for large-scale
13 development.

14 In that planning process, we will talk
15 at greater length about that in the community
16 character piece, but it's important in
17 understanding the context of this project in
18 response to community plans, great emphasis
19 was placed on a multiplicity of actions that
20 would be needed to help the region
21 economically, particularly in light of the
22 burden that the New York City Watershed Regs
23 and the need to protect the New York City
24 watershed for drinking water purposes posed on
25 the region, and the shoulders of the residents
(ALTERNATIVES ISSUE)

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1 in the region.

2 while we discussed alternatives uses
3 as a residential development, and there have
4 been suggestions that you can make a
5 residential development out of this and you
6 can cluster, they're irrelevant to the
7 purposes of this project, which is to bring
8 large-scale economic opportunities with jobs.

9 To the extent that one reduces the
10 golf course -- and admittedly the golf course
11 is just as described, an amenity -- it is a
12 necessary part that will bring people here.
13 It's been recognized in many of the plans over
14 the last ten years, as a way of attracting new
15 people to come to the region. That golf
16 course has employees associated with it.
17 There's a number of employees that are
18 necessary to take care of that golf course.
19 The same type of employees that can help
20 manage that golf course are the employees that
21 work at Belleayre in the winter. And there is
22 a matching of opportunities of employment for
23 both.

24 with respect to alternate layouts, a
25 great deal of attention, and much of our
(ALTERNATIVES ISSUE)

1 alternative section, is a report on analysis ¹⁰²⁸
2 undertaking leading to the proposed project,
3 which, in our view, was more environmentally
4 sensitive and is in response to good comments
5 that we received both during the scoping
6 comments, almost two and a half years of

7 working with the Department on having it
8 complete, with comments from New York City and
9 others because it was an open process of
10 commenting on our preliminary drafts.

11 So we cataloged much of that earlier
12 analysis in the alternative section, in this
13 section. And we documented it.

14 ALJ WISSLER: Section 5.3?

15 MR. RUZOW: Yes. In respect to
16 alternative buildings and building layouts.
17 This, too, has been a source of iteration in
18 the development of the site. If one were to
19 look at the illustrations -- figures rather,
20 Big Indian was 5-6 of the figures, you'll see
21 an early proposed Big Indian Hotel. Concerns
22 were raised when we reviewed that hotel and
23 its siting, approximately the same site, with
24 the New York\New Jersey Trail Conference.
25 They expressed concerns over visibility of
(ALTERNATIVES ISSUE)

□

1 that and its relative height and presence; and ¹⁰²⁹
2 as a consequence of that, the Applicant hired
3 Emilio Ambasz and the design which is now
4 proposed, which cascades around that
5 topographic area to try to match the contours,
6 was undertaken and planned.

7 In response to concerns regarding
8 glare and sun, we eliminated skylights, the
9 glass was focused to be non-reflective, the
10 roof was planted as part of Emilio Ambaz'
11 design not to mirror the log forest -- a
12 fairly young forest that is on top of the

13 Belleayre Ridge plateau, which we have all
14 walked through now, at least once -- but to,
15 in effect, mask to the extent practicable, and
16 that's a requirement of SEQRA at all times,
17 the visibility from a distance.

18 With respect to the Wildacres Hotel,
19 illustrations are seen in Figures 5-7 and 5-8,
20 these were earlier designs. Even before this,
21 there was another design. They were much more
22 expansive, separated out, covered a larger
23 area. There was no underground parking. In
24 response to concerns expressed at the local
25 level, the building was redesigned.

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1 There were concerns in the original ¹⁰³⁰
2 preliminary sketches. There was going -- it
3 was almost like a little village, it would be
4 creating 100,000 square feet of retail. We
5 took into account the concerns raised by both
6 the local businesses and community leaders and
7 eliminated down to 13,000, which is basically
8 square feet of shops associated with each of
9 the hotels, the golf pro shop and basic
10 amenities, convenience-type items for hotel
11 guests, and took out the notion of trying to
12 create a separate village on the hill.

13 ALJ WISSLER: Mr. Ruzow, the comments
14 with respect to the initial plan for the Big
15 Indian Hotel and the initial plan for the
16 Wildacres Hotel and so forth, I understand
17 what you're saying. Are those comments

18 separately filed someplace? Are they part of
19 the DEIS?

20 MR. RUZOW: They were part of scoping
21 comments, your Honor, that were early on in
22 the process.

23 ALJ WISSLER: They're not part of the
24 record that --

25 MR. RUZOW: No, just the drawings are.
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1 ALJ WISSLER: You're pointing out that¹⁰³¹
2 your alternative layouts and so forth in the
3 DEIS essentially summarizes what you learned
4 from those comments?

5 MR. RUZOW: Correct. With respect
6 to -- I'll go back to this in a moment --
7 depending on how you want to do the break,
8 your Honor, I'll talk about the one golf
9 course hotel and the issues that were raised
10 this morning with respect to the HVS analysis
11 and the examination by the Applicant of trying
12 to propose just a single hotel and golf course
13 at either location, one or both, in a moment.
14 That's in Section 5.3.3.

15 ALJ WISSLER: I don't know what your
16 presentation is. You tell me where a logical
17 break would be for lunch. Are we there?

18 MR. RUZOW: Almost. No, we're not.
19 This is probably a good spot.

20 ALJ WISSLER: We cannot go past 5
21 today. As a matter of fact, I would like to
22 stop before 5, like quarter of or so. With
23 that in mind, short lunch?

24 MR. GERSTMAN: Can we go off the
25 record?
(ALTERNATIVES ISSUE)

1 ALJ WISSLER: 1:15, short lunch.
2 (12:40 - 1:15 P.M. - LUNCHEON RECESS
3 TAKEN.)

4 ALJ WISSLER: Folks, we are ready to
5 get back on the record. Let's proceed.

6 MR. RUZOW: Your Honor, I'm going to
7 skip the rest of the discussion on 5.3 and
8 rely on our discussions with Mr. Baum in a few
9 minutes. With respect to Section 5.4 of the
10 EIS, Alternative Water Supply. We have on the
11 water supply issues in the Issues Conference
12 scheduled for the end of the month, we'll go
13 into great detail, but it was an issue of
14 great certain, and so the consideration of
15 alternative sources of supply for both the Big
16 Indian Resort as well as wildacres was
17 critically important, so the discussion was
18 appropriately included in here.

19 The next section, 5.5, is alternative
20 wastewater disposal. Here at this juncture,
21 we have proposed two tertiary treatment
22 wastewater systems, one for each of the resort
23 components. But in earlier iterations of the
24 Draft EIS, there was reliance on community
25 septic systems, a variety of alternatives
(ALTERNATIVES ISSUE)

1 which DEP, in their earlier comments on the
2 EIS, suggested examination of the tertiary

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3 plants, and we included that so the issue of
4 wastewater has been already considered. But
5 the importance of wastewater treatment has
6 been considered extensively. What hasn't
7 been -- while we have analyzed it, DEP has not
8 analyzed it -- in terms of the environmental
9 benefits in their own considerations in tying
10 the Big Indian Resort to the Pine Hill
11 wastewater treatment plant, a suggestion also
12 made by USEPA in its March comments to your
13 Honor.

14 Alternative site access. That was
15 also an important consideration. One of the
16 earlier iterations of the DEIS had access from
17 Lasher Road. We passed by Lasher Road on the
18 tour of Route 28. In our line-of-sight
19 studies in the early preparation for doing the
20 visual impact studies, it was discovered that
21 an access road coming up from Lasher Road
22 would be visible from the Big Indian area as
23 you're coming west, northbound on Route 28,
24 and therefore we eliminated that access point
25 and shifted to the Friendship Road access
(ALTERNATIVES ISSUE)

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1 point. Again, it was important because it was¹⁰³⁴
2 in response to the primary concern of
3 visibility of -- from Route 28. The current
4 situation in terms of visibility from Route
5 28 -- it's virtually invisible -- and you can
6 see a change in a tree line, and that's about
7 it at that location.

8 with respect to alternative golf
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9 course management practices, I will leave that
10 in part of the pesticide discussion that we
11 will have -- scheduled also in the last week
12 of June -- but a great deal of consideration
13 was given to the selection of grass for the
14 golf course as a means of addressing both the
15 amount of pesticides and fertilizer required,
16 as well as irrigation. And so there were a
17 number of considerations in consultation with
18 our experts at Cornell about the right mix,
19 but it was intended to affirmatively address
20 what was an important issue raised by folks
21 both in water and pesticides, and runoff from
22 that.

23 Alternative stormwater management
24 practices has been a continuing issue of
25 concern, and we had a number of approaches to
□ (ALTERNATIVES ISSUE)

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1 the construction schedule as well as
2 mechanisms in terms of the project design to
3 address and minimize the amount of impervious
4 surface or exposure in the course of
5 construction to the site, and those are
6 reflected in this section.

7 Under the no action alternative, we
8 focused on the elements. The no action is one
9 of those areas of SEQRA which is viewed
10 differently by different people. If you're a
11 governmental agency, no action has more
12 meaning because government has lots of
13 choices. And in the literature, you will find

14 discussions of a distinction between private
15 applicants and what they need to do under a no
16 action alternative versus what a -- a public
17 applicant versus private applicant. Here, we
18 focused on the things that were most
19 important, at least in our view, in the
20 discussion.

21 Because the scope of activities in
22 terms of the existing land use, if this
23 project doesn't go ahead -- this is an
24 assemblage of parcels -- it is not one
25 ownership -- excuse me, one boundary parcel
(ALTERNATIVES ISSUE)

1 with one deed. It's an assemblage of parcels,¹⁰³⁶
2 and there's no merger associated with those
3 parcels.

4 So the property simply could be sold
5 off in the event of no action here. So the
6 development under no action, each parcel could
7 take its own time.

8 Contrary to the suggestion by Mr.
9 Ellsworth, there would be no real opportunity
10 for cumulative impact of the future
11 development of all the parcels if they're
12 owned by different people and unrelated in
13 terms of each individual's choice on what to
14 develop.

15 So you would lose the ability -- one
16 of the great values of this project is its
17 ownership and control by one entity. It's one
18 of the things you look at in terms of
19 providing the greatest measure of

20 environmental control, and indeed from an
21 operations point of view and construction
22 point of view. You have one entity to go
23 after and be responsible, not a multiplicity
24 of entities. So that is an important
25 consideration.

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1 with respect to one of the criticisms
2 about no action and logging, there is
3 extensive information in the DEIS, albeit not
4 in this section, on logging. Figure 2-3 of
5 the DEIS shows the existing development on the
6 Big Indian Plateau. It shows the logging
7 roads that are present. Mr. Ellsworth didn't
8 accompany us on the site visit, but the site
9 visit revealed the extent of logging that
10 occurred.

11 In addition, in the DEIS discussions
12 on pages 2-4 and 2-5, there is discussion on
13 the logging roads and the historic uses of the
14 property. It is not a table, and I would
15 suggest that such a table be a necessary
16 requirement, of each year in which logging
17 occurred, but it records the historical
18 logging that has occurred on the site.

19 Similarly on page 3-84 and 3-133,
20 there is discussions of, again, of logging and
21 what has occurred on the site. So when the
22 next logging would occur, I can't say and I'm
23 not sure we investigated, nor do I think its
24 necessarily a responsibility in a no action

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alternative to start speculating what future
(ALTERNATIVES ISSUE)

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1 actions like that would occur on a project
2 like this.

3 So that is the basic elements of how
4 we have addressed the obligations to consider
5 alternatives, but for the discussion of
6 alternative designs and sizes.

7 I also bring your attention to Table
8 5-2, which is an alternative table. DEC
9 requested that we -- notwithstanding our
10 subsequent position that building wildacres
11 alone or Big Indian alone was not feasible
12 after studied by HVS and Mr. Baum's group --
13 we prepared a table that -- a matrix type
14 table that compared the effects of each
15 project.

16 As you know, the projects are largely
17 divided by the drainage divide along Belleayre
18 Mountain; and so the effects, at least from a
19 water perspective, are felt in two different
20 basins -- and they're quite separate. The
21 streams on Big Indian, the tributaries and the
22 water courses that flow down to Birch Creek,
23 adjoin at Birch Creek, the general flow of
24 surface water leads into the Esopus and into
25 the Ashokan Basin; whereas on wildacres, it's
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1 quite different. It's flows that eventually
2 reach Emery Brook that eventually reach down
3 to the East Branch of the Delaware.

4 So they're quite separable in terms of
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5 the impacts. Indeed, in terms of the visual
6 studies -- we have had the Issues Conference
7 on visual -- it is all very clear that there
8 are separate views, and they're all
9 understandable in that context. So we
10 prepared a chart that broke it down. We did
11 the best we could in terms of the employment
12 associated with the separate units in order to
13 provide the opportunity to at least understand
14 what's going on on each site; but without
15 conceding that, in effect, the separate
16 projects are feasible -- they're not. And
17 we'll turn to Mr. Baum now and ask him to
18 discuss the work that he has done.

19 Erich Baum, if you could give your
20 name for the reporter.

21 MR. BAUM: Sure. Erich Baum.

22 MR. RUZOW: Who do you work for?

23 MR. BAUM: Hospitality -- HVS
24 International.

25 MR. RUZOW: How long have you worked
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1 for HVS?

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2 MR. BAUM: Fourteen years.

3 MR. RUZOW: What is your personal
4 background and experience, your education?

5 MR. BAUM: I have a Bachelor's in
6 Hotel Management from Cornell, and also a
7 Master's in Writing from the University of San
8 Francisco. And I have been basically doing
9 the same type of work for the last 14 years,

10 which is going out and doing inspections and
11 meeting with developers or hotel operators
12 who -- if the property is proposed, then with
13 the developer -- and coming back and doing the
14 analysis of coming up with -- in most cases, a
15 market value appraisal of the hotel. But we
16 also do feasibility and other types of
17 consulting related to hotels.

18 MR. RUZOW: We marked as the
19 Applicant's Exhibit 9 your curriculum vitae.
20 Can you tell us a little about HVS
21 International.

22 MR. BAUM: Sure. It was founded in
23 1980 by Steve Rushmore who is a signatory to
24 this report. He's the managing member of the
25 New York office and a president of the firm.
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1 It was kind of the first of its kind, a
2 consulting firm specifically for hotels.
3 There were firms providing the same sort of
4 services, but they were part of accounting
5 firms providing a broader range of services;
6 so the company's name, Hospitality Evaluation
7 Services, really tells the story. It's grown
8 to include 17 divisions now offering a wide
9 variety of services, but the core services of
10 appraisal and consulting are carried out by
11 ten offices throughout the world, and we
12 appraise thousands of hotels each year.

13 MR. RUZOW: How many employees are
14 there in HVS?

15 MR. BAUM: If you included all the
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16 related divisions, I could only really
17 guess -- I wasn't able to get a hard number,
18 but it would be in the hundreds.

19 MR. RUZOW: In terms of the areas in
20 which in your experience and HVS's experience
21 in evaluating hotel properties, it's across
22 the US? Your CV had a number of locations?

23 MR. BAUM: Yes, some Carribean but
24 mainly the United States. I think I've worked
25 in something like 35 states or so.

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1 MR. RUZOW: On behalf of whom do you¹⁰⁴²
2 perform these evaluation services?

3 MR. BAUM: Our bread and butter is
4 60 percent retained by banks to do appraisals
5 for refinancing or acquisitions or -- that
6 sort of thing. Then the other 40 percent is a
7 mix of feasibility studies and other strange
8 consulting jobs like this one.

9 MR. RUZOW: The report that you
10 referred to is in Appendix 27, the HVS report,
11 just give the title so we all have that.

12 MR. BAUM: Sure. Economic Evaluation
13 Belleayre Resort at Catskill Park, Shandaken,
14 Middletown, New York.

15 MR. RUZOW: When were you asked to
16 prepare that report?

17 ALJ WISSLER: Specifically what part
18 of the DEIS is that?

19 MR. RUZOW: volume 9, Appendix 27, the
20 tab is labeled "HVS Consulting."

21 MR. BAUM: We were retained in March,
22 I believe I inspected the site on the 1st.

23 MR. RUZOW: What year?

24 MR. BAUM: 2002, sorry.

25 And did most of the work during the
(ALTERNATIVES ISSUE)

1 month of April, there was a review process. 1043

2 We finalized the report in DEIS of 2002.

3 MR. RUZOW: Can you summarize for us
4 the question that you were asked to consider
5 in preparing a report?

6 MR. BAUM: Sure. The Executive
7 Summary is the very first section in the
8 report, and I thought I would walk through
9 that.

10 MR. RUZOW: Sure.

11 MR. BAUM: If anybody else wants to
12 turn to that, it starts on page 1-1, Executive
13 Summary. It's about 10 pages, but I'll try to
14 sprint through it and hit the high points and
15 try to address some of the questions that were
16 raised earlier. On the third page, it really
17 gets into the meat of what we have done. We
18 focused on the development of a forecast of
19 income and expense for the hotel, spa, retail,
20 food and beverage outlets and golf courses;
21 and the purpose was to develop an income
22 stream and then compare that to a construction
23 cost estimate in order to yield -- in order to
24 derive an internal rate of return, or an IRR,
25 as described previously by Dr. Alschuler.
(ALTERNATIVES ISSUE)

1 Our IRR, I'll take on a little bit of
2 the question of whether it is an IRR and what
3 it actually represents. The -- 14 percent is
4 used as the pivotal figure in the study. It's
5 the threshold, in our opinion, for
6 feasibility. That actually represents a
7 weighted average of rates of return required
8 by the debt portion and the equity portion.
9 If you were to get specific about it, the debt
10 would probably be in the range of a seven
11 percent interest rate, and the equity investor
12 would typically require 20 percent. So 14
13 percent. When you take into effect that it's
14 not a 50\50 split, if you weighted it based on
15 the fact that the lender would probably
16 account for 65 percent of the financing,
17 that's how you get to 14.

18 When we take the perspective
19 throughout the study of a typical investor,
20 but as Dr. Alschuler pointed out correctly,
21 it's really a melding of two -- it's not
22 actually one individual, it's a melding of the
23 two perspectives, debt and equity.

24 If this was a feasibility study that
25 were to be used to attain financing, which
 (ALTERNATIVES ISSUE)

1 most of ours are, the developer for whom it
2 would be prepared would be seeking to appeal
3 to both debt and equity people, equity
4 investors. Therefore, the melding is -- the
5 14 percent is, in our opinion, a worthy basis

6 for the conclusion.

7 The next question here is what were we
8 actually retained to do? First test the
9 feasibility of the whole project as imagined
10 by the developer. And then, in the event any
11 particular component of the project is
12 removed, what is the impact on the remaining
13 components' economic feasibility? That's the
14 core question that we were asked to answer.

15 I'm now on page 14, and the
16 explanation of why the lodging units, as
17 they're called, also called vacation ownership
18 units, why they're treated separately from the
19 hotel and golf club components. The reason
20 for that is that the profile and risk factors
21 of the two components are so distinct from one
22 another. They have a very different buildout.
23 They have different levels of risk associated
24 with them.

25 The vacation ownership units, there's
(ALTERNATIVES ISSUE)

1 no real precedent for them for what's imagined¹⁰⁴⁶
2 here in this region. You could make the same
3 argument about the hotel and golf club on the
4 scale that it's imagined. There are at least
5 four star resorts throughout the northeast
6 United States, such as the Sagamore which is
7 relatively nearby in Lake George. So the risk
8 associated with vacation ownerships is much
9 higher, in our opinion; therefore, it requires
10 a much higher rate of return.

11 The vacation ownership units also

12 have -- they'll only be built to the extent
13 that they're sold. The buildout proceeds as
14 the units are sold off. The selling of the
15 units wouldn't progress until the hotel and
16 golf club component really has its legs under
17 it and it's basically open and operational.
18 Because the marketing of the vacation
19 ownership units is so tied to the services and
20 the amenities associated with the hotel and
21 golf club, the one has to come before the
22 other.

23 We come to the question of creating
24 scenarios. What could reasonably be
25 constructed without -- what could be removed
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1 from the pie of alternatives and still be
2 worth investigating. Right off the bat, we
3 throw out the option of building the detached
4 lodging units or the vacation ownership units
5 separate from -- it's not conceivable you
6 could build those without the hotel and golf
7 club components because of the reasons I just
8 noted, because the marketing of those units is
9 tied to the facilities, services and amenities
10 that come with the hotel and golf club. So
11 it's not conceivable that they would be built
12 without the hotel and golf club.

13 MR. RUZOW: The operation of the
14 lodging units is tied to the hotel?

15 MR. BAUM: Yes.

16 MR. RUZOW: The rooms that are there,

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17 the buildings, the lodges that are housing
18 those shares are operated by the hotel itself?

19 MR. BAUM: Right.

20 MR. RUZOW: It's not as if it's a
21 condo unit. They're not separately owned.
22 They're part of the hotel complex and, in
23 effect, serviced by the hotel servicing?

24 MR. BAUM: Yes. The
25 question -- because of the tremendous
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1 infrastructure cost, the economic need for
2 marketing synergies and operational
3 efficiencies and the necessary provision of
4 access to the numerous hotel and country club
5 facilities, it's not reasonable to explore the
6 possibility of the detached lodging
7 communities standing alone.

8 I have a metaphor for then
9 understanding why the returns on the two have
10 to be analyzed separately. If I am a lender
11 or an equity investor. Looking at this
12 project from that perspective, I have two
13 major concerns. This is a destination resort
14 being proposed in an untested area in a cold
15 weather climate. I want to see that the hotel
16 and golf club can meet a threshold IRR on its
17 own without the benefit of the lodging units,
18 lodging communities. Because of the risks
19 associated with developing the lodging units,
20 the marketing costs of that -- I digressed.

21 The other thing that we need from that
22 perspective, I want to have at the same time

23 the potential and the capacity for this
24 lodging unit component. If you picture an ice
25 cream sundae, the hotel and golf club is the
(ALTERNATIVES ISSUE)

1 ice cream, the return that you get from the ¹⁰⁴⁹
2 lodging unit communities is the cherry on top,
3 but you need the whole ice cream sundae.
4 That's how it's perceived.

5 You don't see resorts progressing
6 these days without this lodging unit
7 possibility being attached to it. Resorts are
8 extremely risky, and this represents basically
9 a subsidy return on top of what is usually a
10 fairly marginal return on the resort and golf
11 club component. You don't see a lot of
12 resorts being built because they are so risky.

13 The next part of this addresses the
14 residential lots, sales, the 21 Highmount
15 Estates residential lots, which represent a
16 retailing of a small portion of the subject
17 land. The marketability of this element is
18 subordinate to the success of the other
19 components, the hotel, country club and
20 attached lodging units. So because it's so
21 speculative, in our minds, the economic
22 viability of the hotel club and detached
23 lodging units is the real test in this study.

24 Into spelling out the scenarios; I
25 start by identifying basically six economic
(ALTERNATIVES ISSUE)

1 units. Big Indian has two units, the hotel ¹⁰⁵⁰

2 and spa, country club; same with wildacres,
3 that's three and four, and the detached
4 lodging unit communities at each of the two
5 destinations are five and six. Simplifying
6 the analysis, we can apply conventional wisdom
7 and immediately eliminate many of the possible
8 combinations. I already went over why we
9 can't envision the detached lodging units
10 proceeding alone.

11 In addition, the economic yields
12 associated with the two proposed country clubs
13 are below market requirements when analyzed
14 apart from their hotel components, so that's
15 not quite conceivable. What is conceivable is
16 proceeding with the elimination of one or the
17 other resort in its entirety or the golf club
18 at one or the other of the resorts in its
19 entirety. That's how we come up with the five
20 scenarios.

21 MR. RUZOW: Scenario 1 is the proposed
22 resort as currently contemplated. Scenario 2
23 is --

24 MR. BAUM: Elimination of the golf
25 club at wildacres, 3 is elimination of the
(ALTERNATIVES ISSUE)

1 country club at Big Indian, 4 is elimination¹⁰⁵¹
2 of wildacres components in their entirety, and
3 5 is elimination of Big Indian components in
4 their entirety. Pointing out here again, the
5 detached lodging units are evaluated
6 separately due to the differing levels of risk
7 of return, my ice cream sundae metaphor.

8 Key conclusions. Before going into
9 the key variations that are applied in the
10 five scenarios, we summarize our argument here
11 for what happens when you lose 18 holes of the
12 36 holes of proposed golf. The argument can
13 be summarized as such: Based on our research,
14 based on our experience, based on the
15 testimony provided by other golf industry
16 experts, a golf resort has at least 36 holes
17 of golf. If there are less than 36 holes of
18 golf, it's a hotel with a golf course, it's no
19 longer a golf resort. So the distinction
20 is -- I think that's clear. I'll repeat that
21 again if I have to.

22 Our argument is that when you lose 18
23 holes of golf, you lose some of your critical
24 mass that's associated with having the two
25 golf courses, and also being perceived as a
(ALTERNATIVES ISSUE)

1 world class golf resort. There are some costs¹⁰⁵²
2 to that scenario in terms of the key income
3 and expense variables. They are summarized on
4 Table 1-1 of page 1-9. These are by no means
5 the only variables that play in this income
6 and expense forecast, rather what we're
7 presenting here are the variables that are
8 varied among the five scenarios. For the
9 hotel components, we varied the occupancy
10 rate. We start with Big Indian --

11 MR. RUZOW: You're talking about
12 page --

13 MR. BAUM: Page 1-9, Table 1-1. For
14 Big Indian, we're in Scenario 1. This is
15 where everything happens. Stabilized
16 occupancy rate, 65 percent.

17 If you go to Scenario 2, you take away
18 the wildacres golf course, you're no longer a
19 golf resort, you're a hotel with golf course,
20 five points of occupancy lost, down to
21 60 percent.

22 Scenario 3, you get your wildacres
23 golf course back, but you lose Big Indian;
24 basically the same idea, 60 percent occupancy
25 rate -- you're a hotel with a golf course.
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1 Scenario 4, you eliminate wildacres,
2 you've lost some of your critical mass. You
3 have less marketing power, you have made a
4 smaller splash, and you lose three percentage
5 points of occupancy.

6 Scenario 5, you don't have Big Indian,
7 you don't have any occupancy. That is
8 basically the reasoning that goes along with
9 each of the top line variables. That would be
10 anything that affects revenue. So occupancy
11 and average rate for the golf clubs, you have
12 stabilized rounds and/or use charge per round,
13 that relates to greens fees and usage, member
14 dues, that sort of thing.

15 MR. RUZOW: Can I stop you for a
16 second. The stabilized occupancy, describe
17 for a second what that concept means.

18 MR. BAUM: That means when you open
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19 up, you're going to have a period where you
20 need to get your message out. You need to
21 form a market. You need to have people get in
22 the doors and then go back and start talking
23 about it. It takes a long time. Depending on
24 the complexity of the property, if we're
25 talking about a Motel 6 or something like
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1 that, they can stabilize in the first year; 1054
2 but something like this, it's not unusual
3 four-year process.

4 So where I show stabilized occupancy
5 rate of 65 percent, we actually -- if you look
6 at the meat of the study, it goes something
7 like 55, 58, 62, 65 year four. And that's
8 intended to represent all ups and downs
9 throughout the course of the property's
10 economic life. It may perform better than
11 that; it may perform worse than that. This is
12 intended to represent all cycles.

13 MR. RUZOW: In the course of a year,
14 in a stabilized succession, you may have
15 occupancy, obviously, higher than that; for
16 example, a summer season; but in other times
17 of the year, they could be lower?

18 MR. BAUM: Yes, an annual occupancy
19 rate is intended to account for any variations
20 throughout the year.

21 MR. RUZOW: You're using an average
22 rate. We heard figures the other day at the
23 Emerson for a five star in the range of \$489

24 to \$530 a day that they're currently getting.
25 This is much lower, yet we're talking about a
(ALTERNATIVES ISSUE)

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1 five star --

2 MR. BAUM: It's a different animal.
3 The real variable is the room count. 24 rooms
4 at the Emerson, we have 400 rooms to sell
5 here. You can't hopefully get the same
6 average rate.

7 MR. RUZOW: It's an average rate. So
8 the most you can get for a room, which you
9 might in some peak season, but over the course
10 of a year as well?

11 MR. BAUM: It's not the rack rate.
12 It's not the rate you or I would get when we
13 call up and say, what's the rate tonight?
14 It's the weighted average of all. If you have
15 volume accounts, maybe one -- you have a tough
16 month and you take on some discounted groups
17 to fill up the house. It counts for all those
18 variations --

19 ALJ WISLER: Weighted in what way?
20 You're not just taking a total occupancy
21 dividing by 12 and that's it.

22 MR. BAUM: Weighted isn't the right
23 word; I was wrong. If you took the total
24 number of occupied rooms for the year and
25 divided that by the number of rooms available
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1 for the whole year, that's the occupancy rate.
2 The average room rate is the total rooms'
3 revenue divided by the number of occupied

4 rooms. It's basically average revenue per
5 occupied room.

6 ALJ WISSLER: There's no separate
7 factor for the summertime as opposed to the
8 wintertime?

9 MR. BAUM: Right. So those are the
10 top line factors. I -- we also varied some
11 expense ratios, and the argument would go as
12 follows: If you look at Big Indian, base your
13 expenses per rooms, we used an expense ratio
14 of 22.5 percent.

15 Scenario 2, you lose your golf course
16 at wildacres, no impact on that expense ratio.

17 You go to Scenario 3, you lose your
18 golf course at Big Indian, no impact there.

19 However you get to Scenario 4, you no
20 longer have your -- basically your sister
21 hotel with which to share certain expenses,
22 staffing, reservations, that's going to drive
23 your expense ratio up a bit. In order to
24 account for that, we applied an additional one
25 percentage of rooms' revenue. So that's the
(ALTERNATIVES ISSUE)

1 thinking that was applied for each of these ¹⁰⁵⁷
2 expense ratios.

3 So when you -- we got new income and
4 expense streams for each of these five
5 scenarios. We isolated construction costs for
6 each of the components and said: Okay, if
7 this scenario doesn't have wildacres, we're
8 going to kick out the wildacres construction

9 costs. So we're definitely doing apples with
10 apples, and we calculate what we're calling an
11 IRR, which our analysis demonstrates that the
12 threshold is only met under Scenario 1 where
13 the threshold is supported later in the report
14 using investor surveys.

15 MR. RUZOW: In terms of the -- how you
16 arrived at the IRR, do you disagree with
17 Dr. Alschuler's characterization of the IRR?

18 MR. BAUM: I think he did an awesome
19 job of describing it. And I'm really glad
20 that he did, so I don't have to. I thought it
21 was right on.

22 MR. RUZOW: In terms of what it does,
23 it's not a precise number that you could go to
24 a book and say: Here, this is an IRR for this
25 particular kind of project, you derive it?
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1 MR. BAUM: what it relates to
2 best -- yes, it was derived. If I were to do
3 this assignment and treat it as an appraisal,
4 which I think was alluded to as kind of how it
5 was being thought out, one of the -- the
6 methodology -- one of the primary
7 methodologies used for doing an appraisal of
8 property like this is called a discounted cash
9 flow analysis, which is really more like what
10 we've presented here, maybe than a pure IRR.
11 So I can understand some of the criticisms
12 that maybe the term isn't quite right. Really
13 what this is is more purely a backed out
14 discount rate. They both represent the same

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15 thing. They both represent a rate of return.

16 If I was to appraise this hotel, I
17 would probably apply a discount rate of
18 14 percent, and that would provide me with a
19 market value as to which I would then compare
20 to construction costs in order to determine
21 whether or not it was feasible. If after
22 applying the 14 percent discount rate, I got a
23 market value conclusion that was higher than
24 the construction costs, then I would say it's
25 feasible. If it's about equal, I would say
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1 it's marginal, which is kind of where we're at ¹⁰⁵⁹
2 with this. If it's below, then I would say
3 infeasible.

4 MR. RUZOW: With respect to the
5 detached lodging units, the comments by
6 Mr. Seymour this morning and the City, you saw
7 the City's Exhibit 6, the Memorandum --

8 MR. BAUM: Right.

9 MR. RUZOW: -- the criticism with
10 respect to not combining the two IRR's --

11 MR. BAUM: It's hard to look at the
12 IRR figures that are shown here and be able to
13 gauge it as compared to market requirements
14 because it combines basically two separate
15 asset types. So I don't know what the
16 threshold is for combining them, and there
17 probably isn't one -- there isn't one
18 promulgated because these projects vary so
19 widely. Some projects may be weighted more

20 heavily towards detached lodging units, and
21 therefore would have a higher IRR. A project
22 that has only a smaller component of detached
23 lodging and a much bigger hotel component
24 would you have a lower IRR. And it's
25 impossible to say which one of them actually
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1 meets a threshold because that threshold would¹⁰⁶⁰
2 be moving with that mix. That's why you have
3 to separate them, and say this one meets this
4 threshold, and this one meets this threshold.

5 The way in which the development
6 progresses and the way in which an investor
7 looks at this and says: I need this hotel and
8 golf club to stand on its own, it has to
9 provide a viable return on its own because
10 it's a going concern. The detached lodging
11 units are sold off and the developer can sort
12 of wash their hands of it after it's sold off.
13 It's that new owner's problem, but the hotel
14 is a yearly nightmare, a yearly issue, and
15 they have to also be very concerned -- they're
16 going to eventually want to sell it. We
17 assume a ten-year holding period. This
18 property has to support itself on its own year
19 after year, or it's not going to have a good
20 reversion. That's the term used for a sell.

21 ALJ WISSLER: Let me stop you right
22 here. So under the proposed scenario, a hotel
23 and golf course gets built, it demonstrates
24 its economic viability, and in fact if its
25 return reaches a certain threshold, then it

□

1 makes sense to build the detached units; am I ¹⁰⁶¹
2 getting that right?

3 MR. BAUM: Well, what it makes sense
4 to -- so is -- now you have met your first
5 hurdle, now you can say, okay, this is good,
6 because this is kind of the hard one. Now I
7 got my 14. Most cases, vacation ownership
8 units are perceived as being highly lucrative,
9 generating returns of the sort you see here;
10 but when they fail, they fail big. You have
11 thrown a whole lot of marketing, and suddenly
12 the money in the market hasn't show up, and
13 you have nothing for what you have done.

14 MR. RUZOW: The plan is to build one
15 or two, in effect, sample lodging units at the
16 same time the hotel -- in our phasing plan,
17 shows building a few units at each location,
18 but not all of them. They don't just get
19 built -- they're not staged in the sense that
20 it's going to take four years to build them
21 all out physically.

22 ALJ WISSLER: Because there may not be
23 a market demand. But that brings us then to a
24 situation where if the whole project got
25 approved, you might end up with two hotels and
(ALTERNATIVES ISSUE)

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1 two golf courses and that's it, because the ¹⁰⁶²
2 market would never justify any further
3 development of the site?

4 MR. BAUM: It's entirely possible.

5 MR. RUZOW: In terms of the basis for
6 deriving your assumptions in terms of the
7 hotel, these numbers you arrived at, and one
8 of the elements that was criticized, was the
9 wage number you included in the report. Can
10 you explain how you derived at and why you, in
11 effect, used different numbers than in other
12 portions of the DEIS?

13 MR. BAUM: Sure. I never even looked
14 at those figures. It's a level of
15 detail -- again, we're intending to mimic the
16 actions of a typical, prudent investor. The
17 number of variables that go into the forecast
18 of income and expense that we have here -- it
19 can't be quantified really. To look at
20 something -- let's take the rooms departmental
21 expense ratio as an example because that's
22 somewhere where local wages would certainly
23 have an impact.

24 That local wage issue would impact
25 only a small -- not a small but a portion of
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1 that room's expense. If you're going to start ¹⁰⁶³
2 breaking it down by what are local -- what's
3 the local wage going to be for housekeepers,
4 you would apply that same level of scrutiny to
5 about 99 other elements of the room's expense
6 ratio, and you would go insane, and you would
7 be pulling out -- you would be looking at a
8 haystack and pulling out one piece of hay and
9 saying, okay, I know this one.

10 ALJ WISSELER: So far it's all strange
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11 that I'm having an ice cream sundae.

12 MR. BAUM: Okay, too many metaphors.
13 Here is how this would be looked at. A room's
14 expense ratio would be based on a review of
15 comparable industry data for hotels relating
16 to the actual performance of typical hotels.
17 You get to a problem when you start thinking
18 about this hotel as being typical because
19 there aren't many things that are comparable
20 to it, but we were able to do a search through
21 our database. We have six income and expense
22 statements. They're on page 317, three pages
23 of them. They involve comparable scale
24 resorts. They're not all in rural locations
25 like this, but three of them are in similarly
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1 rural locations. And you get from that study,¹⁰⁶⁴
2 you get a typical room's expense ratio, which
3 I then applied in the evaluation of this
4 property.

5 So, it didn't -- you could look at
6 this -- I used a typical room's expense ratio
7 of 22.5 percent, the composite data showed
8 21.8 percent. As far as these types of
9 analyses go, that's the same number, that
10 variation is not meaningful, and you could
11 argue that number is low. You could pick out
12 a comparable resort and say: They run 30
13 percent as an expense ratio, where are you
14 getting a 22.5? You could say it's high,
15 because maybe here is one that runs at 18.

16 I'm saying this is basically an
17 industry average for a resort of this sort and
18 a location of this sort, and that is how a
19 prudent investor would look at this.

20 MR. RUZOW: You had an opportunity to
21 visit some of the hamlet areas. I know we
22 have driven through Phoenicia and Pine Hill
23 and Margaretville and Arkville and
24 Fleischmanns. In doing your own analysis, is
25 there anything comparable to this type of
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1 resort and the amenities that it's proposed to¹⁰⁶⁵
2 offer?

3 MR. BAUM: Not in the Catskills, no.
4 The closest you have to do -- to find a five
5 star, the way this is envisioned, it's world
6 class. That's a term that I heard used for
7 it. That means the market is the world. To
8 find a world class resort, that's -- it can be
9 vague, but the Sagamore is probably the
10 closest you get to a hotel that you could say:
11 Look, we're getting some new competition in
12 the area, but I'm not sure how far Lake George
13 is from here, but that's the closest you come.

14 MR. RUZOW: In terms of the financing
15 component, your judgment is that the only
16 feasible alternative among the ones you
17 considered is the entire project, Scenario 1,
18 based on your analysis?

19 MR. BAUM: Right.

20 MR. RUZOW: But that includes the
21 lodging units as a component?

22 MR. BAUM: Yes. Our conclusion is
23 that, based on our experience in the industry,
24 you don't see resorts getting built unless
25 they have the potential for this vacation
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1 ownership possibility.

2 MR. RUZOW: In terms of the market,
3 you had the opportunity to review the Hillier
4 and RCI reports which are part of Appendix 27
5 as well. After having had a chance to review
6 that, the market for the vacation segments, do
7 you believe that there's a market based on the
8 review of those reports?

9 MR. BAUM: We didn't do independent
10 research on that. I really used their
11 conclusions. I can't -- we didn't do research
12 to back it up but --

13 MR. RUZOW: Those reports suggest that
14 there's a market?

15 MR. BAUM: Yes, they sure do.

16 MR. RUZOW: A concern was expressed
17 yesterday during the community character
18 discussions that this resort might be
19 competition for the hamlet areas. Would you
20 agree with that?

21 MR. BAUM: That's hard to picture. I
22 can't see how that would happen.

23 MR. RUZOW: Because of what's being
24 offered?

25 MR. BAUM: Yeah, it's a different
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1 animal. It's a world class resort. There's
2 nothing of that sort here right now.

3 MR. RUZOW: Visitors to the resort as
4 contemplated -- you went through the hamlet
5 areas, you saw some of the businesses,
6 et cetera. Would people who visited the
7 resort be interested in the hamlet areas -- I
8 know you toured Route 28 a little bit?

9 MR. BAUM: I would think so. The
10 Catskills are -- they're probably a lot of
11 people that would come to the hotel who have
12 never been to the Catskills but who have heard
13 about it all their lives, because it's part of
14 Americana, I would think they would want to go
15 down and investigate it a little bit just out
16 of curiosity. Kind of a little bit of
17 history.

18 MR. RUZOW: The concern has been
19 expressed that people who come to these
20 resorts simply stay there; is that your
21 experience?

22 MR. BAUM: Maybe if they were only
23 coming for two days or so; but after that
24 point, and because of the vacation ownership
25 units and just also the profile of the resort,
(ALTERNATIVES ISSUE)

1 I think there would be a lot of stays on the
2 order of one week. It's hard to imagine you
3 wouldn't want to come down off the mountain
4 and investigate the area a little bit, I would
5 think.

6 MR. RUZOW: There are two styles --
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7 two basic descriptions of the vacation resort
8 in context, one is called club, and those are
9 longer stays, and the timeshares of wildacres
10 are described as one- to two-week intervals.
11 what is your experience with respect to how
12 those club share interests are divided around
13 the year? Do people buy three months,
14 January, February, March; how does that work?

15 MR. BAUM: If you're talking about
16 what's called a quarter share where an owner
17 shares ownership with three other people,
18 that's called a quarter because you're one of
19 four. That means you own it for one-fourth of
20 the year, but you don't occupy it in one
21 contiguous three-month block. Rather what
22 they do is they move their blocks in three- or
23 four-week intervals among the different
24 seasons so that if you're an owner, you're not
25 stuck constantly in a wet spring each year.

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1 You get some weeks around the Fourth of July¹⁰⁶⁹
2 or Christmas to make it attractive to every
3 investor.

4 MR. RUZOW: In summary,
5 notwithstanding the comments you heard earlier
6 from both the City's consultant and
7 Dr. Alschuler, there was a question in their
8 mind as to the feasibility of the project and
9 the appropriateness of separating out the
10 lodging units. Is your judgment or opinion
11 changed with regard to the comments that you

12 heard?

13 MR. BAUM: No.

14 MR. RUZOW: So the conclusions reached
15 in your report, you're still endorsing?

16 MR. BAUM: Yes.

17 ALJ WISSLER: Staff.

18 MR. ALTIERI: We would like to take
19 five, your Honor.

20 ALJ WISSLER: You got it.

21 (2:14 - 2:40 P.M. - BRIEF RECESS
22 TAKEN.)

23 ALJ WISSLER: Mr. Ruzow.

24 MR. RUZOW: I apologize. I just have
25 one further question of Mr. Baum.
(ALTERNATIVES ISSUE)

1 In reaching your judgment about the ¹⁰⁷⁰
2 feasibility of the project, what bearing does
3 the location here in the Central Catskills
4 have on the project?

5 MR. BAUM: It's an area of great
6 natural beauty, it's an area with tremendous
7 heritage as a tourist destination, but that
8 image is tarnished, obviously, by the failures
9 of hotels in places like Sullivan County; and
10 it's because of those reasons that in order to
11 overcome those limitations, a quantum leap of
12 the sort represented by the resort as imagined
13 by the Applicant is necessary with the scale
14 and the quality level, the caliber associated
15 with it.

16 MR. RUZOW: Thank you.

17 ALJ WISSLER: Mr. Altieri.
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18 MR. ALTIERI: First, staff's role in
19 this issue of alternatives is only in its
20 status a lead agency. To that end, it's
21 staff's view that the Applicant considered
22 alternatives regarding locations, availability
23 of properties, zoning, economic viability.
24 Staff also believes that the Applicant
25 addressed the scope of work so that the DEIS
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1 was sufficient to give the public an
2 opportunity for comment on the DEIS, and staff
3 properly accepted the DEIS. And not to
4 restate everything that was already stated
5 today, but we rely on cites to Section
6 617.9,(B) (V), Roman numeral V, that an
7 Applicant provide a description and evaluation
8 of the range of alternatives to the action
9 that are feasible, considering the objectives
10 and capabilities of the project sponsor.

11 We would further add that a DEIS not
12 be unreasonably exhaustive or be a perfect
13 document, and that's the staff's view that
14 this is a sufficient document, sufficient for
15 public review. We're not claiming it's a
16 perfect document.

17 The staff would further add that
18 depending on the evaluation of potential
19 impacts through this proceeding, there may be
20 a need for further evaluation of alternatives,
21 and we would refer to Table 5-2, the
22 Alternatives Table, Summary of East and West

23 Project Components. Depending on what may be
24 found regarding potential impacts of this
25 proceeding, perhaps this table could be
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1 augmented to include community character and ¹⁰⁷²
2 secondary growth categories, and also,
3 depending on what may be found, perhaps some
4 more detail. We think as far as the
5 sufficiency of the DEIS now, the range of
6 alternatives is sufficient; but again,
7 depending on how things play out in this
8 proceeding, perhaps Table 5.2 would be
9 augmented.

10 ALJ WISSLER: That's it?

11 MR. ALTIERI: Yes.

12 MR. GOLDSTEIN: Your Honor, if I may
13 before asking Dr. Alschuler to briefly
14 respond, I would just note that while Mr. Baum
15 certainly has a background in hotel management
16 and consulting based on his CV, I'm not sure
17 he's established his qualifications to testify
18 as an expert on rates of return, economic
19 viability, various investment and development
20 scenarios and similar issues, but we don't
21 object to leaving his comments in the record
22 for what they're worth.

23 Also, we do agree with project
24 sponsors that will deal with the equity issues
25 concerning water supply that were briefly
(ALTERNATIVES ISSUE)

1 touched on when we cover a more comprehensive ¹⁰⁷³
2 water supply issue. And with that, I'll ask

3 if Dr. Alschuler will give us a brief
4 response.

5 MR. ALSCHULER: I'll respond to
6 Mr. Baum's comments were the two core
7 questions that were addressed in our work;
8 one, is there an adequate exploration of
9 alternatives; and two, is there an adequate
10 assessment of feasibility. I completely
11 concur with Mr. Baum's statements that the
12 proposed investment, to use his phrase, is
13 extraordinarily risky. And I would augment it
14 by saying if you are going to propose to a
15 client an extraordinarily risky investment, it
16 would be incumbent on you to do two things
17 that were not done here. One, look at
18 investments which are less risky; and
19 secondly, if we are looking at things that are
20 in the range of being extraordinarily risky,
21 have a range that is somewhat broader,
22 including the kind of destination resorts that
23 were referenced in my testimony that rely on
24 other sorts of amenities and other sorts of
25 attractions in order to establish a
(ALTERNATIVES ISSUE)

□

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1 destination.

2 Consistent with that, I would provide
3 a different answer to the judge's question on
4 the relationship between the potential failure
5 of the hotel project and the marketability of
6 the detached units. I don't believe the
7 answer given is the scenario that would occur.

8 were the hotel component to fail, it would not
9 disappear. It would just simply wipe out the
10 original investor, and somebody else would
11 operate it.

12 The likelihood that you would build
13 and spend several million dollars and then
14 shut it is, I think, a highly unlikely
15 scenario. Were it not to work economically
16 and allow them to repay the debt, what happens
17 in these circumstances is you get a workout
18 and wipe out some portion of the equity and
19 some portion of the debt. Either you work it
20 out in the current ownership and you stay with
21 it, having wiped out some portion of the
22 equity or debt, or it's transferred to
23 somebody else for bankruptcy proceedings and
24 reopened. So what would happen in the event
25 of failure, which I believe is your question,
(ALTERNATIVES ISSUE)

□

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1 is those residential units would be built,
2 they would be operated just simply by a
3 different owner or restructured ownership.

4 So I don't believe there is any
5 logical basis to conclude that were the
6 project to fail, you would not market it.
7 Somebody else might market it, or a
8 re-structured operation would operate it.

9 ALJ WISSLER: I think the point that I
10 was making, with what Mr. Baum said, was that
11 a scenario could exist where the hotels do
12 thrive, but just barely that they don't thrive
13 well enough to justify building the timeshare

14 units.

15 DR. ALSCHULER: I don't believe that
16 to be an economically foreseeable
17 circumstance. What you have here is a
18 circumstance where -- I agree with Mr. Baum,
19 that the operation of the hotel provides an
20 amenity that assists you to market the other
21 units. And you perhaps may purchase services,
22 do you want the golf course, do you want the
23 restaurant and spa facilities that would
24 operate.

25 So you could have a circumstance,
(ALTERNATIVES ISSUE)

1 frankly, where it's losing money, and it would¹⁰⁷⁶
2 still be rational to go develop the other
3 units because you want to dig yourself out of
4 the hole. If you can make money there, you'll
5 do it. And even if it's losing money to the
6 extent where the developer actually loses the
7 property, they are still going to develop
8 those units because they're under the scenario
9 that the Applicant has provided
10 economically -- you add value, you make money
11 by doing it. And having sunk the investment
12 of the golf course and sunk the investment of
13 the infrastructure, I find it very, very
14 difficult to imagine a scenario where you say,
15 oh, I have this opportunity to make money, but
16 I'm not going to.

17 Even if you're not making money on the
18 hotel, somebody is going to step in and do it.

19 And since you are highly likely to finance
20 these things separately -- one of the
21 differences between myself, I think, in the
22 context of the analysis -- the notion that
23 you'll have a single source of financing, one
24 investor, one source of debt -- projects like
25 this don't happen that way. People come in
(ALTERNATIVES ISSUE)

1 and specialize in investing in different types¹⁰⁷⁷
2 of hotels, in different tranches of debt, and
3 you're likely to see a variety of equity
4 investors and a variety of some sources of
5 debt here. It's entirely possible you could
6 have one source of debt and equity operating
7 on the hotel and then another coming in
8 seeking to finance the associated residential
9 development.

10 So the likelihood that you would see a
11 hotel even limping around or a hotel that
12 failed as a five-star, reincarnated coming
13 back as a three-star, which is, again, a not
14 uncommon phenomenon. You would then see the
15 associated units developed because they're
16 profit centers. If they're profitable,
17 somebody is going to do it. If they're not
18 profitable, it's not going to happen. But the
19 notion you have this way to make money out
20 there, and capitalism is not going to figure
21 out a way for you to make that money, that is
22 not a scenario that the market is going to
23 take very seriously.

24 ALJ WISSLER: would you agree with
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25 Mr. Baum that whatever scenario you imagine
(ALTERNATIVES ISSUE)

1 here for development will require a hotel? ¹⁰⁷⁸ Is
2 there a scenario where you could have a golf
3 course with timeshares and that's it?

4 DR. ALSCHULER: We have conducted no
5 independent analysis that reviews a wide
6 range. My confidence in responding to your
7 Honor is in response to the question that your
8 Honor has posed.

9 ALJ WISSLER: I understand.

10 DR. ALSCHULER: We haven't examined on
11 the basis -- I would tend, on the basis of my
12 experience to agree with Mr. Baum, that it
13 would be very difficult to operate the kind of
14 timeshare unit he has talked about.

15 The question though, I think, which
16 is--it's my second comment, I find the core
17 logic presented by Mr. Baum to be -- it's
18 fundamentally circular. What he has argued is
19 that we have to build a world class golf
20 destination. In order to build a world class
21 golf destination, we need 36 holes. We need
22 36 holes that are supported by two different
23 price points of hotel, which are then enhanced
24 in profitability by a series of timeshares and
25 other units -- which gets us back to the fact
(ALTERNATIVES ISSUE)

1 that we need 36 holes of golf. That chain of ¹⁰⁷⁹
2 logic is correct, but it is circular. It
3 starts out with the notion that the only

4 alternative one is examining is building a
5 world class golf destination with a hotel,
6 et cetera, et cetera.

7 I think the core of my disagreement
8 with the scope of alternatives, I find it
9 implausible that the only rational thing to do
10 as an investor with this property is to build
11 a golf destination. We have many forms of
12 destinations in America. We have many hotels
13 that do well. We have many combinations of
14 hotel and interval ownership. Most of them
15 are not golf destinations.

16 So it would be highly usually, I
17 think, to find a property in America for which
18 the only alternative was the construction of a
19 golf destination. Once you begin with that
20 premise, that the only thing to do is to build
21 a world class golf destination, then
22 everything else must flow from it because
23 that's what you decided. And then everything
24 that has to happen fails because you're not
25 supporting the development of a world class
(ALTERNATIVES ISSUE)

□

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1 golf destination, which as Mr. Baum very
2 appropriately noted, a very risky and hard
3 thing to do.

4 Most of these things, a significant
5 number of that these things fail. You're
6 competing -- he was right about world class.
7 We should take this term very seriously. You
8 use it, and Mr. Baum used it correctly, which
9 means you're competing with customers who can

10 go pretty much around the world. They want to
11 play golf at these prices, they can go to
12 Arizona, they go to California, they can go
13 Florida, they can go to South Carolina. At
14 these price points, you have an very affluent
15 population, your competition is severe. And
16 that's why these things are risky.

17 So, you know, this one, like all of
18 them, has its potential competitive
19 advantages; you drive as opposed to an
20 airplane, that's an asset, but you're in a
21 tough competitive environment. And
22 particularly given that it's cold and it's hot
23 here, not everybody particularly loves that.

24 My concern is that once you enter the
25 change of logic that says the only
(ALTERNATIVES ISSUE)

1 alternatives are those that are a world class¹⁰⁸¹
2 golf destination, you're going to end up
3 exactly where Mr. Baum said, and I agree with
4 him in large part. If you are building a
5 world class golf destination, you pretty much
6 need what he said. And I think all we're
7 saying is there are other kinds of
8 destinations, there are other kinds of hotels,
9 there are other ways to develop this land that
10 are economic assets to this community -- that
11 warrant investigation. After investigation,
12 they may turn out not to be feasible, they may
13 turn out to have questions. We have not done
14 that, but they certainly on their face warrant

15 investigation.

16 The final comment is arcane, but it
17 has to do with our old friend the IRR here. I
18 understood from the beginning this was a
19 blended rate. I find it very compromising to
20 use a blended rate. You can drown in a pool
21 of water that is on average two inches deep.
22 The average is not what is always very helpful
23 because nobody ever invests in the average.
24 Nobody ever has an average child. You don't
25 live -- averages are statistical phenomena for
(ALTERNATIVES ISSUE)

1 which reality is very hard to find. And the¹⁰⁸²
2 ability here to attract an actual equity
3 investor, for whom the average is
4 uninteresting, I think, makes it impossible to
5 calculate from his averages back to a test of
6 feasibility. Because the test of feasibility
7 is not the average -- he said here he wants a
8 20 percent rate of return. That is a very
9 high return, and I think probably correct here
10 given, as he said, the extraordinary risk.

11 You have a source of debt capital that
12 I think is probably much cheaper than you may
13 attract; but in today's market, you're not
14 going to lend for this at seven percent.
15 You're going to lend at substantially higher
16 rate, and you're going to get a mezzanine
17 position probably between the debt and the
18 equity at a higher rate.

19 So I think the tool is way too crude,
20 and what it does is create -- normally it

21 wouldn't matter -- but it matters here because
22 on very small spreads, two percent, we're
23 knocking out alternatives. And if we're going
24 to knock out alternatives on small spreads, we
25 need much greater precision here that allows
(ALTERNATIVES ISSUE)

1 us to understand what, in fact, the return of ¹⁰⁸³
2 the equity investor is going to be.

3 Then most importantly, I continue to
4 believe that the kind of backing into the
5 number off a final stabilized cash flow is not
6 a way -- I don't believe that the pension
7 funds and others who use Mr. Baum's advice
8 would ever invest in this project based on
9 this analysis. They would want to see a
10 discounted cash flow. They would want to
11 understand how money was spread out over time,
12 how long your equity was out there, what the
13 nature of the costs and the relationship
14 between that was, and the returns.

15 I would be very surprised if Mr. Baum
16 believes that this analysis if submitted to a
17 bank would justify a loan, or if this analysis
18 submitted to an investor would justify an
19 investment. They would find this interesting,
20 they would find it a useful piece of data, but
21 the notion that an investor would make a
22 decision here without a careful discussion of
23 cash flow-- certainly no investor, certainly
24 in my firm would.

25 So I think if back to the core
(ALTERNATIVES ISSUE)

1 question, his arguments make me more convinced
2 that given the threshold of risk, we should be
3 looking at a broader range of alternatives.
4 The arguments against the alternatives are
5 inherently circular, and the threshold of
6 feasibility is not one that has the precision
7 or the rigor that I think a project of the
8 size of this magnitude warrants.

9 ALJ WISSLER: Okay, thank you.

10 Mr. RUZOW.

11 MR. RUZOW: Can we respond with
12 Mr. Baum?

13 ALJ WISSLER: In a minute?

14 MR. RUZOW: Yes, just a minute.

15 MR. GERSTMAN: We have one or two
16 additional comments.

17 ALJ WISSLER: I'd like to finish that.

18 MR. ELLSWORTH: They pretty much
19 admitted that there's no comparable resorts
20 for this proposed facility. And I think
21 that's consistent with the chart that I
22 submitted previously that shows a Summary of
23 Comparables, Economic Feasibility Analysis.

24 MR. GERSTMAN: Part of CPC 32.

25 MR. ELLSWORTH: CPC 32. The way I did
(ALTERNATIVES ISSUE)

1 this analysis, it eliminated sites that were
2 in warm weather locations before it went
3 through the exercise of figuring out which
4 ones had golf and which ones had 36 holes of
5 golf. There are -- among the 108 sites total,
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6 there are some that have the 36 holes of golf,
7 and pretty much all of them, except the one I
8 mentioned previously, perhaps one, all of them
9 are in warm weather localities.

10 So I think the conclusion you can draw
11 from this is that the world class golf
12 destinations really should be targeted for
13 warm weather locations.

14 Another thing. The entire economic
15 analysis was bifurcated. There was an initial
16 study that was done to come up with some of
17 the baseline information and data, and then
18 the analysis that Mr. Baum did, it sounded
19 like he just accepted those numbers, that they
20 weren't submitted to any sort of analysis by
21 him to see if they fit into the specific type
22 of analysis that he wanted to do. And I think
23 that that disconnect is unfortunate because
24 you really -- when you have two consultants
25 working independently to produce a final
(ALTERNATIVES ISSUE)

□

1 product, you have to make sure somebody's
2 checking to make sure the two pieces fit
3 together.

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4 MR. GERSTMAN: Your Honor, just to sum
5 up our rebuttal comments, and we may want to
6 close with something further. Just for the
7 record, we would note that I don't believe DEC
8 staff has at their disposal the kind of
9 expertise that Mr. Alschuler brings to this
10 feasibility analysis, and it appears to me

11 they have taken the position based upon their
12 analysis of the acceptability of the DEIS for
13 the purposes of commencing the public review
14 process, and not the in-depth analysis that
15 would be required to evaluate the feasibility
16 of those alternatives and the project itself.

17 ALJ WISSLER: Mr. Greene, did you want
18 to respond?

19 MR. GREENE: I just want Mr. Seymour
20 to have an opportunity to respond to
21 Mr. Baum's criticism of the memorandum,
22 City 6, and I want to give a brief summation,
23 wouldn't take more than five minutes.

24 ALJ WISSLER: Go ahead.

25 MR. SEYMOUR: Your Honor, my comments
(ALTERNATIVES ISSUE)

□

1 echo Dr. Alschuler to a certain extent, is 1087
2 really focused on an adequate assessment of
3 alternatives, not so much as other
4 alternatives that might go there but really
5 alternatives involving something less than the
6 whole.

7 It was Mr. Baum's opinion that the
8 timeshare units, as stated before, would not
9 work without the hotel, and I agree with that
10 a hundred percent. It also states that the
11 hotel operation, although marginally feasible,
12 it is feasible -- it's at the threshold that
13 he sets for feasibility which means both hotel
14 and golf course resorts by themselves up there
15 on the hill without the timeshare would be
16 economically feasible and may be an

17 alternative to look it. Although he says that
18 you do need the timeshare in order to gain the
19 overall return, the IRR, the overall return
20 necessary to attract investors.

21 If that's the case, then I would
22 believe that a rational investor, whether it's
23 this pier group of investors that
24 Dr. Alschuler talked about or REIT, or even
25 the bank, would look at both pieces together
(ALTERNATIVES ISSUE)

1 and say they both have to be integrally tied,¹⁰⁸⁸
2 the hotel, golf resorts and the timesharing.
3 And if that's the case, they would look at
4 that combined IRR for that, again, using the
5 logic that he used, in terms of comparing
6 these alternatives and comparing these
7 investments, they would look at the combined
8 IRR which perhaps was not part of the scope of
9 his work -- but which I did in my analysis.

10 My analysis further went on and said
11 that the IRR's of the combined double resorts,
12 both Big Indian and Wildacres, are not much
13 different if you look at them individually as
14 hotel resorts and 18-hole golf courses, and
15 using their numbers that HVS put in their
16 report. If that's the case, then to me, a
17 viable alternative that ought to be analyzed
18 are one or both resorts -- resorts,
19 timesharing and golf and the hotels together.
20 That's what I wanted to make sure that I said
21 here.

22 MR. GREENE: If I might, to summarize,
23 your Honor. I acknowledge that I might not
24 have the same deep familiarity with SEQRA that
25 some of my colleagues have here today, but the
(ALTERNATIVES ISSUE)

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1 City believes that it would be contrary to
2 SEQRA in its regulations to allow the DEIS for
3 the largest project in the Catskills in over
4 50 years to not include a comprehensive
5 environmental analysis of reduced scale
6 alternatives, especially when those
7 alternatives are feasible and required to be
8 analyzed under the scoping document.

9 Mr. Seymour's testimony shows that
10 there are economically feasible reduced scale
11 alternatives that exist for this project. The
12 City believes that the DEIS is severely flawed
13 until those alternatives are considered by the
14 Applicant.

15 The testimony by Mr. Alschuler --
16 Dr. Alschuler and Mr. Seymour has cast
17 sufficient doubt on the alternatives analysis
18 performed in the DEIS that would require a
19 reasonable person to inquire further;
20 therefore, this issue is suitable for
21 adjudication under 6 NYCRR.

22 ALJ WISSLER: City rests?

23 MR. GREENE: City does rest again.

24 ALJ WISSLER: Mr. Young, I'll give you
25 the benefit of everybody's comments.
(ALTERNATIVES ISSUE)

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1 MR. YOUNG: I wanted to clarify. The
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2 testimony of Glen Neelis is being offered on
3 behalf of Delaware County. Glen himself is
4 not neutral on his project, as the Town of
5 Shandaken, Town of Middletown are saying
6 they're neutral. When we offer the testimony
7 of Glen Neelis, we're not doing it on behalf
8 of the Coalition of Watershed Towns but solely
9 on behalf of Delaware County.

10 MR. RUZOW: Erich, would you respond
11 to Dr. Alschuler's comments, because I was
12 confused by his interpretation of what you had
13 said to -- in response to Judge Wissler's
14 question.

15 MR. BAUM: Yes, I think there was
16 probably a misunderstanding there.

17 MR. GERSTMAN: Could you speak up?

18 MR. BAUM: Sure. I think there was
19 probably a misunderstanding. It sounds like I
20 misunderstood what you said and then -- at any
21 rate, here is what I think was said. I think
22 I was asked is there a possibility that the
23 hotel and golf clubs will be constructed and
24 then no market appears for the detached
25 lodging units.

(ALTERNATIVES ISSUE)

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1 ALJ WISSLER: Such that you continue
2 to operate the hotel, but that's as far as we
3 go?

4 MR. BAUM: Yes, and I think that is a
5 possible outcome. I agree with Dr. Alschuler
6 that if there was a problem with the hotel

7 operation's viability, it is very obvious to
8 me it would go through a workout. There would
9 be a second or possibly a third owner who
10 would finally have a capital structure that
11 would make it work.

12 ALJ WISSLER: Explain the term
13 "workout." What is that?

14 MR. BAUM: Workout means your loan is
15 distressed, your bank doesn't want to own the
16 property because they don't have the expertise
17 to operate it. They want to make it work with
18 you somehow. So that's how the term comes
19 about. It can also ultimately lead to a
20 distressed sale.

21 ALJ WISSLER: They may restructure the
22 loan?

23 MR. BAUM: They may restructure the
24 loan; right, reduce the principal, make it
25 viable.

(ALTERNATIVES ISSUE)

1 MR. RUZOW: This is something that you ¹⁰⁹²
2 have experience with at HVS?

3 MR. BAUM: Yes, it's something that we
4 saw a lot of in the early 1990's. It's not as
5 common now, fortunately, because lending
6 principles were -- became much more
7 disciplined in the latest real estate upturn
8 so that with the latest downturn, it didn't
9 occur as much.

10 MR. RUZOW: The principles that you're
11 talking about in your evaluation in terms of a
12 change of thinking in 1990 and thinking today,
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13 2002 in your report, is that you're applying a
14 more disciplined review in terms of the
15 market?

16 MR. BAUM: That was me, really just me
17 editorializing. The changes in the lending
18 principles didn't bear on our projections.
19 The income stream is what it is. It's not
20 really related to that. You could say it
21 might have something to do with why interest
22 rates are low. It's tangential.

23 MR. RUZOW: Based on your evaluation,
24 do you believe that you could interest any
25 hotel chain to come to this location in the
(ALTERNATIVES ISSUE)

1 Catskills -- in the first instance, without 1093
2 golf and without timeshares?

3 MR. BAUM: Just a hotel?

4 MR. RUZOW: Yes.

5 MR. BAUM: That's really hard. That's
6 virtually impossible to imagine. You're
7 creating a destination resort with no
8 recreational alternatives. Unless you had
9 something else in mind.

10 MR. RUZOW: With respect to the
11 discussions on golf, we refer your Honor to
12 the Appendix 27, the letters of record, an
13 alphabetic section which deals with letters
14 regarding the golf component of the resort.

15 MR. BAUM: I would like to address
16 whether or not I'm qualified to address this
17 issue of IRR's. Our firm does this sort of

18 study. I've done four of them probably
19 already this year. Maybe in a busy year, ten
20 to fifteen of them. They are routinely
21 digested, accepted and paid for and made use
22 of, and the methodology is completely
23 legitimate and accepted.

24 MR. RUZOW: Thank you.

25 ALJ WISSLER: Thank you, Mr. Baum.
(ALTERNATIVES ISSUE)

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1 Is that it on alternatives?

2 (NO AFFIRMATIVE RESPONSE.)

3 Seeing no takers, it is.

4 MR. RUZOW: Subject to connection,
5 your Honor, with community character.

6 MS. ROBERTS: I would like to call
7 Dr. Erik Kiviat to the stand.

8 ALJ WISSLER: Wildlife and habitat
9 impacts. This is CPC's petition, Issue H.

10 MR. YOUNG: Your Honor, for the
11 record, I'm leaving.

12 ALJ WISSLER: Record will so reflect.

13 (MR. YOUNG EXITS HEARING ROOM.)

14 MS. ROBERTS: Your Honor, I would like
15 to submit for the record CPC Exhibit 32,
16 Dr. Kiviat's Supplemental Report on wildlife
17 Impacts.

18 ALJ WISSLER: That will be 34.

19 MR. GERSTMAN: 34, as the Judge says.

20 ("HUDSONIA" REVIEW OF THE DEIS FOR
21 THE PROPOSED CROSSROADS VENTURES BELLEAYRE
22 RESORT AT CATSKILL PARK, ULSTER AND DELAWARE
23 COUNTIES, NEW YORK WITH RESPECT TO BIOLOGICAL

24 DIVERSITY RECEIVED AND MARKED FOR
25 IDENTIFICATION AS CPC EXHIBIT NO. 34, THIS
(WILDLIFE & HABITAT ISSUES)

1095

1 DATE.)

2 MS. ROBERTS: I'm just going to forgo
3 any statement from me because of the lateness
4 of the hour, and we want to get Mr. Kiviat on
5 and off today, so I'm going to ask Dr. Kiviat
6 to summarize the report that was submitted as
7 part of the petition and also updated with the
8 exhibit that I just handed out today.

9 DR. KIVIOT: I'm an ecologist. I have
10 a Ph.D in ecology. I've lived in the Hudson
11 valley all my life. I've been doing
12 biodiversity survey work for more than 30
13 years. I'm the co-author of the Biodiversity
14 Assessment Manual for the Hudson River Estuary
15 Corridor.

16 MS. BAKNER: Could you speak up a
17 little bit?

18 DR. KIVIAT: I've been involved in
19 biodiversity survey work for more than 30
20 years. I'm the co-author of the Biodiversity
21 Assessment Manual for the Hudson River Estuary
22 Corridor. I have a number of scientific and
23 non-technical publications on wildlife
24 habitat, wetlands and other topics.

25 I am the Executive Director of
(WILDLIFE & HABITAT ISSUES)

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1 Hudsonia, a nonprofit organization. We're a
2 research institute. We don't take positions

3 for or against development projects. Our role
4 is to try to bring a firmer scientific footing
5 into this kind of discussion, and I've been
6 asked to participate today on behalf of the
7 Catskill Center.

8 MS. ROBERTS: Excuse me. It's
9 actually the Catskill Preservation Coalition,
10 not just the Catskill Center.

11 DR. KIVIAT: Thank you.

12 MS. ROBERTS: You're welcome.

13 DR. KIVIAT: So I submitted a report
14 dated the 21st of April 2004, and also a short
15 supplemental report dated the 9th of June 2004
16 which amends my first report on the basis of
17 observations that I made on the site visit on
18 the 26th and 27th of May. And I just want to
19 go through these reports and highlight some of
20 my questions and concerns about the Draft
21 Environmental Impact Statement and some of the
22 things that I saw on the site.

23 One piece of information in the
24 literature that I think is noteworthy that I
25 believe has not been addressed in the DEIS is
(WILDLIFE & HABITAT ISSUES)

□

1 found in this book by Michael Kudish, The 1097
2 Catskill Forest, A History. Kudish identified
3 a one and a half square mile area of
4 first-growth forest at Belleayre Mountain.
5 First growth is what many of us would refer to
6 loosely as virgin forest. Kudish's definition
7 is a forest that has not been logged, cleared,
8 stripped for bark or intentionally burned.

9 And the trees are a shade taller in species,
10 and many of them are in the 100- to 300-year
11 age range.

12 This definition doesn't refer
13 specifically to Belleayre. This is his
14 definition for the Catskill Mountains as a
15 whole. But he did identify a large area, that
16 would be a thousand acres of first-growth
17 forest in the area of Belleayre Mountain, and
18 we have submitted a map and table from
19 Dr. Kudish's book showing where that area is.

20 MS. ROBERTS: Let me stop you for a
21 moment and hand in this exhibit. CPC would
22 like to submit CPC Exhibit 35 for the record
23 which is pages copied from the book that
24 Dr. Kiviat just spoke about.

25 (EXCERPTS FROM BOOK "THE CATSKILL
□ (WILDLIFE & HABITAT ISSUES)

1 FOREST A HISTORY" BY MICHAEL KUDISH RECEIVED 1098
2 AND MARKED FOR IDENTIFICATION AS CPC EXHIBIT
3 NO. 35, THIS DATE.)

4 MS. BAKNER: Is the book available or
5 just those pages?

6 MS. ROBERTS: We haven't copied the
7 whole book. It's available in the library.
8 We're copying the couple of pages that will be
9 referenced today.

10 Your Honor, is that sufficient? Do we
11 need to copy the entire book?

12 ALJ WISSLER: What you're giving me is
13 fine. If the Applicant wants to put more in,

14 he can do so.

15 MS. ROBERTS: Let the record state
16 that I'm going to give this book to
17 Applicant's counsel to just take a look at.

18 DR. KIVIAT: To my knowledge, this
19 block of first-growth forest straddles both
20 the state ski area and the proposed
21 development site. I have not seen a map
22 comparing the boundaries of the first-growth
23 forest with the boundaries of the Belleayre
24 Resort site, so I can't determine how much of
25 that forest is on the site. And I think
(WILDLIFE & HABITAT ISSUES)

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1 that's something that the Applicant needs to
2 consider because although there are other
3 first-growth forest areas in the Catskill
4 Mountains, this is certainly a resource of
5 particular biological significance at the site
6 of the proposed development.

7 MS. ROBERTS: Dr. Kiviat, one second
8 or two. Your Honor, on the site visit on the
9 days that we mentioned, the 25th and 26th, we
10 were on the top of the mountain of Belleayre,
11 and we suspect part of this might be part of
12 the old growth that Dr. Kiviat is talking
13 about. And I also wanted to submit pages from
14 the book that we're talking about which
15 actually documents old growth cut by the DEC
16 on the top of Belleayre Mountain to make room
17 for a new ski lift.

18 So this will be CPC Exhibit 36.

19 ("THE CATSKILL FOREST A HISTORY" BY
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20 MICHAEL KUDISH PAGES 78, 85, 105 RECEIVED AND
21 MARKED FOR IDENTIFICATION AS CPC EXHIBIT NO.
22 36, THIS DATE.)

23 MS. ROBERTS: While we're stopped,
24 Dr. Kiviat, can you talk about the nature of
25 old-growth forest at higher elevations such as
(WILDLIFE & HABITAT ISSUES)

1 the elevation we were at at the Belleayre Ski¹¹⁰⁰
2 Mountain?

3 DR. KIVIAT: Can you explain a little
4 more?

5 MS. ROBERTS: Sure, about the nature
6 of the size of a tree at a higher elevation.
7 By looking at a tree at a higher elevation,
8 you might think that it is a small tree and
9 then assume that it is young?

10 DR. KIVIAT: Yes. At higher
11 elevations, and also where soils are
12 shallower, where there's more rock in the
13 soil, more rock fragments, where there's less
14 water, where other conditions reflect the
15 elevated and weather-exposed environment,
16 trees grow more slowly so that small trees can
17 actually be quite old, and yet not appear to
18 be old because of their size.

19 MS. ROBERTS: Thank you.

20 DR. KIVIAT: Another point that I want
21 to make about the forest on certain portions
22 of the site is that there are areas where
23 beech is very abundant in the forests; and
24 this appears to be somewhat unusual in the

25 Catskills. The DEIS does refer to some of
(WILDLIFE & HABITAT ISSUES)

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1 these stands as being co-dominated by beech.
2 There is, for example, a stand, a forest stand
3 along the Lost Clove trail which I believe is
4 on the site. It's a little hard to tell
5 because the boundary of the site is not marked
6 there, which is very highly dominated by
7 beech, along with other hardwoods such as
8 sugar maple.

9 It's been stated about the Catskill
10 Forests that a striking decline in beech
11 occurred between about 1800 when surveyors
12 recorded witness trees for their land surveys
13 marking the boundaries of parcels that were
14 surveyed and the mid twentieth Century,
15 according to Robert McIntosh, who was a
16 vegetation ecologist, who did quite a lot of
17 research in the Catskills.

18 So it seems to me that these stands
19 that are dominated or co-dominated by beech at
20 Belleayre Mountain may have some particular
21 biological significance. And this question
22 should be raised whether these forests are
23 indeed unusual in the Catskills and whether
24 they might play some role in supporting
25 mammals or insects or other things that depend
(WILDLIFE & HABITAT ISSUES)

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1 partly or entirely on beech.

2 There are, by the way, a number of
3 insects that feed on beech leaves and some
4 animals like the black bear that often feeds

5 heavily on beech mast, which is the nuts of
6 the beech.

7 Another point I want to make about the
8 forests in general on the site is that the
9 DEIS states that the mean or average size of
10 the trees is 12 inches, or about 30
11 centimeters, in diameter, and therefore,
12 according to the DEIS, trees large enough to
13 provide potential maternity roost habitat for
14 the federally endangered Indiana bat are not
15 present.

16 Two comments on this, because I think
17 it's an important point that needs to be
18 considered. An average is an average, so
19 about half of the trees are going to be larger
20 than the average, and about half of them are
21 going to be smaller than the average, so
22 clearly from a statistical point of view,
23 there are going to be plenty of trees that are
24 larger than 30 centimeters in diameter. And
25 some of those will be potentially large enough
(WILDLIFE & HABITAT ISSUES)

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1 to support Indiana bat use.

2 The other point is that looking at the
3 site as part of the team on the site visit and
4 also looking at it from the public trails
5 across the site or border the site, I did see
6 numerous large trees in certain locations, and
7 to give a couple examples: On the site visit
8 on May 26th, there were eight or more Sugar
9 Maples in the 40 to 50 centimeters diameter

10 size range, and an unidentified maple about
11 60 centimeters, that would be about two feet
12 in diameter, at the hotel site on the western
13 property.

14 And also on the same day near the site
15 of the 18th fairway, I saw about ten trees in
16 the 40- to 50-centimeter diameter size range,
17 including both sugar maples and red maples.
18 My point here is simply that I think the DEIS
19 is deficient in the way that it addresses the
20 question of potential summer habitat for
21 Indiana bat, which is a species that needs to
22 be considered in the discussion of a project
23 of this magnitude.

24 MS. ROBERTS: Before we go on to
25 flora, let me ask you, in your opinion, is
(WILDLIFE & HABITAT ISSUES)

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1 Michael Kudish a well-respected person,
2 scientist on forests of the Catskills?

3 DR. KIVIAT: He is, certainly in my
4 experience, very well-respected, and I would
5 say he is probably one of the foremost experts
6 on the Catskill forests, the ecology of the
7 Catskill forests and the history of the
8 forests.

9 MS. ROBERTS: Again, he has found at
10 least, we think, somewhere near a thousand
11 acres of forest, first-growth forest that may
12 be on the site or near the site, or
13 overlapping, but we can't tell because of the
14 mapping and because we haven't been on the
15 site?

16 DR. KIVIAT: That's correct. When my
17 colleagues and I look at a site that's
18 proposed for development or proposed for some
19 other land use, perhaps recreational use or
20 something else, we think of biological
21 diversity in two ways. One is which species
22 of plants and animals and other organisms are
23 present or might be present on that site.

24 ALJ WISSLER: Dr. Kiviat, can I take
25 you back to the first-growth forest. Do they
(WILDLIFE & HABITAT ISSUES)

1 appear on a list or anything like that that ¹¹⁰⁵
2 would -- for preservation? Do you know what
3 I'm asking you?

4 DR. KIVIAT: Not to my knowledge.
5 Kudish points out that many of the
6 first-growth forest stands in the Catskills
7 that he identified are not the same as the
8 wilderness areas which have been preserved as
9 part of the Catskill Park. As far as I know,
10 and I, of course, may not be familiar with all
11 the information on this subject, the
12 identification of these first-growth forests
13 in Kudish's book are -- that's the primary
14 source of information on that topic, and I
15 will say though --

16 ALJ WISSLER: Is a first-growth forest
17 by definition something that is listed as
18 something endangered?

19 DR. KIVIAT: Not necessarily, but I
20 would say that first-growth forests are of

21 conservation concern because as time goes on,
22 there are fewer and fewer acres of
23 first-growth forest because, as was just
24 pointed out by Ms. Roberts, during the process
25 of development and management and other human
(WILDLIFE & HABITAT ISSUES)

1 activities, incrementally portions of these ¹¹⁰⁶
2 first-growth forest stands are lost. And once
3 they're lost, they're gone. It's the
4 definition of first-growth forest is that once
5 it's been cleared, it cannot once again become
6 first-growth forest.

7 ALJ WISSLER: So that I'm clear, the
8 concern here is that the first-growth forests
9 that have been identified by Mr. Michael
10 Kudish have not been delineated on the project
11 site maps; is that what we're saying?

12 MS. ROBERTS: The concern is that it's
13 certainly close enough to the site, and we
14 have found already evidence on the top of
15 Belleayre Mountain that DEC actually, in '84 I
16 believe, was cited for inappropriately cutting
17 first-growth forest. There are provisions,
18 and maybe Dr. Kiviat can expand on that, the
19 DEC's management policy, that require extra --
20 I don't know what they are but -- efforts when
21 you're talking about cutting first-growth
22 forest.

23 ALJ WISSLER: I would ask staff to
24 identify for me what Departmental regulation
25 or guidance there is with respect to
(WILDLIFE & HABITAT ISSUES)

1 first-growth forest and the cutting of the
2 same.

3 MS. ROBERTS: The second Exhibit 36,
4 that I handed out to you, Dr. Kudish does talk
5 about DEC's mistake in cutting these forests.
6 Because we saw some of them and he saw some of
7 them, and again, the property is contiguous,
8 we're concerned that it was missed. We
9 haven't been over the whole property. We were
10 just there for a couple of days.

11 ALJ WISSLER: I want to understand
12 your position for the sake of this Issues
13 Conference.

14 MR. RUZOW: Your Honor -- my question
15 is, you said that -- you testified that he saw
16 first-growth forest.

17 DR. KIVIAT: Let me clarify that.
18 According to Michael Kudish's book, part of
19 this area of first-growth forest that he
20 identified at Belleayre Mountain surrounds the
21 upper ends of the lifts at the ski area, and
22 he does refer in the book, and I believe we
23 have given you copies of those pages, to the
24 loss of several acres of the first-growth
25 forest during the development of the lifts and
(WILDLIFE & HABITAT ISSUES)

1 the associated facilities at various times as
2 recently as 1995.

3 MR. RUZOW: But not on our property?

4 MS. ROBERTS: No, no.

5 DR. KIVIAT: As far as the development

6 site, the resort site is concerned, I don't
7 know how much of it is covered by the
8 first-growth forest because this information
9 is not available to us.

10 ALJ WISSLER: That's the question I'm
11 asking. Are there any first-growth forests on
12 the top of the mountain on the project
13 property?

14 MS. BAKNER: No.

15 MS. ROBERTS: They say no. We say
16 it's possible and needs further investigation.

17 MS. BAKNER: We can answer that with
18 other pages from the same book.

19 MS. ROBERTS: All right. Fine.

20 DR. KIVIAT: So when we assess a site
21 for biological diversity, we think about this
22 in two ways. We think about the species that
23 are there or could be there, and we also think
24 about the habitats. Really the first thing
25 that's important to do is to ask which
(WILDLIFE & HABITAT ISSUES)

1 habitats are present on the site, what are the ¹¹⁰⁹
2 characteristics of those habitats, and
3 according to that information, where might
4 there be certain species that are rare or
5 vulnerable or that have some other
6 significance for conservation or management.

7 Following on that concept of the
8 habitat assessment, especially because my
9 ability to spend time on this site has been
10 very limited, I want to raise the question
11 about Northern Monkshood which is a

12 federally-listed threatened plant that has a
13 substantial and very significant population in
14 the Catskill Mountains, a population which is
15 disjunct by a very great distance from the
16 other nearest population of the species.

17 Monkshood is associated with springs
18 in the Catskills. And as we found on the site
19 visit on May 26th and 27th, there are a number
20 of locations on the site where there are
21 springs, and there appears to be habitat that
22 is potential habitat for Northern Monkshood.
23 And I believe this question has been glossed
24 over in the DEIS, and I think that a
25 federally-listed species, federally and state
(WILDLIFE & HABITAT ISSUES)

□

1 listed, really is something that needs to be ¹¹¹⁰
2 given more attention during the environmental
3 impact analysis. We want to know where on the
4 site there are habitats that potentially
5 support this species, and that a survey for
6 this plant has been conducted by a botanist
7 who has the appropriate experience at the
8 right time of year and otherwise appropriate
9 for the task.

10 There are other rare plants of
11 significance which could be present on the
12 site. Another one is called Moschatel. It's
13 associated in the Catskills with rocky areas,
14 especially calcareous, that is limy rocks, and
15 it is a state-listed species.

16 MS. BAKNER: Dr. Kiviat, do you have

6-10-04crossroadsz
17 the Latin genus and species there?

18 DR. KIVIAT: Yes, it's in the -- I'll
19 give it to you, but it's in the report that I
20 prepared on the 21st of April. It's called
21 Adoxa, A-d-o-x-a, moschatellina,
22 m-o-s-c-h-a-t-e-l-l-i-n-a, and it's common
23 name is Moschatel, M-o-s-c-h-a-t-e-l -- not to
24 be confused with cheap wine, by the way.

25 I want to mention the lists of flora
(WILDLIFE & HABITAT ISSUES)

1 in the DEIS. There are two places in the DEIS¹¹¹¹
2 where there are lists of the plants that were
3 identified on the site. One is in the wetland
4 Delineation Report, and the other is in Table
5 3-20. However, looking at these two lists,
6 which are actually mostly the same, but one is
7 in a different order than the other, neither
8 of these is a complete botanical survey of the
9 site, and it seems to me that with a site of
10 this importance and a project of this
11 magnitude, that there really should be a
12 complete botanical survey; and in particular,
13 there really should be a complete rare plant
14 survey. And those two types of surveys
15 normally would be conducted together by an
16 experienced botanist, someone who knows this
17 part of the country.

18 During the site visit, at which I was
19 present for a day and a half, and while I was
20 valiantly trying to keep up with everyone and
21 listen to the conversation and do various
22 other things, I did spend some time looking at

23 the plants that I was walking past, and I
24 found at least a dozen species that are not on
25 the flora list on the DEIS. Actually I'm
(WILDLIFE & HABITAT ISSUES)

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1 looking at the list more closely after
2 preparing this Supplemental Report. I
3 erroneously mentioned three species that are,
4 in fact, on that second list that I saw last
5 night for the second time. It's very hard for
6 me to find things in the DEIS.

7 The ones that I erroneously listed as
8 not being listed in the DEIS are trout-lily,
9 white snakeroot and --

10 ALJ WISSLER: Are you talking about
11 CPC 34, the supplement?

12 DR. KIVIAT: Yes.

13 ALJ WISSLER: Can you identify for me
14 the areas of the report, and I'll just cross
15 them out.

16 DR. KIVIAT: If you look at the bottom
17 of page 2, the last paragraph, there's a list
18 of -- short list of plant species. It's
19 prefaced by the statement: "During the site
20 visit, I observed the following plant species
21 not reported on the flora of the wetlands and
22 uplands of the Belleayre Resort site, Table 1,
23 page 13 of the Wetland Delineation Report.
24 That is correct, however, I think --

25 ALJ WISSLER: I'm not seeing where we
(WILDLIFE & HABITAT ISSUES)

1113

1 are.

2 MS. ROBERTS: Excuse me, Dr. Kiviat,
3 that's actually at the bottom of page 1.

4 DR. KIVIAT: It's page 2 on my copy.
5 It's the first page of text. Sorry.

6 So it is correct that these species
7 are not listed in that one flora list in the
8 wetland Delineation Report; however, three of
9 them are in the other flora list in Table 3-20
10 of the DEIS; however, my point is that if I
11 could see a dozen plants in that relatively
12 brief time, when I was not focusing on a
13 botanical survey, that are not listed in the
14 DEIS, I think probably there is a great many
15 more plant species that were not in those
16 flora lists of the DEIS. And I think that
17 this development proposal is too large to omit
18 a good botanical survey, a really thorough
19 survey.

20 MS. BAKNER: Dr. Kiviat.

21 MS. ROBERTS: Excuse me, Ms. Bakner.

22 ALJ WISSELER: Wait a minute. I want
23 to clear up the report. Is that what you were
24 going to do?

25 MS. BAKNER: That was all I was going
(WILDLIFE & HABITAT ISSUES)

1114

1 to ask.

2 ALJ WISSELER: What should I cross out
3 on -- I'm on page 1.

4 DR. KIVIAT: What I said here is
5 actually accurate, but I would like to amend
6 that by saying that when I looked at the other
7 plant list in the DEIS, Table 3-20 in the

8 wetland Delineation Report, three of these
9 species that I mention in this paragraph, in
10 fact, are listed in Table 3-20. Those are
11 trout-lily, white snakeroot and squirrel-corn,
12 and I think that answers your question
13 about --

14 In particular, I noticed on the site
15 that there seemed to be quite a lot of
16 diversity of the sedges, s-e-d-g-e-s,
17 belonging to the genus Carex, C-a-r-e-x. It's
18 a large group of plants which are very useful
19 as environmental indicators. And the genus
20 also includes a number of species that are on
21 the New York Natural Heritage Program list of
22 rare plant species in New York State. There
23 seems to be quite a bit of sedge diversity
24 both in the wetlands and on the uplands of the
25 site; again, based on my limited observations
(WILDLIFE & HABITAT ISSUES)

1115

1 during the site visit.

2 Only eight species of sedges are
3 identified in the DEIS in these two flora
4 lists, and I would be very, very surprised if
5 there were not 20 or 30 or 40 species of
6 sedges, maybe more on the site, and quite
7 possibly some rare sedges among those. So
8 again, I think that this is an area where the
9 DEIS is deficient, and where for planning
10 purposes, more information is needed.

11 I'd like to go on to comment on the
12 bird survey in the DEIS, an appendix to the

13 DEIS. This was a breeding bird survey. It
14 was conducted in April, May and June of one
15 year, mostly in May and June. And if I
16 understand correctly, the field zoologist who
17 conducted the breeding bird survey also
18 conducted the reptile and amphibian survey.
19 According to Mr. Franke at the site visit,
20 that was Sheila Tuttle; is that correct?

21 MR. FRANKE: Yes.

22 DR. KIVIOT: If I understand the DEIS
23 correctly, Ms. Tuttle spent eight days doing
24 the survey work, both the breeding bird survey
25 and the reptile and amphibian survey. I came
(WILDLIFE & HABITAT ISSUES)

1116

1 to that conclusion by matching up the two
2 lists of dates and the descriptions of the two
3 surveys. I just want to make the point here
4 that this amount of survey time is very, very
5 small for a 2,000 acre site, especially for a
6 site that has rugged topography such as the
7 Belleayre Resort site.

8 Many ornithologists consider that
9 three to five visits to each location on a
10 site are necessary in order to find all the
11 breeding birds that are there during a
12 particular season.

13 MS. ROBERTS: Dr. Kiviat, let me just
14 clarify. When you say each location, I note
15 the term "unit" is often used?

16 DR. KIVIOT: Yes.

17 MS. ROBERTS: What is a unit?

18 DR. KIVIOT: Maybe I can explain this
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19 a different way. A good field ornithologist
20 conducting a breeding bird survey can cover --
21 under good conditions and with a lot of
22 energy -- up to maybe 100 acres in a day. You
23 have about five or six hours in the morning
24 when birds are at their peak of singing and
25 displaying when they're easy to see and hear.
(WILDLIFE & HABITAT ISSUES)

1117

1 I would say very roughly that one
2 would be able to cover this 2,000 acre site in
3 about 20 days at 100 acres per day. And that
4 may be a bit optimistic, because there are
5 certainly some areas on the site where it's
6 hard to move around. There are steep areas,
7 there are areas of dense vegetation, there are
8 some very heavily forested areas that might
9 take longer to survey, but let's say 100 acres
10 in a day. And in order to find all the species
11 that are breeding during a particular season,
12 and in particular, to find whatever rare
13 species of birds may be present during the
14 breeding season, one would need to make about
15 three to five visits. That's normally
16 considered a minimum.

17 Some ornithologists say ten visits.
18 But I'm going to be a little less rigorous and
19 say three to five visits. If we said three
20 visits to each part of the site, each
21 100 acres, that would be about 60 days of
22 breeding bird survey field work. And I don't
23 think that's at all an unreasonable amount of

24 survey time to spend on this site to find the
25 less common species of breeding birds in the
(WILDLIFE & HABITAT ISSUES)

1118

1 spring and early summer.

2 MS. ROBERTS: Is that possibly because
3 this site is also contiguous to -- between 60
4 to 65 percent of this land is state-owned
5 which provides a contiguous habitat for the
6 breeding birds, so you would take that time
7 because of the site?

8 DR. KIVIOT: I think because of the
9 fact that the site is extensively forested and
10 is part of a much larger area of forest
11 off-site, many thousands of acres of
12 contiguous forest, that that is going to mean
13 that the site is likely to support some
14 breeding bird species and some other wildlife
15 that would not be present if the blocks of
16 forest were smaller. Because there are some
17 species of birds which need large areas of
18 contiguous forest, and there are other animals
19 that have that requirement as well.

20 So, yes, it does mean that the fauna
21 are richer in forests that are in large
22 blocks. If you're looking at both the
23 interior of the forest and also the edges of
24 the forest.

25 Now, I think a consequence of this
(WILDLIFE & HABITAT ISSUES)

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1 very abbreviated breeding bird survey is that
2 the birds that were reported in the DEIS are
3 basically common species with a couple of

4 exceptions, and I think that the noteworthy
5 exceptions are sharp-shinned hawk and common
6 nighthawk. I was particularly interested in
7 the mention in the DEIS of the common
8 nighthawk because in all of my professional
9 activities in the Hudson Valley, which go back
10 to about 1971, I have never heard the -- what
11 is described as the booming call of a common
12 nighthawk.

13 This is the territorial call that the
14 bird makes during the breeding season, and
15 it's a very distinctive and unusual sound.
16 And it is stated in the literature on birds of
17 this part of the country that the common
18 nighthawk has undergone a rather severe decline
19 in much of the northeastern U.S., and it seems
20 to be particularly true in New York State. So
21 I think on that basis, that an observation of
22 a nighthawk has some interest.

23 Now, if I understand correctly, the
24 DEIS report on the bird survey states that the
25 booming call of a nighthawk was heard during
(WILDLIFE & HABITAT ISSUES)

1 the breeding season, and that it might have¹¹²⁰
2 nested on a power line right-of-way near the
3 old farmhouse. And you'll recall that I asked
4 to see that power line right-of-way during the
5 site visit. We looked at the two ends of it
6 at the roads. Apparently the zoologist who
7 did the bird survey didn't follow up on this
8 observation to try to determine if, in fact,

9 there was a territorial nighthawk or a pair of
10 nighthawks that might have been breeding in
11 the area.

12 The power line right-of-way, based on
13 the little pieces of it that I saw, looked to
14 be far too overgrown for nighthawk breeding,
15 but in other parts the site, there are
16 certainly habitats that are potentially
17 suitable, and those would be open meadow
18 habitats with vegetation that's not too dense,
19 or ledges with some bare, more or less, flat
20 rock or other openings in the vegetation, and
21 possibly also flat roofs, although I don't
22 know whether those exist on the site or not;
23 but nighthawks are well-known to nest on flat
24 roofs, often gravel surfaced roofs, as well as
25 on flat, bare or partially bare soil.

(WILDLIFE & HABITAT ISSUES)

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1 There's certainly other questions that
2 could be raised about the birds. There
3 apparently wasn't any bird survey work done
4 outside of the breeding season, so we don't
5 know anything about the functions that the
6 site may provide to birds during the post
7 breeding season in the summer or during
8 migration periods in the fall and spring or
9 during the winter. And for some species of
10 birds, those are critical periods where some
11 of these Catskill Mountain habitats may have
12 some conservation significance.

13 I would like to go on and raise some
14 questions about the reptile and amphibian

15 survey. To my understanding of the DEIS,
16 Ms. Tuttle did the reptile and amphibian
17 survey concurrently with the breeding bird
18 survey in this period of, I believe, eight
19 days; and she identified 14 species of
20 amphibians and reptiles which are listed in a
21 table in the Appendix to the DEIS.

22 During the site visit, the day and a
23 half of the site visit in May, I saw four
24 species of reptiles and amphibians that were
25 not reported in Ms. Tuttle's reptile and
(WILDLIFE & HABITAT ISSUES)

1 amphibian survey list. Those are the northern¹¹²²
2 ring-necked snake, which I saw on May 26th
3 under a rock on the western portion of the
4 site just before we came back to the cars.
5 And on May 27th, the smooth green snake which
6 I saw on that rock ledge, and I pointed out to
7 your Honor and the rest of the group; and two
8 amphibians, the spotted salamander -- I found
9 two unhatched egg masses in a pool in the
10 wetland near the Marlowe Mansion, or at least
11 we parked at that Marlow Mansion to get to
12 that wetland, and I think it was near the 18th
13 fairway or the 15th fairway. I'm sorry if
14 I --

15 MR. GOLDSTEIN: Was it near three
16 cement springs?

17 DR. KIVIAT: That's correct.

18 MS. ROBERTS: It was near the three
19 cement springs.

20 DR. KIVIAT: Correct. Since there
21 were springhouses and a water supply system
22 and a covered reservoir, which I guess were
23 installed for the Marlowe Mansion, the wetland
24 is associated with those springs.

25 Also Tom Alworth found a wood frog
(WILDLIFE & HABITAT ISSUES)

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1 which I captured and identified at another
2 location -- and let me see if I can tell you
3 exactly where that was -- spotted salamander
4 and wood frog are both absent from the
5 amphibian and the reptile list in the DEIS --
6 north of the site of Fairway 15.

7 Now, wood frogs also normally breed in
8 what are called vernal pools or intermittent
9 woodland pools like the spotted salamander,
10 and both of these species depend on this type
11 of habitat, as well as the forests surrounding
12 the vernal pools for their life histories.

13 So the very limited vernal pools that
14 appear to be present on this site -- I saw one
15 of them. I presume there are others, but I
16 don't know where they all are. These pools
17 are going to be of some real significance for
18 wood frog and spotted salamander because there
19 are very few examples of this kind of habitat
20 on the site.

21 Now, I think I want to conclude the
22 mention of reptiles and amphibians by saying
23 two other things. I think that the reptile
24 and amphibian survey reported in the DEIS was
25 not adequate if it found 14 species and not

1 the four species that I encountered more or
2 less casually in a day and a half of group
3 site visit when I didn't have really the
4 luxury of really focusing on zoological field
5 work.

6 My other question is that in the
7 Catskill Mountains, there are two well-known
8 timber rattlesnake populations, one at Mount
9 Tremper, one at Overlook Mountain. There are
10 some other observations of timber rattlesnake,
11 and this is a threatened species in New York.
12 In other parts of the Catskills, there is, for
13 example, a series of observations reported in
14 The Ashokan Catskills, the book by John
15 Bierhorst, B-i-e-r-h-o-r-s-t -- is the author
16 of the book called, The Ashokan Catskills,
17 which is a book about the natural history of
18 the Town of Olive.

19 So there's reason to think that there
20 may be other timber rattlesnake populations in
21 the Catskills in addition to these two
22 well-known and well documented and well
23 acknowledged populations at Tremper and
24 Overlook.

25 This is a -- the question that just
(WILDLIFE & HABITAT ISSUES)

1 has to be raised and addressed in any thorough
2 environmental impact analysis because the
3 timber rattlesnake is a threatened species.
4 If you look at --

5 MS. ROBERTS: CPC Exhibit 3A. Can he
6 identify it there?

7 ALJ WISSLER: We all have a small one
8 in evidence.

9 DR. KIVIAT: If you look at this map
10 of the site, the southern portion of the
11 eastern property along most of the southern or
12 southeastern edge of that property, there's an
13 area of steep rocky soils that are described
14 on this map, this slope map as being
15 predominantly in the range of 25 to 40 percent
16 slopes, showing as reddish purple on the map.
17 And if I understand correctly from the soils
18 map in the DEIS, those are approximately
19 conterminous, or at least substantially
20 overlapping, with a type of soil referred to
21 either as Halcott Rock Outcrop Complex, which
22 is what the DEIS calls it, or Arnot Rock
23 Outcrop Complex, which is what the Ulster
24 County soil survey calls it. And this is a
25 soil that occurs on areas of rocky, steep
(WILDLIFE & HABITAT ISSUES)

□

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1 slopes.

2 This particular area of the site that
3 I have identified here has a -- more or less
4 southerly exposure, southerly or a little west
5 of southerly, so that it would receive a lot
6 of sunlight and be quite relatively warm in
7 the spring and fall when timber rattlesnakes
8 are coming out of or returning into their
9 winter dens.

10 And this is precisely the kind of
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11 habitat where one goes to look for timber
12 rattlesnakes in southeastern New York. And
13 there is no mention that I can find in the
14 DEIS of any real careful analysis of potential
15 habitat for the species on the site or any
16 serious effort to specifically conduct a
17 survey for timber rattlesnakes at the
18 appropriate time of the year.

19 And I think this is something that has
20 been a prominent concern in the Hudson Valley
21 in recent years because of certain other
22 development projects and because of the
23 increasingly tenuous survival status of this
24 species in New York State. So my point here
25 is although we have no direct evidence of
(WILDLIFE & HABITAT ISSUES)

1 timber rattlesnakes on or close to this site,¹¹²⁷
2 this is a question that does need to be
3 addressed, and it does need to be addressed in
4 a serious and well documented fashion.

5 I mention in my reports other species
6 of animals that have some conservation
7 interests that may be on the site. I'm not
8 going to go into all this in detail, but it's
9 in all the reports.

10 Certainly I think from a general point
11 of view here, and from the point of view of
12 the DEC and from the sport fishing community
13 in the Catskills, the brook trout is a very
14 important issue. Brook trout showed up in the
15 fish surveys that are reported in the DEIS for

16 all or almost all of the streams on and in the
17 vicinity of the site, at least down low enough
18 in their basins where their streams are large
19 enough to support that species; and another
20 fish called the slimy sculpin which is an
21 indicator of very high quality, cool,
22 unpolluted stream water in this part of the
23 country also showed up in some of those stream
24 fish surveys. And this leads me to think that
25 the lower elevation portion of the site and
(WILDLIFE & HABITAT ISSUES)

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1 areas directly downstream from them which
2 would be potentially affected by development
3 activities on the site support important
4 populations of brook trout, which is a native
5 fish species and species which is held in high
6 regard by anglers in the Catskills and other
7 parties of the Northeastern United States.

8 So the potential impacts on brook
9 trout populations and their habitat from, for
10 example, siltation and other downstream
11 impacts of development need to be taken very
12 seriously in the review of this permit
13 application.

14 Another issue about wildlife which is
15 not addressed in the DEIS, as far as I can
16 tell, is that of off-site impacts as opposed
17 to downstream impacts. And one of the things
18 that it seems to me that a resort project of
19 this type and magnitude is going to do is
20 generate a lot of recreational activity in the
21 vicinity of the site. And this activity is --

22 this increase in activity will include hiking,
23 mountain biking, cross-country skiing, bird
24 watching and probably a variety of other
25 outdoor non-consumptive forms of recreation,
(WILDLIFE & HABITAT ISSUES)

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1 and possibly some consumptive forms of
2 recreation as well, such as hunting and
3 fishing.

4 I think that the potential impacts of
5 increases in these activities on the trails
6 and the streams and other points in the
7 landscape that recreationists are going to be
8 using and are going to be attracted to need to
9 be assessed. And I'm thinking, for example,
10 of impacts on trail erosion, the quality of
11 trails, which is always an issue for hiking
12 trails. And also potentially the disturbance
13 of certain bird species during the breeding
14 season when some birds are very sensitive
15 simply to people walking in their breeding
16 territories, if one can judge from some
17 ornithological research that's been conducted
18 in recent years, in the last ten years.

19 Another point I would like to make
20 about wildlife is that although the DEIS does
21 to some extent address birds and reptiles and
22 amphibians and fish, that there doesn't seem
23 to have been any real attention paid to the
24 possibility that there are rare invertebrate
25 species on the site, or in places where they
(WILDLIFE & HABITAT ISSUES)

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1 could be affected by off-site impacts.

2 There is a rare species of tiger
3 beetle which has been reported near the site
4 according to the Nature Conservancy, and I'm
5 going to spell the scientific name of this
6 tiger beetle. The genus is C-i-c-i-n-d-e-l-a,
7 and the species name is
8 a-n-c-o-c-i-s-c-o-n-e-n-s-i-s. That name is
9 probably longer than the animal is, but it
10 doesn't make it any the less a potential
11 conservation concern. This is a species that
12 lives in streamside habitats, and I would
13 estimate, based on the information available
14 to me, that the floodplain areas identified by
15 FEMA and reported in the DEIS along several
16 streams that are on the site would be
17 potential habitat for this rare tiger beetle.
18 And one of those streams certainly would be
19 Birch Creek which we saw at the end of the
20 site visit on May 27th.

21 There's been a lots of discussion
22 about some of the wetlands on the site and
23 whether or not they're what the Army Corps of
24 Engineers refers to as isolated wetlands; that
25 is, whether they lack surface water
(WILDLIFE & HABITAT ISSUES)

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1 connections to stream systems. That's an
2 important question. But irrespective of that,
3 these wetlands need to be considered as
4 wildlife habitat whether or not they are
5 isolated. And in some cases, isolated
6 wetlands provide habitat functions to wildlife

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7 that non-isolated wetlands don't provide. And
8 that is, for example, true in the case of the
9 vernal pool habitats, that spotted salamanders
10 and wood frogs and some other less common pool
11 breeding amphibians use, because those need to
12 be habitats that don't have fish in them.

13 So the isolated pools tend to be
14 better habitat. So I simply want to make the
15 point that one can't just view wetlands in the
16 light of whether or not they're isolated. One
17 also has to ask, more fundamentally, what
18 habitat do these wetlands provide to wildlife
19 and to plants, and to possibly other
20 organisms.

21 MS. ROBERTS: Dr. Kiviat, I wanted to
22 just interrupt you for a minute and ask you
23 two questions. I'm handing you a letter dated
24 July 11th, 2003 from the U. S. Fish and
25 Wildlife Service to Colonel O'Dowd of the Army
(WILDLIFE & HABITAT ISSUES)

1 Corps of Engineers, and ask you if you've 1132
2 reviewed that letter.

3 DR. KIVIAT: I have.

4 MS. ROBERTS: Can you describe what
5 this letter says, or in general terms what it
6 described about wetlands?

7 DR. KIVIAT: Well, the letter makes
8 the point that there are about 23 acres of
9 wetlands on the project site. The project
10 proposal involves a number of road crossings
11 over wetlands and streams, and the letter also

12 raises the question whether there are streams,
13 ephemeral and intermittent streams, that would
14 be affected by development that have not been
15 identified as streams in the DEIS based on the
16 U.S. Fish and wildlife Service's observation
17 of stream channel segments on the site.

18 The letter refers to the potential
19 impacts of construction activities and other
20 activities on wetlands and streams; changing
21 flow patterns, changing water quality
22 potentially. There are some estimates of the
23 amount of wetlands, both jurisdictional and
24 non-jurisdictional, that would be affected by
25 the proposed development and the -- some
(WILDLIFE & HABITAT ISSUES)

1 comment on the wetland mitigation proposal. ¹¹³³
2 And I think that the -- you know, that as a
3 plant and animal ecologist, the impression
4 this letter left on me is that there is a
5 limited amount of wetland habitat on the site,
6 as is typical in much of the Catskill
7 Mountains, and that the proposed project would
8 appear to have very substantial impacts on
9 those wetlands.

10 MS. ROBERTS: So would you support the
11 concerns raised in this letter?

12 DR. KIVIAT: I do, absolutely.

13 MS. ROBERTS: Your Honor --

14 ALJ WISSLER: 37?

15 MS. ROBERTS: Yes.

16 (LETTER DATED 7-11-03 FROM COLONEL

17 JOHN B. O'DOWD RECEIVED AND MARKED FOR

18 IDENTIFICATION AS CPC EXHIBIT NO. 37, THIS
19 DATE.)

20 MS. ROBERTS: While we're talking
21 about wetland habitat, I just wanted to refer
22 back to May 25th when we were on the site
23 visit; and you recall the wetlands that you
24 mentioned before that was near the
25 springhouses?

(WILDLIFE & HABITAT ISSUES)

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1 DR. KIVIAT: Yes.

2 MS. ROBERTS: There was a pipe leading
3 out, and we questioned where this pipe was
4 coming from. I'm not asking you about the
5 hydrology or to talk about whether -- where
6 that's been draining from, but obviously there
7 was a drainage of some sort coming from that
8 area. If it is shown that that wetland area
9 is being drained, would you think that would
10 have an impact on the wetland wildlife?

11 DR. KIVIAT: Wetland wildlife is very
12 dependant on the quantity on timing and
13 quality of the water in the wetlands. This
14 has been established through many years of
15 research on a quite a wide variety of
16 different kinds of wildlife. And, yes, I
17 would be concerned that if water were being
18 removed from the wetland or diverted before it
19 goes into the wetland, that that would affect
20 potentially the kinds of wildlife able to use
21 that wetland, and the population quality, if
22 you will, for those species; how productive

23 they are, how well they're able to maintain
24 their populations and so forth.

25 MS. ROBERTS: Thank you.
(WILDLIFE & HABITAT ISSUES)

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1 DR. KIVIAT: One other point about
2 wetlands. When we were on the second day of
3 the site visit, if I remember correctly, May
4 27th, at the location of Irrigation Pond 1, I
5 saw a logging road that had several large
6 puddles or small pools on it which had some
7 wetland plants, and this is an area that
8 apparently was not delineated during the
9 wetland delineations. I don't know how large
10 it is, I don't know whether it's a federal
11 jurisdictional wetland, whether it's isolated
12 from stream systems or not, but I think that
13 it's important to at least find all of the
14 wetlands on the site and delineate them and
15 then be able to make an informed decision
16 about what is important and what isn't
17 important.

18 ALJ WISSLER: Where are the wetlands?

19 DR. KIVIAT: At the location of
20 Irrigation Pond 1, up on top of the eastern
21 property.

22 ALJ WISSLER: And what kind of flora
23 did you observe there?

24 DR. KIVIAT: I saw at a minimum a
25 wetland sedge called Carex. I was 57
(WILDLIFE & HABITAT ISSUES)

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1 yesterday. You have to excuse me for a
2 moment. I have to think of that later for
Page 185

3 you. I saw one species of wetland sedge in
4 those puddles, and I think there were other
5 wetland plants there as well, but I did not
6 have the time to look at them carefully or to
7 examine the soils.

8 MS. ROBERTS: Dr. Kiviat, do you think
9 that those plants might be written in your
10 field notes?

11 DR. KIVIAT: They are absolutely, and
12 if you like me to take the time, I will.

13 MS. ROBERTS: Or can we supplement?

14 ALJ WISSLER: We can do that. How
15 much more do you have?

16 MS. ROBERTS: I think about five
17 minutes.

18 ALJ WISSLER: Because we'll take a
19 short break, and you can provide it then.

20 MS. ROBERTS: Fine.

21 DR. KIVIAT: While we were looking at
22 those pools, Mr. Franke said the Applicant's
23 soil scientist dug soil pits or made borings,
24 I forget which, every 100 feet; is that
25 correct?

(WILDLIFE & HABITAT ISSUES)

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1 MR. FRANKE: No.

2 DR. KIVIAT: I'm sorry. Maybe I
3 misunderstood when we were out in the field.

4 MR. FRANKE: I think we were talking
5 about the level of precision in doing the high
6 intensity soils mapping, and the unit size of
7 the soils, and I believe we were talking about

8 unit size of an acre.

9 DR. KIVIAT: Does that mean one boring
10 per acre?

11 MR. FRANKE: In terms of the field
12 work to prepare the high intensity soils map,
13 there's not a boring done across a grid, if
14 you will, across the site. There's samples
15 taken, typically a hand shovel or auger.

16 DR. KIVIAT: When I said boring, I
17 meant a soil auger boring. At what intervals
18 are those soil auger samples taken?

19 MR. FRANKE: Regular intervals based
20 on landscape position.

21 MS. BAKNER: The soil boring locations
22 were for the sedimentation basins. That may
23 have been the confusion that came up.

24 DR. KIVIAT: Well, I'm actually
25 thinking right now in general about the
(WILDLIFE & HABITAT ISSUES)

1 identification of potential hydric soils, and¹¹³⁸
2 the point is that on a site of this size, of
3 necessity the soil scientist is typically
4 going to work with aerial photographs and then
5 go on the site and do some ground truthing to
6 confirm the soils using shovel pits or a soil
7 auger. And that there are spaces in between
8 those soil samples where there can be smaller
9 areas of hydric soils that will be overlooked
10 during the soil survey, and as a consequence,
11 possibly overlooked during the wetland
12 delineation process. And that particular
13 location, which looked to me like undelineated

14 wetland, simply raises the question about that
15 area and possibly about other areas of the
16 site, whether there are small wetlands that
17 have not been delineated that may have some
18 particular significance to wildlife and
19 plants.

20 My last point is that the DEIS refers
21 to a letter from the New York Natural Heritage
22 Program dated May 4, 2000, that is four years
23 ago, recording no known records of rare
24 species or communities at the site. All of
25 the letters that I have seen from the New York
(WILDLIFE & HABITAT ISSUES)

1 Natural Heritage Program of this nature say ¹¹³⁹
2 that because there's a constant influx of data
3 into the files of the Heritage Program, the
4 inquiry should be updated each year. And it
5 seems to me incumbent upon the Applicant to
6 update that inquiry so that we can all have
7 the benefit of any new data that may have come
8 to the New York Natural Heritage Program
9 within the last four years. And this is
10 really a standard procedure that's now gone
11 through in almost any environmental analysis.

12 ALJ WISSLER: Thank you, Doctor.

13 MS. ROBERTS: Your Honor, would you
14 like to take five minutes, and we'll take a
15 look in Dr. Kiviat's field notes.

16 MR. GERSTMAN: We have several more
17 questions.

18 ALJ WISSLER: Of Dr. Kiviat?

19

MR. GERSTMAN: Yes.

20

ALJ WISSLER: I'm sorry. I thought
you were done.

22

MR. GERSTMAN: No, but I wouldn't mind
a couple-minute break to find the citation and
go right into the completion of his testimony.

23

24

ALJ WISSLER: That's fine. Then
(WILDLIFE & HABITAT ISSUES)

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25

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1

response.

2

(4:24 - 4:33 P.M. - BRIEF RECESS

3

TAKEN.)

4

(4:33 P.M. - MR. RUZOW EXITED HEARING

5

ROOM.)

6

ALJ WISSLER: Let's begin again.

7

MS. ROBERTS: I just wanted to ask you

8

a few more questions, and somewhat just

9

reiterate.

10

Dr. Kiviati, we talked a little about

11

this particular site. It your professional

12

opinion this site is unique in terms of

13

habitat because it is surrounded by at least

14

60, 65 percent of preserved land and why?

15

DR. KIVIATI: It's becoming

16

increasingly unusual in the northeastern

17

states, and certainly in this part of New York

18

State, to have such large blocks of contiguous

19

forests. And this makes the areas that remain

20

that have that characteristic very important

21

for wildlife.

22

MS. ROBERTS: So based on your

23

professional opinion --

24

DR. KIVIATI: I think it's unusual.

25

MS. ROBERTS: But is it
(WILDLIFE & HABITAT ISSUES)

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1 unique -- unusual?

2 DR. KIVIAT: Well, I don't use the
3 word "unique," because everything is unique.
4 I'm a bit of a grammarian. But it's
5 definitely unusual, and it's definitely
6 something I would be concerned about.

7 MS. ROBERTS: Based on your
8 professional experience, is it likely that
9 many other sedges, as you mentioned, and
10 wildlife, would be on the site that haven't
11 been identified?

12 DR. KIVIAT: Yes, I think so. On the
13 basis of having found in a very small amount
14 of time a dozen plants and four reptiles and
15 amphibians that were not mentioned in the
16 DEIS, and comparing it to my experience
17 working on other sites in the Hudson Valley,
18 including some experience that I have in the
19 Catskills, definitely, yes, I think there are
20 quite a few kinds of plants and animals that
21 are on this site, in my judgment, that have
22 not been discovered in the biological surveys
23 for this DEIS.

24 I don't know which species those are;
25 but in terms of the thoroughness of the survey
(WILDLIFE & HABITAT ISSUES)

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1 work, yes, there's quite a bit of stuff out
2 there to be discovered, and certainly one
3 group of species that has not been surveyed

4 adequately is the sedges, Carex sedges.

5 MS. ROBERTS: Generally is this sort
6 of work done for this site adequate or at
7 least in your office to the level that you
8 think is professional and adequate?

9 DR. KIVIAT: Well, I think the real
10 question there is, is this survey work
11 adequate to provide the information that can
12 be used to design a project that will not
13 result in the unnecessary loss of species from
14 this site and its vicinity. And if the
15 question is framed that way, no, the survey
16 work is not adequate.

17 MS. ROBERTS: In terms of birds that
18 depend on large tracks of land, did you
19 mention there were some birds that do?

20 DR. KIVIAT: That depend on large
21 areas of contiguous forest.

22 MS. ROBERTS: That you would likely
23 find or have identified on this site?

24 DR. KIVIAT: Well, one or two of those
25 are mentioned in the DEIS. One is the
(WILDLIFE & HABITAT ISSUES)

1 sharp-shinned hawk. I would expect barred
2 owl, for example, which is dependent usually
3 on large forest tracts, and probably a number
4 of what are referred to as forest interior
5 songbirds like the scarlet tanager which
6 are -- which thrive in large blocks of forest
7 but don't do well in smaller blocks of forests
8 because they're more subject to predators and
9 parasites and other impacts that result from

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10 human activities around the edges of the
11 forests.

12 MS. ROBERTS: The timber rattlesnake,
13 are you aware of state laws that provide
14 protection for endangered species so that they
15 would not be harmed if someone came across
16 them?

17 DR. KIVIAT: The Endangered Species
18 Act in the Environmental Conservation Law, to
19 my understanding, and certainly Department
20 staff can clarify this, or correct me if I'm
21 wrong, it does protect the timber rattlesnake
22 as a threatened species, and if I remember
23 correctly, it provides for a \$1,000 fine if
24 there's a case of willful killing or
25 collection or interference in the behavior --
(WILDLIFE & HABITAT ISSUES)

1 MS. ROBERTS: Or removal from a site? ¹¹⁴⁴

2 DR. KIVIAT: Or removal from a site.

3 MS. ROBERTS: Thank you, Dr. Kiviat.

4 Your Honor, I just want to point out
5 that we have three more related experts to
6 wildlife habitat coming in subsequent days;
7 Dr. Burger on birds, then Merna Hall and
8 Dr. Dawson on forest and forestry impacts, and
9 they are related to the habitat issue.

10 ALJ WISSLER: One more question --

11 DR. KIVIAT: I have the name of the
12 sedge, the wetland sedge that I mentioned at
13 the site of Irrigation Pond 1. It's called
14 Carex, C-a-r-e-x, stipata, s-t-i-p-a-t-a.

15 MS. ROBERTS: I do have one more
16 question. Dr. Kiviat, can you just talk about
17 the potential impact on brook trout from this
18 project and other trout and their habitat?

19 DR. KIVIAT: The brook trout
20 particularly is sensitive to water quality,
21 and presumably the reason why brook trout are
22 doing well in this area around Belleayre
23 Mountain is because the streams are cool and
24 the loads of suspended sediment are low, and
25 otherwise these streams have good water
(WILDLIFE & HABITAT ISSUES)

1 quality, high dissolved oxygen, for example. ¹¹⁴⁵

2 So development activity that involves
3 a lot of removal of forest will normally have
4 a large impact on streams by removing shade
5 from the streams, increasing the water
6 temperature, by causing soil erosion that
7 results in the transport of sediment into the
8 streams, and the increase in turbidity, and
9 then both the increased temperature and the
10 increased turbidity contribute to a decrease
11 in dissolved oxygen.

12 And all of those impacts, as well as
13 changes in stream flow which typically occur,
14 are normally deleterious to brook trout
15 habitat and brook trout populations. And the
16 lowlands of the Hudson Valley and eastern
17 Ulster County and in Dutchess County, for
18 example, have lost many of their brook trout
19 population as a result of these kinds of
20 impacts, and other impacts of human

21 activities.

22 MS. ROBERTS: So although this project
23 may not impact a large part of the stream, may
24 or may not, are you suggesting that if maybe
25 certain parts of a stream are -- where there
(WILDLIFE & HABITAT ISSUES)

1 is now forest cover are then clear cut, or a ¹¹⁴⁶
2 large part of the forest is removed, it will
3 have an impact on a large part of the stream
4 even away from where the actual tree removal
5 is occurring?

6 DR. KIVIAT: Yes, these impacts
7 propagate downstream. The changes in water
8 quality, increasing sediment load and other
9 impacts on stream water quality and on the
10 flow pattern of streams move downstream with
11 the water.

12 MS. ROBERTS: I thank you. I think
13 that's it. Thank you.

14 MR. GREENE: Before the Applicant
15 responds, I would like to note at 5 I have a
16 meeting and I have to leave.

17 ALJ WISSELER: Fine.

18 MR. GREENE: I want to make sure no
19 scheduling will go on.

20 ALJ WISSELER: No. Our next meeting
21 will be on the 17th, and just -- I guess we'll
22 just meet at the parking lot at 49A and Route
23 28 at 9 o'clock.

24 MR. GREENE: Very good.

25 MS. BAKNER: I want to give you our
(WILDLIFE & HABITAT ISSUES)

1 exhibits first so it will be a little
2 smoother. This is the resume of Richard
3 Futyma. He is a doctor of botany.

4 ALJ WISSLER: This is Applicant's 10.
5 (RESUME OF RICHARD P. FUTYMA RECEIVED
6 AND MARKED FOR IDENTIFICATION AS APPLICANT'S
7 EXHIBIT NO. 10, THIS DATE.)

8 MS. BAKNER: This is the next
9 Applicant's exhibit. It is the resume of
10 Kevin Franke.

11 (RESUME OF KEVIN FRANKE RECEIVED AND
12 MARKED FOR IDENTIFICATION AS APPLICANT'S
13 EXHIBIT NO. 11, THIS DATE.)

14 ALJ WISSLER: Applicant's 11.

15 MS. BAKNER: This is the resume from
16 Sheila Tuttle. She is the expert who did the
17 bird and amphibian survey.

18 (RESUME OF SHEILA E. TUTTLE RECEIVED
19 AND MARKED FOR IDENTIFICATION AS APPLICANT'S
20 EXHIBIT NO. 12, THIS DATE.)

21 (MR. GREENE EXITS HEARING
22 ROOM.)

23 MS. BAKNER: I want to note for the
24 record that Sheila Tuttle is no longer an
25 employee of LA Group. When you have a project
(WILDLIFE & HABITAT ISSUES)

1 that lasts from 1999 to 2004, it's a little
2 hard not to have changes like that.

3 This exhibit, which I'm introducing
4 now, is a May 5th, 2004 letter from Charlene
5 Poole [sic] at the New York Natural Heritage
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6 Program of DEC, to Kevin Franke. Attached to
7 it are sensitive materials regarding an
8 inquiry, updated inquiry that Mr. Kiviat had
9 suggested that we make. And I'm just noting
10 for the record that I think the locations of
11 some things aren't supposed to be public, but
12 I really have nothing --

13 ALJ WISSLER: Then I need a redacted
14 version for this, because this is part of
15 public record. I gather your concern is the
16 locations for folks who would want to poach
17 and do other outrageous things; is that what
18 we're talking about?

19 MS. BAKNER: That's what we're talking
20 about.

21 MS. ROBERTS: How would that work then
22 if one party has seen this?

23 MS. BAKNER: I think it will be okay.

24 MS. KREBS: I can only say about a few
25 species, your Honor. No matter what I say,
(WILDLIFE & HABITAT ISSUES)

1 I'm probably going to want to have staff look¹¹⁴⁹
2 at it.

3 MS. BAKNER: There's no protected
4 species on it. They're all listed as
5 unprotected.

6 ALJ WISSLER: I think counsel can have
7 a look at it. It doesn't need to go into the
8 record other than redacted for those
9 environmental reasons.

10 MS. BAKNER: So I need somebody to

11 tell me what should be redacted. Here is
12 another copy so we can just mark however it
13 should be redacted.

14 MS. KREBS: Do you want us to come
15 back with a redacted version if necessary? We
16 have no problem with counsel seeing it.

17 ALJ WISSLER: I don't have the
18 expertise.

19 MS. KREBS: Certainly counsel can see
20 it before it goes in the record. I should
21 extract it.

22 ALJ WISSLER: In terms of the species,
23 you can refer to them, but in terms of
24 specific locations -- you understand?

25 MS. ROBERTS: Yes, I do. We're,
(WILDLIFE & HABITAT ISSUES)

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1 frankly, a little concerned about the
2 rattlesnake, just the suggestion that it's
3 there. I certainly understand their concern.

4 ALJ WISSLER: I will mark a copy.
5 Ms. Krebs, let me give you two.

6 MS. BAKNER: I have another one for
7 her.

8 (LETTER FROM NYS DEPT. OF
9 ENVIRONMENTAL CONSERVATION NEW YORK NATURAL
10 HERITAGE PROGRAM DATED 5-5-04 RECEIVED AND
11 MARKED FOR IDENTIFICATION AS APPLICANT'S
12 EXHIBIT NO. 13, THIS DATE.)

13 MS. ROBERTS: The attorney for
14 Shandaken is not here.

15 ALJ WISSLER: We'll have to revisit
16 this issue because you have several more

17 witnesses that you want to call.

18 MS. BAKNER: I will not furnish it to
19 anyone else until your Honor tells me.

20 ALJ WISSLER: I'm simply directing
21 that when the parties have it, this is not
22 something -- I don't want, even other people
23 of CPC; do you understand?

24 MS. ROBERTS: We got it.

25 ALJ WISSLER: And the same thing goes
(WILDLIFE & HABITAT ISSUES)

1 for the Applicant. Need to know folks only. ¹¹⁵¹

2 MS. BAKNER: Those are the only three
3 exhibits that we have.

4 First, your Honor, what I would like
5 to do is go over the record in this matter;
6 and specifically what I would like to do is go
7 over the extensive record in the DEIS that was
8 created by LA Group and their experts. First
9 of all, we have an extensive discussion of
10 terrestrial and aquatic ecology in the Draft
11 Environmental Impact Statement that commences
12 at page 3-81 and continues until page 3-110.
13 Also, I would direct your attention
14 specifically to mitigation measures which are
15 set forth on pages 3-94 through 3-96, as well
16 as 3-107 through 3-110.

17 Also included with the Draft
18 Environmental Impact Statement is a ecological
19 community map, 3-17 and 3-18. They should
20 look somewhat similar to the site visit maps
21 that we used when we were out in the field.

22 Following that, we have Table 3-19,
23 which is Existing Vegetation, which sets forth
24 exactly each type of ecological community that
25 can be found on the site, and lists its
(WILDLIFE & HABITAT ISSUES)

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1 acreage on the eastern property and the
2 western property, and provides a percentage of
3 total area. For that, I would direct your
4 attention to the beech maple mesic forest
5 which is shown to be the most substantial
6 portion of the site.

7 ALJ WISSELER: Which is that?

8 MS. BAKNER: Table 3-19, Existing
9 Vegetation. It's shown as 81.5 percent of the
10 site. In addition to that, we have the flora
11 of the Belleayre Resort site on Table 3-20;
12 and Table 3-21, which shows the amount of
13 vegetation disturbance site wide.

14 So what it does is it takes all of the
15 various types of communities that were noted
16 to exist on the site and it shows exactly how
17 much of that will be disturbed by the proposed
18 activity down to two decimal points.

19 Then Table 3-24(B) shows the Xeriscape
20 Plant List.

21 MR. ALTIERI: Could I break in for a
22 minute?

23 Dan had to go. Are we now staying
24 past 5 and getting through this, or are we
25 cutting off at 5?

(WILDLIFE & HABITAT ISSUES)

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1 MS. BAKNER: I think we're staying and
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2 getting done.

3 ALJ WISSLER: Yes, that's what we
4 agreed to.

5 MS. BAKNER: Table 3-24(B) represents
6 the xeriscape Plant List, and that is the
7 plants that we propose to plant on top of the
8 building, the Big Indian Hotel.

9 Table 3-25 sets forth on the wetlands
10 table the location key to a map showing the
11 size and type of all the wetlands found on the
12 site, both isolated as determined by the Army
13 Corps of Engineers and connected, but they're
14 all set forth here. None of them have been
15 excluded.

16 Table 3-26 is the wetlands table for
17 the western property.

18 Table 3-26(A) is the projected impacts
19 to wetlands on the Belleayre Resort site for
20 the entire property.

21 Table 3-27 are the bird species
22 observed at the Belleayre Resort site in the
23 spring of 2000, continuing for several pages;
24 and then 3-29, the reptiles and amphibian
25 species observed in the spring and early
(WILDLIFE & HABITAT ISSUES)

□

1 summer of the year 2000.

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2 In addition to this, extensive
3 discussion of what's present on the site in
4 the various habitat communities.

5 we also have Appendix 20 which
6 provides additional detail on the bird,

7 reptile and amphibian surveys that took place.
8 In here are the exact dates of the surveys and
9 a description of how the surveys were
10 conducted. Specifically the bird survey is
11 first, and I would just direct your Honor's
12 attention to the paragraphs with respect to
13 the field surveys that say how the field
14 surveys were conducted, what time they were
15 conducted, and generally what the conditions
16 were on the site when they were conducted.

17 We'd also note that we did inquire of
18 the United States Department of the Interior
19 what federal threatened and endangered species
20 may be on this site, and we received a letter
21 back from them indicating, as I recall, that
22 there were no known occurrences.

23 We also received a letter from the New
24 York Natural Heritage Group at DEC in 2000, as
25 well as the letter in 2004 which we just
(WILDLIFE & HABITAT ISSUES)

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1 handed out as one of our exhibits. So we
2 have, in accordance with typical practice,
3 made every effort to try to find out what's
4 out there before we even undertook the surveys
5 that were undertaken.

6 Also in Appendix 20 is Table 1 which
7 is a list of the potential bird species of the
8 Belleayre Resort site. These potential bird
9 species are taken, I believe, from a textbook:
10 Anderly and Carol, 1988. I think the idea
11 there is, and I'll have Mr. Franke speak to
12 that, is that, in fact, we try to anticipate

13 what bird species are present or likely to be
14 present in the communities on-site, whether or
15 not we happen to see them on any particular
16 day that we're on the site. And we also have
17 a list of the bird species identified on-site
18 whether visually or by calls or what exactly
19 was seen.

20 Similarly, there's a reptiles and
21 amphibians report. Again, it goes over the
22 field surveys, and it describes the techniques
23 that were used. Since Sheila Tuttle could not
24 be here with us today, Kevin Franke, who is
25 familiar with the survey that she undertook,
(WILDLIFE & HABITAT ISSUES)

1 will be providing us with some insight on her¹¹⁵⁶
2 extensive search for timber rattlesnake
3 habitat and her methods for looking for timber
4 rattlesnake habitats. And she herself is an
5 expert in the area of turtles, which is rather
6 easy to remember seeing how her name is Sheila
7 Tuttle, and she is married to Dr. Brown who is
8 rather famous for his timber rattlesnake
9 studies. He's at Skidmore.

10 That's pretty much the record that we
11 have here, along with the list of amphibians
12 that were expected to be found at the site and
13 the ones that were found at the site by
14 Sheila.

15 The first thing I would like to talk
16 about here is the May 5th, 2004 letter that we
17 received from DEC. I would note for the

18 record that the Natural Heritage report
19 commented on several types of habitats and one
20 species in the letter, but that you'll note
21 that under the New York Legal Status Heritage
22 Ranks and Federal Status, they're all listed
23 as unprotected.

24 The first category we have here is
25 beech maple mesic forest, and as you recall on
(WILDLIFE & HABITAT ISSUES)

1 our site, that's roughly 85 percent of our ¹¹⁵⁷
2 site, and what it says here is: "A large
3 matrix forest that can be accessed by most of
4 the trails in the Catskill Park, and covers
5 the majority of the Towns of Lexington,
6 Shandaken, Hardenburgh, Woodstock and Hunter."

7 So at least for this part of the
8 Catskills, there's certainly nothing unusual
9 in this area for the beech maple mesic forest.
10 In fact, it says that it covers much of the
11 Catskill Park.

12 I would also note for the record that
13 it refers -- there's a reference here to the
14 tiger beetle that Dr. Kiviat mentioned, so
15 apparently that's sighting the beetle by the
16 conservation group was reported to DEC, it
17 looks like, back in 1997. I have no idea why
18 it wouldn't have been mentioned on the letter
19 we received from them in 2000, but computer
20 databases being what they are, perhaps that's
21 not a surprise.

22 Kevin, I'm going to ask you to address
23 later the location of this in relation to the

24 site. Just don't let me forget it.

25 So that's our record. That's the new
(WILDLIFE & HABITAT ISSUES)

1 information in the record. Like Mr. Gerstman¹¹⁵⁸
2 and the CPC, we will have additional
3 witnesses. We will have additional
4 presentation and comment in connection with
5 habitat on the other issues, plus we will also
6 most likely have an additional person coming
7 in and speaking to bird issues at a later
8 date.

9 ALJ WISSLER: Let me add something
10 with respect to Applicant's 13, this letter.
11 This would indicate that the species
12 enumerated here are unprotected?

13 MS. BAKNER: That's correct.

14 ALJ WISSLER: I think the reason why
15 it's sensitive material is simply because the
16 New York State Heritage Program has said that
17 it is, and it can't be released to the public
18 without their permission. So there really is
19 not the danger of endangered species.

20 MR. JOULE: There is no endangered
21 species issues.

22 ALJ WISSLER: My concern about having
23 this redacted, there's really nothing to
24 redact other than the admonition that this
25 guides us all, that this is part of the record
(WILDLIFE & HABITAT ISSUES)

1 in this matter but cannot be released to the¹¹⁵⁹
2 public without permission of the New York

3 Natural Heritage Program. It's in the record,
4 no redaction necessary.

5 MS. BAKNER: All right. We've heard
6 here today the proposition that because our
7 surveys were not as long as Dr. Kiviat would
8 like them, that somehow that represents a
9 defect in the record here. I would submit
10 that there is no defect in the record and that
11 there is no substantive and significant issue
12 that has been raised.

13 None of the deficiencies, alleged
14 deficiencies that Dr. Kiviat has raised mean
15 that the Draft Environmental Impact Statement
16 wasn't complete in its description of the
17 communities and the site, and it certainly has
18 not suggested any way in which, not having a
19 survey that was of a different type, somehow
20 would have an effect on the overall project.

21 Specifically, if you look at 6 NYCRR
22 617.9, it provides certain requirements for
23 Draft EIS's and final EIS's, and this section
24 is -- 617.9, looks to be (B), Roman numeral
25 (II) (B) (5) Roman (II). It says: "what's
(WILDLIFE & HABITAT ISSUES)

□

1 required is a concise description of the
2 environmental setting of the areas to be
3 affected, sufficient to understand the impacts
4 of the proposed actions and alternatives."

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5 Now, what we have done here is we've
6 put together a wildlife survey that covers the
7 species that were likely to be found on the
8 site based on the information that we

9 collected. It also fully covered the scope of
10 such surveys as they were specified in terms
11 of the DEIS scoping document. We, in fact,
12 looked for all of the species that were
13 suggested, and we carefully evaluated and
14 characterized the site.

15 what I would like to do now is move,
16 Kevin, to you. If you can just describe your
17 qualifications.

18 MR. FRANKE: Kevin Franke, LA Group as
19 environmental analyst for 15 years.
20 Educational background, Master's Degree in
21 Environmental and Forest Biology, College of
22 Environmental Science and Forestry in
23 Syracuse; Master's in biology. A fair portion
24 of my work does involve wildlife survey work,
25 more direct field work earlier in my
(WILDLIFE & HABITAT ISSUES)

1 employment with the LA Group. More recently ¹¹⁶¹
2 coordinating field survey work of other
3 qualified biologists.

4 MS. BAKNER: Also with us today is
5 Dr. Richard Futyma, a doctor of botany. Could
6 you describe yourself.

7 DR. FUTYMA: Yes. Richard Futyma, I
8 have been with the LA Group for 16 years. I
9 have a Ph.D and Master's in Botany from the
10 University of Michigan. Before that I had a
11 Bachelor's in Biology from SUNY Buffalo. And
12 as I said, I've been with the LA Group for 16
13 years. I've been doing floristic studies of

14 various sorts for 29 years, and most of my
15 work with the LA Group has been in wetlands
16 and floristic studies for various development
17 projects.

18 MS. BAKNER: Since Dr. Futyma is here
19 and can tell us about the botany study, Kevin,
20 if you could address briefly for us the study
21 that was undertaken by Sheila Tuttle and her
22 qualifications for doing so.

23 MR. FRANKE: Sheila is a wildlife
24 biologist by education and by experience,
25 conducted the bird surveys as well as the
(WILDLIFE & HABITAT ISSUES)

1 reptile and amphibian surveys. Both surveys ¹¹⁶²
2 were basically stratified surveys, stratified
3 by community types which had been mapped on
4 the project previously by Dr. Futyma with --
5 taking attention, especially for the reptiles
6 and amphibians, paid to those areas --

7 ALJ WISSLER: Excuse me. Kevin, if
8 you could look this way.

9 MR. FRANKE: Sure -- with particular
10 attention for the reptile, amphibian survey
11 made to aquatic and semi-aquatic habitats.
12 Because of the low habitat diversity on the
13 site, as Teresa mentioned, one of the
14 community types is approximately 85 percent of
15 the site, we feel that has bearing on the
16 intensity and duration of the survey. Given
17 the diversity of the wildlife on the site is
18 going to be a function of diversity of the
19 habitat of the site. The more diverse the

20 habitat, the likely -- the higher number of
21 species are likely to be found on a particular
22 piece of land.

23 The surveys encompassed the entire
24 project site, but paid particular attention to
25 that portion of the project site,
(WILDLIFE & HABITAT ISSUES)

1 approximately 575 acres or a quarter of the ¹¹⁶³
2 site, that's proposed for development. The
3 field surveys themselves, especially the bird
4 survey, was a random search method, stratified
5 by the vegetation communities, habitat types
6 mapped on the site. The identification of the
7 various bird species was either by direct
8 observation or by song or call.

9 The reptile survey, survey described
10 as a visual encounter survey, whereby habitat
11 is investigated in its existing condition,
12 also by overturning leaves --

13 MR. GERSTMAN: I'm sorry, we can't
14 hear.

15 MR. FRANKE: -- overturning leaves,
16 peeling bark, looking under rocks, much of the
17 techniques Mr. Kiviat was employing on the
18 site on his brief visit.

19 In terms of the rattlesnake habitat
20 and the areas of large rock was actually
21 investigated with the aid of a flashlight and
22 a mirror. So there was an intensive survey
23 for both the birds and reptiles and
24 amphibians.

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MS. BAKNER: Can you cover the
(WILDLIFE & HABITAT ISSUES)

25

1 location for me of the sighting of the tiger
2 beetle?

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3 MR. FRANKE: Yes. The report
4 contained in the recent letter from the New
5 York Natural Heritage Program, the tiger
6 beetle reports the location where Lost Clove
7 Brook enters the headwaters of Esopus Creek.
8 That's not an area that we visited directly
9 during our site visit, but if you were to --
10 it's off of the project site, off of the road
11 that comes off 28 going into Big Indian.

12 ALJ WISSLER: Is it visible on 3A?

13 MR. FRANKE: It might be on 3A. Here
14 is the map attachment to the letter that
15 indicates it, but 3A, the location boundary of
16 the project site, Route 28, Lost Clove Road,
17 the siting was located in this area here.
18 (Indicating)

19 ALJ WISSLER: Indicating an area just
20 south of the Big Indian site?

21 MR. FRANKE: Yes.

22 MS. BAKNER: Again, Kevin, what status
23 does the letter indicate that the beetle has;
24 protected or unprotected?

25 MR. FRANKE: It's listed as an
(WILDLIFE & HABITAT ISSUES)

1 unprotected species.

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2 MS. BAKNER: Dr. Kiviat has suggested
3 we may have missed an old or virgin growth of
4 forest on our property. I would like you to

5 briefly address that, if you could.

6 MR. FRANKE: In examining the exhibit
7 submitted by CPC showing the mapping of the
8 first-growth forest and comparing that with
9 the mapping from the DEIS --

10 MS. BAKNER: Your Honor, that's
11 Exhibit 35.

12 MR. FRANKE: -- comparing that with
13 the mapping of the project site, including
14 DEIS Figure 2-3, it appears that this area
15 indicated on the CPC exhibit is off of the
16 project site, and not within the project site
17 boundaries. In addition to the mapping field
18 studies and the history of the project site,
19 would indicate that there are no such first
20 growth areas on the project site. The mapped
21 site in CPC Exhibit 38 is actually to the --it
22 would be the south/southwest of the Big Indian
23 plateau. And on Figure 2-3, clearly
24 illustrates the intensity of the logging
25 trails on that portion of the project site.
(WILDLIFE & HABITAT ISSUES)

1 The character of the vegetation is much of the ¹¹⁶⁶
2 same as what was seen on our site visit,
3 clearly not an unaffected forest stand.

4 MS. BAKNER: Dr. Kiviat has suggested
5 that perhaps some of these old growth trees
6 are small or stunted due to the elevation at
7 which they're located. What is your opinion
8 of this?

9 MR. FRANKE: We certainly observed

10 that type of phenomenon when we were on top of
11 the ski center, and Dr. Kiviat pointed out the
12 vegetation and its apparent stressed
13 condition. It is my opinion that that
14 condition does not occur on our project site
15 due to a number of factors, including
16 elevation and exposure. We're simply not as
17 high as the ski center, and we do not have the
18 direct exposure as the very upper part of the
19 ski center does.

20 MS. BAKNER: I would like to refer now
21 to the book from which excerpts were taken for
22 CPC Exhibits 35 and 36, specifically, The
23 Catskill Forest, A History by Michael Kudish.
24 If you look at page 102, which I will furnish,
25 there is specific language addressing the
(WILDLIFE & HABITAT ISSUES)

1 ridge and forestry practices on the ridge in¹¹⁶⁷
2 terms of the history, and what it says is:
3 "The charcoal industry required the near
4 clear-cutting of the forest on the ridges as
5 opposed to the timber industry which normally
6 required selective cutting in the Catskills."

7 Then it goes on to say: "Chapter 13
8 in this book describes the Catskill charcoal
9 industry in general, but the charcoal pits
10 located on Belleayre Mountain will be
11 described in some detail here." Just as a
12 footnote, I'm sure everyone realizes that you
13 make charcoal by burning trees in a very
14 meticulous manner. "Paul Huth, naturalist at
15 the Mohonk Preserve in the Schwangunks near

16 New Paltz, informed me of the remains of
17 charcoal pits on Garriton Ridge. Garriton
18 Ridge is another name for the site of the
19 plateau. This ridge is Belleayre Mountain's
20 southeast spur which rises between Lost Clove
21 and Birch Creek above the hamlet of Big
22 Indian. The ridge was nearly cleared off
23 during the period 1890 to 1900 by Paul's
24 grandfather and great grandfather. My
25 inspection, May 16th, 1987 of the then recent
(WILDLIFE & HABITAT ISSUES)

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1 logging, about 1980, on private land on
2 Garriton Ridge revealed stumps of 80-year-old
3 northern red oak and white ash;" and then it
4 goes on to talk about the trees, and mention
5 that they climbed to an elevation of
6 2,900 feet between the Pine Hill Lost Clove
7 trail junction and the Belleayre Mountain
8 lean-to. I want to point out that the book
9 itself provides a lot of interesting history
10 about logging, even logging on our site.

11 Our Draft Environmental Impact
12 Statement, as Mr. Ruzow went on at length
13 earlier today, extensively describes the
14 logging that occurred on the site. It also
15 contains mapping showing the logging trails
16 and provides a lot of information. If you
17 also were to look on page 84, Table 20-1 of
18 the same book, it talks about first growth
19 tracts, area and entry points.

20 Kevin, if you could explain the

21 6-10-04crossroadsz
relevance of this in terms of the elevation of
22 our site.

23 MR. FRANKE: The site that's indicated
24 as being first growth closest to our project
25 site on that mapping provided as CPC
(WILDLIFE & HABITAT ISSUES)

1 attachment is identified as Site No. 10, and ¹¹⁶⁹
2 it's listed as Belleayre Mountain in Table
3 20-1. The size of the area is listed in the
4 table as 1.5 miles, and the average elevation
5 of entry points in feet is listed as
6 2,945 feet.

7 without having read the text, I'm
8 assuming that is the elevation when ascending,
9 at which you first enter these stands. We
10 simply do not have forest stands on our
11 project, especially forest stands that would
12 be disturbed that approach this elevation. So
13 this mapped area is at a higher elevation than
14 what's on the site.

15 ALJ WISSLER: 2945?

16 MR. FRANKE: Yes.

17 MS. BAKNER: Thank you very much,
18 Kevin. And I would note that we will obtain
19 the book, we will make copies. And since
20 we'll have more time later, we'll look for
21 more information in the book.

22 Dr. Kiviat originally sent us --
23 included a report, Kevin, with his -- with the
24 petition that CPC put in. In it there were
25 several questions that were raised, and I just
(WILDLIFE & HABITAT ISSUES)

1 want to run through them with you. The first
2 one is: "Large areas of forest co-dominated
3 by beech may provide special biodiversity
4 value for species of insects, fungi or animals
5 that utilize beech as a resource."

6 ALJ WISSLER: We're looking at
7 Exhibit L to CPC's petition?

8 MS. BAKNER: Yes.

9 ALJ WISSLER: Page reference, please.

10 MS. BAKNER: Pages 36 through 41 in
11 terms of the reference to the CPC petition.

12 ALJ WISSLER: In reference to
13 Dr. Kiviat's report?

14 MS. BAKNER: That would be -- there
15 are no page numbers, your Honor. It would be
16 the comments starting under Field
17 Reconnaissance.

18 ALJ WISSLER: April 16th, 2004.
19 What's the first sentence under Field
20 Reconnaissance?

21 MS. BAKNER: Yes, that's right.
22 That's right.

23 MR. FRANKE: Could you repeat the
24 question?

25 MS. BAKNER: "Large areas of forest
(WILDLIFE & HABITAT ISSUES)

1 co-dominated by beech provide special
2 biodiversity value for species of insects,
3 fungi or animals that utilize beech as a
4 resource."

5 MR. FRANKE: I would concur with

6 Dr. Kiviat that maybe those species, insects,
7 bacteria that may be so specialized that they
8 rely heavily on beech or beech forests, but
9 given the ubiquitous nature of this cover
10 type, not only on our project site but in this
11 general area of the Catskills, I don't share
12 Dr. Kiviat's concerns for impacts on
13 biodiversity.

14 MS. BAKNER: The other issue raised by
15 Dr. Kiviat here is an issue of forest
16 fragmentation, and I believe -- I believe
17 that's raised just generally in his letter,
18 your Honor. It's going to be very hard for me
19 to point to the exact location.

20 ALJ WISSLER: We're talking about
21 within Exhibit L?

22 MS. BAKNER: That's correct.
23 He makes the comment: "Forest
24 fragmentation will adversely impact the
25 assemblage of forest responsibility species,
(WILDLIFE & HABITAT ISSUES)

1 and its this assemblage of species that forms¹¹⁷²
2 the core of the IBA," which is the Audubon
3 identification of the particular Catskill
4 site.

5 In your opinion, is this project going
6 to cause fragmentation in light of the
7 conditions at the site and surrounding the
8 site?

9 MR. FRANKE: Within the project site,
10 certainly there will be localized habitat
11 fragmentation, and it can have localized

12 detrimental effect to those forest interior
13 species that inhabit continuous type forest.
14 When viewed on a larger landscape scale, given
15 the project setting within the
16 Constitutionally-protected Catskill Park, I
17 don't feel that this impact would rise to the
18 level of significance.

19 MS. BAKNER: Is the issue of
20 fragmentation a clear issue? Do some species
21 do better and other species do not as well;
22 how does it work?

23 MR. FRANKE: There certainly are those
24 species, as concern has been expressed, for
25 those forest interior species. There are also
(WILDLIFE & HABITAT ISSUES)

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1 those species that are more forest edge
2 oriented. And as we saw the consistent nature
3 of the habitat on the existing project site,
4 that will certainly change with development
5 and will actually be providing more forest
6 edge as opposed to forest interior habitat.

7 So from that standpoint, there may be
8 actually species that are not present on the
9 site today that post development may make use
10 of the site, specifically those forest edge
11 type species.

12 MS. BAKNER: In your opinion, does the
13 location of this proposed project in proximity
14 to the Belleayre Mountain Ski Center and the
15 intensive use area make it more suitable for
16 development than other properties that may be

17 closer to the areas that are protected as
18 forever wild?

19 MR. FRANKE: I think from a
20 fragmentation standpoint, if this project site
21 were located interior than some of these
22 larger protected areas, I think you would have
23 potential for higher degrees of impact. But
24 given the fact that it is located on the edge
25 of a large protected area rather than
(WILDLIFE & HABITAT ISSUES)

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1 interior, lessens that to some degree.

2 The proximity to the intensive use
3 area may have some bearing on it, but I think
4 there's such a large land area that even
5 within the intensive use area, I don't think
6 is disturbed. I don't think the use of the
7 intensive use area has a lot of bearing.

8 MS. BAKNER: What about the roads in
9 the existing clearing for the existing
10 structures on primarily the western parcel but
11 also the eastern parcel?

12 MR. FRANKE: Again, I think that's
13 adding some diversity somewhat to the habitat
14 because we do have some open areas as opposed
15 to the continuous tree canopy.

16 MS. BAKNER: Dr. Kiviat also commented
17 that the zoological survey ignored rare or
18 uncommon mammals which would be expected to be
19 present in the well-developed forest and rocky
20 habitat present at the site. If you could
21 just discuss the mammals that were seen and,
22 you know -- do you need the list?

23 MR. FRANKE: It would be helpful if
24 you have it handy. It's my recollection, I'll
25 confirm when I look at the list, that none of
(WILDLIFE & HABITAT ISSUES)

1 the mammal species that were documented to 1175
2 occur on the project site were rare,
3 threatened, endangered or special concern
4 species.

5 MS. BAKNER: Are you satisfied that
6 Mrs. Sheila Tuttle's examination of the site
7 would have discovered habitat suitable --
8 would have discovered habitat suitable for
9 timber rattlesnake if it existed on the site?

10 MR. FRANKE: Yes, I do very feel very
11 comfortable with that, given Sheila's
12 experience and personal knowledge of the
13 timber rattlesnake.

14 It's stated clearly in the DEIS, and
15 supported somewhat by Dr. Kiviat's statements,
16 essentially the south-facing slopes are most
17 attractive from a solar standpoint; however,
18 in order to make these areas suitable for
19 timber rattlesnake basking require openings in
20 the canopy that allow sun to penetrate.

21 You recall where we found the green
22 snake and the other red belly snake, we were
23 basically standing in an area that had been
24 clearly previously, and the sun was allowed to
25 penetrate and provide sunlight to the ground
(WILDLIFE & HABITAT ISSUES)

1 surface, thus warming the ground somewhat. 1176

2 Those south-facing slopes, having
3 discussed this with Mr. Frisenda as well,
4 Crossroads Ventures, long-time resident of the
5 area, very familiar with the property -- since
6 we do have a closed canopy forest on these
7 southern slopes, by virtue of that closed
8 canopy does not provide suitable basking
9 habitat.

10 MS. BAKNER: The mammals are listed in
11 this section. would you have anticipated
12 finding any mammals other than the ones you
13 saw there given the extensive amount of time
14 that you, as well as other members of the LA
15 Group and other consultants, have spent on the
16 site?

17 MR. FRANKE: No, I think the survey
18 work was thorough.

19 MS. BAKNER: You want to just list
20 those mammals that you saw.

21 MR. FRANKE: Eastern chipmunk, red
22 squirrel, gray squirrel, red fox, eastern
23 cottontail, raccoons, eastern coyote, bobcat,
24 whitetail deer, beaver, black bear. I think I
25 got them all.

(WILDLIFE & HABITAT ISSUES)

1 MS. BAKNER: As you said, none of
2 those were threatened or endangered.

3 As I understand it, Sheila did, as
4 part of her wildlife survey, look for a
5 suitable habitat and evaluate the issue of
6 whether suitable habitat exists on-site for
7 the maternal colonies of the Indiana bat, and

1177

8 I believe the Draft Environmental Impact
9 Statement addresses that, and I was just
10 wondering if you could cover that for the
11 record.

12 MR. FRANKE: Right. In the EIS, there
13 are citations to a number of sources
14 documenting the presence of the Indiana bat
15 for trees of large diameter, and also other
16 sources indicating that oftentimes these large
17 trees are located in open areas.

18 I'm not going to disagree that there
19 are an occasional large tree located in
20 different parts of the project site, but the
21 lack of concentrated areas of large trees
22 essentially decreases significantly the
23 potential of this area functioning in that
24 way.

25 MS. BAKNER: So you're satisfied that
(WILDLIFE & HABITAT ISSUES)

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1 Sheila looked at this issue, and it was
2 covered as part of the Draft Environmental
3 Impact Statement?

4 MR. FRANKE: Yes.

5 MS. BAKNER: Turning to Dr. Futyma.
6 Doctor, what uniquely qualifies you to
7 undertake a plant survey on a site such as
8 this?

9 DR. FUTYMA: Uniquely. Well, I guess
10 there are very few people who know a lot about
11 plants, so I have extensive field experience
12 throughout the Great Lakes region, and I've

13 been doing this for, as I said, 29 years; so I
14 guess those are my qualifications, experience.

15 MS. BAKNER: In connection with your
16 work identifying plants, do you commonly also
17 delineate wetlands, and can you tell us what
18 your qualifications are for doing so?

19 DR. FUTYMA: For delineating
20 wetlands -- well, I have been trained in the
21 federal method for delineation of wetlands,
22 and I've been doing that since about 1990.

23 MS. BAKNER: Actually I know you've
24 been doing that longer. I would say more like
25 1988. The first question I want to ask you
(WILDLIFE & HABITAT ISSUES)

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1 is: Regarding the Northern Monkshood, and
2 this is a wildflower that Dr. Kiviat has
3 suggested could be present on the site --
4 although, again, the DEC files don't suggest
5 that it's present in this area of Ulster
6 County -- nonetheless, could you describe for
7 us the Northern Monkshood; what it is?

8 DR. FUTYMA: It's a wildflower. I
9 can't say that I've seen it personally, but
10 from having seen pictures in books, knowing
11 what it's like -- there are certainly garden
12 varieties or garden-related species that are
13 grown in gardens. My understanding is that
14 this plant can grow up to a meter tall, has
15 relatively large spikes and flowers,
16 relatively large leaves, palmately --
17 relatively characteristic of that family. And
18 I know that in my looking through the

19 wetlands, especially seeing as I was involved
20 in just about all the -- delineating the
21 boundaries of nearly all the wetlands on the
22 site, especially the more uppermost ones that
23 are dependent on the springs, which is where
24 Northern Monkshood is known to grow, I'm
25 pretty certain that if I had seen it, I would
(WILDLIFE & HABITAT ISSUES)

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1 have identified it. And I did not see
2 anything that I would refer to as the Northern
3 Monkshood.

4 MS. BAKNER: Is the Northern Monkshood
5 what's known as a showy plant?

6 DR. FUTYMA: I guess by comparison
7 with other plants growing on this site, you
8 would probably say it was showy, yes.

9 MS. BAKNER: DEC Region 3 -- excuse
10 me. The U.S. Fish and Wildlife Service on its
11 Region 3 website has a picture of the plant
12 and other information, and I just wanted to
13 quote from this information, if I may. It has
14 a description of the habitat for this
15 particular wildlife -- wildflower, excuse me.
16 It indicates that: "The Northern Monkshood, a
17 threatened plant, is associated with wetlands
18 and seeps and the headwaters of the streams in
19 the Catskills." So, Dr. Futoryma, the areas
20 where you would be likely to find this
21 wildflower, you examined intensively?

22 DR. FUTYMA: Yes.

23 ALJ WISSLER: Are you going to put

24 that in?

25 MS. BAKNER: I don't see any reason to
(WILDLIFE & HABITAT ISSUES)

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1 put it in. I would be happy to put this
2 information in on the flower.

3 ALJ WISSELER: We don't have to do it
4 today, but just the one page that you read
5 from; and I take it it has a web address
6 somewhere on that page?

7 MS. BAKNER: Yes. We'll type that up
8 and put it in.

9 ALJ WISSELER: Just photocopy the page,
10 as long as the web address is on there.

11 MS. BAKNER: Okay.

12 A threatened plant -- in your
13 experience, does a threatened plant receive as
14 much protection as, say, a threatened animal?

15 DR. FUTYMA: No. That's principally
16 because plants being attached to their
17 substrate are considered to be part of the
18 land, and therefore they're owned and
19 controlled by the person who owns that land on
20 which they're growing; whereas animals are
21 free to roam and can go from one property to
22 another. The principle, as I understand it,
23 are kind of like the king owns -- or the State
24 owns the wildlife rather than the actual
25 landowners owning the wildlife, but whereas
(WILDLIFE & HABITAT ISSUES)

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1 plants are owned by the plant owner.

2 MS. BAKNER: This concept is covered
3 in the New York State Endangered Species Law,
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4 which I'm sure I don't need to provide your
5 Honor.

6 ALJ WISSLER: Give me a cite.

7 MS. BAKNER: The citation to that
8 would be Environmental Conservation Law
9 Section 9-1503.

10 As Dr. Futyma noted, the law is less
11 restrictive than the laws protecting
12 endangered species of animals in that: "It
13 only prohibits persons from removing, picking
14 or damaging a protected plant without the
15 consent of the landowner."

16 I stress, it's certainly not our
17 intent, in any case, to pick any flowers. We
18 don't believe they occur on the site, and we
19 believe that we've looked at them and that
20 there's no substantive and significant issue
21 raised with respect to the flower.

22 I would also note that the federal
23 laws that deal with the protection of
24 endangered plants are very similar to the
25 state laws in that the federal law provides
(WILDLIFE & HABITAT ISSUES)

1 only limited protection for plants as well,¹¹⁸³
2 basically prohibiting their disturbance on
3 federal lands or lands under federal
4 jurisdiction.

5 ALJ WISSLER: Do you have a cite for
6 me? You can do it later.

7 MS. BAKNER: I just want to make sure,
8 your Honor, that we've addressed all the

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issues that have been raised.
Mr. Franke, I know we're going to talk about aquatic habitat later, but if you could clear up for the record for us. Are we claiming there are not brown trout and slimy sculpins in the streams and creeks around the site?

MR. FRANKE: Brook trout?

MS. BAKNER: Brook trout.

MR. FRANKE: No. And the EIS is clear in the record that the electrofishing studies [sic] that were performed by DEC, in which I participated, indicated numbers of brook trout in a number of streams on the project site. If my recollection is correct, I think the highest number of brook trout that we found in the area were near the snowmaking reservoir,
(WILDLIFE & HABITAT ISSUES)

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in that stream that drains from Belleayre Ski Center, as well as the brook in Woodchuck Hollow and Giggie Hollow.

MS. BAKNER: Kevin, the project sponsor, in their direction to LA Group on the design of the soil erosion and sedimentation control plan, what was one of your primary concerns in the design of that plan?

MR. FRANKE: I'm not sure I follow.

MS. BAKNER: Relative to control of sedimentation and the fish habitat.

MR. FRANKE: Certainly that was one of the prime focuses of our role in designing the construction phasing, involving clearing and

15 grading. Essentially that we needed to keep
16 material within the limits of our construction
17 site and not to have erosion occurring and
18 sedimentation occurring off site.

19 MS. BAKNER: Dr. Kiviat, while he was
20 at the site, identified some egg masses as
21 containing spotted salamander at the location
22 of the -- what I'll call the springhouses
23 right behind the Marlowe Mansion. It's my
24 understanding that Sheila Tuttle identified
25 the spotted salamander as a species likely to
(WILDLIFE & HABITAT ISSUES)

1 occur on-site, and that it was identified in ¹¹⁸⁵
2 our list, although she didn't have the
3 pleasure of identifying one?

4 MR. FRANKE: That's correct.

5 MS. BAKNER: Is the spotted salamander
6 a protected species under either federal or
7 state law?

8 MR. FRANKE: Not to my knowledge.

9 MS. BAKNER: Dr. Futyma, did you
10 participate with us in getting the approvals
11 from the United States Army Corps of
12 Engineers?

13 DR. FUTYMA: Yes, I did.

14 MS. BAKNER: And the approval that was
15 obtained from the Army Corps which is
16 contained in the Draft Environmental Impact
17 Statement and dated July 18th, 2003, can you
18 describe for us what that approval was.

19 DR. FUTYMA: Not that I'm familiar

20 with the dates of all the letters, so I assume
21 that that letter is the actual permit letter,
22 or rather the letter stating that the project
23 would be permittable under Nationwide Permit
24 14.

25 MS. BAKNER: That's correct. In the
(WILDLIFE & HABITAT ISSUES)

1 Corps process, the first step in the process ¹¹⁸⁶
2 is obtaining a jurisdictional determination of
3 the limits of waters of the United States,
4 including wetlands and streams, that are
5 regulated by the Army Corps. Did you assist
6 in obtaining that approval as well?

7 DR. FUTYMA: Yes. I was the main
8 delineator of wetlands, although assisted by
9 Roger Case, our soil scientist, and Barbara
10 Beale, who formerly worked with the LA Group;
11 both of them very experienced in wetland
12 delineation according to the federal methods.
13 And I was the one who wrote the wetland
14 delineation report and edited the maps and
15 submitted them to the Army Corps in early
16 2000; and later dealt with the representative
17 of the Corps showing him on-site to those
18 wetlands that he wanted to see, and obtained
19 the final jurisdictional determination from
20 him later.

21 MS. BAKNER: Did the Army Corps of
22 Engineers make an extensive review of the
23 wetlands that were present on the site?

24 DR. FUTYMA: He did not look at every
25 single wetland on the site, but that's

1 relatively typical. He did take a look across
2 all the site essentially, starting in the more
3 western portion and going to the very
4 easternmost portion, and he saw a few things
5 that he wanted to change. We did change those
6 parts of the wetland boundaries on the maps to
7 his satisfaction.

8 MS. BAKNER: Was he particularly
9 interested in whether wetlands were or were
10 not connected to stream corridors or other
11 waters in the UMP?

12 DR. FUTYMA: Yes, he was. We're
13 speaking of Brian Orzel of the United States
14 Army Corps of Engineers, and he did make it a
15 point to investigate some of these
16 relatively -- well, somewhat unusual wetlands
17 that are essentially like stream corridors
18 that will be flowing in one part but then
19 disappear into the ground. And he was
20 interested in those, and in order to determine
21 whether or not there was a connection with
22 other surficial waters.

23 MS. BAKNER: Not to torture
24 Dr. Futyima, the reason why he was looking at
25 those areas was because of a Supreme Court
(WILDLIFE & HABITAT ISSUES)

1 case known as Solid Waste Association of
2 Northern Cook County, and what it is is a
3 Supreme Court case -- and I apologize, I can
4 give you the cite later, your Honor -- which

5 found that for certain wetlands, the Army
6 Corps of Engineers no longer had jurisdiction.
7 And I wouldn't attempt to characterize the
8 case it's related to the issue of whether
9 something is isolated or not.

10 The important thing in this case, is,
11 at the project sponsor's direction, we went to
12 the federal agency with jurisdiction over this
13 matter, we delineated the wetlands on-site, we
14 went through the process of having them come
15 out and approve the location of the wetlands
16 in the field with Dr. Futyma; and in addition
17 to that, we moved forward through the process
18 and submitted what's known as a
19 pre-construction notification under the
20 Nationwide Permit Program.

21 These are regulations established by
22 the United States Army Corps of Engineers
23 pursuant to Section 404 of the Clean water
24 Act. These regulations were adopted -- these
25 are permits that are adopted by rule. And if
(WILDLIFE & HABITAT ISSUES)

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1 you qualify for them and you follow all the ¹¹⁸⁹
2 appropriate procedures, then the Corps concurs
3 in writing that you qualified to use those
4 Nationwide Permits. That's the July 18th,
5 2003 letter that I referred to earlier.

6 The letter that CPC has put into the
7 record is a letter from the U.S. Fish and
8 Wildlife Service Department of the Interior.
9 That was received by the United States Army
10 Corps of Engineers prior to them giving us

11 notice that we complied with and could proceed
12 under the permit.

13 So the federal agency with
14 jurisdiction in the matter, the United States
15 Army Corps of Engineers, has reviewed that
16 letter by the National Fish and wildlife
17 Service, and over the objections of the
18 National wildlife -- excuse me, over the
19 objections of the Fish and wildlife Service,
20 has given us the permit.

21 Under the federal program, the Army
22 Corps of Engineers has to consult with two
23 sister agencies as part of the
24 pre-construction notification process, two
25 sister federal agencies. One of those is the
(WILDLIFE & HABITAT ISSUES)

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1 Fish and wildlife Service whose primary
2 concern is habitat protection. The other is
3 the United States Environmental Protection
4 Agency, in this case the Region 2 wetlands
5 office -- I believe that Dan Montala is still
6 the head of that particular division within
7 Region 2.

8 In any event, the Region 2 office of
9 EPA did not object or otherwise send any
10 letter in response to the pre-construction
11 notification. That is significant, your
12 Honor, because the United States Environmental
13 Protection Agency under Section 404(C) of the
14 Clean water Act has the authority to designate
15 any wetland in the country a non-disposal

16 site.

17 So if the EPA had objected to the
18 issuance of any approval by the Corps for this
19 project, that would, in essence, if I can use
20 a card term, trump the Army Corps of Engineers
21 process. But the Fish and Wildlife Service
22 has no independent jurisdiction.

23 In addition to the sister federal
24 agencies, the Army Corps of Engineers is also
25 bound by certain agreements, sometimes they're
(WILDLIFE & HABITAT ISSUES)

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1 letter agreements, sometimes they're formal
2 MOA's, whereby they provide notification to
3 the Department of Environmental Conservation
4 Region 3, and they also provide notice to the
5 New York City Department of Environmental
6 Protection because they have an agreement for
7 all projects in the watershed, that they will
8 provide advanced notice to the DEP as part of
9 the pre-construction notification process.

10 So that process is 45 days. In
11 reality, it stretches over a period of years.
12 And basically we started working with the
13 Corps in 2000, and we received the approval
14 from them in 2003. So 45 days -- maybe for us
15 quite a bit longer.

16 So for that reason, your Honor, I
17 would submit that the letter that was
18 provided, sort of out of context by the
19 Catskill Preservation Coalition, certainly on
20 the issue of habitat may be useful, but on the
21 issue of jurisdiction is irrelevant in that

22 the agency with the authority to do so has
23 issued the approval for the project.

24 The next thing I would like to get to
25 is the suggestion that Dr. Kiviat made that
(WILDLIFE & HABITAT ISSUES)

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1 somehow this distinction --

2 ALJ WISSLER: Let me ask you this: Do
3 you need your witnesses any more for this, or
4 is this colloquy with the attorneys? Because
5 I'm going to stop at 6.

6 MS. BAKNER: I can address that at a
7 later point if DEC would like to go.

8 ALJ WISSLER: No, if you have more
9 questions of Dr. Futyma.

10 MS. BAKNER: I don't believe so, your
11 Honor, no.

12 ALJ WISSLER: Then I don't want to --
13 do you want to wrap it up here?

14 MS. BAKNER: If I could wrap it up.
15 we have looked at all the habitats on-site,
16 and we have carefully evaluated them. We
17 haven't dismissed any because they're isolated
18 or small. We've looked at them all down to
19 two decimal points. We've described them.
20 We've studied them. And we believe that the
21 project as designed where we're preserving
22 approximately 70 percent of the site and the
23 forested area surrounding the areas to be
24 developed is reasonable, and we believe that
25 the mitigation measures that we have proposed,
(WILDLIFE & HABITAT ISSUES)

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1 which I referenced earlier, specifically the
2 mitigation measures on pages --

3 ALJ WISSLER: 394 and so forth?

4 MS. BAKNER: Yes, 307 through 310 will
5 ensure that we don't have a substantial
6 adverse effect on habitat, and I don't believe
7 that, with all due respect to Dr. Kiviat, who
8 is clearly a very qualified person, that we
9 have in any way failed to comply with our
10 obligations under SEQRA in this particular
11 area.

12 There is one last question I have for
13 Dr. Futyma. In your opinion, Dr. Futyma, did
14 you do a thorough evaluation of the wetlands
15 present on the site?

16 DR. FUTYMA: Yes, we certainly
17 evaluated the wetlands in the manner that we
18 have been accustomed to with the Army Corps.
19 we delineated them just as we have delineated
20 the wetlands on all the other sites we have
21 done in the past ten years.

22 MS. BAKNER: Thank you very much.

23 ALJ WISSLER: Do you want to respond?

24 MR. GERSTMAN: Yes, Judge, when we
25 reschedule.

(WILDLIFE & HABITAT ISSUES)

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1 ALJ WISSLER: You have additional
2 witnesses anyway?

3 MR. GERSTMAN: Yes.

4 ALJ WISSLER: All right. We are
5 concluded here today, and the next thing is
6 the site visit next week, and we're back here

7 next Friday.

8 MR. GERSTMAN: Yes, traffic in the
9 morning, and who knows what in the afternoon.
10 Thank you, Judge.

11 (6:02 P.M. - WHEREUPON, THE ABOVE
12 PROCEEDINGS CONCLUDED.)

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(WILDLIFE & HABITAT ISSUES)

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C E R T I F I C A T I O N

6 I, THERESA C. VINING, hereby certify
7 and say that I am a Shorthand Reporter and a Notary
8 Public within and for the State of New York; that I
9 acted as the reporter at the Issues Conference
10 proceedings herein, and that the transcript to which
11 this certification is annexed is a true, accurate

6-10-04crossroadsz
12 and complete record of the minutes of the
13 proceedings to the best of my knowledge and belief.

14

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THERESA C. VINING

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19 DATED: July 12, 2004

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