

**BEFORE THE TRANSPORTATION AND PUBLIC SAFETY COMMITTEE
OF THE OHIO HOUSE OF REPRESENTATIVES
HOUSE BILL 490**

**OPPONENT TESTIMONY OF JEREME KENT
CHIEF EXECUTIVE OFFICER
ONE ENERGY ENTERPRISES INC.**

March 8, 2022

AS SUBMITTED

I have been fighting this issue since 2016 when ODOT accused my company of committing several hundred misdemeanors that could have resulted in up to 197 years in jail.

Good morning, Mr. Chairman, Vice Chair McClain, and the rest of the Committee, my name is Jereme Kent, and I am the founder and CEO of One Energy Enterprises Inc. in Findlay, Ohio. One Energy is an industrial power company that is building Utility 2.0. We install and operate wind turbines and large energy infrastructure onsite for factories in Ohio.

In 2016, we were building one of these Wind for Industry projects when ODOT sent us a notice that we had been rejected for a permit that we did not apply for.

That action started a three-year ordeal that cost One Energy more than \$500,000 and resulted in an Ohio Appellate Court ruling that stated that ODOT did not have any authority over our project because it was located outside of the "six surfaces" where they had jurisdiction.

Now, more than six years after this issue first came up, I find myself once again fighting yet another ODOT Aviation attempt at a massive power grab.

To me this is not about House Bill 490 (HB490). This is about an agency that is out of control. It is about lies that this agency has told this committee and has told the sponsor of this bill.

I had the opportunity to meet with Representative Holmes a couple of weeks ago. I will tell you what I told him. I have all of the respect in the world for his objective of creating laws that will prepare Ohio for airspace issues of tomorrow. One Energy agrees that, as drones and new aircraft take to the skies, there will be numerous unprecedented issues that will need legislative action.

HB490, however, does far more than modernize the airspace. HB490, as it exists today, brings up the same administrative overreach and power-hungry maneuvers that we have seen from ODOT Aviation for the last six years.

That, in our opinion, is completely unacceptable.

Make no mistake, the same three individuals that we have been fighting at ODOT Aviation for six years are the same individuals behind this bill. We have served a public records request on ODOT Aviation and have read all

their emails regarding HB490. As a result, it is clear that the Ohio Aviation Administration is running everything by ODOT Aviation and ODOT Aviation is making a majority of the decisions. From helping proponents prepare for testimony, to reviewing suggested questions, to drafting the language of the bill, to making changes to the bill, to being angry that One Energy is involved, all the emails trace back to ODOT Aviation.

If you would like a copy of the results of the records request, please let me know.

Here are few things that you need to know about HB490 and the proponent testimony that you have heard so far.

1. The ODOT Aviation department that deals with obstruction evaluation consists of just one person: Mr. John Stains. Mr. Stains in his sworn testimony from our first case against ODOT admitted at the time that his entire professional training on obstruction evaluation consists of “attending workshops” with a total of less than 40 hours of combined training. (*See Attachment 1*).
2. The ODOT Aviation Director, Mr. Jim Bryant, admitted under oath that he is the one who unilaterally decided to change department policy to extend their authority beyond the six surfaces based on a conversation with a fellow pilot. No public notice was given, no rules or laws were changed, the Department just decided to extend its authority to all of the airspace of Ohio. The result of that decision is that law abiding companies, like One Energy, were accused of a crime. (*See Attachment 2*).
3. The language in HB490 results in a massive expansion of ODOT Aviation authority and jurisdiction. Right now, ODOT Aviation has the authority to make decisions about structures that penetrate the “six surfaces” – roughly four-six miles around an airport. In HB 490, ODOT Aviation would have authority over any structure above 200 feet, anywhere in the state of Ohio. They would have authority to reject a project with a tall structure anywhere in the state. One man, with less than 40 hours of training, could override everyone.
4. HB 490 would allow the department to apply any unwritten standard they wanted to any situation. The FAA has a 398-page document, titled JO 7400.2N Procedures for Handling Airspace Matters, that sets out how the FAA will review all matters related to tall structures. The manual is regularly updated, subject to rulemaking procedures, and it results in the uniform regulation of airspace matters across the United States. ODOT does not plan to use this manual, and ODOT has no manual of their own. They believe that local airport officials and ODOT’s one employee are better suited to apply on the fly judgement. HB490 would let them.
5. HB 490 removes due process for the builder by not having ODOT even consider their response to the local airport complaint before having to go through a costly administrative process.
6. Based on sworn testimony, ODOT does not currently consider whether an obstruction will have adverse effect or significant adverse effect. ODOT pays a consultant to determine if a structure is an obstruction, and if it is ODOT automatically rejects it. (*See Attachment 3*). That flies in the face of the methods the FAA uses. If ODOT’s current methods had been applied over the last 50 years, Columbus would not have most of the downtown it enjoys today.

We have tried for six years to get ODOT Aviation in check. We have offered to work with them on creating a one-paragraph bill that says they have the authority to enforce the FAA’s process. We offered a two-paragraph bill that encourages them to help local airports advocate for themselves in the FAA process.

ODOT, the Ohio Aviation Association, and Aircraft Owners & Pilots Association have rejected both. They clearly just want the power to apply their own judgement.

HB 490’s stated purpose is good. HB 490’s current language is bad. The proponents of HB490 testified that the bill does not expand ODOT’s current jurisdiction, and they are only seeking to clarify its jurisdiction. That is patently false. Section 4561 of the Ohio Revised Code is clear on ODOT’s current jurisdiction which is limited to the “six surface areas” surrounding an airport. HB 490 eliminates the six surface areas and expands ODOT’s jurisdiction to any tall structure over 200 feet across the state. That is not a “simple clarification”. It is a blatant attempt to expand its jurisdiction without clear objective standards which would adversely affect the ability for businesses across Ohio to successfully fund and permit projects. That expansion attacks private property rights, it introduces a completely

arbitrary process, it significantly expands the jurisdiction of an already unqualified department, it makes it harder to attract big industry, and it throws due process out the window.

I encourage the committee to send a strong signal that state agency overreach and discouragement of economic development is not acceptable in Ohio. Lastly, I encourage the amendment of HB490 to focus solely on the noble task of modernizing Ohio for the aviation opportunities of tomorrow.

I am happy to take any questions you may have.

ATTACHMENT 1

Sworn Testimony of Mr. John Stains in Administrative Hearing for Denial of Permits for 2016-DOT-647-OE (2015-WTE-5286-OE) and 2016-DOT-4888-OE (2016-WTE-2721-OE). (Highlighted for Emphasis)

1 traveling public. We feel we do a much better job of
 2 that than what the FAA does. Our point is often the
 3 FAA does do a cursory review and say, "Okay, well" --
 4 and, again, we're not in disagreement with the FAA
 5 that it is a hazard, the disagreement comes in to
 6 whether it's significant or not. And we believe that
 7 to the traveling public, that is a significant
 8 hazard. And with our technical experts, we will
 9 explain, as I'm sure One Energy will, what exactly is
 10 this airspace that we're talking about that we're in
 11 disagreement with.

12 As stated, they're correct that it
 13 doesn't penetrate the six enumerated spaces that were
 14 specifically stated in -- what is it? -- 4561.32.
 15 But that what we do is we -- we do include all of the
 16 airspace in a sense to be considered within limits,
 17 within reasonable limits, within the reason that the
 18 federal statutes have adopted. Obviously there would
 19 be an argument that, oh, gee, then nothing over 400
 20 feet or 500 feet could ever be built anywhere in
 21 anyplace any time. Well, no one takes that type of
 22 restrictive interpretation of the statutes, but what
 23 we do look at is a reasonable interpretation of the
 24 statutes, and we believe our interpretations will be

1 Ohio Department of Transportation?

2 A. That's correct.

3 Q. And you've been employed by the Ohio
 4 Department of Transportation for how many years now?

5 A. Since 2006.

6 Q. And your -- your education is as an
 7 engineer?

8 A. That's correct.

9 Q. Do you hold any certificates of
 10 engineering with the State of Ohio?

11 A. Licensed as a registered professional
 12 engineer in the State of Ohio.

13 Q. And you're currently working in the
 14 Office of Aviation; is that correct?

15 A. That's correct.

16 Q. And when did you start your employment
 17 in the Office of Aviation of the Ohio Department of
 18 Transportation?

19 A. Full-time, approximately on March 20th,
 20 2016; on a part-time basis, in December of 2012.

21 Q. Prior to 2012, had any of your
 22 responsibilities at the Ohio Department of
 23 Transportation involved the Office of Aviation?

24 A. No.

1 found to be reasonable.

2 Thank you.

3 MR. LITTLE: We'd like to first call
 4 Mr. Stains.

5 (Witness placed under oath.)

6 OFFICER HARDESTY: Go ahead.

7 MR. LITTLE: Just as a preliminary
 8 comment, the exhibits we'll utilize today are in
 9 three-ring notebooks, they are -- for both your
 10 benefit, Mr. Hardesty, and the witness's, there's
 11 letters and then there's usually subsets, and we have
 12 A-1, A-2, A-3, or B-1, B-2, B-3, and that's how we'll
 13 proceed in terms of the exhibits. But if I may
 14 proceed, I will.

15 ---

16 JOHN STAINS,
 17 being by me first duly sworn, as hereinafter
 18 certified, deposes and says as follows:

19 CROSS-EXAMINATION

20 BY MR. LITTLE:

21 Q. Mr. Stains, will you state your full
 22 name for the record, please?

23 A. John Stains.

24 Q. And you're currently employed by the

1 Q. Prior to 2012, had any of your
 2 responsibilities or experiences or training involved
 3 air- -- aeronautical matters?

4 A. No.

5 Q. And to put a more finer point on it,
 6 prior to 2012 would any of your training,
 7 experiences, or work responsibilities include any
 8 involvement with the Airport Protection Act or any of
 9 the regulations relating to the same?

10 A. No.

11 Q. Now, you mentioned that in 2012 you
 12 started having some part-time work for the Office of
 13 Aviation. What was your first -- first position with
 14 the Office of Aviation in 2012?

15 A. I'm sorry, my position?

16 Q. In 2012, please.

17 A. It's the same as it is today.

18 Q. And -- and what was that?

19 A. Airport engineer.

20 Q. And how much of your responsibilities in
 21 2012 were assigned or dedicated to the Office of
 22 Aviation?

23 A. Approximately two days per week.

24 Q. And since you started working in the

1 Office of Aviation in 2012, have you received any
2 additional accreditations or certificates or
3 licensing that would relate to your work in the
4 Office of Aviation?

5 A. Specific? I'm sorry, I don't
6 understand.

7 Q. Sure. Since you started working
8 part-time with the Office of Aviation in 2012, have
9 you received any special licensing or certificates
10 relating to matters you handle within the Office of
11 Aviation?

12 A. Licensing, no; training, yes.

13 Q. So you've had training. Has that
14 training culminated in any type of lic- -- you said
15 no licensing, but any particular certificate or
16 designation?

17 A. Certificate of completion, if that's
18 what you mean.

19 Q. Okay. Prior to 2012, did you have any
20 familiarity whatsoever with the provisions of the
21 Airport Protection Act?

22 A. No.

23 Q. And prior to 2012, did you have any
24 familiarity with the permitting process that is

1 A. Responsibility, when I started full-time
2 in March of 2016.

3 Q. Did you have any involvement with
4 respect to the permitting process administered by the
5 Ohio Department of Transportation's Office of
6 Aviation prior to March 20, 2016?

7 A. Some involvement, yes.

8 Q. And what was the extent of your
9 involvement prior to March 20, 2016?

10 A. Primarily technical matters to assist in
11 determining airspace violations.

12 Q. And when you say "technical," what are
13 you specifically referring to, please?

14 A. Identifying the contributing
15 characteristics of an airport to determine the
16 correct airspace to apply.

17 Q. Have you at any point in time held
18 yourself out as having any expertise with respect to
19 any aeronautical subjects?

20 A. I don't understand what you mean by held
21 myself out.

22 Q. Have you represented or indicated that
23 you are an expert to anyone regarding any
24 aeronautical matters?

1 administered by the Ohio Department of Transportation
2 under the Airport Protection Act?

3 A. No.

4 Q. When you began working part-time with --
5 in the Office of Aviation in 2012, who was -- to whom
6 did you report?

7 A. Jim Bryant.

8 Q. And Mr. Bryant holds what title, please?

9 A. He's the administrator of the Office of
10 Aviation.

11 Q. And that's a title he still holds today?

12 A. That's correct.

13 Q. Is there -- is he the most senior person
14 for the Ohio Department of Transportation in the
15 Office of Aviation?

16 A. Yes.

17 Q. Now, when you started with the Office of
18 Aviation in 2012, did you have any involvement or
19 responsibility for the consideration of permits?

20 A. No.

21 Q. And when was the first time you would
22 have had any responsibility for any formal permits
23 considered or issued or denied by the Office of
24 Aviation?

1 MR. SEVERANCE: Objection.

2 OFFICER HARDESTY: If you know.

3 THE WITNESS: I have testified in prior
4 hearings. I don't understand really what you mean by
5 "expert," but I have testified in other hearings.

6 BY MR. LITTLE:

7 Q. Okay. So you testified --

8 A. To the -- to the technical aspects.

9 Q. That is in terms of the measurements?

10 A. Yes.

11 Q. Have you ever conducted, for example, an
12 aeronautical study pursuant to Part 77?

13 A. Yes.

14 Q. And that's something you would have done
15 by yourself without the aid or assistance of others?

16 A. Yes.

17 Q. Is -- is that something you've done
18 since March 20, 2016?

19 A. Yes.

20 Q. And how many times since March 20, 2016,
21 have you conducted such an aeronautical study?

22 A. I don't know.

23 Q. Has it been more than five?

24 A. Yes.

1 Q. More than 10?
 2 A. Yes.
 3 Q. And in conducting those aeronautical
 4 studies, you heard as you were sitting here during
 5 the opening, you would have -- your testimony is you
 6 would have consulted the various federal manuals that
 7 are referenced in the Administrative Code?
 8 A. Yes.
 9 Q. Okay. So we'll go through those in a
 10 little bit later.
 11 Would you have conducted any
 12 aeronautical studies prior to March 20, 2016?
 13 A. No.
 14 Q. And prior to March 20 -- excuse me,
 15 during the time frame of March 20 -- strike that.
 16 During the time frame of 2012 through
 17 March 20, 2016, what other responsibilities did you
 18 have at the Ohio Department of Transportation?
 19 A. Administration of the Ohio Airport
 20 Improvement Program, the Grant Program, the
 21 engineering duties related to it insofar as project
 22 selection, plan review, compliance review, project
 23 closeout construction inspection, also conducting
 24 pavement inspections using Micropaver and developing

1 A. Yes.
 2 Q. And during the time frame of 2012
 3 through March 20, 2016, what were you -- are you --
 4 excuse me, were your other responsibilities also
 5 under Operations?
 6 A. Yes, they were.
 7 Q. In which of the categories listed under
 8 Operations would you have been assigned at that point
 9 in time?
 10 A. The Office of Maintenance Operation,
 11 here it's listed as Maintenance Administration.
 12 Q. Thank you. Now, within the Department
 13 of -- or, excuse me, the Office of Aviation, since
 14 March 20, 2016, how many employees are in that
 15 department?
 16 A. In which department?
 17 Q. Excuse me, the Office of Aviation.
 18 A. I don't know exactly, 20-some.
 19 Q. And has that pretty much been consistent
 20 during your -- your tenure in that department
 21 starting in 2012?
 22 A. Yes.
 23 Q. And of the 20-some individuals that are
 24 in the Office of Aviation today, are those all

1 reports with that.
 2 Q. Pavement inspections, is that with
 3 respect to runways or was it roads or a combination?
 4 Trying to understand.
 5 A. Airport pavement.
 6 Q. Now, within the Office of Aviation, and
 7 just -- just maybe this will help, if you could
 8 please look at the notebook seated -- or set to your
 9 right and open up and look at Tab A-1. And do you
 10 recognize A-1 as a table of organization for the Ohio
 11 Department of Transportation?
 12 A. Yes.
 13 Q. And if we follow the blocks, there's an
 14 Assistant Director of Operations, David Coyle. Do
 15 you see his box?
 16 A. Yes.
 17 Q. And then under his box are three boxes,
 18 Operations, District Deputy Director -- Directors,
 19 and then Facilities & Equipment Management. Do you
 20 see that?
 21 A. Yes.
 22 Q. And then under the Operations box, we
 23 see a box for Aviation. Is that the Office of
 24 Aviation that you're assigned to today?

1 full-time?
 2 A. No.
 3 Q. How many of those are full-time?
 4 A. All but a few.
 5 Q. Okay. And with respect to the 20 or
 6 some individuals in the Office of Aviation -- and
 7 we'll just -- we'll mark it since March 20, 2016, how
 8 many of them are involved in any way in the
 9 permitting process?
 10 A. Other than myself, we have some help
 11 administratively, but essentially it's just myself.
 12 Q. Okay. So when counsel was describing
 13 the Department's greater expertise than the FAA as
 14 relating to the subject matters, he's referring to
 15 your expertise; is that right?
 16 A. I assume so.
 17 Q. Okay. Is there anyone else in the
 18 Office of Aviation that from your perspective has
 19 greater expertise with respect to FAA -- excuse me,
 20 the Ohio -- Ohio Airport Protection Act than
 21 yourself?
 22 A. In the Office of Aviation?
 23 Q. Yes, sir.
 24 A. No.

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1 Q. And within the Office of Aviation today,
 2 is there anyone else other than yourself that has
 3 greater expertise with respect to FAA matters?
 4 A. You're going to have to be more clear,
 5 there's a lot of FAA matters.
 6 Q. Thank you. I'll ask a better question.
 7 Other than yourself, is there anyone
 8 else in the Office of Aviation that you believe has
 9 greater expertise than yourself relating to Part 77
 10 as it relates to the FAA regulations?
 11 MR. SEVERANCE: Objection.
 12 OFFICER HARDESTY: Well, again, if you
 13 know, if you can answer.
 14 THE WITNESS: We have airport inspectors
 15 that inspect for Part 77 surfaces to identify
 16 obstructions as part of our responsibilities. To say
 17 they have more or less than me, I can't say.
 18 BY MR. LITTLE:
 19 Q. Okay. I'm just -- all I want to do is
 20 drill down on the -- the expertise that's in that
 21 department today. So we have airport inspectors who
 22 would have experience with Part 77 as it relates to
 23 air surfaces; is that right?
 24 A. That's correct.

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1 Q. Okay. And how many of those inspectors
 2 are there?
 3 A. Currently we have three that have --
 4 that are qualified to do that.
 5 Q. And when you say "qualified," how --
 6 how -- what do you mean by their qualifications?
 7 A. Their -- they have taken the training
 8 through the FAA's contractor, GCR, to perform 5010
 9 inspections on airports.
 10 Q. I'm sorry, what type of inspections?
 11 A. 5010.
 12 Q. 5010. And is -- is that how they
 13 receive their qualifications is through taking an
 14 FAA-administered course?
 15 A. Yes.
 16 Q. Have you taken that same course?
 17 A. No.
 18 Q. Were any of those three airport
 19 inspectors involved with respect to either of the two
 20 turbines that are the subject of this hearing?
 21 A. No.
 22 Q. With respect to the two turbines that
 23 are the subject of this hearing then, who within the
 24 Office of Aviation would have had the expertise that

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1 would have reviewed the -- those two turbines?
 2 A. I was responsible for reviewing the two
 3 turbines.
 4 Q. I'm sorry, your voice is trailing.
 5 A. I was responsible for reviewing the two
 6 turbines.
 7 Q. To the extent anyone else in the office
 8 assisted you, were they principally administrative
 9 staff?
 10 A. Essentially, yes.
 11 Q. So was the only person within the Office
 12 of Aviation that reviewed these two turbines that
 13 from your -- your experience would have had any
 14 expertise as to Paragraph 7 -- or Part 77 of the FAA
 15 regs would have been yourself?
 16 A. Could you repeat the question, please?
 17 Q. Sure. Was the only individual at the
 18 Department of Aviation that would have been involved
 19 in reviewing the two turbines at issue that have
 20 experience as it relates to Part 77 FAA, was that
 21 yourself?
 22 A. That's myself.
 23 Q. You answered the question whether or not
 24 you had taken the training, the 5010. Do you have

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1 any other training -- excuse me, do you have any
 2 training that you receive from the FAA?
 3 A. Yes.
 4 Q. And what -- what training do you hold or
 5 have you received?
 6 A. I've been to several workshops at the
 7 Detroit Airport District's Office regarding airspace
 8 matters.
 9 Q. Any other training or experience you --
 10 excuse me, any other training you've received
 11 regarding airspace other than the FAA workshops?
 12 A. Sure. We've also had training on the
 13 software that we use to process these.
 14 Q. The software you use to consider
 15 permits --
 16 A. That's correct.
 17 Q. -- applications?
 18 Is that software through the vendor or
 19 was it -- or why don't you --
 20 A. The software is Federal Airways &
 21 Airspace, and the training was provided by the
 22 vendor.
 23 Q. Any other training you've received other
 24 than what you've already outlined for us with respect

1 to Part 77 of the FAA regs?
 2 A. No specific formal training.
 3 Q. Any other training that you've received
 4 that you've not yet told us about as to the
 5 administration of the Ohio Airport Protection Act?
 6 A. No.
 7 Q. And if I could have you look at B-2.
 8 I'm sorry, I neglected to mention, in terms of
 9 your -- your workshops through the FAA, you would
 10 have received training. That would have been how
 11 many hours roughly?
 12 A. Four or five days.
 13 Q. Was that continuous or over multiple --
 14 A. Over two different events.
 15 Q. Okay. And then the training you
 16 received on the software application would have
 17 been -- consisted of how much time, please?
 18 A. Forty hours.
 19 Q. We're looking at B-2. And one of the
 20 things I've done is this is an Administrative Code
 21 section; so to keep it easier for our discussion I've
 22 put page numbers in the lower right-hand corner. So
 23 if you could turn to Page 12. And you're familiar
 24 with Ohio Administrative Code Section 5501:1-10-08?

1 If you think you can answer it.
 2 THE WITNESS: Repeat the question.
 3 BY MR. LITTLE:
 4 Q. Sure. Is it your position you have the
 5 same or greater ability to conduct aeronautical
 6 studies as the FAA?
 7 A. I have the ability to conduct
 8 aeronautical studies. I can't speak to whether --
 9 the level that the FAA does.
 10 Q. Are you familiar with the level of study
 11 that's conducted by the FAA --
 12 A. Somewhat.
 13 Q. -- in conducting an aeronautical study?
 14 A. Somewhat.
 15 Q. Do you believe your level of study is
 16 greater than the -- that conducted by the FAA?
 17 MR. SEVERANCE: Objection as to level of
 18 study.
 19 OFFICER HARDESTY: Well, I'll allow it.
 20 MR. SEVERANCE: I don't know that that's
 21 been defined.
 22 THE WITNESS: What specifically are you
 23 asking?
 24 BY MR. LITTLE:

1 A. I have read it, yes.
 2 Q. Okay. And there's a reference to
 3 aeronautical study in Subparagraph (A). Do you see
 4 that?
 5 A. Yes.
 6 Q. Okay. Is -- is that the -- when you say
 7 that you've been involved in aeronautical studies, is
 8 that the type of study that you -- you're indicating
 9 to us that you believe you're qualified to conduct?
 10 A. Yes.
 11 Q. Okay. And that's the qualifications you
 12 have based upon your four to five days of training
 13 with the FAA and the 40 hours or so of training with
 14 the vendor for your software?
 15 A. That's correct.
 16 Q. Is there anyone else on the staff in the
 17 Office of Aviation that conducts aeronautical studies
 18 other than yourself?
 19 A. No.
 20 Q. Is it your position that you have the
 21 same or greater experience to conduct aeronautical
 22 studies as the FAA?
 23 MR. SEVERANCE: Objection.
 24 OFFICER HARDESTY: Well, if he knows.

1 Q. Well, I'm trying to find out -- and let
 2 me -- let me -- let me ask a few preliminary
 3 questions, maybe it will help you answer the
 4 question.
 5 On -- in -- in the course of a calendar
 6 year, the Office of Aviation considers or evaluates
 7 how many structures of the State?
 8 A. The last few years, approximately 3,000.
 9 Q. Okay. And in -- in the course of a
 10 year, those 3,000 evaluations, are they going to be
 11 reviewed by you personally?
 12 A. The proposals are reviewed by running it
 13 through our software program, the reports are
 14 reviewed by me.
 15 Q. Okay. So are you the one that uploads
 16 the information into the software program?
 17 A. No.
 18 Q. Okay. So someone else does the
 19 mechanical test -- mechanical process of uploading
 20 the data, but insofar as the Department is concerned,
 21 you're the person in any given calendar year that
 22 would review the 3,000 different reports relating to
 23 those structures; is that right?
 24 A. No, not necessarily.

ATTACHMENT 2

Sworn Testimony of Mr. Jim Bryant in Administrative Hearing for Denial of Permits for 2016-DOT-647-OE (2015-WTE-5286-OE) and 2016-DOT-4888-OE (2016-WTE-2721-OE). (Highlighted for Emphasis)

1 estimation for denying this permit?
 2 A. It also impacted the VFR traffic pattern
 3 airspace.
 4 Q. Is that a basis for denying the permit?
 5 A. No, because the 7- -- not by itself.
 6 The .17(a)(2) surface is much lower.
 7 Q. Okay. So if, in fact, this one did not
 8 violate 77.17(a)(2), there is no other basis that's
 9 been articulated by the Department for denying the
 10 permit; is that right?
 11 A. Well, it still impacts the VFR traffic
 12 pattern airspace, which is outlined in our report,
 13 but the basis for denying it was .17(a)(2).
 14 Q. Okay. And I think you just told us a
 15 moment ago, if the -- if 77.17(a)(2) was not the
 16 basis for denying it, otherwise you've identified an
 17 issue, but that in itself would not have been a basis
 18 for denying the permit; is that correct?
 19 A. No, it's not correct.
 20 Q. What's incorrect about that statement?
 21 A. Well, it still impacts the VFR traffic
 22 pattern airspace.
 23 Q. Okay. And would you have denied the
 24 permit for that basis?

1 Department of Transportation?
 2 A. I'm the Aviation Administrator, sir.
 3 Q. And how long have you held that
 4 position, please?
 5 A. Since 2004.
 6 Q. And were you associated with the
 7 Department of Transportation prior to 2004?
 8 A. I was not. I was a public servant,
 9 though.
 10 Q. Were you associated with avia- --
 11 aviation -- excuse me, if I can speak -- aviation
 12 prior to 2004?
 13 A. Since 1973.
 14 Q. And '73, that would have -- would that
 15 have been military related?
 16 A. No, sir.
 17 Q. All right. What was your experience in
 18 aviation starting in '73?
 19 A. I started taking private flying lessons.
 20 Q. And then did you ultimately become a
 21 private pilot?
 22 A. Private, commercial, instrument, multi
 23 engine, and helicopter rated.
 24 Q. And were you a pilot for any

1 A. I -- in this case, I denied it on
 2 .17(a)(2).
 3 Q. Okay. Well, have you -- I'll ask it
 4 again -- all right. We'll take your answer.
 5 Your testimony is the sole reason
 6 that it was denied here is because it's 77.17(a)(2)?
 7 A. Correct.
 8 MR. LITTLE: All right. This might be a
 9 good time to break and organize the next witness.
 10 OFFICER HARDESTY: Okay. We'll break
 11 till 3:00 o'clock.
 12 (Recess taken.)
 13 (Witness placed under oath.)
 14 ---
 15 JAMES E. BRYANT,
 16 being by me first duly sworn, as hereinafter
 17 certified, deposes and says as follows:
 18 CROSS-EXAMINATION
 19 BY MR. LITTLE:
 20 Q. Would you please state your full name
 21 for the record?
 22 A. Yes, sir. James E. Bryant, B-r-y-a-n-t.
 23 Q. Mr. Bryant, my name's Marion Little.
 24 What is your current position with the Ohio

1 governmental agencies prior to 19- -- excuse me,
 2 prior to 2004?
 3 A. Yes, sir, I was.
 4 Q. Okay. Where was that?
 5 A. I was the commander, the captain of the
 6 Ohio State Highway Patrol, Aviation Section.
 7 Q. Great. Thank you.
 8 So I want to get your perspective on a
 9 couple of things.
 10 A. Yes, sir.
 11 Q. We've heard some statements earlier
 12 today that perhaps the Aviation office had not been
 13 as vigilant in enforcing Ohio laws in the past as it
 14 is today. And I want to focus your attention on the
 15 time period of 2011 forward. And do you recall
 16 during the time period of 2011 forward whether it was
 17 brought to your attention or you otherwise concluded
 18 that there was any type of failure on the part of the
 19 Aviation unit or group to adequately enforce Ohio
 20 laws?
 21 A. Yes, sir, it was, and I take full credit
 22 for that.
 23 Q. And when was that conclusion reached,
 24 please?

1 A. Around 2011, I don't have the exact
2 date. We had one of our pilots who was working in
3 the airspace protection brought some issues to my
4 attention.

5 Q. And do you recall specifically what
6 those issues were in 2011, please?

7 A. He was looking at I believe it was some
8 airspace issues involving Port Columbus, and the FAA
9 was doing an analysis of that airspace. And during
10 that conversation, he talked about some of the other
11 permits that we had issued and questioned whether
12 those permits should have been issued or not, based
13 on his experience as a commercial pilot and based on
14 safety issues involving -- like in Port Columbus, the
15 departure or the arrival of aircraft on a particular
16 runway with a cell tower that was being requested to
17 be built right at Hamilton Road and 270.

18 Q. And do you recall with any specificity
19 in what respect you or others at the Department
20 concluded there was somehow a failure by the Office
21 of Aviation to adequately enforce Ohio laws?

22 A. Well, when Brent started explaining his
23 concerns and then explained what we had done in the
24 past to me and how we were administering the Ohio

1 know, the effect of what the FAA was recommending
2 versus, you know, what probably really in our -- in
3 our estimate should have been done.

4 Q. And so was there an effort undertaken in
5 this 2011 time frame to better -- excuse me, to amend
6 the Revised Code to more adequately describe what was
7 the claimed jurisdiction of the Department of
8 Transportation?

9 A. Okay. Let me clarify. 2011 sounds
10 correct, but I'm not sure. It was sometime in that
11 time period, okay. And, yeah, Brent had been working
12 with the Ohio Revised Code, and had made multiple
13 recommendations within the Code on some things that
14 he felt needed to be changed at that particular time.

15 Q. And, I'm sorry, the individual's name
16 again, please?

17 A. Brent Wharton.

18 Q. And so did Mr. Wharton at that time,
19 2011, give or take, I understand you're not sure --

20 A. Sure, sure.

21 Q. -- exactly the time frame, did he come
22 up with proposed changes to the Airport Protection
23 Act?

24 A. Yes, he did. And the discussion, if I

1 Revised Code dealing with Part 77, and the fact that
2 in this particular case the tower went out for a
3 notice for comment, public comment, our office made
4 comment, I believe, and I know Port Columbus did, and
5 were not favorable comments on this tower being in
6 this location because of the effect it would have on
7 the departure or the arrival of -- of a particular
8 runway, I can't remember what runway it was.

9 And the FAA had basically determined
10 that it wasn't a hazard and that they were going
11 to -- they were going to allow the tower to -- to be
12 built, but they were going to change the approach --
13 and I can't remember if it was the approach or the
14 departure of the aircraft. And our pilot, who is a
15 military pilot, a lieutenant colonel in the Air
16 Force, explained some of his concerns about changing
17 the -- I can't -- again, I can't remember if it was
18 the departure or the -- or the arrival part of the
19 approach, and being a pilot I understood what he was
20 saying.

21 So we started talking a little bit more
22 about maybe some of the other -- other approvals that
23 we had just let go through that we really hadn't
24 maybe done our due diligence on in looking at, you

1 can recall correctly, was he had looked at some of
2 the sections, and so I asked him to go through all
3 the -- the 4561 sections and just take a look at
4 those, because there was also some old language in
5 there about the Civil Aeronautics Board that needed
6 to be updated as well. So he took that on to start
7 looking through those sections and making
8 recommendations that he felt were appropriate.

9 Q. Okay. And then at some point was
10 Mr. Wharton's comments memorialized in some proposed
11 legislation?

12 A. Yes, but it was sometime later. Through
13 one of our current staff attorneys, Carrie Glaeden,
14 she looked at that information, and I believe she
15 worked with John Stains to -- to maybe a little bit
16 further look into, that was my understanding, to make
17 the decision on what we felt would need to be
18 changed --

19 Q. So --

20 A. -- or updated.

21 Q. Excuse me. So it sounds like it was a
22 multi-year process of trying to formulate and move
23 forward with the proposed changes to the Revised
24 Code.

1 A. It didn't occur right away, because
2 sometime after 2011, maybe 2012 or early 2013, Brent
3 left the agency. So, you know, he wasn't completely,
4 if I remember right, through with that review of
5 those ORC recommended changes. So it started up
6 again and, you know, we successfully completed what
7 we felt was appropriate.

8 Q. Okay. But that process you're
9 describing for me sounds like it occurred over a
10 period of multiple years?

11 A. That's correct.

12 Q. Okay. And the -- the proposed changes
13 included clarifying what was perceived as the
14 ambiguity about the Department's authority over
15 certain airspaces?

16 A. Correct.

17 Q. Okay. That is there was an issue of
18 whether or not the Department's jurisdiction or
19 statutory authority was confined to six enumerated
20 surfaces that are called imaginary surfaces as you
21 know?

22 A. Yes, sir.

23 Q. And trying to determine whether or not
24 the Department's jurisdiction or authority would

1 A. Yes, sir.

2 Q. And each of these surfaces there, I
3 count them being six, you're familiar with those; is
4 that correct?

5 A. Yes, sir.

6 Q. And each of those surfaces are defined
7 in Part 77; is that correct?

8 A. Of the six surfaces, sir?

9 Q. Yes, sir.

10 A. Yes, sir, that's correct.

11 Q. Okay. And with respect to each of those
12 six surfaces, those are the surfaces that a structure
13 cannot be constructed or penetrate into without the
14 State providing some form of permit; is that correct?

15 A. No, not really. There is six surfaces,
16 and there's an additional surface which we felt that
17 we had jurisdiction to also administer that we didn't
18 feel that the Ohio Revised Code when it was prepared
19 in 1991 or '92 adequately explained that. So we've
20 always felt that we had the jurisdiction to
21 administer the Part 77, we just wanted to make it
22 clear.

23 Q. When you say "Part 77," can we agree
24 that that does -- that does not appear in

1 extend beyond those six imaginary surfaces?

2 A. Not correct.

3 Q. And could you please look at
4 Exhibit B-1, which is in the notebook in front of
5 you, please. It's going to be to your left there.

6 A. Okay.

7 Q. Okay. And showing you an excerpt from
8 the Ohio Airport Protection Act, specifically Section
9 4561.31(A)(1), direct your attention there first. It
10 should be on the first page of the exhibit which --
11 excuse me, on Page 3 of the exhibit, I apologize.
12 Let me know when you're there.

13 A. Okay.

14 Q. And, sir, I'm looking at the language
15 that says, "...no person shall commence to install
16 any structure or object of natural growth in this
17 state, any part of which will penetrate or is
18 reasonably expected to penetrate into or through any
19 airport's clear zone surface, horizontal surface,
20 conical surface, primary surface, approach surface,
21 or transitional surface without first obtaining a
22 permit from the department of transportation under
23 section 4561.34 of the Revised Code." Do you see
24 that?

1 4561.31(A)(1) as -- as you describe it?

2 A. Yes, sir, we can.

3 Q. Okay. Notwithstanding, I think what
4 you've told us, it's your position -- or the
5 Department's position -- don't mean to make this
6 about you.

7 A. Sure.

8 Q. But it's the Department's position that,
9 for example, it has the ability to exercise
10 jurisdiction over a structure penetrating the
11 77.17(a)(1) and (a)(2) space?

12 A. That's correct, sir.

13 Q. Okay. And am I to understand that -- is
14 that the space that the Department has always
15 believed its had jurisdiction over, notwithstanding
16 the language found in 4561.31(A)(1)?

17 A. That's correct.

18 Q. Okay. And is that the language that --
19 excuse me, is that the airspace for which the
20 Department was seeking to have some clarification?

21 A. Yes, sir.

22 Q. And is that why the -- this process
23 started initially with Mr. Wharton to come up with
24 proposed changes to 4561.31, to make clear and

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1 Q. And that's because there have -- there
 2 has been issues expressed about the language being
 3 ambiguous and not supporting the Department having
 4 jurisdiction on the chap- -- excuse me, the Part 77
 5 errors other than the six imaginary surfaces set
 6 forth in the current version of the statute?
 7 A. I've been told that.
 8 Q. Okay. And so in order to remedy that,
 9 there is proposed legislation being pursued?
 10 A. Yes, sir.
 11 Q. And, in fact, you have appeared before a
 12 Senate committee advocating the adoption of this new
 13 language?
 14 A. I'm trying to think if I testified or
 15 not. I'm sorry.
 16 Q. Well, let me ask a better question.
 17 A. Okay.
 18 Q. You have -- you have spoken before a
 19 Senate committee regarding this proposed amendment
 20 irrespective of whether they've sworn you in or not?
 21 A. I believe so.
 22 Q. Okay. Now, what I want to do is drill
 23 down for a moment, because you started off describing
 24 in 2011, or whatever the particular year was, that

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1 Mr. Wharton was trying to clean up, if you will, some
 2 language issues because of some concerns. Was -- the
 3 concerns you had in 2011, we'll just use that date
 4 for the sake of argument, were the concerns that
 5 existed about lack of enforcement, did it have
 6 anything to do with the particular airspace being
 7 regulated?
 8 A. Yeah, yeah, it did. It -- it was the
 9 airspace being regulated, and if I remember correctly
 10 it was around Port Columbus, and it was the fact
 11 that -- and, again, that the FAA was going to allow
 12 the cell tower to take place, it was going to
 13 penetrate -- I don't know what surface it was, I
 14 don't recall what surface it was, but -- and to allow
 15 that to take place, they were going to change either
 16 the approach or the departure of one of the -- one of
 17 the runways at Port Columbus, which there was a
 18 safety concern.
 19 Q. Okay. Do you have a recollection of
 20 whether or not the cell tower at issue was
 21 penetrating any one of these six imaginary surfaces
 22 described in .31?
 23 A. I really can't tell you that.
 24 Q. Okay.

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1 A. I don't remember.
 2 Q. And was the -- do you have any
 3 recollection of whether the concern that existed at
 4 that time related to the Department's ability to
 5 regulate -- or desire, intention, or necessity to
 6 regulate airspace outside those six enumerated
 7 imaginary surfaces?
 8 A. I don't believe that conversation came
 9 up.
 10 Q. Okay.
 11 A. It was more directed towards the -- the
 12 tower and the location and dealt with Port Columbus.
 13 Q. So the issue relating to the six
 14 imaginary surfaces and whether the Department's
 15 jurisdiction extended beyond that was a subject
 16 matter that actually arose several years later after
 17 you identified these issues?
 18 A. I can't say several years, but sometime
 19 after the initial conversation with Mr. Wharton,
 20 that's correct.
 21 Q. Okay. And -- and if I'm clear, and
 22 correct me if I'm wrong, Mr. Wharton really wasn't
 23 addressing an issue about expanding this regulated
 24 airspace beyond the six imaginary surfaces, it sounds

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1 like he was addressing other things with his proposed
 2 amendment changes.
 3 A. And, again, so that I'm clear, I don't
 4 know what airspace he was talking about, okay. If it
 5 was one of the six or if it was .17(a), whatever, he
 6 was addressing penetration into Part 77 airspace,
 7 okay. So I can't tell you for sure it was one of the
 8 six or one of them outside the six. I can just tell
 9 you he was addressing a safety concern about Part 77
 10 airspace.
 11 Q. Fair enough. So based upon whatever
 12 concerns were expressed in 2011, what changes, if
 13 any, did the Department make in 2011 as it related to
 14 the permitting process?
 15 A. Well, it wasn't immediately after his
 16 conversation, but the changes that were made was
 17 that, you know, I personally did a review of the Part
 18 61 Revised Code and understood that it gave us the
 19 right to administer or enforce the regulations in the
 20 Part 77 airspace. And I didn't see anywhere in the
 21 ORC that it really talked about any variances, other
 22 than the fact that it gave us the ability to issue
 23 permits if we felt that there could be a penetration
 24 of that airspace and it could be done safely.

1 So at that particular point, I made the
2 decision that, you know, we would start to regulate
3 Part 77 airspace without any penetration, and if
4 there was any penetration then we had to look at that
5 additionally to decide if that was something that we
6 could accept or not as a state.

7 Q. And -- and Part 77 airspace actually
8 captures a lot of different space.

9 A. Yes, sir, that's correct.

10 Q. So I want to try to drill down a little
11 bit more, if I may.

12 A. Okay.

13 Q. So was the decision made at -- at this
14 time frame that -- by you that the Department would
15 regulate the 77.17(a)(1) and (a)(2) airspace?

16 A. I didn't address that. I just talked
17 about Part 77 airspace, sir.

18 Q. Okay. So whatever the Part 77 airspace
19 was, the Department was going to regulate at that
20 time?

21 A. That's correct, sir.

22 Q. Okay. And -- and that included the Part
23 77 airspace other than the six imaginary surfaces set
24 forth in .31 essentially?

1 jobs. And there was never brought to my attention
2 that there was any problem with how we were
3 regulating the airspace. So, again, whether we were
4 or we weren't with -- outside the six imaginary
5 surfaces, I can't answer that.

6 Q. Okay. Is there anyone you know that you
7 can identify for us that can tell us whether from
8 2011 back the Department of Transportation was
9 regulating airspace -- any airspace other than the
10 six imaginary surfaces identified in 4561.31?

11 A. Yeah, I would say the people that were
12 running the airspace program. John Milling was one
13 of the people that had been there for a number of
14 years, Eric Smith was another employee who's --
15 neither one are no longer employed with the State,
16 who basically were -- and I think John was maybe the
17 lead person, John Milling, in regulating the airspace
18 prior to 2004 probably from -- and, again, I'm not
19 sure, but I'm thinking that John had been there since
20 the mid '90s.

21 Q. Okay. So are those the two individuals
22 you would have asked to determine whether or not the
23 Department was regulating airspace prior to 2012
24 other than these six imaginary surfaces set forth in

1 A. Again, it was talking about Part 77
2 airspace and really didn't regulate anything, just
3 the imaginary six, because in the Revised Code,
4 again, it's been our feeling that we've had the
5 ability to enforce any of the Part 77 airspace. So
6 that's what we were looking to do, and that's what
7 we've done as we've moved forward.

8 Q. So are you saying that prior to 2011,
9 the Department had not regulated all the Part 77
10 airspace?

11 A. I don't believe we did it correctly,
12 that's correct, sir.

13 Q. And when you say "correctly," I -- I
14 think of sometimes you can regulate it and you just
15 don't do it correctly and sometimes you just don't
16 regulate it. Is it the pos- -- is it your
17 recollection that the Department in 2011 and prior
18 simply didn't regulate certain Part 77 airspace?

19 A. You know, I can't answer that, because
20 I've never looked at all the permits that were issued
21 prior to 2011 or the permits that came in from 2004
22 to 2011, okay. And, you know, our office has a lot
23 of technical operations in the office; so, you know,
24 those experts in those offices, I let them do their

1 4561.31?

2 A. It would be two of the people, and then
3 moving forward we've got current employees who were
4 from 2004, John Carpico and Brent Wharton would be
5 the other two.

6 Q. Okay.

7 A. And then, of course, then we've got John
8 Stains who's also been involved as well.

9 Q. Okay. And Mr. Wharton's no longer with
10 us --

11 A. That's correct.

12 Q. -- at the Department. Mr. Stains joined
13 that particular unit sometime on a full-time basis in
14 2016, I believe.

15 A. Prior to 2016 he was there on a
16 part-time basis, probably 20, 25 hours a week.

17 Q. Okay. So it sounds like you have a
18 number of people that could have been contacted. My
19 question then is: At any point in time, did the
20 Department of Transportation go through the process
21 of trying to determine whether or not prior to 2012
22 it had, in fact, regulated any airspace other than
23 the six imaginary surfaces set forth in 4561.31?

24 A. We did not.

ATTACHMENT 3

Sworn Testimony of Mr. Jim Bryant in Administrative Hearing for Denial of Permits for 2016-DOT-647-OE (2015-WTE-5286-OE) and 2016-DOT-4888-OE (2016-WTE-2721-OE). (Highlighted for Emphasis)

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1 to Mr. Klein?
 2 A. Yes, it is.
 3 Q. Okay. And it was relating to a permit
 4 for Synergy airspace?
 5 A. It was related to a permit denial for
 6 Synergy Building Systems.
 7 Q. Okay. And is -- and I'm just trying to
 8 find out, the -- the content that appears after this,
 9 is -- was that written by you?
 10 A. Which content?
 11 Q. Well, just please take a look at the
 12 page marked 2, 3, 4, and 5, and 6, and I'm just
 13 trying to find out whether you wrote that.
 14 A. I did not write this.
 15 Q. Okay. Who wrote that letter?
 16 A. Well, it's labeled at the bottom,
 17 "Provided by Brent A. Wharton."
 18 Q. Okay. Is that something you would have
 19 reviewed prior to forwarding this?
 20 A. I don't recall.
 21 Q. And do you know one way or the other
 22 whether Mr. Wharton wrote this?
 23 A. Mr. Wharton was in charge of airspace
 24 protection at the time; so it's my assumption that he

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1 wrote it, but I don't know.
 2 Q. And at the time, your position, what
 3 were you doing with respect to permit denials?
 4 A. Just assisting Mr. Wharton with
 5 technical matters.
 6 Q. All right. Well, let's -- let's look at
 7 E-2 for a moment, find something you wrote. Do you
 8 recognize E-2?
 9 A. I do.
 10 Q. And what is E-2, please?
 11 A. This is a PowerPoint presentation.
 12 Q. Did you present this?
 13 A. I did.
 14 Q. Did you prepare the contents?
 15 A. Yes.
 16 Q. And to whom did you present this?
 17 A. We did joint workshops with the FAA
 18 Airport District Office in Detroit, five locations
 19 throughout the state.
 20 Q. And -- and, I'm sorry, who is the
 21 audience?
 22 A. Airports, airport sponsors mainly,
 23 consultants as well.
 24 Q. Okay. So if you could -- I can direct

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1 your attention to what is marked as Page 11. Let me
 2 know when you're there.
 3 A. Referring to Slide 11?
 4 Q. Yes, please.
 5 A. Yes.
 6 Q. And if I understand Slide 3, the
 7 position communicated was the Department makes no
 8 distinction between an obstruction or a hazard, is
 9 that true, Slide 11?
 10 A. Not Slide 3?
 11 Q. I'm sorry, what did I say?
 12 A. Slide 3.
 13 Q. I apologize, I misspoke.
 14 Looking at Slide 11, it says, "The
 15 Department makes no distinction between an
 16 obstruction or a hazard," and that's a statement
 17 being made on behalf of the Department of
 18 Transportation, correct?
 19 A. That's correct.
 20 Q. And the Department's statement, it says,
 21 "All permanent structures that violate Part 77
 22 surfaces will be denied"; is that correct?
 23 A. Yes, that's what it says.
 24 Q. Well, and is that the formal position

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1 taken by the Department of Transportation?
 2 A. It is.
 3 Q. And at least that's the position taken
 4 by the Department during -- since March 2016; is that
 5 correct?
 6 A. That's correct.
 7 Q. And --
 8 OFFICER HARDESTY: Excuse me, did you
 9 say 2016?
 10 MR. LITTLE: Yes, sir.
 11 OFFICER HARDESTY: Okay.
 12 BY MR. LITTLE:
 13 Q. And this PowerPoint was presented in the
 14 spring of 2016; is that correct?
 15 A. Approximately, yes. I don't remember
 16 the exact date.
 17 Q. I'm just going on what -- what it says
 18 on the first page, "ODOT/FAA Workshops Spring 2016."
 19 Does that make sense?
 20 A. Yes.
 21 Q. Okay. Now, the second bullet, if you
 22 will, on Slide 11 says, "The consideration of safety
 23 shall be paramount to considerations of economic or
 24 technical factors"; is that right?