BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of the 6011 Greenwich Windpark, LLC for a Certificate to Site Wind-Powered Electric Generation Facilities in Huron County, Ohio	))))	Case No. 13-990-EL-BGN

6011 GREENWICH WINDPARK, LLC MEMORANDUM CONTRA APPLICATION FOR REHEARING OF OMEGA CROP CO., LLC

I. INTRODUCTION

Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4906-7-17(E), 6011 Greenwich Windpark, LLC ("Greenwich") submits its Memorandum Contra to the Application for Rehearing of Omega Crop Co., LLC ("Omega"). Greenwich urges the Ohio Power Siting Board ("OPSB" or "Board") to deny the application for rehearing filed by Omega in its entirety for the following reasons.

II. ARGUMENT

Omega's application for rehearing should be rejected by the Board for two primary reasons. First, Omega lacks the standing to seek rehearing in this matter. Thus, Omega's application for rehearing is not properly before the Board. Second, even if Omega's application for rehearing is properly before the Board, the grounds for rehearing raised by Omega are without merit.

A. The Board is statutorily prevented from considering Omega's application for rehearing because Omega lacks the standing to seek rehearing.

Ohio Revised Code Section ("R.C.") 4903.10 establishes the requirements of an application for rehearing of a final order of the Board. Under the statute, an application for rehearing may be considered by the Board if:

> 1) the application for rehearing was filed within thirty days by a party who entered an appearance in the proceeding;
>
> 2) the proceeding was uncontested; or
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> 3) the party entering the application for rehearing failed to make an appearance but demonstrates: a) just cause for failing to enter an appearance, and b) that the interests of the applicant were not adequately considered in the proceeding.

Omega's application for rehearing fails to meet any of the requirements of R.C. 4903.10 governing the right to seek rehearing. Accordingly, Omega's application for rehearing must be denied.

1. Omega failed to make a proper appearance in the underlying proceeding, and the proceeding was not "uncontested."

In its application for rehearing, Omega asserts that it made an appearance in the underlying proceeding and is therefore entitled to seek a rehearing pursuant to R.C. 4903.10. This assertion simply ignores the procedural facts of this case. On August 21, 2014, Omega filed a motion to intervene in the underlying proceeding. *Late-Filed Motion to Intervene of Omega Crop Co., LLC, An Adjacent Property Owner*, Case No. 13-990-EL-BGN (August 21, 2014). This motion significantly exceeded the Board's deadline to intervene of April 18, 2014. Consequently, the Board rejected Omega's petition to intervene, noting that "Omega's petition to intervene was filed 125 days after the filing deadline for petitions to intervene, and *fails to set forth any statement of good cause for failing to timely file its request for intervention and no showing that extraordinary circumstances justify granting the motion*." *Opinion, Order, and*

Certificate, Case No. 13-990-EL-BGN (August 25, 2014), at pg. 4 (hereinafter "*Opinion, Order, and Certificate")*. (Emphasis added). Omega's assertion that it properly made an appearance in this proceeding is contradicted by the facts.

Next, Omega asserts that there was no need for it to make an appearance in order to have a right to seek rehearing because the proceeding was uncontested. Omega Application for Rehearing ("App. for Rehearing"), at 9. Under R.C. 4903.10, a party failing to make an appearance has a right to request a rehearing if the proceeding was "uncontested." Notably, Omega offers no case law or other legal authority to support its assertion that the proceeding was "uncontested" under R.C. 4903.10. Indeed, Omega's claim reflects a misunderstanding of the term "uncontested" as used in R.C. 4903.10. Precedent of the Public Utilities Commission of Ohio ("Commission") and the Board demonstrates that the proceeding was not uncontested.[1]

As used in R.C. 4903.10, the term "uncontested" has been applied to proceedings such as a "generic rulemaking proceeding" and other proceedings without any hearing or intervention by interested parties. *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (August 1, 1996); *see also In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise its General Exchange Tariff PUCO No. 8 to Establish Regulations, Rates, and Charges for Custom Calling PLUS Services*, Case No. 91-1648-TP-ATA (October 6, 1992) ("In light of OCC's filing to intervene in this proceeding, this matter cannot be deemed to be an uncontested proceeding . . . .").

For example, in the case *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of*

[1] The provisions of R.C. 4903.10 provide the procedure for application requesting rehearing in both Commission and Board proceedings.

Administrator Agreements and Statements of Work, Toledo Edison made a filing to the Commission for approval of administrator agreements and statements of work. Case No. 09-553-EL-ECC (January 13, 2010). The Commission soon after issued an order approving Toledo Edison's filings. There had been no hearing, nor any procedural schedule providing for intervention, and no other party attempted to intervene. After the Commission's order approving the filings, however, a number of parties requested rehearing. Although these parties had not made an appearance in the proceeding, the Commission granted their applications for rehearing because the Commission determined that the proceeding was an "uncontested proceeding."

A Board proceeding concerning a certificate application is far from a generic, uncontested proceeding. Interested parties may intervene, like the Ohio Farm Bureau Federation ("OFBF") did in the present case. Board proceedings require a hearing, where parties provide direct testimony and are subject to cross-examination. Finally, in a Board proceeding, the Board Staff maintains an adversarial posture towards a certificate applicant, vigorously investigating the contents of an application, conducting discovery upon the applicant, and protecting landowners and the public interest. These factors demonstrate that a Board proceeding is not "uncontested."

The Board's prior application of R.C. 4903.10 to the current proceeding further demonstrates that the proceeding was not uncontested. In fact, the Board's recent decision to reject an application for rehearing **is directly on point** with the present case and as such demonstrates that Omega is not automatically entitled to seek rehearing. On March 22, 2010, the Board approved a stipulation entered into by the parties and granted Hardin Wind Energy, LLC ("Hardin") a certificate to construct, operate, and maintain a 300 megawatt wind-powered generation facility. *In the Matter of the Application by Hardin Wind Energy, LLC, for a*

Certificate of Environmental Compatibility and Public Need for the Hardin Wind Farm, Case No. 09-479-EL-BGN ("*Hardin Wind Farm*"). Shortly after Hardin's certificate was granted, on April 21, 2010, Mid-Ohio Energy Cooperative, Inc. ("Mid-Ohio") filed an application for rehearing. Mid-Ohio had not previously intervened in the proceeding. In its July 15, 2010 Entry on Rehearing, the Board rejected Mid-Ohio's application for rehearing on procedural grounds that it did not meet the requirements of R.C. 4903.10. Significant to the instant case is that the Board did not deem the proceeding as "uncontested" which would have granted Mid-Ohio the automatic right to seek rehearing.

In sum, the present case cannot be considered "uncontested." First, the proceeding was not a generic rulemaking. Second, Board precedent demonstrates that its certificate application proceedings are not "uncontested." Thus, despite its unsupported claims to the contrary, Omega lacks an automatic right to seek rehearing.

2. Omega is unable to show good cause for its failure to make an appearance in the proceeding and that its interests were not adequately considered in the proceeding.

In order to grant leave to file an application for rehearing any person, firm, or corporation who did not previously enter an appearance and become a party in a Board proceeding, like Omega, the Board must find: (a) that the applicant's failure to enter an appearance prior to the entry upon the journal of the Board or the order complained of was for just cause, ***and*** (b) that the interests of the applicant were not adequately considered in the proceeding. Omega fails to meet these statutory requirements, as well.

a. Omega's failure to make a proper appearance in the proceeding was not for just cause.

Significantly, the Board has already determined that Omega's failure to intervene was not supported by good cause. In rejecting Omega's late-filed petition to intervene in the proceeding,

the Board noted that Omega's petition "fails to set forth any statement of good cause for failing to timely file its request for intervention . . . ." *Opinion, Order, and Certificate*, at 4. Despite this conclusive finding by the Board, Omega continues to assert in its application for rehearing, without providing any new support for its position, that its failing to become a party to the proceeding was for just cause. App. for Rehearing, at 9.

Omega states that its failure to become a party in the proceeding was for just cause, namely, because of "the pace of procedural schedule, it was not reasonably possible for Omega to earlier bring the issues raised herein to the Board's attention. . . ." Essentially, Omega's claim is that it only learned of the Project after it was too late; hence their 125 day late-filed motion to become a party. However, an examination of the facts quickly establishes that Omega's claim is baseless.

Omega was provided notice of the Project on numerous occasions before the intervention deadline and on multiple other occasions well before its 125 day late-filed motion to intervene. The procedural record establishes the following instances of notice:

- May 9, 2013 & May 14, 2013: Greenwich published notice of the public informational meeting in the *Norwalk Reflector* and *Greenwich Enterprise Review*, respectively;

- May 22, 2013: Greenwich held a public informational meeting on May 22, 2013;

- March 13, 2014: Greenwich filed that notice of the proposed project was sent to property owners, affected tenants, and adjacent property owners, ***including Omega***;

- March 12, 2014 & April 14, 2014: Greenwich published notice of the hearings in the *Norwalk Reflector* ***which contained express notice of the intervention deadline by interested parties***;

- March 18, 2014 & April 22, 2014: Greenwich published notice of the hearings in the *Greenwich Enterprise Review* ***which contained express notice of the intervention deadline by interested parties***; and

- May 6, 2014: A local public hearing was held at South Central High School, in Greenwich, Ohio.

The above-mentioned instances put Omega on constructive notice of the Project, including the intervention deadlines. *See Hardin Wind*, where the Board rejected Mid-Ohio's application for rehearing, noting that Mid-Ohio had constructive notice up until the period for intervention had expired as a result of the published notices of the project.

Omega also had **actual notice** of the project well before it filed its motion to intervene in the proceeding 125 days after the intervention deadline. As such, Omega falsely asserts that it learned of the Project after it was too late to timely file a motion to intervene. *See* App. for Rehearing, at 31 (asserting that Omega's late-intervention request "was pulled together as quickly as possible").[2] For example, Gerald Oney was present at the May 22, 2013 public informational meeting[3] as noted on Attachment A. Mr. Oney also submitted public comments to the Board about the Project on June 26, 2014. *See* Public Comments, Case No. 13-990-EL-BGN. Clearly, Omega was aware of the Project. Yet, despite this proof of actual notice of the Project, Omega delayed its attempt to become a party to the proceeding until 125 days after the intervention deadline. Simply put, Omega's failure to properly become a party to this

[2] Omega strangely suggests that the Board acted unlawfully by because the "public hearing was held at the earliest date *permitted by law*." App. for Rehearing, at 33. (Emphasis added). Omega also complains that the Board's formal review of the application was 74 days (from March 6, 2014, when the application was deemed complete until the evidentiary hearing on May 19, 2014). App. for Rehearing, at 32. However, Omega ignores the fact that Greenwich first submitted its application for review on December 23, 2013, thereby triggering an extensive completeness review by the Board Staff. Omega also neglects the fact that, from the period between May 19, 2014 until the Board's decision on August 25, 2014, the application and evidentiary record were subject to Board review.

[3] Omega is owned by Gerald and Connie Oney. App. for Rehearing, at 1.

proceeding was not for just cause. Therefore, Omega's application for rehearing is not properly before the Board.

b. Omega's interests were adequately considered in the proceeding.

For its application for rehearing to even be considered by the Board, Omega must also demonstrate to the Board that Omega's interests were not adequately considered in the proceeding. As an initial matter, Omega fails to actually identify its specific interests at stake in this proceeding. The section of Omega's application for rehearing entitled, "Omega's Interests Were Not Adequately Considered," states in its entirety: "For the reasons expressed herein, Omega urges the Board to find that Omega's interests were not adequately considered in the proceeding." App. for Rehearing, at 21.

Because Omega fails to actually identify its specific interests at stake in this proceeding, the Board is left to guess as to Omega's interests. Presumably, Omega's interests stem from its status as an adjacent property owner and operating farm. The potential impact of the Project to neighboring properties and agricultural property is required by law to be considered by the Board as part of the proceeding and were indeed adequately considered in the proceeding. *See* R.C. 4906.20 and O.A.C. Rules 4906-17-03 thru 4906-17-08; *see also Opinion, Order, and Certificate*, at 7-24; 47-48.

In addition to the Board's consideration of extensive data relating to potential impacts of the Project to adjacent properties and agricultural operations, OFBF's intervention in this proceeding further ensured that Omega's interests as a farming business were adequately considered. *See Motion to Intervene of the Ohio Bureau Federation*, Case No. 13-990-EL-BGN (January 9, 2014) ("The [OFBF] and the Huron County Farm Bureau maintain a non-profit organization representing agricultural interests at the state and local levels. Over 208,000

member families belong to the organization state wide, including over 1,300 families in the Huron County Farm Bureau.") Notably, Gerald and Connie Oney are members of the OFBF. The OFBF identified the following as its interests for intervening in this proceeding:

> Residents in rural neighborhoods want assurances that environmental considerations – setbacks, noise standards, shadow flicker and other factors – are addressed with effective turbine placement. Area businesses want to make sure that a wind facility in the community enhances local commerce and economic development. In short, OFBF has extensive experience gathering input, addressing the needs of and representing farm, small business and rural residents concerning energy development. This perspective cannot be provided by another existing party.

Id.

In its application for rehearing, Omega does not indicate any specific interest at stake different from those identified by the OFBF.

Finally, although not present in Omega's application for rehearing as interests that were at stake in the proceeding, a June 26, 2014 letter to the Board from Gerald Oney mentions his concern for bald eagles. *See* Public Comments, Case No. 13-990-EL-BGN. The letter also notes that a turbine may be placed in close vicinity to Fowler Woods, a nature pressure, though no specific concern related to this fact is identified. *Id.* Concerning the potential impact to bald eagles, the Board examined extensive data related to this issue, noting that "Applicant is currently coordinating with [U.S. Fish and Wildlife Service] on avoidance and minimization measures, and would continue to coordinate until an [Incidental Take Permit] is obtained." *Opinion, Order, and Certificate*, at 11. Additionally, the Board also specifically considered the Project's potential impact to Fowler Woods, finding that "[t]he wind farm, however would not alter the land use of any recreational land." *Id.* at 8.

In sum, Omega does not identify any interest that was not adequately considered by the Board in the proceeding. Accordingly, Omega's application for rehearing is not properly before the Board.

B. Even if Omega's application for rehearing was properly before the Board under R.C. 4903.10, the grounds raised by Omega on rehearing are without merit.

Omega's application for rehearing—although statutorily foreclosed from consideration by the Board—sets forth a number of grounds on which it believes the Board's *Opinion, Order, and Certificate* to be unreasonable or unlawful. Each ground is addressed in the subsections below. None have merit.

1. The rules under which the Board reviewed and approved the Project were effective and legitimate.

Omega alleges that the Board was without jurisdiction to issue its Order in this proceeding because it did not have a rule in place that respected the minimum setback requirements established by the General Assembly under R.C. 4906.20(B). App. for Rehearing, at 22-23.

Omega's claim is premised upon the Board's February 18, 2014, Finding & Order in Case No. 12-1981-GE-BRO, wherein the Board rescinded its existing rules in O.A.C. 4906, and adopted a new and reorganized set of rules. Omega claims that because the Board never filed its newly-adopted rules with the Joint Committee on Agency Rule Review ("JCARR"), those rules are not in effect. According to Omega, the failure of the Board to effectively establish those new rules means that the Board had no rules in place respecting minimum setback requirements and, as a consequence, the Board could not issue an order that satisfies the requirements of R.C. 4906.20(B). App. for Rehearing, at 23.

Omega's argument is wrong and must rely upon a sleight-of-hand omission to even appear logical. Omega pointedly refers to the fact that the Board rescinded its current rules and then goes on to discuss the fact that the replacement rules were never made effective—implying that this created a vacuum in the Board's rules, leaving no effective rules at all. The unstated assumption is that the Board's rescission of the current rules was somehow effective while the adoption of the new rules was not.

While there is no question that the new rules adopted by the Board in Case No. 12-1981-GE-BRO have not been filed with either JCARR or the Secretary of State ("SOS") and are not effective as a result, *the same is true for that portion of the Board's Finding & Order rescinding the existing rules.* R.C. Chapter 119 and R.C. 111.15 (as effective during the relevant times herein), require both that proposed rules, *as well as rules to be rescinded*, be filed with the SOS and the Director of the Legislative Service Commission. Hence, for the same reason the Board's new rules adopted by the February 18, 2014, Finding & Order are not effective, *neither are the current rules rescinded.*

The result of the February 18, 2014, Finding & Order urged by Omega is not only contrary to the law, which governs the adoption of administrative rules, it is also flatly contradictory to the plain language of the Board's Finding & Order. Finding 138 of the Finding & Order makes clear that the new rules are replacing the "old" rules, and that the "switch" should be seamless, as the creation of a vacuum in the rules would serve no logical purpose and would not be in the public interest. The rescission of the old rules and the effectiveness of the new rules are bound together by the same process under Ohio law. Barring some feature of the rule that would provide for an automatic expiration, not present here, the old rule will not expire until the new rule becomes effective.

O.A.C. Rule 4906-17(C)(1)(c) contains the setback requirements as required by R.C. 4906.20(B), and in fact were applied in this case. Omega's claim that the Board lacked setback rules at the time it approved the application are baseless and should be rejected by the Board.

2. The Board's recognition of the property line setback waivers was not unreasonable or unlawful.

Omega asserts that the Board unreasonably and unlawfully granted the Certificate in violation of the minimum property line setback requirements. App. for Rehearing, at 23. In granting the Certificate, the Board noted that: "Several turbines are within the minimum property line setback. The adjacent landowners to each of these turbines are participating landowners in the project, with leased parcels, and have signed waivers of the minimum setback." *Opinion, Order, and Certificate*, at 19.

Omega first argues that the setback waivers are invalid, alleging that the waivers failed to follow the proper waiver procedures in accordance with O.A.C. Rule 4901-1-03. App. for Rehearing, at 24. This rule states: "The *board or the administrative law judge may*, for good cause shown, as supported by a motion and supporting memorandum, *waive* any requirement, standard, or rule set forth in Chapters 4906-1 to 4906-17 of the Administrative Code, except where precluded by statute." (Emphasis added). Omega states that Greenwich failed to file such a motion requesting a waiver from the minimum setback requirements. *Id*.

Omega's position reflects a misunderstanding of O.A.C. Rule 4901-1-03. Its provisions apply to requirements, standards, or rules that may be waived by "*the board or the administrative law judge*." However, R.C. 4906.20 states that "[t]he setback shall apply in all cases except those in which all *owners of property* adjacent to the wind farm property *waive* application of the setback to that property . . . ." (Emphasis added.) Under R.C. 4906.20, *property owners* waive setback requirements, not "*the board or administrative law judge*." This

distinction understandably reflects the policy that property owners should be the party that decides whether a turbine is allowed closer to one's property. Under Omega's reading of O.A.C. Rule 4901-1-03, "the board or administrative law judge" could unilaterally waive setbacks requirements—certainly not an outcome intended by the General Assembly.

Omega also argues that Greenwich did not secure waivers from *all* owners of property adjacent to the wind farm property, as required under R.C. 4906.20. App. for Rehearing, at 24. Essentially, Omega argues that every property owner adjacent to *any part* of the entire project area should have veto power over the ability of another property owner to waive the setback requirements applicable to his or her property, even if the objecting party's property is not adjacent to the particular wind farm property seeking a waiver. Omega's interpretation of R.C. 4906.20 thus leads to an absurd result. In contrast, the Board's interpretation of R.C. 4906.20 requires waivers from all adjacent landowners to the *particular* wind property with the setback at issue. Omega offers no argument why this interpretation of R.C. 4906.20 is unreasonable or unlawful.[4]

3. The Board did not act unreasonably or unlawfully by adopting the Stipulation submitted to the Board by Greenwich, the Board Staff, and OFBF.

Omega next asserts that the Board acted unlawfully and unreasonably by adopting the Stipulation filed by Greenwich, the Board Staff, and OFBF. App. for Rehearing, at 26. Omega properly notes that, when deciding whether to adopt a stipulation, the ultimate issue for the

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[4] *See Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. 3d 264 (Ohio 2013), *quoting Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988):

> '[C]ourts . . . must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command.' . . . [W]e have held that deference is owed no matter which way the agency rules. We must accordingly defer to the commission's interpretation, so long as the interpretation is reasonable.

Board's consideration is whether the stipulation is reasonable and should be adopted. *Id.* As Omega further notes, to make this determination, the Board uses the following criteria:

> (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> (2) Does the settlement, as a package, benefit ratepayers and the public interest?
>
> (3) Does the settlement package violate any important regulatory principle or practice?

Id.

Omega states that "neither the direct testimony offered by the Board Staff nor Greenwich discussed the above-criteria." *Id.* This is utterly false and characterizes a selective disregard of the evidentiary record on the part of Omega.

Company Exhibit 5, which was properly admitted into the evidentiary record during the May 19, 2014 hearing, contains the direct testimony of Monica Jensen, on behalf of Greenwich. *See Evidentiary Transcript*, at 16. Concerning the question of whether the Stipulation is a product of serious bargaining among capable, knowledge parties, Ms. Jensen's testimony states, in part:

> During the investigation phase, there were multiple meetings with the Staff on site and throughout this process, our company representatives gained great respect for the expertise of Staff. When the Staff Report was issued a few weeks ago, we had very few items with which we disagreed and those issued primarily concerned refinement to the wording of the conditions.
>
> After we reviewed the Staff Report, we communicated our proposed changes and the reasons for them to the Staff in writing so that when we met, the negotiation process could be efficiently conducted. At the negotiation meeting, we were able to settle all of the issues that led to the final stipulation, which is being filed in this proceeding.

> Those involved in the meeting included the Staff's project manager, its subject matter specialist and an assistant attorney general assigned to the Board. The executive director of the Farm Bureau also participated and I, as Greenwich's Project Manager and our counsel attended. ***Thus, the discussions were among knowledgeable parties who were committed to resolving the issues we had between us.***

Company Ex. 5, at 2-3. (Emphasis added).

On the issue of whether the Stipulation, as a package, benefits ratepayers and the public interest, Ms. Jensen's testimony states, in part:

> The proposed wind farm will provide economic benefits to the community. For example, landowner lease payments are made to all landowners in the project regardless of whether facilities are located on their properties. . . . Increased tax revenue from personal property tax as well as the income from the leases paid by this project will filter into the local economy through increased spending in local business, and enhanced services by the local governments.

Company Ex. 5, at 4.

On the issue of whether the Stipulation package violates any important regulatory principle or practice, Omega acknowledges that the Board Staff's expert witness indicated that he was not aware of any such violation. App. for Rehearing, at 27. Omega also ignores other important parts of the evidentiary record, such as the *Staff Report of Investigation*, providing evidence that the Stipulation is reasonable and should be approved. *See, e.g.*, OPSB Staff Ex. 1, at 47 ("The facility would serve the public interest, convenience, and necessity by providing additional electrical generation to the regional transmission grid.").

Besides erroneously stating that there was no direct testimony or other record evidence addressing the criteria to evaluate whether a stipulation is reasonable and should be adopted, Omega offers no specific arguments as why the Board's approval of the Stipulation was unreasonable or unlawful. Omega provides no specific argument that the Stipulation was not a product of serious bargaining among capable, knowledgeable parties. Omega provides no

specific argument that the Stipulation, as a package, does not benefit ratepayers and the public interest. Lastly, Omega makes no specific argument that the settlement package violated any important regulatory principle or practice. Put simply, Omega fails to meet its burden of demonstrating that the Board acted unreasonably or unlawfully.

4. The Board did not unreasonably or unlawfully fail to consider the public comments submitted to the Board.

Omega claims that the Board acted unreasonably and unlawfully by "fail[ing] to mention the issues, questions, and significant local opposition to Greenwich's proposed wind farm that were identified to the Board [through public comment." App. for Rehearing, at 28. Omega identifies the following areas of concern and objection raised in the public comments: noise; impact to agriculture; emergency response to potential turbine fires; shadow flicker impacts; impacts to recreational property; and potential impacts to business. *Id.*, at 28-29. Each of these subjects was extensively evaluated by the Board as part of Greenwich's certificate application, the Board Staff's investigation, and the Board's *Opinion, Order, and Certificate*. *See, e.g.*, Company Ex. 1; OPSB Staff Ex. 1.

Recognizing that the Board, by rule, requires the above-mentioned subjects to be extensively evaluated, Omega returns to its argument that the Board is not currently operating under effective rules and therefore did not fulfill its statutory duty to consider the above-mentioned subjects. App. for Rehearing, at 29. As discussed in Section II, B(1) of this Memorandum, Omega's argument is without merit.

5. The Board did not act unreasonably or unlawfully when it denied Omega's late-filed motion to intervene, nor were Omega's due process rights violated.

Omega argues that the Board acted unreasonably and unlawfully when it denied Omega's late-filed motion to intervene. App. for Rehearing, at 31. As discussed in detail in Section II,

A(2)(a) of this Memorandum, Omega had actual and constructive notice of the Project and is unable to establish any good cause for its 125 day late motion to intervene. For these reasons, the Board acted reasonably and lawfully when it denied Omega's motion to intervene.

Omega also argues that the Board unreasonably and unlawfully denied Omega's motion to intervene by requiring that Omega agree to be bound by the Stipulation as a condition for its late intervention. App. for Rehearing, at 37. Omega argues that this action by the Board violates its constitutionally protected property and due process rights. *Id*. at 37-39. Although Omega provides little case law or other legal authority to support these assertions, to the extent that Omega does generally cite to case law, it completely misapplies the holdings of those cases. There have been no constitutional violations of Omega's property rights or due process rights.

First, Omega argues that the Board was obligated to review the Greenwich's certificate application and Stipulation under heightened scrutiny. App. for Rehearing, at 38. Instead of applying heightened scrutiny, Omega argues, the Board deferred to the recommendations of the Stipulation. *Id*. The only support for its claim that the Board should have applied heightened scrutiny when reviewing the certificate application and Stipulation is a single reference to the Ohio Supreme Court case of *Norwood v. Horney*. 110 Ohio St. 3d 535 (Ohio 2006). However, *Norwood* has no applicability to this proceeding. At issue in *Norwood* was the interpretation of the "public use" requirement in eminent domain proceedings. *Id*. at 354. The Court held, in part, that "the courts' role *in reviewing eminent-domain appropriations*, though limited, is important in all cases. Judicial review is even more imperative in cases in which the taking involves an ensuing *transfer of the property* to a private entity, where a novel theory of public use is asserted . . . ." *Id*. at 376. (Emphasis added). In the proceeding at issue, there was no use

of eminent domain, nor has there been a transfer of Omega's property to another entity. Omega's use of *Norwood* is misplaced.

Second, Omega argues that the denial of its motion to intervene violated its due process rights. Omega broadly cites to two cases, without any accompanying analysis, to support its claim. Omega first cites *Dolan v. City of Tigard*, in which the U.S. Supreme Court held that a condition to a building permit requiring the applicant to grant an easement for a bicycle path constituted a "taking" without just compensation in violation of the Fifth Amendment. 512 U.S. 374 (1994). In the present case, however, the Board is not requiring Omega to provide an easement across its land. *Dolan* is not applicable. Omega also cites to *Nollan v. California Coastal Comm'n*, in which the U.S. Supreme Court held that where governmental action results in a permanent physical occupation, by the government or others, there is a taking to the extent of that occupation. 483 U.S. 825 (1987). In the present case, the Board's action does not result in any sort of physical occupation, by any entity, of Omega's property. Thus, *Nollan* is inapplicable.

In fact, despite Omega's contention that its constitutional rights have been violated, Omega fails to identify the actual property right that has been violated. The Board's actions have not resulted in any taking or physical invasion of Omega's property, and thus Omega has no constitutional right to compensation or due process. Rather, Omega's right to participate in this proceeding was based solely on the Board's administrative rules, and Omega forfeited its right to participate by failing to properly intervene. Additionally, even if Omega had constitutionally-based due process rights in this proceeding (which it did not, because it has no constitutionally-protected right at stake in this proceeding), due process requires notice and an opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("In its most

fundamental form, procedural due process demands that an individual must receive notice and a meaningful opportunity to be heard."). The Board's rules afforded Omega precisely that—it was Omega that chose to sit idly by and forego its opportunity to be heard. Thus, the Board acted reasonably and lawfully.

III. CONCLUSION

WHEREFORE, Greenwich urges the Board to deny the application for rehearing of Omega Crop Co., LLC for the reasons stated herein.

Respectfully submitted on behalf of
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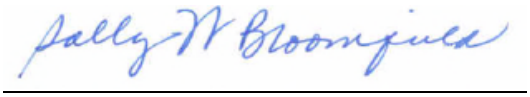
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memo Contra has been served upon the following parties listed below by electronic mail, this 2nd day of October 2014.



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Summary: Memorandum Contra of 6011 Greenwich Windpark, LLC to Application for Rehearing of Omega Crop Co., LLC electronically filed by Teresa Orahood on behalf of Sally Bloomfield