BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting Board's Review of Chapters 4906-1, 4906-5, 4906-7, 4906-11, 4906-13, 4906-15, and 4906-17 of the Ohio Administrative Code	))))	Case No. 12-1981-GE-BRO

REPLY COMMENTS OF
THE AMERICAN WIND ENERGY ASSOCIATION AND
GREENWICH WINDPARK, LLC

I. INTRODUCTION

By Entry dated November 24, 2014, the Ohio Power Siting Board ("OPSB" or "Board") provided parties an opportunity to file comments regarding the proposed revisions of Ohio Administrative Code ("O.A.C.") Rule 4906-4-08 by January 16, 2013, and February 13, 2015. Due to the very narrow scope of the proposed changes to O.A.C. Rule 4906-4-08 to incorporate the setback requirements of House Bill ("H.B.") 483, neither the American Wind Energy Association ("AWEA") nor Greenwich Windpark, LLC ("Greenwich") filed initial comments.[1]

However, the initial comments filed by Greenwich Neighbors United ("GNU") propose changes to O.A.C. Rule 4906-4-08 that go beyond the changes proposed by the Board. As such, AWEA and Greenwich are compelled to reply. GNU's proposed changes not only exceed the scope of this rulemaking but are contrary to law and public policy.

[1] Although not required by OPSB rules, Greenwich filed a letter reserving the right to submit reply comments on January 16, 2013.

II. REPLY COMMENTS

GNU attempts to exploit this limited rulemaking to propose an unlawful and unreasonable change to the Board's interpretation of Ohio Revised Code ("R.C.") Section 4906.20(B)(2)(c). This statutory provision states:

> The 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 pursuant to a procedure the board shall establish by rule and except in which, in a particular case, the board determines that a setback greater than the minimum is necessary.

The Board adopted O.A.C. Rule 4906-4-08(C)(2)(d) interpreting R.C. 4906.20(B)(2)(c):

> Minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the turbine agree to such waiver.

GNU argues that the Board's rule conflicts with Ohio law.[2] Specifically, GNU argues that the language of R.C. 4906.20(B)(2)(c) that "all owners adjacent to the wind farm property" must waive the setback means that every owner adjacent to the wind farm project footprint must waive the setback, regardless of their proximity to the particular turbine setback at issue.[3]

GNU's arguments are without merit. First, GNU's proposals exceed the scope of this rulemaking. Second, GNU's proposed reading of R.C. 4906.20(B)(2)(c) is contrary to well-established legal principles and basic tenants of statutory interpretation and relies on dubious support. Finally, the Board's interpretation of R.C. 4906.20(B)(2)(c) is reasonable and in accordance with Ohio law.

[2] GNU Comments, page 3.

[3] *Id*.

A) <u>GNU's proposed deletion of O.A.C. 4906-4-08(C)(2)(d) exceeds the scope this rulemaking.</u>

By Entry on Rehearing issued May 15, 2014, the Board adopted, as revised by the Entry of Rehearing O.A.C. Chapter 4906-4.[4] Among the adopted rules was O.A.C. Rule 4906-4-08(C)(2)(d), as described above. After the adoption of O.A.C. Chapter 4906-4, including O.A.C. Rule 4906-4-08(C)(2)(d), the Ohio General Assembly passed H.B. 483, which modified the setback requirements for turbines. H.B. 483 did not modify the setback waiver provision of R.C. 4906.20(B)(2)(c).

The Board reopened the adopted rules of O.A.C. Chapter 4906-4-08 for the limited purpose of incorporating the changes of H.B. 483:

> In order ***to comply with the new law***, Staff has ***proposed further revisions*** to Ohio Adm. Code 4906-4-08 . . . . At this time, the Board requests comments from interested persons concerning the attached ***revisions*** to Ohio Adm. Code 4906-4-08. . . . [T]he proposed revisions attached to this Entry are contained in Ohio Adm. Code 4906-4-08(C)(2)(b), with the new language shaded in gray and the deletions reflected with strikethrough.[5]

Emphasis added.

The Board's Entry is clear that this rulemaking is limited to the *revisions* made to O.A.C. Chapter 4906-4-08. There was <u>no</u> proposed revision to the setback waiver rule of O.A.C. 4906-4-08(C)(2)(d). Therefore, GNU's proposal to modify that rule exceeds the scope of this rulemaking.

[4] Case No. 12-1981-GE-ORD.

[5] Entry, Case No. 12-1981-GE-ORD (November 24, 2014), ¶¶ 6-8.

B) GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) is contrary to basic tenants of statutory interpretation and well established legal principles.

a. GNU's proposed interpretation ignores the statutory purpose of R.C. 4906.20

GNU contends that its interpretation of R.C. 4906.20(B)(2)(c) reflects the plain meaning of the statute.[6] However, it is GNU's interpretation that tortures the language of this provision. It is a cardinal rule of statutory construction that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[7]

Moreover, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[8]

To adopt GNU's proposed interpretation requires that R.C. 4906.20(B)(2)(c) be read in a vacuum and not in the context of the statute as a whole. Specifically, the phrase in the waiver provision requiring that "all owners of property adjacent to the wind farm property waive application of the setback" must be read in the context and purpose of R.C. 4906.20 as a whole. In part, the purpose of R.C. 4906.20 is to "prescribe a minimum setback for a wind turbine" from "the property line of the wind farm property."[9]

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[6] GNU Comments, page 3.

[7] *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

[8] *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850); *see also*, *Brotherhood of Locomotove Engineers v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157 (1996).

[9] R.C. 4906.20(B)(2).

It is clear that setbacks apply to *a particular turbine* as it relates to *a particular point of a particular property*. The setbacks affect a particular parcel. A setback has no meaning as applied to property lines not adjacent to the relevant turbine. The setback waiver provision must be read in this context, and as such, the meaning is unambiguous: minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the particular turbine agree to such waiver.

In addition, properly reading the waiver provision as part of the statute as a whole makes clear the meaning of "wind farm property." As described above, GNU proposes an interpretation that conflates "wind farm property" to mean the entire wind farm project footprint. Under this interpretation, every adjacent property owner to the entire wind farm project footprint would have to waive the setback requirement pertaining to a single turbine.

As discussed in more detail below, defining the term "wind farm property" as used in R.C. 4906.20(B)(2)(c) to mean the entire wind farm project footprint leads to absurd results. It also ignores the use and meaning of terms throughout R.C. 4906.20 as a whole. When R.C. 4906.20 is read as a whole, it is clear that "wind farm property" refers to *a particular property* as it relates to *a particular turbine*, not the entire wind farm project footprint. Instead, R.C. 4906.20 uses the term "economically significant wind farm" when referring to a project as a whole.

Thus, GNU's proposed interpretation of the waiver provision is far from reflecting the plain meaning of the statutory language. GNU ignores R.C. 4906.20 as a whole in order to propose a warped interpretation of R.C. 4906.20(B)(2)(c).

b. GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) leads to an absurd result.

It is a time-honored canon of statutory interpretation that if [a] statute can be so construed as to avoid absurdities**,** injustice, and great inconvenience, such construction must be given.[10] GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) is the epitome of absurdity and should not be taken seriously.

The following hypothetical illustrates the absurd result of GNU's proposed interpretation of R.C. 4906.20(B)(2)(c):

> Landowner A is a non-leasing landowner adjacent to the wind farm project. Turbine 1 is placed 1,125 feet from the property line of Landowner A. Because Turbine 1's setback meets the required distance (1,125 ft.) from the property line, no waiver by Landowner A is needed, and Turbine 1 can be constructed regardless of Landowner A's objection. One mile (5,280 feet) away from Landowner A is Landowner B, another non-leasing landowner adjacent to the wind farm property. Landowner B wants to enter into a waiver agreement with the wind developer to allow Turbine 2 to be constructed 1,124 feet away from Landowner B's property line, encroaching upon the required setback. Under GNU's proposed interpretation, Landowner A would have the right to interfere with an agreement concerning Landowner B and Turbine 2, even though Turbine 2 is thousands of feet farther from Landowner A.

As discussed further below, other absurdities would flow from GNU's proposed interpretation of R.C. 4906.20(B)(2)(c). Thus, it must be rejected.

I. GNU's request should be denied because its requested setback waiver interpretation contradicts the legal principles of standing.

The interpretation of the setback waiver provision that GNU has requested the Board to adopt contradicts the very principles of standing under the U.S. Constitution. GNU's requested interpretation of the setback waiver would allow property owners unaffected by the placement of a wind turbine to challenge the enforcement of the setback waiver, although these property owners have suffered no *injury*.

[10] *Martin v. State*, 70 Ohio St. 219 (1904).

The Supreme Court has declared that the constitutional minimum for standing contains the following three elements:

(1) *The plaintiff must have suffered an "injury in fact;"*[11] an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not "conjectural" or "hypothetical;"

(2) *There must be a causal connection between the injury and the conduct complained of*; the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

(3) It must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[12]

In light of the elements of standing, a property owner wishing to challenge the enforcement of the setback waiver provision should, at the very least: (1) have to have suffered an injury in fact, (2) that was caused by the Board's enforcement or failure to properly enforce the setback waiver statute, and (3) have to have requested a remedy likely to redress the injury.

If the Board were to adopt GNU's proposed interpretation of the setback waiver provision, the Board would be giving unaffected property owners the right to challenge the enforcement of the setback waiver, although these property owners have suffered no "injury in fact."

The Board's current rule interpreting the setback wavier requires a wind farm developer to obtain consent from a property owner adjacent to the turbine in order to construct that turbine if it does not meet the setback distance. The Board's current rule simply does not require the developer to obtain a waiver from a property owner whose property is in no way situated near the wind turbine. In other words, the rule protects property owners who actually stand to be

[11] The Ohio Legislature has defined the potential injury: a turbine that is not at least 1,125 feet away from an adjacent landowner's property line.

[12] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557, 112 S. Ct. 2130, 2135, 119 L. Ed. 2d 351, 362, 1992 U.S. LEXIS 3543, 1, 60 U.S.L.W. 4495, 34 ERC (BNA) 1785, 92 Cal. Daily Op. Service 4985, 92 Daily Journal DAR 7876, 92 Daily Journal DAR 8967, 22 ELR 20913, 6 Fla. L. Weekly Fed. S 374 (U.S. 1992)

impacted by the presence of the wind turbine, without giving unaffected or *uninjured* property owners the power to enforce a setback that applies to a different property owner.

Moreover, under GNU's requested setback waiver interpretation, unaffected property owners would also fail to satisfy the second element of standing, "causation." If unaffected property owners have suffered no injury, in the first place, there can be *no causal connection* between the injury and the complained of conduct. In short, without an injury, there can be no cause of the injury.

Lastly, under GNU's requested interpretation of the setback waiver, unaffected property owners would also fail to satisfy the third element of standing, "redressability." Because the unaffected property owners would not have suffered an injury, the remedy that the property owners would seek would not likely redress their injury. In short, if there is no injury, there can be no reparations for the injury.

GNU's requested interpretation of the setback waiver provision contradicts the very notion of standing and should be rejected.

c. GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) should be rejected because it offends longstanding notions of contracts law and makes for poor public policy.

GNU's proposed interpretation of the setback waiver should also be denied because it contradicts long-standing principles of contracts law and makes for bad public policy by enabling completely unaffected property owners to impede other parties' rights to contract. Indeed, the great irony of GNU's position is that although it purports to protect the rights of property owners, its proposed interpretation of the setback waiver provision unreasonably attacks the rights of property owners.

Our society places great importance on one's freedom to enter into contracts. It is a well-established principle that "parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain."[13] It has also been stated that the construction of a contractual agreement depends upon the "will of the parties between whom it is formed,"[14] not some third unaffected party. And, "[a]ny law, then, which enlarges, abridges, or in any manner changes… [the intention of the two contracting parties], when it is discovered, necessarily *impairs* the contract itself.[15]

The importance that society places on the freedom to contract cannot be understated. The value that we ascribe to the freedom to contract is even memorialized in the federal Constitution which prohibits states from passing laws that impair the obligations of contracts.[16] Moreover, the well-established legal doctrine of "tortious interference with a contract" essentially prohibits third parties from acting in ways that impede others from exercising their right to contract and provides adversely affected parties with a legal cause of action.[17] This legal doctrine has been adopted by Ohio and other jurisdictions, reinforcing the importance that our society places on the freedom to contract.

Because the freedom to contract is so well-regarded, protected by our nation's Constitution and embodied in a legal cause of action, it is unreasonable for GNU to ask the Board to adopt an

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[13] *Barreda v. Silsbee*, 62 U.S. 146, 170, 16 L. Ed. 86, 94, 1858 U.S. LEXIS 630, 45, 21(U.S. 1859).

[14] *Ogden v. Saunders*, 25 U.S. 213, 254, 6 L. Ed. 606, 620, 1827 U.S. LEXIS 394, 2 (U.S. 1827).

[15] *Id*.

[16] U.S. Constitution, Article I, Section 9, cl. 1.

[17] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 175, 707 N.E.2d 853, 858, 1999 Ohio LEXIS 828, 1, 1999-Ohio-260 (Ohio 1999).

interpretation of the setback wavier contained in R.C. § 4906.20(B)(2)(c) that would impede the rights of other parties to enter into a contractual agreement.

In the present case, were the Board to adopt GNU's proposed interpretation of the setback waiver, wind developers and property owners' rights to enter into contracts, including the right of a landowner to contract to waive the setback distances applicable to his or her own property, would be impeded. Not only does such a request offend well-established principles of contract law, but such an outcome would be against public policy because it would enable unaffected landowners to interfere with the ability of the affected landowner and wind developer to enter into a contract. Thus, the adoption of GNU's interpretation would be contrary to longstanding legal principles and constitute poor public policy for the State of Ohio.

d. Ohio Senator William Seitz does not speak for the Ohio Legislature and his letter does not equate to the Legislature's intent.

The sole support cited by GNU in support of its absurd interpretation of R.C. 4906.20(B)(2)(c) is a letter from Ohio Senator William Seitz.[18] The esteemed Senator from Cincinnati is entitled to his opinion. However, he does not speak for the Ohio Legislature, and his opinion cannot be given weight as legislative intent.

If legislative intent is to be considered, then there are two primary sources upon which courts may rely. [19] The first is "statements" made by legislators in reports issued by committees on pieces of legislation, or review actual statements made on the assembly or senate floor. Committee reports are often meant to represent the consensus view of a committee or legislature. The second primary type of legislative history referenced by judges are past drafts of bills or the

[18] GNU Comments, page 3.

[19] *See*, Kenneth R. Dortzback, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. (1996).

sequence of development of legislation. Bills can go through numerous revisions where certain terms or ideas are either developed or eliminated.

The statement by Senator Seitz cited by GNU cannot not be treated as indicative of the legislature's intent concerning the waiver of setbacks requirements. The statements were not part of the floor debate, nor do they represent the findings or consensus of any committee. It is also noteworthy that R.C. 4906.20 has been amended at least three times since its enactment in 2008 but not once has the waiver language in 4906.20(B)(2)(c) been modified, despite the Board's interpretation of the waiver provision.[20] As such, GNU's reliance on Senator Seitz's letter is misplaced.

C) <u>The Board's rule is supported by Ohio law.</u>

Read in the context of R.C. 4906.20, the setback waiver provision of R.C. 4906.20(B)(2)(c) is unambiguous: minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent *to the turbine* agree to such waiver.[21]

Assuming, *arguendo*, that the setback waiver is improperly read in a vacuum, as GNU proposes, then there is ambiguity concerning the meaning of the term of "wind farm property" as used in R.C. 4906.20(B)(2)(c).[22] Specifically, if read in a vacuum, the term could refer to the entire wind farm project footprint, as proposed by GNU, or the term could refer to a particular property as it relates to a particular turbine, as the broader context and purpose of R.C. 4906.20 makes clear.

[20] R.C. 4906.20 was amended in 2012, 2013, and 2014.

[21] *See supra* pp. 4-5.

[22] A statute is ambiguous when its language is subject to more than one reasonable interpretation. *Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. (2013).

In instances where the statutory language is ambiguous, Ohio law defers to the interpretation of the administrative agency, in this case, the OPSB. "[C]ourts must give due deference to an in 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."[23]

The Board's current rule interpreting the setback waiver provision is reasonable, and, in practice, it addresses GNU's purported underlying concern. As stated in GNU's initial comments, GNU is a non-profit corporation formed for the "purpose of promoting the safety and well-being of the community."[24] This is precisely what the Board's current setback waiver rule accomplishes.

The current rule ensures that property owners who stand to be affected by a wind turbine adjacent to their property that does not meet the statutory setback requirements have the ability to withhold their consent to a waiver. Equally important is that the current rule is not overly broad to allow property owners who are unaffected by the wind turbine to impede the ability of other landowners to freely make decisions affecting their own land. In short, the current rule is reasonable because it addresses GNU's purported interest in protecting landowners by protecting those individuals who stand to be directly affected by the setback distance of a particular wind turbine—nothing more, but nothing less.

II. CONCLUSION

For the reasons offered herein, the Board should reject GNU's proposed interpretation of R.C. 4906.20.

[23] *Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. 3d 264 (Ohio 2013).
[24] GNU's Initial Comments, p. 1.

Respectfully submitted on behalf of
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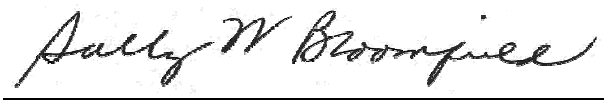
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments was served upon the parties of record listed below this 13th day of February *via* electronic mail.



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Summary: Comments Reply comments of the American Wind Energy Association and Greenwich Windpark LLC electronically filed by Teresa Orahood on behalf of Sally Bloomfield