

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of	)	
Republic Wind, LLC, for a Certificate to	)	Case No. 17-2295-EL-BGN
Site Wind-Powered Electric Generation	)	
Facilities in Seneca and Sandusky Counties,	)	
Ohio.	)	

**NOTICE OF ADDITIONAL AUTHORITY**

Republic Wind, LLC (“Republic Wind”) hereby submits additional authority in the above-referenced proceeding regarding the recent decision in *One Energy Enterprises LLC, et al., v. Ohio Department of Transportation*, No. 17CV005513 (Ohio Com.Pl. March 2, 2020). Pursuant to the briefing schedule agreed to by the parties at the conclusion of the adjudicatory hearing, Republic Wind filed its Initial Post-Hearing Brief on December 23, 2019. On January 13, 2020, Republic Wind filed its Reply Brief, which cited the *One Energy* case. (Republic Wind, LLC’s Reply Brief, at p. 39). When Republic Wind filed its Reply Brief, One Energy’s motion for partial summary judgment was pending before the Franklin County Court of Common Pleas regarding a complaint One Energy filed against the Ohio Department of Transportation.

On March 2, 2020, the Court issued a decision granting summary judgment as to one count of One Energy’s complaint. Because the One Energy decision was not available when Republic Wind filed its Reply Brief, Republic Wind is hereby notifying the Board this decision.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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Dylan F. Borchers (0090690)

Devin D. Parram (0082507)

Dane Stinson (0019101)

BRICKER & ECKLER LLP

100 South Third Street

Columbus, OH 43215-4291

Telephone: (614) 227-2300

Facsimile: (614) 227-2390

E-Mail: [dborchers@bricker.com](mailto:dborchers@bricker.com)

[dparram@bricker.com](mailto:dparram@bricker.com)

[dstinson@bricker.com](mailto:dstinson@bricker.com)

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Notice of Additional Authority was served upon the following parties of record electronic mail this 12<sup>th</sup> day of March 2020.



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Devin D. Parram

cendsley@ofbf.org

lcurtis@ofbf.org

amilam@ofbf.org

mleppla@theoec.org

tdougherty@theoec.org

ctavenor@theoec.org

jvankley@vankleywalker.com

cwalker@vankleywalker.com

dwd@senecapros.org

jclark@senecapros.org

mulligan\_mark@co.sandusky.oh.us

jodi.bair@ohioattorneygeneral.gov

dennyh7@frontier.com

mkessler7@gmail.com

william.cole@ohioattorneygeneral.gov

**IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

One Energy Enterprises LLC, et al.,           :       Case No. 17CV 5513  
  :       Judge Julie M. Lynch  
  :  
  :  
  :  
Ohio Department of Transportation,       :  
  :  
  :  
  :  
Defendant.                                   :

**DECISION AND ENTRY GRANTING  
MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT AS TO  
CLAIM FOR DECLARATORY RELIEF,  
Filed July 31, 2017**

**LYNCH, J.**

This matter is back before the Court upon the motion of Plaintiffs One Energy Enterprises LLC (“One Energy”) and OEE XXV LLC (“OEE”) (collectively, “Plaintiffs”) for partial summary judgment, which was filed on July 31, 2017. Defendant Ohio Department of Transportation (“Defendant” or “ODOT”) filed a memorandum in opposition to Plaintiff’s motion on August 21, 2017, and Plaintiffs filed a reply.

For the reasons discussed below, this Court finds Plaintiffs’ motion as to Count Two well taken, and summary judgment is hereby granted as to that Count.

Plaintiff One Energy is engaged in the business of constructing large-scale wind turbines for industrial customers. (Compl. ¶ 5.) Plaintiff OEE is wholly-

owned by One Energy and is the entity that will own a certain wind turbine project planned for a specific industrial facility in Findlay, Ohio (the "Findlay Project".) (Compl. ¶ 6.) Plaintiffs have averred that OEE has a current contract with the industrial facility in Findlay regarding the Findlay Project; has current and/or prospective banking and finance relationships directly related to the Findlay Project; and further, is in the advanced planning stages of multiple other, similar projects with prospective customers. (Compl. ¶ 8.) Defendant ODOT is the Ohio administrative agency that is charged, under the Ohio Airport Protection Act set forth in R.C. 4561.30 to 4561.39 (the "OAPA"), with considering applications for and issuing and/or denying the permits necessary to lawfully construct tall structures that fall within certain defined surfaces that extend out from airports in Ohio. (Compl. ¶ 9.)

The Federal Aviation Administration ("FAA") regulates matters of air navigation and safety within the national airspace. 14 C.F.R. 77 contains the federal regulations applicable to tall structures which penetrate the national airspace. Plaintiffs submitted notice of the Findlay Project, which is considered an obstruction to air navigation under 14 C.F.R. 77.17(a)(2), to the FAA. The FAA subsequently issued the desired "No Hazard" determination to the Findlay Project. (Compl. at ¶ 33.)

Plaintiffs filed this action to prevent ODOT from taking any action to regulate the turbines associated with the Findlay Project. Plaintiffs have alleged that consistent with the express statutory language of the OAPA, no permit application need be filed with ODOT, and ODOT lacks jurisdiction over, any

structure that will not and/or is not reasonably expected to penetrate one of the Imaginary Surfaces.<sup>1</sup> Compl. at ¶ 22. The Findlay project, which will stand approximately 405 feet above ground level and be located a little beyond four miles from the Findlay Airport, will not penetrate any of the Imaginary Surfaces. Compl. at ¶ 16. As such, Plaintiffs allege that the Findlay Project is beyond the reach of ODOT's regulatory jurisdiction under the OAPA.

Plaintiffs asserted two causes of action in their Complaint: a claim for "Injunctive Relief to Prevent Tortious/Unlawful Interference by ODOT" (Count One), and a claim for "Declaratory Relief" (Count Two). In Count Two, Plaintiffs alleged that OAPA specifically limits ODOT's authority and jurisdiction over regulating the construction of tall structures near airports to those proposed structures that would penetrate or could reasonably be expected to penetrate **only** the six "Imaginary Surfaces" set forth in the OAPA, but that ODOT has admitted in sworn testimony that it believes its statutory authority and jurisdiction extends beyond the six "Imaginary Surfaces" to include other separate and distinct "Obstruction Standards" set forth in the relevant FAA regulations. (Compl. ¶¶ 43-44.) Plaintiffs have requested that the Court enter an order "declaring that ODOT has no authority or jurisdiction under the OAPA to regulate or otherwise take any actions with respect to structures or proposed structures that do not penetrate and are not reasonably expected to penetrate any of the six Imaginary Surfaces." Pl's MPSJ p.15.

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<sup>1</sup> There are six Imaginary Surfaces. These are the clear zone surface, the horizontal surface, the conical surface, the primary surface, the approach surface, and the transitional surface).

The Court originally granted a motion to dismiss filed by Defendant and denied Plaintiffs' motion for partial summary judgment. The Tenth District Court of Appeals affirmed the Court's decision as to Count One of Plaintiffs' complaint, albeit for different reasons, but reversed and remanded this case for the Court to readdress Plaintiffs' motion for summary judgment on Count Two. *One Energy Enters., LLC v. Ohio DOT*, 10th Dist. Franklin No. 17AP-829, 2019-Ohio-359. Upon reconsideration, the Court finds Plaintiffs' motion well taken as to Count Two.

Pursuant to R.C. 2721.02 and R.C. 2721.03, courts of common pleas generally have jurisdiction to issue a declaratory judgment regarding a question of construction or validity arising under a statute and to declare the rights, status, or legal relations under it. *Burger Brewing Co. v. Liquor Control Commission, Dept. of Liquor Control*, 34 Ohio St.2d 93, 296 N.E.2d 261 (1973). As the Tenth District found, the present case "presents the essential elements for declaratory relief." *One Energy Enters., LLC*, 2019-Ohio-359, at ¶ 39. Additionally, because the Plaintiffs "have pending contracts to construct a structure which is potentially subjected to the OAPA, the present declaratory judgment action is not premature." *Id.*

This Case centers on how the OAPA is to be interpreted. R.C. 4561.31(A) states in relevant part:

(1) Except as provided in divisions (D), (E), and (F) of this section, no person shall commence to install any structure or object of natural growth in this state, any part of which will penetrate or is reasonably expected to penetrate into or through any airport's clear zone

surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface without first obtaining a permit from the department of transportation under section 4561.34 of the Revised Code. The replacement of an existing structure or object of natural growth with, respectively, a structure or object that is not more than ten feet or twenty per cent higher than the height of the existing structure or object, whichever is higher, does not constitute commencing to install a structure or object, except when any part of the structure or object will penetrate or is reasonably expected to penetrate into or through any airport's clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface. Such replacement of a like structure or object is not exempt from any other requirements of state or local law.

(2) No person shall substantially change, as determined by the department, the height or location of any structure or object of natural growth in this state, any part of which, as a result of such change, will penetrate or is reasonably expected to penetrate into or through any airport's clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface, and for which installation had commenced or which was already installed prior to October 15, 1991, without first obtaining a permit from the department under section 4561.34 of the Revised Code. This division does not exempt the structure or object from any other requirements of state or local law.

(3) No person shall substantially change, as determined by the department, the height or location of any structure or object of natural growth for which a permit was issued pursuant to section 4561.34 of the Revised Code, without first obtaining an amended permit from the department under that section.

R.C. 4561.32 states:

In accordance with Chapter 119. of the Revised Code, the department of transportation shall adopt, and may amend and rescind, any rules necessary to



administer sections 4561.30 to 4561.39 of the Revised Code and shall adopt rules based in whole upon the obstruction standards set forth in 14 C.F.R. 77.21 to 77.29, as amended, to uniformly regulate the height and location of structures and objects of natural growth in any airport's clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface. The rules shall provide that the department may grant a permit under section 4561.34 of the Revised Code that includes a waiver from full compliance with the obstruction standards. The rules shall also provide that the department shall base its decision on whether to grant such a waiver on sound aeronautic principles, as set out in F.A.A. technical manuals, as amended, including advisory circular 150/5300-13, "airport design standards"; 7400.2c, "airspace procedures handbook,"; and the U.S. terminal procedures handbook.

R.C. 4561.34 also states:

(A) The department of transportation, subject to Chapter 119. of the Revised Code, shall grant or deny a permit for which an application has been filed under section 4561.33 of the Revised Code. In determining whether to grant or deny a permit, the department shall determine whether the height and location of a structure or object of natural growth, as set forth in the permit application, will be an obstruction to air navigation based upon the rules adopted under section 4561.32 of the Revised Code if installed as proposed. In the case of an application to substantially change an existing structure or object, the department shall determine whether the change in the height or location of the structure or object, as set forth in the application, will create such an obstruction. The consideration of safety shall be paramount to considerations of economic or technical factors. In making a determination under this division the department shall render its decision upon the record, but may consider findings and recommendations of other governmental entities and interested persons concerning the proposed structure

or object; however, those findings and recommendations are not binding on the department.

(B) The department may grant a permit under this section subject to any modification of the height or location of a structure or object the department considers necessary. In the absence of such modification or unless it grants a waiver from compliance with the obstruction standards, the department shall deny a permit if it determines, in accordance with division (A) of this section, that a proposed structure or object or a change to an existing structure or object, as set forth in the application, would be an obstruction to air navigation based upon the rules adopted under section 4561.32 of the Revised Code.

(C) In rendering a decision on an application for a permit, the department shall issue an opinion stating its reasons for the action taken. The department shall serve upon the applicant and each party, as provided in division (C) of section 4561.33 of the Revised Code, a copy of its decision regarding a permit and the opinion.

Where the language used in a regulation or statute is clear and unambiguous, the statute or regulation must be applied as written, and no further interpretation is necessary. *Vaughn Indus. v. Dimech Servs.*, 167 Ohio App.3d 634, 2006-Ohio-3381, 856 N.E.2d 312, ¶ 23 (6th Dist.), citing *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 65 Ohio St.3d 86, 103, 600 N.E.2d 1042 (1992). If, however, the statute is subject to various interpretations, "a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991).

One Energy argues that the plain language of R.C. 4561.31 limits ODOT's authority to structures that penetrate or are reasonably expected to penetrate the six Imaginary Surfaces set forth in the OAPA. The Court agrees and finds that R.C. 4561.31(A) expressly limits ODOT's permitting authority to the six, specific imaginary surfaces.

Defendant would like this Court to find ambiguity in the fact that "clear zone surface" is not expressly defined in the OAPA. However, R.C. 4561.32 requires ODOT to "adopt rules based in whole upon the obstruction standards set forth in 14 C.F.R. 77.21 to 77.29, as amended, to uniformly regulate the height and location of structures and objects of natural growth in any airport's clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface." Significantly, 14 C.F.R. 77.21 contains a definition for "clear zone surface."

ODOT argues that the definition for "clear zone surface" found in 14 C.F.R. 77.21(b) cannot be applied to the OAPA because 14 C.F.R. 77.21 is specific to military airports, and the OAPA does not apply to military airports. While the Court agrees that 14 C.F.R. 77.21 is specific to military airports, the OAPA expressly requires ODOT to look to that section to adopt rules "to uniformly regulate the height and location of structures and objects of natural growth in **any** airports clear zone surface[.]" R.C. 4561.32 (Emphasis added). Therefore, the Court finds that the definition of "clear zone surface" contained in 14 C.F.R. 77.21 applies to the OAPA, and there is no ambiguity in this term.

Despite the clear statutory language, ODOT would like this Court to equate an airport's "clear zone surface" to the obstruction standards as set forth in 14 C.F.R. 77.17. However, the OAPA specifically directs the OAPA to adopt rules based in whole upon the obstruction standards set forth in 14 C.F.R. 77.21 to 77.29, not 14 C.F.R. 77.17. The Court cannot read the term "clear zone surface", which is expressly defined in 14 C.F.R. 77.21, to mean the more general Federal obstruction standards set forth in 14 C.F.R. 77.17.

ODOT also contends that the language in R.C. 4561.34(A), which states that "[i]n determining whether to grant or deny a permit, the department shall determine whether the height and location of a structure or object of natural growth, as set forth in the permit application, will be an obstruction to air navigation **based upon** the rules adopted under section 4561.32 of the Revised Code if installed as proposed[.]" supports a finding that ODOT's jurisdiction is not limited only to the Imaginary Surfaces. It further relies on the language in this section that says "[t]he consideration of safety shall be paramount to considerations of economic or technical factors." R.C. 4561.34(A). The Court does not agree that this language grants ODOT permitting authority over anything other than the six Imaginary Surfaces. Because rules adopted under R.C. 4561.32 are expressly limited to regulating an airport's clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface, i.e. the Imaginary Surfaces, the Court finds that ODOT's permitting authority under R.C. 4561.34 is necessarily and unambiguously subject to the same express limitation. See, also R.C. 4561.36 (waiver

provisions are likewise necessarily limited to penetrations of the Imaginary Surfaces).

ODOT also relies on O.A.C. 5501:1-10-04, as support for its belief that its permitting jurisdiction includes the obstruction standards set forth in 14 C.F.R. 77.17. That section stated that “no person . . . shall construct . . . any structure which constitutes an obstruction as defined by the ‘Standards for Determining Obstructions’ unless the person obtains a permit from [ODOT].” However, that section was rescinded on October 31, 2019.

ODOT next notes that 14 C.F.R. Part 77, which simplified existing regulations and changed the reference sections for obstruction standards from 14 C.F.R. 77.21-77.29 to 14 C.F.R. 77.13-77.23, became effective on January 18, 2011, and suggests that the Revised Code has not caught up to the 2011 amendment. However, this administrative code section underwent its most recent five-year review on March 19, 2015. Yet, it did not expand the federal code sections it referenced.

Finally, even if the Court were to find ambiguity in the statutory scheme, the Court still cannot rule in ODOT’s favor. Rather, the existence of an ambiguity compels a ruling in Plaintiffs’ favor. “An administrative agency can exercise only those powers that are expressly conferred upon it by the Ohio General Assembly.” *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, ¶ 32, 827 N.E.2d 766. “In construing a grant of administrative power from a legislative body, the intention of that grant of power, and the extent of the grant, must be clear, and, if there is doubt, that doubt must be resolved

against the grant of power.” *City of Akron v. Ohio Dep’t of Ins.*, 2014-Ohio-96, ¶¶30, 9 N.E.3d 371, 381 (10th Dist.), citing *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶¶ 40, 773 N.E.2d 536. Here, any ambiguity in the OAPA necessitates rejecting an expansive interpretation of ODOT’s regulatory authority.

Based on all the foregoing, the Court finds that ODOT has no authority or jurisdiction under the OAPA to regulate or otherwise take any actions with respect to structures or proposed structures that will not penetrate and are not reasonably expected to penetrate any of the six Imaginary Surfaces. Accordingly, the Court hereby **GRANTS** Plaintiff’s motion for partial summary judgment as to Count Two.

This is a final appealable order and there is no just cause for delay.

**IT IS SO ORDERED.**

Direction to Clerk:

Pursuant to Civ.R.58(B), you are to serve notice of this judgment and its date of entry upon the journal to all parties not in default for failure to appear within three days of the judgment’s entry upon the journal, and note the service in the appearance docket.

Electronic notification to all counsel of record

Franklin County Court of Common Pleas

**Date:** 03-02-2020  
**Case Title:** ONE ENERGY ENTERPRISES LLC ET AL -VS- OHIO STATE  
DEPARTMENT TRANSPORTATION  
**Case Number:** 17CV005513  
**Type:** JUDGMENT ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive script that reads "Julie M. Lynch". The signature is written in dark ink and is positioned over a faint, circular official seal of the Franklin County Court of Common Pleas. The seal contains the text "FRANKLIN COUNTY COURT OF COMMON PLEAS" and "ALL THINGS ARE".

/s/ Judge Julie M. Lynch

Court Disposition

Case Number: 17CV005513

Case Style: ONE ENERGY ENTERPRISES LLC ET AL -VS- OHIO  
STATE DEPARTMENT TRANSPORTATION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes



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**in**

**Case No(s). 17-2295-EL-BGN**

Summary: Text Republic Wind, LLC's Notice of Additional Authority electronically filed by  
Teresa Orahod on behalf of Devin D. Parram