

FILE

BEFORE  
THE OHIO POWER SITING BOARD

In the Matter of the Application of **BLUE CREEK** )  
**WIND FARM, LLC** for a Certificate to Site a )  
Wind-Powered Electric Generation Facility in Van ) Case No. 09-1066-EL-BGN  
Wert County, Ohio and Paulding County, Ohio. )

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**RESPONSE OF BLUE CREEK WIND, LLC  
TO  
THE MARCH 7, 2007 LETTER FROM HOAGLIN AND TULLY TOWNSHIPS**

The township trustees of Hoaglin and Tully Townships in Van Wert County, Ohio (collectively the "Trustees") filed a letter with the Ohio Power Siting Board (the "Board") on March 22, 2011 (the "Township Letter") seeking to impose certain per turbine transportation permits and fees on Blue Creek Wind Farm, LLC ("Blue Creek")<sup>1</sup>. The Township Letter specifically asked for the Board's "advice concerning an appropriate course of action to ensure that the Board of Trustees' decisions regarding the permits will be recognized, that the necessary permits will be obtained and the fees paid." Blue Creek hereby responds to the Township Letter.

The underlying contention of the Trustees is that Blue Creek has not complied with Condition No 40 in the Certificate, Opinion and Order issued by the Board on August 23, 2010 (the "Certificate"). This contention is entirely untrue. Condition No. 40 in the Certificate states:

- (40) Heartland shall obtain all required county and township transportation permits and all necessary permits from ODOT. Any temporary or permanent road closures necessary for construction and operation of the proposed facility shall be coordinated with the appropriate entities including, but not limited to, the Van Wert and Paulding county engineers, ODOT, local law enforcement, and health and safety officials.

<sup>1</sup> The Certificate was issued in the name of Heartland Wind, LLC ("Heartland"), the initial applicant. On October 15, 2010, Heartland and Blue Creek filed a joint application to transfer the Certificate from Heartland to Blue Creek. The Board granted the joint transfer application on November 18, 2010 in the same docket as the original application, Case No. 09-1066-EL-BGN.

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The Trustees are apparently interpreting the phrase “all required county and township transportation permits” to include: 1) a new, \$1,000/turbine transportation and haul permit fee that the Hoaglin Township trustees set forth in a resolution dated May 24, 2010; and 2) a “permit needed for wind and cell towers” and corresponding \$1,000/turbine fee imposed by the Tully Township trustees in a resolution dated October 4, 2010 (collectively the “Per Turbine Transportation Permits”). The Per Turbine Transportation Permits and corresponding fees are allegedly designed to compensate the Trustees for certain issues involving roads and ditches in their respective townships. Contrary to the Trustees’ contentions, however, Blue Creek has complied with Condition No. 40 because it has obtained all required permits. There are no valid transportation permits that can be required, nor permit fees that can be levied, by either Hoaglin or Tully Township.

Blue Creek’s predecessor, Heartland, met with all of the local entities, including the Trustees, to negotiate a single road agreement that would cover all local jurisdictions within the Blue Creek Wind Farm project area. In October 2010, Blue Creek entered into a comprehensive road agreement with Van Wert and Paulding counties, and Blue Creek, Latty, and Union townships (“Road Agreement”). Tully Township and Hoaglin Township declined to execute the Road Agreement. However, both Townships participated in the negotiations for the Road Agreement and received concessions.<sup>2</sup> In addition, the Hoaglin Township trustees specifically authorized Blue Creek to make certain road improvements in the township by letter agreements signed on November 3, 2010 and November 4, 2010 respectively. The completed improvements to Hoaglin Township roads and Van Wert County roads that are in Hoaglin Township cost Blue Creek approximately \$750,000. In addition to the significant road upgrades, the Townships will also receive increased revenue from Blue Creek’s eventual payments in lieu of taxes authorized by Senate Bill 232. Tully Township trustees declined to execute the road agreement due to a

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<sup>2</sup> For example, they insisted on a financial surety provision and certain grading along side the roads.

dispute over an upgrade they requested to the ½ mile of Tully Township road that is planned to be used by Blue Creek. In light of the fact that only one turbine will be transported across the road segment, Blue Creek thought the upgrade unnecessary, but stands by its obligation to repair that segment of road if damage occurs.

In addition, R.C. 5727.75(F)(4), which was enacted as part of Senate Bill 232, requires Blue Creek to:

repair all roads, bridges, and culverts affected by construction as reasonably required to restore them to their preconstruction condition, *as determined by the county engineer in consultation with the local jurisdiction responsible for the roads, bridges, and culverts*. In the event that the county engineer deems any road, bridge, or culvert to be inadequate to support the construction or decommissioning of the energy facility, the road, bridge, or culvert shall be rebuilt or reinforced to the specifications established by the county engineer prior to the construction or decommissioning of the facility. The owner or lessee of the facility shall post a bond in an amount established by the county engineer and to be held by the board of county commissioners to ensure funding for repairs of roads, bridges, and culverts affected during the construction.

(Emphasis added). This provision ensures that local roads are properly cared for during the wind farm construction process, and specifically obligates the county engineer to oversee road repairs. The statute does not authorize the Township Trustees to require a transportation permit or impose a corresponding per turbine transportation fee<sup>3</sup>. Therefore, the Trustees are without authority to exact any tax or issue any permit with respect to turbines in the Blue Creek Wind Farm.

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<sup>3</sup> The Townships are traditional townships governed by Chapter 503 of the Ohio Revised Code. As traditional townships, the Townships only possess the powers specifically granted by the General Assembly because "townships of Ohio have no inherent constitutionally granted police power." *Yorkavitz v. Bd. Of Township Trustees of Columbia Township* (1957), 166 Ohio St. 349, 351. Instead, "townships are creatures of the law and have only such authority as is conferred on them by law. Therefore, the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred on them by law [i.e. the Ohio Revised Code]." *State ex rel. Schramm v. Ayres* (1952), 158 Ohio St. 30, 33. There is no provision in the Ohio Revised Code that specifically authorizes the Townships to impose a transportation and haul permit fee on Blue Creek. Further, the Townships lack the power to impose a special permit under Ohio Revised Code Section 4513.34.

The new language of R.C. 5727.75(F)(4) is also entirely consistent with the language in Condition No. 40. The language in Condition No. 40 was intended to cover any public entity that had the “required authority” to issue permits. Because the Townships have no authority to impose the Turbine Transportation Permits and corresponding fees on Blue Creek, or require any other such permit, Blue Creek has met the requirements of Condition No. 40. Blue Creek obtained all required approvals from the county engineers and entered into the comprehensive Road Agreement with both counties and the majority of the townships (and specific letter agreements with Hoaglin Township) for those aspects over which the Townships had authority to act.

In addition to the provisions of S.B. 232, R.C. 4906.13 preempts the Townships from exercising any authority over Blue Creek or its turbines. Generally, the powers of R.C. 4906.13(B) “trump” local regulations; in particular, permits or other approvals issued by townships. The first sentence of RC 4906.13(B) affirmatively states:

No public agency or political subdivision of this state may require any approval, consent, *permit*, certificate, *or other condition* for the construction or initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code. (Emphasis added).

Elaborating on this statement, the Ohio Supreme Court noted that “power siting projects are exempt from local regulation.”<sup>4</sup> Because Blue Creek received the Certificate from the Board on August 23, 2010, any permit or fee attempted by the Township over the Blue Creek project is null and void due to the preemption of R.C. 4906.13.

Moreover, the Townships have no valid claim to the narrow exceptions set forth in R.C. 4906.13. The second sentence of R.C. 4906.13(B) is narrowly written to encompass only two exceptions to which Board preemption does not apply: 1) “state laws for the protection of employees engaged in the construction of such facility or wind farm” (e.g. OSHA-type

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<sup>4</sup> *State ex rel. State Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 77.

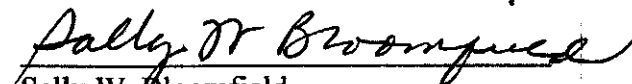
regulations); and 2) all "municipal regulations" other than those involving the "location or design of, or pollution control and abatement standards" of the Blue Creek Wind Farm.

The second exception applies only to a "municipal" entity. The statute specifically omitted the words "county" and "township." Under Ohio law, political subdivisions are carefully and separately defined and categorized, and the Ohio Supreme Court long ago declared that under Ohio law, "a township can not be a municipal corporation."<sup>5</sup> These definitive statements indicate that the second sentence of R.C. 4906.13(B) only captures municipal (city and village) regulations and not those of counties or townships. As a result, the Board's Certificate trumps all local regulations, including the Townships' permitting requirements.

For all the reasons given above, Blue Creek urges the Board to reject the contention of the Townships with respect to the alleged non compliance by Blue Creek with respect to Condition No. 40.

Respectfully submitted,

HEARTLAND WIND, LLC

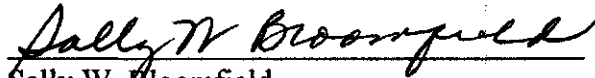
  
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<sup>5</sup> *Carroll v. Wash. Township Zoning Comm'n* (1978), 56 Ohio St.2d 164, 167.<sup>5</sup> See also 1987 Ohio Op. Atty Gen. 605 (explaining that "[a]s the Supreme Court recognized in *Carroll*, the township and municipal corporation forms of community government are legally distinct entities from both a constitutional and a statutory perspective").

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Response was served upon the following parties of record via hand delivery or regular U.S. Mail this 5<sup>th</sup> day of April 2011.

  
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