

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting)
Board's Review of Rule 4906-4-08 of the)
Ohio Administrative Code.) Case No. 16-1109-GE-BRO

**COMMENTS OF GREENWICH NEIGHBORS UNITED
ON ADDITIONAL REVISION**

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JANUARY 31, 2018

ATTORNEYS FOR GREENWICH NEIGHBORS UNITED

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I. BACKGROUND

On September 15, 2014, House Bill 483 ("H.B. 483") became effective, thus amending R.C. 4906.20 and 4906.201 with respect to the setback requirements applicable to applications that come before the Ohio Power Siting Board ("OPSB").

By Entry issued November 24, 2014 in Case No. 12-1981-GE-BRO, the OPSB requested comments on the OPSB Staff's proposed revisions to Rule 4906-4-08, Ohio Administrative Code ("O.A.C."), which, among other things, revised the setback requirements for applications to construct wind-powered electric generation facilities in light of the amendments to R.C. 4906.20 and 4906.201 made in H.B. 483.

In response to the November 24, 2014 Entry, comments were timely filed on January 16, 2015 by various stakeholders.¹ But rather than addressing the

¹ Previously and in Case No. 12-1981-GE-BRO, Greenwich Neighbors United ("GNU") filed comments on January 16, 2015, more than three years ago. In GNU's January 16, 2015 comments, it supported the views and recommendations offered by Union Neighbors United ("UNU") in comments filed the same day.¹ Then, and in more detail, GNU addressed the failure of the proposed rules to: (1) comply with R.C. 4906.20(B)(2)(c) with regard to the population of adjoining property owners who must execute a valid waiver from the minimum setback requirements before any waiver can operate for the benefit of a wind farm developer; (2) establish, by rule, the procedure which must be followed before such a waiver

commenters' recommendations, concerns and objections, the OPSB set the input aside for some future unspecified discussion and adopted the proposed rules which had promoted the concerns and objections. The OPSB also said (in an Order issued on November 12, 2015 – about one year after the OPSB requested comments and over 10 months after comments were filed) that “[u]pon conclusion of those discussions, but no later than June 1, 2016, the Board will initiate a rulemaking docket for the purpose of issuing for formal comments the Staff’s proposed revisions to Ohio Adm.Code 4906-4-08 resulting from the stakeholder deliberations.”² Additionally, the OPSB stated that: “It is the Board's expectation that Staff will strive to resolve the technical issues with the stakeholders and include the agreed-upon proposals in the revisions to be put out for comment.”³ And the OPSB’s November 12, 2015 Order in Case No. 12-1981-GE-BRO identified certain issues that were to be included in the discussions leading up to the issuance of the proposed rules.

Since the issuance of the November 12, 2015 Order, the OPSB has issued two invitations to parties interested in attending a public meeting. Each invitation came without any meaningful guidance on the procedural or substantive purpose of the meeting.

may be lawfully obtained and used by a wind farm developer to evade the minimum setbacks; and, (3) recognize the unavailability of such a waiver in any case where the OPSB determines, in any case, that the minimum setback is not a reasonable setback. More broadly speaking, GNU, like UNU, also observed that the OPSB’s proposed rules in Case No. 12-1981-GE-BRO comprehensively failed to meet the letter and spirit of the rulemaking requirements set forth in R.C. 4906.20.

² *In the Matter of the Ohio Power Siting Board's Review of Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 of the Ohio Administrative Code*, OPSB Case No. 12-1981-GE-BRO, Second Finding and Order at 5 (November 12, 2015).

³ *Id.* at 5-6.

On February 12, 2016, after the first meeting which took place on January 29, 2016, the OPSB abruptly closed Case No. 12-1981-GE-BRO.

On May 18, 2016, the OPSB initiated a new rulemaking docket in this proceeding, Case No. 16-1109-GE-BRO, for the purpose of issuing, for formal comment, proposed revisions to Rule 4906-4-08, O.A.C. Case No. 16-1109-GE-BRO was opened for the purpose of conducting a five-year review and was not focused on the substantive concerns that the OPSB had previously identified (in Case No. 12-1981-GE-BRO) as requiring further consideration.

A “rulemaking kickoff workshop” (the second meeting with the OPSB Staff) was held in Columbus on June 9, 2016. Again, this public meeting was scheduled and held without any advance guidance regarding the procedural or substantive purpose of the meeting. Nonetheless, several stakeholders attended the June 9, 2016 meeting and offered comments.

At no time during the January 29, 2016 or June 9, 2016 sessions did the OPSB Staff engage in discussions for the purpose of resolving “technical issues” or any other issues.

On September 22, 2016, the OPSB issued another Entry (in this case) inviting interested parties to submit comments on another set of proposed rules. The proposed rules and a misleading Business Impact Analysis⁴ were attached to the September 22, 2016 Entry in Case No. 16-1109-GE-BRO.

⁴ The Business Impact Analysis (“BIA”) is required by Ohio’s Common Sense Initiative (“CSI”). When issuing rules, the BIA element of the CSI requires the OPSB to respond to a standard set of questions.

On October 24, 2016, GNU submitted comments for the OPSB's consideration. Among other things, GNU's October 24, 2016 comments objected to the proposed rules because they were inconsistent with the controlling statutes. For example, at pages 7 and 8 of its October 24, 2016 comments, GNU stated:

As the OPSB knows, the controlling statutory language states that the minimum setbacks must be complied with unless '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 OPSB has no authority to rewrite or ignore the controlling statutory language and it has no ability to establish a rule that does so.

Accordingly, GNU urges the OPSB to adopt the controlling language in R.C. 4906.20(B)(2)(c) for purposes of identifying the population of adjacent property owners that must agree to a setback waiver before the waiver can permit a wind farm developer to evade the minimum setback requirements. The word 'all' cannot be written out of the law by the OPSB's application of an existing rule or through the establishment of a new rule. The OPSB's rules should respect the

The OPSB's BIA in this case ignores the substance of the questions and then inserts answers that are, at best, misleading. For example, and in response to a question asking the OPSB to explain how it will measure the success of the proposed regulation, the OPSB claims that "... rules in this package contain general provisions and procedural matters which will not have measureable outputs or outcomes." BIA at 2. For example, and in response to a request that the OPSB list the stakeholders included by the OPSB in the development or initial review of the draft regulation, the OPSB claims that the Board conducted a workshop on June 9, 2016 to receive feedback and that the OPSB "... enjoyed significant stakeholder participation at the workshop." BIA at 2-3. As explained above, the June 9, 2016 meeting took place without any guidance on the purpose of the meeting and since the "draft regulation" did not show up until September 22, 2016, it was **not possible** for anybody who participated in the June 9, 2016 meeting to provide feedback on any "draft regulation." For example, and in response to a question regarding the scientific data used to develop the rule or the measurable outcomes of the rule and how the scientific data support the regulation being proposed, the OPSB tellingly asserts that "[n]o specific scientific data was cited in the development of these rules." BIA at 3. Because the OPSB is obligated, by R.C. 4906.20(B)(2) to prescribe reasonable regulations regarding such things as erosion control, wildlife protection, interconnection, ice throw, sound and noise levels, blade shear, shadow flicker, and decommissioning, GNU asserts that the OPSB's clear admission that it has relied on no scientific data is an acknowledgement, by the OPSB, that its draft regulations ignore a primary and critical input (scientific data) which must be considered to prescribe reasonable regulations. For example, in response to a request that the OPSB identify the impacted business community, the OPSB claims that "... the only businesses impacted by the rules would be entities seeking to build electric generation facilities and wind farms." BIA at 4. GNU's members include family farmers engaged in the business of farming and land owners who host and operate recreational businesses. The property rights of these businesses and the opportunity for these businesses to enjoy their property rights without wind farms trespassing are affected by the draft rules; these businesses are part of the business community impacted by the draft rules.

General Assembly's command that no waiver of the minimum setback requirements will be effective unless and until all owners of property adjacent to the wind farm property waive application of the minimum setback requirements.

(citation omitted).

On November 8, 2016, GNU filed Reply Comments in this proceeding. At pages 7 and 8 of its Reply Comments, GNU stated:

In Case No. 08-1024-EL-ORD, the OPSB had occasion to address an argument advanced by Buckeye Wind, LLC ("Buckeye"). In the *2008 Rulemaking*, the OPSB adopted a rule that said that:

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

During the rehearing process associated with the *2008 Rulemaking*, Buckeye claimed that the above quoted language was unreasonable and unlawful because it could be interpreted as requiring consent of every owner of property. Buckeye urged the OPSB to change the adopted rule and suggested language based on Buckeye's interpretation of the controlling statute (much as MAREC has done here). The OPSB rejected Buckeye's position (for reasons advanced by UNU) stating as follows:

The Board finds that Section 4906.20(B)(2), Revised Code, is clear and unambiguous as to who must agree to the waiver of the minimum setback. To that end we agree with UNU that it is a well-settled principle of statutory construction that, where the statute is clear and unambiguous, statutory interpretation is not necessary and the statute must be applied giving effect to the words used. *In re Collier*, 85 Ohio App.3d 232, 236-237 (1993). Further, **where the statute is clear and unambiguous, the agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute.** *Id.* Accordingly, the Board finds it unnecessary and inappropriate to revise Rule 4906-17-08(C)(1)(c)(iii), O.A.C, as proposed by Buckeye.

In any event, the Staff's proposed change to Rule 4906-04-08(C)(2)(d), O.A.C., deletes language that is contained in the controlling statute and inserts words not used in the statute. Then, in proposed Rule 4906-04-08(C)(3), O.A.C., language is added to simply indicate that "... owner(s) of adjacent property to any wind farm property may waive the minimum setback requirements" The new language also addresses the form and content of the waiver. Neither the existing language in the OPSB's rules nor the new language in the draft rules establishes the procedure which must be followed by a wind farm developer to obtain a lawful waiver.

As the OPSB knows, the controlling statutory language states that the minimum setbacks may not be evaded unless '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 OPSB has no authority to rewrite or ignore the controlling statutory language and it has no ability to establish a rule that does so. The OPSB's prior holdings confirm that the controlling statutory language is clear and leaves no room for interpretational monkey business.

(citations omitted).

On May 4, 2017, many months after the comment phase was completed, the OPSB issued a Finding and Order in this proceeding. At page 24 of that Finding and Order and in response to GNU's Comments and Reply Comments, the OPSB said:

We are not required to insert the language of the statute in order to give it effect, especially considering that the Board has already stated that it is clear from whom waivers are required, and find that this particular paragraph does not need to replicate the language found in the statute. The Board finds that this is simply a procedural paragraph, fully in compliance with the governing statute.

At page 25 of that Finding and Order and in response to GNU's Comments and Reply Comments, the OPSB essentially repeated the above-quoted language.

On June 5, 2017, GNU filed an Application for Rehearing that contested, among other things, OPSB's refusal to conform the above-discussed rule language to the

controlling statute. More specifically and, for example, at page 6 of its Application for Rehearing, GNU asserted that:

The *May 4 Order*, Rule 4906-4-08(C)(2)(d), O.A.C, and Rule 4906-4-08(C)(3), O.A.C., are unreasonable and unlawful because they conflict with the controlling statute. In addition, the *May 4 Order* is unreasonable because it promotes mystery and confusion while the law and the public interest call for transparency and clarity.

On June 19, 2017, the Applications for Rehearing were granted through the issuance of an Administrative Law Judge Entry.

On August 17, 2017, the OPSB issued its Second Entry on Rehearing once again rejecting GNU's assertion that the proposed rules are unlawful and unreasonable because of conflicts with the controlling statutes.

Following the OPSB's issuance of its Second Entry on Rehearing, the OPSB submitted its proposed rules to the Joint Committee on Agency Rule Review ("JCARR"). After GNU contested the proposed rules submitted to JCARR (for the same reasons it had contested the proposed rules in its pleadings submitted to the OPSB), the OPSB issued an Entry on January 18, 2018 requesting additional comments to be filed on or before February 1, 2018. More specifically, the January 18, 2018 Entry stated (at page 3):

At this time, the Board requests comment on an additional revision on the first sentence of Ohio Adm.Code 4906-4-08(C)(3). Specifically, the Board seeks comment on modifying the language of Ohio Adm.Code 4906-4-08(C)(3) as follows:

'Setback waivers. The owner(s) of all property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.'

Once again, the OPSB made no effort to engage stakeholders in informal discussions for the purpose of identifying and resolving concerns and objections.

II. ABOUT THE COMMENTERS

GNU is a nonprofit corporation formed for the purpose of promoting the safety and well-being of the community in and around Greenwich, Ohio. Among other things, it works to proactively address issues relating to the siting of industrial wind turbines. In addition to GNU's participation in Case No. 12-1981-GE-BRO and Case No. 16-1109-GE-BRO, GNU or its members have actively participated in OPSB Case Nos. 13-990-EL-BGN and 15-1921-EL-BGA where the OPSB issued a certificate to a wind project developer even though almost 70% of the proposed turbines violated the lesser minimum setback requirements that were in force then.

III. ADDITIONAL COMMENTS

The initial proposed change to Rule 4906-04-08(C)(2)(d), O.A.C., deleted language that clearly conflicted with the controlling statute in favor of language that repeated the error. Then in the initially proposed Rule 4906-04-08(C)(3), O.A.C., language was added to simply indicate that "... owner(s) of adjacent property to any wind farm property may waive the minimum setback requirements"

Now, the OPSB is seeking additional comments on another statute-evading, confusion-perpetuating, attempt to define the population of property owners that must execute a proper waiver before a wind farm developer (or the OPSB) can evade the statutory minimum setback requirements. More specifically, the OPSB has asked for additional comments on yet another version of the Rule 4906-4-08(C)(3), O.A.C.,

language: “Setback waivers. The owner(s) of all property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.”

This latest OPSB unauthorized attempt to rewrite the law is advanced by the OPSB despite and in disregard of an uncontested prior OPSB holding that:

...Section 4906.20(B)(2), Revised Code, is clear and unambiguous as to who must agree to the waiver of the minimum setback. To that end we agree with UNU that it is a well-settled principle of statutory construction that, where the statute is clear and unambiguous, statutory interpretation is not necessary and the statute must be applied giving effect to the words used. *In re Collier*, 85 Ohio App.3d 232, 236-237 (1993). Further, **where the statute is clear and unambiguous, the agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute.**⁵

The latest OPSB unauthorized and precluded attempt to rewrite the law to its own liking consists of another jumbled order of some of the words that appear in the controlling statute, the insertion of words not found in the controlling statute and the omission of others. The latest OPSB proposal suggests that the OPSB is seeking to test the limits of what it can do to rewrite controlling law.

To appreciate the defects and legal significance of the OPSB latest word-jumbling effort, one must begin with a review of the prime statutory directives which are clearly set forth in R.C. 4906.20 (and incorporated in R.C. 4906.201).

First, the OPSB must establish a reasonable setback based on the facts and circumstances in each case.

⁵ (emphasis in original). See discussion at page 5 above.

Second, that reasonable setback cannot be less than the statutory minimum. As the OPSB has held, it has no authority to permit a wind turbine project developer to evade the statutory minimum setbacks.⁶

If the OPSB finds that a setback greater than the minimum is warranted based on the facts and circumstances in a particular case, the controlling statute does **not** allow a wind project developer to evade this setback by securing waivers from all owners of property adjoining the wind farm property.

With regard to statutory minimum setbacks, a project developer shall **not** evade, such minimum setbacks in any case “...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.” R.C. 4906.20(B)(2)(c).

Instead of being faithful to the language in the clear and unambiguous controlling statute, the OPSB now asks for additional comments on language that results in the word “all” attaching to some unidentifiable property (“property adjacent to any wind farm property”) as a substitute for **all owners of property** adjacent to the wind farm property.

And, the distortion created by this potentially deceptive repositioning of words (while inserting some and omitting others) is excessively accessorized by the OPSB’s steadfast refusal to define “wind farm property.”

⁶ *In the Matter of the Application of 6011 Greenwich Windpark, LLC for a Certificate to Construct a Wind-Powered Electric Generation Facility in Huron County, Ohio*, Case No. 13-990-EL-BGN, Entry on Rehearing at 14 (Aug. 27, 2015) (“R.C. 4906.20 does not grant to the Board or the ALJ the authority to waive the minimum setback requirement.”).

And, the OPSB's latest word jumble continues to ignore the controlling statutory command that any valid waiver of the statutory minimum setback requirements must be obtained "pursuant to a procedure the board shall establish by rule."

And, the latest word jumble advanced by the OPSB states that the required population of property owners may waive minimum setback violations. Of course, such owners may or may not elect to execute the required waivers. But the controlling statute states that such property owners must execute waivers obtained pursuant to a procedure the OPSB specifies by rule before any minimum setback evasion can be enabled. The latest word jumble advanced by the OPSB suggests that a minimum setback waiver is permissive rather than mandatory for the project developer.

And, the OPSB latest word jumble continues to ignore that controlling statute's preclusion of any waivers in a particular case where the OPSB "... determines that a setback greater than the minimum is necessary."

And, OPSB's latest word jumble combined with its omission of words in the controlling statute and the insertion of words not in the controlling statute indicates that the waiver involves a waiver of "their rights." The OPSB has offered nothing to indicate what "rights" are to be covered by its waiver vision.

The law calls the type of rulemaking advanced by the OPSB a "standardless" trap, a form of regulation that violates the United States and Ohio Constitutions.

The Due Process Clauses of the Fifth and Fourteenth Amendments give rise to the void-for-vagueness doctrine. The doctrine has two primary goals. The first goal is to ensure "fair notice" to the subject of the law as to what the law requires; the second is

to provide standards to guide the discretion of those charged with enforcing the law. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995). The United States Supreme Court has defined the first goal with greater specificity by holding that “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Id.* at 1105 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed 322 (1926)). The second goal “relates to notice to those who must enforce the law ... [t]he standards of enforcement must be precise enough to avoid ‘involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.’” *Id.* (citing *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465, 47 S.Ct. 681, 687, 71 L.Ed. 1146 (1927)).

Although the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values, “vague laws in any area suffer a constitutional infirmity.” *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) (collecting cases at n. 1). See also, *Cline*, 274 U.S. at 463 (“The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.”)

The Ohio Supreme Court re-affirmed and clarified the void-for-vagueness doctrine in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The court struck down a municipal ordinance that allowed private property in a “deteriorating area” to be taken by eminent domain, even though the municipal code set forth “a fairly

comprehensive array of conditions that purport to describe a ‘deteriorating area,’ including ... incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, and diversity of ownership.” *Id.* at

¶ 93. The Court held:

In the cases before us, we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial. The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code’s definition of ‘deteriorating area’ provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning.

In essence, ‘deteriorating area’ is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement – a danger made more real by the malleable nature of the public-benefit requirement.

Id. at ¶¶ 97-98.

The OPSB has no authority to rewrite or ignore the controlling statutory language and it has no ability to establish a rule that does so. The OPSB cannot lawfully adopt rules that create a standardless trap.

In summary and paraphrasing from the lyrics of the Who’s *Won’t Be Fooled Again*, the new boss is the same as the old boss. The latest word jumble advanced by the OPSB conflicts with the controlling statutory language and promotes mystery and confusion.

Accordingly, GNU once again urges the OPSB to: (1) adopt the controlling language in R.C. 4906.20(B)(2)(c) for purposes of identifying the population of adjacent property owners that must agree to a minimum setback waiver before the waiver can

permit a wind farm developer to evade the minimum setback requirements; (2) define “wind farm property” as the project area (used in other OPSB rules); (3) respect the controlling statute’s requirement that a valid minimum setback waiver must be secured in accordance with the procedure the OPSB establishes by rule; and (4) respect the controlling statute’s command that no setback waivers shall be available if the OPSB finds that something more than the statutory minimum is required in a particular case.

Additionally, the rules should specify that any proposed amendment to a certificate that, if approved, would increase the invasion of the minimum setback area shall be deemed a new application rather than an amendment of an issued certificate (meaning that no such amendment can be approved without a hearing). It is GNU’s position that the OPSB is obligated to respect the rights of non-participating adjoining property owners and to make sure those rights don’t get pushed through the cracks as a result of a proposed certificate amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Comments of Greenwich Neighbors United on Additional Revision* has been served via electronic mail or ordinary U.S. mail, postage prepaid, upon the following parties of record this 31st day of January 2018.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/31/2018 9:32:02 AM

in

Case No(s). 16-1109-GE-BRO

Summary: Comments of Greenwich Neighbors United on Additional Revision electronically filed by Mr. Samuel C. Randazzo on behalf of Greenwich Neighbors United