

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of : Case No. 2014-1198
 Hardin Wind LLC for a Certificate to :
 Construct a Wind-Powered Electric : Appeal from the Ohio Power Siting
 Generation Facility in Hardin and : Board, Case No. 13-1177-EL-BGN
 Logan Counties, Ohio :
 :

 MERIT BRIEF
 OF INTERVENING APPELLEE HARDIN WIND LLC

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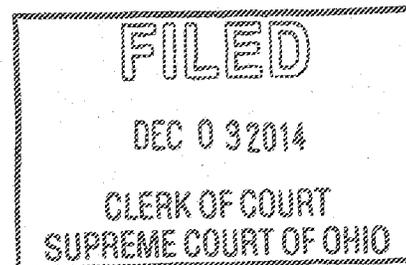


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INTRODUCTION

Appellant Joe Grant contends that the Ohio Power Siting Board's Opinion, Order and Certificate for Hardin Wind LLC to construct, operate and maintain the Scioto Ridge Wind Farm is unlawful and unreasonable because it incorporates turbine setbacks that he alleges increase the risk of ice throw and blade throw. Yet, Appellant fails to cite to any evidence in the record to support his claims instead pointing to testimony that there is some theoretical risk of injury with wind turbine operation, just as there is with any human endeavor. But the mere risk of some theoretically possible injury is not relevant here. Instead, the question on this appeal is whether the Board's decision was lawful and reasonable based on the record evidence.

That question should be answered in the affirmative. Without any objection from Appellant, the Board admitted into evidence Hardin Wind's Application for Certificate, the Board Staff's extensive Report of Investigation, and testimony of all identified witnesses. In relevant part, that evidence established conclusively that there has been no reported human injury due to wind turbine "ice throw" or "blade shear" despite hundreds of thousands of operating hours; that the extraordinarily low risk of any human injury has been further reduced by state of the art wind turbine safety control mechanisms; and that the average turbine setbacks here are more than twice those required by law and, for every turbine, exceed the minimum setback requirements.

This Court should defer to the Board's decision unless it is "...manifestly against the weight of the evidence and so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238 (1977) (citations omitted). The Board did not act unlawfully or unreasonably in reaching its decision given the evidence in the record and

a lack of any evidence by Appellant to the contrary. As to Appellant's claim on the turbines' proximity to Indian Lake, that claim was not raised before the Board in Appellant's application for rehearing. This Court should affirm in full the Board's March 17, 2014 Opinion, Order and Certificate.

STATEMENT OF FACTS

Hardin Wind defers to the Ohio Power Siting Board's (the "Board") presentment of the proceedings for its Statement of Facts, with the addition of some brief background facts. Hardin Wind LLC is a subsidiary of EverPower Wind Holdings, Inc. (Supp. S-9.)¹ Hardin Wind is the applicant for the Scioto Ridge Wind Farm project that is the subject of proceeding. (Id.) On June 28, 2013, as supplemented on July 1, 2013, Hardin Wind filed an application ("Application") for a certificate to construct, operate and maintain the Scioto Ridge Wind Farm project. (Appx. at A-7; Supp. S-1 to S-195, S-204.)² After public notice, public hearing and an adjudicatory hearing on the Application, the Board issued an Opinion, Order and Certificate ("Certificate") approving Hardin Wind's application for the Scioto Ridge project in March 2014. (Appx. at A-6 to A-48.) In May 2014, the Board denied Appellant's application for rehearing of the Certificate and affirmed the Board's prior Opinion and Order. (Appx. at A-49 to A-66.)

ARGUMENT

A. Appellant Bears A Difficult Burden On Appeal.

Appellant bears a very difficult burden on this appeal. *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988 ¶ 34 (2006). This Court cannot reverse, vacate or modify an order of the Board unless the order is found to be unlawful

¹ Citations to "Supp." are to Appellant's Supplement, filed October 14, 2014.

² Citations to "Appx." are to Appellant's Appendix, filed October 14, 2014.

or unreasonable based on the record. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, ¶ 26, citing *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841 ¶ 17. "Under the 'unlawful or unreasonable' standard of R.C. 4903.13, this court will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238 (1977) (citations omitted).

Where the issues raised on appeal were debated at length and a sound decision is reached, there is nothing unlawful or unreasonable which would necessitate reversing, vacating or modifying a decision of the Board. *See, e.g., In re Buckeye Wind*, 131 Ohio St.3d 449, at ¶31. Here, the Board conducted a comprehensive review of the project Application and Staff Report, conducted public and evidentiary hearings where all issues were debated, and issued a thorough 43-page decision summarizing the arguments and its conclusions. The Board also considered Appellant's application for rehearing and issued an 18-page decision affirming its initial decision. (Appx. at A-49 to A-66.) Appellant cannot critique the Board's thorough review and as more fully discussed below, fails to bear his burden of persuasion in this appeal.

B. Response To Appellant's Sole Proposition Of Law: The Board's Orders And Approved Setbacks Are Reasonably And Lawfully Supported By The Record.

Appellant ignores the record when arguing that the Board acted unreasonably by not extending the setbacks from the turbines beyond the minimum setback requirements because of his unsupported belief in "danger of ice throw, blade shear, and the proximity of the turbines to Indian Lake State Park" (Appellant's brief ("App. Br.") at 5.) The record evidence was singularly supportive of the Application, was

admitted without contradiction or objection by Appellant, was thoroughly reviewed and analyzed by the Board, and lawfully and reasonably supports the Board's Opinion and Order. Moreover, Appellant did not submit any evidence contradicting the evidence on ice throw and blade shear. The Board's Opinion and Order issuing the Certificate to Hardin Wind should be affirmed.

1. The Project's Turbine Setbacks Exceed the Minimum Setback Requirements from Property Lines and Residences.

As Appellant admits, the applicable minimum setbacks are more than satisfied here. (App. Br. at 4-5.)

First, there is a property line setback that requires the minimum distance from the turbine's base to the property line of the wind farm property be at least 1.1 times the total height of the turbine as measured from its based to the tip of the blade at its highest point. OAC 4906-17-07(C)(1)(c).³ Because 492 feet is the maximum turbine height proposed in the Application, the nearest nonparticipating property line must be 541 feet from the nearest turbine base.⁴ (Application at 142, Supp. S-150.) The average distance from turbine base to property line is 1,198 feet – more than double the minimum setback requirement. (*Id.*) And, the 541 foot statutory setback is exceeded by every single turbine in the project, with setbacks varying from 549 to 2,367 feet. (*Id.*)

³ Appellants' attempt to apply new setback requirements lacks merit. Not only would the law prohibit the retroactive application of statutory requirements enacted after Hardin Wind filed its Application, and not only does the revised statute grandfather existing certificates and applications from the new requirements, Appellant admits that the setbacks applied by the Board were the applicable minimum statutory requirements. (App. Br. at 6.)

⁴ The minimum property line setback from the base of each turbine is 541 feet. Appellant's brief incorrectly states twice that the minimum setback approved is 451 feet. (App. Br. at 6, 7.)

Second, there is also a required minimum setback from the nearest, habitable, residential structure already located on adjacent property. OAC 4906-17-07(C)(1)(c). Because the longest proposed turbine rotor diameter is 400 feet, the required residential structure setback is 950 feet. (Application at 142, Supp. S-150.) Here again, the average setback of more than 1,989 feet is more than double the minimum requirement and every setback – ranging from 1,335 to 4,047 feet – exceeds the minimum requirement by hundreds of feet. (Id.; see also Certificate at 12 ¶ 16, Appx. at A-17.)

Importantly, the Board has approved and this Court has affirmed similar and even lesser turbine setbacks in other proceedings based on the Board's expertise and thorough review of issues, including those related to setbacks such as blade shear, ice throw and proximity to non-participating properties. See, e.g., *In re Application Of Black Fork Wind Energy, LLC*, 138 Ohio St.3d 43, 2013-Ohio-5478, ¶ 23; *In re Buckeye Wind*, 131 Ohio St.3d 449, at ¶¶ 20-21, 34. Neither the law nor the facts here support any different result.

2. The Setbacks Approved by the Board are Reasonable Relative to the Extremely Low Risk of Potential Ice Throw.

There is no record support for Appellant's argument that potential ice throw requires setbacks greater than those approved here. To the contrary the evidence is so one-sided here Appellant has to overstate or misstate the evidence to claim that ice throw is "likely" or "could possibly" cause injury. (App. Br. at 6-7.)

In very rare instances, ice throw can occur "when ice accumulates on rotor blades." (Application at 87, Supp. S-95; Michael Speerschneider Direct Testimony ["Speerschneider Direct"] at 12, HW Supp. 12; Hearing Transcript ["TR"] at 33:9-16, HW

Supp. 66.)⁵ But ice throw has not resulted in even one reported occurrence of human injury despite hundreds of thousands of hours of wind turbine operation. (*Id.*) To protect the public from the already extremely low risk of ice throw or injury, Hardin Wind will incorporate additional safety measures. (Speerschneider Direct at 12, HW Supp. 12; TR at 33:9-16, HW Supp. 66.)

For example, each turbine has technology which shuts the turbine down in the event that ice forms on the turbine and Hardin Wind will use operational measures to prevent a turbine from operating again until the ice is shed or melts. (Application at 88, Supp. S-96; Speerschneider Direct at 12, HW Supp. 12; TR at 33:9-16, HW Supp. 66.) Hardin Wind is actually going beyond standard measures by employing ice sensors on the turbines *and* siting the turbines to conform with GE's setback recommendation for turbines in icing conditions even though GE only recommends application of that setback when ice sensors are not employed on a turbine. (Speerschneider Direct at 12, HW Supp. 12.) In short, although as with "any other human endeavor, there is some risk," Hardin Wind uses siting and technology to "very effectively" mitigate and keep that risk "as low as humanly possible." (TR at 34:12-18, HW Supp. 67.)

All of this was considered by the Board Staff during its independent review of the Application. (Staff Report at 38, 44 & 47, Supp. S-238, S-244 & S-247.) The Staff even went farther, considering a 2003 study on the risk of ice throw from wind turbines that recommended turbines be located "a distance of 150 percent of the sum of the hub height and rotor diameter from occupied structures." (Staff Rep. at 38-39, Supp. S-238-39.) Applying that formula to the Application, the Staff determined that the proposed

⁵ Citations to "HW Supp." are to the Supplement of Intervening Appellee Hardin Wind LLC that is being filed contemporaneously with this Merit Brief.

turbines "would need to be located a distance of approximately 333 meters (1,092 feet) from any occupied structure or heavily travelled road." (*Id.*) Even though that requirement was more exacting than the Board's minimum setback requirement (which has no road related requirement), the Staff evaluated the turbine locations under that formula and "determined that no turbines would need to be relocated to meet this requirement." (*Id.*)

Appellant mischaracterizes the Staff Report on this point, stating that Staff recommended an ice throw setback of 1,092 feet and then arbitrarily latching onto this distance as the appropriate distance from all property lines. Nowhere in the record is any link made between the ice throw setback recommended by Staff and property lines. That is a leap made by Appellant with no record support. What is undisputed and supported by the record is the Board's analysis and finding that project setbacks and Hardin Wind's use of safety control mechanisms will minimize the already extraordinarily low risk of ice throw. (Appx. at A-19, A-22; Supp. S-247; see also TR at 34:1-2, HW Supp. 67; Speerschneider Direct at 12, HW Supp. 12.) Appellant's argument on this point is without merit and unsupported by the record.

3. The Setbacks Approved by the Board are Reasonable Relative to The Very Rare Risk of Potential Blade Shear.

The admitted and undisputed record shows that there is no evidence anyone ever has been injured as the result of a wind turbine blade failure. (Application at 89, Supp. S-97.) "In fact, in the hundreds of thousands of operating hours throughout the world, there not been one incident of human – of injury to – of harm or injury to humans." (TR at 33:21-24, HW Supp. 66.) Even without regard to the risk of injury, blade shear occurrences "are very rare and few between." (TR 33:17-18, HW Supp.

66.) And, as the industry has matured, "[s]tate of the art braking systems, pitch controls, sensors, and speed controls on wind turbines that have greatly reduced the risk of blade throw." (Application at 89, Supp. S-97.) As a result, "the wind turbines proposed for this Facility are of the highest level and meet all applicable federal, state and /or local codes." (*Id.*) Moreover, the project setbacks – which always exceed and, on average, double the minimum setbacks required – "are intended to protect the public from the already minimal risk of blade throw." (Application at 90, Supp. S-98.)

The minimal risk of blade failure was also thoroughly analyzed by the Board in the Staff Report, at the hearing, and addressed by the Certificate approved by the Board. (See Staff Report at 37-39, Supp. S-237-39; TR at 33, 78-79, HW Supp. 66, 111-12; Appx. at A-11-12, A-19 ¶ 23, A-22, A-40-41.) Specifically, the Board recognized that the proposed turbines have safety features to prevent accidents, including two fully independent braking systems, a pitch control system, and turbine shut-offs in the event of excessive wind speeds, excessive blade vibration, or stress, and that design certification by the wind industry has led to significant reductions in the incidence of blade failure. (Supp. S-237-38.)

In the face of all of this evidence, Appellant claims only that more information is needed. But that claim lacks merit given the history and lack of any reported injury, given the safety control mechanisms to be incorporated in the turbines, and given the siting of the turbines at distances much greater than the Board's minimum or manufacturer requirements – all of which support the Board's decisions in this case. The Board's approval of the setbacks in the Certificate is based in analysis of the

extensive information provided by the application and the Staff's investigation. Thus, the Court should not reverse, vacate or modify the decision of the Board.

4. Appellant Cannot Complain of Setbacks Relative to Indian Lake State Park.

On appeal, Appellant makes the untimely argument that the Certificate is unreasonable because the Board should have increased the setbacks beyond the minimum requirements from Indian Lake State Park. (App. Br. at 10.) This claim fails because it was not stated in Appellant's application for rehearing. Therefore, Appellant may not challenge the setback from Indian Lake State Park.

This Court has repeatedly held applications for rehearing must set forth specific grounds as a jurisdictional prerequisite to appellate review. See *Office Of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247 (1994); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 12 Ohio St.3d 280, 290 (1984). Appellants' application for rehearing only addressed setbacks in relation to safety from "ice throw" and "blade shear" but did not even mention Indian Lake State Park, much less make any argument that the allowed wind farm has any effect on those recreating in Indian Lake State Park.

Regardless, both the Staff and the Board analyzed the potential scenic impacts that turbines might have on those using those using Indian Lake State Park. (Staff Report at 22-23, Supp. S-222-23 (noting that visual impact was studied extensively, including as part of the public relations program and varies greatly based on a number of conditions); Certificate at 6-7, 9 ¶ 5, 16, Appx. A-11-12, A-14, A-21.) Indeed, evidence shows that the visual impact of the turbines varies for each viewer (Supp. S-223), including, as Appellant points out, those who are otherwise busy using Indian Lake State Park's "parking lots, boat launching ramps, boat docks, a paved bike path,

bicycle and boat rental, miniature golf, basketball and volleyball courts, playgrounds and picnic areas." (App. Br. at 11.) The fact that turbines may sometimes be visible to some people hardly renders the Certificate or the Board's Opinion and Order unlawful or even unreasonable. The Board properly weighed all testimony from the public hearing and from the hearing on the Application, and determined that the Application should be approved. The decision to issue the Certificate was lawful and reasonable, and this Court should not reverse, vacate or modify the sound decision of the Board.

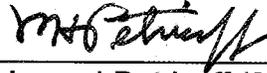
CONCLUSION

This Court need not revisit the Board's procedural rulings, reweigh the evidence or remand the matter for further hearing, as all the issues were thoroughly reviewed and analyzed at the hearing. With 6 witnesses testifying, 19 exhibits marked and 92 pages of testimony along with a meticulous 43-page Board decision followed by a thorough 18-page entry on rehearing, the Board fulfilled the role created for it by the General Assembly when it considered the Scioto Ridge Wind Farm project application. The

Board did not act unlawfully or unreasonably in reaching its decisions, and this Court should affirm the Board's March 17, 2014 Opinion, Order and Certificate.

Respectfully submitted on behalf of,

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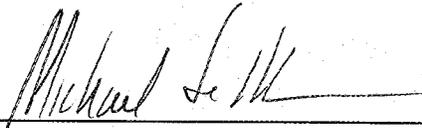
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties of record via U.S. mail on this 3rd day of December 2014.

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