

ORIGINAL

IN THE SUPREME COURT OF OHIO

Joseph J. Grant,	:	Ohio Supreme Court Case No. 2014-1198
	:	
Appellant,	:	Appeal from the Ohio Power Siting Board
	:	
v.	:	Ohio Power Siting Board
	:	Case No. 13-1177-EL-BGN
Ohio Power Siting Board,	:	
	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT JOSEPH GRANT

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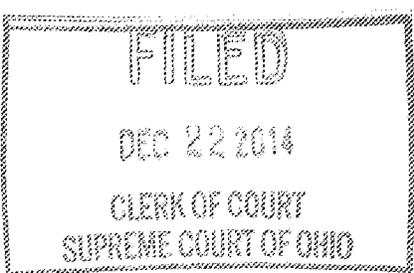


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REPLY BRIEF OF APPELLANT JOSEPH GRANT

INTRODUCTION

This case is not just another appeal of a dissatisfied neighbor of a proposed wind farm. While Hardin Wind, LLC (“Hardin Wind”) and the Ohio Power Siting Board (“Board”) characterize this case as straight-forward, this case differs from previous wind farm appeals in one important aspect. Only three months after the Board issued a certificate in this case, the General Assembly dramatically increased the minimum setbacks for wind farm projects to protect non-participating landowners. After hearing the complaints of local landowners over the years, the General Assembly finally addressed what the Board failed to recognize for years – that the old, bare-minimum statutory setbacks did not protect Ohio citizens. To remedy this problem, the General Assembly increased the 541 ft. property line setback to 1,125 ft. This is more than a 100% increase in the property line setback.

Appellant raised his concerns regarding the inadequacy of the old statutory minimum setbacks during the hearing below. He was not the only neighboring landowner that raised concerns about the Board adopting the minimum setbacks. Numerous people testified at the local public hearing regarding the dangers of ice throw and blade shear. These local landowners also testified regarding a wind turbine manufacturer’s recommended setback that far exceeds the

minimum setbacks adopted by the Board in this case. The concerns raised by Mr. Grant and other individuals at the local public hearing are presumably the same concerns that convinced the General Assembly to substantially increase the statutory minimum setbacks.

Despite the fact that Mr. Grant and local landowners raised all these concerns, the Board blindly accepted the bare minimum setbacks proposed by Hardin Wind. The Board did so, even though its Board Staff witness admitted that these minimum setbacks may not be enough to protect neighboring landowners. This Court has ruled that a determination of the Board is “unreasonable” if it is “manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238, 361 N.E.2d 436 (1977). Because the Board completely disregarded the evidence that addressed the dangers of adopting the minimum setbacks, the Board’s decision was unreasonable and should be reversed.

ARGUMENT

- 1. The record does not support the Board’s decision because Board Staff’s witness admitted that neighboring landowners could potentially be hit by ice thrown from a turbine if the 541 ft. setback is adopted.**

In its merit brief, Hardin Wind claims that Mr. Grant “ignores the record” in this case. Hardin Wind Merit Brief at 3. This claim is false. In his merit brief, Mr. Grant cited directly to Staff’s sole witness, Donald Rostofer, to prove that the 541 ft. minimum setback is woefully inadequate. Appellant’s Merit Brief at 7. Staff witness Rostofer admitted that 541 ft. minimum setback might not protect non-participating landowners from ice throw. Adj. Hearing Tr.¹ at 81.

¹ Two different hearings took place in this case – the adjudicatory hearing and the local public hearing. The adjudicatory hearing took place on January 22, 2014. Citations to “Adj. Hearing Tr.” are to the transcript of the adjudicatory hearing. Citations to the “Public Hearing Tr.” are to the transcript of local public hearing, which took place on January 8, 2014.

He admitted that a non-participating landowner could potentially be injured by ice thrown from a turbine while walking on their property. *Id.*

When asked about the potential dangers of building a residence in close proximity to a turbine, Mr. Rostofer provided a disturbing answer. Adj. Hearing Tr. at 83. He testified that it is the responsibility of neighboring landowners to determine whether it is safe to build residences within the proximity of the turbines. *Id.* Mr. Rostofer testified that non-participating landowners that choose to build residences on their property were building at “their own risk” if these new residences are in close proximity to the turbines. *Id.* Mr. Rostofer’s testimony shows that neighboring landowners’ ability to enjoy and use their own property is seriously limited, and that the 541 ft. setback will not protect neighboring landowners. Despite this evidence, the Board adopted the 541 ft. setback without further analysis. This decision was unreasonable.

2. The Board’s decision is unreasonable because the Board ignored the testimony of non-participating landowners regarding the inadequacy of the 541 ft. statutory minimum setback.

If any party is guilty of “ignoring the record,” it is Hardin Wind. Hardin Wind fails to discuss the testimony of non-participating landowners that testified at the local public hearing regarding the inadequacy of the 541 ft. setback.² Kate Elsasser provided some of the most compelling testimony at the local public hearing on this issue. Public Hearing Tr. 46-56. She also testified regarding her concerns about ice throw. Public Hearing Tr. 47. Ms. Elsasser also testified about European countries that require two kilometer setbacks, which is approximately 6,560 ft., in order to protect the public from turbines. Public Hearing Tr. at 54-55. Ms. Elsasser

² The Board is required to have a local public hearing pursuant to R.C. 4906.06, and the hearing is considered part of the record. (March 17, 2014 Opinion, Order, and Certificates at 6-7 (“Certif”); App. at 11-12).

testified that France has an approximately 1,640 ft.³ exclusion zone that prevents people from coming within 1,640 ft. of wind turbines. Public Hearing Tr. at 55. Ms. Elsasser testified regarding the recommended setback of Vestas, a manufacturer of two of the models that will potentially be used on this project. Ms. Elsasser testified that Vestas previously issued a recommended setback that required individuals to remain at least 1,300 ft. away from the turbines. Public Hearing Tr. at 52.⁴

The Board allegedly considered the testimony from the local public hearing in its decision. Certif. at 6-7; App. at 11-12.⁵ But the Board failed to fully discuss its analysis of these critical issues in its opinion and order. Instead, it merely summarized the comments of those individuals that testified at the local public hearing, and adopted the 541 ft. minimum setback. Certif. at 6-7, App. at A-11-12. The Board's decision is unlawful and unreasonable because it failed to properly weigh the legitimate concerns of local landowners.

3. Hardin Wind's arguments about average setback distances are irrelevant.

To distract the Court from the 541 ft. minimum setback adopted by the Board, Hardin Wind claims that the "average distance from turbine base to property line is 1,198 ft." Hardin Wind Merit Brief at 4. The average setback distance is irrelevant for a number of reasons. First, Hardin Wind admits that at least one property owner is actually 549 ft. from a turbine. Hardin Wind Merit Brief at 4. The 1,198 ft. average setback will not protect this landowner when ice is thrown onto his or her property, which Staff witness Rostofer admitted is a possibility. Adj.

³ Ms. Elsasser testified that the setback is 500 meters. 500 meters is approximately 1,640 ft.

⁴ Luke Reames also testified at the local public hearing. He testified why he believed the proposed setbacks were inadequate. Like Ms. Elsasser, Mr. Reames testified regarding the 1,300 ft. setback that Vestas recommended. Public Hearing Tr. 59.

⁵ Citations to "App" are citations to Appellant's appendix. Citations to "Supp." are citations to Appellant's supplement.

Hearing Tr. at 81. Second, there is no guarantee that Hardin Wind will actually build the turbines in the same exact locations proposed in the application. Once a certificate is issued to a wind farm developer, the developer can seek to shift the locations of the turbines by filing an application to amend the certificate with the Board.⁶ Because the ultimate turbine locations may potentially move, the average setback distance could change as well. That is why establishing an adequate minimum setback in the certificate is important. Instead of carefully considering whether the statutory minimum setbacks should be applied in this case, the Board and its Staff took the easy way out and applied the bare minimum setbacks.

4. The Board and Hardin Wind incorrectly assume that *Buckeye Wind I* justifies the Board's application of the bare minimum statutory setbacks in every wind turbine case.

The Board and Hardin Wind rely heavily on *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 2012-Ohio-878, 966 N.E.2d 869 ("*Buckeye Wind I*"). They contend that the Board's decision should be affirmed simply because the setbacks satisfied the statutory minimum. These arguments should be rejected. First, the Court affirmed the setbacks in *Buckeye Wind I* because the Court determined that the setbacks were supported by the record. *Buckeye Wind I* at ¶ 34. This was not a blanket endorsement of the Board's practice of blindly applying the statutory minimum in all wind farm cases. The Board has a continuing obligation to examine the record in every case to determine if the proposed setbacks are appropriate, even when the proposed setbacks comply with the statutory minimum.

⁶ In fact, Hardin Wind has already filed an application to amend the certificate which requests permission to shift the location of some of the turbines.
See <http://dis.puc.state.oh.us/TiffToPDF/A1001001A14I11B45858D16355.pdf>

In this case, the record shows that the 541 ft. setback will not protect neighboring landowners, and shows why the Board's decision to apply the bare minimum setback was unreasonable. Ms. Kate Elsasser testified that some European countries mandate setbacks that are substantially longer than the 541 ft. minimum adopted by the Board. Public Hearing Tr. at 54-55. She also testified that one turbine manufacturer, Vestas, previously recommended that individuals stay at least 1,300 ft. away from the turbines. The Board does not discuss this in any detail in the opinion, order and certificate. Although the Board briefly discussed the testimony of individuals that spoke at the local public hearing, it is evident that Board ignored the concerns raised by Ms. Elsasser.

5. The General Assembly substantially increased the statutory minimum setbacks to protect non-participating landowners from the old, inadequate minimum setbacks.

In its merit brief, Hardin Wind claims that Mr. Grant is trying to apply the new minimum setbacks established by H.B. 483. Hardin Wind Merit Brief at 4. This mischaracterizes Mr. Grant's position. Although Mr. Grant recognizes that H.B. 483 was not effective when the opinion and order was issued, it is certainly relevant that the 541 ft. setback the Board adopted was eliminated by H.B. 483. In fact, H.B. 483, which increased property line setback to 1,125 ft., was signed into law only three months after the opinion and order in this case was issued.⁷

By increasing the setbacks, the General Assembly presumably recognized that the old 541 ft. setback failed to protect non-participating neighbors because these old setbacks were, in part, measured from the residence. The old statutory setbacks were based upon unwise and false

⁷ The Board argues that the new setbacks were not "effective" until September 15, 2014. But this does not change the fact that the bill was signed on June 16, 2014, only one month after the entry on rehearing was issued by the Board in this case (May 19, 2014). Mr. Grant finds it hard to believe that the Board was not aware of legislation pending that would substantially increase the 541 ft. setback while, at the same time, the Board was considering an application for rehearing about the inadequacy of the 541 ft. setback.

distinctions between “property” and “residence.” The old setbacks failed recognize that property owners should have the right to use and enjoy their entire property without fear of being injured or killed by turbine debris or ice throw. Property owners also should be able to build structures anywhere on their property without being told that they are building at their own risk.

6. The Board unreasonably accepted a one-sided agreement that ignored the safety concerns of non-participating landowners.

In its merit brief, the Board points to the “joint agreement” that the Board adopted in this case. Board Merit Brief at 4. This creates the false impression that this “joint agreement” was a global agreement accepted by a diverse array parties except for one obstinate individual. The Board fails to mention that no non-participating landowners signed the stipulation. There were only three parties that signed the stipulation: Hardin Wind, Staff, and the Ohio Farm Bureau Federation (“Farm Bureau”). None of these parties represented the interest of the non-participating landowners. Hardin Wind’s interest is clearly inconsistent with the interest of the non-participating landowners. The Farm Bureau’s interest also conflicts with the interests of non-participating landowners. The Farm Bureau’s witness testified that the Bureau’s primary concern is obtaining lease payments for participating landowners. Direct Testimony of Dale R. Arnold (“Arnold”) at 3 and 5. Participating owners are paid \$4000 to \$7000 a year to place turbines on their property. Arnold at 5. These participating landowners that the Farm Bureau purportedly represents have an undeniable financial incentive to ignore the dangers of the turbines.

The final party to this “joint agreement” was Staff. If any party should have represented non-participating landowners’ interests, it should have been Staff. Unfortunately, this did not occur. As previously discussed, Staff simply applied the bare minimum setbacks, and expected

non-participating landowners to take responsibility for determining whether or not it would be safe to be in close proximity to the turbines.

This one-sided “joint agreement” failed to incorporate any of the concerns of non-participating landowners. In Commission cases, the Court has previously articulated its concerns with “joint agreements” that fail to account for the interest of entire customer classes. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229 at 233, 661 N.E.2d 1097 (1996). This concern should be even greater in wind farm siting cases, because the people that do not typically sign the stipulation – the non-participating landowners - are almost always the people with the most to lose. In this case, the Board blindly accepted the one-sided stipulation without making any modification to address the non-participating landowners’ concerns about the setbacks.

7. The Board’s claim that Mr. Grant does not have a “present and immediate” interest in this appeal is wrong.

In its merit brief, the Board proposes a new rule that would essentially preclude any appeal of a non-participating landowner in wind farm cases. The Board argues that Mr. Grant should not be allowed to challenge the 541 ft. setback because he did not prove he has current plans to build his residence “within the 541-foot setback.” Board Merit Brief at 10. In essence, the Board is arguing that the only neighboring landowners that can challenge a Board decision are landowners that have “present and immediate” plans to build homes directly next to a turbine. If the court adopts this new rule, non-participating landowners that live in the project area (as Mr. Grant does) and were allowed to intervene in the proceeding before the Board (as Mr. Grant was) will not be allowed to appeal unlawful or unreasonable decisions of the Board. Considering the fact it is typically non-participating landowners that appeal the Board’s siting of

wind turbines, one could see why the Board may like such a rule. The Court, however, should reject the Board's attempt to eliminate the appeal rights of non-participating landowners.

While it is true Mr. Grant must show he has a "present" and "immediate" interest in the appeal, there is no question Mr. Grant proved that he has such an interest. Mr. Grant is a landowner that lives in the project area that sought intervention in the hearing because of his opposition to the project as proposed. Grant's Motion to Intervene at 1; Grant Direct Testimony at 1, Supp. S-296. After consideration of Mr. Grant's motion to intervene, the Board determined that Mr. Grant had an interest in the proceeding and allowed him to intervene. October 30, 2013, Administrative Law Judge Entry. If the project goes forward as proposed, it will assuredly have an impact on the project area, which would also affect Mr. Grant's interest.⁸ Because the project will have an impact on Mr. Grant's vital interest, he has a "substantial right" to bring this appeal. *East Ohio Gas Co. v. Pub. Utilities Comm'n of Ohio*, 39 Ohio St. 3d 295, 295, 530 N.E.2d 875, 878 (1988) (the Court held that the appellant had a substantial right to bring the appeal, citing the Commission's decision granting intervention as evidence of the appellant's interest in the appeal). Compare *In re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St. 3d 284, 288, 2014-Ohio-1532, ¶ 19, (the Court held there was no evidence that the Commission's decision would harm or prejudice the appellant in any manner). The Board's reading of *Holladay Corp.* and its progeny misses the mark. Mr. Grant has the right to appeal to this Court.

⁸ The Board cannot argue that project will not impact a landowner that lives in the project area. Board Staff found during its investigation that the project will have various impacts on the local area, such as socioeconomic impacts, ecological impacts, and potential impacts on the safety of local landowners. Staff Report at 21-45, Supp. at S-221-245.

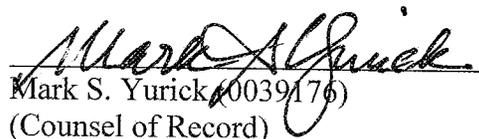
8. The Board's and Hardin Wind's attempt block Mr. Grant's appeal based on a hyper-technical interpretation of R.C. 4903.10 is unwarranted.

Hardin Wind claims that Mr. Grant cannot “complain of setbacks relative to Indian State Park.” Hardin Wind Merit Brief at 9. The Board’s goes as far as saying that Mr. Grant cannot attack setbacks because some of the affected property owners are “unknown” or “unidentified.” Board Merit Brief at 10. These arguments miss the point of Mr. Grant’s appeal. Mr. Grant properly raised his overall concern with the many dangers the turbines will pose for individuals because of inadequate setbacks. Application for Rehearing at 3-4, App. A-69-70. The fact that he did not specifically identify a particular parcel of land that would be impacted (be it Indian State Park or otherwise) should not preclude him from attacking the setbacks proposed by Hardin Wind. The record shows that Mr. Grant is a landowner that lives in the project area that will be impacted by the project. The Court should not shut the door Mr. Grant’s appeal rights because of Hardin Wind’s and the Board’s hyper-technical interpretation of R.C. 4903.10.

CONCLUSION

The Board's adoption of the 541 ft. minimum setback is unreasonable and unlawful. The Board ignored the concerns of neighboring landowners regarding the dangers of adopting a 541 ft. property line setback. These same concerns led to the General Assembly doubling the 541 ft. setback. Instead of considering safer setback options, the Board certificated this project with inadequate setbacks. This will not protect the public. And, despite what Board Staff may believe, local landowners should not bear the risks of dangerous turbines. The Board must do more than simply accept the bare minimum. Its decision does not protect neighboring landowners, and is unreasonable. As such, the Court should direct the Board to correct the error complained of herein by establishing minimum setbacks that protect non-participating property owners living in the project area.

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