

Case No. 2023-1286

In the Supreme Court of Ohio

On Appeal from
The Ohio Power Siting Board
Case No. 21-0117-EL-BGN

In the Matter of The Application of Kingwood,
Solar I, LLC for a Certificate of Environmental
Compatibility and Public Need to Construct a Solar-
Powered Electric Generation Facility in Cedarville, Miami,
and Xenia Townships, Greene County Ohio

**BRIEF OF AMICUS CURIAE,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 82, IN
SUPPORT OF THE POSITION OF APPELLANT
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Amicus curiae the International Brotherhood of Electrical Workers Local Union 82 (IBEW Local 82) supports Appellant Kingwood Solar I, LLC (“Kingwood”) in seeking to reverse the Ohio Power Siting Board (“Board”)’s denial of certification. IBEW Local 82 writes separately to emphasize three ways that the Board erred when deciding that “based on the unanimous opposition to the Project by the government entities whose constituents are impacted by the Project,” the Kingwood Project (“Project”) was not in the “public interest.” ICN 146, Opinion & Order (December 15, 2022) ¶152.

One, opposition was not at all “universal.” Only three of the twelve townships in the county participated in the case. Further, the Board, which improperly relied on public comments to support its position, summarily disregarded IBEW’s members’ comments, presumably because they did not support the Board’s contrived narrative of “universal opposition”. *Id.* ¶43 and fn. 8. Numerous local public hearing witnesses and commenters advocated for the Project, and for good reason—the Project will bring over four hundred jobs, millions of dollars in payments to the local community, more energy production to Ohio, and will reduce the need for polluting forms of energy. The Board’s understanding that opposition was “overwhelming” shows a clear misapprehension of the record.

Two, the Board never assessed whether there would be any potential negative impacts to the public before deciding that the Project was not in the “public interest.” In fact, the Board found the Project satisfied every criterion of R.C. 4906.10(A) except (A)(6). The Board must evaluate the “public interest” by “balancing the facility’s projected benefits with the potential negative impacts.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶55. But the Board did not conduct any balancing of positive and negative impacts before deciding this Project did not serve the public interest. Instead, the Board counted

statements of local opposition, and then concluded that given the (incorrect) number of statements, the Project would not serve the public interest. Not once in its summary of those statements did the Board evaluate any evidence of potential negative effects. This new method of evaluating the “public interest” is not a faithful construction of the statutory term, and for this error, the Board’s decision should be reversed.

Three, the Board unreasonably concluded that the project would not serve the public interest—while acknowledging that the Project would bring significant economic investment and job opportunities and would generate clean electricity to fuel further economic growth, and safeguard against unhealthy air pollution. Even considering the local opposition, whose concerns the Board failed to evaluate, there is little to no evidence of negative impacts to the local communities. Their concerns are either contradicted by undisputed evidence in the record or fully addressed by conditions on certification to which Kingwood has already agreed. Denying certification would deprive the public of the valuable benefits of the Project, while failing to prevent significant negative impacts.

INTERESTS OF AMICI CURIAE IBEW LOCAL UNION 82

IBEW Local 82 represents electrical workers across industries, including utilities. IBEW Local 82 covers Ohio’s Miami Valley Region, where it has nearly 900 active members. In Greene County, where this project will be located, IBEW Local 82 has over 270 members. IBEW Local 82 supports the proposed Project, which will bring substantial new investment to the area. The Project will create over 400 jobs during its construction phase, including for skilled electrical workers, supporting lifelong careers in Ohio’s skilled building and construction trades. ICN 57, Staff Report (October 20, 2021) at 16.

After construction is complete, the Project will sustain numerous long-term jobs, including for electrical workers, for ongoing maintenance and operations throughout its 35-year lifetime. *Id.* at 17. These jobs will bring significant earnings to workers on the Project, which will further stimulate economic activity in the area. And with well-paying and stable local jobs, IBEW members enliven their communities, volunteering as coaches for youth sports teams, acting as volunteer firefighters, and being present at home and with their families. The Project will further benefit the entire state of Ohio by training a skilled workforce capable of constructing solar and energy storage facilities, which will in turn attract greater investment to the state. For all of these reasons, IBEW Local 82 supports the Project and respectfully urges the Court to reverse and remand the Board’s decision.

BACKGROUND

I. Fact Background

IBEW Local 82 incorporates Appellant Kingwood’s statement of facts.

II. Legal Background

The Board must evaluate eight factors based on the record when considering whether to approve a utility project: “the need for the facility”; the “nature of the probable environmental impact”; whether the project would impose “the minimum adverse environmental impact”; whether the project would “serve the interests of electric system economy and reliability”; compliance with other state laws; “what its impact will be on the viability” of certain agricultural land; whether the project “incorporates maximum feasible water conservation practices”; and whether the project will serve “the public interest, convenience, and necessity.” R.C. 4906.10 (A). The Board must “find[] and determine[]” that each of one these factors has been

fulfilled before granting certification. *Id.* The Board may also condition certification upon modification. *Id.* § 4906.10(B).

STANDARD OF REVIEW

When reviewing Board orders, the Court reviews questions of law de novo, without according the Board any deference. *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶12 (citing *In TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, --- Ohio St.3d ----, 2022-Ohio-4677, --- N.E.3d ----, ¶3. Questions of law include “questions like what is the proper interpretation of a statutory term, or whether the board followed the procedures prescribed by statute.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶12 (citations omitted).

If the Board’s decision rests on an “open-textured” term like “public interest,” the Court considers whether the Board’s “exercise of its implementation authority” falls “within the zone of permissible statutory construction.” *Id.* ¶15 For example, the Court concluded that in evaluating the “public interest,” the Board did not exceed its statutory authority by considering a “facility’s impact on current and potential recreational areas.” *Ohio Edison Co. v. Power Siting Comm’n*, 56 Ohio St. 2d 212, 214, 383 N.E.2d 588 (1978)). More recently, the Court reviewed the Board’s “exercise of its implementation authority” in determining “whether a facility represents the ‘minimum adverse environmental impact,’” again by “looking to whether the agency’s decision falls within a zone of permissible statutory construction.” *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶16 (citation omitted).

For questions of fact, the Court considers whether “the record contains sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake

or willful disregard of duty.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶7. If the Board’s order is “internally inconsistent,” then the Board’s decision was “unreasonable.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶16.

ARGUMENT

I. Proposition of Law No. 1: When the Board’s conclusion is “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty,” the Court will reverse the Board’s decision. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7.

The Board clearly misapprehended the record to find that the Project was not in the public interest on the sole basis of public opposition. ICN 146, Opinion & Order (Dec. 15, 2022) ¶152. First, the Board’s conclusion that the Project did not serve the public interest was based solely on “unanimous opposition,” which is not proper as the Board failed to find any negative impacts and weigh those against the public benefits. Further, the record establishes that the Board ignored both evidence of support, *Id.* ¶152 (rejecting evidence submitted by Kingwood of polling results), and public comments in support, *Id.* (refusing to consider IBEW member comments), to artificially create a narrative of overwhelming opposition.

A. IBEW Local 82 members supported the Project because of its overwhelmingly positive economic impacts.

IBEW Local 82 members provided support both through testimony at the local public hearing and through public comments on the docket. *Id.* At the local public hearing an IBEW Local 82 member, Mr. Bruce, testified that he is a lifelong resident of the City of Xenia in Greene County. ICN Trans. (Jan. 20, 2022) p. 148 lines 12-17. Mr. Bruce testified regarding his support for the Project based on the money that the local schools will receive from the Project’s operation, if approved. *Id.* p. 149 lines 8-12. Additionally, Mr. Bruce testified to the benefits the

Project will provide local workers should the Project enter the Payment in lieu of Taxes program. *Id.* lines 18-25. Finally, he touched on the educational benefits the Project will provide students with the Greene County Career Center who may have the opportunity to work on the Project. *Id.* p. 150 lines 4-6.

IBEW Local 82 writes to support the Project for these reasons and more. The record established that the Project would generate for Ohio “\$32.7 million in local earnings during construction[,]. . . \$7.7 million in annual earnings during facility operations. . \$112.1 million in local output during construction [and] . . . \$1.7 million in local annual output during facility operation.” ICN 57, Staff Report (Oct. 29, 2021) at 16. Additionally, the Project would enter into an agreement projected to contribute between \$1.2-1.5 million annually in lieu of taxes to Greene County. *Id.*

The Board used the opposition of local government entities in the proceeding to completely ignore and eliminate public support for the project by claiming their decision is based on the “unanimous opposition to the Project by the government entities whose constituents are impacted by the Project” instead of actually listening to the local citizens who made their voice heard. ICN 146, Opinion & Order (Dec. 15, 2022) ¶152. This is particularly egregious when the testimony of the local government officials highlighted how few people they actually talked with. ICN Trans. Volume VI at pp. 1506, 1538 (Jeff Ewry, a Cedarville Township Trustee, only spoke to “three to four dozen or less” people about the Project.); *Id.* at pp. 1450-1452. (Don Hollister, a Miami Township Trustee, conversed with “dozens” of residents about the Project); *Id.* at pp. 1292-1294 (Stephen Combs, a Xenia Township Trustee, only spoke to about 40-50 residents and received about 50 emails opposing the Project.)

The Board's decision improperly relies on a few local government officials, who admitted they spoke to relatively few people, replacing the stated positions of every supportive local resident with the opinions of these local officials. The Board's decision is based on a misapprehension of the record and must be reversed.

II. Proposition of Law No. 2: The Board's implementation of a statutory term cannot fall outside "the zone of permissible statutory construction." *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶15.

The Board must evaluate whether a proposed project serves "the public interest, convenience, and necessity." R.C. 4906.10(A). This is an "evidentiary issue." See *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶70. In evaluating the "public interest," the Board must consider evidence of impacts, not the quantity of opinions. Yet the Board here relied only on "uniform public opposition expressed by the local government entities" without examining whether that opposition was based on any underlying evidence of negative impacts. ICN 146, Opinion & Order (Dec. 15, 2022) ¶150; ICN 165 Order on Rehearing (Sept. 21, 2023) ¶30. The Board noted that the local governments involved in the proceeding claimed their opposition was based on land-use concerns, the project's impact on the environment, agricultural impacts, property value concerns, tourism impacts, and wildlife impacts. ICN 146, Opinion & Order (Dec. 15, 2022) ¶147.

Yet, at no point did the Board discuss whether any of those concerns were grounded in fact and supported by the evidence. And the Board could not have done so because the Board found that the Project satisfied every other criterion of R.C. 4906.10(A) which by default addresses all of those above concerns. Because the Board did not consider whether the evidence shows that the project might negatively affect the people who articulated their opposition, let alone explain how the evidence supports the concerns raised by the opposition, the Board could

not and did not weigh negative impacts against benefits. The Board simply accepted the opposition on its face without probing whether the opposition was grounded in fact and reality. This unprecedented method of evaluating the “public interest” fell outside “the zone of permissible statutory construction,” and the Board’s decision must be reversed. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, ---N.E.3d ----, ¶15.

A. To evaluate “public interest,” the Board must consider evidence of public impacts.

To fulfill its mandate to evaluate the public interest, the Board “balanc[es] the facility’s projected benefits with the potential negative impacts.” *Id.* ¶55. It is not uncommon for neighbors to dislike proposed projects. In prior cases challenging Board decisions on the public interest, neither the Board nor this Court considered how many people voiced their opinions against the project. Instead, the Board and this Court considered whether the challengers had presented sufficient evidence of negative impacts to establish that the project was against the public interest.

For example, when two surrounding cities and a local opposition group appealed the Board’s certification of a natural gas pipeline, the Court did not consider the breadth of the opposition. Instead, the Court took a close look at the evidence presented by the appellants on safety hazards and determined that the record did not support their conclusion that the project was against the public interest. *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶¶48-58. Evidence of negative impacts was essential to the Court’s decision, so much so that the Court distinguished another case in which appellants never had an opportunity to present the facts to the Board. *Id.* ¶¶55-56 (citing *In re Application of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210). Because the Board allowed the challengers to “build [their] factual case” against the natural gas pipeline and

considered the evidence on safety hazards, the Court accepted the Board's conclusion on public interest. *Id.* ¶56.

Just recently, the Court considered an appeal brought by a group of neighbors to the Board's certification of two solar projects. *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶12. The appellants raised many arguments, including that the setbacks between the solar projects and neighboring land and homes were insufficient and would negatively affect them. *Id.* ¶69. Because the appellants "failed to present any evidence" that the setbacks were insufficient, the Court rejected their arguments. *Id.* ¶70.

Similarly, when neighboring residents, the surrounding county and three cities challenged the Board's certification of a wind farm on the basis of public interest, the Board, and later the Court, considered challengers' evidence of negative impacts. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶¶30-33. The appellants' expressed concern was potential blade throw from wind turbines, and again the Court concluded that the evidence was not sufficient to reverse the Board's conclusion that the project was in the public interest. *Id.* ¶¶30-31.

Earlier this year, the Court considered another appeal of the Board's certification of a wind farm by neighbors, this time nineteen local residents and an observatory. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----. Again, challengers asserted the project was against the public interest, this time on the basis of economic impact. *Id.* ¶¶54-58. An economic analysis showed that positive economic impacts outweighed negative economic impacts, the neighbors submitted no contrary analysis, and the Board determined that the project was in the public interest. *Id.* ¶¶55, 58. The Court agreed that the evidence supported the Board's conclusion. *Id.*

In all cases, this Court reviewed whether the Board considered specific evidence of negative impacts and did so appropriately. In no case did the Board suggest that negative statements alone were evidence of negative impacts. Even in the two prior determinations the Board cites to support its argument that the Board considers statements of opposition, the Board considered whether the commenters presented any evidence of negative impacts, not just how many statements there were. ICN 165, Order on Rehearing (Sept. 21, 2023) ¶38 (citing *In the Matter of the Application of Republic Wind, L.L.C. for A Certificate to Site Wind-Powered Elec. Generation Facilities in Seneca & Sandusky Clys., Ohio*, OPSB No. 17-2295-EL-BGN, ¶¶87, 95, 100 (June 24, 2021) (finding that “Local Residents have set forth credible evidence” of negative impacts to the public interest); *In re Am. Transm. Systems, Inc.*, OPSB No. 19-1871-EL-BTX, ¶58 (May 19, 2022) (considering whether the “evidence in the record” supported a determination that the facility served the public interest)). In fact, one former Chairman of the Board recognized that “passionately held views of one or more opponents of a project do not necessarily mean that the positions held by the developer are not reasonable, are without merit or incapable of being sustained by the Board,” and advised that the Board make its determinations based on the evidence. *In re Application of the Ohio State Univ. for a Certificate of Environmental Compatibility and Public Need to Construct a Combined Heat and Power Facility in Franklin County, Ohio*, OPSB No. 19-1641-EL-BGN, (Sept. 17, 2020) (Randazzo, S., concurring).

B. The Board impermissibly considered opinions, not impacts.

Here, the Board took a tack the Court has never seen or allowed before. Instead of determining whether the concerns raised by those local governmental entities which opposed the Project were substantiated and resulted in negative impacts which may outweigh the benefits of

the Project, the Board simply stopped after counting negative statements. The Board then assumed that because there were negative statements and opposition, the public interest would not be served by the Project. This assumption is fatally flawed. Negative statements may be based on misapprehensions, impermissible discrimination, or outright falsehoods. Unless the Board investigates the reasoning behind the opposition and substantiates that reasoning, the Board cannot determine whether there are any potential negative impacts, or whether the opposition simply did not understand the project or the mitigation measures; exaggerated the project's consequences; or just found it unsuited to their tastes. In another administrative context, the reviewing court warned against relying on "public opinion" instead of "direct evidence" because of the impossibility of comparing "subjective" opinions. *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App.3d 689, 694-695, 672 N.E.2d 1087 (11th Dist.1996).

If the Board listens to opinions alone, without probing for evidence of the negative impacts underlying those opinions, the Board cannot assess whether any negative impacts have been mitigated, or weigh them against the benefits, as it needs to do to assess whether the project serves the overall public interest. A neighbor who opposes a project because it will exacerbate her asthma is concerned about very different impacts than a neighbor who opposes a project because it is not pretty.

The Board's new method of evaluating the public interest by considering negative public statements instead of any underlying evidence of negative impacts is not permissible as a matter of law. If allowed to stand, it will incentivize project opponents to spread misinformation so that more people will speak out against a project, no matter how beneficial. The legislature wisely prevented such gamesmanship by entrusting the Board to review the facts and accurately determine public impacts. This Court should not allow the Board to abandon its role and assume

that opinions are facts. To do so would reduce the Court’s own role in judicial review. The Court would no longer review the evidence to determine whether the Board’s conclusions on public impacts are adequately supported, but only verify that the Board correctly tallied negative opinions. This Court is not a poll counter, and neither is the Board. The law demands more.

III. Proposition of Law No. 3 If the record does not “contain[] sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence,” the Court will reverse. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. The Board’s conclusion that the project is against the public interest is manifestly contrary to the record.

The Board agrees that it must evaluate the public interest through a “broad lens.” ICN 146, Opinion & Order (Dec. 15, 2022) ¶142. Had it actually done so, the Board could not have found that the Project is against the public interest. The Project will bring sweeping benefits to the people of the state of Ohio and to the local community. In comparison, had the Board investigated the rationale behind the four local government entities’ opposition, it would have seen very little to substantiate concerns about any negative impacts. As discussed above, the oppositions concerns were addressed through the Joint Stipulation conditions as proven by the Board’s findings that the seven other statutory factors for certification were satisfied. The record does not support the Board’s determination.

A. The record shows, and the Board acknowledged, immense benefits to Ohio and the local community.

There is no dispute that this Project would significantly benefit Ohio. The Board acknowledged five comprehensive categories of benefits: “(1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and [payment in lieu of taxes], (3) air quality and climate impact improvements relative to transitioning from fossil fuels

to renewable energy resources, (4) protecting landowner rights, and (5) preserving agricultural land use.” ICN 146, Opinion & Order (Dec. 15, 2022) ¶142.

In other words, this Project would not only create hundreds of jobs, tens of millions of dollars in economic growth, and additional millions of dollars to fund payments to the local community, but it would also ensure that the electrical supply continues to sustain further economic growth. See ICN 57, Staff Report (October 20, 2021) at 16. (Detailing the millions of dollars in economic growth and direct payments to the local community). The Project would generate this energy much more cleanly than fossil fuel alternatives, so that it will not inundate local communities with toxic air pollution or further contribute to climate change. And because this Project would return the land to agriculture following operation, the Project would preserve agricultural use.

In addition to these recognized benefits, there are several benefits implicit in the Board’s conclusion, based on the record, that the other seven statutory factors for certification had been established. ICN 146, Opinion & Order (Dec. 15, 2022) ¶¶175-178, 180-181. For example, the Project undisputedly serves “interests of electric system economy and reliability,” “incorporates maximum feasible water conservation practices,” and imposes “minimum adverse environmental impact.” R.C. § 4906.10(A).

B. There is little to no evidence of negative impacts.

The Board placed inordinate and unprecedented weight on unsubstantiated public opposition, which did not demonstrate or substantiate any significant negative impacts, and then used non-record public comments to justify its decision – unless they did not support the Board’s decision in which case they were discarded as not persuasive. Public comments were top of mind to the Board in assessing the public interest. ICN 146, Opinion & Order (Dec. 15, 2022) ¶¶148,

151. But the Board did not examine whether the commenters that opposed the project had any legitimate concerns, were distinct individuals, or maintained their opposition. While public comments can sometimes be informative and should be considered, the Board wisely announced a policy to put more weight on sworn testimony submitted to the record and subject to cross-examination. Board, *Public participation at the OPSB*, <https://opsb.ohio.gov/processes/public-participation> (accessed Dec. 18, 2023). The Board failed to adhere to this policy and placed more weight on the public comments than they can bear.

Further, when faced with public comments that undercut the Board's ultimate conclusion, the Board simply did not count them. ICN 146, Opinion & Order (Dec. 15, 2022) ¶148, fn. 8. Stunningly, while in the same breath claiming to not discount the importance of IBEW's comments in the proceeding, the Board immediately states "we see benefit to considering the ratio of support/opposition comments absent the IBEW block for purposes of gauging the local perception of the project." *Id.* fn. 8. IBEW Local 82 has over 270 members in Greene County and at least 103 members in Xenia and Miami Townships, yet the Board simply ignored their support because it hurt the math the Board cobbled together in an attempt to justify its unsupportable conclusion in this proceeding. Though the IBEW members' public comments are not part of the record, the comments should have been considered by the Board as much as the negative comments were. It was "internally inconsistent" and "unreasonable" for the Board to consider only the negative comments without considering positive comments. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶16 (citations omitted).

As noted above, the Board recited a list of concerns by the four local governments who opposed the Project. *Id.* ¶147. The Board mentioned (1) land-use concerns, (2) the Project's

impact on certain nature preserves and state parks, (3) agricultural impacts, (4) property value concerns, (5) concerns of project sprawl and impacts to higher density housing, (6) impacts to the agricultural character of the area, (7) tourism impacts, and (8) wildlife impacts. *Id.*

Completely absent from the Opinion and Order was any additional discussion as to the validity of any of these concerns. Unlike the benefits, which the Board expressly stated it found existed based on the record, *Id.* ¶149, the Board never mentions those concerns again.

Instead, the Board stated its “primary concern surrounding the Project, * * * , is the uniform public opposition expressed by the local governments”. *Id.* ¶150. The Board doubled down and stated, “based on the unanimous opposition to the Project by the government entities, whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest.” *Id.* ¶152. The Board’s decision on every other criterion of R.C. 4906.10(A) means that even if it attempted to find negative impacts based on the local governments’ concerns the Board would have failed. The first two concerns noted by the local governments were land-use concerns and impacts on nature preserves and state parks. But the Board determined that the Project represented the minimum adverse environmental impacts to land use and cultural resources. ICN 146, Opinion & Order (Dec. 15, 2022) ¶¶107-108.

The third concern was the Project’s impact on agriculture. The Board found that, subject to the agreed upon conditions, the Project’s impact on agriculture was in compliance with R.C. 4906.10(A)(7), especially since the area will be restored to agricultural use after the useful life of the Project. *Id.* ¶¶155-156. The fourth concern the Board recognized the local governments were worried about was diminished property values. The only property value study in the record shows that there are no negative impacts to nearby property values, and the Staff found no errors in this study. ICN 57, Staff Report (October 29, 2021) at 41.

The fifth and sixth concerns were project sprawl in connection with high density housing and the impact on the agricultural character of the area. If the local governments meant that the Project would negatively affect the residential character of the surrounding community, this concern is not based in fact. The Project will be built on agricultural land. *Id.* at 11. Further, in assessing the Project’s environmental impact, the Staff found that “[s]ignificant impacts to residential... land uses are not anticipated, and surrounding agricultural land use would continue with minimal disruption.” *Id.* at 11-12. Further, the Board noted that while Staff cited to concerns related to regional planning compliance and aesthetics, Staff did not find those concerns warrant denying the Project. ICN 146, Opinion & Order (Dec. 15, 2022) ¶47.

Finally, the seventh and eighth concerns the Board noted the local governments raised were negative impacts on tourism and wildlife. The latter was conclusively resolved when the Board found that the Project determined the probable environmental impact and represented the minimum adverse environmental impact. *Id.* ¶108. The Board did not directly address the local governments’ concerns related to tourism. However, those concerns were based on the Projects impact on various cultural, historical, scenic, and recreational resources. *Id.* ¶146. Because the Board found that the Project represented the minimum adverse environmental impacts to land use and cultural resources this would eliminate any concerns related to negative impacts on those cultural resources. *Id.* ¶¶107-108.

Although the Board failed to ever establish if the local governments’ concerns raised valid negative impacts to be weighed against the established benefits of the Project, the record is clear that those concerns fail to raise any negative impacts. The Board undertook no attempt to determine if any of the local governments’ concerns would lead to verifiable negative impacts. This Court’s held that the Board must evaluate the “public interest” by “balancing the facility’s

projected benefits with the potential negative impacts.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶55. Because the Board failed to establish any negative impacts exist it could not and did not weigh the benefits it acknowledged against anything.

C. The Board should have preserved the project’s benefits and addressed any remaining negative impacts by imposing conditions on the project.

To the extent the Court finds that there are any significant negative impacts, the Court should instruct the Board to impose conditions to mitigate those impacts and grant the certification. The Board has the power to and regularly imposes conditions to mitigate negative impacts. See R.C. § 4906.10(A); *In re Application of Duke Energy Ohio*, 166 Ohio St.3d 438, 450, 187 N.E.3d 472 (2021) (noting that the Board is “plainly empowered” to impose certificate conditions). Because the benefits of this Project are vast, the only reasonable path forward requires preserving those benefits and mitigating negative impacts so that on balance, the Project serves the public interest.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the Board’s denial of certification of the Kingwood Solar Project.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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