IN THE SUPREME COURT OF OHIO

IN THE MATTER OF	**:**	
THE APPLICATION OF	**:**	
KINGWOOD SOLAR I, LLC	**:**	**Case Number: 2023-1286**
For a Certificate of Environmental	**:**	
Compatibility and Public Need for a Solar-	**:**	
Powered Electric Facility Located	**:**	
in Greene County, Ohio	**:**	**(On Direct Appeal from the**
	:	**Ohio Power Siting Board**
	:	**Case No. 21-117-EL-BGN)**

BRIEF OF INTERVENING APPELLEE THE BOARD OF COMMISSIONERS OF GREENE COUNTY, OHIO

Thaddeus M. Boggs (0089231)
(Counsel of Record)
Jesse J. Shamp (0097642)
Frost Brown Todd LLP
10 West Broad Street, Suite 2300
Columbus, OH 43215
Tel: (614) 464-1211
Fax: (614) 464-1737
Email: tboggs@fbtlaw.com
Email: jshamp@fbtlaw.com
Attorneys for Greene County Board of Commissioners

Michael J. Settineri (0073369)
(Counsel of Record)
Anna Sanyal (0089269)
Emily J. Taft (0098037)
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-5462
Fax: (614) 719-5146
Email: mjsettineri@vorys.com
Email: aasanyal@vorys.com
Email: ejtaft@vorys.com
Attorneys for Appellant
Kingwood Solar I, LLC

David Yost (0056290)
Attorney General of Ohio
Stephen W. Funk (0058506)
(Counsel of Record)
Emily Anglewicz (0083129)
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
Tel: (330) 849-6602
Fax: (330) 376-4577
Email: sfunk@ralaw.com
Email: eanglewicz@ralaw.com
Attorneys for Appellee
Ohio Power Siting Board

Daniel A. Brown (0041132)
(Counsel of Record)
Brown Law Office LLC
204 S. Ludlow St., Suite 300
Dayton, OH 45402
Tel: (937) 224-1216
Fax: (937) 224-1217
Email: dbrown@brownlawdayton.com
Attorney for Appellees/Cross-Appellants
Board of Trustees of Cedarville Township

[continued on next page]

Jack A. Van Kley (0016961)
(Counsel of Record)
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
Tel: (614) 431-8900
Fax: (614) 431-8905
Email: jvankley@vankley.law
Attorney for Appellees/Cross-Appellants
Citizens for Greene Acres, et al.

Lee A. Slone (0075539)
(Counsel of Record)
McMahon DeGulis LLP
1335 Dublin Road, Suite 216A
Columbus, OH 43215
Tel: (614) 678-5372
Fax: (216) 621-0577
Email: lslone@mdllp.net
Attorney for Appellees/Cross-Appellants
Board of Trustees of Miami Township

David Watkins (0059242)
(Counsel of Record)
Kevin Dunn (0088333)
411 E. Town Street, Flr. 2
Columbus, OH 43215
Tel: (614) 947-8600
Fax: (614) 228-1790
Email: dw@planklaw.com
Email: kdd@planklaw.com
Attorneys for Appellees/Cross-Appellants
Board of Trustees of Xenia Township

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Ohio Supreme Court Cases

Ohio Revised Code

INTRODUCTION

The considered opinion of local governments, closest to the people they represent, is assuredly a relevant factor for consideration by the Ohio Power Siting Board ("the Board") under Section 4910.06(A)(6) of whether a proposed facility will "serve the public interest, convenience, and necessity." This criterion affords the Board discretion to weigh the benefits and detriments of a project, including but not limited to the opposition or support of the local governments for the affected areas. Appellant, Kingwood Solar I, LLC, ("Appellant" or "Kingwood") asks this Court to delete R.C. 4906.10(A)(6), which requires that applicants demonstrate to the Board that their project satisfies the "public interest, convenience, and necessity."

Here, local opposition amounted to more than legislative resolutions filed on the public comment docket—all of the local political subdivisions in which Appellant's project would be present filed resolutions of opposition and intervened to participate in the adjudicatory hearing conducted by administrative law judges of the Board. The Board considered the opposition of the local governmental bodies, as well as the testimony of their representatives and the representatives of Appellant, to reach its decision. Reversing the Board's decision, as Appellant demands, would cut these local interests out of the Board decision-making process and substitute this Court's weighing of factual evidence and credibility for that of the Power Siting Board.

Appellant also spends disproportionate energy criticizing the Staff Report. But all argument about the Staff Report is a red herring because it was the Board, not the Staff, that issued the Opinion and Order denying the certificate of environmental compatibility and public need for Appellant's project. The Board's consideration of the position of those local

governments closest to the project and affected community is not a "delegation" of the Board's decision-making mandate. The Board considered the position of local governments among others, scrutinized the evidence presented by Appellant and intervening parties, and the Board independently determined that Appellant did not satisfy its burden to show that the project satisfies the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

This Court should decline Appellant's request for it to amend Section 4906.10, and affirm the Board's denial of Appellant's certificate of environmental compatibility and public need.

STATEMENT OF FACTS AND THE CASE

The Commissioners adopt by reference the Statement of Facts and Case in the Merit Brief of Appellee the Power Siting Board, as well as those in the Merit Brief of Cedarville Township, Miami Township, Xenia Township, and Citizens for Greene Acres, Inc. and further state the following:

Appellant's Application sought the Board's approval of a 175 MW solar-powered electric generation facility to be located in Cedarville, Miami, and Xenia Townships, and entirely within Greene County, Ohio. (Ohio Power Siting Board Supplement to the Briefs (Supp.) at 322). In total, the project would occupy approximately 1,025 acres of land within a 1,500-acre project area. *Id.* The total project area would extend on a southwest to northeast axis roughly parallel to Clifton Road and Wilberforce Clifton Road for a distance of approximately five miles. *Id.* at 325. The project was originally proposed with 25-foot setbacks from fence line to non-participating property lines, *id.* at 322, but the Joint Stipulation entered between Kingwood and the Ohio Farm Bureau Federation ("OFBF") would have required a 250-foot minimum setback from non-participating residences (not property lines) to the project fence line, and 50 feet from project

fence line to the edge of public rights of way. (Joint Stipulation and Recommendation as to Certificate Conditions, filed with the Ohio Power Siting Board March 4, 2022, at 4, 11).

The County's Assessment of the Project and Resolution in Opposition

The County Administrator for Greene County, Brandon Huddleson, was first informed of the Kingwood proposal in November 2020. (Supp. at 397). After being informed of the planned project, County Administrator Huddleson began to study the Power Siting Board process, and he engaged in conversation with staff for the Greene County Regional Planning and Coordinating Commission ("RPCC") regarding the County's land use plan. (Transcript of Proceedings Before the Ohio Power Siting Board ("Tr.") Volume VII, at 1701–1704). The conversations with the RPCC staff involved drafting language to address alternative energy sites in the County's land use plan. (Supp at 397; Tr. Volume VII at 1704).

The Commissioners continued to investigate the impacts of solar development, both on the major-facility scale of the Kingwood application and on more-limited scales. On April 6, 2021, shortly before Kingwood filed its application with the Power Siting Board, the Commissioners hosted a town hall meeting to solicit input from the public. (Supp. at 398). In this town hall meeting, there "was input from proponents and opponents of the project," with "far more negative comments than positive ones" and "[t]he overwhelming sentiment was that the project did not fit th[e] area for many reasons that were expressed." *Id.*

The Greene County Board of Commissioners filed a timely notice of intervention on July 21, 2021. (*See* Ohio Power Siting Board Admin. Law Judge Entry of August 26, 2021, ¶27). Cedarville, Miami, and Xenia Townships timely intervened as well. *Id.* Joining these governmental intervenors were several non-governmental organizations, including In Progress,

LLC, the Tecumseh Land Preservation Association, the Ohio Farm Bureau Federation, and the Citizens for Greene Acres, Inc. ("CGA"). *Id.* The CGA was joined by fourteen additional individual landowners who own properties adjacent to the planned project area. *Id.* at ¶28.

In the meantime, the County RPCC prepared an amendment to the County's land use plan, Perspectives 2020, to address alternative energy installations in the County. (Supp. at 398). Perspectives 2020 is the guiding document used by local officials considering any new development or land use application. (Supp. at 399). The amendment to Perspectives 2020 recognized six overarching goals of the County's long-term vision for land use planning. *See id.* at 376–381. One of the priorities identified for the public and for the Perspectives 2020 steering committee was "protecting agricultural use and prime farm soils." *Id.* at 377.

The amendment to Perspectives 2020 explained goals and strategies that would be carried forward to the in-development Perspectives 2040 updated land use plan. *See id.* at 377. These included "balanc[ing] development and farmland preservation by guiding development to urbanized areas and to locations within the urban service boundary that are better suited for non-agricultural use." The Perspectives 2020 amendment recognized that "[a]griculture in Greene County is not only an important industry creating thousands of permanent jobs in Greene County, it is a way of life, a heritage passed on for generations." *Id.* at 378. The "[v]ast agricultural landscapes, trails, parks, open spaces, neighborhoods, and employment centers all work together to make Greene County one of the best places to live in Ohio." *Id.*

The amendment recognizes that the utility-scale solar facilities' "consum[e] massive tracts of land[,] in most cases prime farmland." *Id.* at 379. In addition to active agricultural use, the Perspectives 2020 amendment highlights that "[o]ne of the main concerns with utility scale solar and wind projects is the size of these facilities." *Id.* This is a concern because "Greene

County places great emphasis on protecting and growing its tourism economic base that relies on exceptional natural, scenic, recreational, and cultural resources, and the outstanding visual landscape leading to these destinations where industrial-scale solar and wind facilities would be inconsistent with the existing land use character that so well defines and surrounds these treasures." *Id.*

The Perspectives 2020 amendment includes several policies to protect the scenic agricultural character of rural Greene County. These include limiting the maximum land area that may be occupied by utility-scale renewable energy systems; preventing location of such facilities within the viewsheds of any cultural, historic, scenic, or recreational resources in the county; and requiring setbacks from road rights-of-way and parcel lines of a minimum of 300 feet for solar installations. *Id.* at 380.

The RPCC and Commissioners held public hearings on the Perspectives 2020 amendment on August 24, 2021 and August 26, 2021. *Id.* at 376. Following the last of those hearings, the RPCC recommended adoption by the Commissioners, and the Commissioners obliged by adopting the amendment in County Resolution 21-8-26-10 on August 26, 2021. *Id.*

The Commissioners later considered their stance on Appellant's project pending before the Power Siting Board. Having apprised themselves of the contents of the project application, solicited the views of the public through the April 6, 2021 town hall meeting, and considering the land-use goals adopted to guide their land-use decisions, the Commissioners adopted Resolution No. 21-10-28-8 stating their opposition to the application on October 28, 2021 (the "Opposition Resolution"). (Supp. at 373–375).

The Commissioners' Opposition Resolution was the result of the work that had been done to define the County's land-use objectives with respect to renewable energy installations that had not been contemplated in the original Perspectives 2020 Land Use Plan. In particular, regarding the Kingwood application, the Commissioners identified the project's lack of the desired 300-foot setbacks and viewshed screening as concerns. (Kingwood Ex. 22 before the Ohio Power Siting Board ("October 28, 2021 Commissioners' Meeting Minutes"), at 3). The Commissioners' Opposition Resolution also recognized that the Kingwood project "would be located in a relatively densely, and growing, populated area, with fifty-one (51) non-participating houses located within 300 feet of the project area boundary according to Kingwood's [OPSB] filings." (Supp. at 374). The project's "five-mile viewshed area identified by Kingwood" would include "several other State and local cultural, historic, scenic, and recreational resources, including Clifton Gorge Dedicated Nature Preserve, Clifton Mill, Clifton River Road Reserve, John Bryan State Park, and numerous trails, with potential near-foreground visibility from Clifton Gorge Dedicated Nature Preserve, and John Bryan State Park," as well as visibility from the roads leading to the various resources. *Id.* These findings led to the Commissioners' conclusion that the Kingwood project could be an "economic detriment to tourism." *Id.* The Commissioners unanimously adopted the Opposition Resolution. *Id.*

The Board Staff's Report of Investigation and Local Public Hearing

The Ohio Power Siting Board Staff ("Board Staff") filed its Staff Report of Investigation ("Staff Report") on October 29, 2021. (Supp. at 317). The Staff Report recommended denial of the requested Certificate because of Kingwood's "inability to establish one of the eight statutory criteria" for the Certificate's approval, namely the failure to establish that the facility would serve the public interest, convenience, and necessity. *Id.* In the Staff Report's further discussion

of the required public interest, convenience, and necessity showing, the Report acknowledges the Opposition Resolution, including the Commissioners' determination that the Kingwood application is "'incompatible with the general health, safety, and welfare of the residents of Greene County.'" *Id.* at 360, quoting the Opposition Resolution. The Staff Report goes on to state Staff's conclusion that "there is general opposition to the project from the local citizens and local governmental bodies," and those local bodies' "interest in and, in this case strong opposition to, the project is especially compelling." *Id.* at 359, 360.

The OPSB held its local public hearing on November 15, 2021. There, the Board heard testimony from dozens of members of the public, including residents near the project area. *See* Tr. of Nov. 15, 2021 Local Public Hearing, Supp. at 1–290). The number of witnesses testifying in opposition to the Kingwood project was a substantial majority compared to those in support. *Id.*

The Adjudicatory Hearing

The OPSB convened the adjudicatory hearing on Kingwood's application on March 7, 2022. Kingwood offered testimony of its development manager, Dylan Stickney. In his testimony, Mr. Stickney asserted his opinion that the public interest, convenience, and necessity would be served by the provision of jobs and payments in lieu of taxes (PILOTs) to the local taxing jurisdictions. (Kingwood Ex. 6 before the Ohio Power Siting Board, "Stickney Direct Testimony," at 35). He also asserted that the public interest, convenience, and necessity would be served due to the project answering demand for renewable energy and grid reliability. *Id.* Mr. Stickney, however, had never spent any substantial time in Greene County prior to his involvement with the Kingwood project. (Tr. Volume IX, at 2149). His entire contact with Greene County has been in relation to his employment with Vesper Energy. *Id.*

County Administrator Brandon Huddleson offered testimony of the County's assessment of the project application, and both the Commissioners' Opposition Resolution and the Perspectives 2020 amendment were offered into evidence. (*See* Tr. Vol. VII at 1693–1749). Mr. Huddleson addressed the Commissioners' determination that the proposed Kingwood project would be incompatible with the general health, safety, and welfare as outlined in the Opposition Resolution. *Id.* at 1716–1724. He also addressed the issue of a PILOT payment, noting his analysis of "the PILOT versus the taxes that they would be subject to on the project otherwise," concluding it would not be "in [the County's] financial best interest to agree to a PILOT." *Id.* at 1727.

The Opinion and Order

Following the local hearing, adjudicatory hearing, and post-hearing briefing of Kingwood and the intervening parties, the Board issued its Opinion and Order rejecting the proposed joint stipulation and denying Kingwood's application for a certificate of environmental convenience and public need on December 15, 2022 ("Opinion and Order"). The Board determined that, based on the evidence before it, Kingwood's project and application would not "serve the public interest, convenience, and necessity" as required by R.C. 4906.10(A)(6). (Opinion and Order at ¶152). The Board's Opinion and Order reasonably and lawfully determined that the unanimous opposition of local government entities is a dispositive and sufficient reason for the Board to reject the stipulation and deny the certificate. (Opinion and Order at ¶¶145, 152). In doing so, the Board stated that its "focus goes beyond merely counting local government resolutions to determine whether a certificate is warranted," and instead "focus[es] on the vigor and rationale of the local government opposition, which clearly serves as an indicator of this Project's lack of public support." (Opinion and Order at ¶145). The Board's Opinion and Order goes on to

describe the concerns raised in the Commissioners' amendment to the Perspectives 2020 land use plan and the Opposition Resolution specific to this project application. (Opinion and Order at ¶146).

The Board's Opinion and Order also addresses Kingwood's allegations of improper contact or influence in the Staff Report concerning Kingwood's application. The Opinion and Order notes that there is "no impropriety as to the nature and timing of Staff's communications with the local government entities" and that "Staff *should* ascertain the position of local government entities that are impacted by a project in order to determine whether a project complies with the public interest, convenience, and necessity." (Opinion and Order at ¶79). Such activity is akin to "Staff and Applicant communicat[ing] directly as to exchanging information relevant to the consideration of a pending project thought Staff's analysis of an application." *Id.*

All Parties' applications for rehearing were denied by an Order on Rehearing issued September 21, 2023, and the Appellant filed its notice of appeal October 11, 2023.

ARGUMENT

In addition to the following arguments, the Commissioners incorporate the arguments and authorities contained within the Power Siting Board's Brief on Merits, and in the briefs of Cedarville Township, Miami Township, Xenia Township, and Citizens for Greene Acres, Inc.

Appellant's First Proposition of Law:

> **Because the record, including hundreds of pages of exhibits and days of expert testimony, established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the 'public interest, convenience, and necessity' under 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio was unlawful and unreasonable.**

Appellant's disagreement with *how* the Board weighed and evaluated various facts and circumstances when considering whether the application serves the public interest, convenience, and necessity is insufficient to demonstrate that the Board's decision is unreasonable, unlawful, and against the manifest weight of the evidence. Essentially, the Appellant seeks a de novo weighing of evidence and for this Court to replace the Board's judgment with its own. But that is not what this Court's review of Board orders entails.

This Court's standard of review for Board orders is "prescribed by statute" such that this Court "may reverse, modify, or vacate an order of the [B]oard only when, upon consideration of the record, [this Court] conclude[s] that the order 'was unlawful or unreasonable.'" *In re Application of Firelands Wind, LLC,* 2023-Ohio-2555, 2023 WL 4770456, ¶11, quoting R.C. 4903.13, 4906.12. The appellant bears the burden of showing the order was unlawful or unreasonable. *Id.*, citing *In re Complaint of Reynoldsburg,* 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶18 and *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶29.

The meanings of "unlawful" and "unreasonable" differ. The "unlawful" determination entails this Court's "review of legal questions . . . like what is the proper interpretation of a statutory term . . . or whether the board followed the procedures prescribed by statute . . . or by its own regulations." *Id.* at ¶11, 12 (internal citations omitted). This Court reviews such legal questions de novo. *Id.* at ¶13.

The "unreasonable" determination is a bit different. This Court recognizes that the statute involves an "open-textured nature of the terms at issue [that] inherently vests a degree of discretion in the administrative agency." *Id.* at ¶15. Thus, the Court looks to whether "[t]he agency's exercise of its implementation authority must fall within the zone of permissible

statutory construction." *Id.*, citing *Ohio Edison Co. v. Power Siting Comm.*, 56 Ohio St.2d 212, 383 N.E.2d 588 (1978). The Court does not "'reweigh the evidence of second-guess [the Board] on questions of fact.'" *Id.* at ¶17, quoting *Lycourt-Donovan v. Columbia Gas of Ohio, Inc.*, 152 Ohio St.3d 73, 2017-Ohio-7566, 93 N.E.3d 902, ¶35. Rather, the Court will uphold the reasonableness of the Board's decision "'when 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.'" *Id.*, quoting *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶7.

Appellant's analysis focuses predominantly on weighing the evidence that was presented to the Board and arguing for this Court to strike a different balance as to what is in the "public interest." The "public interest" is not defined by statute, and only a few courts have tried to define it. The case Appellant points to, *State ex rel. Ross v. Guion*, 161 N.E.2d 800, 82 Ohio Law Abs. 1 (8th Dist. 1959), ultimately is not very helpful here. That case was a mandamus action, involving a building permit request. The property owner had obtained a rezoning from the City, but when she applied for a building permit the building commissioner denied it based on his interpretation that the rezoning of her property was invalid spot zoning. *Guion*, 161 N.E.2d at 801.

The question before the court in *Guion* was "the right of a municipal administrative officer, whose duty is to perform a ministerial act under an ordinance passed by the legislative body of the municipality, to refuse to perform that act for the sole reason that he believes the legislative body has in this matter enacted an invalid ordinance." *Id.* at 802. The "public interest" discussion in the case was deployed to determine whether the court should determine for itself

the underlying constitutionality of the rezoning—which courts would only do in that procedural posture of a mandamus case if the underlying cause was of "general public interest"—or simply grant the writ and require the building commissioner to grant the permit. *Id.* at 802-804. The court admitted that whether a matter is a matter of "general public interest" is "not susceptible of accurate definition." *Id.* at 803.

The sense in which the *Guion* court discussed the "general public interest" is different than the sense in which the phrase "public interest" is used in R.C. 4906.10(A)(6). In *Guion*, the question was whether the rezoning of the individual property was of such gravity to the general public that the court should step beyond the immediate question of mandamus to weigh in on the constitutionality the underlying action to be taken. Essentially, the court was considering the matter as a "public purpose." *See id.* at 803. In R.C. 4906.10(A)(6), the phrase "public interest" is more abstract, as the object of the verb "to serve"—in this case, the "public interest" means more than the gravity of public purpose. It is more analogous to the "public good" or "public welfare," and thus is an "open-textured term" left to the Board to evaluate and determine.

The balance of Appellant's discussion of its First Proposition of Law does nothing more than ask this Court to substitute its evaluation of the evidence for the first-hand evaluation by the Board. As noted above, however, when this Court evaluates the reasonableness of a Board decision, its role is limited to determining whether the Board's decision on the evidence is within the "zone of permissible statutory construction." *See In re Application of Firelands Wind, LLC*, 2023-Ohio-2555, 2023 WL 4770456, at ¶15.

Appellant's tactic of comparing the outcome of this application with Board decisions on different applications is not persuasive because the balance of evidence in other applications is simply beside the point. Here, faced with evidence on both sides of the (A)(6) question,

including the legislatively adopted opposition of the affected local governments, which was admitted into the record along with the testimony of the government officials considering the local impact of the proposal, the Board acknowledged potential public benefits but concluded that these were outweighed by the uniform public opposition expressed by the local government entities whose constituents are impacted by the Project. *See* Order at ¶¶143–152.

It is not as if the Board overlooked or ignored evidence of public benefits—it actually recited several public benefits but found that these were counterbalanced by the uniform opposition of the local governments on this application. *Id.* Appellant's argument boils down to saying the Board should consider the factors that favor this application and ignore factors that cut against the application. But the "broad lens" the Board uses must take in numerous inputs, including economic and environmental benefits as well as the consideration of local residents and governments. As discussed above, it is certainly not unlawful for the Board to factor local government opposition in its determination of the "public interest"—no statutory language, rule, or case authority has limited the term "public interest" to exclude local government opposition. And it is not "unreasonable" for the Board to interpret "public interest" to include the findings of the local governments representing the people most directly affected by a project.

Appellant's Second Proposition of Law:

> **The Board's consideration of and reliance on the local government authorities' positions on the Project to determine that the Project is not in the public interest, convenience, and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable.**

Appellant's Second Proposition of Law takes the odd position that local government authorities' positions on the Project should not have been considered at all—essentially that it should not have been admitted. What makes this Proposition odd is that if local government

authorities' opposition should not have been considered *at all*, that is an assertion going to admissibility, rather than persuasiveness, of the local governments' positions. Appellants waived any argument about admissibility by failing to preserve any objections on admissibility grounds at the adjudicatory hearing.

To the extent that Appellant's Second Proposition of Law argues that the Board did not properly weigh the local government's position as compared to other record evidence, that again asks this Court to take on a role that neither this Court's cases nor the statute contemplates. Given the open-texture of the phrase "public interest, convenience, and necessity," the Court again only determines determining whether the Board's decision on the evidence is within the "zone of permissible statutory construction," rather than second-guessing the Board. *See In re Application of Firelands Wind, LLC*, 2023-Ohio-2555, 2023 WL 4770456, at ¶15.

Here, the Board plainly lays out the evidence it considered, both from the sworn testimony at the public hearing as well as the multi-day adjudicatory hearing at which all parties participated. The Board's acknowledgment of the number of comments submitted to the public docket does not undermine its finding that Appellant failed to demonstrate that the project would serve the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6). When the Board addresses the public comment docket, it does so primarily in relation to the ratio of opponent-to-proponent sworn testimony offered at the local public hearing. Opinion and Order at ¶43 (noting the 78-to-22 opposition-to-support ratio, except for "single-issue" "mass filing" on behalf of IBEW). The unsworn public-comment-docket comments were not themselves dispositive of the Board's review, nor did they improperly influence the Board.

Appellant's Third Proposition of Law:

> **The Board's reliance on the positions of the local governing body of Greene County and the three intervening townships to deny Kingwood's certificate application was an impermissible delegation of the Board's decision-making authority to the local governing body of Greene County and the three intervening townships as to the determination required by R.C. 4906.10(A)(6) and consequently the determination of whether to issue a certificate of environmental compatibility and public need was impermissible, unlawful, and unreasonable.**

This proposition of law is a rehash of propositions of law numbers one and two from Appellant, each of which is meritless (as described above). But, more specifically, this proposition of law mistakes the Board's reliance on public and local government opposition for Board obedience to public and local government opposition. That the Board happened to rule in favor of the position advanced by the public opponents and local governments in this case does not demonstrate that the Board abrogated its authority, any more than the Board's approval of certificates in many, many other cases would show that it abrogated its authority to project applicants and supporters.

Appellant's argument on this proposition of law fails to afford agency to the Board and, at its base, is simply a repeat of Appellant's theme that this Court should substitute its own judgment in weighing the evidence under the statute's broad, "open-textured" terms for that of the Board. The statute requires applicants to demonstrate their projects serve the "public interest, convenience, and necessity," leaving to the Board the responsibility to apply those broad terms. As explained above, the law does not prohibit the Board from considering the opposition of local residents and local governments in its evaluation of "public interest" under R.C. 4906.10(A)(6)—doing so is an *exercise*, rather than an *abrogation*, of the Board's sole and plenary authority over power siting in Ohio. Appellant's arguments to the contrary seek to add restrictions that simply do not exist in the text of the statute.

Appellant's Fourth Proposition of Law:

> **The Board's change of its interpretation for what is required to meet the 'public interest, convenience, and necessity' criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to be a basis for the Board to deny a certificate without a reasonable basis for doing so is unlawful and unreasonable.**

Contrary to Appellant's argument, the Board's consideration of resident and local government opposition to any solar project does not mean that the Board is somehow providing a local veto over project applications.

Consider, for example, *In re Champaign Wind, LLC*, OPSB Case No. 12-16-EL-BGN, Opinion, Order, and Certificate (May 28, 2013), cited at page 33 of Appellant's Merits Brief. This case involved opposition of the impacted political subdivisions, but it does not indicate consideration of particular local factors or resolutions in opposition, such as the Opposition Resolution and Perspectives 2020 amendment that were entered into evidence here. This application also differs in that the evidence at hearing, from the direct testimony of County Administrator Brandon Huddleson, acknowledges the cultural, historic, and recreational resources in the County that would be impacted by the application and that these are "economic drivers and local treasures" for which [p]eople travel from all over the country." (Supp. at 399–400). These facts were introduced and weighed by the Board in this case, and attempting to reach the same outcome here as was reached on different facts in *Champaign Wind* is a vain exercise that is not justified by this Court's precedent or Chapter 4906.

Appellant's Fifth Proposition of Law:

> **The Board's consideration of and reliance in its Order on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and was therefore unlawful and unreasonable.**

The Board's use of the unsworn public comment docket is lawful and reasonable in this context. The Board did not adopt the unsworn statements on their own right, but appropriately

considered their number and that they were consistent with the sworn statements at public hearing and Staff testimony. Reliance on unsworn public comment statements by themselves, contrary to sworn evidence, may be problematic but despite the impression made by Appellant's merit brief that was not the case here. The Board considered the public comment docket, appropriately, as relevant information contextualized by testimony during the and at the local public hearing.

Appellant's Sixth Proposition of Law:

> **The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, was unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete and sufficient information on the nature of Staff's investigation including whether Staff's investigation was outcome determinative, in violation of R.C. 4906.07(C) and in violation of Kingwood's due process rights.**

The conspiratorial fixation on the preparation of the Staff Report did not make sense during the evidentiary hearing, and it does not make sense now. The Administrative Law Judges heard many days and hours of testimony on the application. They received hundreds of pages of documentary material. The Staff Report was one input, but it was far from the only input in the Board's ultimate decision. And there is no indication whatsoever that the Staff Report itself, as opposed to the underlying evidence received by the ALJ's on the Board's behalf, determined the outcome or had any particular influence whatsoever.

CONCLUSION

The Board of Commissioners of Greene County, Ohio, submit that the Board may lawfully and reasonably consider the positions taken by local governments, whether in support of

or in opposition to, power-siting projects in considering whether they serve the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6).

The Appellant's position amounts to little more than asking this Court to substitute its judgment for that of the Power Siting Board. The Ohio General Assembly has not limited the Board's ability to evaluate the "public interest, convenience, and necessity," therefore leaving the determination of this "open-textured" term to the specialized Board it has created for the purpose. Here the Board has taken the reasonable and correct position that the opposition of every local government with jurisdiction over the project site is a relevant factor in its determination and that the Appellant has not demonstrated the contrary as its burden requires.

The Board's decision is lawful and reasonable, and should be AFFIRMED.

Respectfully submitted,

/s/*Thaddeus M. Boggs*

THADDEUS M. BOGGS (0089231)
JESSE J. SHAMP (0097642)
Frost Brown Todd LLP
10 West Broad Street; Suite 2300
Columbus, Ohio 43215
Phone: (614) 464-1211
Fax: (614) 464-1737
tboggs@fbtlaw.com

COUNSEL FOR INTERVENING APPELLEE
BOARD OF COMMISSIONERS OF GREENE COUNTY, OHIO

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Intervening Appellee,* has been sent via email to Counsel of Record for the Parties pursuant to S.Ct.Prac.R. 3.11:

Michael J. Settineri
Anna Sanyal
Emily J. Taft
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
aasanyal@vorys.com
ejtaft@vorys.com
Attorneys for Appellant
Kingwood Solar I, LLC

David Watkins
Kevin Dunn
Plank Law Firm, LPA
411 E. Town Street, Flr. 2
Columbus, OH 43215
dw@planklaw.com
kdd@planklaw.com
Attorneys for the Board of
Trustees of Xenia Township

Thaddeus Boggs
Jesse Shamp
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
tboggs@fbtlaw.com
jshamp@fbtlaw.com
Attorneys for the Greene County
Board of Commissioners

Stephen W. Funk
Emily Anglewicz
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
Tel: (330) 849-6602
Fax: (330) 376-4577
Email: sfunk@ralaw.com
Email: eanglewicz@ralaw.com
Attorneys for Appellee
Ohio Power Siting Board

Daniel A. Brown
Brown Law Office LLC
204 S. Ludlow St., Suite 300
Dayton, OH 45402
dbrown@brownlawdayton.com
Attorney for the Board of
Trustees of Cedarville Township

Lee A. Slone
McMahon DeGulis LLP
1335 Dublin Road, Suite 16A
Columbus, OH 43215
lslone@mdllp.net
Attorney for the Board of
Trustees of Miami Township

Jack A. Van Kley (0016961)
(Counsel of Record)
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
Tel: (614) 431-8900
Fax: (614) 431-8905
Email: jvankley@vankley.law
Attorney for Appellees/Cross-Appellants
Citizens for Greene Acres, et al.

Respectfully submitted,

/s/ Thaddeus M. Boggs
Thaddeus M. Boggs (0089231)

Counsel for
Intervening Appellee
Board of Commissioners of
Greene County, Ohio

0147119.0741862 4872-3014-1858v1