

Case No. 2023-1011

In the Supreme Court of Ohio

On Appeal from the Ohio Power Siting Board
Case No. 20-1605-EL-BGN

BIRCH SOLAR 1, LLC

vs

OHIO POWER SITING BOARD

**AMICUS BRIEF OF THE ALLEN AUGLAIZE COALITION FOR REASONABLE
ENERGY IN SUPPORT OF APPELLANTS**

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I. AMICUS CURIAE STATEMENT OF INTEREST

The Allen Auglaize Coalition for Reasonable Energy (the “Coalition”) is an unincorporated nonprofit Ohio association, and a voluntary, independent organization of concerned citizens from Allen and Auglaize Counties formed to protect the interests of the local community, to promote alternative sources of electric power, to advocate for private property rights, wise economic development, protection of the environment, and to ensure that energy development promotes the local economy and local institutions such as public schools. In furtherance of its mission, the Coalition intervened in the Ohio Power Siting Board’s (“OPSB” or “Board”) administrative proceedings concerning the Birch Solar 1, LLC Project (“Project”), and actively participated in the evidentiary hearing, gathering and entering into evidence information justifying a substantial public interest in the Project.

The Coalition opposes OPSB’s decision to deny the Project due solely to “universal opposition from local governments and residents.” As the Coalition’s sustained, public support for the Project throughout the OPSB process and in public forums in and around Allen and Auglaize Counties demonstrate, the OPSB’s conclusion that opposition to the project was “universal” is utterly in error, both legally and factually. The OPSB’s arbitrary denial will have a significant impact on the renewable energy industry in Ohio, and will deny the benefits of the Project, including economic development and an expanded tax base that will support badly needed public school and other public amenities in Allen and Auglaize Counties. The unique interests and perspective of the Coalition as an organization of concerned local citizens that has been an active intervenor in the administrative proceedings will assist this Court in its deliberations on this matter.

II. INTRODUCTION

In the orders on appeal here, the OPSB concluded that the Project meets every substantive statutory standard. Indeed, the record demonstrates that the Project will provide major economic benefits for Allen and Auglaize Counties and Ohio as a whole, that its environmental impacts have been fully mitigated, and that the Project is consistent with all other substantive statutory requirements. Nonetheless, the OPSB denied the Project a Certificate of Environmental Compatibility and Public Need (“Certificate”) based on supposedly “unanimous” local opposition. The OPSB’s order must be reversed for three primary reasons. First, the OPSB’s conclusion that local opposition is “unanimous” is unsupported in the record. Obviously, the Coalition’s continuous support for the project in this appeal, and the only representative of local citizens to intervene and participate in the evidentiary hearing before the OPSB, demonstrates that opposition to the project is not “unanimous.” In addition, the record contains scientific polling demonstrating that strong majorities in the local area, as well as in Ohio more broadly, support the Project as well as renewable energy development generally.

Second, in evaluating whether a project meets the “public interest, convenience and necessity,” it is well established that the OPSB must consider the interests of the public as a whole. Its decision to reject a project with demonstrated benefits to the public broadly on the basis of narrow presumed opposition from a handful of local governments is therefore contrary to law. Moreover, the OPSB failed to conduct a meaningful evaluation to determine whether the conditions proposed by the parties in the Stipulation addressed any of the underlying concerns.

Finally, the Board failed to conduct any examination of the local opposition, which was provided only in public comments and never subject to cross-examination in the hearing. Even a cursory review of a local government entity’s public comments shows it fails to advance any evidence justifying its speculative claims which are ill-informed and lack any basis in fact.

III. STATEMENT OF FACTS

Birch Solar 1, LLC (“Birch Solar”) filed its application for a certificate on February 12, 2021. Birch Solar, the Coalition, the Ohio Farm Bureau Federation (“OFBF”), the Board of County Commissioners of Auglaize County (“Auglaize County”), the Board of Township Trustees of Logan Township (“Logan Township”), and the International Brotherhood of Electrical Workers, Local Union 32 (“IBEW”), actively discussed concerns associated with the Project, and reached a joint stipulation and recommendation (“Stipulation”) with conditions that fully addressed all concerns with the Project. The Shawnee Township Trustees (“Shawnee Township”), a three-person administrative body representing one of the twelve townships of Allen County, was the only intervenor not to sign the Stipulation. Against Birch Solar, the only citizen’s group opposed to the Project, initially filed to intervene in the proceeding but withdrew from the proceeding and dropped its opposition to the Project prior to the agreement on the Stipulation.

In advance of the hearing, Birch Solar, OPSB, and the Coalition filed written testimony. The evidentiary hearing, open to all intervenors including Auglaize County, Logan Township, and Shawnee Township, was held on May 18, 2022. Birch Solar, OFBF, the OPSB, and the Coalition were the only entities to appear at the hearing. None of the local government entities filed written testimony or participated in the hearing. Without providing any of the parties a meaningful opportunity to cross examine the purported local government opposition, the Board summarily denied Birch Solar’s application for a Certificate on October 20, 2022. Despite the active support and involvement from local residents in the affected areas like the Coalition, IBEW, and OFBF, and Auglaize County and Logan Township agreeing to the Stipulation, the Board found there was “uniform public opposition expressed by the local government entities.” *Opinion and Order*, Case No. 20-1605-EL-BGN, at 19 (OPSB Oct. 20, 2022). The conclusion is

based not in the hearing or record, but in unverifiable public comments from individuals who were never subject to cross-examination.

Following the denial, Birch Solar filed an Application for Rehearing, and the Coalition and IBEW jointly filed an Application for Rehearing on November 21, 2022. The applicants raised multiple points of error, four of which are at issue on appeal before this Court: (1) that OPSB unreasonably, unlawfully, and against the manifest weight of the evidence, failed to consider the public interest, convenience, and necessity of the Project under R.C. 4906.10(A)(6) through a broad lens; (2) OPSB unreasonably, unlawfully, and against the manifest weight of the evidence relied on unsupported, unsworn, and disproven claims of adverse Project impacts; (3) OPSB unreasonably, unlawfully, and unconstitutionally abrogated its authority to determine the public need of the project under the R.C. 4906.10(A)(6) factors; and (4) OPSB unreasonably, unlawfully, and unconstitutionally violated Chapter 303 of the Ohio Revised Code (“SB 52”) by retroactively applying solar project restrictions to the Birch Solar Project. The OPSB’s June 15, 2023 Order on Rehearing failed to adequately address these points of error and arbitrarily and wrongfully concluded that “given the universal opposition from local governments and residents, the Board could not determine that the proposed project was in the public interest, convenience, and necessity.” *Order on Rehearing*, Case No. 20-1605-EL-BGN, ¶ 20 (OPSB June 15, 2023).

Birch Solar timely filed a Notice of Appeal on August 11, 2023. The Coalition now files this amicus brief in support of Appellants pursuant to S.Ct.Prac.R. 16.06, and requests this Court to reverse the OPSB Opinion and Order and Order on Rehearing (“Orders”) with instructions to issue a Certificate of Environmental Compatibility and Public Need to Appellant Birch Solar.

IV. STANDARD OF REVIEW

The Ohio Supreme Court must apply the same standard of review to OPSB determinations that it applies to orders of the Public Utilities Commission. *In re Application of*

Champaign Wind, LLC, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7; *see* R.C. 4906.12 (subjecting OPSB to Public Utilities Commission of Ohio review standard under R.C. 4903.13). The Court may reverse, modify, or vacate an order when it finds that the order was unlawful or unreasonable. R.C. 4903.13. This Court has “complete and independent power of review in appeals from the board” with respect to questions of law (*Champaign Wind*, ¶ 7), and is “never required to defer to an agency’s interpretation of the law.” *In re Application of Alamo Solar I, L.L.C.*, — N.E.3d —, ¶ 11, 2023 WL 6851474 (Ohio 2023); *In re Application of Firelands Wind, L.L.C.*, — Ohio St.3d —, 2023-Ohio-2555, — N.E.3d —, ¶ 12 (*quoting TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, — Ohio St.3d —, 2022-Ohio-4677, — N.E.3d — [emphasis in original]).

The Court will affirm an OPSB order on factual grounds only if “the record contains sufficient probative evidence to show that the order 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.” *Champaign Wind*, ¶ 7 (emphasis added). An agency’s decision is unreasonable when “the evidence clearly does not support it, or when an agency’s decision is internally inconsistent.” *Id.*

V. ARGUMENT

The Coalition concurs with and wholly supports the legal arguments raised by Appellant Birch Solar in their brief on the merits.

In order for the Board to issue a certificate, the Board must make findings and determinations regarding each of the requirements outlined in R.C. 4906.10(A). The Board determined that the Project, as conditioned in the Stipulation satisfied all substantive requirements of the statute – it is needed to serve electric demand in Ohio, its environmental impact has been minimized, it is consistent with regional plans for expansion of the electric

power system, it will not affect the viability of agricultural land, and it will incorporate maximum water conservation practices. Indeed, there is no record evidence to support any other conclusion.

Yet, the OPSB determined that the facility would not serve the public interest, convenience, and necessity solely because of opposition from local government entities, which it concluded demonstrates “unanimous” public opposition. R.C. 4906.10(A)(6); *Opinion and Order, supra*, ¶ 72. This is contrary to the statute and against the manifest weight of record evidence. The Court should reverse the Board’s Orders with instructions to issue a Certificate of Environmental Compatibility and Public Need to Appellant Birch Solar.

A. The Board’s conclusion that there was “universal” opposition to the Birch Solar Project is unsupported by the record.

The Court will uphold the Board’s factual determinations only if “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, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. Here, the Board’s conclusion is in direct contradiction to the record.

The Board deemed the mere existence of public comments in opposition to the Project sufficient to deny the Certificate. There were no other concerns, or issues identified, and the Board explicitly acknowledged the economic, environmental, and local benefits the Project would bring to Allen and Auglaize Counties and to Ohio. *Staff Report of Investigation*, ICN 94, at 46.

The Board based its decision solely on the conclusion that there was “*universal* opposition from local governments and residents,” “*uniform*, manifest opposition to the proposed

project,” and “*uniform* and overwhelming opposition to the project by local governments and members of the public.” *Order on Rehearing*, at ¶¶ 20, 22, 29 (emphasis added). As the Coalition’s participation in this appeal, as well as the scientific polling data in the record, demonstrates, opposition to the project was anything but “uniform,” “universal,” or “overwhelming.” OPSB’s conclusions, which are the sole basis for its decision, are manifestly contrary to the record evidence and its orders must therefore be reversed.

Even the OPSB Staff acknowledged significant public support for the Project. The OPSB Staff Report states “Staff acknowledges the significance of the public input received ... both in favor and in opposition to the proposed project.” *See Staff Report of Investigation*, ICN 94, Ex. 1, at 46 (emphasis added). In addition, the only record evidence speaking to local involvement was submitted by the Coalition: a petition with over 250 local signatures supporting the Project including many signatures from individuals directly affected by the Project. *See Initial Post Hearing Brief of the Coalition*, ICN 122, Ex. 2, at 2. The Coalition’s active participation in the administrative process in support of the project demonstrates significant local approval of the Project, not “unanimous” opposition. The Coalition’s members include those that have contracted with Birch Solar to lease land for the Project, those that regularly commute past and live near the proposed Project site, those involved with local schools and governments who support the Project because taxes paid by the Project will allow construction of badly-needed schools and other facilities, and those who support the Project because it will benefit the local economy and environment. These citizens banded together to support the Project and protect the interests of the local community, private property rights, and the environment, and promote wise economic development and alternative sources of renewable energy. The direct involvement of this citizens organization contradicts the Board’s assumption that the local government public

comments speak for all the citizens in their respective communities. And it shows that opposition to the Project was not, as the Board concludes, “universal” or “uniform.”

Moreover, Birch Solar provided scientific polling data to also demonstrate overwhelming support for solar development across Ohio. *See Supplemental Testimony of Shanelle Montana*, at 5 (May 16, 2022). This polling showed that in and around the Lima, Ohio area, 7 in 10 voters agreed new sources of clean energy are important and nearly 75% of local voters viewed solar farms as beneficial to the economy and environment. *See Id.* The polling also found solar development projects enjoy wide support across Ohio. *Id.* This evidence demonstrates that the affected public, including those living close to the Project, in fact *supports* the Project. This evidence also renders the Board’s conclusion that opposition is “uniform” untenable. The polling data demonstrates that, if anything, the Board is relying on comments from a vocal minority that does not accurately represent overall public sentiment for the Project.

In the face of record evidence clearly demonstrating local support for the Project, and uncontested data, petitions, poll results, environmental analyses, economic impact surveys, and real estate impact analysis, it is unreasonable for the Board to elevate baseless, hollow posturing from local governments that actively chose not to participate in the administrative process above record evidence that has been carefully vetted by all participants, including the OPSB, in the hearing process.

Here, the record provides overwhelming evidence in support of the Project and the Court should find the Board’s decision is against the manifest weight of the evidence that its finding of “universal” and “uniform” opposition to the Project is obviously erroneous.

B. The Board unlawfully abdicated its duty to independently determine whether the Project serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

The OPSB holds the ultimate responsibility to determine whether a project serves the public interest, convenience, and necessity. The Board is tasked with determining whether the project serves the “public interest, convenience, and necessity,” not whether the project is popular among the public. Long-established precedent construing R.C. 4906.10(A)(6) requires the Board to examine the interests of the public broadly. *See In re Application of Duke Energy Ohio, Inc.*, 158 Ohio St. 3d 1501, 2020-Ohio-2803, 144 N.E.3d 438, at ¶ 30 (noting that division (A)(6) requires the Board to account for the “public”); *see also In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA12 BTX, Entry on Rehearing (Feb. 20, 2022), at ¶ 35 (“[t]he interests of the *general public* are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6)” [emphasis added]). In making this determination, the Board has considered various factors, including public interaction, economic benefits, public safety, energy generation, noise, electrical interference, aesthetic impacts, and local natural resources. *See, e.g., In re Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Opinion, Order, and Certificate (Mar. 18, 2021), at ¶¶ 65–67 (noting applicant’s interaction with public and analyzing public safety); *In re Aquila Fulton Cty. Power, LLC*, Case No. 01-1022-EL-BGN, Opinion, Order, and Certificate (May 20, 2002), at 1213 (public need, economic impact, public safety, noise, aesthetic impact, electrical interference, and impact to natural resources); *In re Duke Energy Madison, LLC*, Case No. 98-1603-EL-BGN, Opinion, Order, and Certificate (May 24, 1999), at 10-11 (public need, public safety, noise, and aesthetic impact).

The Board therefore erred in elevating the narrow interests of a few local governments over the interests of Ohio’s citizens collectively. In fact, the Board’s decision here cannot be squared with previous decisions in which it issued certificates to project proponents despite

actual unanimous local opposition. *See e.g., In re Champaign Wind, LLC*, PUCO Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013) (issuing certificate even though the county and townships in the project area unanimously opposed the project); *In re Buckeye Wind, LLC*, PUCO Case No. No. 08-666-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010) (same); *see also, In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area); *In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), at ¶ 293 (holding that despite local citizens’ testimony, the project would not create more opportunity for crime in the locality and the applicant had proposed adequate safety measures and setbacks, risk mitigation plans, and that the amended joint stipulation benefited the public).

Furthermore, here, “the Board found the opposition of the local governments to be representative of the public’s interest in the project.” (*Order Denying Rehearing*, at ¶ 29). This is a clear misapprehension of the legal requirements under R.C. 4906.10(A)(6). By treating local government opposition as a proxy for the public interest, the Board has ignored evidence that the Project will bring broad benefits to Ohioans across the state. As reflected in the record, the Project will create jobs and benefit the local economy and school districts while advancing clean, renewable energy in Ohio, thus reducing the pollution burden associated with traditional fossil fuel generation. *Staff Report of Investigation*, ICN 94, at 46. These are broad benefits that will have ripple effects throughout the State. Hence, the Board’s decision cannot be squared with the record. By unreasonably elevating the concerns of local governments, despite uncontested evidence of broad beneficial impacts, the Board has unlawfully shirked its responsibility to

determine whether energy projects benefit the public generally and has ignored evidence demonstrating that Birch Solar undeniably provides such broad public benefits.

Lastly, the OPSB did not analyze the merits of the perceived opposition, or critically evaluate whether the local government concerns were adequately addressed in the proposed Stipulation conditions. Such a failure is a significant departure from past precedent, and unconstitutionally circumvents the OPSB's delegated authority to make a reasoned determination as to whether a project serves the public interest, convenience, and necessity under R.C. 49.06.10(A)(6). The OPSB Orders unlawfully expand the agency's authority to approve or deny certificates of environmental compatibility and public need based solely on the existence of opposition without any independent evaluation. By increasing its own authority in this Order, the OPSB has established dangerous precedent whereby projects meant to serve the public good shall be subject to the whims of local officials regardless of merit. This will create inconsistent opportunities throughout Ohio especially for renewable energy projects, which inherently rely on linear infrastructure to connect power generation to end users.

Moreover, even a cursory examination of the comments demonstrates that they are contrary to the record evidence, uninformed as to the actual benefits and impacts of the Project, and unsupported by evidence. The main local government entity voicing opposition, Shawnee Township, did not participate in the hearing or submit evidence in the record. It only submitted public comments. Specifically, Shawnee Township submitted seven public comments, six of which were in opposition to the Project:

- Its first comment on November 20, 2020 claimed that the applicant did not conduct “unbiased impact studies on land, wildlife, drinking water, and human health.” *Shawnee Township Pub. Com.* (Nov. 20, 2020). But, based on extensive evidence submitted by Birch Solar and a suite of mitigation measures agreed to in the Stipulation, the Board properly determined under R.C. 4906.10(A)(2) and (3) that the Project will not have unmitigated environmental impacts. *Opinion and Order*, ¶ 49.

- The second comment simply provided a copy of the township’s 2009 Comprehensive Plan. *Shawnee Township Pub. Com.* (Nov. 20, 2020).
- On May 3, 2022, Shawnee Township Chairman Spieles submitted comments opposing the Project because it is “not suitable for areas abutting residential properties in any jurisdiction,” asserting that the Project would cause a decline in property values. *Shawnee Township Pub. Com.* (May 3, 2022). But Birch Solar conducted a study finding the Project would have no detrimental impacts on home values. In addition, Birch Solar agreed to plant trees and increase the setback to mitigate visual impacts on surrounding properties. Hence, the concern is baseless. Chairman Spieles also reiterated baseless concerns regarding consequences to land quality, land contamination, water contamination, hazards to human health, and hazards to flora and fauna. *Id.* There is no evidence to support any of these claims in the record. On the contrary, the record contains evidence demonstrating that each of these concerns is unfounded.
- The fourth public comment is a duplicate of the third. *Shawnee Township Pub. Com.* (May 10, 2022). It also includes similar objections from the two other Trustees. *Id.*
- The fifth public comment was filed on July 13, 2022, serving only “as a rebuttal to [the Coalition’s] petition” which contained over 250 local signatures in support of the Project, and was uncontested at the evidentiary hearing. *Shawnee Township Pub. Com.* (July 13, 2022). The comment provided no evidence that the Coalition’s broad support for the Birch Solar Project is anything other than genuine. It also repeated unfounded concerns about property values and environmental impacts.
- The sixth comment, submitted on July 29, 2022, included an unverified table of people opposing the Project. *Shawnee Township Pub. Com.* (July 29, 2022). This table contained systemic inaccuracies and blatant false misrepresentations. Subsequent public comments stated that individuals listed in the July 29th table “had no prior knowledge of [Shawnee] [T]ownship’s intent to submit their names on the list...nor did they authorize the inclusion of their names on the list filed with the Board.” *Jack A. Van Kley Pub. Com.* (Sept 6, 2022). These individuals requested the “Board disregard the inclusion of their names on [Shawnee Township’s] list.” *Id.*
- Shawnee Township’s last comment, dated June 14, 2023, after the record closed, is an impermissible collateral attack on evidence submitted in the record and the Board’s conclusions that the Project had fully mitigated all foreseeable environmental impacts. *Shawnee Township Pub. Com.* (June 14, 2023). Shawnee Township attacked the polling evidence submitted by Birch Solar but neither provided contradictory evidence nor disputed the validity of the poll via cross examination at the hearing. The comments also assert that archeological surveys showed “substantial amounts had not yet been surveyed,” “oil and gas well findings were not deemed as compatible on the project site,” “environmental impact on the 14 streams, 3 wetlands, and endangered animals in the area did not satisfy requirements,” “electromagnetic analysis of the oil and gas wells failed to demonstrate minimization of adverse environmental impacts,” and “whether [drinking water] contamination is from

chemicals inside the panels or the coating on the outside of the...panels.” *Id.* The archeological and oil and gas well issues were addressed before the Board issued its *Opinion and Order*, and the Board had already made a determination on the nature of the probable environmental impact of the Project and found that “the facility represents the minimal adverse environmental impact” as required under R.C. 4906.10(A)(2)-(3). The comments are an improper collateral attack on the Board’s determinations regarding environmental impacts of the Project and provide no evidence to support their assertions.

At a minimum, given that Shawnee Township listed citizens as opposing the Project who in fact did not authorize the use of their names and did not oppose the Project, the Board should carefully review each comment to determine whether Shawnee Township’s opposition to the Project accurately represents its citizens’ sentiments. In any event, all parties, including Shawnee Township and other local government entities, were afforded the explicit opportunity to raise issues associated with the environmental analyses or any other issues with the Project. Yet, no local government entity even appeared at the hearing. To allow entities to forego established opportunities to participate in the administrative process and defer to unreasoned, unjustified, unilateral collateral attacks undermines agency authority and deprives applicants of a meaningful opportunity to defend against baseless accusations as administrative due process requires. The Court should find the Board may not rely on hollow opposition to contravene record evidence demonstrating that the Project serves the public interest.

The manifest weight of the evidence unambiguously provides reasoned support for the Project and that any environmental impacts are adequately mitigated as required under Ohio law. The OPSB failed to evaluate opposition claims and thereby abdicated its duty to determine whether a project serves the public interest. As demonstrated above, the opposition’s claims would not have withstood even mild scrutiny.

The Court should reverse the Board’s Orders with instructions to issue a Certificate of Environmental Compatibility and Public Need to Appellant Birch Solar.

C. The Board unconstitutionally applied SB 52 retroactively under R.C. 4906.10(A)(6) by delegating to local governments its authority to determine whether the Project serves the public interest, convenience, and necessity.

The “[B]oard is a creature of statute and can only act within the powers the legislature has confers upon it.” *In re Black Fork Wind Energy, LLC*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. As such, “[t]he relevant requirements [to obtain a Certificate] are set by the General Assembly, not by the Board.” *Accord TWISM*, 2022-Ohio-4677, at ¶ 50. Therefore, the question is whether the General Assembly, through its enactment of R.C. 4906.10(A)(6), allowed the Board to consider the opinions of the local government authorities regarding appropriate siting or public opinion, absent other unaddressed concerns, to determine whether a project serves the public interest, convenience, and necessity.

As the Board rightfully acknowledged, the Project is not subject to SB 52, which permits local governments to enact ordinances barring renewable energy development in specific areas in their jurisdiction. But, by treating local government opposition as dispositive in this case, the Board improperly granted retroactive power to the local governments to veto OPSB projects. This it cannot do.

SB 52 is an express grant of authority to local governments to prohibit the construction of large wind or solar facilities in certain areas of their counties. Prior to SB 52, local governments lacked this authority and the OPSB was the sole authority determining whether to grant or deny certification under R.C. 4906.10 to projects subject to its jurisdiction. Indeed, if local government entities already had this authority under R.C. 4906.10(A)(6), SB 52 would have been unnecessarily redundant. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App.3d 40, 49, 443 N.E.2d 1034 (8th Dist. 1982) (Markus, J. concurring) (“If the former law already so provided, there would have been no reason for that amendment.”).

The Board discusses a resolution from Allen County asserting that if SB 52 could be applied retroactively, the township would have restricted development from the Project. *Order and Opinion*, at 16-17. By denying the Certificate solely on the basis of local government opposition, the Board permitted these local governments to veto the Birch Solar project, thus improperly applying SB 52 retroactively. While the Board may consider the positions of local governments in making the determinations required by R.C. 4906.10, it cannot cede its authority to local governments. By basing its decision to reject Birch Solar’s application here solely on the basis of opposition from local government entities, that is exactly what OPSB did here. The Board’s decision therefore violates long-established Ohio law barring retroactive application of legislation. *State ex rel. Hamilton v. Indus. Comm’n*, 2021-Ohio-1824, ¶ 28 (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence”); *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 9 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

The Court should reverse the Board’s Orders with instructions to issue a Certificate of Environmental Compatibility and Public Need to Appellant Birch Solar.

VI. CONCLUSION

The Board’s Orders are contrary to statute and based solely on the Board’s conclusion that local opposition was “universal,” a conclusion that is obviously unsupported by the record evidence. The Coalition has actively participated in the agency proceedings and advocated for the approval of the Project on behalf of residents, business people, and landowners in Allen and Auglaize Counties. The Board’s erroneous and unsupported conclusion of “universal opposition” blatantly and willfully ignores record evidence and the Coalition’s existence and participation in these proceedings. The Board abdicated its duty to determine whether a project serves the public interest, convenience, and necessity and deferred to the hollow, unreasoned,

and deceptive comments of local entities seeking to collaterally attack an agency process in which they had every opportunity to engage. This Court should therefore reverse the OPSB's Orders and grant Birch Solar's request for a Certificate, or reverse and remand this matter to the OPSB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2023, a copy of the foregoing Amicus Brief was served upon the following counsel of record by electronic mail:

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