

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Oak Run	)	
Solar Project, LLC for a Certificate of	)	
Environmental Compatibility and Public	)	Case No. 2024-1477
Need to Construct a Solar-Powered Electric	)	
Generating Facility in Madison County,	)	
Ohio.	)	On Appeal from the Ohio Power Siting
	)	Board, Case Nos. 22-549-EL-BGN and
	)	22-550-EL-BTX
In the Matter of the Application of Oak Run	)	
Solar Project, LLC for a Certificate of	)	
Environmental Compatibility and Public	)	
Need to Construct a Transmission Line in	)	
Madison County, Ohio.	)	

**BRIEF OF AMICUS CURIAE OHIO ENVIRONMENTAL COUNCIL
IN SUPPORT OF APPELLEE**

/s/ Chris Tavenor
Counsel of Record
Chris Tavenor (0096642)
Karin Nordstrom (0096713)
OHIO ENVIRONMENTAL COUNCIL
556 East Town Street
Columbus, OH 43215
knordstrom@theoec.org
ctavenor@theoec.org
(614) 487-7506

Counsel for Amicus Curiae
Ohio Environmental Council

March 12, 2025

Christine M.T. Pirik (0029759)
(Counsel of Record)
Jonathan R. Secrest (0075445)
David A. Lockshaw, Jr. (0082403)
Terrence O'Donnell (0074213)
Matthew C. McDonnell (0090164)
Dickinson Wright PLLC
180 East Broad Street, Suite 3400
Columbus, Ohio 43215
Tel: (614) 591-5461
Fax: (614) 670-6009
cpirik@dickinsonwright.com
jsecrest@dickinsonwright.com
dlockshaw@dickinsonwright.com
todonnell@dickinsonwright.com
mmcddonnel@dickinsonwright.com
Counsel for Oak Run Solar Project, LLC

David Yost (0056290)
Attorney General of Ohio
John H. Jones (0018010)
Section Chief
Ambrosia Wilson
30 East Broad Street, 16th Floor
Columbus, OH 43215-3414
Tel: (614) 466-4397
Fax: (614) 644-8764
john.jones@ohioattorneygeneral.gov
ambrosia.wilson@ohioattorneygeneral.gov
Counsel for Appellee Ohio Power Siting Board

Jack A. VanKley (0016961)
(Counsel of Record)
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, Ohio 43235
Tel: (614) 431-8900
Fax: (614) 431-8905
jvankely@vankley.law
*Counsel for Appellants Madison County Board of Commissioners and Board of Trustees for
Deercreek, Monroe, and Somerfield Townships*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTERESTS OF AMICUS CURIAE	2
STATEMENT OF THE FACTS AND CASE	3
STANDARD OF REVIEW	3
ARGUMENT	4
I. Contrary to the Appellants’ Propositions of Law, the Board’s Opinion & Order, including the Conditions from the Stipulation, satisfy the requirements of R.C. 4906.10(A) and are part of the “dynamic process” overseen by the Board.	7
A. Appellants’ Proposition of Law #1 misstates the visual description requirements in OAC 4906-4-08(D)(4)(f).	10
B. Proposition of Law #4 misstates the regulations regarding wildlife surveys and ignores the Conditions in the stipulation regarding wildlife management.	11
D. Proposition of Law #6 ignores this Court’s own precedent around deference to Board expertise regarding its own regulations and the purpose of Conditions to oversee final implementation of a Certificate.	13
II. The Appellants have waived their first Assignment of Error by not briefing it; in the alternative, a broad balancing of factors requires the Ohio Power Siting Board, and the Ohio Supreme Court in its review, to look beyond a mere tallying of local opposition.	13
A. The Court should not overturn the Board’s decisions solely based on public opposition, rather considering it as one factor amongst the many included in the Board’s broad statutory criteria.	14
B. The Board’s decision regarding Oak Run’s application appropriately balances different factors, including public support and opposition.	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Buckeye Wind, L.L.C.</i> , 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869	9, 10, 11
<i>In re Application of Alamo Solar I, L.L.C.</i> , 174 Ohio St.3d 143, 235 N.E.3d 372, 2023-Ohio-3778, ¶ 12	passim
<i>In re Application of Champaign Wind, L.L.C.</i> , 2016-Ohio-1513	3, 4, 5, 6
<i>In re Application of Firelands Wind, L.L.C.</i> , 173 Ohio St.3d 40, 2023-Ohio-2555, 227 N.E.3d 1129	passim
<i>In re Application of Icebreaker Windpower, Inc</i> , 169 Ohio St.3d 617, 2022-Ohio-2742, 207 N.E.3d 651.....	8, 9
<i>Monongahela Power Co.</i> , 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921	5
<i>Ohio Edison Co. v. PUC</i> , 78 Ohio St. 3d 466, 469, 1997-Ohio-196, 678 N.E.2d 922 (1997)	4
<i>State ex rel. Colvin v. Brunner</i> , 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979	16
<i>Util. Serv. Partners, Inc. v. Pub. Util. Comm.</i> , 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038	16
<i>Waltz v. Power Siting Bd. (In re Duke Energy Ohio, Inc.)</i> , 166 Ohio St. 3d 438, 187 N.E.3d 472, 2021-Ohio-3301	6, 7

Statutes

R.C. 4906.10	1, 3, 4, 6
--------------------	------------

Regulations

OAC 4906-4-08	10, 11
---------------------	--------

INTRODUCTION

Last year, the Ohio Power Siting Board (hereinafter the “Board”) approved Oak Run Solar LLC (hereinafter “Oak Run”), one of the most ambitious and creative electric generation facilities proposed in Ohio. Ohio has long been a hub for innovation, improving the lives of its citizens and others around the world. Oak Run represents the potential for continued investment in renewable energy in Ohio, a necessary step given the threats posed by climate change. As a state that still generates nearly 60.5% of its electricity from coal-fired and natural gas power plants and only 5% of its electricity from renewable resources, Oak Run will be the most significant contribution to-date against climate change in Ohio’s utility-scale energy sector. Solar energy provides a zero emissions source of electricity; it also helps reduce the amount of water consumption attributable to the electric sector (i.e. water used in coal and nuclear resources) since no water is used to create electricity from solar panels. The new facility will provide roughly 800 MW of renewable solar energy and a 300 MW battery energy storage system (BESS) while featuring a planned agrivoltaic site. This proposed project represents a significant step toward diversifying Ohio’s electric portfolio and driving agricultural innovation.

The legal questions the Court must consider in this appeal are not new, because the Appellants continue to put forth positions long rejected by this Court in appeal after appeal of Board decisions. The Appellants ask this Court to second-guess factual determinations of the Board in its review of Applications; but this Court has repeatedly emphasized it plays a different role in overseeing the broad, statutory discretion the General Assembly affords the Board through R.C. 4906.10(A).

The reality is, in addition to bringing innovation to Ohio, Oak Run meets or exceeds all of the statutory siting requirements. Oak Run has provided the necessary information to satisfy

Ohio's legal requirements for the siting of renewable energy in Ohio. Oak Run is an important step toward developing a new, safe method in which to increase clean energy in the Midwest. The Joint Stipulation's terms, which the Board incorporated into its Opinion & Order, will ensure the project's development and operations will have the minimum adverse environmental impact possible. For the reasons outlined below, the Ohio Environmental Council (OEC) asks this Court to approve the Board's decision to grant Oak Run a certificate to build its Central Ohio facility.

INTERESTS OF AMICUS CURIAE

The OEC is a statewide non-profit, non-partisan environmental and conservation organization, composed of nearly one hundred organizational groups and thousands of individual members across Ohio. Over the past five decades, the OEC has advocated to protect the environment and health of all Ohio communities through legal and policy advocacy, decision-maker accountability, and civic engagement. The OEC has thousands of members across Ohio, including members in Madison County, home to the Oak Run project. The organization advocates strongly for more renewable energy development in order to meet Ohio's growing demand for energy while mitigating the causes of climate change. The OEC also advocates strongly for the protection of water resources as well as critical habitats for native and migratory species.

The OEC has followed the development of renewable energy generation in Ohio for many years, directly intervening in cases before the Board, including the case on appeal now before this Court. *See Petition to Intervene and Memorandum in Support electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council*, 16-1871-EL-BGN, Ohio Power Siting Board, October 13, 2017; *See also Petition to Intervene and Memorandum in Support electronically filed by Ms. Karin Nordstrom on behalf of Ohio Environmental Council*, 22-0549-EL-BGN, Ohio Power Siting Board, March 7, 2023. In this case, the OEC intervened at the Ohio Power Siting

Board, joined the Joint Stipulation and Recommendation (the “Stipulation”) at issue here, participated in the evidentiary hearing, and filed expert testimony in support of the Stipulation. Based on the OEC’s review of Oak Run, its environmental considerations, and its Stipulation, the project presents a significant public interest benefit to the community, Ohio, and the energy grid itself. The OEC submits this brief as amicus curiae in support of the Board’s lawful approval of Oak Run’s application, as well as to support the Conditions from the Stipulation approved by the Board.

STATEMENT OF THE FACTS AND CASE

Amicus Curiae adopts and incorporates by reference the Statement of the Facts and Case delineated by the Appellee, the Ohio Power Siting Board, and the intervening Appellee, Oak Run.

STANDARD OF REVIEW

The Ohio Supreme Court’s authority in reviewing decisions of the Board centers on questions of law, with broad discretion given to the Board’s review of evidence in determining whether to grant a Certificate to an energy generation facility. When considering whether to approve an application for a certificate to construct Oak Run, the Board makes its determination pursuant to R.C. 4906.10(A). The Board cannot grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified, unless the Board determines the project meets eight statutory criteria. *Id.*

When reviewing decisions of the Board, the Ohio Supreme Court reverses, modifies, or vacates an order only when its “review of the record reveals that the order is unlawful or unreasonable.” *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 7. The Court does not reverse or modify board decisions regarding questions of fact “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*; see also R.C. 4903.13 (“a final order made by the [Board] shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.”) The Court defers to the Board’s expertise on highly specialized issues, but does not defer to an “agency’s interpretation of a statute that it is tasked with implementing.” *In re Application of Alamo Solar I, L.L.C.*, 174 Ohio St.3d 143, 235 N.E.3d 372, 2023-Ohio-3778, ¶ 12. “Appellants bear the burden of demonstrating that the Board’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.” *In re Champaign Wind* at ¶ 7. The Court has “‘complete and independent power of review as to *all questions of law*’ in appeals from the Board.” *Id.* (emphasis added), quoting *Ohio Edison Co. v. PUC*, 78 Ohio St. 3d 466, 469, 1997-Ohio-196, 678 N.E.2d 922 (1997).

ARGUMENT

R.C. 4906.10(A) outlines the broad statutory criteria created by the General Assembly for the Board to utilize in reviewing applications for utility-scale electric generation projects. Ultimately, all projects approved by the Ohio Power Siting Board must be in the service of the “public interest, convenience, and necessity.” *Id.* at (A)(6). The Board interprets public interest to require a broad balancing of benefits against negative impacts, and this Court has repeatedly affirmed the Board’s standard. In *Firelands Wind*, a case regarding a utility-scale wind facility, the Board balanced “projected benefits with the potential negative impacts . . . [finding] that the project ‘will serve the public interest, convenience, and necessity’ as required by R.C. 4906.10(A)(6).” *In re Application of Firelands Wind, L.L.C.*, 173 Ohio St.3d 40, 2023-Ohio-2555, 227 N.E.3d 1129

at ¶ 55. The Court found “nothing unlawful about the board’s interpretation of the rule and nothing unreasonable about its determination” that the project served the public interest. *Id.* at ¶ 58.

Similarly, the Court affirmed the Board’s approval in *In re Application of Champaign Wind, L.L.C.*, noting how the Board did not make its public interest finding based on one factor and included several factors in its conclusion, including “benefit [to] the environment and consumers” and “minimal aesthetic impact on the local community.” *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, at ¶ 47. The Court also approved the Board’s decision in *Champaign Wind* despite neighbor and county contentions regarding public hazards from blade shear and fire hazards. The Court relied on its consistent application of deference to the Board, noting that it “consistently refuse[s] to substitute [its] judgment for that of the [board] on evidentiary matters.” *Id.* at ¶ 30, quoting *Monongahela Power Co.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶ 29 (additional citations omitted). On the record, board staff provided evidence “that blade throw is rare that they had never known it to injure a member of the public,” amongst other evidence. *Id.* The Court concluded the Board had ample evidence to make its determination. *Id.* at ¶ 33 (“the neighbors and the county have failed to prove that the board’s adoption of the regulatory minimum setbacks was against the manifest weight of the evidence or contrary to the criteria in R.C. 4906.10(A)”).

This Court has also approved certificates of compatibility and need when the Board balances benefits against significant risks, demonstrating its deference to the Board in its ability to assess complex circumstances. *Waltz v. Power Siting Bd. (In re Duke Energy Ohio, Inc.)*, 166 Ohio St. 3d 438, 187 N.E.3d 472, 2021-Ohio-3301. In *Waltz*, the Court reviewed an appeal by multiple intervening parties for a gas pipeline in the Cincinnati area. The intervenors cited numerous safety risks, arguing that the Board and the applicant disregarded the safety interests presented by the

pipeline. *Id.* at ¶ 71. The Court disagreed, stating that “there is ample evidence to support the board’s conclusion that ‘Duke and Staff have thoroughly addressed the safety considerations related to the Project, as raised by the intervenors and the public . . .’ [and] we do not second-guess it.” *Id.* The Court also deferred to the Board’s evaluation of estimated tax benefits. *Id.* at ¶ 79. The Board, in its decision to approve Oak Run’s application subject to the Conditions in the Stipulation, relied on the Court’s reasoning in *Waltz v. Power Siting Bd.* See Opinion & Order, ¶ 217, Appellants’ Appx 110 - 111.

What *Firelands*, *Champaign Wind*, and *Waltz* collectively present is a legal framework for understanding how the Ohio Supreme Court reviews Board decisions regarding the public interest and other similar standards (such as public need). The Court repeatedly affirms the importance of balancing multiple factors rather than finding one issue to be dispositive. See *Firelands Wind* at ¶ 55 (the court did not disturb the Board’s balancing of the “projected benefits with the potential negative impacts” in finding the wind facility served “the public interest, convenience, and necessity”); see also *Waltz v. Power Siting Bd.* at ¶ 71 (“we do not second-guess [the Board’s decision]”). Therefore, the OEC interprets the Court’s consistent precedent in reviewing Board decisions as not only deferring to the Board’s discretion regarding the balancing of factors for public interest and similar determinations under R.C. 4906.10(A); the Court requires the consideration of multiple factors, and one factor cannot be solely dispositive of R.C. 4906.10(A)(6). A project serving the “public interest, convenience, and necessity” must consider multiple issues, such as the need for the facility, the environmental impact, the impact to the nearby community, the benefits to the nearby community and the state, and more. For the Board to make its determinations on any given project, it must consider the question holistically, rather than any given issue in isolation.

With these principles in mind, the OEC provides the following arguments regarding why the Court should affirm the Board’s decision to grant Oak Run’s application. The Appellants’ arguments ultimately fail because they disregard essential elements of precedent governing both the Board’s review of applications. The Appellant asserts six propositions of law. The first five propositions of law argue the Board approved the application without Oak Run providing sufficient evidence or information regarding the following issues: (1) viewshed mitigation; (2) visual impacts; (3) specific pollution impacts and mitigation efforts; (4) plant and wildlife impacts; and (5) emergency response procedures. The sixth proposition of law argues that Oak Run never submitted a complete application to the Board due to the alleged lack of information described in propositions (1) through (5), and that the burden of proof lies with the Applicant, rather than the Appellants. The Appellants want this Court to wade into the evidence and make specific factual determinations regarding the Board’s authority and expertise. However, this Court’s precedent directly contravenes that approach; the Appellants refuse to recognize the flexibility of the dynamic process utilized by the Board.

I. Contrary to the Appellants’ Propositions of Law, the Board’s Opinion & Order, including the Conditions from the Stipulation, satisfy the requirements of R.C. 4906.10(A) and are part of the “dynamic process” overseen by the Board.

The first five propositions of law all fail for the same reason: they require a narrow view of the Board’s statutory authority contrary to this Court’s precedent. *See In re Application of Icebreaker Windpower, Inc.*, 169 Ohio St.3d 617, 2022-Ohio-2742, 207 N.E.3d 651, ¶ 50 (“*Icebreaker*”). In *Icebreaker*, the Court described the Board’s approval of the offshore wind project as employing “a flexible standard in granting the requested certificate” that “poses no legal problem.” *Id.* at ¶ 50 (“an agency, particularly when facing new issues, may proceed on an incremental, case-by-case basis,” quoting *Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-

878, 966 N.E.2d 869, at ¶ 33). Ultimately, the Court concluded “the board determined that Icebreaker's evidence and the conditions imposed under the revised stipulation showed sufficient compliance with the statutory requirements,” and it was the appellant’s burden to show that the Board erred. *Id.* at ¶ 51.

Additionally, the Court has emphasized how R.C. 4906.10(A) “empowers the board to grant a siting certificate ‘upon such terms, conditions, or modifications of the construction, operation, or maintenance’ of the facility as the board deems appropriate.” *In re Application of Alamo Solar I, L.L.C.*, 174 Ohio St.3d 143, 235 N.E.3d 372, 2023-Ohio-3778, ¶ 41. In *Alamo Solar I*, the Court reviewed the Board’s numerous factual determinations and other decisions, ultimately upholding the “board’s authority to impose conditions that are subject to monitoring for compliance by board staff.” *Id.*, quoting *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 13-18. Further, “the statutes authorize a dynamic process that does not end with the issuance of a construction certificate.” *Buckeye Wind*, 2012-Ohio-878, at ¶ 16.

The Court recently upheld the Board’s approval of a utility-scale wind facility that faced a similar appeal though with slightly different facts. *In re Application of Firelands Wind, L.L.C.*, 173 Ohio St.3d 40, 2023-Ohio-2555 (“Firelands Wind”). In *Firelands Wind*, the Court concluded that the appellants failed to establish the Board’s approval of the project as “unlawful or unreasonable.” *Firelands Wind*, 2023-Ohio-2355, at ¶ 3. The Court outlined essential interpretations of the statute regarding the Board’s authority: “the legislature has directed an agency to make determinations as to a project’s compliance with broad statutory criteria The open-textured nature of the terms at issue inherently vests a degree of discretion in the

administrative agency.” *Id.* at ¶ 14 - 15. The Court described the Board’s exercise of its authority being “reasonable” if it exists within the “zone of permissible statutory construction.” *Id.* at ¶ 15.

Icebreaker, *Alamo Solar*, and *Firelands Wind*, all recent cases reviewed by the Court, establish the precedent through which the Board operates in reviewing applications. *Buckeye Wind* further emphasizes how the Board’s Conditions operate as a constant oversight mechanism for projects, an extension of the legislature’s authority granted to the Board: “The General Assembly vested the board with authority to allow its staff to monitor Buckeye’s compliance with conditions that the board has set, conditions upon which the neighbors already had the chance to be heard.” *Buckeye Wind* at ¶ 16. This Court has consistently applied these cases when it reviews decisions of the Board. What the Appellants propose, in their Propositions of Law, is an approach to the Board’s process that this Court has never adopted. The Appellants do not apply the rules established by this Court in those cases regarding what constitutes an unlawful or unreasonable decision by the Board; the Appellants do not even reference these cases in their arguments.¹

For example, Proposition of Law #1 and Proposition of Law #2 fail because the Appellants simply do not accept the Board’s authority to subject certificates to Conditions as part of the “dynamic process” authorized by the General Assembly. *See, e.g., Buckeye Wind* at ¶ 16. The Appellants argue that Oak Run did not provide measures taken to minimize adverse impacts created by the facility or a plan for visual screening. Appellants’ Br. at 17. But Condition 46 of the Stipulation requires documentation, annually, of the landscaping and lighting plan, “including efforts to maintain vegetative screening to at least a 90 percent vegetation survival rate.” Appellants’ Appx 057. Such conditions lean into the “board’s authority to impose conditions that

¹ In fact, Propositions of Law 1 through 5 of the Appellants’ arguments in their merit brief do not reference a single Ohio Supreme Court opinion, ignoring the Court’s consistent interpretation of the Board’s authority as granting it broad discretion in the application of its statutory criteria for granting certificates to electric generation facilities.

are subject to monitoring for compliance by board staff.” *Alamo Solar I*, 2023-Ohio-3778, at ¶ 41. *See also* Condition 14 of the Stipulation, Appellants’ Appx 046 (requiring the creation of a “landscape and lighting plan in consultation with a landscape architect licensed by the Ohio Landscape Architects Board that addresses the aesthetic and lighting impacts of the facility with an emphasis on any locations where an adjacent non-participating parcel contains a residence with a direct line of sight to the project area”). Below, additional examples illustrate how the Appellants’ Propositions of Law fail because the Appellants reject this Court’s well established precedent regarding review of Board decisions.

A. Appellants’ Proposition of Law #1 misstates the visual description requirements in OAC 4906-4-08(D)(4)(f).

The Appellants claim that OAC 4906-4-08(D)(4)(f)² mandates the project “minimize” adverse visual impacts. Appellants’ Br. at 17. However, the Ohio Administrative Code does not mandate Applicants “minimize” adverse visual impacts. Instead, OAC 4906-4-08(D)(4) requires an Applicant to “evaluate” the visual impact of the proposed facility and “describe plans to mitigate any adverse impact.” The Board requires evaluation and description of measures taken to minimize; it does not require minimization of impacts to an arbitrary level deemed by the Appellant. The Appellants also argue that Oak Run has not provided a vegetative screening plan, Appellants’ Br. at 9, but Conditions 14 and Conditions 46 of the Stipulation require a Landscape and Lighting Plan prior to commencement of construction, an approach repeatedly utilized by the Board and upheld by this Court. *See, e.g., Alamo Solar I*, 2023-Ohio-3778, at ¶ 41.

² Because the Board decided Oak Run on March 21, 2024, the Ohio Administrative Code citations in this brief are to the rules as they were prior to May 30, 2024, the date when the Board adopted new rules.

B. Proposition of Law #4 misstates the regulations regarding wildlife surveys and ignores the Conditions in the stipulation regarding wildlife management.

The Appellants mischaracterize OAC 4906-4-08(B) as requiring the Applicant to survey *all* plant and animal species while it specifically requires only a survey of *either* plant and animal species of commercial or recreational value *or* designated endangered or threatened species. The word “or” in the regulation must be given its proper meaning. OAC 4906-4-08(B)(1)(c) features two sentences.³ The first sentence states that the Applicant “provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary.” It describes the geographic boundary for the animal survey. The second sentence says “the literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreation value, *or* species designated as endangered or threatened.” *Emphasis added*. It describes the class of animals to be surveyed.

Because “or” must be given its proper meaning in the sentence, OAC 4906-4-08(B)(1)(c) is necessarily limiting the scope of the wildlife survey to focus on the most important animal species within a geographic area—the ones at greatest threat to extinction. Oak Run focused on endangered species; it need not identify all species present in the vicinity as the Appellant claims, especially when the project presents limited to no threat to such wildlife.

³ This Court has previously emphasized the importance of recognizing when “or” is used as a disjunctive conjunction to indicate the difference in parts of a code, including in *In re Firelands Wind*. “In the past, we have not generally distinguished between “unreasonable” and “unlawful.” But the meanings of the terms are different, as evidenced by the legislature’s use of the disjunctive “or” in the “unlawful or unreasonable” statutory standard of review, R.C. 4903.13; R.C. 4906.12. See also 2 Ohio Jurisprudence 3d, Administrative Law, Section 221 (2016) (explaining that the terms “unlawful” and “unreasonable” refer to different aspects of an agency’s order).” *In re Firelands Wind, L.L.C.*, 2023-Ohio-2555, at ¶ 11.

C. Proposition of Law # 5 mischaracterizes the BESS’s storage potential to support its erroneous conclusions regarding risk while ignoring relevant Stipulation conditions.

The Appellants claim the Board failed to make any provisions regarding emergency plans in response to the 300 MW BESS proposed alongside the 800 MW of solar capacity. However, Condition 18 of the Stipulation, approved in the Board’s order, includes all of the following:

(18) The Applicant shall provide documentation to Staff, and file on the docket in this case, the fire protection engineering review of the BESS facility at least 30 days prior to the preconstruction conference for the BESS. This documentation shall be in the form of a BESS emergency response plan and shall address and ensure the Applicant’s commitment to, at least, but not limited to, the following: adhere to the latest industry standards for BESS, including the National Fire Protection Association (“NFPA”) (NFPA 855 [2023], NFPA 69, 70, 70E), the Underwriters Laboratory standards (“UL”) (1642, UL 1973, UL 9540, and UL 9540A), the International Fire Code 2021 Chapter 21 for BESS-specific guidance, and the Ohio Fire Code for general guidance; collaborate with the local fire chief or authority having jurisdiction (“AHJ”); and collaborate with the local fire chief or AHJ to ensure there is sufficient water resources and a long-term supply of water for any firefighting needs at the facility in accordance with the applicable fire code.

Appellants’ Appx 047. Contrary to the Appellants’ assertion that the Board cannot “vet” the measures proposed, the Board’s opinion states the national industry standards an emergency plan must meet. If the Applicant fails to provide an appropriate emergency response plan under Condition 18, they will be violating the terms of their certificate.

Furthermore, in the Statement of Facts, the Appellants mischaracterize the BESS’s storage capacity, calling “four hours of the Project’s electrical production” miniscule. Appellants’ Br. at 11. What the Appellants neglect to mention is that four hours of an 800 MW solar facility is actually a significant amount of energy storage—the nameplate capacity of the associated BESS is 300 MW, a greater capacity than some other utility-scale electric generation projects (the project

in *Firelands Wind*, for example, had a stated capacity of 297.66 MW at the time this Court reviewed that case).

D. Proposition of Law #6 ignores this Court’s own precedent around deference to Board expertise regarding its own regulations and the purpose of Conditions to oversee final implementation of a Certificate.

The Appellants’ sixth Proposition of Law relies on the narrow legal interpretations utilized in the first five Propositions of Law, whereby they claim the Applicant failed to provide certain types of information under the Board’s regulations. But these arguments of an “incomplete” application missing specific “information” amounts to relitigating questions already considered by this Court in *Alamo Solar I*. This Court found nothing unlawful about the Board’s actions in *Alamo Solar I*, which included a condition waiting until pre-construction for information such as a specific landscape plan, because:

R.C. 4906.10(A) empowers the board to grant a siting certificate “upon such terms, condition, or modifications of the construction, operation, or maintenance” of the facility as the board deems appropriate. Thus, we have upheld the board's authority to impose conditions that are subject to monitoring for compliance by board staff.

(citations omitted.) *Alamo Solar I*, 2023-Ohio-3778 at ¶ 41.

In the Board’s decision regarding Oak Run, it noted the Court’s ruling in *Alamo Solar I* and relied on it in its analysis of the Appellants’ arguments regarding the sufficiency of information provided. See Opinion & Order, ¶ 119; Appellants’ Appx 062 - 063. The Appellants propose an interpretation of R.C. 4906.10(A) never adopted by this Court; no reason exists to deviate from precedent in reviewing the Board’s decision to grant Oak Run a certificate for its project.

II. The Appellants have waived their first Assignment of Error by not briefing it; in the alternative, a broad balancing of factors requires the Ohio Power Siting Board, and the Ohio Supreme Court in its review, to look beyond a mere tallying of local opposition.

In its Application for Rehearing, the Appellants in this case argued that the Board should endorse a standard where “especially prominent and one-sided” local opposition can act as a sole deciding factor in finding a project does not serve the public interest. Appellants’ Rehearing App. at 5, Appellants’ Appx 143. The Appellants included a similar issue in their Notice of Appeal to the Court as Assignment of Error (1); however, the filed merit brief lacks any arguments in support of this Assignment of Error. Accordingly, the Court should view the Appellants as having waived the argument. The Court considered a similar waiver issue in *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, where it held a party failed to support a takings claim when its only support for the claim was a single citation to 1902 court decision. *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 53. The Court noted that the party bore “the burden of demonstrating the unlawfulness of the commission’s order.” *Id.*, ¶ 53. When an issue is first raised on reply, the party “failed to preserve it.” *Id.*, ¶ 54, citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 61.

However, if the Court does not waive the Appellants’ first Assignment of Error, the following arguments provide a framework for the Court’s consideration regarding that issue.

A. The Court should not overturn the Board’s decisions solely based on public opposition, rather considering it as one factor amongst the many included in the Board’s broad statutory criteria.

Recently, the Board has denied multiple renewable energy applications based solely on public opposition. However, this Court has yet to decide on appeal whether the Board was justified when it denied cases solely on public opposition. That precise question is under consideration before the Court in *In the matter of the Application of Kingwood Solar I*, Case No. 2023-1286. Appellants’ first Assignment of Error considers a similar question from the reverse stance—should

the Court overturn the Board's decision regarding the public interest when significant public opposition exists?

The existence of both questions is why the OEC proposes the Court adopt and communicate a rule to both the Board and parties before the Board clarifying both approval and denial of wind and solar facilities pertaining to the public interest. If the Court establishes a rule that the Board must consider a variety of factors when considering the public interest, balancing benefits and negative impacts, then the Board can never allow one factor to solely override other considerations. Such a rule would provide clarity to Applicants before the Board—and to public opposition and support.

Right now, public opponents to projects believe they can simply muster enough loud, aggressive opposition to effectively “veto” a project regardless of the project's benefits to the local community or Ohio as a whole. But the opposition to the project could be based on reasons and perspectives entirely divorced from the evidentiary record regarding the public benefits (and negative impacts) of a given project. Such an approach contradicts the purpose for the Board's complex and dynamic process. Consider the inverse circumstance—if a project received *overwhelming public support* yet the evidence indicated it would cause significant harm to the public due to dangerous air pollution, would the Board be required to approve the project anyway? The laws of Ohio cannot reasonably be read to require overwhelming opposition or support to be a sole deciding factor of whether a project is in the public interest. An evidentiary hearing balancing many different factors allows the Board to consider all benefits and impacts.

B. The Board's decision regarding Oak Run's application appropriately balances different factors, including public support and opposition.

The Board's logic in approving Oak Run's application reflects the broad balancing of factors the Court should endorse. Instead of considering one factor as more dispositive than the

others, the Board said “it must balance project benefits against the magnitude of potential negative impacts on the local community” when determining if a project “will serve the public interest, convenience, and necessity.” Opinion & Order at ¶ 93, Appellants’ Appx 037. The Board considered both safety and electromagnetic fields in its analysis of the Staff Report, ¶¶ 94 - 100, Appellants’ Appx 037 - 039, in addition to other considerations brought forth by intervening parties:

1. The Stipulation and its benefit to the public interest (¶ 202, Appellants’ Appx 103)
2. The benefits of the agrivoltaics program and installation of 300 MW BESS, including the economic and environmental benefits at the local/state level (¶ 203, Appellants’ Appx 103)
3. Additional economic benefits to the local community, including to local governments and schools and labor (¶ 204, Appellants’ Appx 103 - 104)
4. Other environmental benefits, including limited development of the land for industrial and residential developments (¶ 205, Appellants’ Appx 104)
5. Climate benefits of the project, reducing the need for burning fossil fuels on Ohio’s electric grid (¶ 206, Appellants’ Appx 104 - 105)
6. Proximity to other electric resources, such as transmission lines (¶ 207, Appellants’ Appx 105)
7. Other historical factors in the case, including Madison County’s approval for an Alternative Energy Zone, extensive public engagement and incorporation of suggestions from the local community, and ongoing

stakeholder feedback systems in the project design (§ 207, Appellants' Appx 105 - 106)

8. \$13 million in development and land purchase investment in the county from Savion, the company behind Oak Run, and associated ongoing engagement with local governments regarding the project and potential tax payments to the community (§ 208, Appellants' Appx 106)
9. The nature and magnitude of local opposition, including from local governmental entities (§ 212, Appellants' Appx 108)
10. Potential risks of the BESS project (§ 214, Appellants' Appx 109)

After considering all these factors, Staff recommended the Board find the proposed Facility “would serve the public interest, convenience, and necessity,” *Id.* at § 211, Appellants' Appx 107 - 108, and the Board agreed. *Id.* at § 216, Appellants' Appx 110. The Board definitively stated that it “must balance projected benefits against the magnitude of potential negative impacts on the local community.” *Id.* at § 217, Appellants' Appx 110 - 111. The Board also referenced this Court's analysis in *Waltz. v. Power Siting Board*, where it balanced the likelihood of risks against potential benefits. *Id.* Regarding public opposition, the Board simply stated that the “statutory criterion must also encompass the local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion and impact to natural resources.” *Id.* It did not consider local citizen opposition as a dispositive factor in its review of Oak Run. Importantly, the Board also balanced its analysis with aspects considered in other sections of R.C. 4906.10(A), including the facility's commitment to address the public's concerns through compliance with the Madison County 2014 Land Use Plan and lack of zoning changes within the project area. *Id.* at § 223, Appellants' Appx 115 - 116.

The Board applied a broad balancing of factors consistent with its past decisions and in accordance with Court precedent. The Court should not disturb that decision, following past precedent outlined in *Alamo Solar I*, *Firelands Wind*, and other similar cases.

CONCLUSION

The OEC urges the Court to affirm the Board's decision, granting Oak Run its certificate. By doing so, the Court helps continue Ohio's history as a hub for innovation, authorizing construction of one of the largest solar facilities in the country and the largest in Ohio. And at the same time, the Court helps Ohio increase in-state renewable energy generation at a time where Ohio's electric grid needs both more generation *and* carbon-free generation. This Court has long relied upon the Board's expertise in implementing its complex application process for electric generation facilities, and it need not change that approach with Oak Run. This appeal represents, instead, the Appellants refusal to accept the Conditions in the Stipulation as approved by the Board as sufficient to meet the statutory criteria provided by the Ohio General Assembly. The Board thoroughly vetted Oak Run through a comprehensive application process. It balanced its numerous benefits against its limited risks. That work need not be disturbed.

/s/ Chris Tavenor
Chris Tavenor (0096642)
Counsel of Record
Karin Nordstrom (0096713)
OHIO ENVIRONMENTAL COUNCIL
556 East Town Street
Columbus, OH 43215
knordstrom@theoec.org
ctavenor@theoec.org
(614) 487-7506

Counsel for Amicus Curiae
Ohio Environmental Council

March 12, 2025

CERTIFICATE OF SERVICE

I certify that, on March 12, 2025, a copy of this Amicus Brief was served upon the following counsel of record by electronic mail:

/s/Chris Tavenor

Chris Tavenor (0096642)

Christine M.T. Pirik
Jonathan R. Secrest
David A. Lockshaw, Jr.
Terrence O'Donnell
Matthew C. McDonnell
cpirik@dickinsonwright.com
jsecrest@dickinsonwright.com
dlockshaw@dickinsonwright.com
todonnell@dickinsonwright.com
mmcdonnell@dickinsonwright.com
Counsel for Oak Run Solar Project, LLC

John H. Jones
Ambrosia Wilson
john.jones@ohioattorneygeneral.gov
ambrosia.wilson@ohioattorneygeneral.gov
Counsel for Appellee Ohio Power Siting Board

Jack A. VanKley
jvankely@vankley.law
Counsel for Appellants Madison County Board of Commissioners et al

