

FRIDAY, MARCH 23, 2023
OFFICE OF THE BOARD OF COMMISSIONERS
PICKAWAY COUNTY, OHIO

The Pickaway County Board of Commissioners met for a Special Session in their office located at 139 West Franklin Street, Circleville, Ohio, on Friday, March 23, 2023, with the following members present: Mr. Jay H. Wippel and Mr. Gary K. Scherer. April Dengler, County Administrator, Gary Cameron, EMA Director, and Tim McGinnis were also in attendance. Mr. Harold R. Henson was absent from today's session.

In the Matter of
Executive Session:

At 3:48 p.m., Commissioner Gary Scherer offered the motion, seconded by Commissioner Jay Wippel to enter into Executive Session pursuant to ORC §121.22 (G) (5) matters required to be kept confidential by federal law or regulations or state statutes; with April Dengler, County Administrator, Gary Cameron, EMA Director and Angela Karr, Clerk in attendance.

Roll call vote on the motion was as follows: Commissioner Wippel, yes; Commissioner Henson, absent; Commissioner Scherer, yes. Voting No: None. Motion carried.

Attest: Angela Karr, Clerk

At 3:53 p.m., the Commissioners exited Executive Session and Commissioner Gary Scherer offered the motion, seconded by Commissioner Jay Wippel, to resume Regular Session.

Roll call vote on the motion was as follows: Commissioner Wippel, yes; Commissioner Henson, absent; Commissioner Scherer, yes. Voting No: None. Motion carried.

Attest: Angela Karr, Clerk

No Action taken.

In the Matter of
Motion Approving the
Motion to Quash Subpoena of Circleville Solar, Llc
By the Pickaway County Board of Commissioners:

Commissioner Gary Scherer offered the motion, seconded by Commissioner Jay Wippel, to approve the following attachment:

- **Motion to Quash Subpoena of Circleville Solar, Llc by the Pickaway County Board of Commissioners**
- **Certificate of Service**

Voting on the motion was as follows: Commissioner Wippel, yes; Commissioner Henson, absent; Commissioner Scherer, yes. Voting No: None. Motion carried.

Attest: Angela Karr, Clerk

With there being no further business brought before the Board, Commissioner Scherer offered the motion, seconded by Commissioner Wippel, to adjourn.

Voting on the motion was as follows: Commissioner Wippel, yes; Commissioner Henson, absent; Commissioner Scherer, yes. Voting No: None. Motion carried.

**FRIDAY, MARCH 23, 2023
OFFICE OF THE BOARD OF COMMISSIONERS
PICKAWAY COUNTY, OHIO**

Jay H. Wippel, President

Harold R. Henson, Vice President – {absent}

Gary K. Scherer, Commissioner
BOARD OF COUNTY COMMISSIONERS
PICKAWAY COUNTY, OHIO

Attest: Angela Karr, Clerk

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)
Circleville Solar, LLC for a Certificate)
of Environmental Compatibility and) Case No. 21-1090-EL-BGN
Public Need for a Solar Facility Located)
in Wayne and Jackson Townships,)
Pickaway County, Ohio.)

**MOTION TO QUASH SUBPOENA OF CIRCLEVILLE SOLAR, LLC BY
THE PICKAWAY COUNTY BOARD OF COMMISSIONERS**

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March 23, 2023

**ON BEHALF OF THE PICKAWAY COUNTY BOARD OF
COMMISSIONERS**

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**MOTION TO QUASH SUBPOENA OF CIRCLEVILLE SOLAR, LLC BY
THE PICKAWAY COUNTY BOARD OF COMMISSIONERS**

INTRODUCTION

Circleville Solar, LLC’s (“Circleville Solar”) subpoena is unreasonable and outside the scope of the discovery rules because it seeks privileged information that is irrelevant to the proceeding before the Ohio Power Siting Board (“Board”). In essence, Circleville Solar wants the Board—a state agency—to compel members of a legislative body—the Pickaway County Board of Commissioners (“Commissioners”)—to testify about the speech and debate leading to the passage of Resolution Number PC-041222-32, a resolution against Circleville Solar’s project. As explained below, the Commissioners of the Pickaway County Board, like members of any other legislative body in Ohio, are protected by the doctrine of absolute legislative privilege. Circleville Solar seeks to violate that well-established privilege because it wants to depose the Commissioners about the motivations behind the resolution.

Other than seeking to violate the Commissioners’ legislative privilege, Circleville Solar’s Motion fails to identify any relevant information that could be gleaned from the depositions and fails to explain how such depositions could reasonably lead to the discovery of admissible

evidence. The short answer is that there is none and Circleville Solar seeks to harass the Commissioners in retaliation for their opposition to the solar project.

Moreover, the General Assembly has clearly spoken and directed developers such as Circleville Solar to work with local residents and obtain support of local government for their projects. Circleville Solar has not meaningfully engaged with the Pickaway County Commissioners and has not appeared at any of the county commission meetings in the 11 months that have passed since the adoption of the resolution they indicate in their motion they now want to discuss. A representative of the Pickaway County Commissioners, indeed the individual Commissioners themselves, cannot expand or retract their official actions through a deposition. Like this very Board, the Pickaway County Commissioners can only act through their official actions—a deposition of an individual commissioner or other representative has no effect on the resolution. Moreover, again like this Board, the Pickaway County Commissioners are required to act at open meetings and in compliance with the Sunshine Act requirements. The entire concept of seeking to utilize a deposition to explore issues that are required by statute to be handled in another context flies in the face of Ohio law.

Finally, failing to quash this subpoena will allow developers to weaponize the subpoena process by chilling local government officials from providing public official positions on projects like the Circleville Solar project. Further, failing to quash this subpoena also weaponizes the subpoena process because it could be used to create judicial conflict issues for ad hoc members of the Board. Failing to quash the subpoena would allow developers, such as Circleville Solar, to strategically subpoena officials they would want to prevent from acting as an ad hoc voting member of the Board since it would be improper for a County Commissioner to be both a deponent in a case and an ad hoc voting member.

The Board should quash this extreme overreach by Circleville Solar.

APPLICABLE LAW

Under O.A.C. 4906-2-23(C), the Board may “quash a subpoena if it is unreasonable or oppressive[.]” For a subpoena to be valid, it must, among other things, be “within the scope of discovery set forth in rule 4906-2-14 of the Administrative Code.” O.A.C. 4906-2-23(D). O.A.C. 4906-2-14(B) limits the scope of discovery to non-privileged matters that are “relevant to the subject matter” of the proceeding or “reasonably calculated to lead to the discovery of admissible evidence.” Ohio Civ. R. 26(B)(1) similarly limits discovery to relevant, non-privileged matters that are “proportional to the needs of the case[.]”

In addition, Ohio Civ. R. 45(C)(3)(b) requires the tribunal to quash a subpoena if the subpoena requires “disclosure of privileged or otherwise protected matter and no exception or waiver applies[.]”

ARGUMENT

I. The Subpoena Seeks Privileged Information and Must be Quashed.

A. Legislative Privilege Applies to Boards of County Commissioners.

In 1980, the Ohio Supreme Court recognized that, under the common law, absolute legislative privilege covers not only members of Congress and the General Assembly, but also members of local legislative authorities. *Constanzo v. Gaul*, 62 Ohio St. 2d 106, 110 (1980). In reaching that conclusion, the Court considered the Speech or Debate Clause of the United States Constitution and the Speech or Debate Clause of the Ohio Constitution.¹ *Constanzo*, 62 Ohio St.

¹ The Speech or Debate Clause of the United States Constitution protects members of Congress from being “questioned in any other Place.” U.S. Const. art I, § 6, cl.1. And the Speech or Debate Clause of the Ohio Constitution similarly protects members of the Ohio General Assembly by providing that “they shall not be questioned elsewhere.” Ohio Const. art. II, § 12.

2d at 109. The Court also considered the common law, including *Tanner v. Gault*, 20 Ohio App. 243, 245-46 (9th Dist. 1925), which held that the legislative privilege extends to “all legislative bodies, state or municipal, and that the county commissioners” in that case were “such a body within the rule.” *Constanzo*, 62 Ohio St. 2d at 110.²

And, the Ohio Supreme Court has made clear that the scope of the privilege extends to statements “made during the course of official proceedings by members of local governing bodies, at least where the statements relate to a matter under consideration, discussion or debate.” *Constanzo*, 62 Ohio St. 2d at 110. Put another way, the privilege “extends to meetings, processes, conversations, and documents that are ‘an integral part of the deliberative and communicative processes’ by which legislators participate in legislative or committee proceedings.” *Dublin v. State*, 138 Ohio App. 3d 753, 759 (10th Dist. 2000) (citation omitted).

The Pickaway County Board of Commissioners is a local legislative authority. *See* Ohio Const. art X, § 4 (“The Legislative authority (which includes the Board of County Commissioners) of any county”); R.C. 307.14(A) (“‘Legislative Authority’ means the board of county commissioners). On April 12, 2022, the Board of Commissioners passed Resolution Number PC-041222-32, “express[ing] its opposition to” Circleville Solar’s “request to construct and operate the facility” at issue in this case. That resolution was a legislative act by the Board of Commissioners.

² The Ohio Supreme Court’s holding in *Constanzo* is well founded. “The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.” *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). “Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.” *Id.*

B. Legislative Privilege Extends to Civil Discovery.

The purpose of the legislative privilege is clear and firmly rooted—to protect legislators, in both criminal and civil actions, from diverting “their time, energy, and attention from their legislative tasks to defend the litigation.” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975); see *Tenney*, 341 U.S. at 373 (“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.”) (internal citations and quotations omitted).³

Moreover, the legislative privilege applies to compelled discovery in civil actions, even where the legislator is not a party. See *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015) (the legislative “privilege extends to discovery requests, even when the lawmaker is not a named party in the suit”); *Dublin v. State*, 138 Ohio App. 3d at 759-60 (applying the legislative privilege to civil discovery and upholding discovery order because the information sought was outside the scope of the privilege).

Circleville Solar disagrees with the Pickaway County Board of Commissioners’ Resolution and subpoenaed the Commissioners to testify about *why* the Resolution passed. See Motion to Issue Subpoena (“Circleville Solar seeks to depose a representative of the Pickaway County Commissioners” about “issues underlying the passage of a county resolution against the solar

³ Legislative privilege exists not simply for the “personal or private benefit” of legislators but is designed “to protect the integrity of the legislative process by insuring the independence of individual legislators”—to guarantee, in short, that “legislative function[s] ... may be performed independently.” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975); see *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). By “enabling these representatives to execute the functions of their office without fear” of interference, the “rights of the people” are protected. *Tenney*, 341 U.S. at 373-74. Otherwise, the “privilege would be of little value if they could be subjected to the cost and inconvenience and distractions” of litigation. *Id.* at 377. “This legislative privilege reflects concern for an effective system of checks and balances among the three branches of government.” *Dublin v. State*, 138 Ohio App. 3d 753, 758-59 (10th Dist. 2000).

project”). In other words, Circleville Solar seeks to inquire “into acts that occur in the regular course of the legislative process and into the motivation for those acts.” *United States v. Brewster*, 408 U.S. 501, 525 (1972). The “subpoenas’ only purpose was to support the lawsuits inquiry into the motivation behind [the legislation], an inquiry that strikes at the heart of the legislative privilege.” *Hubbard*, 803 F.3d at 1310. This is exactly what the legislative privilege was designed to prevent.

II. Circleville Solar Seeks Irrelevant Information.

According to Circleville Solar’s Motion, it seeks to depose “a representative of the Pickaway County Commissioners” to ostensibly “allow Circleville Solar to respond to issues raised by the Pickaway County Commissioners, including any issues underlying the passage of a county resolution against the solar project[.]” Motion at 1. But the Board of Commissioner’s resolution does not identify any particular “issue” with the solar project. Rather, it merely reflects that two Commissioners voted in favor of the resolution, thus passing it and thereby “expressing its opposition to the request to construct and operate the facility.” On the other hand, if Circleville Solar meant issues raised during the regular session of the Board of Commissioners on April 12, 2022—when the resolution was debated and ultimately passed—then it already had its chance to address those issues in an open meeting with the Board of Commissioners. The County Commissioners, individually or in the aggregate, have nothing to add to their resolution—a document that speaks for itself.

So, what relevant information—other than simply violating legislative privilege—could Circleville Solar glean from deposing one or all the Pickaway County Commissioners? The Motion is silent and understandably so—there is no relevant information. That conclusion is evident from Circleville Solar’s claim—in its Motion—that it has already “addressed a number of

issues pertaining to the health, safety, and welfare of the Pickaway County residents.” Motion at 1. Circleville Solar cannot explain how a deposition of the County Commissioners will help it or the Board “better understand and address” the issues it claims to have already addressed in support of its application. Motion at 1.

Moreover, consider the fact that Circleville Solar waited nearly a year after the resolution was passed and a mere month before the hearing in this matter to even file its hastily prepared Motion and draft subpoena.⁵ Again, if there was relevant information to be had by deposing the Commissioners—or obtaining their documents—then why wait until the proverbial eleventh hour? There is no reasonable explanation other than Circleville Solar disagrees with the resolution and seeks to harass the County Commissioners for passing it.

CONCLUSION

The Board should grant this motion and quash Circleville Solar’s attempt to breach the County Commissioners’ legislative privilege and otherwise harass the Commissioners for passing a resolution it disagrees with.

Respectfully submitted,

/s/ Matthew R. Pritchard

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**ON BEHALF OF THE PICKAWAY COUNTY BOARD OF
COMMISSIONERS**

⁵ Circleville Solar’s Motion is not at all clear who it seeks to depose. In the body of the Motion, it refers to “a representative of the Pickaway County Commissioners.” Yet, its proposed subpoena is directed to all three Commissioners. Further confusing things, in its “Definitions” Circleville Solar defines “You” to mean “yourself as Manager or[sic] the Seneca County Airport[sic].”

CERTIFICATE OF SERVICE

In accordance with Ohio Adm. Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion to Quash Subpoena of Circleville Solar, LLC by the Pickaway County Board of Commissioners* was sent by, or on behalf of, the undersigned counsel for Pickaway County to the following parties of record this March 23, 2023, via electronic transmission.

/s/ Matthew R. Pritchard

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**On Behalf of the Public Utilities
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