



LEGAL OPINION RE: USE OF ROADS
WIND PROJECT ON AMHERST ISLAND
Summary received by Council on January 9, 2012

Comments from Cunningham Swan

1. **Use of Roads - General**

- A road allowance, whether open or unopened, is a public highway that the public, generally has a right to use.
- The municipality is entitled to place restrictions on how road allowances are used, especially if the use will cause damage.
- The municipality is entitled to pass load limit bylaws based on the reasonable carrying capacity of the road.
- The municipality is entitled to compensation for damages to a public highway.

2. **Installation of Electric Transmission Equipment**

- Algonquin Power is entitled to construct or install electric transmission equipment within or over a public street or highway. This would include all road allowances that have not been stopped up and closed by bylaw.
- The legal authority to use the public highways for purposes of installing infrastructure is found in Section 41 of the *Electricity Act*. This section provides that a "distributor" may install its electrical infrastructure in the public highway without the consent of the municipality and without paying the municipality any compensation for the use of the highway. Additionally, the *Expropriations Act* does not apply to such a use.
- The Province anticipated issues around the use of municipal highways and amended the *Ontario Energy Board Act* regulations to specifically identify the electrical distribution system from a generating facility to the public electric grid as a "distribution system". As a "distributor", an alternative energy company is entitled to rely on Section 41 of the *Electricity Act* to grant it access to public highways. This amendment came into force in 2005. The Ontario Energy Board has recently ruled that this interpretation is the law in Ontario.
- Algonquin Power may install its electrical infrastructure associated with its generation facility that is necessary to distribute the power from the wind turbines to the power grid within the municipal road allowance. The consent of the municipality is not required. However, the location of the structures and equipment must be acceptable to the municipality. If the Township and Algonquin Power cannot agree on the location of the equipment, Algonquin Power can apply to the Ontario Energy Board for a ruling and the Board has the jurisdiction to establish the final location of the equipment.
- While Algonquin Power does not have to pay for the use of the highway, it must give reasonable notice of entry to the property and, in so far as is practicable, restore the highway to its original condition and pay compensation for any damage caused by the entry.

- Although Algonquin Power may be able to rely on expropriation powers, leave of the Ontario Energy Board is required, and there would be delays associated with exercising these powers, including the potential for public hearings.

Comments from Windlectric Inc. via Miller Thomson (lawyers)

- This summarizes the responsibilities of municipalities with regard to the connection of renewable energy projects to the provincial power grid, and the associated use of roads and road allowances.
- As part of the efforts to expand renewable energy project development in Ontario, the *Green Energy and Green Economy Act* (the enabling legislation for the Green Energy Act) brought in various changes impacting upon the powers and responsibilities of municipal governments relevant to this area.
- Legislative sections are in place requiring municipalities to enable the connection of these projects to the provincial grid.

Section 41 of the *Electricity Act* includes the following provisions:

Public streets and highways

41. (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.

No consent required

- (5) The exercise of powers under Subsections (1), (2) and (3) does not require the consent of the owner of or any other person having an interest in the street or highway.

Location

- (9) The location of any structures, equipment or facilities constructed or installed under Subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

- In summary, a municipal owner of roadways and road allowances will be required to permit the installation, by a transmitter or distributor, of equipment necessary for the transmission or distribution of electricity. If locations for such equipment cannot be agreed between such transmitter or distributor and the municipality, the locations will be determined by the Board.
- It is our understanding that renewable energy project owners are distributors, an understanding which has now been confirmed by the Plateau Decision, in which, in part:
 - o The Board rejected the municipality's position that the developer, by virtue of being a "renewable energy generation facility", was not also a "distributor" for the purposes of Section 41 of the *Electricity Act*.
 - o Having found that the developer had a right to the use of road allowances for the purposes of distributing power to the provincial grid, the Board sought to determine the placement of the distribution equipment within the municipal

road allowances. Since the municipality had not placed any competing placement proposals before the Board, the Board accepted the developer's proposed locations.

- (Our conclusion is that) based on the legislation and confirmed in the Plateau Decision, a developer engaged in a renewable energy generation facility does not require a licence under the *Electricity Act*, but does qualify as a distributor eligible to utilize roads and road allowances for distribution facilities, and municipalities have no basis in law to deny such parties the use of same. In the absence of an agreement on the location of such facilities, a municipality may have the location of those distribution facilities imposed on it by the Board.
- Overall, it is in the interest of both municipalities and developers to engage in good faith discussions regarding the placement of distribution facilities within road allowances, and it is clear that municipalities may not use the process of determining the location of distribution facilities to obstruct or prevent the establishment of a renewable energy generation facility.

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Summarized by Diane Pearce, Chief Administrative Officer, Loyalist Township from documents provided to Council in December 2011 by Cunningham Swan and Algonquin Power. Summary received by Council as a public record on January 9, 2012.

Attachment (Information provided by Stantec Consulting: General Information regarding Municipal Consideration under the Renewable Energy Approval)

January 4, 2012

Information provided by Stantec Consulting: General Information regarding Municipal Consideration under the Renewable Energy Approval

Renewable energy projects are exempt from most landuse planning instruments under the *Planning Act*. Municipalities, as such, cannot restrict the use of land for renewable energy projects. In the case of a wind farm, municipal by-laws (other than by-laws under the *Planning Act*) continue to apply. Municipalities have by-law powers through the *Municipal Act, 2001* and the *Building Code Act, 1992* for matters such as noise, tree protection, outdoor illumination, etc.

Developers therefore need to consult with the municipality(ies) within their project study area to determine which by-laws are in place, and under which legislation they've been enacted. They should then consult with the municipality(ies) to determine the permits and approval process they need to complete. In some cases, developers may come to an agreement with the municipality(ies) outside that of the standard municipal by-laws, but the format and content of that agreement is up to the developer and municipality.

The municipal permitting process is outside of the REA application. At no time do developers need to include municipal by-law agreements or permits in the REA application. They do however need to consult with municipalities as outlined in the REA process which includes notification of the project, the provision of draft project documents and the provision of a municipal consultation form, all in accordance with minimum regulated timelines. Developers can of course go beyond the minimum standard for consultation during the REA process, and meet with municipalities early and often throughout a project.

The next step for the Amherst Island Wind Energy Project will be to confirm, with the County of Lennox and Addington and Loyalist Township, what by-laws are in place, how a proponent applies for approval, and what the timelines are for receiving a response. The timeline for receiving a response from the municipality(ies) is permit-specific. Therefore specific research needs to be completed on each required permit to determine the timelines that should be followed. If there is a delay in receiving a response or permit from a municipality, an appeal is possible depending on the type of permit the developer is looking to obtain. There are different appeal processes for most municipal permits. For example, for building permits there is a Building Code Commission. The appeal bodies should have a trigger for an appeal based on non-responsiveness. There are different appeal processes for most municipal permits. For example, for building permits there is a Building Code Commission. The appeal bodies should have a trigger for an appeal based on non-responsiveness.

From Stantec's research it is believed the following municipal permits will likely apply for the Amherst Island Wind Energy Project:

| Key Permit / Authorization | Rationale |
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| Municipal Consent, Work with the R.O.W | Required for works in municipal road allowances |
| Consent/Severance Application | Required if easements over private lands required |
| Road Cut Permit | May be required for access roads off of county roads or works to county roads |
| Pre-Condition Survey | Assessment of pre-construction conditions for engineering staff |
| Building Permit | Compliance with building codes (Loyalist Township) |
| Entrance Permit | Entrance from county roads (Loyalist Township and County of Lennox and Addington) |
| Transportation Plan | Adherence to road safety and suitability |
| Right-of-way control (includes following permits: entrance application, excavation application, excess load application, encroachment application, and utility municipal consent application). | <p>This permit is required by County of Lennox and Addington. Details of the applications it includes are provided below.</p> <ul style="list-style-type: none"> • Entrance application (public, residential, commercial, farm, field) • Excavation application (private construction in a County road allowance) • Excess load application (over-size loads/dimensions as per The Highway Traffic Act) • Encroachment application (private feature remaining in a County road allowance) • Utility Municipal Consent Application - For public utility installation in a County road allowance. |
| Additional Plans related to general engineering (e.g. siltation control, lot grading, plan of services, etc.), installation of temporary dock, | Required supporting information/plans required by Loyalist Township and the County of Lennox and Addington. |

Information provided by Stantec Consulting: General Information regarding Municipal Consideration under the Renewable Energy Approval

| Key Permit / Authorization | Rationale |
|--|-----------|
| water, wastewater, storm water, transportation, geotechnical | |

Other items of interest:

- The MOE identifies that developers and municipalities might want to enter into a type of mutually beneficial agreement which could define municipal responsibilities and developer obligations.
- Municipalities, under the *Municipal Act, 2001* may charge developers for infrastructure such as road cuts, road access, occupancy permits, emergency response, sewer, water and waste collection.
- A municipality, under the *Building Code Act, 1992* is entitled to charge building permit fees.
- MOE's REA Guide for Municipalities. See attached link
http://www.energy.gov.on.ca/docs/en/ON9126_MEI_Guidance_Brochure9.pdf