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September 12, 2014

RESS & COURIER

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

Re: Application by Suncor Energy Products Inc. ("Suncor")

We are counsel to Suncor. Enclosed please find Suncor's application and pre-filed evidence under Section 41(9) of the *Electricity Act* to determine the location of Suncor's distribution facilities within certain road allowances.

Yours truly,

FOGLER, RUBINOFF LLP

Albert M. Engel

cc: C. Scott, Suncor
J. Hood, Suncor

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an application by Suncor Energy Products Inc. for an Order or Orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) establishing the location of the applicant's distribution facilities within road allowances owned by the Town of Plympton-Wyoming, all as set out in this application.

APPLICATION

SUNCOR ENERGY PRODUCTS INC.

September 12, 2014

EXHIBIT LIST

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			Appendix N – Email from Town to Suncor of September 10, 2014 with wording of motions passed related to Suncor's request for Town agreement to location of Distribution System within Town road allowances
	5	1	Order Sought
			Appendix A – List of Plympton-Wyoming Streets and Highways for Cedar Point II Wind Energy Project Distribution System Location

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an application by Suncor Energy Products Inc. for an Order or Orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) establishing the location of the applicant's distribution facilities within certain road allowances owned by the Town of Plympton-Wyoming, all as set out in this application.

APPLICATION

1. Suncor Energy Products Inc., ("**Suncor**") is an Ontario corporation, with a registered office in Mississauga. Suncor is developing and will own and operate the generation and distribution assets associated with the Suncor Cedar Point II Wind Energy Project (the "**Project**") in the Municipality of Lambton Shores, the Township of Warwick, and the Town of Plympton-Wyoming ("**Town**"), in Lambton County, Ontario.

2. Suncor hereby applies to the Ontario Energy Board (the "**Board**") pursuant to Section 41(9) of the *Electricity Act, 1998*, as amended (the "**Electricity Act**") for an order or orders establishing the location of Suncor's distribution facilities within the streets and highways owned by the Town, listed in Exhibit B, Tab 5, Schedule 1, Appendix A (collectively, the "**Road Allowances**"), all as set out in Exhibit B, Tab 5, Schedule 1 (Order Sought).

3. Suncor was issued Renewable Energy Approval Number 6914-9L5JBB ("REA") for the Project on August 22, 2014. As a result of the REA being issued, the Project is approved for 55 wind turbine locations, 46 of which will be built, 27 of which are located within the Town (collectively, the "**Generation Facilities**"). The Generation Facilities will have a total nameplate capacity of up to 100 MW. To convey the electricity generated by the Generation Facilities to a transmission system, which is in turn connected to the IESO-controlled grid, Suncor plans to construct certain distribution facilities (the "**Distribution System**"). The Distribution System will include approximately 124 km of 34.5 kV distribution lines located on private property and municipal and county right-of-ways, which will convey electricity from each of the wind turbines to a transformer substation, from which a transmission system will convey the electricity to the IESO-controlled grid.

4. As the owner and operator of the Distribution System, Suncor is a "distributor" within the meaning of the Electricity Act and the Board's decisions in EB-2010-0253, EB-2013-0031, EB-2013-0233 and EB-2014-0139. As a distributor, Suncor has chosen to locate a portion of its Distribution System within approximately 22.615 km of Road Allowances pursuant to the statutory right of distributors under subsections 41(1) and 41(5) of the Electricity Act. These subsections, among other things, give distributors the right to construct and install structures, equipment and other distribution facilities over, under or

on any public street or highway without the consent of the owner of, or any other person having an interest in, such public street or highway.

5. In accordance with Section 41(9) of the Electricity Act, Suncor, as the distributor, and the Town, as the owner of the Road Allowances, are required to agree on the location of the Distribution System within the Road Allowances, which location shall be determined by the Board in the event of a disagreement.

6. Notwithstanding its statutory rights, as more particularly described in Exhibit B, Tab 3, Schedule 1, Suncor has sought, as is commonplace in Ontario, to negotiate agreements with the Town with respect to the location, construction, operation and maintenance of the Distribution System within the Road Allowances.

7. While neither Town staff nor Town Council have expressed concern with the location of the Distribution System, the Town has nevertheless to date not approved the execution of any agreement with Suncor as to the location of the Distribution System within the Road Allowances.

8. Because Suncor and the Town cannot reach an agreement with respect to the location of the Distribution System within the Town's Road Allowances, Suncor requests that the Board issue an order or orders, pursuant to Section 41(9) of the Electricity Act, establishing the location of the Distribution System within the Road Allowances, all as set out in Exhibit B, Tab 5, Schedule 1.

9. Suncor requests that the Board expedite its hearing of this application in accordance with Sections 2.01 and 7.01 of the Board's *Rules of Practice and Procedure* because (i) the only person directly affected by this application is the Town as the sole owner of the Road Allowances, and (ii) Suncor received its REA on August 22, 2014 and its project schedule requires construction to commence shortly.

10. Suncor also requests that the Board, in hearing this application, be guided by its mandate, under Section 1(1)(5) of the *Ontario Energy Board Act, 1998*, to "promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities".

11. Suncor requests that copies of all documents filed with or issued by the Board in connection with this Application be served on the Applicant and the Applicant's counsel as follows:

    (a) The Applicant:

        Suncor Energy Products Inc.

c/o Suncor Energy Inc.
P.O. Box 2844
150 – 6th Avenue S.W.
Calgary, AB T2P 3E3

Attention: Mr. Chris Brett
Tel: 403-296-7125
Fax: 403-724-3626
Email: chbrett@suncor.com

(b) The Applicant's Counsel:

Fogler, Rubinoff LLP
P.O. Box 95
3000-77 King Street West
Toronto, ON M5K 1G8

Attention: Mr. Albert Engel
Tel: 416-864-7602
Fax: 416-941-8852
Email: aengel@foglers.com

12. Additional written evidence, as required, may be filed in support of this Application and may be amended from time to time prior to the Board's final decision.

13. The Applicant requests that the Board proceed by way of written hearing, pursuant to Section 34.01 of the Board's *Rules of Practice and Procedure*.

Dated at Toronto, Ontario, this 12th day of September, 2014.

Suncor Energy Products Inc.
By its counsel
Fogler, Rubinoff LLP

Per: _____
Albert Engel

SUMMARY OF THE PRE-FILED EVIDENCE

THE APPLICATION AND THE PROJECT

This is an application by Suncor Energy Products Inc. ("**Suncor**" or the "**Applicant**") for an order or orders pursuant to Section 41(9) of the *Electricity Act, 1998* (as amended) (the "**Electricity Act**") establishing the location of the Applicant's distribution facilities within certain public rights-of-way, streets and highways owned by the Town of Plympton-Wyoming (collectively, the "**Road Allowances**"), all as set out in Exhibit B, Tab 5, Schedule 1.

Suncor is an Ontario corporation, with a registered office in Mississauga. Suncor is developing and will own and operate the generation and distribution assets associated with the Suncor Cedar Point II Wind Energy Project (the "**Project**") in the Municipality of Lambton Shores, the Township of Warwick, and the Town of Plympton-Wyoming ("**Town**"), in Lambton County, Ontario.

Suncor was issued Renewable Energy Approval Number 6914-9L5JBB ("**REA**") for the Project on August 22, 2014. As a result of the REA being issued, the Project is approved for 55 wind turbine locations, 46 of which will be built, 27 of which are located within the Town (collectively, the "**Generation Facilities**"). The Generation Facilities will have a total nameplate capacity of up to 100 MW. To convey the electricity generated by the Generation Facilities to a transmission system, which is in turn connected to the IESO-controlled grid, Suncor plans to construct certain distribution facilities (the "**Distribution System**"). The Distribution System will include approximately 124 km of 34.5 kV distribution lines located on private property and municipal and county right-of-ways, which will convey electricity from each of the wind turbines to a transformer substation, from which a transmission system will convey the electricity to the IESO-controlled grid. The Distribution System is proposed to be installed below grade within trenches or within conduit installed via directional drill. Suncor has chosen to locate a portion of the Distribution System within approximately 22.615 km of Road Allowances that are listed in Exhibit B, Tab 5, Schedule 1, Appendix A. As set out in Exhibit B, Tab 2, Schedule 1, a

balance of environmental, social, technical and economic considerations has resulted in Suncor's decision to locate the Distribution System within these Road Allowances.

STATUTORY RIGHTS OF DISTRIBUTORS

Pursuant to sections 41(1) and 41(5) of the Electricity Act and the Board's decisions in EB-2010-0253, EB-2013-0031, EB 2013-0233 and EB-2014-0139, distributors may construct or install distribution facilities over, under or on any public streets or highways without the consent of the owner of or any other person having an interest in such streets or highways. Pursuant to section 41(9) of the Electricity Act, distributors are required to obtain the agreement, of the owner of the street or highway, to the location of the distribution facilities over, under or on the street or highway. If agreement cannot be reached, then, pursuant to section 41(9) of the Electricity Act, the Ontario Energy Board shall determine the location.

CHRONOLOGY OF EVENTS

Although it is not under any statutory obligation to do so, starting on March 5, 2013, Suncor did attempt to negotiate a road use agreement with the Town that would have included provisions for the location of its Distribution System within the Road Allowances (see Exhibit B, Tab 4, Schedule 1, Appendix A). To date, the road use agreement has not be executed. Suncor also formally requested the Town's agreement to the Distribution System locations on May 15, 2014, June 6, 2014, between June 12, 2014 and August 21, 2014, and on September 4, 2014 (see Exhibit B, Tab 4, Schedule 1). At the Town Council meeting on September 10, 2014, Suncor's request for Council approval of the location of its Distribution System was received, but no agreement was provided.

ORDER SOUGHT

Suncor therefore applies to the Board pursuant to Section 41(9) of the Electricity Act for an order or orders establishing the location of the Distribution System within the Road Allowances, all substantially in accordance with Suncor's plans as set out in Exhibit B, Tab 5, Schedule 1.

THE APPLICANT

Suncor Energy Products Inc. ("**Suncor**") is an Ontario corporation, with a registered office in Mississauga. Suncor is developing and will own and operate the generation and distribution assets associated with the Suncor Cedar Point II Wind Energy Project (the "**Project**") in the Municipality of Lambton Shores, the Township of Warwick, and the Town of Plympton-Wyoming ("**Town**"), in Lambton County, Ontario. Suncor constructs, manages and operates wind generation facilities with over 255 MW of installed wind energy generation capacity in Canada.

PROJECT DESCRIPTION

The Cedar Point II Wind Energy Project ("**Project**") will be located within the Municipality of Lambton Shores, the Township of Warwick, and the Town of Plympton-Wyoming ("**Town**"), in Lambton County, Ontario. Lambton County is situated in south-western Ontario. A map of the generation and distribution facilities that make up the entire project as approved by Renewable Energy Approval Number 6914-9L5JBB issued on August 22, 2014, is provided at Exhibit B, Tab 2, Schedule 1 Appendix A.

1. FIT Contract

The Project is being developed pursuant to a Feed-in Tariff ("**FIT**") contract awarded to the Applicant by the Ontario Power Authority under the Ontario FIT Program on July 6, 2011. The Project will therefore further the Government of Ontario's policy objectives of increasing the amount of renewable energy generation that forms part of Ontario's energy supply mix, while promoting a green economy. To help facilitate these objectives, the distribution facilities that are associated with the Project will deliver electricity from the Project turbines to a transmission system that will in turn deliver the electricity to the IESO-controlled grid.

2. The Generation Facilities and Distribution System

As shown in Appendix A of this Exhibit B, Tab 2, Schedule 1, the site of the Project's generation facilities (the "**Generation Facilities**") is situated in the Municipality of Lambton Shores, the Township of Warwick and the Town of Plympton-Wyoming. The Generation Facilities will include 46 wind turbine generators, constructed at 55 approved locations and will have a total nameplate capacity of up to 100 MW. Each turbine will consist of a supporting tower, concrete tower foundation, rotor blades and a gearbox/electrical generator housing.

The distribution system associated with the Project (the "**Distribution System**") will convey electricity from the Generation Facilities to a transformer substation through a total of 124 km of Distribution Systems lines (also referred to as collector and collection lines in various reports prepared for the renewable energy approval application). In particular, a generator step-up

("**GSU**") transformer, located immediately adjacent to each wind turbine, will transform the electricity generated in the nacelle of each wind turbine to a Distribution System line voltage (i.e. 690 v to 34.5 kV). From each GSU, the Distribution System will convey the electricity at 34.5 kV to a transformer substation. Subject to technical considerations, the Distribution System line will primarily be buried to a minimum depth of 1 meter by means of trenching or, where being installed underneath watercourses, woodlots or roads, by means of directional drilling. There may be occasional locations where the collection lines are placed above ground on wood, concrete or steel poles in the event that a physical obstruction is discovered during construction. The transformer substation to which the Distribution System connects will step-up the electricity to 115 kV for transmission ultimately to the IESO-controlled grid. Additionally, on June 6, 2014, at the Town's request, the Applicant committed to the Town to locating the Distribution System lines in accordance with the following specific requirements:

1) Crossings of municipal road allowances will be installed by directional drilling the lines underground in conduit at least 1.5m below the invert of the ditch and 2.5m below the centre line of the travelled portion of the road;

2) Crossings of Municipal Drains located within the Municipal road allowances will be installed by directional drilling the lines in conduit at least 1.5m beneath the invert of the municipal drain; and

3) When locating lines within road allowances, the Applicant shall install the lines within 1m of the property limit of the right of way, unless unknown obstacles are discovered. In such a case the location shall be as far from the travelled portion of the road as possible.

The Applicant has secured rights in certain privately owned lots on which certain segments of the Distribution System will be situated. The Distribution System will also occupy approximately 22.615 km of streets and highways ("Road Allowances") that are owned by the Town, as more particularly described in Exhibit B, Tab 5, Schedule 1 (the "**Road Allowances**"). A Maps illustrating the proposed location of the entire Distribution System are provided in

Appendix A of this Exhibit B, Tab 2, Schedule 1 and in Appendix L of Exhibit B, Tab 4, Schedule 1.

3. Renewable Energy Approval

Suncor has received a renewable energy approval for the Project. Renewable Energy Approval Number 6914-9L5JBB ("**REA**") was issued by the Ministry of the Environment to Suncor on August 22, 2014. A copy of the REA is provided in Exhibit B, Tab 2, Schedule 1, Appendix J, and a map of the approved project is provided at Appendix A of this Exhibit B, Tab 2, Schedule 1. Suncor filed its REA application for the Project in accordance with Ontario Regulation 359/09 made under the *Environmental Protection Act*. The REA application included a number of reports which considered the potential impacts of, and constraints applicable to, the Distribution System within the Road Allowances and the Project area, including the following:

- the Natural Heritage Assessment Reports (which assessed potential natural heritage features in the Project area and developed mitigation measures for any potential impacts on any such features identified as significant);

- the Consultation Report (which included consultation on environmental, social, technical and economic aspects of the Project with regulatory agencies, the local community and the Municipality);

- the Water Assessment and Water Body Report (which assessed water bodies in the Project area and developed mitigation measures for any potential impacts on any such features identified as significant);

- the Archeological Assessment Reports, specifically the Heritage Assessment, Stage 1 and 2 Archeological Assessment Reports (which surveyed for archaeological sites in the Project area and developed mitigation measures for any potential impacts on any such sites); and

- the Modification Report (which assessed effects of a minor project design change consisting of a change/addition to collector line, access road and transmission line routes to avoid a newly evaluated Provincially Significant Wetland complex).[1]

The REA reports listed above, among others, identified significant environmental, social and other features in the Project area in the vicinity of the Distribution System, determined appropriate setbacks from those features, and proposed additional mitigation measures where appropriate. The proposed location of the Distribution System was determined through an iterative approach and based on the extensive environmental assessment and community consultation process conducted in accordance with Ontario Regulation 359/09. As a result, the proposed location of the Distribution System within the Road Allowances that is set out in Exhibit B, Tab 5, Schedule 1 reflects the best balance of environmental, social, technical and economic considerations.

[1] The above-mentioned reports, and additional reports submitted as part of the Project's REA application, are publicly available at http://www.suncor.com/en/about/4797.aspx

Exhibit B
Tab 2
Schedule 1
Appendix A

Location Map dated July 2014, of Proposed Generation and Distribution Facilities Associated With the Project subsequently approved by Renewable Energy Approval Number 6914-9L5JBB issued August 22, 2014

Stantec

Legend

- Project Boundary

Proposed Project Components

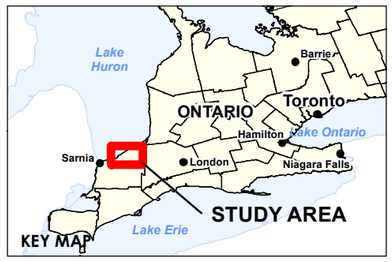
- Turbine
- Substation
- MET Tower
- Access Road
- Collector Line
- Transmission Line

Other Infrastructure

- Substation- NextEra Jericho

Existing Features

- Expressway / Highway
- Road
- Wooded Area
- Watercourse
- Waterbody
- Municipal Boundary



Notes

1. Coordinate System: NAD 1983 UTM Zone 17N
2. Base features produced under license with the Ontario Ministry of Natural Resources © Queen's Printer for Ontario, 2013.

July 2014
160960709

Client/Project

Suncor Energy
Cedar Point Wind Power Project

Figure No.

1

Title

Project Location

W:\active\60960709\drawing\MXD\REA_Reports\DraftSitePlan\DraftSitePlanRevisions_2014_07\160960709_Fig1_ProjectLocation_20140711.mxd
Revised: 2014-07-11 By: dharvey

STATUTORY RIGHTS OF DISTRIBUTORS

1. Suncor is a "Distributor"

Under the *Electricity Act, 1998* (the "**Electricity Act**"), a "distribution system" means a system for conveying electricity at voltages of 50 kV or less, and includes any structures, equipment or other things used for that purpose. The same definition is used under the *Ontario Energy Board Act, 1998* (the "**OEB Act**"). As described in Exhibit B, Tab 2, Schedule 1, the Applicant's Distribution System will consist of underground 34.5 kV feeder circuits that connect and convey electricity from each of the turbines to a transformer substation (constructed and owned by the Applicant) which in turn will connect to a transmission system that will connect to the IESO-controlled grid. As such, the Distribution System is a "distribution system" for purposes of the Electricity Act and the OEB Act, including the regulations thereunder.

Under this same legislation, a "distributor" is defined simply as a person who owns or operates a "distribution system". Accordingly, in respect of the Distribution System, the Applicant is a "distributor". Pursuant to Section 4.0.1(1)(d) of O. Reg. 161/99 under the OEB Act, a distributor will not be required to obtain or hold a distribution license under Section 57(a) of the OEB Act where, as will be the case with Suncor, the distributor distributes electricity for a price no greater than that required to recover all reasonable costs with respect to a distribution system that they own or operate, if the distributor is a generator and distributes electricity solely for the purpose of conveying it into the IESO-controlled grid. While the Applicant will not require a license from the Board in respect of the Distribution System, this will not affect the Applicant's status as a "distributor" for purposes of the Electricity Act or OEB Act or the regulations thereunder.

The above analysis is consistent with the Board's findings in EB-2010-0253, EB-2013-0031 and EB-2013-0233 and EB-2014-0139 in which the Board considered applications under section 41 of the Electricity Act by Plateau Wind Inc., Wainfleet Wind Energy Inc., East Durham Wind, Inc. and Jericho Wind Inc., respectively, in circumstances similar to the present application. Copies of the Board's decisions in EB-2010-0253, EB-2013-0031, EB-2013-0233 and EB-2014-

0139 are provided in Appendices A, B, C and D, respectively, of this Exhibit B, Tab 3, Schedule 1.

2. Rights of Distributors Under Section 41

Pursuant to subsections 41(1) and 41(5) of the Electricity Act, a distributor may construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its distribution system, including poles and lines, within any public street or highway without the consent of the owner of or any other person having an interest in such street or highway — in this case, the Road Allowances of the Town of Plympton-Wyoming (the "**Town**").[1] In the event that a distributor and the owner of the chosen public streets or highways cannot agree to the location of the distribution facilities within such public streets or highways, section 41(9) of the Electricity Act provides that the Board shall determine such location.[2] Under section 41 of the Electricity Act, the Applicant therefore has the right to locate the Distribution System within the Road Allowances and the right to bring this application. These rights arise because the Applicant, as the owner and operator of the Distribution System, is a "distributor" within the meaning given to such term in the Electricity Act.

Also notable is that subsections 41(2) and (3) of the Electricity Act grant related rights to the distributor to inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection 41(1), as well as to enter the street or highway at any reasonable time to exercise the powers referred to in subsections 41(1) and (2).[3] In this regard, Suncor has the right, pursuant to section 41(3) of the Electricity Act, to enter into, and

[1] Section 41(1) states, “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.” Section 41(5) states, “The exercise of powers under subsections [41] (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.”

[2] Section 41(9) states, "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."

[3] Section 41(2) states, "The transmitter or distributor may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1) or a predecessor of subsection (1)." Section 41(3) states, "The transmitter or distributor may enter the street or highway at any reasonable time to exercise the powers referred to in subsections (1) and (2)."

travel and carry equipment along the public streets, highways and right-of-ways of the Town as Suncor deems necessary to construct, install, operate, maintain and decommission the Distribution System within the Road Allowances.

Because of the limited scope of section 41(9), and because the Applicant and the Town have been unable to agree on the location of the Distribution System within the Road Allowances the only issue before the Board is determining that location. The Board has acknowledged the limited scope of, and its limited jurisdiction in, proceedings under section 41(9) of the Electricity Act for facilities that are similar in nature to the Distribution System. Specifically, in its Decision and Order in the section 41 application by Plateau Wind Inc. (EB-2010-0253), the Board stated as follows:

> [Section 41 of the Electricity Act] limits the Board's role in this proceeding to a determination of the location of Plateau's proposed Distribution Facilities within the Road Allowances. Given the legislative restriction on the Board's jurisdiction, it is not the Board's role in this proceeding to approve or deny the Project or the Distribution Facilities, to consider the merits, prudence or any environmental, health or economic impacts associated with it or to consider alternatives to the project such as routes for the Distribution Facilities that are outside of the prescribed Road Allowances. Also, it is not within the Board's jurisdiction in this proceeding to consider any aspect of Plateau's proposed wind generation facilities.[4]

Similarly, in its Decision and Order in the Section 41 application by East Durham Wind, Inc. (EB-2013-0233), the Board stated:

> Given the scope of subsection 41(9), it is not the Board's role in this proceeding to decide whether the Project should be approved, consider issues relating to wind turbines or renewable energy generally, or consider alternatives to the Project such as routes for the Distribution System that are outside of the Road Allowances. According, the concerns in the letter 1 of comments [relating to the location of wind turbines and their impact on property values, health, and aesthetics, broad environmental issues, and the provincial government's renewable energy policy] are not within the scope of this proceeding.[5]

[4] Ontario Energy Board, Decision and Order, Section 41 Application by Plateau Wind Inc. (EB-2010-0253), para. 9.
[5] Ontario Energy Board, Decision and Order, Section 41 Application by East Durham Wind, Inc. (EB-2013-0233), p. 5.

Accordingly, the present application only concerns the question of where Suncor's Distribution System will be located within the Road Allowances.

Exhibit B
Tab 3
Schedule 1
Appendix A

OEB Decision and Order in EB-2010-0253

Case Name:

Plateau Wind Inc. (Re)

IN THE MATTER OF the Electricity Act, 1998 as amended (the "Electricity Act");
AND IN THE MATTER OF an application by Plateau Wind Inc. for an order or orders pursuant to section 41(9) of the Electricity Act establishing the location of Plateau Wind Inc.'s distribution facilities within certain road allowances owned by the Municipality of Grey Highlands.

2011 LNONOEB 11

No. EB-2010-0253

Ontario Energy Board

Panel: Paul Sommerville, Presiding Member; Paula Conboy, Member

Decision: January 12, 2011.

(50 paras.)

Tribunal Summary:

Plateau Wind filed an application with the Board dated July 30, 2010, under subsection 41(9) of the *Electricity Act, 1998,* for an order of the Board establishing the location of Plateau's proposed distribution facilities within road allowances owned by Grey Highlands. Plateau is in the business of developing wind energy generation projects and the associated distribution facilities in Ontario. As part of the Project, which will involve eighteen GE 1.5 Megawatt wind turbine generators, Plateau plans to construct 44 KV overhead and underground electrical distribution facilities to transport the electricity generated from the Turbines to the existing local distribution system of Hydro One.

The Board considered its legislative authority as set out in section 41 of the *Electricity Act.* The Board noted that the legislation limits the Board's role in this proceeding to a determination of the location of Plateau's proposed Distribution Facilities within the Road Allowances. Given the legislative restriction on the Board's jurisdiction, the Board noted it is not its role to approve or deny

the Project or the Distributions facilities, to consider the merits, prudence or any environmental, health or economic impacts associated with it or to consider alternatives to the project.

The Board agreed with Plateau's and Board staffs' submission that the Distribution Facilities which transport the electricity generated from the Turbines to the existing local distribution system of HONI, and ultimately to the IESO controlled grid, are a "distribution system, as defined in the *Electricity Act.* The Board also determined that Plateau is a distributor as defined in the *Electricity Act.* Accordingly, the Board granted the application.

DECISION AND ORDER

INTRODUCTION

1 Plateau Wind Inc. ("Plateau" or the "Applicant") filed an application dated July 30, 2010 (the "Application") with the Ontario Energy Board (the "Board") under subsection 41(9) of the *Electricity Act, 1998,* S.O. 1998, c. 15, Schedule A, as amended (the "*Electricity Act*") for an order or orders of the Board establishing the location of Plateau's proposed distribution facilities within road allowances owned by the Municipality of Grey Highlands ("Grey Highlands"). The Board assigned File No. EB-2010-0253 to the application.

2 Plateau is in the business of developing wind energy generation projects and the associated distribution facilities in Ontario. Plateau is the corporate entity created to hold and operate the generation and distribution assets of the Plateau Wind Energy Project in Grey County and Dufferin County, Ontario.

3 Plateau plans to develop the Plateau Wind Energy Project (the "Project") which will involve eighteen GE 1.5 megawatt ("MW") wind turbine generators, together having a nominal nameplate capacity of 27 MW. Twelve of the wind turbine generators are relevant to this Application, eleven of which will be located in Grey Highlands and one of which will be located in Melancthon Township (collectively referred to as the "Turbines"). In total, the Turbines will have a nominal nameplate capacity of 18 MW. Plateau has entered into a feed-in tariff contract with the Ontario Power Authority for the Project.

4 As part of the Project, Plateau plans to construct 44 kilovolt ("kV") overhead and underground electrical distribution facilities to transport the electricity generated from the Turbines to the existing local distribution system of Hydro One Networks Inc. ("HONI") and ultimately to the IESO-controlled grid. Plateau would like to locate certain portions of the electrical distribution facilities (the "Distribution Facilities") within road allowances owned by Grey Highlands (the

"Road Allowances").

5 Because Plateau and Grey Highlands have not been able to reach an agreement with respect to the location of the Distribution Facilities, Plateau requested that the Board issue an order or orders, pursuant to section 41(9) of the *Electricity Act*, determining the location of Plateau's Distribution Facilities within the Road Allowances.

6 In support of the Application, Plateau filed a brief of documents which included descriptions of Plateau's proposed Distribution Facilities, list of municipal road allowances proposed for location of the Distribution Facilities, maps showing the road allowances, a copy of the proposed road use agreement and other relevant project documents (collectively the "pre-filed evidence").

THE PROCEEDING

7 The Board has proceeded with this application by way of a written hearing. The procedural steps followed are outlined below:

- Application filed	July 30, 2010
- Notice of Application Issued	August 19, 2010
- The Board issued its Procedural Order No. 1	October 29, 2010
- Plateau filed its submission	November 8, 2010
- Grey Highlands and Board staff filed their submissions	November 29, 2010
- Plateau filed its reply submission	December 6, 2010

Grey Highlands was granted intervenor status and ten parties were granted observer status in this proceeding.

THE LEGISLATION

8 The Board's authority in this proceeding is derived from section 41 of the *Electricity Act* which states as follows:

Subsection 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. 1998, c. 15, Sched. A, s. 41 (1).

Subsection 41. (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. 1998, c. 15, Sched. A, s. 41 (9).

SCOPE OF PROCEEDING

9 The above-noted legislation limits the Board's role in this proceeding to a determination of the location of Plateau's proposed Distribution Facilities within the Road Allowances. Given the legislative restriction on the Board's jurisdiction, it is not the Board's role in this proceeding to approve or deny the Project or the Distribution Facilities, to consider the merits, prudence or any environmental, health or economic impacts associated with it or to consider alternatives to the project such as routes for the Distribution Facilities that are outside of the prescribed Road Allowances. Also, it is not within the Board's jurisdiction in this proceeding to consider any aspect of Plateau's proposed wind generation facilities.

EVIDENCE AND SUBMISSIONS

Plateau's Evidence and Submissions

Some key elements of Plateau's evidence and submissions are outlined below:

10 During 2008-2009, Plateau carried out an Environmental Assessment for the Project. The final Environmental Assessment report and a Notice of Completion were made publicly available for review and comment from June 12, 2009 to July 11, 2009. On April 14, 2010, Plateau publicly filed its Statement of Completion of the Environmental Assessment after the Ministry of the Environment rejected all requests to elevate the Project to an environmental review/individual environmental assessment.

11 Plateau submitted that a balance of environmental, social, technical and economic considerations impacted Plateau's decision on the location of the Turbines and therefore on the location of the Distribution Facilities. An excerpt from the Pre-Filed Evidence which lists the Road Allowances is attached to this Decision and Order as Appendix "A".

12 Plateau submitted that the only outstanding issue with respect to Plateau's use of the Road Allowances is the location of the Distribution Facilities within the Road Allowances. In this regard, Plateau undertook to negotiate a standard road use agreement with Grey Highlands.

13 According to Plateau's evidence, as a result of the above-noted negotiations, Plateau, the Municipal Staff of Grey Highlands (the "Municipal Staff") and Grey Highlands' legal counsel reached a mutually acceptable agreement with respect to the location, construction, operation and

maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement").

14 In negotiating the Proposed Road Use Agreement, Plateau asserted that it addressed the concerns of the Municipal Staff regarding the routing of the Distribution Facilities. In addition, under the Proposed Road Use Agreement, Plateau indicated that it planned to confer certain monetary and non-monetary benefits on and provide numerous protections to Grey Highlands.

15 The evidence indicates that on May 17, 2010, the Municipal Staff issued Report PL.10.34 recommending a form of the Proposed Road Use Agreement to the Grey Highlands Committee of the Whole.

16 The evidence further indicates that in a letter dated June 24, 2010 to the Grey Highlands Mayor and Members of Council, the Grey Highlands Chief Administrative Officer recommended that the Proposed Road Use Agreement be approved by Grey Highlands Council (the "CAO Recommendation").

17 On June 28, 2010, the Grey Highlands Council rejected the CAO Recommendation. As a result, because Plateau and Grey Highlands could not reach an agreement with respect to the location of the distribution facilities, Plateau filed the Application with the Board for an order or orders, pursuant to section 41(9) of the *Electricity Act*, establishing the location of Plateau's Distribution Facilities within the Road Allowances.

18 Plateau stated that it has chosen to route certain power lines, poles and other facilities associated with the Distribution System within the Road Allowances pursuant to the statutory right of distributors under section 41(1) of the *Electricity Act.*

19 Plateau submitted that the Distribution Facilities as well as other 44 kV electrical facilities which transport the electricity generated from the Turbines to the existing 44 kV local distribution system of HONI, and ultimately to the IESO-controlled grid, is a "distribution system" and that Plateau is a "distributor" as defined in the *Electricity Act*[1]. As such, Plateau submitted that it is a distributor and is entitled to the rights of distributors under section 41 of the *Electricity Act,* including the right, under the circumstances, to bring this Application pursuant to Section 41(9) of the *Electricity Act.*

20 Plateau submitted that section 4.0.1(1) (d) of O. Reg. 161/99 under the *Ontario Energy Board Act* exempts from the licensing requirements those distributors that distribute electricity for a price no greater than that required to recover all reasonable costs with respect to a distribution system owned or operated by a distributor that is also a generator and that distributes electricity solely for conveying it to the IESO-controlled grid.

21 Plateau also submitted that because of the limited scope of section 41(9) and because the two parties have been unable to reach an agreement on the location of the Distribution Facilities within

the Road allowances, the only issue before the Board is determining that location.

22 An excerpt from Plateau's submissions which describes the proposed location of the Distribution Facilities within the Road Allowances is attached as Appendix "B" to this Decision and Order.

Grey Highlands' Submissions

Some key elements of Grey Highlands' submissions are outlined below:

23 Grey Highlands stated that the Project is a "renewable energy generation facility" as that term is defined under the Electricity Act and Ontario Regulation 160/99 and, as such, it is afforded no rights under section 41 of the *Electricity Act.* Accordingly, Grey Highlands submits that the Board has no authority or jurisdiction to make a determination under subsection 41(9) of the *Electricity Act* as the Applicant is neither a transmitter nor distributor of electricity.

24 Grey Highlands submitted that the rights bestowed under section 41 of the *Electricity Act* represent a special privilege granted to transmitters and distributors and "Where special privileges are granted under statutory authority, the legislation granting such special privilege must be strictly construed."[2]

25 Grey Highlands submitted that, based on section 2 (1) of the *Electricity Act* and sections 1(4) and 1(5) of Ontario Regulation 160/99, any distribution line or lines under 50 kilometres in length that convey electricity from a renewable energy generation facility to a distribution system are not components of a distribution system, but rather are components of the "renewable energy generation facility". Grey Highlands further submitted that :

- a number or combination of distribution lines are not a "distribution system" as defined in the *Electricity Act* if they are components of a "renewable energy generation facility";

- the defined terms "distribution system", "generation facility", "renewable energy generation facility" and "transmission system" are all mutually exclusive.

26 Furthermore, Grey Highlands stated that Section 57 of the *Ontario Energy Board Act* requires all transmitters, distributors and generators to hold a licence issued under authority of that Act.

27 Grey Highlands asserted that, if the distribution lines associated with a "renewable energy generation facility" constituted a "distribution system" as defined in the *Electricity Act*, Plateau would be required to be licensed as a distributor under section 57 of the *Ontario Energy Board Act.*

28 Grey Highlands further asserted that the Applicant's submission concerning the applicability

of subsection 4.0.1(1) (d) of Ontario Regulation 161/99 is erroneous because the Applicant is not in the business of generating electricity and supplying it to the ISEO-controlled grid on a "non-profit basis".

29 In its submission Grey Highlands also stated that:

- based on Section 26 of the *Electricity Act*, if the Applicant is a distributor then the Applicant is required to provide access to the distribution lines to "consumers" and the Applicant's evidence does not indicate or identify that consumers will have access to the distribution lines;

- the Applicant's own description of its proposal indicates that it will deliver electricity to the HONI distribution system and not consumers; and

- the Applicant does not have a Conditions of Service[3] document because it has no intentions of distributing electricity to consumers and because it is not a "distributor".

Board Staff Submissions

Some key elements of Board staff's submissions are outlined below:

30 Board staff submitted that, in its view, based on the *Electricity Act* definitions of "distribute", "distribution system" and "distributor", the distribution component of the Applicant's proposed facilities does qualify as a distribution system and that the Applicant is a distributor and therefore has standing to bring an application under section 41 of the *Electricity Act.*

31 Board staff further submitted that Plateau's Distribution System would be exempt, under Section 4.0.1 (d) of Ontario Regulation 161/99, from the licence requirement of section 57(a) of the *OEB Act* because the Distribution System would transport electricity from its generation facilities to the Hydro One distribution system and ultimately to the IESO-controlled grid, and no other use of the Distribution System has been identified by Plateau.

Plateau's Reply Submissions

Some key elements of Plateau's reply submission are outlined below:

32 Plateau disagrees with Grey Highlands submission that no aspect of the Project meets the definition of "distributor" under the *Electricity Act* and that Plateau therefore cannot take advantage of the rights afforded to distributors under the section 41 of the *Electricity Act.* Plateau repeated that it clearly was a distributor, as that term is defined in the *Electricity Act* and that; consequently, as a distributor, it is entitled to the rights afforded to distributors under section 41 of the *Electricity Act.*

33 Plateau reiterated its submissions in chief that, under section 4.0.1(1) (d) of Ontario Regulation 161/99, it is exempt from the distribution licensing requirement in section 57(a) of the *OEB Act.* It added that it is irrelevant that it will profit from the sale of generated electricity since section 4.0.1(1)(d) only requires that the generated electricity be **distributed** at a price no greater than that required to recover all reasonable costs in order for the licensing exemption to apply.

34 Plateau stated that it disagrees with Grey Highlands' assertion that being a "distribution system", "generation facility", "renewable energy generation facility" and "transmission system" are all mutually exclusive terms. Plateau further stated that there is nothing in Section 57 of the *OEB Act* that suggests that there is such mutual exclusivity.

35 Plateau further states that the wording of section 4.01(1) (d) of Ontario Regulation 161/99 clearly demonstrates that a person can be both a distributor and a generator and that the exemption applies to a "distributor" that is also a "generator" and distributes electricity solely for the purpose of conveying it to the IESO controlled grid.

36 Plateau submitted that the enactment of the Green *Energy and Green Economy Act, 2009* (the "*Green Energy Act*") amended section 1(1) of the *OEB Act* to require the Board, in carrying out its responsibilities under the *OEB Act* or any other legislation in relation to electricity, to be guided by the objective of promoting "the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities." Plateau further stated that the Board must therefore be guided by this objective, among others, in deciding the Application.

37 Plateau submitted that the sections in the *Power Corporation Act* and the *Public Utilities Act* that Grey Highlands referenced have been repealed and pertain to a former regulatory regime that is no longer in place.

BOARD FINDINGS

38 Given the Board's limited jurisdiction in this proceeding, there are two decisions that need to be made. The first is a determination of whether Plateau is a "distributor" for the purposes of Section 41 of the *Electricity Act.* If so, the second determination is where should the location of Plateau's distribution facilities within Grey Highlands' road allowances be, given that the parties are not able to reach an agreement.

39 The Board agrees with Plateau's and Board staff's submissions to the effect that the Distribution Facilities, as well as other 44 kV electrical facilities which transport the electricity generated from the Turbines to the existing 44 kV local distribution system of HONI and ultimately to the IESO-controlled grid, are a "distribution system" as defined in the *Electricity Act.*

40 The Board disagrees with Grey Highlands' submission that the defined terms "distribution

system", "generation facility", "renewable energy generation facility" and "transmission system" are all mutually exclusive since there is nothing in the applicable legislation that would support such an interpretation. Indeed, when the words of the Statute and the Regulation are given their plain meaning, it is evident to the Board that the Legislature intended them to operate precisely as Plateau suggests they should. As the owner of the distribution system that is intended to transport the generated electricity to the IESO, Plateau is a distributor, but one which has the benefit of the licensing exemption contained in Ontario Regulation 161/99.

41 The Board accepts Plateau's and Board staff's submissions that, as the owner or operator of the distribution system, Plateau is a distributor as defined in the *Electricity Act.*

42 Accordingly, the Board finds that, as a distributor, Plateau is entitled to bring an application under section 41 of the *Electricity Act* and is entitled to the relief the Board may grant on such an application.

43 Since the evidence indicates that Plateau and Grey Highlands could not agree on the location of Plateau's distribution facilities within Grey Highlands' road allowances, it is the Board's role to determine the location of the Distribution Facilities in accordance with section 41 (9) of the *Electricity Act.*

44 The Board notes Plateau's evidence that, during the course of negotiations between Plateau and the Municipal Staff regarding a road use agreement, the two parties had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement") and that the Proposed Road Use Agreement was subsequently rejected by the Grey Highlands Council without apparent explanation.

45 The Board also notes that Grey Highlands' submissions focused on Plateau's status as a distributor, its rights under section 41 of the *Electricity Act* and the Board's authority or jurisdiction to make a determination under subsection 41(9) of the *Electricity Act*, but made no submissions regarding any alternative or preferred location for the Distribution Facilities within the Road Allowances.

46 In terms of determining the location of the Distribution Facilities, the Board has therefore considered the only evidence provided in this proceeding with respect to proposed location for the Distribution Facilities and that evidence has been provided by Plateau.

47 In the absence of any competing proposal, the Board accepts Plateau's proposed location of the Distribution Facilities within the Road allowances in Grey Highlands.

48 Furthermore, the Board agrees with Plateau's and Board staff's submissions that Plateau is exempt from the requirement for a distributor licence under Section 4.0.1 (d) of Ontario Regulation 161/99. Contrary to the assertion of Grey Highlands, the fact that Plateau does not require a licence

does not imply that they are not a distributor. In the Board's view the Regulation giving rise to the exemption could not be clearer. It specifically contemplates that the "distributor" can be a generator, and that the exemption applies to such a distributor when it distributes electricity "solely for the purpose of conveying it into the IESO-controlled grid." This language really renders the Municipality's argument on this point untenable.

49 The Board notes that there were a number of interested parties that were granted observer status and took an active role in terms of providing comments regarding various aspects of the Project. Some of the observer comments regarding Plateau's status as a distributor are addressed in the above findings. Other observer concerns were related to health effects, aesthetic impact of the Project and the Turbines as well as the impact on property values. These concerns are not within the scope of this proceeding (see paragraph [9] above) and were not considered by the Board in arriving at this decision.

50 THE BOARD ORDERS THAT:

* The location of Plateau's Distribution Facilities within the Road Allowances shall be as described in Appendix "A" and Appendix "B" to this Decision and Order except for any changes that are mutually agreed to between Plateau Wind Inc. and the Municipality of Grey Highlands.

DATED at Toronto, January 12, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

* * * * *

APPENDIX "A"

EXCERPT FROM PRE-FILED EVIDENCE

(Exhibit B, Tab 3, Schedule 1, Page 6)

LIST OF MUNICIPAL ROAD ALLOWANCES WITHIN WHICH THE DISTRIBUTION SYSTEM WILL BE LOCATED

1. 210 Sideroad Road (also known as Melancthon-Artermesia Townline), between Provincial Highway No. 10 and East Back Line.
   PIN: 37265-0133(LT)

2. East Back Line from 210 Sideroad Road to Melancthon Artemisia Townline.
   PIN: 37265-0136(LT) and 37265-0134(LT)

3. Melancthon Artemisia Townline from East Back Line to Road 41A.
   PIN: 34151-0029(LT)

4. Melancthon Osprey Townline from Road 41A to the access road to Turbine #3.
   PIN: 37260-0052(LT)

5. Road 41A, from the Melancthon Artemisia Townline to South Line B Road.
   PIN: 37260-0199(LT)

6. South Line 'B' Road from Road 41 A to Grey County Road 2.
   PIN: 37260-0198(LT)

7. Centre Line A Road from County Road 2 westerly to Turbine #6 entrance.
   PIN: 37260-0125(LT)

8. Centre Line A Road from County Road 2 easterly to Turbines #10 and #12 road entrance.
   PIN: 37260-0125(LT)

* * * * *

APPENDIX "B"

EXCERPT FROM PLATEAU'S WRITTEN

SUBMISSIONS DATED NOVEMBER 8, 2010

(Tab 2, Pages 7-9)

located over, on or near traveled or untraveled sections of the Road Allowances. The hearing does not concern which Road Allowances that Plateau has chosen to use.

3.0 PROPOSED LOCATION OF THE DISTRIBUTION SYSTEM WITHIN THE ROAD ALLOWANCES

Plateau proposes that the location of the Distribution System within the Road Allowances should be as follows:

- The Distribution System facilities shall generally be located 1.0-1.5 metres from the abutting property line, provided this location is reasonable and meets all applicable safety standards.[9] A cross-sectional drawing included at Appendix C shows the approximate location of where Plateau proposes to position the poles and other Distribution System facilities within the Road Allowances. As discussed below, this proposal accords with the terms of the proposed road use agreement between Plateau and Grey Highlands.[10]

- Where practicable and with certain exceptions, the Distribution System facilities that Plateau will construct, maintain or install shall not be located under the existing or contemplated traveled portion of any of the Road Allowances.[11] Rather, Plateau will locate these facilities adjacent to such existing or contemplated traveled portion of such Road Allowances. As discussed below, this proposal accords with the terms of the proposed road use agreement between Plateau and Grey Highlands.[12]

In addition to proposing this location for the Distribution System within the Road Allowances, Plateau requests that the Board, pursuant to its authority under section 23(1) of the OEB Act, include the following conditions in its Order:

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[9] For example, once the detailed engineering process is completed, Plateau may be required to slightly deviate from the 1.0-1.5 metre setback to minimize the need for tree cutting, road crossings and guy anchors on private properties, as well as to accommodate the flow of the ditch drainage.
[10] See Exhibit B, Tab 4, Schedule 1, Page 3 of the Application.
[11] Exemptions include certain underground road crossings that allow the Distribution System to follow the existing HONI poles in order to minimize the need to place poles on both sides of the Road Allowances.
[12] See Exhibit B, Tab 4, Schedule 1, Page 3 of the Application.

- Plateau shall acknowledge that the rights to use the Road Allowances are not exclusive rights. In addition, Grey Highland is not precluded from entering into the Road Allowances for its own municipal purposes, and Grey Highlands has no obligation to notify Plateau of such entry provided it does not adversely affect the Distribution System.

- In constructing or decommissioning the Distribution System within the Road Allowances (the "Work"), Plateau shall use all due care and diligence to prevent, among other things, any unnecessary or unavoidable interference with the travelled portion of any Road Allowance or with any traffic thereon.

- Prior to the commencement of any Work, Plateau shall file plans with Grey Highlands and/or the Saugeen Valley Conservation Authority detailing the Work. Plateau will undertake the Work in accordance with those plans.[13]

- Within 30 days of the completion of any construction Work, Plateau shall deposit with Grey Highlands as-constructed plans detailing the location and specifications of any installed infrastructure, including any distribution lines and poles.

- Plateau shall undertake and complete any Work requiring a permit from Grey Highlands within the time specified in such permit, provided such time is reasonable. Plateau shall also complete such Work so as not to cause unnecessary nuisance or damage to Grey Highlands or any other user of the Road Allowance where the Work is conducted.

- Prior to the commencement of any Work, Plateau shall obtain any necessary approval of any federal, provincial, county or municipal government or agency. Plateau shall also notify any other person or body operating any equipment, installations, utilities or other facilities within the Road Allowances about the details of the Work, including where it is to be conducted.

- In the event that it becomes necessary to break, remove, or otherwise pierce the existing surface of any of the Road Allowances to undertake the Work, Plateau shall, in so far as is practical, at its own expense, repair, reinstate, restore, or remediate such surface to the same or better condition than existed prior to the commencement of such Work.[14]

- Subject to section 41 of the OEB Act, if Plateau wishes to relocate any of the Distribution System facilities previously installed, placed or constructed in the

[13] This condition is in accordance with Section 41 (7) of the Electricity Act, which states: "If a transmitter or distributor exercises a power or entry under this section, it shall, (a) provide reasonable notice of the entry to the owner or other person having authority over the street or highway ...."

[14] This condition is in accordance with Section 41 (7) of the Electricity Act, which states: "If a transmitter or distributor exercises a power or entry under this section, it shall, ... (b) in so far as is practicable, restore the street or highway to its original condition; and (c) provide compensation for any damages caused by the entry."

> Road Allowances, it shall notify Grey Highlands in writing of its intent to do so, and Grey Highlands shall not unreasonably withhold its consent to such relocation.

Notably, none of these requested terms or conditions vary from those already enshrined in the standard road use agreement (the "Proposed Road Use Agreement") that Plateau negotiated with the Municipal Staff of Grey Highlands (the "Municipal Staff") and Grey Highlands' legal counsel.[15] In the negotiations, the parties reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution System within the Road Allowances.[16] In particular, under the Proposed Road Use Agreement, Grey Highlands would have affirmed Plateau's statutory right to use the Road Allowances for the Distribution System and agreed to the location of the Distribution System. In exchange, Plateau would have conferred certain benefits on and provided numerous protections to Grey Highlands. A copy of the Proposed Road Use Agreement is attached at Appendix D.

In addition, none of the requested terms and conditions vary substantially from the terms and conditions contained in the agreement between Plateau and Melancthon, which Melancthon Council has already approved, regarding the location of seven turbines and the associated distribution facilities in its jurisdiction.[17] One of these turbines is the Turbine in Melancthon that is part of the Plateau I and II siting area, and some of the distribution facilities will be located on the Melancthon side of some of the Road Allowances that are jointly owned by Melancthon and Grey Highlands.

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[15] For a summary of those terms and conditions, see Exhibit B, Tab 4, Schedule 1, Pages 4-7 of the Application.
[16] See Exhibit B, Tab 4, Schedule 1, Pages 1-2 of the Application.
[17] See Exhibit B, Tab 4, Schedule 1, Pages 2-3 of the Application.

qp/e/qlspi

1 The *Electricity Act* definitions are as follows:

> "distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less;
>
> "distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose;
>
> "distributor" means a person who owns or operates a distribution system.

2 Paragraph 7 of Grey Highlands' submission dated November 25, 2010.

3 A document required under Section 2.4.1 of the Distribution System Code.

Exhibit B
Tab 3
Schedule 1
Appendix B

OEB Decision and Order in EB-2013-0031

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0031

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Wainfleet Wind Energy Inc. for an Order or Orders pursuant to subsection 41(9) of the *Electricity Act 1998,* S.O. 1998, c. 15, Schedule A, as amended, establishing the location of Wainfleet Wind Energy Inc.'s distribution facilities within certain public right-of-way and street owned by the Township of Wainfleet, Regional Municipality of Niagara.

BEFORE: Paula Conboy
Presiding Member

Peter Noonan
Member

DECISION AND ORDER

June 27, 2013

BACKGROUND

Wainfleet Wind Energy Inc. ("Wainfleet Wind" or the "Applicant") filed an application dated February 4, 2013, with the Ontario Energy Board (the "Board") under subsection 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15, Schedule A*, as amended (the "*Electricity Act*") for an order or orders of the Board establishing the location of Wainfleet Wind's proposed distribution facilities within certain road allowances owned by the Township of Wainfleet (the "Township").

The Board issued a Notice of Application ("Notice") on March 13, 2013.[1]

Following the publication of Notice, Ms. Katherine Pilon applied for intervenor status and requested an oral hearing. The Applicant objected to her intervention request on the basis that her proposed intervention was directed at issues outside the scope of subsection 41(9) of the *Electricity Act*. The Board deliberated, and subsequently denied Ms. Pilon's request to intervene upon the grounds that her proposed intervention dealt with matters that are outside the Board's jurisdiction under subsection 41(9) of the *Electricity Act*. However, the Board allowed Ms. Pilon to file materials in this proceeding as letters of comment. No other person applied to the Board for intervenor status.

The Board decided to proceed by way of a written hearing process in this matter. Procedural Order No. 1 was issued on April 26, 2013 to set out the process for the conduct of the written hearing.

SCOPE OF PROCEEDING

As stated in the Board's Notice, the scope of this proceeding is limited to determining the location of the Applicant's Distribution System within the road allowances owned by the Township.

THE APPLICATION

Wainfleet Wind is an Ontario corporation which carries on the business of developing renewable wind energy generation projects. It has partnered with Rankin Construction Inc., a local contractor which carries on the business of building renewable

[1] The original Notice was issued on March 6, 2013 and a revised Notice was issued on March 13, 2013.

infrastructure. Wainfleet is a distributor of electricity within the meaning of the *Electricity Act*.

The Applicant has entered into a contract with the Ontario Power Authority ("OPA") and is in the process of developing a 9 MW wind power generating facility with five wind turbines, located in the Township and the Niagara Region.

As part of the project, the Applicant is proposing to construct a 27.6kV underground system ("Distribution System") that will collect power from the turbines and deliver it to a switching station, proposed to be located on private lands along the unopened road allowance of Sideroad 22 (also known as "Brawn Road") in the Township. The Applicant proposes to install the Distribution System underground under private and public lands in the Township and elsewhere in the Niagara Region. This Application is made only in reference to the public lands within the authority of the Township. Wainfleet Wind states that its proposed Distribution System is necessary to transmit electricity from the wind turbines to the distribution system, in order to comply with its contractual commitments to the OPA.

The Applicant asserts that it has been unsuccessful in negotiations with the Township to obtain an agreement for the location of the underground Distribution System, including high voltage cables, associated ducts, and a communications cable along and across Concession 1 Road and across the unopened Sideroad 22 road allowance at the location of a municipal drain within the Township. Pursuant to subsection 41(9) of the *Electricity Act*, the Applicant requests that this Board determine the location of structures, equipment and other facilities to be installed under or on Concession 1 Road and unopened Sideroad 22.

In particular, the Applicant requests that the Board determine the location of an underground diagonal crossing of unopened Sideroad 22.The Applicant also intends to carry the Distribution System underground across private lands until the Distribution System intersects Concession 1 Road. The Applicant therefore requests that the Board determine the location of a concrete encased duct bank or directional bore crossing for a perpendicular crossing of Concession 1 Road. Finally, the Applicant requests that the Board determine the location of the Distribution System to be constructed underground within the road allowance of Concession 1 Road to its point of intersection with Station Road, a municipal road under the jurisdiction of the Regional Municipality of Niagara. The project for which the Applicant seeks the approval of this Board is described at

Exhibit B/Tab 2/Schedule 1 and shown on applicable engineering drawings[2] at Exhibit B/Tab 3/Schedule 1/Appendix A, of the application.

Wainfleet Wind states that the proposed cable installations of the Distribution System are designed to meet or exceed the requirements of the Ontario Electrical Safety Code Standard C22.3-#7, Underground Systems and permanent buried cable markers will be installed at either end of the road crossings as recommended by the Canadian Standards Association. Additional details are provided in the construction notes contained in applicable drawings.

THE RECORD

The record consists of the application, letters of comment submitted by members of the public, interrogatories of Board staff, the Applicant's response to Board staff interrogatories, and the submissions of Board staff and the Applicant.

Although the Township did not apply for intervenor status the Board granted leave to the Township to intervene in this proceeding. However, the Township did not take the opportunity to participate or make any submissions on the issues before the Board. Accordingly, the Applicant is the only formal party in this case.

The Board received a number of letters of comment from Ms. Katherine Pilon. The letters of comment filed by Ms. Pilon relate to her opposition to the wind generation project rather than to the issues pertinent to the decision that the Board must make under subsection 41(9) of the *Electricity Act*. Accordingly, the Board has not relied on any of the letters of comment except for a portion of Ms. Pilon's submissions of April 27 and April 30, 2013 in which she, like the Applicant, provided some additional information on the public utility of Station Road as background information about the project.

Pursuant to Procedural Order No. 1, Board staff submitted interrogatories to Wainfleet Wind. The Applicant provided satisfactory responses to all of the Board staff interrogatories.

On May 27, 2013, Board staff filed a written submission. Board staff observed that the Township staff were consulted about the proposed location of Distribution System and

[2] For the purpose of this application, the applicable drawings are: Drawing #'s: 123901C1.0, 123901C1.1 to 123901C1.4, 123901C1.14 and 123901C1.15

that the Township has not provided the Applicant with any concerns about the proposed location. The Board staff submission noted that: "In the absence of information to the contrary, the route selected appears to staff to be the most efficient and least invasive."

On June 3, 2013, Wainfleet Wind filed its reply submissions. Wainfleet Wind submitted that its application establishing the location of the Distribution System on road allowances owned by the Township should be approved.

Additionally, Wainfleet Wind also requested that the Board consider an award of costs against the Township. Wainfleet Wind noted that it was forced to bring this application because it was unable to reach an agreement with the Township and that the Township's conduct has inflicted unnecessary costs and inconvenience on Wainfleet Wind. The Applicant submitted that the Board should exercise its discretion to award costs against the Township in favour of Wainfleet Wind in the amount of $3,500.00 plus the Board's cost of the Application. Wainfleet Wind stated that its request for costs only covers the publishing costs that it incurred as a necessary part of this application.

BOARD FINDINGS

The Applicant is the only formal party in this case. The Township received notice of this application but chose not to seek intervenor status or participate in the proceeding even after the Board, of its own motion, granted leave to the Township to intervene. Ms. Katherine Pilon filed several letters of comment but her concerns were directed at the wind generation facility project which is outside of the scope of this application. None of her comments were specific to the Applicant's request to locate the Distribution System within the Township's road allowances. The application by Wainfleet Wind pursuant to subsection 41(9) of the *Electricity Act* is essentially unopposed.

The Applicant has established that it is a distributor of electricity and that it has a statutory right to place its Distribution System within a municipal road allowance pursuant to subsection 41(1) of the *Electricity Act*. The Board finds that the Applicant and the Township have been unable to agree upon the location of the Distribution System within the road allowances that are the subject of this application. The Board notes that satisfactory responses have been made by the Applicant to the interrogatories posed by Board staff. The engineering drawings for the location of the distribution line and related structures have been considered and the Board finds that they are satisfactory. Therefore, the Board finds that the Applicant has satisfied the

burden of proof under the *Electricity Act* to demonstrate that the proposed location of its Distribution System in the municipal road allowances is appropriate and the application is approved.

In order to ensure that adequate regulatory oversight is provided for this project the Board has decided that the following conditions to its approval will be imposed on the Applicant:

1) The Applicant shall advise the Board's designated representative of any proposed material change in the location of the facilities as described in the Plans and Profiles as set out at ExB/T2/S1 and Ex B/T3/S1/Appendix A of the application and shall not make a material change in the Plans and Profiles without prior approval of the Board or its designated representative.

2) The Applicant shall designate a person as Project Manager and shall provide the name of the individual to the Board's designated representative. The Project Manager will be responsible for the fulfillment of the Conditions of Approval on the construction site.

3) The Board's designated representative for the purpose of this Condition of Approval shall be the Manager, Electricity Facilities and Infrastructure Applications.

As to the question of costs, the Board has decided that this is not an appropriate case in which to award costs. The Township chose not to become a formal party to the Board's proceeding, as it was entitled to, and therefore did not add any delay or cost for the Applicant in this proceeding. Clearly, the Applicant is frustrated by its dealings with the Township and the Board is aware that other legal proceedings have taken place between the Applicant and the Township. However, the Board cannot take cognizance of those matters for the purposes of determining costs in this proceeding. We note that the Applicant requested in its Reply that the question of costs not delay the Board's decision, which would clearly be the result if the Board established a process to determine whether a non-party in the context of this case could, and should, be subjected to an award of costs. All things considered, the Board declines to make a cost order in this case.

THE BOARD ORDERS THAT:

1. The location of Wainfleet Wind's Distribution System on road allowances owned by the Township, as described in the application at Exhibit B/Tab 2/Schedule 1 and in the applicable drawings at Exhibit B/Tab 3/Schedule 1/Appendix A and subject to the Conditions of Approval set out in this Decision and Order is approved.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Wainfleet Wind shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

ISSUED AT Toronto on June 27, 2013

ONTARIO ENERGY BOARD

Original Signed by

Kirsten Walli
Board Secretary

Exhibit B
Tab 3
Schedule 1
Appendix C

OEB Decision and Order in EB-2013-0233

Ontario Energy Board

Commission de l'énergie
de l'Ontario

Ontario

EB-2013-0233

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by East Durham Wind, Inc. for an Order or Orders pursuant to subsection 41(9) of the *Electricity Act 1998,* S.O. 1998, c. 15, Schedule A, as amended, establishing the location of East Durham Wind Inc.'s distribution facilities within certain road allowances owned by the Municipality of West Grey.

BEFORE: Emad Elsayed
Presiding Member

Ellen Fry
Member

DECISION AND ORDER

November 7, 2013

DECISION

The location of East Durham's distribution system on road allowances owned by the Municipality of West Grey ("the Municipality") is approved as described in this Decision and Order.

BACKGROUND

East Durham Wind, Inc., ("East Durham") filed an application dated June 14, 2013 with the Ontario Energy Board (the "Board"), under subsection 41(9) of the *Electricity Act, 1998, S.O. 1998, c. 15, Schedule A*, (the "Act") for an order or orders of the Board establishing the location of approximately 9.1 kilometers of East Durham's proposed distribution system within certain public streets, highways and right-of-ways owned by the Municipality in Grey County, Ontario.

The Board issued a Notice of Application and Written Hearing on July 9, 2013. The Municipality and Karen and Syd Parkin (the "Parkins") requested and were granted intervenor status. The Board also received letters of comment from a number of local residents.

The Parkins submitted evidence. The Parkins and Board staff submitted interrogatories on East Durham's evidence. No party filed interrogatories on the evidence submitted by the Parkins. East Durham provided responses to all interrogatories.

East Durham filed its argument-in-chief on September 4, 2013. The Board received submissions from the Municipality and the Parkins. East Durham filed its reply submission on September 19, 2013

On October 2, 2013, the Board issued a letter requiring East Durham to provide a more complete response to Board staff interrogatory no. 2(ii) by providing the analysis and supporting documentation that underpins its determination that it is appropriate to locate its facilities 1-4 meters from abutting property lines. The letter also asked East Durham to confirm the accuracy of a map provided as part of East Durham's argument-in-chief.

East Durham submitted its response on both matters on October 4, 2013. The Parkins submitted their comments on Oct 7, 2013.

THE APPLICATION

East Durham has entered into a Feed-in-Tariff contract with the Ontario Power Authority and is in the process of developing a wind generation facility, called the East Durham Wind Energy Centre (the "Project") in the Municipality. The Project will have a total generation capacity of up to 23 MW and includes generation and distribution assets.

As part of the Project, East Durham is proposing to construct an underground distribution system to transmit power generated by the wind turbines to the distribution system of Hydro One Networks Inc. ("Hydro One") for delivery ultimately to the IESO-controlled grid. Specifically, East Durham is proposing to construct 28.3 kilometers of underground 34.5 kV distribution lines on private and public lands, which will convey power from each of the turbines to a transformer substation. From that point, an overhead 44 kV line will convey the electricity to Hydro One's distribution system. The components of East Durham's proposed distribution system are collectively referred to in this Decision and Order as the "Distribution System".

East Durham proposes to locate approximately 9.1 kilometers of the underground portion of the Distribution System on road allowances that are owned by the Municipality. The road allowances at issue are referred to in this Decision and Order as the "Road Allowances".

Subsections 41(1) and 41(9) of the Act provide as follows:

> 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.
>
> 41. (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.

East Durham submits that it is a "distributor" within the meaning of subsection 2(1) of the Act. Accordingly, East Durham submits that it has the right to install facilities for the purpose of the Distribution System under "any public street or highway" pursuant to subsection 41(1) of the Act.

East Durham submits that it has been unsuccessful in its attempts to agree with the Municipality on the location of the portion of the Distribution System that would be on the Road Allowances. The Municipality does not dispute this. East Durham also submits that neither the Municipality nor any other party in this proceeding has proposed an alternate location. This is not disputed. Accordingly, East Durham is applying to the Board under subsection 41(9) for a determination of the location of the portion of the Distribution System that would be installed under the Road Allowances as described below.

- The Distribution System shall generally be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).
- Where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4 meters from the abutting property line.
- Where practicable, and where they meet all applicable engineering, environmental and health and safety standards, the diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.[1]

The submissions of the Municipality and the Parkins regarding the various issues are described under Board Findings. Board staff declined to file a submission.

SCOPE OF THE BOARD'S JURISDICTION

As indicated above, the Board's authority in this proceeding is derived from section 41 of the Act.

Subsection 41(9) limits the scope of this proceeding to a determination of the location of the applicable portion of the Distribution System within the Road Allowances.

As indicated above, the Board received a number of letters of comment from local residents. These letters dealt with the location of the Project's wind turbines and their

[1] Pre-filed evidence of East Durham, Ex B/Tab 6/Schedule 1

impact on property values, health, and aesthetics. They also dealt with the Ontario Government's renewable energy policy in general and broad environmental issues.

Given the scope of subsection 41(9), it is not the Board's role in this proceeding to decide whether the Project should be approved, consider issues relating to wind turbines or renewable energy policy generally, or consider alternatives to the Project such as routes for the Distribution System that are outside of the Road Allowances. Accordingly, the concerns in the letters of comment described above are not within the scope of this proceeding.

BOARD FINDINGS

Is The Applicant a Distributor?

The Municipality submitted that the application should be denied because East Durham is not a "distributor" within the meaning of section 41. It submitted that this is the case because East Durham does not own or operate a distribution system and that, until it receives its Renewable Energy Approval ("REA") from the Ministry of the Environment ("MOE"), it will not have the authority to do so. Distinguishing this case from the Board's Decision in the Plateau case[2], the Municipality submitted that Plateau, at the time of its application, had received MOE approval to construct and operate its "renewable energy generation facilities" which also authorized Plateau to construct, own and operate a distribution system.

In response, East Durham submitted that the Act does not require all necessary approvals to be in place prior to being able to access the rights afforded to a distributor under section 41.

Concerning the Plateau case, East Durham submitted that whether or not Plateau had certain approvals in place at the time of its section 41 application was not cited as a basis for the Decision. East Durham also referred to the Board's more recent Wainfleet Decision[3]. In that case, according to East Durham, the Board granted the section 41 application prior to Wainfleet having received the REA for its project. East Durham further submitted that the Board's Decision and Order in that case was not made conditional on receipt of the REA.

[2] EB-2010-0253
[3] EB-2013-0031

The Board agrees with East Durham that the Act does not require that all necessary approvals, such as the REA, be obtained prior to granting an application under subsection 41(9). Accordingly, the Board does not consider that there is any relevant basis to distinguish this application from the applications in the Plateau and Wainfleet cases, in which the applicants were considered to be "distributors". The Board notes, however, that in order to proceed with construction of the Distribution System, East Durham will need to obtain all legally required permits and other approvals.

Proposed Location of the Distribution System

East Durham has provided maps that identify the starting and ending points of the various segments of the Distribution System within Road Allowances. Further, the table at section 2.0 of East Durham's argument-in-chief provides the length and location (i.e. western side of the Road Allowance) of each segment. Concerning the proposed setback of the Distribution System as indicated above, East Durham has proposed that, where practicable, and where it meets all applicable engineering, environmental and health and safety standards, the Distribution System lines shall be located 1-4metres from the abutting property line.

The Municipality submitted that East Durham's application should be denied because East Durham had not provided the "location" of the proposed lines within the Road Allowances. The Municipality submitted that what East Durham provided was not actual locations but merely "guidelines" for determining locations. Although the Municipality acknowledged that East Durham had refined its general description of the proposed locations in its argument-in-chief, it maintained that these locations were not sufficiently precise. The Municipality submitted that it is not its duty to propose locations, and that it should be East Durham who must propose locations.

East Durham submitted that it has proposed a "narrow corridor" which provides the best balance of environmental, social, technical and economic considerations. East Durham also submitted that, given that the Board will be determining the location of the Distribution System in this proceeding prior to the start of construction, the approved location must allow for some reasonable flexibility to ensure that East Durham can address any engineering, environmental, health and safety or other practical challenges that may arise during construction.

East Durham also submitted that in its view section 41 does not require the identification of a "precise" or "exact" location. Section 41, according to East Durham, only states that the "location" shall be agreed upon by the transmitter or distributor and the owner. East Durham argued that this wording makes it a mutual obligation on the distributor and the owner of the Road Allowance. East Durham also submitted that the Municipality, by its own admission, had refused to provide feedback to help refine the proposed locations. East Durham submitted that if the Municipality had provided comments regarding the location and any existing infrastructure in the area, it would have enabled East Durham to further refine the proposed locations.

The Board issued a letter to East Durham, dated October 2, 2013, requesting additional information to support East Durham's proposed 1-4 meter location parameter. East Durham responded, by letter dated October 4, 2013. East Durham provided examples of municipalities and counties in the vicinity of the Municipality that have adopted policies regarding the location of underground infrastructure that are consistent with the considerations described by East Durham. This included a policy issued by the County of Grey, in which the Municipality is located, titled, Policy for Utility Place on Grey County Rights of Ways.

East Durham also submitted that, as part of its REA application, it undertook various studies in the project area, such as the Natural Heritage Assessment, the Water Assessment, and Archeological Assessment and consulted all stakeholders in keeping with the requirements in Ontario Regulation 359/09. Following these studies and others, East Durham states that its initial proposal was refined and revisions were incorporated where appropriate, to ensure that the proposed location represents the best balance of environmental, social, technical and economic considerations.

The Parkins submitted that the additional information filed by East Durham did not support the request for a 1-4 meter corridor. The Parkins submitted that the requirement for a 1.5 meter setback in the Municipality of Lambton Shores was for overhead utility lines and not underground lines. The Parkins, submitted that although in their view the Municipality would likely not agree, a 1 meter setback from street line would be acceptable to them. The Parkins recommendation was based on the Municipality of Lambton Shores' Infrastructure Design Guidelines and Construction Standards, dated January 2002.

While section 41 requires that the Board determine a "location" under the road allowance, the Board agrees with East Durham that this wording does not require a precise location. The Board considers that the mapping and location information provided by East Durham is sufficient to determine the location for the purpose of this application.

The Board accepts the evidence of East Durham that it is appropriate to locate the Distribution System lines 1-4 meters from the abutting property line. The Board considers, however, that this location could probably have been refined further if there had been more communication between East Durham and the Municipality. The Board encourages East Durham and the Municipality to consult during construction to address any issues or concerns about the precise location that may arise. As indicated below, the Board has made provision in its decision for any agreement reached as a result of such consultation.

Stray Voltage

The Municipality and the Parkins have raised concerns about the possibility that the Distribution System will cause stray voltage problems. The Parkins filed a copy of a Private Member's Bill concerning stray voltage and the Ontario *Green Energy Act*. East Durham argued that wind turbines do not cause stray voltage. East Durham further argued that Hydro One oversees stray voltage issues and has developed a protocol to proactively test for stray voltage and mitigate any concerns at no cost to the landowner. East Durham stated that it will assist any concerned landowner in the Project area in this process with Hydro One.

East Durham also argued there is no nexus between the evidence filed by the Parkins concerning stray voltage generally and the issue before the Board in this proceeding (i.e. where portions of the Distribution System should be located within the Road Allowances). East Durham submitted that the Parkins have not filed any evidence suggesting that East Durham's Distribution System in particular will cause stray voltage or that, if so, the proposed location of a portion of the Distribution System in the Road Allowances is such that stray voltage would cause an adverse impact.

The Board agrees with East Durham that the evidence does not indicate that the portion of the Distribution System proposed to be located in the Road Allowances would necessarily cause stray voltage, or if so, that the proposed location in the Road Allowances would cause an adverse impact due to stray voltage. The Board also notes

that section 4.7 and Appendix H of the Board's *Distribution System Code* sets out the investigation procedures related to stray voltage.

THE BOARD ORDERS THAT:

1. The location of East Durham's Distribution System on Road Allowances owned by the Municipality is approved as follows:

    a. The Distribution System shall be located in the Road Allowances listed on Exhibit B, Tab 6, Schedule 1, Appendix A, as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B (and updated in section 2.0 of East Durham's argument-in-chief and in response to the Board's letter dated October 2, 2013).

    b. The Distribution System lines shall be located 1-4 meters from the abutting property line unless otherwise agreed between East Durham and the Municipality.

    c. The diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendices C and D shall be followed in constructing the Distribution System within the Road Allowances.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, November 7, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Exhibit B
Tab 3
Schedule 1
Appendix D

OEB Decision and Order in EB-2014-0139

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2014-0139

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Jericho Wind, Inc. for an Order or Orders pursuant to section 41(9) of the *Electricity Act 1998,* S.O. 1998, c. 15, Schedule A, as amended, establishing the location of Jericho Wind, Inc.'s distribution facilities within certain road allowances owned by Lambton County.

BEFORE: Emad Elsayed
Presiding Member

Ken Quesnelle
Vice Chair and Member

DECISION AND ORDER

July 17, 2014

Decision

The proposed location of Jericho Wind, Inc.'s ("Jericho") distribution system and associated facilities ("Distribution System") within road allowances owned by Lambton County (the "County"), is approved as detailed later in this Decision and Order. This approval includes any subsequent refinements that are mutually agreed to by Jericho and the County.

The Application

Jericho filed an application dated March 18, 2014 with the Ontario Energy Board (the "Board"), under subsection 41(9) of the *Electricity Act, 1998,* S.O. *1998*, c. 15, Schedule A, as amended for an order or orders of the Board establishing the location of approximately 26 kilometers of Jericho's proposed Distribution System within certain public streets, highways and right-of-ways owned by the Corporation of the County. The Board assigned File No. EB-2014-0139 to this application.

Jericho is in the process of developing a 150 megawatt wind farm called Jericho Wind Energy Centre (the "Project"), in the Municipality of Lambton Shores and the Township of Warwick in Lambton County, and in the Municipality of North Middlesex in Middlesex County, Ontario. Jericho's application for Renewable Energy Approval ("REA") from the Ontario Ministry of the Environment was received on April 14, 2014. The Project is being developed pursuant to a contract with the Ontario Power Authority under the Feed-in-Tariff program.

Procedural Steps

The Board issued a Notice of Application and Written Hearing (the "Notice") on March 31, 2014.

The Board issued Procedural Order No.1 on May 8, 2014, granting intervenor status to the County, and setting a schedule for a round of interrogatories for the participants.

On June 8, 2014, the Board issued Procedural Order No.2 deciding to proceed by way of a written hearing and setting a schedule for submissions by the parties.

On June 16, 2014, Jericho filed its Argument in Chief, followed by the County's Submission on June 23 and Board staff's Submission on June 24, all in accordance with the Board order. On June 25, Jericho filed its Reply Submission.

Board Findings

The primary issues raised in in this proceeding can be grouped into the following three areas:

1. Utilization of Road Allowances vs. Private Lands.
2. Sufficiency of Information.
3. Lack of Alternatives.

Each of these issues is addressed below.

Utilization of Road Allowances vs. Private Lands

The County takes the position that it would be safer for the public if the Distribution System (note that the County uses the term "transmission infrastructure" in its submission) [1] were to be located on private lands instead of the County-owned road allowances. The County refers in its submission to an opinion by Mr. Jason Cole, Manager of the County's Public Works Department to that effect[2]. The County also makes reference to potential health and safety issues associated with the construction of the "electrical transmission infrastructure" such as having large construction equipment and workers installing electrical transmission infrastructure in close proximity to the travelled portion of the road allowances[3].

Board Staff submits that the legislation limits the Board's role in a Section 41 proceeding to a determination of the location of the proposed distribution facilities within the road allowances. Board staff submits that the Board stated in previous Section 41 proceedings[4] that its role is not to approve or deny the proposed distribution facilities, to consider the merits, prudence or any environmental, health, or economic impacts associated with these facilities, or to examine alternatives to the project. Board staff does not oppose Jericho's application.

Jericho submits that Section 41 gives distributors like Jericho the right to locate their distribution systems within the road allowances, and that the scope of this proceeding is limited to determining the location of Jericho's Distribution System within road allowances

[1] Lambton County's Submission, June 23, 2014, page 1, section 3
[2] Ibid, section 4
[3] Ibid, page 2, section 5
[4] Board staff Submission, June 24, 2014, page 2

owned by the County[5]. Jericho also clarifies the fact that aspects related to Jericho's transmission infrastructure have already been addressed[6] in the Board's leave to construct decision in EB-2013-0361. Furthermore, Jericho indicates that there is no affidavit evidence in this case to support the County's assertion regarding the safety of the Distribution System[7]. Jericho also confirms that no above ground distribution infrastructure will be located in the road allowances.

The Board agrees with Board Staff and Jericho that the Board's jurisdiction in this proceeding is to determine the location of the proposed Distribution System within the County's road allowances. The Board also agrees that any issues related to the construction of the transmission infrastructure are beyond the scope of this proceeding. Further, the Board notes that the County has not provided any evidence as part of this proceeding to support the assertion that there are safety issues associated with the location of the Distribution System within the road allowances.

Sufficiency of Information

The County submits that the drawings submitted by Jericho in the application were not sufficiently detailed, particularly in relation to the exact horizontal and vertical alignment with respect to existing property lines and roadway features[8].

Jericho, in its Reply Submission, stated that the mapping and location information filed with the application was sufficiently detailed, and at least as detailed as other similar cases approved by the Board (e.g.EB-2013-0233)[9]. More specifically, Jericho referred to two maps from its application[10] which were provided to County staff as part of finalizing the Road Use Agreement ("RUA") to support its argument that it provided sufficient information to the County. The first map filed as Schedule B11 in the proposed RUA[11] which was also included at Exhibit B, Tab 6, Schedule 1, Appendix B of the application. The second map filed as Schedule B10 in the proposed RUA[12] which was also included at Exhibit B, Tab 6, Schedule 1, Appendix C of the application. These two maps show a

[5] Jericho's Argument in Chief, June 16, 2014, Part 1.0, page 2, lines 10 -16
[6] Jericho's Reply Submission, June 25, page 3, lines 13 - 15
[7] Ibid, page 3, lines 16 - 20
[8] Lambton County's Submission, June 23, 2014, page 2, section 11
[9] Jericho's Reply Submission, June 25, pages 5 – 6
[10] Ibid, pages 6 - 7
[11] Exhibit B/Tab 4/Schedule 1/Schedule B11 "Jericho Distribution (Collection) Location Map"
[12] Ibid/Schedule B10 "Jericho Distribution (Collection) Perpendicular Cross-Sections"

plan view of the Distribution System and detailed drawings of all road crossings, including minimum depths for Jericho's Distribution System underneath the travelled portion of the road. Jericho submits that the County had the opportunity during the interrogatory process to seek additional details, but did not do so. Jericho also states that, had the County staff required more detailed drawings prior to their recommendation of the RUA, they would have provided that information.

The Board finds that Jericho did provide sufficiently detailed information in support of its application. The Board also agrees that if the County required further specific details about these drawings, it would be the Board's expectation that these details would have been requested during the interrogatory process. The Board's expectation is that Jericho will continue to work cooperatively with the County to address any issues regarding the location details which may emerge going forward.

Lack of Alternatives

The Board notes that the parties reiterated some of the same arguments noted above in support of their respective positions concerning the alleged "lack of alternatives." While acknowledging[13] that the proposed general location of the Distribution System does reflect the work of both the County and Jericho staff, the County reiterated its position that potential hazards could be avoided if the Distribution System were to be located on private lands[14]. The County acknowledged the existence of multiple County staff reports which endorsed the signing of the RUA, but referred to them as "nothing more than the opinion of certain unelected individuals"[15].

Jericho submitted that, while the proposed RUA was going through a 60-day public comment period, the County Council repeatedly declined to engage Jericho in any relevant technical discussions concerning the Distribution System or the RUA[16].

The Board reiterates its earlier finding that its jurisdiction in this case is limited to determining the location of the proposed Distribution System within the County's road allowances. During the prolonged discussion period among the parties, the County had

[13] Lambton County's Submission, June 23, 2014, page 3, section 14
[14] Ibid, page 3, section 15
[15] Ibid page 3, section 18
[16] Jericho's Reply Submission, June 25, pages 8 – 9

the opportunity to suggest other alternatives within the road allowances, but it did not do so. The Board supports the location of the Distribution System as applied for by Jericho.

THE BOARD ORDERS THAT:

1. The location of Jericho's Distribution System in the road allowances owned by the County, as described below, is approved.

   a. The Distribution System shall generally be located in the Road Allowances and the locations listed on Exhibit B, Tab 6, Schedule 1, Appendix A of the application.

   b. The Distribution System lines shall be more particularly located as shown in the drawings included in Exhibit B, Tab 6, Schedule 1, Appendix B of the application.

   c. The location aspects of the diagrams shown at Exhibit B, Tab 6, Schedule 1, Appendix C of the application shall be followed in constructing the Distribution System within the Road Allowances.

   This order also includes any subsequent refinements to the Distribution System location that are mutually agreed to by Jericho Wind, Inc. and Lambton County.

2. Pursuant to section 30 of the Ontario Energy Board Act, 1998, Jericho Wind, Inc. shall pay the Board's costs of and incidental to this proceeding immediately upon receipt of the Board's invoice.

ISSUED AT Toronto on July 17, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

CHRONOLOGY OF EVENTS

Further to section 41(9) of the Electricity Act, on May 15, 2014, Suncor requested the Town's agreement to the specific location of its electrical infrastructure (consisting of buried underground 34.5 kV cables, also referred to as "Collection System" and "Underground Collector Line") for the purpose of its Distribution System (hereinafter collectively referred to as "**Distribution System**"), by providing the Town with detailed drawings of the proposed location. Prior to May 15, 2014, both Suncor and the Town contemplated agreement to the location of the Distribution System in streets and highways owned by the Town (collectively "**Road Allowances**") in a draft Wind Turbine Agreement ("**WTA**") (proposed by the Town on May 6, 2013) and a Road Use Agreement ("**RUA**") (proposed by Suncor on March 5, 2014). However, Suncor and the Town have not been able to execute either an WTA or a RUA to date, and the drafts of both the WTA and RUA did not include drawings of the actual proposed locations of the Distribution System.

This chronology is set out in two parts. The first demonstrates the Town's publicly stated position on wind energy development. The second outlines the key events in the parties' inability to reach an agreement on the location of the Distribution System within the Road Allowances in a timely manner that will enable Suncor to meet its contractual commitments under its FIT contract.

Part I – Town Council Position on Wind Energy Development

- On April 28, 2010, Town Council passed a resolution requesting that the Ontario Provincial Government place a moratorium on all new wind projects until a comprehensive, independent, and peer-reviewed scientific study can confirm that industrial wind energy sites do not pose a risk to community health and environment concerns (see Exhibit B, Tab 4, Schedule 1, Appendix A).

- On February 8, 2012, Town Council passed a motion to support another resolution requesting a moratorium on "Industrial Wind Turbine Development in Ontario." (see Exhibit B, Tab 4, Schedule 1, Appendix B)

- Throughout 2012, Town Council passed by-laws ("**2012 By-Laws**") purporting to prohibit the construction and operation of Suncor's proposed Cedar Point Wind Power Project. Suncor applied to the Ontario Superior Court of Justice to quash and/or have these by-laws declared to be without effect with respect to Cedar Point. On May 23, 2014, the Court released its decision with

respect to Suncor's application, quashing and/or declaring the various by-laws of no force and effect on Cedar Point. (see Exhibit B, Tab 4, Schedule 1, Appendix C)

Part II – Key Events Resulting in the Parties' Inability to Agree to the Location of the Distribution System Within the Road Allowances

- On May 6, 2013, along with a Municipal Consultation Form ("**MCF**") completed by the Town at Suncor's request as part of the renewable energy approval application process, the Town provided Suncor with a draft "Wind Turbine Agreement" ("**WTA**") that referred to "poles, lines, underground conduits and other related structures, equipment and facilities, as described in Schedule "B" (the "Works")", dated April 19, 2013, but did not attach a Schedule "B" to the WTA (see Exhibit B, Tab 4, Schedule 1, Appendix D)

- On August 2, 2013, Suncor responded to the MCF and stated that it would be seeking further clarification from the Town regarding the WTA and a Road Use Agreement ("RUA").

- On September 3, 2013, the Town responded to Suncor's comments on the MCF. The Town's comments do not mention the WTA, but state that a Road Use Agreement should be agreed and entered into prior to provincial approval of Cedar Point.

- On March 5, 2014, Suncor responded to the Town's September 3, 2013 comments and provided the Town with a draft RUA. The draft RUA made reference to, but did not include any of the drawings for the electrical infrastructure locations (see Exhibit B, Tab 4, Schedule 1, Appendix E).

- On April 17, 2014, Suncor followed up with the Town about setting up a meeting to discuss the draft RUA. This meeting ultimately occurred on June 5, 2014.

- On May 15, 2014, Suncor requested that the Town approve the locations of its electrical infrastructure (distribution system). At this time Suncor provided the Town with electronic and hardcopy versions of Suncor's Distribution System map for the Town (see Exhibit B, Tab 4, Schedule 1, Appendix F).

- On June 5, 2014 Suncor met with Town staff and discussed the draft RUA as well as the locations of the Distribution System set out in the maps provided to the Town on May 15, 2014.

- On June 6, 2014, as a result of the meeting with the Town staff on June 5, 2014, Suncor committed to the following, with respect to its Distribution System as set out in Exhibit B, Tab 4, Schedule 1, Appendix G:

  (a) Crossings of Municipal Road allowances will be installed by directional drilling the cables beneath in conduit at least 1.5m below the invert of the ditch and 2.5 m below the centre line of the travelled portion of the road;

  (b) Crossing of Municipal Drains located within the Municipal road allowances will be installed by directional drilling the cables in conduit at least 1.5m beneath the invert of the municipal drain.

  (c) When locating cables within the road allowance, Suncor shall install the cables within 1 m of the property limit of the right of way, unless unknown obstacles are discovered. In such a case, the location shall be as far from the travelled portion of the road as possible.

- At the June 12, 2014 Town Council meeting, Town Council considered Suncor's request regarding approval of the location of its Distribution System. The minutes from this meeting are attached as Exhibit B, Tab 4, Schedule 1, Appendix H and the relevant portion reads as follows:

  "Council considered a request from Suncor Energy Products Inc. Regarding approval of the Location of Electrical Infrastructure. Ms. Coughlin advised that under the Electricity Act, an approved electrical distributor has the right to place infrastructure on the road allowance but the municipality has the opportunity to comment on the proposed locations. Major Napper advised that legal counsel had no concern regarding the matter.

  While there were no concerns expressed regarding the location of the proposed infrastructure, Council members expressed concern regarding approving any locations prior to provincial approval of the wind turbine development project. After discussing the matter, Council passed the following resolution:

  Motion #12 *– Moved by Ben Dekker, Seconded by Bob Woolvett that the correspondence relating to the Suncor Energy Products Inc. – Request for Council Approval of the Location of Electrical Infrastructure be received and that the matter be tabled pending REA approval*."

- Between June 12, 2014 and August 25, 2014, Suncor and the Town engaged in privileged settlement discussions in an attempt to resolve issues outstanding as a result of Suncor's challenge to the Town's 2012 By-Laws. As part of these discussions, Suncor requested that the Town approve the location of its Distribution System in the Road Allowances.

- On August 21, 2014, Suncor requested that a proposed agreement be put on the public agenda for the August 27, 2014 Town Council meeting. This proposed agreement included an agreement as to the location of Suncor's Distribution System within the Road Allowances. Attached as Exhibit B, Tab 4, Schedule 1, Appendix I is a copy of this email including a copy of the draft agreement, redacted to include only the portions of the draft agreement that are relevant to this proceeding, as well as the only Schedule to the draft agreement that is relevant to this proceeding, namely Schedule C, the Distribution System locations drawings.

- On August 22, 2014, Suncor received its REA for Cedar Point (see Exhibit B, Tab 4, Schedule 1, Appendix J).

- Email exchanges between Suncor and Town staff between August 21, 2014 and August 29, 2014 indicate that neither Town staff nor Town Council addressed Suncor's request for agreement of its Distribution System locations in the Road Allowances (see Exhibit B, Tab 4, Schedule 1, Appendix K).

- On September 4, 2014, having received its REA on August 22, 2014, Suncor formally requested that Town Council agree to the location of Suncor's Distribution System in the Road Allowances at its September 10, 2014 Town Council meeting (see Exhibit B, Tab 4, Schedule 1, Appendix L).

- On September 10, 2014, Town Council received Suncor's request of September 4, 2014, but did not provide agreement as to the location of Suncor's Distribution System in the Road Allowances. The Town simply passed the following motion:

> Motion #13 - Moved by Ben Dekker, Seconded by Ron Schenk that the correspondence relating to the Suncor Energy Products Inc. – Request for Council Approval of the Location of Electrical Infrastructure be received. (see Exhibit B, Tab 4, Schedule 1, Appendices M and N).

Exhibit B
Tab 4
Schedule 1
Appendix A

April 28, 2010 Town Council Meeting Minutes

The Corporation of the Town of Plympton-Wyoming
Regular Council Meeting

Date: Wednesday, April 28, 2010
Time: 2:00 p.m.
Location: Plympton-Wyoming Council Chambers
546 Niagara St., Wyoming, Ont.

Council Members Present: Lonny Napper, Mayor
Don Nelson, Deputy Mayor
Councillors – Gary DeBoer
Ben Dekker
Paul Kingston
Muriel Wright

Council Members Absent: Councillor Ron Schenk

Staff Members Present: Kyle Pratt, Chief Administrative Officer
Reg McMichael, Director of Public Works & Engineering
Caroline DeSchutter, Clerk

Call to Order
At 2:00 p.m., Mayor Lonny Napper called the meeting to order.

Declaration of Pecuniary Interest/Conflict-of-Interest
No declaration was made by any one member of Council at this time. Mayor Napper requested Council members to make the appropriate declaration if necessary throughout the business of the meeting.

Adoption of Council Meeting Minutes
Motion #1 *– Moved by Ben Dekker, Seconded by Muriel Wright that the minutes of the Regular Council Meeting of April 14, 2010 be approved as printed and distributed.*
Motion Carried.

Business Arising from Previous Meetings
Provincial Senior Award
Having been discussed as well at their previous meeting, no consensus was made by Council for the submission of a nomination for the subject award. It was noted that numerous individuals throughout the municipality would qualify for this award, ultimately creating a difficulty in submitting a single nomination.

Public Works Department
In consultation with Reg McMichael, Director of Public Works & Engineering, the following was addressed with Council:

- reference made to Progress Report presented to Council in the Agenda's "Staff Reports"; Mr. McMichael added that a recommendation regarding ORO responsibilities was projected for this September, and that C. N. Watson consultants would be making a presentation to Council at their June 16th meeting regarding the Water/Sewer Financial Plan
- was also noted by Mr. McMichael that two items for Council's next regular meeting would include a "Protected Species Exemption Agreement" with M.N.R., and a report addressing Canada Post's recent request for re-signing of the Forest rural area to 911 numbering in-lieu-of rural route postings, which was scheduled for late May/early June

No further business was addressed at this time, and no additional inquiries presented by Council.

Planning/Zoning Department

In consultation with County Planner Will Nywening and Planning Assistant Carlie Burns, who both were present at this time at the meeting, the following topics were discussed with Council:

Request for Agreement – Construction of New Home

Motion #2 *– Moved by Don Nelson, Seconded by Gary DeBoer that By-law Number 59 of 2010, being a by-law to allow two houses on a property on a temporary basis (3951 Egremont Road), be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-law accordingly.*

Motion Carried.

Official Plan Review

In response to the recommendation presented by staff, the following motion was approved by Council:

Motion #3 *– Moved by Gary DeBoer, Seconded by Don Nelson that the Open House for the Official Plan review to be held at the Plympton-Wyoming Council Chambers be rescheduled for the 22nd day of June, 2010, 7 – 9 p.m.; That the courtesy Open House for the Official Plan review to be held specifically for the property owners of Lots in Plan 28 and 486 at the Plympton-Wyoming Council Chambers be rescheduled for the 24th day of June, 2010, 7 – 9 p.m., and that the Public Meeting for the Official Plan review to be held at Plympton-Wyoming Council Chambers be rescheduled for the 30th day of June, 2010, at 7:00 p.m.* ***Motion Carried.***

Property Standards Concerns

Motion #4 *– Moved by Ben Dekker, Seconded by Paul Kingston that Council request the Chief Administrative Officer to address the Property Standards concerns outlined in the Planning/Zoning Agenda of April 28th, 2010, pursuant to Council discussion.*

Motion Carried.

Suncor Wind Energy Project
Council was advised by C.A.O. Kyle Pratt that no representative from the firm could be scheduled to attend today's Council meeting, and that a meeting would be scheduled at a later date. Reference was made to the notice included of the Public Meeting being held on May 18th at the Camlachie Community Centre by Suncor Energy.

Committee of Adjustment
Council was distributed copies of applications being received by the Committee at their next meeting of May 11th, 2010.

Green Energy Act Regulations
Council was distributed copies of a letter given to M.P.P. Bob Bailey by Mayor Napper, to follow-up on Council's initial expression of concern, dated November 27th, 2009, regarding the subject legislation. Additionally, the following resolution was approved by Council in response to Mr. Bailey's request, for submission at Queen's Park:

Motion #5 *– Moved by Paul Kingston, Seconded by Muriel Wright that the Ontario Provincial Government place a moratorium on all new wind projects until a comprehensive, independent, and peer-reviewed scientific study can confirm that industrial wind energy sites do not pose a risk to community health and environment concerns.*

Councillor Muriel Wright requested that Council's vote on this motion be a recorded one, The vote, determined by draw pursuant to the Procedural By-law, was recorded by the Clerk as follows:

Gary DeBoer ..... In Favour
Lonny Napper ..... In Favour
Muriel Wright ..... In Favour
Don Nelson ..... In Favour
Paul Kingston ..... In Favour
Ben Dekker ..... Not In Favour
(Ron Schenk absent from meeting)

Motion Carried.

There being no further business to discuss, the following resolution was approved by Council, and Will Nywening made his exit from the Council Chambers (Carlie Burns remained at the meeting):

Motion #6 *– Moved by Don Nelson, Seconded by Gary DeBoer that all items on the Planning/Zoning Agenda for the April 28th, 2010 Regular Council Meting, not otherwise addressed by Council resolution, be noted as received by the Plympton-Wyoming Council.* ***Motion Carried.***

Accounts

Motion #7 *– Moved by Ben Dekker, Seconded by Muriel Wright that the Accounts as listed in the attached form be approved by the Plympton-Wyoming Council for payment:*

a) NorthWest Consulting
- Gillatly Drain Improvement
- Robertson Drain/Sawmill Creek Investigation
- Stonehouse Drain Investigation
- Carmichael Drain Branches A&B
- Barnes Drain Relocation
- Donaldson/Franklin/Lakeview Watermain Replacement

b) Robert B. Gray
- Statement of Account *(in confidential envelope)*

c) Town of Plympton-Wyoming
- General Pay List
- Public Works Pay List

Motion Carried.

Staff Reports

With reference to the respective Staff Reports presented, the following motions were approved by Council:

Motion #8 *– Moved by Paul Kingston, Seconded by Muriel Wright that the Gillatly Municipal Drain Investigation 2010 Report, dated April 19, 2010, as prepared by Northwest Consulting (Will Bartlett) be accepted as received by the Plympton-Wyoming Council, and distributed as recommended by Mr. Bartlett to all owners of land initially advised of the onsite meeting, as well as the petitioner, being M.T.O. (Ministry of Transportation).*

Motion Carried.

Motion #9 *– Moved by Gary DeBoer, Seconded by Don Nelson that Council authorize Northwest Consulting to prepare a report to address the "Request for Maintenance" submitted by Brian Douglas, to ascertain the condition of the structure over the drain, being the Chalmers Drain, S l/2 Lot. 7, Concession 4, in the Town of Plympton-Wyoming.*

Motion Carried.

Motion #10 *– Moved by Ben Dekker, Seconded by Paul Kingston that Council endorse the Memo from Carol Hoskin dated April 22, 2010, regarding Garbage Collection Costs, and that Council endorse the recommendation made by staff accordingly.*

Motion Carried.

Motion #11 *– Moved by Gary DeBoer, Seconded by Don Nelson that Council acknowledge "Staff Reports" as listed in the attached form not otherwise addressed in resolution form by Council:*

a) NorthWest Consulting – Will Bartlett
- Gillatly Municipal Drain Investigation 2010 Report

b) Reg McMichael
- Progress Report – April 20, 2010

c) Carol Hoskin
- Memo - Garbage Pickup – Camlachie Mini Storage
- Memo – Property Taxes *(in confidential envelope)*

d) Caroline DeSchutter
- Memo – Procedural By-law Update – By-law #60 of 2010

Motion Carried.

Committee Meeting Minutes & Reports

Motion #12 *– Moved by Don Nelson, Seconded by Gary DeBoer that the Committee Meeting Minutes and Reports as listed in the attached form be noted as received by the Plympton-Wyoming Council:*

a) Lambton Farm Safety
- April 19, 2010 Agenda
- March 1, 2010 Minutes

b) Wyoming Public Cemetery Board
- October 13, 2009 Minutes

c) Tourism Sarnia Lambton
- Thursday, March 11, 2010 Minutes
- March 2010 Report

d) Plympton-Wyoming Water/Sewer Committee
- April 21, 2010 Agenda
- March 31, 2010 Minutes
- Wyoming Water/Sewer Accounts
- Plympton Water/Sewer Accounts

Motion Carried.

Councillors' Reports

Motion #13 *– Moved by Muriel Wright, Seconded by Ben Dekker that the Councillors' Reports as listed in the attached from be noted as received by the Plympton-Wyoming Council, and filed accordingly.* ***Motion Carried.***

By-laws

Motion #14 *– Moved by Ben Dekker, Seconded by Paul Kingston that By-laws Numbered 48 to 58 of 2010, being Municipal Drainage Maintenance By-laws, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-laws accordingly.* ***Motion Carried.***

Motion #15 *– Moved by Gary DeBoer, Seconded by Don Nelson that By-law Number 60 of 2010, being a by-law to update the Procedural By-law, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Motion #16 *– Moved by Ben Dekker, Seconded by Paul Kingston that By-law Number 61 of 2010, being a by-law to appoint a Secretary-Treasurer to the Committee of Adjustment and a Secretary to the Property Standards Committee be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Motion #17 *– Moved by Gary DeBoer, Seconded by Don Nelson that By-law Number 62 of 2010, being a by-law to authorize Amendment Number 4 to the Agreement with CH2M-Hill-OMI for the Operations and Management of the Plympton Lakeshore Area Sewage Treatment Plant, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Correspondence – ***Action-Required Items***

Motion #18 *– Moved by Paul Kingston, Seconded by Muriel Wright that Council endorse the letter of authorization to the Community Health Services Department, County of Lambton, for the 2010 use of larvacide in Plympton-Wyoming.* ***Motion Carried.***

Motion #19 *– Moved by Don Nelson, Seconded by Gary DeBoer that we accept the complaint of Dave Minielly on the Morgan Drain, and that Arnold Hoekstra be instructed to investigate and make the necessary repairs.* ***Motion Carried.***

Motion #20 *– Moved by Paul Kingston, Seconded by Muriel Wright that we accept the complaint of Wayne Stewardson on the Montgomery Drain, and that Arnold Hoekstra be instructed to investigate and make the necessary repairs.* ***Motion Carried.***

Motion #21 *– Moved by Paul Kingston, Seconded by Muriel Wright that we accept the complaint of Wayne Stewardson on the Berry Drain, and that Arnold Hoekstra be instructed to investigate and make the necessary repairs.* ***Motion Carried.***

Motion #22 *– Moved by Ben Dekker, Seconded by Paul Kingston that the Council of the Town of Plympton-Wyoming hereby applies for funding for the purpose of collecting, collating, compiling and formatting bridge asset and condition data, and agrees to submit Bridge Asset and Condition Data for inclusion in Municipal Dataworks by March 31, 2011.* ***Motion Carried.***

Motion #23 *– Moved by Don Nelson, Seconded by Gary DeBoer that Correspondence relating to "Action-Required Items" as listed in the attached form, not otherwise addressed by resolution, be noted as received by the Plympton-Wyoming Council, and filed accordingly:*

a) County of Lambton
   - Letter of Authorization – Larvicide Use of West Nile Virus

b) Falun Dafa Association of Canada
- Proclamation – 16th Anniversary of Falun Dafa Introduction to the Public

c) Bluewater Health Foundation
- Permission to Distribute 2011 Dream Home Lottery Tickets

d) Drain Maintenance Request(s)
- Morgan Drain
- Montgomery Drain
- Berry Drain

e) OGRA
- Bridge Infrastructure Data

Motion Carried.

Correspondence – ***Recommended Reading & Routine Approval/Information Items***
Motion #24 *– Moved by Muriel Wright, Seconded by Paul Kingston that Correspondence relating to "Recommended Reading" and Routine Approval & Information Items, not otherwise addressed by resolution, be noted as received by the Plympton-Wyoming Council, and filed accordingly.* ***Motion Carried.***

New Business

Backup Animal Control Officer

Council was advised by C.A.O. Kyle Pratt that no qualified applications had been received in response to the local advertisement for a backup Animal Control Officer. He indicated that he would continue to follow-up on other options for Council to consider.

Municipal Elections 2010

Council was advised by the Clerk that options for the mandatory formation of a Compliance Audit Committee were being considered by local Clerks collectively, and that a report would be forthcoming for Council's consideration. Council was also advised that the website was being kept updated to include all individuals who have filed their Nomination Papers to date for the upcoming Municipal Election, which to date included Lonny Napper, Ben Dekker, Robert Woolvett and Netty McEwen.

New Business – Council & Staff Members

Muriel Wright

- in response to her inquiry, Councillor Dekker confirmed that after Council's final approval of the 2010 Budget, he would be requesting the scheduling of a further Committee meeting for the Wyoming/Reeces Corners trail project, adding that survey work would be facilitated by Reg McMichael, and inquiries could then be made regarding possible funding opportunities

Don Nelson

- asked Public Works to check into improvement of signing on Confederation Street, west of Broadway Street, to give notice of upcoming school zone, to improve local safety and awareness to traffic

Ben Dekker

- asked that correspondence with the Wyoming Community Foundation be followed-up in a subsequent Council Meeting to address the current status of the municipality's reserve fund for a Medical Facility

Don Nelson

- advised Council that the new fire truck for the Camlachie Fire Department was being delivered on Friday, May 7th, and would be on display during the following Saturday morning until 12 noon, should Council wish to see the new purchase
- Mr. Nelson added that an Open House at the Camlachie Fire Hall was tentatively scheduled to be held on June 5th

No further New Business was presented by Council and Staff at this time.

Closed Meeting Session (4:30 p.m.)
Motion #25 *– Moved by Ben Dekker, Seconded by Muriel Wright that Council move into a Closed Meeting session for the purpose of discussion regarding Identifiable Personal Issues and Potential Litigation Issues.* ***Motion Carried.***

Motion #26 *– Moved by Gary DeBoer, Seconded by Don Nelson that Council return to the Open Meeting Session.* (4:40 p.m.) ***Motion Carried.***

Motion #27 *– Moved by Ben Dekker, Seconded by Paul Kingston that Council endorse the municipality's restoration of the property at 4178 Blue Point Drive to facilitate maintenance of the grounds.* ***Motion Carried.***

Approval of Confirming By-law
Motion #28 *– Moved by Don Nelson, Seconded by Gary DeBoer that By-law Number 63 of 2010, being the Confirming By-law for the Regular Council Meeting of April 28, 2010, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk or Deputy Clerk authorized to sign the said by-law accordingly.*

Motion Carried.

Meeting Adjournment

Motion #29 *– Moved by Paul Kingston, Seconded by Muriel Wright that the Regular Council Meeting be adjourned until the next Regular Meeting, to be held on May 12th, 2010, commencing at 5:00 p.m.* ***Motion Carried.***

At 4:50 p.m., the meeting was adjourned.

Clerk

Mayor

Exhibit B
Tab 4
Schedule 1
Appendix B

February 8, 2012 Town Council Meeting Minutes

The Corporation of the Town of Plympton-Wyoming
Regular Council Meeting

Date: Wednesday, February 8, 2012
Time: 9:15 a.m.
Location: Plympton-Wyoming Council Chambers
546 Niagara St., Wyoming, Ont.

Council Members Present: Lonny Napper, Mayor
Ben Dekker
Netty McEwen
Ron Schenk
Muriel Wright

Council Members Absent: Don Nelson
Robert Woolvett

Staff Members Present: Kyle Pratt, Chief Administrative Officer *(C.A.O.)*
Caroline DeSchutter, Clerk

Call to Order
At 9:15 a.m., Mayor Lonny Napper called the meeting to order.

Declaration of Pecuniary Interest
No declaration was made by any one member of Council at this time. Mayor Napper requested Council members to make the appropriate declaration if necessary throughout the business of the meeting.

Adoption of Council Meeting Minutes
Motion #1 *– Moved by Ben Dekker, Seconded by Muriel Wright that the minutes of the Regular Planning Meeting of January 23, 2012 be approved as printed and distributed.* ***Motion Carried.***

Motion #2 *– Moved by Muriel Wright, Seconded by Ben Dekker that the minutes of the Closed Planning Meeting of January 23, 2012 be approved as printed and distributed.* ***Motion Carried.***

Motion #3 *– Moved by Netty McEwen, Seconded by Ron Schenk that the minutes of the Regular Council Meeting of January 25, 2012 be approved as printed, distributed and amended accordingly.*
Motion Carried.

Motion #4 *– Moved by Ron Schenk, Seconded by Netty McEwen that the minutes of the Closed Council Meeting of January 25, 2012 be approved as printed and distributed.* ***Motion Carried.***

Business Arising from Previous Meetings
Rescheduling of Upcoming Council Meeting Times
Having been discussed at previous meetings, the following motion was approved by Council:

Motion #5 *- Moved by Muriel Wright, Seconded by Netty McEwen that Council endorse changes in upcoming Regular Council Meeting dates and times in the following manner:*

- *Regular Planning Meeting for February 27, 2012 be rescheduled to be held on February 21, 2012, commencing at 5:00 p.m.*
- *Regular Council Meeting for February 29, 2012 be rescheduled to be held on February 22, 2012, commencing at 5:00 p.m.*
- *Regular Council Meeting of May 9, 2012 be rescheduled to commence at 5:00 p.m., in-lieu-of the regular startup time of 9:15 a.m.*
- *Regular Planning Meeting for August to be held on August 13, 2012, commencing at 5:00 p.m.*
- *Regular Council Meeting for August to be held on August 15, 2012, commencing at 9:15 a.m. (one Regular Meeting only in August)* ***Motion Carried.***

Sale of 2012 Dog Tags

Council endorsed the door-to-door sale of dog tags this year, to ensure up-to-date records and the monitoring of dogs throughout the municipality.

Public Works Department

Council members confirmed that they had no inquiries/issues to be addressed relating to the Public Works Department at this time.

Planning/Zoning Department

Council was advised that Planning Coordinator Carlie Burns would be joining them during Closed Session to address a Planning matter.

Accounts

Motion #6 *– Moved by Ron Schenk, Seconded by Netty McEwen that the Accounts as listed in the attached form be approved by the Plympton-Wyoming Council for payment as amended:*

a) Town of Plympton-Wyoming
   - Council Paylist – January 2012
   - Drainage Superintendent Paylist December 17 – 31, 2011
   - Drainage Superintendent Paylist January 2012 ***Motion Carried.***

Staff Reports

With reference to the Staff Reports as presented, the following motions were approved by Council:

Motion #7 *– Moved by Muriel Wright, Seconded by Ben Dekker that Council endorse the staff recommendation made in the attached form regarding 2010 Property Tax/Penalty adjustments, and that the Revenue and Accounts Coordinator be directed to make said adjustment.* ***Motion Carried.***

Motion #8 *– Moved by Netty McEwen, Seconded by Ron Schenk that Council acknowledge "Staff Reports" as listed in the attached form not otherwise addressed in resolution form by Council:*

a) Carol Hoskin
   - Report – Property Tax Payment Posting Error – October 2010 ***Motion Carried.***

Councillors' Reports

Motion #9 *– Moved by Ben Dekker, Seconded by Muriel Wright that the Councillors' Reports as listed in the attached form be noted as received by the Plympton-Wyoming Council, and filed accordingly:*

a) Lonny Napper
   - News Release – Council Highlights – February 1, 2012

Motion Carried.

By-laws

Motion #10 *– Moved by Netty McEwen, Seconded by Ron Schenk that By-law Number 10 of 2012, being a by-law to endorse collection of Municipal Drain Maintenance Assessments, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk/Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Motion #11 *– Moved by Ron Schenk, Seconded by Netty McEwen that By-law Number 11 of 2012, being a by-law to authorize an Agreement with Ontario Clean Water Agency (O.C.W.A.) for the provision of Overall Responsible Operator (ORO) services for the Plympton and Wyoming Water Systems, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk/Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Motion #12 *– Moved by Muriel Wright, Seconded by Ben Dekker that By-law Number 12 of 2012, being a by-law to endorse collection of Drainage Assessments for the Carmichael Drain Improvement Project, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk/Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Correspondence – Action-Required Items

Motion #13 *– Moved by Muriel Wright, Seconded by Ben Dekker that Correspondence relating to "Action-Required Items" as listed in the attached form, not otherwise addressed by resolution, be noted as received by the Plympton-Wyoming Council, and filed accordingly:*

a) Resolution(s)
   - Girl Guides of Canada – Guide-Scout Week

b) Ministry of Citizenship and Immigration
   - Newcomer Champion Awards

c) Heart & Stroke Foundation of Ontario
   - Ontario Defibrillator Access Initiative (ODAI)

Motion Carried.

Correspondence – *Recommended Reading & Routine Approval/Information Items*

Motion #14 *- Moved by Ron Schenk, Seconded by Netty McEwen that Correspondence relating to "Recommended Reading" and "Routine Approval and Information Items" not otherwise addressed by resolution, be noted as received by the Plympton-Wyoming Council, and filed accordingly.*

Motion Carried.

New Business

Hodgins Drain Report

Motion #15 *– Moved by Muriel Wright, Seconded by Ben Dekker that Council acknowledge as received the Hodgins Drain Repair and Improvement 2011 Report, dated January 31, 2012, and that a*

Consideration Meeting for the said Report be scheduled to be held on Wednesday, March 28, 2012, commencing at 6:30 p.m. ***Motion Carried.***

Proposed Lease of former Camlachie Library Building

Following discussion regarding the Mayor's recommendation as presented, the following motion was approved by Council:

Motion #16 *– Moved by Ron Schenk, Seconded by Netty McEwen that Council authorize the lease of the former Camlachie Library Building to O.C.W.A., to be facilitated by a monthly lease agreement.*

Motion Carried.

Coyote Presence Concerns in Residential Neighbourhoods

It was confirmed by staff that O.P.P. personnel had advised that calls from concerned residents in residential neighbourhoods regarding the presence of coyotes in the municipality should be referred directly to the O.P.P. to be responded to. Mayor Napper relayed concerns expressed to him from a local hunter regarding by-law restrictions in place in the municipality, which staff were directed to address if subsequent inquiries should be submitted at the office.

New Business presented by Council & Staff Members

Netty McEwen

- distributed to Council and staff copies of the Parks and Recreation Study Report prepared by herself and Mayor Napper, and requested that the report be reviewed, and comments submitted to the Committee members accordingly

Ben Dekker

- subsequent to business discussed at the Wyoming Fire Executive Meeting held on Tuesday, February 7th, 2012, and addressed accordingly by Councillor Dekker, the following motions were approved by Council:

Motion #17 *– Moved by Ben Dekker, Seconded by Muriel Wright that Council endorse the recommendation made by the Wyoming Fire Executive Committee to increase the Wyoming Fire Department force from three Captains to four Captains.* ***Motion Carried.***

Motion #18 *– Moved by Ron Schenk, Seconded by Ben Dekker that the Council of the Town of Plympton-Wyoming authorize the Chief Administrative Officer to recruit for the vacant position(s) of Captain(s) in the Wyoming Fire Department, and appoint a Selection Committee and make recommendation on the preferred candidate(s) to Council.* ***Motion Carried.***

Ron Schenk

- distributed a letter directed to all Ontario municipalities from the Municipality of Arran-Elderslie requesting support, and the Council responded with approval of the following motion:

Motion #19 *– Moved by Ron Schenk, Seconded by Ben Dekker that Council endorse the resolution in the attached form from the Municipality of Arran-Elderslie regarding the requested moratorium on Industrial Wind Turbines Development in Ontario, and that the proper parties be notified accordingly.*

Motion Carried.

No further business was presented by Council or staff members at this time.

Closed Meeting Session – 11:00 a.m.

Motion #20 *– Moved by Muriel Wright, Seconded by Ben Dekker that Council move into a Closed Meeting Session for the purpose of discussion regarding a Proposed or Pending Acquisition or Disposition of Land by the Municipality, and Litigation or Potential Litigation affecting the Municipality.*

Motion Carried.

Motion #2 (11:15 a.m.) *– Moved by Muriel Wright, Seconded by Ben Dekker that the Closed Meeting Session be adjourned.* ***Motion Carried.***

Approval of Confirming By-law

Motion #22 *– Moved by Muriel Wright, Seconded by Ben Dekker that By-law Number 13 of 2012, being the Confirming By-law for the Regular Council Meeting of February 8, 2012, be taken as read a first, second and third time, finally approved, and the Mayor and Clerk/Deputy Clerk authorized to sign the said by-law accordingly.* ***Motion Carried.***

Meeting Adjournment

Motion #23 *- Moved by Ron Schenk, Seconded by Netty McEwen that the Regular Council Meeting be adjourned until the next Regular Meeting, to be held on Wednesday, February 22nd, 2012, commencing at 5:00 p.m.* ***Motion Carried.***

The meeting was adjourned at 11:30 a.m.

_____ _____

Clerk **Mayor**

Exhibit B
Tab 4
Schedule 1
Appendix C

May 23, 2014 – Judgement in Suncor v. Plympton-Wyoming

CITATION: Suncor Energy Products v. Town of Plympton-Wyoming, 2014 ONSC 2934
COURT FILE NO.: 6964/13
DATE: 2014/05/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Suncor Energy Products Inc. Applicant	)	Albert Engel, for the Applicant
– and –	)	
Corporation of the Town of Plympton-Wyoming Respondent	)	Eric Gillespie, for the Respondent
	)	**HEARD:** February 26, 2014

M.A. GARSON J.

INTRODUCTION

[1] This is an application brought by Suncor Energy Products Inc. ("Suncor"), pursuant to s. 273 of the *Municipal Act, 2001*, S.O. 2001, c. 25 ("*Municipal Act*") and Rule 14.05 of the *Rules of Civil Procedure* seeking:

A. An order quashing By-Law 6 of 2012 in whole or in part for illegality as it concerns Suncor's structures that support a wind turbine generator having a related output greater than 3kW;

B. An order quashing By-Law 50 of 2012 in whole or in part for illegality;

C. An order quashing By-Law 75 of 2012 in whole or in part for illegality, as it concerns charges identified for wind turbines;

D. Alternatively, a declaration that the above by-laws are of no force or effect due to a conflict with provincial legislation, including the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("*EPA*");

E. Additionally, a declaration that any and all of Plympton-Wyoming's ("the Town") by-laws passed under Part V of the *Planning Act*, R.S.O. 1990, c. P.13, including By-Law 97 of 2003, By-Law 104 of 2007, and By-Law 15 of 2012, do not apply to Suncor's wind farm by virtue of s. 62.0.2(6) of the *Planning Act* since it is a renewable energy undertaking; and

F. Additionally, a declaration that it would be contrary to law for the Town to refuse Suncor a building permit for its wind farm on the basis of By-Law 50 of 2012.

[2] The respondent asks the court to adjourn the proceedings to allow the parties to continue to discussions. Unfortunately for the respondent, the applicant expressed no desire to continue such discussions and wished to proceed with the application. There being no prospect of success in such discussions, the court declined to adjourn the matter and proceeded to hear the parties.

BACKGROUND

[3] Suncor is an Ontario corporation that was awarded a contract by the Ontario Power Authority for the development of a large, 100 MW, Class 4 wind farm called "Cedar Point" consisting of 46 wind turbines at 55 selected locations, 27 of which are located in the Town.

[4] The Town is an open, long-time supporter of a moratorium on wind turbines. The Town is acting in accordance with various concerns raised by citizens regarding possible adverse health effects from wind turbines. There is a considerable history of discussion and interaction between the Town and Suncor as regards the building of Cedar Point.

[5] In 2009, Ontario enacted the *Green Energy and Green Economy Act, 2009*, S.O. 2009 C.12 ("*GEGEA*"), which amended several acts including the *EPA*. The *GEGEA* encouraged the development of renewable energy and generally removed barriers for renewable energy projects within the province. Three important steps in this regard were:

1. The creation of a feed-in tariff program ("FIT") to procure energy from renewable sources like wind farms.

2. The creation of the Renewable Energy Approval ("REA") process as prescribed in O. Reg. 359/09 made pursuant to the *EPA* and administered by the Ministry of the Environment ("MOE").

3. The placing of restrictions on municipal authority under the *Planning Act* and the *Municipal Act* when such projects are at issue.

[6] Section 47.3 of the *EPA* mandates that an REA is required prior to any construction, installation, use, operation, or changing of the wind facility.

[7] O. Reg. 359/09 sets out the requirements of the REA process. In short, it requires that proponents undertake detailed environmental studies and prepare corresponding technical reports that are prescribed in the regulation for review and approval by appropriate provincial ministries prior to a complete REA application package being submitted to a "Director" as appointed by the MOE. It includes requirements for consultation with the public and local authorities and posting of applications on the Environmental Registry website. It provides for public input prior to a decision by the Director.

[8] O. Reg. 359/09 is a very detailed regulation. Of note, among its many prescriptions are setbacks of a distance of 550 m and sound level limits at non-participating noise receptors of 40 dBA.[1] A "noise receptor" is, in effect, a place that provides overnight accommodation or is an educational facility, day nursery, or place of worship, or vacant land zoned for such a use. The 550 m minimum setback distance has been reviewed and approved by the Divisional Court.[2]

[9] As such, an REA must specify the exact locations where wind turbines shall be constructed and operated, as well as the applicable sound level limits, the most restrictive of which is 40 dBA. The 40 dBA limit is prescribed by the MOE's 2008 "Noise Guidelines for Wind Farms", which is incorporated by reference into O. Reg. 359/09.

[10] Under ss. 47.4 and 47.5 of the *EPA*, the Director makes the final call on the issuance and/or terms of an REA, having regard to "public interest".

[11] Once issued, an REA may be appealed to the Environmental Review Tribunal by any person, resident in Ontario, on grounds that engaging the project approved by the REA will cause serious harm to human health, or serious and irreversible harm to plant life, animal life, or the natural environment.[3] A further appeal can then be taken to the Divisional Court or the Minister of the Environment.

[12] If there is a conflict between any provision of the *EPA* or its regulations and any other Act or regulation, s. 179 of the *EPA* sets out that its provisions or regulations prevail.

[13] Normally, zoning by-laws may be passed by the councils of local municipalities under the provisions of Part V of the *Planning Act*. Those powers include controls on the use of land and on the erection of structures. However, s. 62.0.2(6) of the *Planning Act* specifically provides that a by-law passed under Part V does not apply to a renewable energy undertaking, which includes a renewable energy project and a renewable energy generation facility.

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[1] See ss. 54 and 55 of O. Reg. 359/09.
[2] See *Hanna v. Ontario (Attorney General*), 2011 ONSC 609.
[3] See s. 142.1 of the *EPA*.

[14] As required under this above regime, Suncor has applied for a provincial REA for Cedar Point in accordance with the applicable regulatory scheme for renewable energy projects under the *EPA*.[4]

[15] As far as I am aware, Suncor's REA request is still outstanding.

The Cedar Point Project

[16] Suncor's Cedar Point has been in the works since 2005. Certain land lease agreements and consultations began in 2006. Between 2006 and 2008, Suncor actively engaged in discussions with county and Town planners over the development of zoning by-laws that would specifically address wind power projects in the Town. Certain by-laws were enacted during this time that fit within provincial prescriptions for wind power projects. All seemed to be going well between Suncor and the Town.

[17] In 2009, following the introduction of the *GEGEA* and its legislated changes, Suncor applied under the applicable FIT program for the green light on Cedar Point as far as the Ontario Power Authority was concerned. This was granted in 2011 for up to 100 MW at Cedar Point.

[18] On April 16, 2013, Suncor submitted its REA application for Cedar Point, purporting to include up to 46 wind turbines, access roads, meteorological towers, electrical collector lines, a substation, and a 155kV transmission line. Final selection of turbine construction sites from among those approved will be selected prior to construction. Suncor submits that all of the proposed turbine locations comply with the 550 m setback and 40 dBA sound limit requirements set out in O. Reg. 359/09.

[19] On December 5, 2013, Suncor's REA for Cedar Point was deemed completed and posted on the provincial Environmental Registry for public comment. A decision with respect to an REA is typically expected within six months of this posting.

[20] When the parties appeared for the hearing of this application on February 26, 2014, the REA decision had yet to be delivered.

Town Actions in Opposition and Suncor Reactions

[21] In the meantime, the Town was openly disappointed with the restrictions placed by the *GEGEA* in 2009 on municipal planning control over renewable energy projects.

[22] The Town argues that it did not become aware of Cedar Point in its current form until April 2010.

[23] On April 28, 2010, the Town's council passed a resolution calling for *inter alia* "a moratorium [by the province] on all new wind projects until a comprehensive,

[4] See ss. 47.1-47.3 of the *EPA*.

independent, and peer-reviewed scientific study can confirm that industrial wind energy sites do not pose a risk to community health and environment concerns."

[24] In May 2010, Town representatives attended a luncheon and open house for Cedar Point hosted by Suncor to discuss aspects of the project.

[25] At a July 14, 2010 council meeting, the Town considered letters and emails from concerned residents over the proposed Cedar Point and considered whether to hold a public meeting to discuss wind turbine projects in the Town. It was decided that further investigation was necessary.

[26] In November 2010, in response to resident concerns, the Town's council discussed various by-laws that could be enacted to "protect the Town's interests regarding Industrial Wind Turbines".

[27] In the spring of 2011, after what appears to be some confusion over the future of Cedar Point, the Town was advised that Cedar Point would be moving forward.

[28] Representatives of the Town and Suncor met in September 2011 to discuss the project.

[29] At a November 2011 council meeting, the Town's council directed staff to explore building permit costs for wind turbines.

[30] The Town received the final description report for Cedar Point from Suncor on December 12, 2011.

[31] In the Town's view, "[g]iven the lack of communication from Suncor Energy up to this point regarding their project … [Town council] directed staff to explore the feasibility of by-laws to protect the Town's interest."

[32] At a December 14, 2012 council meeting, the Town "directed staff to draft a by-law to protect the municipality from any future costs resulting from the decommissioning and dismantling of wind turbines after their effective life span and to have the owner of the wind turbine(s) to [sic] put up a security or bond for each turbine, payable to the [Town] before a building permit is issued."

[33] As the Town submits, "[c]ouncil wanted to do this to protect the Town's interests and to ensure that the decommissioning and removal is completed in a satisfactory manner."

[34] On January 23, 2012, after a public meeting and discussion of an internally conducted wind turbine regulation report, the Town passed By-Law 6 of 2012, which increased its building permit fee for wind turbines from $100 per turbine, as it was previously prescribed in a schedule to its By-Law 76 of 2007, to $10,000 per turbine plus $100/m of total height, including blade height. It also introduced a requirement for the posting of a security of $200,000 for wind turbine removal.

[35] On February 8, 2012, the Town passed a motion supporting another resolution calling for a moratorium on industrial wind turbine development in the province.

[36] On February 21, 2012, the Town passed By-Law 15 of 2012, which amended its previous comprehensive zoning specifications as had been found in By-Law 97 of 2003. By-Law 15 of 2012 increased the required setbacks for wind turbines from 600 m to 2000 m from any contiguous group of four or more lots; from 400 m to 2000 m from a dwelling on a separate lot; and from 400 m to 2000 m from a point on a separate lot that does not have a dwelling.

[37] Suncor submits through expert evidence that the changes introduced by By-Law 15 of 2012 in effect will prohibit the development of commercial wind turbines anywhere in the Town, which blocks the construction of Cedar Point in the Town. The Town did not challenge any of the affidavit evidence of the experts, nor did it cross-examine any of the affiants.

[38] The Town received from Suncor a "Notice of Public Meeting" and "Information for Public Display and Municipal Consultation Form" on March 19, 2012.

[39] After taking several steps over April-May 2012 to echo a similar by-law passed in another municipality, on June 23, 2012, the Town passed By-Law 50 of 2012. It established 2 km setbacks, 32 dB noise level limits, and required indemnification for any loss of property or adverse health effect from the construction of industrial wind turbines. It defines property as "property line, vacant land, dwelling or structure and their inhabitants of all species used for private or business or public purposes".

[40] As the Town submits, "[p]rior to the passing of By-law 50 of 2012, [Town council] considered empirical data from other jurisdictions around the world when deriving setbacks from property lines. Council decided that a two kilometre setback, as suggested in a variety of studies and in areas of Europe, Australia and California would best protect the health and safety of residents in the [Town]. It was for this very reason, that the [Town council] supported a moratorium on the development of wind turbines until the proper health studies have been conducted. Following [Town council]'s discussion regarding the subject draft, [Town council] approved By-law 50 of 2012."

[41] Suncor submits that the application of By-Law 50 of 2012 would make it impossible to site any of the wind turbines at the locations proposed by Suncor for Cedar Point and makes it impossible to construct a Class 4 wind turbine anywhere within the Town.

[42] On July 18, 2012, the Town again received a "Notice of Public Meeting" from Suncor.

[43] On August 20, 2012, the Town received a "Notice of Draft Site Plant" from Suncor.

[44] On September 10, 2012, the Town received an "Updated Municipal Consultation Form" and "Municipal Consultation Package" from Suncor.

[45] Later on September 10, 2012, at a special meeting called, the Town passed By-Law 75 of 2012, which mandates a development charge of $8,891 per wind turbine and defines "wind turbine" as "any wind energy conversion system with a name plate capacity greater than 300 kilowatts, that converts wind energy into electricity for sale to an electrical utility or other intermediary."

[46] The Town has passed other zoning by-laws under Part V of the *Planning Act*, in addition to By-Law 15 of 2012, such as By-Law 104 of 2007.

[47] On October 11, 2012, Town representatives met with Suncor representatives to address concerns over the Town's newly enacted by-laws. The Town received further concerns from Suncor on November 22, 2012.

[48] The Town sent Suncor a "Letter of Response regarding Wind Turbine By-laws" on December 14, 2012.

[49] During this time, the Town submits that it received a petition containing 2,500 signatures of residents in opposition to the development of Cedar Point. It also submits that up to April 26, 2013, the Town received 921 objection letters to Cedar Point.

[50] On February 7, 2013, the Town received from Suncor more documents regarding Cedar Point and requested feedback. In the Town's view, it reviewed the documents over several months and identified a number of areas where insufficient information was provided so as to allow the Town to respond with the requested feedback.

[51] On February 12, 2013, the Town received a response letter from Suncor requesting a delegation with Town council.

[52] On February 13, 2013, Suncor served the Town with notice of the current application.

[53] The Town submits that it requested further consultation with Suncor on April 26, 2013 and that Cedar Point not move forward until certain unknowns and concerns were addressed.

[54] The Town also submitted a letter and various reports to the MOE noting a variety of issues it had with the proposed Cedar Point.

[55] On August 2, 2013, the Town received from Suncor a response indicating that in its view, the Town's concerns had been resolved. The Town did not agree.

[56] The Town responded on September 4, 2013 and outlined several issues that in its view remained outstanding.

[57] The Town was notified on October 4, 2013 that Suncor would respond within the next two weeks. The Town submits that it did not hear back.

[58] On December 12, 2013, the Town was notified that Suncor's REA application for Cedar Point had been deemed complete by the MOE and had been posted for public comment on December 5, 2013, as discussed above.

[59] The Town was openly displeased about Suncor moving on to this next step when, in the Town's view, numerous outstanding issues remained unresolved. The Town submits that it had received word from the MOE on May 19, 2011 that projects would not move forward until municipal concerns were addressed.

[60] The Town made its displeasure over the REA known to the MOE. Town council instructed staff to write to the MOE requesting a 30-day extension to the 45-day public comment period relating to Cedar Point, given its outstanding concerns.

[61] On February 5, 2014, the Town received a response to its extension request from the MOE. It did not provide for an extension but in the Town's view, "advised that the [Ministry] is currently in the process of conducting a detailed technical review of the application." Counsel for Suncor advised the court that the public consultation period was extended to 60 days and concluded on February 3, 2014.

[62] It appears as though Suncor raised its objections to the passing of the by-laws by way of letters subsequent to their passing. It did not participate in the various council meetings to argue against the by-laws it now seeks to challenge.

POSITIONS OF THE PARTIES

[63] Suncor challenges the legality of the By-Laws 6, 50 and 75 of 2012 on the basis of illegality and argues that they are of no force and effect.

[64] Suncor further seeks a declaration that numerous by-laws passed under Part V of the *Planning Act* do not apply to Suncor's proposed wind farm by virtue of s. 62.0.2(6) of the *Planning Act*.

[65] The Town argues that the application should be stayed as premature as Suncor is awaiting provincial approval for the REA for Cedar Point and cannot commence any actions in building the proposed wind farm until such approval is received. In other words, the REA is a precondition to assessing the validity of the by-laws and such determination should not be made in a factual vacuum. Alternatively, the Town asks for a 30-day adjournment to allow for more dialogue with Suncor in light of recent decisions in other courts and an acknowledgement by the Town that modifications to certain by-laws are appropriate.

ANALYSIS AND THE LAW

Jurisdiction of the Court

[66] The court has jurisdiction to quash a municipal by-law for illegality by virtue of s. 273 of the *Municipal Act*, which states:

> Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

[67] Further jurisdiction to assess a conflict between a municipal by-law and provincial legislation can be found in s. 14 of the *Municipal Act*, as discussed more below.

[68] Rule 14.05(3)(d) of the *Rules of Civil Procedure* reads:

> 14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is, …

> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statue, order in council, regulation or municipal by-law or resolution.

Standard of Review

[69] The Court of Appeal recently reviewed the standard when municipal by-laws are at issue in *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273:

> **12** Since municipalities are creatures of statute, their jurisdiction is limited to the powers provided by the legislature. Accordingly, a city does not have jurisdiction to pass a by-law that authorizes acts prohibited by its governing legislation. Since a city has no particular expertise in jurisdictional issues, a court will review the legality of a municipal by-law on the standard of correctness: see *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29, [2007] 2 S.C.R. 588, at para. 37. Section 273(1) of the Act gives the Superior Court the discretion to "quash a by-law … for illegality."
>
> **13** Absent illegality, municipal by-laws are well insulated from judicial review. Section 272 of the Act prohibits a review of a by-law passed in good faith "in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law." Thus, a court cannot interfere with a by-law that is unreasonable, but a court may quash one that is illegal.
>
> **14** In reviewing a decision quashing or refusing to quash a by-law for illegality, an appellate court must give a high degree of deference to the judge's findings of fact and the inferences drawn from those facts. While generally the appropriate standard of review on questions of law is correctness, courts are cautioned in cases involving municipal challenges to require "clear demonstration" before concluding that a municipality's decision is made without jurisdiction: see *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342, at para. 36, citing *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244.
>
> **15** Courts reviewing decisions made within jurisdiction must apply a deferential standard: see *Nanaimo*, at para. 35. As the application judge explained, provided they act with jurisdiction, municipalities are accountable to their constituents, and not to the courts.

[70] Indeed, as stated for example in *London Taxicab Owners' and Drivers' Group Inc. v. London (City)*, 2013 ONSC 1460, at para. 42:

> **42** Questions respecting jurisdiction are reviewed on a correctness standard. However, the courts are told to take a broad and deferential approach to municipal decision making. The Supreme Court of Canada expressed it in this way in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485:

> The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced .... This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters ... *Municipal Act, 2001*, S.O. 2001, c. 25. ... This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes ...

The Prematurity Argument

[71] The Town primarily relies upon *Wiggins v. wpd Canada Corp.*, 2013 ONSC 2350 to support its prematurity argument. In *Wiggins,* the wind project was not yet under construction and the REA had not yet been granted. The REA process was "in its inception".[5] The court dismissed an action in nuisance, trespass and other common law remedies for fear that "[t]he court would be speculating on how the Minister would deal with the application, or how the Tribunal would alter that decision on appeal, if at all. The courts will not impose injunctive relief where there is no way of assessing whether the future harm will transpire".[6]

[72] The Town submits that the facts are similar here. Suncor cannot tell the court how the impugned by-laws will affect it because, like the plaintiffs in *Wiggins*, it cannot prove that the project will be approved. It therefore seeks a remedy based on a problem it anticipates through speculation and on the presumption that it will receive its approval.

[73] Respectfully, the court does not find the few other cases on prematurity to which it was referred in the Town's factum to be of any significant aid on this question.

[74] While not directed to it, in its right, the court also notes the recent case of *Drennan v. K2 Wind Ontario Inc.*, 2013 ONSC 2831, which at first blush seems factually similar to the current case. The defendants in *Drennan* proposed to develop a wind power project in the Town of Ashfield-Colborne-Wawanosh consisting of 140 wind turbines. The defendants had sought an REA for the project; approval had yet to be granted. The plaintiffs—farmers in the town—were opposed to the project and brought an action to halt the regulatory process in its tracks. The statement of claim sought various remedies, including *Charter* relief, damages for nuisance, and injunctive relief. A variety of motions were brought on both sides. In short, Grace J., relying on *Wiggins*, found that the plaintiffs' action was premature and ordered it stayed until the regulatory process under the *EPA* was complete. The plaintiffs eventually took their case to Environmental

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[5] At para. 7.
[6] At para. 90.

Review Tribunal, being the natural next step after the REA was granted by the Director on July 23, 2013.[7] The REA withstood the administrative appeal.

[75] As a preliminary observation, I cannot ignore the fact that the Town defends against the application primarily on a procedural basis and does not significantly attempt to counter the merits-based arguments put forth by Suncor.

[76] As to prematurity, the court is well aware of the need to resist ruling on potential non-issues. Indeed, as these cases and others make clear, the REA administrative review process should be respected by the courts. The regulatory approval process is statutorily mandated, and a court can easily derail this process prior to its completion by prematurely interfering, which would certainly be contrary to the legislature's intention. It is clear that the REA process should be given the chance to run its course before it is subject to court interference.

[77] However, the prematurity argument is neither relevant nor applicable to the current application given the relief sought by Suncor. This case differs considerably as compared to others cited above in support of the prematurity argument. It differs on the facts, on the type of proceeding, and on the remedy sought.

[78] Here, Suncor requests that the by-laws be quashed for illegality and/or declared to have no effect in that they conflict with provincial law. Whether either of these requests are legitimate at law is a question of law that, in my view, can and should be addressed on the current application even though the REA regulatory process is incomplete.

[79] In a perfect world, the REA process at issue here would be complete before a court addresses these by-laws, which would satisfy the authorities in favour of the administrative approval process running its course before court review. But such is not the case here.

[80] The prematurity argument concerns court interference in the REA process and the various appeals that lie from it. It does not concern the validity of by-laws that, by circumstance in the current case, concern the same subject matter as the REA process.

[81] In other words, the REA and the by-laws are two separate and distinct issues not dependent upon one another. If this court was being asked to step into the ongoing REA process at this early stage, then the application would surely be premature. But this court is not being asked to do that. The court is being asked to adjudicate on by-laws as they currently stand at law. It happens to be the case that if the by-laws are good law, then it shuts down Suncor's building of the project in the Town, but not necessarily its receipt of an REA for the project. If the by-laws are quashed or ruled ineffective, however, then Suncor is essentially unshackled to build under municipal law, but that does not guarantee its receipt of a provincial REA that is required before it is actually permitted to build Cedar Point.

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[7] See *Drennan v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 10 (the court was in fact referred to this latter decision).

[82] The by-laws at issue are not expressly directed at Suncor or Cedar Point. As such, even if Suncor is denied an REA, another company may very well come along with the same complaints regarding the by-laws. This serves as all the more reason why the by-laws at issue should be reviewed regardless of Suncor's ongoing REA request.

[83] Accordingly, the court does not agree with the Town's argument at para. 58 of its factum, where it states that without an REA the impugned by-laws have only hypothetical effect.

[84] Therefore, in this case, it is unnecessary for a valid REA to be granted before a court considers the application to quash the by-laws or declare as to their effect.

[85] Moreover, recall that it is Suncor—not the Town—that is requesting that the by-laws be quashed or declared to have no effect. By doing so, it is Suncor—not the Town—that is threatening court interference despite the REA administrative process being underway.

[86] Typically, however, "prematurity cases" in the wind farm context involve an action or application by concerned residents or towns aimed at halting a company's pursuit and receipt of an REA in its tracks. It is the company that then defends against these proceedings by arguing that they are premature, i.e. by arguing that the company is entitled to the benefit of the full legislatively-prescribed administrative review process before a court steps in. Many courts rightfully have respected the company's rights in this regard.

[87] Here, we have Suncor, in the midst of its REA process, also attacking the by-laws as illegitimate, and we have the Town defending against the application on the basis of prematurity—a different dynamic.

[88] Accordingly, the Town's prematurity argument in this case is not persuasive. As a result, the court will not dismiss the application for prematurity.

Issues and Merits of the Application

[89] The primary issues on this application are as follows:

1. Is By-Law 50 of 2012 invalid for vagueness and uncertainty?

2. Is By-Law 50 of 2012 without effect pursuant to s. 14 of the *Municipal Act*?

3. Should By-Law 50 of 2012 be quashed for illegality pursuant to s. 273 of the *Municipal Act*?

4. Are the portions of By-Law 6 of 2012 that relate to wind turbines *ultra vires* the Town?

5. Is the development charge for wind turbines set out in By-Law 75 of 2012 *ultra vires* the Town?

6. Are any and all by-laws passed by the Town under the authority of Part V of the *Planning Act* to have no legal application to a renewable energy undertaking, including Cedar Point, as a result of s. 62.0.2 of the *Planning Act*?

7. Can By-Law 50 of 2012 interfere with the issuance of a building permit to Suncor for Cedar Point?

[90] These issues are addressed in turn below after setting out the appropriate legislative framework.

***Law Under the* Municipal Act**

[91] Generally, the Town's powers are to "be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues".[8]

[92] The Town is empowered to pass by-laws concerning its economic, social, and environmental well-being and the health, safety, and well-being of persons.[9]

[93] Under s. 128(1) of the *Municipal Act*, the Town may prohibit and regulate matters that in the good faith opinion of council are or could become or cause public nuisances. Under s. 129 of the *Municipal Act*, the Town is entitled to prohibit or regulate noise and vibration.

[94] However, s. 14 of the *Municipal Act* states:

> ***Conflict between by-law and statutes, etc.***
>
> 14. (1) A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.
>
> ***Same***
>
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

[95] Section 273 of the *Municipal Act* states:

> ***Application to quash by-law***

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[8] Section 8(1) of the *Municipal Act*.
[9] Section 11(2) of the *Municipal Act*.

273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

Definition
(2) In this section,

"by-law" includes an order or resolution.

Law under the Planning Act

[96] Section 62.0.2 of the *Planning Act* reads in relevant part as follows:

Renewable energy undertakings

Policy statements and provincial plans
62.0.2 (1) Despite any Act or regulation, the following do not apply to a renewable energy undertaking, except in relation to a decision under section 28 or Part VI:

1. A policy statement issued under subsection 3 (1).

2. A provincial plan, subject to subsection (2).

Exception
(2) Subsection (1) does not apply in respect of,

(a) the Niagara Escarpment Plan;

(b) another provincial plan, if the provincial plan is prescribed for the purposes of this subsection; or

(c) a provision of another provincial plan, if the provision is prescribed for the purposes of this subsection.

Official plans
(3) For greater certainty, an official plan does not affect a renewable energy undertaking.

Same
(4) Section 24 does not apply to,

(a) the undertaking of a public work that is a renewable energy undertaking or is intended to facilitate or support a renewable energy undertaking;

(b) the passing of a by-law with respect to a public work described in clause (a); or

(c) the passing of a by-law that is intended to facilitate or support a renewable energy undertaking.

Demolition control area
(5) A by-law passed under section 33 does not apply to a renewable energy undertaking.

By-laws and orders under Part V
(6) **A by-law or order passed or made under Part V does not apply to a renewable energy undertaking.**

Transition, existing agreements

> (7) **An agreement that is entered into under Part V before the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force applies to a renewable energy project, and to any related renewable energy testing facility and renewable energy testing project, until the day a renewable energy approval is issued under section 47.5 of the *Environmental Protection Act* in relation to the renewable energy project.** [Emphasis added.]
>
> ***Development permit system***
> (8) A regulation or by-law made or passed under section 70.2 does not apply to a renewable energy undertaking. …

Issue #1: Is By-Law 50 of 2012 invalid for vagueness and uncertainty?

[97] Suncor's main submission in this regard is that By-Law 50 of 2012 is identical in form and substance to the Town of Wainfleet's by-law, briefly noted above, that has previously been found by Reid J. in *Wainfleet Wind Energy Inc. v. Wainfleet (Township)*, 2013 ONSC 2194 to be invalid and without force and effect as a result of vagueness and uncertainty.

[98] In *Wainfleet*, the energy company was in the process of developing a five turbine renewable power facility in Wainfleet, Ontario. It had submitted an REA application.

[99] The town had passed a by-law that applied to all property in the town and set out prohibitions related to wind turbines of a certain size. The by-law prescribed:

> (a) a minimum setback distance of 2 km from any property measured from the tip of the rotor blade in horizontal position, which applied to the construction, erection, or operation of any wind turbine inside the town;
>
> (b) a wind turbine noise emission prohibition of 32 dB at the nearest property; and
>
> (c) a mandatory indemnification of 100% for any loss of property value or adverse health effect directly or indirectly caused by a wind turbine.

[100] The by-law defined "property" to mean "property line, vacant land, dwelling or structure and their inhabitants of all species used for private or business or public purposes."

[101] The parties in *Wainfleet* acknowledged that the by-law, if valid and enforceable, would block the energy project as was then constituted.

[102] The energy company sought a declaration that the by-law enacted by the town relating to wind turbine development should either be quashed or did not apply to its project. The town defended its by-law and argued that if the by-law was unenforceable or *ultra vires*, certain provisions of O. Reg. 359/09 made under the *EPA* and certain provisions of the *Planning Act* were contrary to s. 7 of the *Charter* and as a result were invalid.

[103] At para. 6, Reid J. referenced s. 54 of O. Reg. 359/09 to note that Ontario's regulations provide that industrial wind turbines must be constructed at least 550 m from identified noise receptors. He also referenced the "Noise Guidelines for Wind Farms" for the fact

that applicants for approval must provide detailed information concerning noise to be generated by the project.

[104] As to vagueness and uncertainty, Reid J. stated (citations omitted):

> **31** A by-law is invalid for vagueness and uncertainty if: (a) it is not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis; (b) it fails to sufficiently delineate any area of risk; and, (c) it offers "no grasp" for courts to perform their interpretive function. This standard is exacting, and the onus is on the applicant to establish that the by-law should be declared invalid.
>
> **32** After a full contextual analysis, including a consideration of the by-law's purpose, the court's role is to determine whether the by-law must be declared invalid. For the reasons that follow, I am persuaded that this by-law must be declared invalid on the basis of vagueness and uncertainty.
>
> **33** The purpose and context of this by-law is clear: to provide protection from the effect of noise emitted from [industrial wind turbines].
>
> **34** The purpose of the by-law derives from the Township Council's concern for the health, safety, quality of life and well-being of its citizens and their properties. This is clear from the by-law's preamble and the uncontested evidence of the Mayor. These are legitimate matters for municipal control as listed in subsection 11(2) of the *Municipal Act, 2001*. Related concerns about noise and nuisance are identified in the preamble to the by-law and are also listed in sections 128 and 129 of the *Act*.
>
> **35** The crux of the by-law is the minimum setback distance for all [industrial wind turbines]. This is obvious from the title of the by-law after deleting (by agreement of the parties) the reference to indemnification for loss of property value. In its attempt to prevent negative impact arising from noise, the by-law requires that [industrial wind turbines] are to be located at a minimum distance of two kilometres from any "property," and prescribes the maximum level of sound in decibels at the property.
>
> **36** For the setback distance to have any meaning, the two points from which the setback is measured must be clear. The first point is the proposed site of the [industrial wind turbine] and the second is the nearest property. The site, as a measuring point, is clear; the property is not.
>
> **37** As noted, property is defined in the by-law to mean "property line, vacant land, dwelling or structure and their inhabitants of all species used for private or business or public purposes." The by-law is said to apply to all property within the territory of the Township and, perhaps redundantly, to all property owned by the Township.

> **38** Based on this definition, property could be a property line. Property lines are known, and described in municipal surveys. However, the balance of the definition is not at all clear. How is vacant land defined? Who is an inhabitant? Can the inhabitants live on the vacant land, or only in a dwelling or structure? If the inhabitants are "all species", does that include animals, birds, insects and plants? Can inhabitants be regular but transitory, such as migratory birds? What is the object of the phrase: "used for private or business or public purposes"? Could it be the land or dwellings or structures, the inhabitants, or both?
>
> **39** One interpretation of the definition is that it relates to all vacant (as it says) or occupied (by implication) land in the Township. If one accepts the Township's position that the by-law was not contrived to prevent [industrial wind turbine] development anywhere within the township, that interpretation is not available. Otherwise, the by-law would be clearly invalid based on conflict, as discussed below.
>
> **40** The uncertainties arising from the definition of property are beyond those that could provide a basis for legal debate and reasoned analysis. The definition is unintelligible. No developer could reasonably measure its risk in building an [industrial wind turbine] on any particular site. There is simply no logical and reasoned way that a court can grasp the definition sufficiently to perform its required interpretive function.

[105] Having found that the by-law was of no force and effect, Reid J. found that it was unnecessary to determine whether the by-law was specifically applicable to the energy project at issue.[10] Further, given his determination, Reid J. similarly held that it was unnecessary to determine whether the provincial enactments under the *EPA* and other provincial green energy legislation deprived the town's residents of various protections afforded under the *Charter*.[11]

[106] Like Reid. J. at para. 31 in *Wainfleet*, this court quotes with approval the discussion of the proper approach when gauging vagueness and uncertainty articulated by Howden J. in *Neighbourhoods of Windfields Limited Partnership v. Death*, [2007] O.J. No. 5081 (S.C.), at paras. 26-27:

> **26** From the above review of the recent authorities, several important aspects of a proper approach to an attack on at enactment based on vagueness are clarified.
>
> (i) Whether the case involves a civil, administrative, or municipal enactment, or raises a constitutional issue, the test is the same.

---

[10] See para. 56.
[11] See para. 57.

> *Nova Scotia Pharmaceutical*, para. 70; *Consortium Developments (Clearwater) Limited v. Sarnia* [1995] O.J. No. 1649 (Div. Ct.).
>
> (ii) The enactment is impermissibly vague only if it is not intelligible and so fails to provide an adequate basis for legal debate and reasoned analysis; if it fails to sufficiently delineate any area of risk; and if it offers "no grasp" for courts to perform their interpretive function. It is an exacting standard. (*Nova Scotia Pharmaceutical*, para. 63).
>
> (iii) The policy basis or rationale behind the test is two-fold, in that there be fair notice to citizens, and that discrimination in enforcement is to be limited. (*Nova Scotia Pharmaceutical*, para. 39); *Reference re ss. 193 and 195.1 of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123)
>
> (iv) Laws today are often, of necessity, framed in general terms to allow for flexible application and to not obscure the legislative purpose. Courts must be wary of using the vagueness doctrine to prevent or impede action in furtherance of the valid social objectives of the particular legislature or council. A delicate balance is required between societal interests and individual rights. (*Nova Scotia Pharmaceutical*, para. 68).
>
> (v) In determining whether a law is too vague, the court must,
>
> > (a) consider the need for flexibility and carry out its interpretive role;
> > (b) recognize that standard of absolute certainty in legislation is impossible; and
> > (c) consider that many varying judicial interpretations of a given disposition may be possible and may coexist (*Nova Scotia Pharmaceutical*, para. 28).
>
> **27** Following this approach, it is necessary for the court to carry out its full interpretive role first, as a necessary precondition to consideration of the vagueness test. It is necessary because the interpretive analysis tests the proposition contextually (*Canadian Pacific Limited*, *supra* at para. 47). In doing so, the modern approach to statutory interpretation is followed, and a proper contextual analysis of the legislation in question helps to determine the capability of the enactment in question to guide legal debate. …

[107] As to municipal by-laws in particular, as determined long ago by the Court of Appeal in *Hamilton Independent Variety and Confectionary Stores Inc. v. Hamilton (City)*, [1983] O.J. No. 3, at paras. 20-26, a by-law must express its meaning with certainty and must clearly identify the duties and obligations it imposes. The words must be precise enough

for individuals or enforcing agencies to give the words a reasonable interpretation—otherwise, the by-law will be invalid for vagueness and uncertainty.

[108] I note that By-Law 50 of 2012 is indeed, as Suncor submits, identical in form and substance to the by-law declared to be void in *Wainfleet*.

[109] I adopt the analysis of Reid J. quoted above on the vagueness and uncertainty question.

[110] That said, in my view, By-Law 50 of 2012 is invalid and without force and effect as a result of vagueness and uncertainty. For the setback distance in By-Law 50 of 2012 to have meaning, the two points from which the setback is measured must be clear. Just like in *Wainfleet*, where the identical definition was at issue, here there is no method to determine the meaning of the term "property" as it is defined in By-Law 50 of 2012. The definition is therefore unintelligible. There is no way for a developer to reasonably measure its risk in proposing to build a wind turbine at a particular site. The by-law creates uncertainties that are beyond legal debate and legal analysis, and accordingly, the court cannot perform its required interpretive function.

Issue #2: Is By-Law 50 of 2012 without effect pursuant to s. 14 of the* Municipal Act*?

[111] In light of any conclusion above, there may be no need to address this issue. However, I do so in the event that I am wrong on Issue #1.

[112] In the court's view, Issue #2 is comprised of two sub-issues with s. 14 of the *Municipal Act* in mind:

a. Does By-Law 50 of 2012 conflict with provincial legislation or an approval issued under provincial legislation?

b. Does By-Law 50 of 2012 frustrate the purpose of a provincial Act, regulation, or instrument?

[113] If either question is answered in the affirmative, By-Law 50 of 2012 is invalid.[12]

<u>Does By-Law 50 of 2012 conflict with provincial legislation or an approval issued under provincial legislation?</u>

[114] This question concerns section 14(1) of the *Municipal Act*.

[115] As the Court of Appeal indicated in *Croplife Canada v. Toronto (City)*, [2005] O.J. No. 1896 (C.A.), the question to ask here is if it is impossible to comply simultaneously with By-Law 50 of 2012 and with a provincial Act, regulation, instrument, or approval.

---

[12] See e.g. *Croplife Canada v. Toronto (City)*, [2005] O.J. No. 1896 (C.A.), at paras. 60-63, citing *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188.

[116] Suncor submits that if an REA is issued for Cedar Point, and if the REA is granted in accordance with its application as was submitted, it will be impossible for Suncor to construct Cedar Point while complying with the prescriptions as found in By-Law 50 of 2012 and with the REA.

[117] Suncor submits that it prepared its REA application for Cedar Point in accordance with the requirements as set out in O. Reg. 359/09. Its REA application specifies 55 proposed wind turbine sites, with final locations to be determined, but all of them comply with the 550 m setbacks and 40 dBA sound level limit at non-participating receptors as prescribed in O. Reg. 359/09. None of its proposed 55 sites would be able to comply with the 2 km setbacks and 32 db sound level limit as contained in By-Law 50 of 2012.

[118] Recall, however, that the Director can accept or reject an application for wind turbine construction relying on a variety of criteria, and can change the 550 m minimum setback.

[119] While at this time this issue appears to only pose a potential conflict, Reid J. in fact addressed this issue in *Wainfleet*, which again concerned a by-law identical in form and substance to that of By-Law 50 of 2012. As stated by Reid J. at para. 45:

> **45** Until the Director approves an application, there is only a *potential* for conflict. However, there would be a direct conflict once there is an approved project containing an [industrial wind turbine] location that appears to contravene the municipal by-law. In that case, the provincial standard would apply based on subsection 14(1) of the *Municipal Act, 2001* and the by-law would be of no effect.

[120] As a result, the court agrees with Suncor's submission that any by-law that purports to prohibit the construction and operation of wind turbines at locations approved in an REA will be in direct conflict with the REA regime, and accordingly the *GEGEA*, and therefore be of no force and effect by way of s. 14(1) of the *Municipal Act*.

Does By-Law 50 of 2012 frustrate the purpose of a provincial Act, regulation, or instrument?

[121] This question concerns s. 14(2) of the *Municipal Act*.

[122] In Suncor's view, the effect of By-Law 50 of 2012 is to prevent entirely the construction of Class 4 wind turbines, such as Cedar Point, anywhere in the Town.

[123] In Suncor's view, a municipal by-law that prohibits the construction of wind turbines anywhere within the Town frustrates the purpose of the *GEGEA*, the REA process as found in O. Reg. 359/09 made pursuant to the *EPA*, as well as the FIT program as follows:

1. By-Law 50 of 2012 blocks the growth of renewable energy projects, a goal which is clearly indicated in the preamble as found in Schedule A to the *GEGEA*, and an act that is clearly contrary to the legislature's intention as demonstrated when it went to great lengths to pass the *GEGEA* and other green energy legislation in 2009.

2. The REA process was designed to approve locations for wind turbines that met the prescribed specifications found in O. Reg. 359/09; but By-Law 50 of 2012 that prohibits construction of wind turbines at such approved locations is clearly contrary to the legislature's intention when it established the REA regime.

3. The FIT program is defined in s. 25.35 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, as amended by the *GEGEA*, as "a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located." It is designed to encourage and promote greater use of renewable energy sources. Receipt of an REA *ipso facto* incorporates the fulfilment of the FIT terms. Accordingly, By-Law 50 of 2012 frustrates the object and purpose of the FIT program in that it inhibits a FIT contract holder from carrying out the requirements under such a contract, thereby preventing the facilitation of increased development and operation of renewable energy generating facilities.

[124] Given these concerns, Suncor submits that By-Law 50 of 2012 is without effect pursuant to s. 14(2) of the *Municipal Act*.

[125] The court, however, hesitates to go this far, nor does it deem it necessary to do so.

[126] As to the *GEGEA* in particular, the court is mindful of and endorses Reid J.'s determination in *Wainfleet* at paras. 49-50 (citations omitted), which gauged the identical by-law to that of By-Law 50 of 2012 as regards its effect under s. 14(2):

> **49** Wainfleet Wind Energy submitted that the by-law should be declared of no force and effect pursuant to subsection 14(2) of the *Municipal Act, 2001* because it frustrates the purpose of the [*Green Energy Act* or *GEA*—a schedule to the *GEGEA*] and that therefore a conflict exists. I am not prepared to go that far. *The Municipal Act, 2001* clearly contains provisions to allow control of nuisance and noise as well as health and safety matters, as I have already noted. The *Planning Act* was specifically amended to prevent any zoning by-law from applying to renewable energy undertakings but no similar amendment was made to the *Municipal Act, 2001*. I am not satisfied that the fact that both the *EPA* (as amended by the *GEA*) and the by-law relate to [industrial wind turbines] and apply different standards means that the latter frustrates the purpose of the former, despite the fact that the preamble of the *GEA* refers to, among other purposes, the removal of barriers to renewable energy projects.
>
> **50** I would have had no difficulty in finding that the by-law frustrated the purpose of the *GEA* if there had been evidence to establish that the effect of

> the by-law was actually to prevent entirely the construction of [industrial wind turbines] anywhere in the Township.

[127] Just like in *Wainfleet*, there is no requisite evidence here so as to suggest that the effect of the by-law was actually to prevent entirely the construction of Cedar Point anywhere in the Town.

[128] The court acknowledges that it is Suncor's view that the by-law is meant to do just that, and it should also be noted that this court is not prepared to wade into any bad faith analyses here as it was not raised by the parties on this point. More information is needed before the court is willing to take that step and opine on By-Law 50 of 2012 under s. 14(2) and that simply is not before the court here. I am mindful of the several resolutions passed by the Town calling for a moratorium. This does not in and of itself support a finding of bad faith.

[129] As the court is not prepared to declare that By-Law 50 of 2012 frustrates the *GEGEA*, it naturally follows that it cannot declare that it frustrates the REA regime and the FIT regime, as both latter regimes are grounded in the contemporary *GEGEA*.

[130] I am not prepared at this point to find that By-Law 50 of 2012 frustrates a provincial act or regulation so as to declare it invalid pursuant to s. 14(2) of the *Municipal Act*.

Issue #3: Should By-Law 50 of 2012 be quashed for illegality pursuant to s. 273 of the* Municipal Act*?

[131] As indicated above, s. 273 of the *Municipal Act* allows a court on application to quash a by-law of a municipality in whole or in part for illegality, i.e. that its enactment is *ultra vires* the municipality's authority.

[132] As stated recently by the Court of Appeal in *Detlor v. Brantford (City)*, 2013 ONCA 560, at para. 28:

> **28** … s. 273(1) gives the Superior Court discretion to quash a municipal by-law for illegality … "Illegality" in s. 273 can include a failure to comply with statutory procedural requirements, such as the open meeting requirement in s. 239, and bad faith: see *London (City) v. RSJ Holding Inc.*, [2007] 2 S.C.R. 588, at para. 40; *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.) at 331.

[133] As indicated above, municipalities are creatures of statute and can only act within the powers conferred on them by the provincial legislature.

[134] As stated by the Court of Appeal in *Grosvenor v. East Luther Grand Valley (Township)* (2007), 84 O.R. (3d) 346, at para. 42:

> [M]unicipal by-laws properly enacted are not to be lightly quashed; they are not open to review even if they are unreasonable. It is a pre-condition to that immunization from review, however, that the by-law be "passed in good

> faith". This, in turn, reinforces the essential character of a valid and legal by-law: it must be enacted in good faith.

[135] "A by-law which is ostensibly within the authority of a council to enact may be set aside or declared invalid if its real purpose and attempt is to accomplish by indirect means an object which is beyond its authority": *Barrick Gold Corp. v. Ontario (Minister of Municipal Affairs and Housing)*, [2000] O.J. No. 4426 (C.A.), at para. 59.

[136] A by-law can be deemed to have been passed in "bad faith" if "[c]ouncil acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government": e.g. *Drake v. Stratford (City)*, 2010 ONSC 2544, at para. 41 (varied at 2011 ONCA 98 but not on this definition), citing with approval *H.G. Winton Ltd. and Borough of North York* (1978), 20 O.R. (2d) 737 (Div. Ct.), at p. 744. However, as stated in *London Property Management Assn. v. London (City)*, 2011 ONSC 4710, at para. 100, for example: "[T]he case law shows that the standard to establish bad faith on the part of a municipal council is high. There is a presumption of good faith that must be overcome by the party alleging bad faith."

[137] As discussed above, it is trite law that the question of *vires* is subject to a correctness standard of review: see e.g. *RSJ Holdings Inc.*; *Nanaimo*.

[138] This court again draws attention to Reid J.'s comments on the *ultra vires* question in *Wainfleet* when he was gauging the legality of an identical by-law:

> **51** As I have noted, the *Municipal Act, 2001* gives power to a municipality to regulate, amongst other things, matters of nuisance, noise, health and safety. Despite that legislative mandate, Wainfleet Wind Energy submits that as regards renewable energy projects, the province has fully occupied the field through the *GEA* and the *EPA*, thereby precluding municipal legislation on the subject. As such, the applicant argues that the by-law is *ultra vires* the Township's authority.
>
> **52** I have already commented on the lack of legislated prohibition concerning renewable energy projects in the *Municipal Act, 2001* as compared with those in the *Planning Act*.
>
> **53** The applicant submits that the by-law is in effect a zoning by-law masquerading as one focused on health, safety, noise and nuisance. As such, the *Planning Act* prohibition should apply.
>
> **54** Although setback distances and control over the construction of structures is often a zoning matter, there is no reason why parallel jurisdiction cannot exist between the *Planning Act* and the *Municipal Act, 2001* when different considerations are engaged.
>
> **55** I agree with the position of the Township that the municipality has a continuing role to play in renewable energy projects as appears from s. 5 of the

> *GEA* and Regulation 15/10. Those provisions indicate that most municipal by-laws no longer apply to the extent that they would prevent or restrict a designated project with certain exceptions relating to health, safety, heritage and the environment. However, wind energy is not one of the designated renewable energy projects and as a result there is no legislated prohibition to the continued application of municipal by-laws. If the province wishes to add wind energy to the list of designated renewable energy projects, it obviously has the power to do so.

[139] Here, Suncor submits that the setback provisions, the noise provisions, and the indemnification provisions as found in By-Law 50 of 2012 are all *ultra vires* the Town's authority.

The Setback Provisions

[140] Suncor's argument in this regard concerns s. 62.0.2(6) of the *Planning Act*: "A by-law or order passed or made under Part V [of the *Planning Act*] does not apply to a renewable energy undertaking." In this sense, the amendments to the *Planning Act* on account of the *GEGEA*, discussed above, stripped the municipal right to enact by-laws that control the use of land for renewable energy projects, which Cedar Point undoubtedly is.

[141] Part V of the *Planning Act* is broad; it generally allows municipalities to enact and amend zoning by-laws, thereby restricting the use of land. However, Suncor submits that a municipality cannot, by adopting a descriptive disguise by way of a recital to a by-law, transform a by-law that is in substance a zoning by-law under the *Planning Act* into a regulatory by-law under the *Municipal Act*. It relies on *Death*, noted above, at para. 73, for this proposition, which reads:

> In chapter 4 *Zoning and Land Use*, the Rogers text continues its explanation of the zoning authority and distinguishes it from the municipal authority to pass licensing by-laws (at para. 4.2):
>
> > Zoning is a form of planning by a municipality but is actually a means of carrying out a plan rather than an element or factor in the plan itself. Broadly stated, zoning power enables local governments to control the use of land and the erection and use of buildings and other structures.
> >
> > Zoning is the deprivation for the public good of certain uses by owners of property to which the property might otherwise be put. Underlying planning statutes is the principle that the interest of land owners in securing the maximum value of their property must be controlled by the community. [Emphasis added.]
>
> And at para. 4.2.2:
>
> > Some by-laws which purported to have been passed under the statutory provisions authorizing licensing and regulation of

> businesses and which regulate location or some aspect of land use have been held to be in essence zoning by-laws and invalid since the procedure for enacting such by-laws have not been complied with. A municipality cannot, by adopting a descriptive disguise by way of a recital to a by-law, transform it into a regulatory by-law under the *Municipal Act*, when in substance it is a zoning enactment pursuant to the *Planning Act*.
>
> The Rogers text gives the following examples of by-laws passed under the licensing authority or similar authority which were ruled to have been in effect zoning by-laws: a by-law prohibiting the location of a gas station in a specified area, a by-law restricting the operation of self-service stations at certain locations; a by-law prohibiting a public garage within a certain radius of single dwellings; and a by-law restricting the operation of an adult entertainment parlour to certain defined areas.

[142] In Suncor's view, the 2 km setback distance as prescribed by By-Law 50 of 2012 is an illegitimate means to restrict the use of land within the Town for wind power projects, as applying that setback distance from dwellings and property lines makes it impossible to site any Class 4 wind turbines anywhere in the Town.

The Noise Provisions

[143] As discussed above, O. Reg. 359/09 and the "Noise Guidelines for Wind Farms" incorporated therein comprehensively deal with noise standard as regards wind turbines. As part of its REA application, which has been deemed complete and has been posted for public comment, Suncor had to file an acoustic assessment report and setback report to confirm compliance with this regime.

[144] Suncor submits that By-Law 50 of 2012 provides a new noise standard that is outside the scope and content of O. Reg. 359/09. The maximum noise limit of 32 dB imposed by By-Law 50 of 2012 is incompatible with the maximum 40 dBA as prescribed by O. Reg. 359/09 and makes it impossible to site any Class 4 wind project, like Cedar Point, anywhere in the Town.

The Indemnification Provisions

[145] Suncor argues that the Town lacks authority to impose an indemnification clause in By-Law 50 of 2012, as nothing in the *Municipal Act* provides for this power.

[146] In *Wainfleet*, which dealt with an identical by-law to that of By-Law 50 of 2012, Reid J. noted at para. 58 that the parties had agreed that the indemnification provisions of the by-law were an invalid exercise of municipal power.

[147] Suncor asserts this same logic to submit that the identical indemnification provisions found in By-Law 50 of 2012 are therefore outside the Town's power.

The court's conclusion on s. 273

[148] As to the setbacks imposed in By-Law 50 of 2012, I am not prepared to go so far as to say that the Town is outside its powers by implementing them. As indicated above, these setbacks may be without effect under different legal analyses, but I am not of the view that strictly under s. 273, a quash is required. The Town does not derive its jurisdiction from the *GEGEA*. Under the *Municipal Act*, the Town clearly has power to regulate *inter alia* matters of nuisance, noise, health, and safety. Further, this court agrees with Reid J. in *Wainfleet* that there is a "lack of legislated prohibition concerning renewable energy projects in the *Municipal Act, 2001* as compared with those in the *Planning Act* … Although setback distances and control over the construction of structures is often a zoning matter, there is no reason why parallel jurisdiction cannot exist between the *Planning Act* and the *Municipal Act, 2001* when different considerations are engaged".[13] Accordingly, this court is therefore not of the view that the *Planning Act* prohibition should apply here as Suncor suggests.

[149] As to the noise limitations in By-Law 50 of 2012, while they clearly conflict with those as prescribed under the *GEGEA* by way of O. Reg. 359/09 and are as such without effect in this regard, I am of the view that the *Municipal Act*, in the very least, permits the Town to regulate matters of nuisance, noise, health, and safety in this regard. As such, I am not prepared to find that By-Law 50 of 2012 is *ultra vires* the Town in this regard. Also, I am not of the view that the noise provisions of By-Law 50 of 2012 were passed in bad faith as Suncor submits. This is a high threshold to meet, and while fairness and transparency could perhaps have been managed better, there is not enough before me to make the determination that the Town acted in bad faith. In any event, arbitrariness does not on its face amount to bad faith. It can reasonably be said that while Suncor sees an ulterior motive, underlying all of the Town's actions throughout this ordeal has been some sense that it—rightfully or wrongfully—is concerned about the effects of wind turbines on its residents and that it is evidently listening to such concerns of residents.

[150] Lastly, I agree with Suncor that nothing in the *Municipal Act* justifies the Town's imposition of the indemnification provisions in By-Law 50 of 2012; this is *ultra vires*.

[151] Ultimately, therefore, with the exception of the indemnification provisions, which are accordingly without effect, I do not consider the enactment of By-Law 50 of 2012 to be otherwise outside the Town's municipal authority.

Issue #4: Are the portions of By-Law 6 of 2012 that relate to wind turbines* ultra vires *the Town?

[152] Section 273 of the *Municipal Act* allows this court to gauge the *vires* of the by-law provided that the application is commenced within a year of the by-law's passing. As far as the court is aware, By-Law 6 of 2012 was passed on January 23, 2012 and this application was commenced by way of notice on January 2, 2013.

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[13] At paras. 52 and 54.

[153] By-Law 6 of 2012 imposes three types of fees on wind turbines in the Town: (1) a general fee of $10,000 per turbine; (2) a variable fee of $100/m of total height; and (3) a security deposit/letter of credit of $200,000 per turbine. These amounted to increases or new features across the board.

[154] Suncor challenges these aspects of the by-law for illegality.

[155] As stated by the Court of Appeal in *Detlor*, noted above, at para. 28, "illegality" in s. 273 of the *Municipal Act* can include a failure to comply with statutory procedural requirements.

[156] Municipalities certainly have power to pass by-laws on classes of building permits and applicable fees.[14]

[157] The *Building Code Act* ("*BCA*") defines "building" as structures designated in the building code.[15] O. Reg. 332/12 made pursuant to the *BCA*, deems "a structure that supports a wind turbine generator having a rated output of more than 3 kW" to be a structure for the purpose of the *BCA*.[16]

[158] The *BCA* also outlines several procedural requirements when fees are at issue. For example:

- Section 7(2): "The total amount of the fees authorized under clause (1) (c) must not exceed the anticipated reasonable costs of the principal authority to administer and enforce this Act in its area of jurisdiction."

- Section 7(4): "Every 12 months, each principal authority shall prepare a report that contains such information as may be prescribed about any fees authorized under clause (1) (c) and costs of the principal authority to administer and enforce this Act in its area of jurisdiction."

- Section 7(5): "The principal authority shall make its report available to the public in the manner required by regulation."

- Section 7(6): "If a principal authority proposes to change any fee imposed under clause (1) (c), the principal authority shall, (a) give notice of the proposed changes in fees to such persons as may be prescribed; and (b) hold a public meeting concerning the proposed changes."

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[14] See e.g. *Building Code Act, 1992*, S.O. 1992, c. 23 ("*BCA*"), s. 7.
[15] Section 1(1)(d) of the *BCA*.
[16] Section 1.3.1.1(1)(g) of the *BCA*.

- Section 7(7): "The notice of proposed changes in fees must contain the prescribed information, including information about the public meeting, and must be given in the prescribed manner."

- Section 7(8): "The public meeting concerning proposed changes in fees must be held within the period specified by regulation before the regulation, by-law or resolution to implement the proposed changes is made."

[159] Further, O. Reg. 332/12 states the following:

1.9.1. Fees

1.9.1.1. Annual Report

(1) The report referred to in subsection 7 (4) of the Act shall contain the following information in respect of fees authorized under clause 7 (1) (c) of the Act:

(a) total fees collected in the 12-month period ending no earlier than three months before the release of the report,

(b) the direct and indirect costs of delivering services related to the administration and enforcement of the Act in the area of jurisdiction of the *principal authority* in the 12-month period referred to in Clause (a),

(c) a breakdown of the costs described in Clause (b) into at least the following categories:

(i) direct costs of administration and enforcement of the Act, including the review of applications for permits and inspection of *buildings*, and

(ii) indirect costs of administration and enforcement of the Act, including support and overhead costs, and

(d) if a reserve fund has been established for any purpose relating to the administration or enforcement of the Act, the amount of the fund at the end of the 12-month period referred to in Clause (a).

(2) The *principal authority* shall give notice of the preparation of a report under subsection 7 (4) of the Act to every person and organization that has requested that the *principal authority* provide

1.9.1.2. Change of Fees

(1) Before passing a by-law or resolution or making a regulation under clause 7 (1) (c) of the Act to introduce or change a fee imposed for applications for a permit, for the issuance of a permit or for a maintenance inspection, a *principal authority* shall,

(a) hold the public meeting required under subsection 7 (6) of the Act,

(b) ensure that a minimum of 21 days' notice of the public meeting is given in accordance with Clause (c), including giving 21 days notice to every person and organization that has, within five years before the day of the public meeting, requested that the *principal authority* provide the person or organization with such notice and has provided an address for the notice,

(c) ensure that the notice under Clause (b),

(i) sets out the intention of the *principal authority* to pass the by-law or resolution or make a regulation under section 7 of the Act and whether

> the by-law, resolution or regulation would impose any fee that was not in effect on the day the notice is given or would change any fee that was in force on the day the notice is given,
>
> (ii) is sent by regular mail to the last address provided by the person or organization that requested the notice in accordance with Clause (b), and
>
> (iii) sets out the information described in Clause (d) or states that the information will be made available at no cost to any member of the public upon request, and
>
> (d) make the following information available to the public:
>
> (i) an estimate of the costs of administering and enforcing the Act by the *principal authority*,
>
> (ii) the amount of the fee or of the change to the existing fee, and
>
> (iii) the rationale for imposing or changing the fee.

[160] Paragraphs 117-118 of Suncor's factum read as follows:

> 117. On October 15, 2012, in response to a freedom of information request, Suncor obtained records pertaining to the development and approval of the Town's building permit fees.
>
> 118. These records included annual reports on building permit fees from 2008 to 2011, as well as a staff report dated January 19, 2012 that recommends an increased fee of $10,000 per wind turbine and a $100,000 security deposit per turbine. None of the annual reports make reference to wind turbines. Therefore, the reports do not provide a [rationale] for any change to the $100 Turbine Fee that had been set in 2007. Additionally, the January 19, 2012 staff report provides no details as to the justification for the $10,000 fee and makes no mention of the $100 per metre of turbine height additional fee. As a result, the Town has not met the conditions precedent to change the Turbine Fee in its reports; and there is no justification pursuant to the BCA for either (a) a $10,000 fee for each wind turbine; or (b) a variable fee of $100 per metre of turbine height for each turbine.

[161] Suncor also notes that there is no authority under the *BCA* for municipalities to require a security deposit as was introduced by By-Law 6 of 2012.

[162] I agree with Suncor's arguments on By-Law 6 of 2012. Accordingly, the portions of By-Law 6 of 2012 that relate to wind turbines, specifically the turbine fee of $10,000 + $100/m of total height (including blade height), and the requirement for a $200,000 security deposit, will be quashed as illegal pursuant to s. 273 of the *Municipal Act*.

Issue #5: Is the development charge for wind turbines set out in By-Law 75 of 2012* ultra vires *the Town?

[163] Municipalities have power to pass development charges pursuant to s. 2 of the *Development Charges Act, 1997*, S.O. 1997, c. 27 ("*DCA*"):

Development charges
2. (1) The council of a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies.

What development can be charged for
(2) A development charge may be imposed only for development that requires,

(a) the passing of a zoning by-law or of an amendment to a zoning by-law under section 34 of the *Planning Act*;

(b) the approval of a minor variance under section 45 of the *Planning Act*;

(c) a conveyance of land to which a by-law passed under subsection 50 (7) of the *Planning Act* applies;

(d) the approval of a plan of subdivision under section 51 of the *Planning Act*;

(e) a consent under section 53 of the *Planning Act*;

(f) the approval of a description under section 50 of the *Condominium Act*; or

(g) the issuing of a permit under the *Building Code Act, 1992* in relation to a building or structure.

Same
(3) An action mentioned in clauses (2) (a) to (g) does not satisfy the requirements of subsection (2) if the only effect of the action is to,

(a) permit the enlargement of an existing dwelling unit; or

(b) permit the creation of up to two additional dwelling units as prescribed, subject to the prescribed restrictions, in prescribed classes of existing residential buildings.

Ineligible services
(4) A development charge by-law may not impose development charges to pay for increased capital costs required because of increased needs for any of the following:

1. The provision of cultural or entertainment facilities, including museums, theatres and art galleries but not including public libraries.

2. The provision of tourism facilities, including convention centres.

3. The acquisition of land for parks.

4. The provision of a hospital as defined in the *Public Hospitals Act*.

5. The provision of waste management services.

6. The provision of headquarters for the general administration of municipalities and local boards.

7. Other services prescribed in the regulations.

Local services

> (5) A development charge by-law may not impose development charges with respect to local services described in clauses 59 (2) (a) and (b).
>
> ***Services can be outside the municipality***
> (6) A development charge by-law may impose development charges with respect to services that are provided outside the municipality.
>
> ***Application of by-law***
> (7) A development charge by-law may apply to the entire municipality or only part of it.
>
> ***Multiple by-laws allowed***
> (8) More than one development charge by-law may apply to the same area.

[164] This regime is supplemented by the specifications as found in O. Reg. 82/98.

[165] The *DCA* sets out guidance for municipalities for calculating and approving development charges, for example:

- Under s. 5(1), 1-10, the methods that must be used in developing a development charge by-law and determining the development charges that may be imposed are statutorily prescribed. These include an estimation the anticipated amount, type, and location of development for which development charges can be imposed; consideration of the costs over the past decade of supplying a number of municipal services; consideration of the costs of meeting future municipal needs for such services; and the appropriate distribution of servicing costs to development based on different uses of municipal services by different classes of development.

- Under s. 10(1), "Before passing a development charge by-law, the council shall complete a development charge background study."

- Under s. 10(2), "The development charge background study shall include, (a) the estimates under paragraph 1 of subsection 5 (1) of the anticipated amount, type and location of development; (b) the calculations under paragraphs 2 to 8 of subsection 5 (1) for each service to which the development charge by-law would relate; (c) an examination, for each service to which the development charge by-law would relate, of the long term capital and operating costs for capital infrastructure required for the service; and (d) such other information as may be prescribed."

[166] I am particularly mindful of and concur with the remarks of Swinton J. in *Orangeville District Home Builders Assn. v. Orangeville (Town)*, 2011 ONSC 1639 (Div. Ct.), which involved a leave to appeal request to appeal a decision of the Ontario Municipal Board when it had allowed an appeal by the Orangeville District Home Builders Association from a development charge and reduced the development charges that Orangeville could impose. At paras. 14-17 in *Orangeville*, the court stated:

> **14** The Board concluded that the gross population methodology was inconsistent with s. 2(1) [of the *DCA*]. It took note that development charges

> can only be used to fund "increased capital costs" required because of "increased needs" for services arising from development. According to the Board, that requires a consideration of both existing services in the municipality and a determination of the increased needs caused by development, having taken into account existing services. In its words (at p. 10 of the Reasons):
>
> > In our view, the subsection ensures and demands that the development charges would be for the increase in costs arising from the increased needs of the service and not for the entitlement or privilege of using the service.
>
> **15** The Board concluded that the gross population methodology is not permissible under s. 2(1) because it focuses only on the need for services and not the increase in needs, and therefore, the increase in capital costs caused by the development. As it stated at p. 9 of its Reasons, "It is possible to have 'increased needs' without increased costs if there is ample available capacity to accommodate the forecasted growth". Its view was bolstered by its consideration of s. 5(1)2, which requires the municipality to determine the "increase" in the need for services attributable to development, rather than speaking of the overall service requirements of the new development.
>
> **16** The Town argues that the Board read words out of ss. 2(1) and 5(1)2, having failed to focus on "arising from the development" and "attributable to the anticipated development". Instead of considering the causal connection between the development and the need for services, the Board is said to have read in "incremental" need or "net" need.
>
> **17** In my view, the Board neither read in words, nor read out words in s. 2(1). When s. 2(1) is read as a whole and in light of the Act's purpose, as the Board did in accordance with modern principles of statutory interpretation, it is evident that development charges can only be imposed for increased capital costs arising from or caused by the increased need for services caused by development. The Board recognized that the Act is not concerned with the services that the development needs in isolation. A development charge may only be imposed if the new development results in an increase in the need for services in the broader context of the services already offered in the municipality. That was a reasonable interpretation. Indeed, in my view, its correctness is not open to serious debate.

[167] Accordingly, I agree with Suncor's submission that determining whether a development will lead to increased capital costs requires a determination of existing services in the municipality and a determination of the increased needs cause by development, having taken into account existing services.

[168] Blanket development charges cannot be charged for the mere entitlement or privilege of using a certain service.

[169] Recall that the Town's By-Law 75 of 2012 mandates in its Schedules a development charge of $8,891 per wind turbine. The by-law distinguishes between "residential uses" and "non-residential uses", the latter of which specifically excludes wind turbines.[17] The by-law defines "wind turbine" as "any wind energy conversion system with a name plate capacity greater than 300 kilowatts, that converts wind energy into electricity for sale to an electrical utility or other intermediary".[18] Wind turbines effectively do not fall under either "uses" noted in the by-law.

[170] While it is indicated in its preamble that By-Law 75 of 2012 relies on a 2011 development charges study, I agree with Suncor in that the by-law does not, however, identify the anticipated amount, type, and location of wind turbine development that was studied. It also does not include any methods on calculating past wind turbine servicing costs, any methods on calculating future wind turbine servicing costs, or any methods for allocating costs to wind turbines. At best, the by-law at para. 2(4) states "[t]he development charge with respect to a wind turbine in the municipality shall be calculated in accordance with the rates set out in Schedule 'B'." Unfortunately, Schedule B fails to shed light on how the Town arrived at the $8,891 per wind turbine development charge.

[171] As far as I am aware, there continues to be an absence of a development charges study from the Town that calculates the increased capital costs that may arise from or be caused by an increased need for services arising from wind turbine development.

[172] Considering the above, therefore, in my view, the Town has failed to meet the preconditions as prescribed by statute necessary to pass a valid development charges by-law. Further, the Town has failed to provide a legal justification for the amount being charged for wind turbines under By-Law 75 of 2012—there is no causal link between the charge imposed and the increased capital cost to the Town from wind turbines.

[173] Accordingly, this court is of the view that the wind turbine development charge as found in By-Law 75 of 2012 should be struck as illegal for failure to meet these preconditions.

Issue #6: Are any and all by-laws passed by the Town under the authority of Part V of the* Planning Act *to have no legal application to a renewable energy undertaking, including Cedar Point, as a result of s. 62.0.2 of the* Planning Act*?

[174] As explained above, the *GEGEA* amended the *Planning Act* so as to remove the application of zoning by-laws, related by-laws, and orders made by a municipality under Part V of the *Planning Act* to "renewable energy projects", as defined.

[175] It is undisputed that Cedar Point is a "renewable energy project" that falls within this regime.

[176] However, the Town amended its 2003 and 2007 zoning by-laws in 2012 by way of By-Law 15 of 2012. Its "Explanatory Note" openly indicates that:

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[17] See para. 1(19) of By-Law 75 of 2012.
[18] See para. 1(28) of By-Law 75 of 2012.

> The purpose of this By-law is to amend the zoning provisions pertaining to large wind energy conversion systems within the general provisions section of the Zoning By-law. The current zoning setbacks are 600m from urban areas (clusters of 4 or more lots zoned non-agricultural), 400m from dwellings on separate lots and 400m from the front 50m of separate, vacant parcels (in order to preserve a building envelope). The amendment changes these setbacks to 2000m. As per section 3.31.3 b), the required setback from Residential zones, Institutional zones and uses, Open Space 2 and 3 zones and Mobile Home Park/Campground zones would increase from 400m to 2000m …
>
> **The Town acknowledges that amendments to the Planning Act are such that any person proposing to erect a renewable energy facility does not have to comply with the Town's Zoning By-laws.** [Emphasis added.]

[177] By its terms, By-Law 15 of 2012 amends the then-existing zoning by-law to impose a 2000 m setback from (1) wind turbines with a rotor diameter greater than 12 m or a hub height greater than 45 m; (2) wind turbines with a rotor diameter greater than or equal to 12 m; or (3) "any wind turbine". The points for measuring the 2000 m setbacks vary and, frankly, are confusing.

[178] Suncor submits that by way of s. 62.0.2 of the *Planning Act*, the Town's By-Law 15 of 2012 is without effect as against wind facilities such as Cedar Point. I agree.

[179] By-Law 15 of 2012, and any prior by-law incorporated therein to the extent that they are still applicable, has no legal application to a renewable energy undertaking, including Cedar Point, pursuant to s. 62.0.2 of the *Planning Act*.

Issue #7: Can By-Law 50 of 2012 interfere with the issuance of a building permit to Suncor for Cedar Point?

[180] This issue also concerns the *BCA*, discussed above. Under s. 8(2)(a): "The chief building official shall issue a permit referred to in subsection (1) unless, (a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law".

[181] Under O. Reg. 332/12, aka the "Building Code", made pursuant to the *BCA*, the "applicable law" is as follows:

> (1) For the purposes of clause 8 (2) (a) of the Act, *applicable law* means,
>
> (a) the statutory requirements in the following provisions with respect to the following matters:
>
> (i) section 114 of the *City of Toronto Act, 2006* with respect to the approval by the City of Toronto or the Ontario Municipal Board of plans and drawings,
>
> (ii) section 59 of the *Clean Water Act, 2006* with respect to the issuance of a notice by the risk management official for the *construction* of a *building*,

(iii) section 5 of Regulation 262 of the Revised Regulations of Ontario, 1990 (General), made under the *Day Nurseries Act*, with respect to the approval of plans for a new *building* to be erected or an existing *building* to be used, altered or renovated for use as a day nursery or for alterations or renovations to be made to premises used by a day nursery,

(iv) section 194 of the *Education Act* with respect to the approval of the Minister for the *demolition* of a *building*,

(v) section 6 of Regulation 314 of the Revised Regulations of Ontario, 1990 (General), made under the *Elderly Persons Centres Act*, with respect to the approval of the Minister for the *construction* of a *building* project,

(vi) section 5 of the *Environmental Assessment Act* with respect to the approval of the Minister or the Environmental Review Tribunal to proceed with an undertaking,

(vii) section 46 of the *Environmental Protection Act* with respect to the approval of the Minister to use land or land covered by water that has been used for the disposal of waste,

(viii) section 47.3 of the *Environmental Protection Act* with respect to the issuance of a renewable energy approval,

(ix) section 168.3.1 of the *Environmental Protection Act* with respect to the *construction* of a *building* to be used in connection with a change of use of a property,

(x) paragraph 2 of subsection 168.6 (1) of the *Environmental Protection Act* if a certificate of property use has been issued in respect of the property under subsection 168.6 (1) of that Act,

(xi) section 14 of the *Milk Act* with respect to the permit from the Director for the *construction* or alteration of any *building* intended for use as a plant,

(xii) section 11.1 of Ontario Regulation 267/03 (General), made under the *Nutrient Management Act, 2002*, with respect to a proposed *building* or structure to house farm animals or store nutrients if that Regulation requires the preparation and approval of a nutrient management strategy before *construction* of the proposed *building* or structure,

(xiii) subsection 30 (2) of the *Ontario Heritage Act* with respect to a consent of the council of a *municipality* to the alteration or *demolition* of a *building* where the council of the *municipality* has given a notice of intent to designate the *building* under subsection 29 (3) of that Act,

(xiv) section 33 of the *Ontario Heritage Act* with respect to the consent of the council of a *municipality* for the alteration of property,

(xv) section 34 of the *Ontario Heritage Act* with respect to the consent of the council of a *municipality* for the *demolition* of a *building*,

(xvi) section 34.5 of the *Ontario Heritage Act* with respect to the consent of the Minister to the alteration or *demolition* of a designated *building*,

(xvii) subsection 34.7 (2) of the *Ontario Heritage Act* with respect to a consent of the Minister to the alteration or *demolition* of a *building* where the Minister has given a notice of intent to designate the *building* under section 34.6 of that Act,

(xviii) section 42 of the *Ontario Heritage Act* with respect to the permit given by the council of a *municipality* for the erection, alteration or *demolition* of a *building*,

(xix) section 14 of the *Ontario Planning and Development Act*, *1994* with respect to any conflict between a development plan made under that Act and a zoning by-law that affects the proposed *building* or structure,

(xx) section 41 of the *Planning Act* with respect to the approval by the council of the *municipality* or the Ontario Municipal Board of plans and drawings,

(xxi) section 42 of the *Planning Act* with respect to the payment of money or making arrangements satisfactory to the council of a *municipality* for the payment of money, where the payment is required under subsection 42 (6) of that Act,

(xxii) section 2 of Ontario Regulation 453/96 (Work Permit — Construction), made under the *Public Lands Act*, with respect to the work permit authorizing the *construction* or placement of a *building* on public land,

(xxiii) section 34 or 38 of the *Public Transportation and Highway Improvement Act* with respect to the permit from the Minister for the placement, erection or alteration of any *building* or other structure or the use of land,

(b) the following provisions of Acts and regulations:

(i) subsection 102 (3) of the *City of Toronto Act, 2006*,

(ii) sections 28 and 53 of the *Development Charges Act*, *1997*,

(iii) sections 257.83 and 257.93 of the *Education Act*,

(iv) subsection 5 (4) of the *Environmental Assessment Act*,

(v) subsection 133 (4) of the *Municipal Act*, *2001*,

(vi) subsection 24 (3) of the *Niagara Escarpment Planning and Development Act*,

(vii) subsection 27 (3) of the *Ontario Heritage Act*,

(viii) section 33 of the *Planning Act* except where, in the case of the *demolition* of a residential property, a permit to *demolish* the property is obtained under that section,

(ix) section 46 of the *Planning Act*,

(c) regulations made by a conservation authority under clause 28 (1) (c) of the *Conservation Authorities Act* with respect to permission of the authority for the *construction* of a *building* or structure if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development,

(d) by-laws made under section 108 of the *City of Toronto Act, 2006*, but only with respect to the issuance of a permit for the *construction* of a green roof if the *construction* of the roof is prohibited unless a permit is obtained,

(e) by-laws made under section 40.1 of the *Ontario Heritage Act*,

(f) by-laws made under section 34 or 38 of the *Planning Act*,

(g) subject to clause (h), by-laws made under Ontario Regulation 608/06 (Development Permits) made under the *Planning Act*,

(h) by-laws referred to in clause (g) in relation to the development of land, but only with respect to the issuance of a development permit if the development of land is prohibited unless a development permit is obtained,

(i) by-laws made under Ontario Regulation 246/01 (Development Permits) made under the *Planning Act* which continue in force despite the revocation of that Regulation by reason of section 17 of Ontario Regulation 608/06 (Development Permits) made under that Act,

(j) orders made by the Minister under section 47 of the *Planning Act* or subsection 17 (1) of the *Ontario Planning and Development Act, 1994*, and

(k) by-laws made under any private Act that prohibit the proposed *construction* or *demolition* of the *building* unless the by-law is complied with.

(2) For the purposes of clause 10 (2) (a) of the Act, *applicable law* means any general or special Act, and all regulations and by-laws enacted under them that prohibit the proposed use of the *building* unless the Act, regulation or by-law is complied with.

[182] As Suncor rightfully points out, this section provides for very specific and limited situations in which a municipality can interfere with the issuance of a building permit. In Suncor's view, By-Law 50 of 2012 is not an instance of one of these limited situations and as such does not fall under "applicable law".

[183] Further, Suncor notes that under s. 35(1) of the *BCA*: "This Act and the building code supersede all municipal by-laws respecting the construction or demolition of buildings."

[184] Considering the above, I agree with Suncor that By-Law 50 of 2012 cannot be used or relied on by the Town to interfere with the issuance of a building permit for Cedar Point.

DISPOSITION

[185] For reasons referred to above, I make the following orders:

(i) By-Law 50 of 2012 is:

(a) Invalid for vagueness and uncertainty in part and without force and effect as it relates to minimum setbacks, noise level limits, and mandatory indemnification;

(b) Of no force and effect, pursuant to s. 14(1) of the *Municipal Act*, to the extent that it purports to prohibit the construction and operation of wind turbines at locations approved in an REA, and thereby directly conflict with the REA regime and the *GEGEA*;

(c) *Ultra vires* pursuant to s. 273 of the *Municipal Act*, but only to the extent that it purports to impose mandatory indemnification provisions; and

(d) Of no force and effect to the extent that it interferes with the issuance of a building permit to Suncor for the building of Cedar Point.

(ii) The portions of By-Law 6 of 2012 that relate to turbine fees and security deposits are quashed as illegal pursuant to s. 273 of the *Municipal Act*.

(iii) The portions of By-Law 75 of 2012 that impose development charges for wind turbines are quashed as illegal pursuant to the *DCA*.

(iv) By-Law 15 of 2012, and any prior by-law incorporated therein to the extent that they are still applicable, has no legal application to a renewable energy undertaking, including Cedar Point, pursuant to s. 62.0.2 of the *Planning Act*.

[186] I do not mean to diminish or minimize the concerns of the residents of the Town. Whether in petitions, rallies, or taking the time to observe the court proceedings in this application, they are sincere in their concerns for their health and well-being and their land values. As stated earlier, if the REA is approved for Cedar Point, they may challenge that decision by way of an appeal to the Environmental Review Tribunal.

[187] This is but one step in a many step process. It was painstakingly obvious that counsel for the Town sincerely wished to revive a dialogue with Suncor regarding possible amendments to the by-laws at issue. I would strongly urge both parties to resume this dialogue forthwith and use this judgment as a guideline for the discussion. The impersonal hand of the court is no substitute for the helping hand of a neighbour. Simply put, it is in the interests of the parties to sit down and work together as good neighbours do.

COSTS

[188] If the parties cannot agree, Suncor has 15 days from the date of this ruling to serve and file submissions on costs, not to exceed two typewritten pages in addition to any Offers to Settle and Bills of Costs. The Town has 15 days thereafter to file a response in the same fashion. If no submissions are received within the stipulated timeframe, there shall be no order for costs.

"*Justice M. A. Garson*"
Justice M.A. Garson

Released: May 23, 2014

CITATION: Suncor Energy Products v. Town of Plympton-Wyoming, 2014 ONSC 2934
COURT FILE NO.: 6964/13
DATE: 2014/05/23

ONTARIO

SUPERIOR COURT OF JUSTICE

Suncor Energy Products Inc.

Applicant

– and –

Corporation of the Town of Plympton-Wyoming

Respondent

REASONS FOR JUDGMENT

Garson J.

Released: May 23, 2014

Exhibit B
Tab 4
Schedule 1
Appendix D

April 19, 2013 draft Wind Turbine Agreement

TOWN OF PLYMPTON-WYOMING WIND TURBINE AGREEMENT

This agreement made in triplicate this ___ day of _____, 20___

BETWEEN: **"WIND PROPONENT"**

HEREINAFTER CALLED THE "DEVELOPER" OF THE FIRST PART

-and-

THE CORPORATION OF THE TOWN OF PLYMPTON-WYOMING

HEREINAFTER CALLED THE "MUNICIPALITY" OF THE SECOND PART

WHEREAS the Municipality is the owner of or otherwise exercises jurisdiction over certain public rights-of-way, highways, streets, sidewalks, walkways, driveways, ditches, municipal drains and associated grassy areas and the allowances more particularly identified in Schedule "A" (collectively referred to as the "Road Allowances");

AND WHEREAS the Developer is the owner of an Electricity-generating wind farm, known as _____, consisting of _____ turbines in Plympton-Wyoming and _____turbines in _____, with a total nominal capacity of __MW, which are individually and collectively referred to in this Agreement as "Development";

AND WHEREAS the Municipality and the Developer of _____ have entered into an agreement dealing with the developments, including the use of municipal roads.

AND WHEREAS by virtue of the Green Energy Act, 2009, the Development is not subject to the Official Plan, Zoning By-laws and site plan controls of the Municipality;

AND WHEREAS the parties acknowledge that the Development has a significant impact on the Municipality, and that notwithstanding the provisions of the Green Energy Act, 2009, the Municipality has continuing jurisdiction pursuant to Provincial legislation, including the Municipal Act, 2001, Electricity Act, 1998, Fire Protection and Prevention Act, Emergency Management and Civil Protection Act, the Building Code Act, 1992, the Drainage Act, 1990 and the Environmental Protection Act to deal with the matters contained in this Agreement; as may be amended from time to time;

AND WHEREAS the Developer wishes to construct or install poles, lines, underground conduits and other related structures, equipment and facilities, as described in Schedule "B" (the "Works") for the transmission of electricity on, over, under, along and through the Road Allowances, Municipal Drains and private lands;

AND WHEREAS pursuant to the Electricity Act, 1998, the Development proposed by the Developer is defined as "distribution system", because it generates and conveys electricity;

AND WHEREAS for the purpose of consistency with the Electricity Act, 1998, this Agreement uses the term "Electrical Distribution System", the term is used in a technical sense, and both parties acknowledge that in reality the Development is a transmission system, as commonly understood, in that no electricity is being distributed from the Development to properties within the Municipality, and that no rights are being granted by this Agreement to the Developer in connection with the distribution of electricity to retail users in the Municipality;

AND WHEREAS the Developer has entered into lease agreements with owners of private lands on which the wind generating towers and other equipment are to be constructed ("Leases"), granting access to such private lands for the purposes of the Development, and requiring the owners of such private lands to co-operate with the Developer in obtaining various approvals in connection with the Development;

NOW THEREFORE, in consideration of the mutual agreements contained herein, the Municipality and the Developer agree as follows:

CONSTRUCTION PART

Drawings, Meetings and Construction Work

1. Prior to any substantive on-site works, the Developer shall provide the Municipality with a Construction Environmental Management Plan (CEMP), which shall include a Traffic Management Plan, Hazardous and Non-Hazardous Waste Management Plan, Health and Safety Plan, Emergency Response and Communication Plan, Training Plan, and Complaint Response Protocol. The components of the CEMP shall be developed in consultation with the Municipality.

2. Prior to commencing construction, the Developer shall provide a complete set of engineering drawings to the Municipality, together with proof of all legally required approvals and permits for the Works, identified in Schedule *"B"*.

3. Engineering drawings shall meet the following criteria: All existing utilities shall be shown with appropriate details. The proposed distribution lines shall be shown in their assigned corridor with any deviation clearly marked. Municipal drains shall be shown along with specific details for crossing of watercourses and open or closed drains. Restoration details shall be provided where interference occurs with any drainage culvert.

4. The Developer acknowledges that existing municipal works and services (including Municipal and County of Lambton Roads, drainage culverts, etc.) may not meet the requirements of the Developer for the installation of the works and services proposed to be carried out by the Developer, and the Developer agrees that the improvement or upgrading of the existing municipal works and services to meet the Developer's requirements shall be carried out by and be at the sole expense of the Developer. The Developer shall obtain the approval of the Municipality or The Corporation of the County of Lambton, as the case may be, to the improvement or upgrading of the existing municipal works and services.

5. All driveway entrance culverts are to have a minimum thickness as determined by the roads authority. The Developer acknowledges that it has not used engineering designs to obtain the proposed diameter for its driveway culverts. In the event that the Town Director of Public Works and Engineering experiences difficulties with the capacity of any of these culverts, he may at his sole discretion, acting reasonably, order them to be replaced with properly sized culverts at the expense of the Developer.

6. All underground crossings of watercourses, ditches and municipal drains shall provide a minimum of 1m of clearance below the invert of ditches, drains and watercourses.

7. The Developer shall provide dust control and clean up all construction refuse and debris in order to prevent any dust or refuse problem to traffic or home occupants. The Municipality shall have the right to remedy any concern in this regard utilizing the securities established in this Agreement.

8. At least two weeks prior to the commencement of work, the Developer shall provide to the Municipality pre-development condition reports for all Municipal roads that will be affected by the construction, including haul routes and detour routes.

9. Construction work, including the delivery of components and aggregates, shall be carried out between the hours of 7:00 AM and 7:00 PM, Monday to Saturday only and excluding official holidays.

10. Prior to the start of construction, the Developer and its engineer shall attend a pre-construction meeting with the Municipality, the Municipality's Engineer , the County Public Works Department and other agencies involved in construction approvals to establish any additional requirements and/ or considerations related to the construction of the Development.

Haul Routes

11. The Developer shall cause its servants, agents and contractors to use only the haul routes within the Municipality that are approved in this Agreement. This shall include, but not be limited to hauling turbine components, aggregate, fill, soil, brush, and cement. The approved Municipal haul routes are identified in Schedule "A" or as additionally permitted by the Municipality.

    The approval of the Municipality shall not be unreasonably withheld, delayed or conditioned, but no hauling shall be permitted prior to written approval by the Municipality.

12. The Developer shall notify the appropriate road authorities a minimum of 48 hours prior to the movement of any over-sized or non-conventional loads and obtain any required permits.

13. During construction, traffic control shall be provided in accordance with all Provincial, County and Municipal requirements, and in particular Ontario Traffic Manual-Book 7. In the event that roads have to be temporarily closed, the following provisions shall apply. The Developer shall provide 5 days' notice to the Municipality. The Municipality shall implement its road closure procedure. The Developer shall minimize disruption of access to private properties and shall allow local access to driveways at all times.

14. The dumping of excess fill, soil or brush off-site and/or within the Municipality shall be subject to the approval of the Town of Plympton-Wyoming. The Developer shall require persons hauling excess fill, soil

or brush for dumping to adhere to the haul routes.

15. The private access roads shall be constructed, installed and maintained in a manner and in the locations set out in Schedule "B".

16. Except during construction, repair and decommissioning periods, entrances to the private access roads shall be normal and symmetrical in accordance with the Municipality's standards.

Tree Preservation

17. Access roads, transmission lines and other facilities shall be aligned or sited to maximize tree retention. Unless site specific circumstances otherwise warrant, such roads, lines and facilities shall be located outside the drip lines of all trees. Where the Developer proposes to locate access roads, transmission lines or other facilities within the drip lines of trees on municipal property or to remove trees on municipal property, the Developer shall provide the Municipality with documentation as to the factors supporting such proposal and the written approval of the Municipality shall be required for the proposed location.

18. An inventory shall be kept of all trees that are damaged or removed on municipal property. On the conclusion of the construction period, the Developer shall submit for the approval of the Municipality a tree replacement plan. The Developer shall replace each tree having a diameter of more than 50mm and a height of more than 2.25m in a 1: 2 ratio, in a location as close as possible to the original tree location, thereby maintaining the general configuration of the original grouping of trees. Replacement trees shall be of the same kind, be a minimum of 50 mm diameter and 2.25 to 4m high. Replacement trees shall be maintained by the Developer for two years, and shall replace the trees that do not survive within the duration of the two year maintenance period.

Electrical Distribution System

19. The Electrical Distribution System shall be provided as set out in Schedule "B". The Electrical Distribution System located on municipal road allowances may be referred to as "Distribution Infrastructure".

20. On all Road Allowances where overhead power lines currently exist, the Developer shall be permitted to install overhead lines, providing they are co-located on the same poles as current power lines. Where overhead power lines do not currently exist, they shall be installed underground.

21. On all Road Allowances which are unopened or not maintained year-round, and where there are no existing above-ground power lines, the installation of power lines shall be underground. All underground lines shall be in a corridor 1.0m in width, with the center line 1m from the property line. In the event that the Developer wishes to locate the power line outside of this corridor, it shall provide the proposed location and reasons to the Township for review and approval. The Municipality shall provide a prompt written decision. Aboveground markers shall be placed at intervals not exceeding 500m, and caution tape shall be placed in the trench above the cables. The aboveground markers shall be clearly visible from both directions along the Road Allowance and shall be placed in a manner that shall be visible to snowmobilers.

22. Further provisions regarding the Electrical Distribution System on municipal roads are set out in the Road Use Part of this Agreement.

Grading

23. All private access roads and construction sites shall be suitably graded and drained. It is the responsibility of the Developer to properly grade all private access roads and construction sites. There shall be no flooding of adjacent properties, rerouting drainage flows onto adjacent properties, regrading of slopes on adjacent properties, or the creation of any nuisance as a result of grading activities or damage to tiling or other subsurface drainage. The Developer shall repair or reroute any tile or closed drain that is damaged or removed as a result of the Development. In the event that the Township receives *bonafide* complaints of nuisance, the Town's Engineer, acting reasonably, will have sole discretion regarding the remedy. In the sole discretion of the Town's Engineer the matter may be treated as an emergency pursuant to the provisions of this Agreement.

24. The Developer shall specifically advise the Municipal Drainage Superintendent of the nature of each drain or watercourse or open or closed drain crossing before its commencement, invite same to any associated on-site meeting, and give same opportunity to advise of any Municipal requirements. The Developer shall obtain all Municipal and other permissions required under the Drainage Act or otherwise required by the Municipality with respect to any alteration or crossing of an open or closed Municipal drain. This shall include access roads and collector line, temporary and permanent, surface and underground crossings.

25. The Developer shall be responsible for all costs associated with Municipal Drains with respect to any works or site inspections related to this development.

26. All requirements of this agreement related to construction of the Development shall apply with appropriate

modifications to any repowering, reconstruction, or decommissioning of the Development, including but not limited to pre-construction road surveys, haul routes, commitment to restore roads and infrastructure, and commitment to restore land to prior agricultural use. The Developer shall satisfy the Municipality as to the quality and origin of any off-site fill used in decommissioning and the transport of fill, rubble, and components to and from the Development shall adhere to permitted haul routes.

Lights & Aircraft Safety

27. The Developer shall not erect, locate, relocate, or otherwise place any sign, light or light standard on any part of the Development unless the sign, light or light standard has been approved in this Agreement. Site illumination shall be of an intensity or shielded or directed so as to not illuminate adjacent properties, while maintaining the safety and security of the infrastructure and personnel. The requirements of this section do not apply to any navigational lighting or marking requirements that may be imposed by Transport Canada, NAV Canada, or similar federal or provincial agencies, however, such lights and their operation shall, to the extent allowed under the above noted requirements, be directed skyward and/or shielded so that no light is visible from the ground. Where any flashing lights are required on multiple wind turbines, all of the Development turbine lights shall be synchronized to flash in coordination with one another.

28. For any private aircraft runways (aerodromes) existing in the Municipality and established prior to January 1, 2012, whether identified by Transport Canada or not, the Developer shall not construct any wind turbine in a location that would protrude into the "obstacle limitation surfaces" known as the "take off/approach surface" and the "transitional surface" as defined in publication TP 312 *Aerodrome Standards and Recommended Practices (Revised 03/2005)*, or any successor. As a minimum, such private aircraft runways shall be treated as a "code number 1", "non-instrument" runway. The Developer shall complete and submit an Aeronautical Obstruction Clearance form to Transport Canada, and provide such higher standards with respect to "obstacle limitation surfaces" as may be required by Transport Canada or any other agency for any aerodrome.

Construction Completion

29. Upon the completion of construction, the Developer shall provide to the Municipality the following:

    (a) "As constructed" plans of the Works and services;

    (b) Certificate of the Developer that all Works have been completed in accordance with all required standards and approvals as certified by a Professional Engineer.

ROAD USE PART

30. Pursuant to the provisions of the Electricity Act, 1998, the Municipality grants and transfers to the Developer for a period of twenty (20) years from the date hereof (the "Term"), the right, privilege, interest, benefit and use to enter upon the Road Allowances with such persons, vehicles, equipment and machinery necessary to place, replace, construct, reconstruct, maintain, inspect, remove, operate and repair the Distribution Infrastructure over, along, across, or under such Road Allowances (hereinafter collectively the "Rights") in the locations as specified in Schedule "A". The work shall be done in accordance with the specifications set out in Schedule "B".

31. If the Developer is not in default under this Agreement, the Developer shall have the option to extend the Term of this Agreement for two further ten (10) year periods. The extension shall be upon the same terms and conditions of this Agreement except that there shall be no further right of extension. the Developer shall give prior written notice to the Municipality of its intent to not to renew this Agreement at least six (6) months prior to the end of the then existing Term, otherwise the Term shall be extended for the applicable ten year period, if the Developer is not then in default under this Agreement.

32. The Developer hereby acknowledges that the Rights shall not be exclusive and further acknowledges that the Municipality may have granted or may otherwise grant similar rights and privileges to another person, party, persons, or parties, at any time during the term of this Agreement. The Developer further acknowledges that nothing in this Agreement shall prohibit or restrict the Municipality from entering upon any of the Road Allowances and conducting work thereon for its own municipal purposes, in respect of which the Municipality shall not be required to provide notice to or seek approval from the Developer provided that such work does not adversely affect the Developer's Rights, the Works or the Distribution Infrastructure.

33. The Developer agrees that, in placing, replacing, constructing, reconstructing, maintaining, inspecting, removing, operating, and/or repairing the Distribution Infrastructure or in otherwise undertaking any other work under and/or in conjunction with the Rights, it shall use all due care and diligence to ensure no unnecessary or avoidable interference with the travelled portion of any of the Road Allowances or any pedestrian, vehicular, or other traffic thereon, or any use or operation thereof or any ditch or drain adjacent thereto. The Developer further agrees that all Works undertaken by the Developer shall be at the

Developer's sole cost and expense, including any re-instatement, remediation or restoration of the Road Allowances required to be completed by the Developer pursuant to this Agreement.

34. The Developer agrees that Schedule "B", as may be amended from time to time, details the Works and agrees to undertake any and all such Works to which the Municipality has consented, acting reasonably, in accordance with such plans and specifications. Notwithstanding the generality of the foregoing, the Developer agrees that it shall comply with any and all directions and orders given by the Municipality in respect of the Works, regardless of whether such direction and orders are given before, during, or after the commencement or completion of such Works, provided that the Municipality acts reasonably in respect of such directions and orders.

35. The Developer further agrees that, within one hundred and eighty (180) days of completion of any Works, it shall deposit with the Municipality as constructed plans detailing the location and specifications of any Distribution Infrastructure installed over, along, across or under the Road Allowances and Municipal Drains.

36. Notwithstanding and without limiting any other term hereof, the Developer agrees and undertakes that it will place, replace, construct, reconstruct, maintain, inspect, remove, operate, and repair the Distribution Infrastructure located on any of the Road Allowances in accordance with and in compliance with good engineering practices and, additionally, all federal, provincial, County and municipal laws and by-laws and in substantial compliance with the reasonable directions as issued by the Municipality.

37. Notwithstanding and without limiting the generality of any term hereof, the Developer further agrees that, where practicable, any of the Distribution Infrastructure placed, replaced, constructed, reconstructed, maintained, removed, or otherwise installed pursuant to the Rights will not be located on, over or under the existing or contemplated travelled portion of any of the Road Allowances except where a road crossing is necessary, but shall be located adjacent to such existing or contemplated travelled portion of such Road Allowances, and as far away from the travelled portion as reasonably practicable. In this same regard, the Developer further acknowledges that it shall consult with the Municipality as to the permitted location of any Distribution Infrastructure, which location shall be subject to the Municipality's reasonable approval, and which approval shall be final and binding on the Developer, except as may be otherwise provided by the Ontario Energy Board or the applicable legislation and regulations.

38. Except for emergency situations as provided in section 45, the Developer agrees that any access to the Road Allowances and any Works to be undertaken pursuant to the Rights and for which a permit would otherwise be required shall be undertaken and completed at such reasonable time or times as the Municipality may specify in such permit and, without limiting the generality of the foregoing or any other term hereof, all such Work shall be undertaken and completed in such manner as contemplated pursuant to this Agreement so as not to cause unnecessary nuisance or damage to the Municipality or any user of that portion of the Road Allowance where such Works are to be conducted.

39. The Developer further agrees that, prior to commencement of any Works pursuant to the Rights, it shall obtain the approval of any federal, provincial, county or municipal government or agency having an interest in such Works and, furthermore, it shall notify any other person or body operating any equipment, installations, utilities or other facilities, within the Road Allowances or in the vicinity of the Road Allowances where such Works are to be conducted, of the details of the anticipated Works so as to minimize the potential interference with or damage to such existing equipment, installations, utilities, and other facilities by the Works and so as to maintain the integrity and security thereof.

40. The Developer further agrees that, in the event that it carries out work, it will in all cases repair, reinstate, restore, or remediate the road, including its base surface, drainage works, culverts and associated appurtenances to at least the same condition which existed prior to the commencement of such work. In the event that the Developer shall fail to repair, and reinstate as aforesaid, then, the Municipality may undertake the same and charge the reasonable costs thereof to the Developer and the Municipality shall not be liable for any damage of any nature or kind howsoever caused by reason of such work undertaken by the Municipality as aforesaid, and the Developer hereby agrees to indemnify and save harmless the Municipality and all other concerned parties from any such claims or damages, save and except any direct damage arising from the negligence or willful misconduct of the Municipality or those for whom it is at law responsible.

41. Notwithstanding the terms of this Agreement, where the Distribution Infrastructure interferes with the plans of the Municipality, the Municipality, acting reasonably, shall be entitled to request the Developer to relocate that part of the Distribution Infrastructure interfering with such plans, from within any of the Road Allowances to another location within the Road Allowances, within one hundred eighty (180) days of delivery of written request for such relocation or such longer time as the Developer and the Municipality may determine is appropriate which relocation shall be completed by the Developer, at its sole cost and expense. If the request is made by the Municipality within 5 years of the date hereof, the Municipality will pay 100% of the costs and expenses of the relocation.

42. In the event the Developer fails to remove and/or relocate all or any portion of the Distribution Infrastructure within one hundred eighty (180) days of receipt of written demand from the Municipality

pursuant to the previous section of this Agreement, the Municipality shall have the right to remove and/or relocate such Distribution Infrastructure, following completion of which the Municipality shall deliver and invoice to the Developer detailing the reasonable costs and expenses associated with same and the Developer shall pay the amount of such invoice in accordance with the terms thereof. If the Municipality is required to remove and/or relocate any of the Distribution Infrastructure as described above and without limiting the obligation of the Developer to pay the costs and expenses thereof, the Developer further agrees to:

(a) release the Municipality from any claims for damage to such Distribution Infrastructure and/or other damages flowing from such removal and/or relocation;
(b) save harmless and indemnify the Municipality of and from any and all claims or damages by any party as against the Municipality in respect of such work; and/or
(c) restore and reinstate the road, including its surface, drainage works, culverts and associated appurtenances to at least the same condition that existed prior to the original installation.

The Municipality shall comply with all applicable legislation, regulations and codes in carrying out the work.

43. In the event that the Developer wishes to relocate any of the Distribution Infrastructure that have been previously installed, placed, or constructed in accordance with the Rights, it shall notify the Municipality of such request, in writing, and such request will thereafter be considered and administered by the Municipality, acting reasonably and with diligence, giving due consideration to the scope of the Works already undertaken by the Developer on the Road Allowances, provided that, in considering and administering such request, the Municipality shall be entitled to take into consideration any specific municipal or engineering interests affected by such relocation, including any additional facilities located within the Road Allowances.

44. Without limiting the generality of any other term of this Agreement, the Developer

(a) subject to section 44 will not cut, trim, or otherwise interfere with any trees, brush, plants, or other vegetation in performing the Work unless prior written consent has been obtained from the Municipality;

(b) upon request, whether by the Municipality by its officials or authorized agents, or otherwise, and at its sole expense, shall properly and accurately identify the location of any Distribution Infrastructure within the Municipality, in the event the locations have been changed from the specifications set out in Schedule "B", such reports to identify the height or depth of the relevant portion of the Distribution Infrastructure, provided that the Municipality shall not make such request more than two (2) times in any year; and

(c) at the expiry of the Term of this Agreement, including any renewal thereof, or upon the early termination of this Agreement (as provided herein, including pursuant to Section 111), and to the satisfaction of the Municipality, acting reasonably, the Developer, at its own expense, and within one hundred eighty days (180) thereafter, shall remove any and all Distribution Infrastructure as have been constructed, installed, or placed pursuant to the Rights, and thereafter, reinstate, restore, and remediate the Road Allowances or municipal lands so affected to at least the same condition that existed prior to the Work. In the event that the Developer fails to remove any of the Distribution Infrastructure or otherwise reinstate, restore, or remediate the Road Allowance or municipal lands affected thereby, then the Municipality will be at liberty to remove such Distribution Infrastructure and thereafter restore, reinstate, or remediate the road, including its surface, drainage works, culverts and associated appurtenances without claim, recourse, or remedy by the Developer, the reasonable cost of which removal and restoration will be invoiced to the Developer and the Developer agrees to pay such invoice in strict accordance with the terms thereof.

45. Notwithstanding the requirement of prior notice to the Municipality for the right to commence any work hereunder, including notice of repair to any Works or to the Distribution Infrastructure, and notice to cut, trim, or otherwise interfere with any trees, brush, plants, or other vegetation, the Municipality and the Developer agree that, in the event of an emergency in which the Developer requires immediate access to the Distribution Infrastructure, or to cut, trim, or otherwise interfere with any trees, brush, plants, or other vegetation, and after reasonable efforts to communicate with the Municipality, the Developer may enter upon the Road Allowances and/or municipal lands without prior notice to the Municipality in order to gain access to the Distribution Infrastructure in order to effect such repairs or to cut, trim, or otherwise interfere with any trees, brush, plants, or other vegetation, as are required to address such emergency and, in so doing, shall undertake any work to the standards and as are otherwise required by the terms of this Agreement and to thereafter provide written notification and details and specifications of such repair to the Works to the Municipality on the next municipal business day and to thereafter file amended plans and drawings detailing such repairs as is otherwise required by this Agreement. For the purposes of this provision, "emergency" shall mean a sudden unexpected occasion or combination of events necessitating immediate action.

46. Entire or partial abandonment of the Distribution Infrastructure shall be in accordance with good

engineering practice and applicable standards in force at the time of abandonment. Abandonment shall be at the Developer's sole cost.

47. The Developer acknowledges and agrees that the Rights and the placement, construction, installation, location, and operation of any Distribution Infrastructure are subject to the following:

(a) the right of free use of the Road Allowance by all persons or parties otherwise entitled to such use;

(b) the rights of the owners of the property adjoining any relevant Road Allowance to full access to and egress from their property and an adjacent existing right-of-way, highway, street, or walkway and the consequential right of such persons or parties to construct crossings and approaches from their property to any such right-of-way, highway, street, or walkway; and,

(c) the rights and privileges that the Municipality may have previously or subsequently granted to any other person or party to such Road Allowance or lands.

OPERATION AND MAINTENANCE PART

48. This Part shall apply so long as any part of this Agreement is still in force.

49. The Developer shall maintain the Development in good working order and shall carry out such repairs and maintenance as may be reasonably required by the Municipality. Maintenance shall include keeping the towers and equipment painted.

50. All towers and equipment constructed in the Development after the date of this Agreement shall be painted the same unobtrusive colours, as approved by the Municipality. There shall be no advertising, logo, design, or display affixed to or painted on such towers and equipment, except as approved by the Municipality.

51. The Developer shall supply the Municipality with a copy of the operation and maintenance manuals or plans of the Works and shall periodically update the Municipality's copies if there have been any material changes.

52. In the event that the entrances to the private access roads used by the Developer are secured, the Developer shall at all times provide contact information to provide access when necessary.

53. Without limiting the generality of the foregoing the Developer shall maintain the private access roads in a condition meeting the requirements of the Municipality, The Corporation of the County of Lambton and other authorities for emergency access to the Development.

54. Upon the failure of the Developer to maintain the Development in good working order, the Municipality may make an order in writing to the Developer to carry out such maintenance and repairs as may be reasonably required to bring the works and services in good working order. The Municipality's order shall provide the Developer with a reasonable opportunity to carry out the maintenance or repairs. Notice shall be given in accordance with the notice provisions of this Agreement.

55. Upon the failure of the Developer to comply with the Municipality's order, the Municipality may cause the order to be carried out and the default provisions of this Agreement shall apply. In addition, the Municipality shall have rights of entry, as provided for in section 76.

56. The Developer shall comply with all governmental regulatory requirements in maintaining the Development.

57. The Developer shall promptly notify the Municipality in writing of any written order or notice of non-compliance from any regulatory authority received by the Developer in respect of the Development.

58. The Developer shall notify the Municipality in writing forthwith after any component of the Development has been out of commission for a period in excess of 90 days.

59. The Developer shall implement the monitoring programs for the construction and operational phases of the Development in accordance with the requirements of all agencies having jurisdiction. The results of all the Developer monitoring programs, particularly those relating to noise levels at off-site sensitive uses, shall be provided to the Municipality along with any related comments or requirements from all agencies having jurisdiction. These results shall be provided to the Municipality on an annual basis or more frequently as the circumstances warrant. The Developer and the Municipality shall consult with each other every three years to determine if any additional mitigation measures would be appropriate for the Development. The mitigation requirements may be internal or external to the Development. Nothing in this Agreement shall limit the Municipality's authority to implement its own monitoring programs.

60. The Developer shall be solely responsible for the Municipality's share of the per-call cost of providing emergency services provided to the Development, including all specialized services. (Addendum identifying site specific protocol is to be added once further information is provided).

61. At all times the Developer shall provide the Municipality with the names and contact information (including emergency contact) for all persons engaged by the Developer to be responsible for the Development. Furthermore, the Developer shall provide emergency response services and personnel in accordance with the procedures and responsibilities outlined in the emergency response protocol attached as Schedule "D" to the Agreement.

62. Nothing in this Agreement requires the Municipality to provide winter maintenance on the unopened Road Allowances. Nothing in this Agreement requires the Municipality to provide any maintenance on any private access roads.

63. Nothing in this Agreement requires the Municipality to provide tree or brush removal, or maintenance of any kind on Road Allowances that are not opened or not maintained year round.

64. Where power lines are underground, the Developer shall maintain the aboveground markers on Road Allowances that are not opened or not maintained year-round and shall be liable for any claims in regard to them.

DECOMMISIONING PART

65. Upon any component of the Development, including any single turbine, having been out of commission, by which is meant not operating for a period in excess of 180 days, the Municipality may require the Developer to provide proof that the Development shall be restored and operating within a period of 181 days. In the event *of force majeure* the period of 181 days in the preceding sentence shall be 300 days. The reconstruction and re-powering of the Development, so long as it is diligently and continuously pursued, shall not trigger the provisions of this section.

66. The Municipality shall act reasonably to evaluate the proof provided under Section 65, including permits required and obtained by the Developer, availability of financing and securities and such additional materials as the Developer may provide. At the expense of the Developer, the Municipality may retain such experts as may be reasonably required to evaluate the proof provided by the Developer.

67. If the Municipality is not reasonably satisfied with the proof provided by the Developer, the Municipality may order the decommissioning of the Development.

68. The Municipality's decommissioning order shall set out the reasonable terms of the decommissioning and it may include the removal of all of the Development, both above-ground and in-ground, the removal of all materials from the Road Allowances, the restoration of the Road Allowances, the removal of the Development from private lands both above-ground and in-ground, the removal of all materials from such lands and the restoration of such lands to a minimum depth of l.5m and to a condition that allows the previous use of such lands. The Municipality shall make a specific determination (if so decided) of its reasonable desire to have the foundations of wind turbines removed.

69. The Developer shall comply with the decommissioning order in the time frame provided in the order, failing which the Municipality may cause the order to be carried out, and the provisions of sections 91,112 and113 of this Agreement shall apply to the parties and the Road Allowances.

70. In addition to the preceding provisions, upon prior written notification to the Municipality, the Developer may decommission the Development.

71. Nothing in this Agreement obliges the Municipality to decommission the Development.

COMMUNITY DEVELOPMENT CONTRIBUTION PART

72. The parties acknowledge that the Development, has a significant impact on the financial, developmental, social and environmental situation of the Municipality. In light of this, the Developer shall pay the Municipality a Community Development Contribution which is to be negotiated with the proponent at a later date.

73. Upon the execution of this Agreement, the Developer shall pay the Municipality the sum of $1,827,454.91 (2012 Calculations) for allocation as provided in this Part.

74. The formula for the Community Development Contribution will be calculated as follows:

- Nameplate Capacity (MW) x Project Value = Assessment Value
- Assessment Value x Current Year Industrial Tax Rate (Municipal Portion) = Total Contribution per Wind Turbine
- Total Contribution per Wind Turbine x Number of Wind Turbines in Plympton-Wyoming = Community Development Contribution

75. Upon the first anniversary of the commercial generation of electricity by the Developer, the Developer shall pay the Municipality the sum of $1,827,454.91 (2012 Calculations, adjusted in accordance with

Ontario – All Items Consumer Price Index), and thereafter upon each subsequent anniversary the Developer shall pay the Municipality the said sum of $1,827,454.91 (2012 Calculations), adjusted in accordance with the Ontario -All Items Consumer Price Index or its functional equivalent, and compounded annually, so long as this Agreement is in force.

76. The Municipality shall use the moneys paid pursuant to this Part ("Community Development Contribution") for community betterment projects and/or services. The Municipality shall ensure that the economic benefit provided by the Developer's Community Development Contributions is publicly recognized.

GENERAL PROVISIONS

Developer's Leases with Owners of Private Lands

77. For the purposes of this Agreement, pursuant to the provisions in the Leases, the Developer hereby irrevocably grants to the Municipality the same access to the lands covered by the Leases as the Developer has. The Municipality has no right of action for any loss or injury sustained by the Municipality, its servants and agents in exercising access. The Developer shall not be liable for any breaches of the lease by the Municipality.

78. No subsequent agreement between the Developer and the owners of private lands shall be effective to restrict the foregoing right of access of the Municipality.

Insurance

79. The Developer shall insure against legal liability arising, directly or indirectly, out of the design, installation or construction of the Development and the operations of the Developer, with a policy or policies from an insurance company satisfactory to the Treasurer of the Municipality, acting reasonably. Such policy or policies shall be comprised of primary and/or umbrella coverage and shall include the Municipality, its servants and agents and the Municipality's engineers as additional insurance and shall remain in the custody of the Developer and shall be retained in full effect during the life of this Agreement, including any decommissioning period. Annually the Developer shall provide a certificate of insurance, certified by the insurer, to the Municipality.

80. The insurance policies required to be maintained by the Developer shall comply with the following conditions:

(a) The minimum limits shall be $5,000,000 all inclusive for each incident;

(b) The minimum period of insurance policy coverage shall be one year or as otherwise approved;

(c) The policy shall specify that the policy shall not be canceled or allowed to expire unless prior notice by registered letter has been received by the Municipality from the Insurance Company, or its agent, thirty (30) days in advance of the expiry date.

81. The Developer shall be responsible for all adjustment service costs and shall maintain on deposit with the Municipality throughout the term of this Agreement after the first loss claim on the policy the amount of the deductible in excess of $25,000.

82. The insurance policies may contain an exclusion for blasting. If they do, and blasting is found to be necessary, no blasting shall be done until a blasting insurance endorsement is added.

83. The issuance of such policies of insurance shall not be construed as relieving the Developer or any land owners from such responsibility for claims which exceed the policy limits, for which they may be held responsible.

84. Should the Developer fail to maintain the proper insurance coverage for the Term of this Agreement, the Municipality shall have the authority to draw on the Security to pay any and all costs related to maintaining insurance coverage.

85. Upon the request of the Municipality, the Developer shall provide to the satisfaction of the Municipality proof that all premiums on such policy or policies of insurance have been paid and that the insurance is in full force and effect.

Liability

86. The Developer shall indemnify and save harmless the Municipality and its representatives from all actions, causes of action, suits, claims, costs, interest and demands whatsoever which may arise either directly or indirectly by reason of the construction, operation, or decommissioning of the Development or otherwise out of this Agreement, save and except for any loss or injury resulting from the gross negligence or intentional acts of the Municipality, its servants and agents.

87. The Municipality shall have no liability to the Developer for any damage or loss as a result of the disrepair of the Road Allowances or municipal drains, nor for damages caused by falling trees, nor for any action or inaction, except direct intentional damage, or inaction amounting to gross negligence on the part of the

Municipality.

88. The Municipality shall have no liability to the Developer arising from the actions or inactions of other users of the Road Allowances. The Municipality shall have no liability to the Developer for any damage or interruption in service arising from repairs or other work to the Road Allowances, performed in accordance with applicable laws.

Municipal Expenses

89. The Developer shall pay or reimburse (as the case may be) the Municipality for all reasonable charges and expenses incurred by the Municipality in connection with the negotiation, preparation, review, approval, maintenance and enforcement of this Agreement and without restricting the generality of the foregoing shall also be responsible for all engineering, planning, legal, internal administrative and related expenses incurred by the Municipality in relation to this Agreement both before and after its execution.

90. The Developer shall pay to the Municipality the accounts submitted to the Developer for payment or reimbursement within thirty (30) days. In the event that the Developer does not pay the accounts within thirty (30) days, it is hereby understood and agreed that the Developer shall be in default of this Agreement and the Municipality may, without notice, invoke default provisions as set out in this Agreement.

91. All of the Municipality's expenses shall be a charge against the Security.

Security

92. Security shall be in the form of cash or letters of credit. Letters of credit shall be irrevocable letters of credit from Canadian Chartered Banks issued in accordance with terms satisfactory to the Municipality and they shall provide that if in the sole reasonable opinion of the Municipality default under the terms of this Agreement has taken place the letters of credit thereupon be drawn in whole or in part. The Municipality shall also have the right to draw upon such Securities to enforce this Agreement, do any work required or permitted under this agreement, pay any costs incurred directly or indirectly from the Development or this Agreement, or defend itself from claims arising from the entering into of this Agreement and the authorization, maintenance and decommissioning of the Development. The letters of credit shall be in force for a period of one year and shall provide for automatic renewals, unless three months' prior written notice is given to the Municipality.

93. Interest generated by cash deposits, less the Municipality's charges to administer the accounts, shall be added to the Security and be dealt with as provided elsewhere in this Agreement.

94. The Security may be reduced from time to time at the sole reasonable discretion of the Municipality.

95. Forthwith after execution and as a pre-condition of this Agreement coming into force, the Developer shall deposit irrevocable letters of credit in the sum of $350,000 ("Security") with the Municipality to guarantee compliance with the term of this Agreement or to otherwise permit the Municipality to enforce the terms of this Agreement until the termination of this Agreement.

96. The Security shall be released forthwith 60 days after the Municipality’s resolution issuing Acceptance of Construction Completion, with the balance being held as Maintenance and Decommissioning Security.

97. The Maintenance and Decommissioning Security shall be released to the Developer forthwith after the second anniversary of the complete decommissioning of the Development.

98. The parties acknowledge that the estimate of the appropriate amount for the Maintenance and Decommissioning Security is based on the anticipated cost of decommissioning the Works, but that there is inadequate knowledge of all the relevant circumstance affecting actual decommissioning costs. Each party covenants to advise the other party of any material facts or knowledge acquired which may impact positively or negatively upon the proper amount for the Decommissioning Security. The Developer shall provide additional securities as may be required to cover increases in estimated Decommissioning costs. The parties shall negotiate an appropriate revision of the amount based on the anticipated cost of decommissioning the Works, failing which the matter may be arbitrated.

Inflation Adjustment

99. In the fifth year following the signing of this Agreement and every five years thereafter, the amount of the insurance policy referred to in paragraph 79.(a), and any securities held under Sections 94 & 95 shall be readjusted in accordance with the difference between the most recent Ontario All Items Consumer Price Index at the time of execution of this agreement and that in effect at the time of review (or its equivalent). Forthwith, after notification by the Municipality, the Developer shall increase the amount of the insurance policy and/or deposit additional Security with the Municipality, as specified in the notification.

Alterations and Amending Agreements

100. The Municipality may require and may permit minor alterations to the Works and any work done in

conformity with any such alterations, as agreed to by the Municipality, shall be deemed to be in compliance with the Agreement.

101. The parties acknowledge that regardless of their efforts to reasonably foresee the requirements of the parties for the expected lifetime of this Agreement, it is expected that changes in technology, governmental regulations, general area development and other factors may reasonably necessitate amendments to this Agreement, which may increase the burden on the Developer. The parties acknowledge that their intent is to make the Works successful and operational and in full compliance with the prevailing requirements and municipal objectives at all times, and to that end the parties agree to review the impact of this Agreement in 20__ and each five years thereafter where they shall use their best efforts to enter into such amending or supplementary agreements as may be reasonably necessary. The parties will act in good faith and insofar as is reasonable without impairing (more than minimally) the feasibility or economic performance of the Development and to maintain the compatibility of the Development with general development of the area.

102. The parties agree, however, that no amending or supplementary agreement shall impose any additional responsibility or burden on the Municipality.

Termination of Agreement

103. The Developer shall commence the Works required by this Agreement within two years from the date of the signing of this Agreement by all parties. After commencing the Works required by this Agreement, the Developer shall pursue the completion of the Works with due diligence. If the Developer fails to commence the Works or pursue it as provided above in this paragraph, this Agreement may be terminated by the Municipality. In any event if the Works and the buildings are not completed within three years, subject to extension by any events *of force majeure*, this Agreement may be terminated by the Municipality.

104. If this Agreement is terminated, the Municipality is deemed to have withdrawn its consent to the proposed Development. No liability or other duty of any kind shall be imposed on the Municipality requiring it to carry out any part of this Agreement that the Municipality is required to carry out herein that has not been completed at the time of termination. The Municipality is under no obligation to return any money paid under this Agreement. All money owing to the Municipality by the Developer and the Owners to the date of termination shall be paid forthwith on demand.

105. Notwithstanding anything contained herein to the contrary, if the Developer is delayed in substantially completing the construction of any Works or facility required by this Agreement, or in the operation, repair or maintenance of such work or facility by an act beyond the Developer's reasonable control and without limiting the generality of the foregoing ("events *of force majeure")* including adverse weather conditions, unavailability of parts and supplies, material or labour shortages, labour disputes, strikes and lockouts, national shortages, acts of God or the Queen's enemies, riots, insurrection, civil commotion or damage by fire, lightning, flood, earthquake, tempest, or other casualty, or a curtailment order from the Independent Electricity System Operator or the Distribution Company, so long as such impediment exists, the Developer will be relieved from the fulfillment of the obligation and the time for completion shall be extended by a period of time equal to such delay.

106. Unless earlier terminated under other provisions of this Agreement, this Agreement shall be terminated upon the completion of the decommissioning of the Development.

Access

107. During the term of this Agreement, the developer, in conjunction with the individual landowners, agrees to permit access to the Lands to the Municipality and its agents and to the various authorities involved with approval of this development for the purpose of inspection, maintenance, repair, monitoring and all actions authorized to the Municipality by this Agreement. It is understood and agreed between the parties that at all times entry upon the lands shall be as agent for the Developer and shall not be deemed for any purpose as acceptance or assumption of the Works by the Municipality.

Repair Obligation

108. The Developer shall repair, or at its option, be responsible to pay for the repair of, all damage caused to the existing Road Allowances, other municipal roads, drains, works and services or other municipal infrastructure by or on behalf of the Developer pursuant to this Agreement in connection with the Lands, whether during construction, hauling, operation and maintenance or decommissioning. This covenant extends to damage caused by hauling fill for dumping. In all cases the obligation to repair shall be to repair, as a minimum, to the condition existing prior to the damage occurring.

109. Nothing herein shall constitute an assumption by the Developer of the obligation and responsibility of the Municipality to maintain public highways, Road Allowances or municipal roads. Where the Developer has performed repair work on municipal roads at the request or direction of the Municipality, then upon such work being inspected and approved by the Municipality, the Municipality shall, in the event of any

claims, costs or damages arising from such work, indemnify and save harmless the Developer from any claims, costs or damages arising from such work on the public highways, Road Allowances or municipal roads.

Notice

110. All notices which mayor are required to be given under this Agreement shall be in writing and shall be delivered personally or sent by registered mail or couriered or faxed to the parties at their respective addresses as set out as follows:

The Corporation of the Town of Plympton-Wyoming
546 Niagara St., Box 250
Wyoming, ON
N0N 1T0
Fax: (519) – 845-0597

111. Notices which are delivered or sent in the manner set out shall conclusively be deemed to be received for all purposes hereof, in the case of those faxed or delivered personally or by courier on the date of such faxing or delivery, and in the case of those given by registered mail, on the fourth business day following that upon which the notice was mailed. If at the time of mailing and there is an actual or threatened postal disruption, the notice shall not be mailed, but faxed or delivered personally or by courier.

Default and Enforcement

112. In the event of default by the Developer in respect of any material obligation created hereunder, and provided that the Developer: (i) has received prior written notice of such default from the Municipality and, (ii) has been given a reasonable period of time thereafter to cure such default (such period of time not to be less than forty-five (45) days) and has failed to cure such default, or, such default is not curable within a reasonable time and the Developer has ceased proceeding diligently to remedy same, the Municipality at all times maintains the discretion, acting reasonably, to terminate this Agreement and require the Developer to comply with the provisions of Section 44.(c). For the purposes of this section, "default" shall be the following:

(a) any material breach of any covenant or obligation of the Developer pursuant to this Agreement;

(b) cessation of use of any of the Distribution Infrastructure installed, constructed, or maintained within any of the Road Allowances for a period of not less than one hundred eighty (180) days save and except where such cessation arises as a result *of force majeure* (as defined in section 104), or the performance by the Developer of its obligations pursuant to this Agreement, including in respect of any repair and maintenance obligations pursuant hereto;

(c) abandonment of any of the Distribution Infrastructure as previously installed, constructed, or maintained within any of the Road Allowances, save and except where the Developer, in its discretion, determines that such equipment and facilities are redundant and thereafter removes same;

(d) any assignment of rights and obligations hereunder without the prior written consent of the Municipality except as otherwise permitted pursuant to this Agreement;

(e) the Developer becoming insolvent, bankrupt, or making an authorized assignment or compromise with its creditors; and/or

(f) the Developer ceasing to be a "transmitter" or "distributor" within the meaning of the Electricity Act, 1998.

113. Notwithstanding any agreement between the Developer and any other party, or any rule of law, in the event of default by the Developer, the Municipality may deal with and dispose of the assets of the Development located on municipal lands as the unencumbered owner of the same, accounting only for the surplus to the Developer and any encumbrances.

114. If the Developer fails to complete any requirements set out in this Agreement or fails to maintain the Development in accordance with the terms of this Agreement, then the Municipality may upon seven business days' notice to the Developer or in an emergency situation, being one which the Municipality considers to pose an imminent risk to the safety of any persons or property, may upon 24 hours' notice (if practicable, or without notice if the emergency so dictates) undertake the completion of the requirements of this Agreement including such maintenance works as the Municipality deems necessary and the total cost of such work including all engineering, planning, legal and administrative fees shall be borne by the Developer. The Municipality shall, from time to time, render accounts to the Developer and the accounts shall bear interest in the same manner and at the same interest as municipal tax installments at the time of the rendering of the account. If the Developer fails to pay the Municipality any such amounts within thirty days of the date of billing, then the money owing may be collected pursuant to the security provided therein and/or be added to the tax bill of the Lands whereupon such amount shall be conclusively deemed as tax arrears and may be collected in the same manner as tax arrears.

115. In the event of default by the Developer of any obligations, the provisions of the Municipal Act, 2001, sections 442 and 446, as amended from time to time, shall apply in addition to any other rights of enforcement that may be available to the Municipality against the Developer.

116. In all matters of opinion, the reasonable determination by the Municipality, its officials, professional engineers, planners, lawyers and agents shall be final and conclusive, unless submitted to arbitration in accordance with this Agreement. The Developer shall have no right to dispute any of the accounts in any respect until the amount in dispute shall have been fully paid or the Developer has posted security satisfactory to the Municipality in the amount of such account in cash or by way of a letter of credit. If the Developer shall have first either paid the amount in dispute or posted security as aforesaid, the Owners and the Developer may refer the matter to arbitration. All other matters may be referred by any party to arbitration.

Arbitration

117. For the purpose of this part of the Agreement, the Developer and the Municipality are collectively called the "Parties". Each of them is called the "Party" as the context requires.

118. Any and all disputes, claims or controversies arising out of or in any way connected with or arising from this Agreement, its negotiation, performance, breach, enforcement, existence of validity, any failure of the Parties to reach agreement with respect to matters provided for in this Agreement and all matters in dispute relating to the rights and obligations of the Parties, which cannot be amicably resolved, even if only one of the Parties declares that there is a difference ("Dispute"), will be referred to and finally settled by the Ontario Energy Board, pursuant to the Electricity Act, 1998, s. 41 (9), to the extent a Dispute is within the jurisdiction of the Ontario Energy Board, or to the extent a Dispute is not within the jurisdiction of the Ontario Energy Board, or where both parties agree in writing, the Dispute will be referred to and finally settled by private and confidential binding arbitration. The arbitration shall be governed by the Arbitration Act, 1991 (Ontario) as amended and supplemented by the arbitration sections of this Agreement, and shall constitute a submission for the purposes of the Arbitration Act, 1991. The arbitration shall be held in Ontario in English and governed by Ontario law.

119. Any arbitration shall be resolved in the following manner:

(a) If the Parties can agree upon a single arbitrator, such arbitrator shall conduct the arbitration alone. If they cannot agree on a single arbitrator, then each shall appoint an arbitrator and the two so appointed shall appoint a third arbitrator who shall be chairman. If either Party appoints an arbitrator and gives notice of the appointment to the other, the other shall appoint an arbitrator within five business days. If such appointment is not made within such period, the arbitrator appointed by the first Party shall be deemed to be a single arbitrator approved by the both of them. The two arbitrators shall appoint a third arbitrator within five business days of the appointment of the second arbitrator.

(b) Depending on the nature of the dispute, the arbitrator or arbitrators shall, to the extent appropriate, be practicing professional engineers, planners, lawyers, or the holders of other appropriate qualifications for the subject matter of the Dispute.

(c) The arbitrator or arbitrators shall set a date for the hearing of the matters in dispute ("Hearing") not later than six weeks from the date of appointment of the last arbitrator to be appointed.

(d) The Party seeking the arbitration ("Claimant") shall deliver to the other Party ("Respondent") and the arbitrators, at least four weeks before the hearing, a written statement ("Complaint"), including the allegations of fact and statements of legal principles it admits and which it denies. Within ten days of the receipt of the Complaint, the Respondent shall send to the Claimant and the arbitrators a response ("Response") stating, in detail, which of the Claimant's allegations of fact and statements of legal principles it admits and which it denies, on what grounds and on what other facts and principles of law it relies.

(e) At the time of the delivery of the Complaint the Claimant shall provide to the Respondent copies of all documents on which it intends to rely. At the time of the delivery of the Response, the Respondent shall deliver to the Claimant copies of all documents on which it intends to rely.

(f) If the Respondent fails to deliver a Response within the time limit referred to above, the Respondent shall be deemed to have admitted the Complaint.

(g) Within ten days of receipt of the Response the Complainant may deliver to the Respondent and the arbitrators a written reply to the Response.

(h) Any Party may at any time at least two weeks in advance of the Hearing make a motion to the arbitrator in the event there is a single arbitrator, or the chairman in the event of multiple arbitrators for an order for directions regarding the further conduct of the arbitration and the Hearing, including orders respecting the production of records and documents that are in their possession and power.

(i) The time limits referred to above may be waived by the Parties on consent, or the arbitrator or arbitrators on motion by one of the Parties, should consent not be given.

(j) At the Hearing each Party may adduce whatever evidence it deems advisable. In addition the arbitrator or arbitrators may view the site in his or their consideration of the matters complained about.

(k) The arbitrator or arbitrators shall make their decision as soon as possible after completion of the Hearing and viewing the site. The decision (or the majority decision as the case may be) is final and binding upon the Claimant and the Respondent, and is not to be subject to review or appeal by any Court or other body.

(l) If the result of the arbitration is in favour, or largely in favour of one Party, the cost of the arbitration, including the expenses of that Party, shall be paid by the other. If the result is mixed, each Party shall pay its own expenses and the fees of the arbitrators shall be divided equally between them. The arbitrator or arbitrators shall make the decision as to whether the result is in favour or largely in favour of one Party, or if the result is mixed.

(m) The arbitration shall be kept confidential and its existence and any element of it (including submissions and any evidence or documents presented or exchanged) shall not be disclosed beyond the arbitrators, the Parties (including their shareholders, auditors and insurers), their counsel and any person necessary to the conduct of the arbitration, except as required by law or the rules or requirements of any stock exchange. No individual shall be appointed as an arbitrator unless he or she agrees in writing to be bound by this confidentiality provision.

General

120. The Developer shall be entitled to assign this Agreement, with the consent of the Municipality, which shall not be unreasonably delayed, withheld or conditioned, provided that the Municipality is reasonably satisfied as to the financial responsibility of the assignee, the assignee executes formal documents to assume the obligations of this Agreement, and the assignee posts replacement securities and insurance policies provided for in this Agreement. Upon all of the foregoing taking place, the Developer shall be released from its obligations under this Agreement, and the balance of any securities posted by the Developer with the Municipality shall be promptly returned.

121. The Developer shall be entitled to assign this Agreement without the consent of the Municipality to the Developer's lenders as security for the Developer's obligations to such lenders who shall be further entitled to assign this Agreement in connection with an enforcement of their security. No such assignments shall in any way diminish or eliminate the Developer's obligations, nor shall the Municipality be subjected to any new obligations to the Developer or the assignees. The Municipality agrees to execute and deliver an Acknowledgment and Consent Agreement in favour of any applicable lender, collateral agent or security trustee for the lenders or any assignees, substantially in the form attached hereto as Schedule "C".

122. The Developer covenants that it shall not contest the authority of the Municipality to enter into this Agreement and enforce it. The parties conclusively stipulate that the Municipality has the authority to enter into this Agreement and enforce it. The parties covenant not to contest the legality of this Agreement.

123. Every provision of this Agreement by which the Developer is obligated in anyway shall be deemed to include the words "at the expense of the Developer" and "to the Municipality's reasonable satisfaction in its sole reasonable discretion" unless specifically stated otherwise.

124. The parties hereto agree that this Agreement may be registered against the title of the lands and premises on which the Development is located as listed in Schedule “E” to this Agreement at the cost of the Developer. The execution of this Agreement by a party is conclusive Acknowledgement and Direction by that party to the Solicitors for the Municipality and the Developer to register this Agreement on behalf of the party. The registration of this Agreement shall be deleted upon the sole application of the Municipality upon the termination of this Agreement.

125. The invalidity or unenforceability of any provision or covenant contained in this Agreement shall affect the validity and enforceability of such provision or covenant only and any such invalid provision or covenant shall be severed from the balance of this Agreement, which shall be enforced to the greatest extent permitted by law.

126. No supplement, modification, amendment or waiver of this Agreement shall be binding unless executed in writing by the parties.

127. Each of the parties covenants and agrees with the other that it will at all times hereafter execute and deliver, at the request of the other, all such further documents, deeds and instruments and will do and perform all such acts as may be necessary to give full effect to the intent and meaning of this Agreement.

128. In this Agreement, words importing the singular number include the plural and vice versa and words importing one gender include the other gender as well.

129. This Agreement shall be binding upon and ensure to the benefit of the parties hereto and their respective successors and permitted assigns.

130. The following Schedules attached hereto form part of this Agreement. For registration purposes the Schedules may be omitted. This Agreement and all the Schedules are available for viewing at the offices of the Municipality during regular office hours.

131. The following Schedules attached hereto form part of this Agreement (To be added at a later date).

Schedule "A" - being a plan of the general location of wind turbines, the Electrical Distribution System, haul routes, private access roads and entrances, and other components of the Development.

Schedule "B" - being a detailed list and description of the Works to be undertaken as part of the Development and their specifications.

Schedule "C" - being a sample form for an Acknowledgement and Consent Agreement.

Schedule "D" - being an emergency response protocol.

Schedule "E" - being a list of all properties within the Municipality on which components of the Development are to be located.

Schedule "F" -being a decommissioning plan.

For registration purposes, the Schedules may be omitted.

IN WITNESS WHEREOF the parties hereto affix their signatures and Corporate Seals, attested to by the hands of their proper officers, duly authorized in that behalf.

THE CORPORATION OF THE TOWN
OF PLYMPTON-WYOMING

(Seal)

_____
MAYOR – Lonny Napper

_____
CAO – Kyle Pratt

Developer

_____
AUTHORIZED OFFICER

Exhibit B
Tab 4
Schedule 1
Appendix E

March 5, 2014 draft Road Use Agreement

ROAD USE AGREEMENT

THIS AGREEMENT effective this ____day of _____, 2014 (the **"Effective Date"**)

BETWEEN:

THE CORPORATION OF THE TOWN OF PLYMPTON-WYOMING (hereinafter referred to as the **"Municipality"**)

OF THE FIRST PART

-and-

SUNCOR ENERGY PRODUCTS INC.
a corporation established under the laws
of the Province of Ontario
(hereinafter referred to as "**SEPI**")

OF THE SECOND PART

WHEREAS:

A. the Municipality is a municipal corporation with the meaning of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, is governed by Warden and Council and operated by Administration, which is hereby authorized to administer this Agreement in its entirety, including but not limited to decisions with respect to the operation and termination of this Agreement in accordance with its provisions;

B. the Municipality exercises jurisdiction with respect to approval of certain activities with respect public rights of way, highways, streets, sidewalks, walkways, driveways, ditches and boulevards within the Town of Plympton-Wyoming;

C. the Municipality owns the roads identified in the Approved Road Use Plans, which is attached hereto as **Schedule "B"** and forms a part of this Agreement;

D. SEPI is a Wind Power Project owner/operator, has a current registered corporate identity in Ontario; has an office and mailing address at 2489 North Sheridan Way, Mississauga, Ontario, Canada L5K 1A8; and is operational out of Box 2844 150 6th Avenue SW, Calgary, Alberta, Canada T2P 3E3;

E. SEPI is the owner of the Wind Project, as defined herein;

F. SEPI is the owner of the Power Purchase Agreement for the Wind Project, all assets of the Wind Project, as provided in the SEPI Asset Document, which is attached hereto as **Schedule "A"**, forms a part of this agreement but shall be treated as confidential between the parties to

extent possible under Applicable Law;

G. SEPI wishes to make use of certain roads located in the Municipality to allow for construction, operation and maintenance of the Wind Project and to deliver components and materials thereto;

H. pursuant to section 50(3)(d.l) of the Planning Act, as amended, the Parties may enter into an agreement that has the effect of granting a use of or right in land directly or by entitlement to renewal for a period of more than twenty-one years;

I. the Municipality and SEPI enter into this Agreement with respect of the use, installation, construction, maintenance and operation of certain Electrical Infrastructure on, over, under and within the Road Allowances, as defined herein;

J. subject to Provincial legislation and Ontario Energy Board Approval, and the terms and conditions set forth below with respect to the use of Municipalities Road Allowances, the Municipality acknowledges SEPI's right to install, construct, maintain, operate and decommission such Electrical Infrastructure over, along, across or under Road Allowances;

K. subject to obtaining the necessary approvals from the Municipality for non-electricity transmission related work, SEPI shall have the right to temporarily reconstruct or realign certain portions of the Road Allowances to permit delivery or movement of oversized Wind Project components, including wind turbine blades, tower sections and nacelles;

L. subject to obtaining an entrance permit from the Municipality, SEPI shall have the right to connect access roads from Wind Project turbines to the Road Allowances to permit ongoing access to the wind turbines during Wind Project operations; and

M. SEPI warrants that all times throughout the term of this agreement, including its option periods, it shall retain assets which have a minimum value of $5 million dollars.

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT, in consideration of the payment of the sum of TWO DOLLARS ($2.00) from each Party to the other and other good and valuable consideration, including the terms, covenants and provisions herein, the receipt and sufficiency of which is hereby acknowledged and agreed, the Parties covenant and agree as follows:

A. INTERPRETATION

1. The above recitals are true and the same are hereby incorporated into this Agreement by reference.

2. Each obligation of the Parties hereto contained in this Agreement, even if not specifically expressed as a covenant, shall be considered for all purposes to be a covenant. Each covenant in this Agreement is a separate and independent covenant and a breach of covenant by any Party will not relieve any other Party from its obligation to perform each of its covenants; except as otherwise provided herein.

Definitions

3. In this Agreement, in addition to terms defined elsewhere in this Agreement, the following terms have the following meanings:

   (a) "**Agreement**" means this Agreement, including all Schedules, as it may be confirmed,

amended, modified, supplemented or restated by written agreement between the Parties.

(b) "**Anti-Bribery Laws**" mean any anti-bribery law or international convention, as may apply now or in the future, including the Canadian Corruption of Foreign Public Officials Act, the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act and the OECD Convention on Combating Bribery of Foreign Public Officials.

(c) "**Applicable Law**" means all present or future applicable laws, statutes, regulations, treaties, judgments and decrees and all present or future applicable published directives, rules, policy statements and orders of any Public Authority and all applicable orders and decrees of courts and arbitrators of like application to the extent, in each case, that the same are legally binding on the Parties in the context of this Agreement.

(d) "**Appropriate Emergency Service Providers**" means those emergency service providers set out in **Schedule "C"**, which is attached hereto and forms a part of this Agreement;

(e) "**Approved Road Use Plans**" means the diagrams attached as **Schedule "B"** hereto depicting the location of and other aspects in relation to Electrical Infrastructure in Road Allowances, as approved by the Municipal Engineer prior to the execution of this Agreement.

(f) "**As-Built Plan**" means a Plan following the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure confirming the exact location and specifications of any Electrical Infrastructure installed over, along, across, under or within the Road Allowances.

(g) "**Business Day**" means any day excluding a Saturday, Sunday or statutory holiday in the Province of Ontario, and also excluding any day on which the principal chartered banks located in the Municipality are not open for business during normal banking hours.

(h) "**Commercial Operation Date**" means the Commercial Operation Date as defined in the Power Purchase Agreement, as defined herein.

(i) **"Consulting Engineer"** means an independent qualified professional engineer as appointed by SEPI, from time to time.

(j) "**Deliveries**" means the transporting of materials, components and equipment including overweight or over-size cargoes across or along Road Allowances, to provide for the construction, maintenance, repair, replacement, relocation or removal of wind turbines and other infrastructure for the Wind Project.

(k) "**Distribution Infrastructure**" means infrastructure and systems for the purposes of conveying electricity at voltages of 50 kilovolts or less and includes all structures, equipment or other things used for that purpose including, but not limited to, towers and/or poles, with such wires and/or cables for the distribution of electricity at voltages of 50 kilovolts or less, and all necessary and proper foundations, safety barriers, footings, cross arms and other appliances, facilities and fixtures for use in connection therewith including without limitation, substation facilities and equipment, pads, vaults and junction boxes (whether above or below ground), manholes, handholes, conduits, fiber optics, cables, wires, lines and other conductors of any nature, multiple

above or below ground control, communications, data and radio relay systems, and telecommunications equipment, including without limitation, conduits, fiber optics, cables, wires and lines.

(l) "**Easement Rights**" means the right to place, install, construct, re-construct, inspect, maintain, operate, alter, enlarge, repair, replace, relocate and remove Electrical Infrastructure over, along, within or under the Road Allowances provided for this Agreement.

(m) "**Electrical Infrastructure**" means, collectively, all Distribution Infrastructure and Transmission Infrastructure.

(n) **Electrical Infrastructure Work**" means the installing, constructing, operating, inspecting, maintaining, altering, enlarging, repairing, replacing, relocating and removing of Electrical Infrastructure over, along, across, within or under the Road Allowances in connection with the Wind Project.

(o) "**Entrance(s)**" means one or more points of access across and through the Road Allowances from the traveled portion of the Road Allowances connecting to private lands beyond and certain access roads in and upon adjacent lands used in connection with the Wind Project, which has been approved by the Municipal Engineer.

(p) "**Entrance Work**" means the constructing and maintaining of Entrances to private wind turbine access roads.

(q) "**Material Change"** has the meaning ascribed to such term in Section 31.

(r) "**Municipal Engineer**" means the individual designated to serve in that position for the Corporation of the Town of Plympton-Wyoming duly passed via municipal by-law.

(s) "**Municipal Infrastructure**" means structures, services or facilities of any kind owned or operated by or for the benefit of the Municipality, including drains, water mains and culverts.

(t) "**Parties**" means the Municipality and SEPI collectively, and "Party" means any one of them.

(u) "**Permits**" means those permits required to be obtained by SEPI from the Municipality for the purposes of performing the Work and for the purposes of use of the Road Allowances, along with all requirements for the issuance of such Permits and all fees associated with such Permits, as set out in the Permits and Fees Document, which is attached hereto as **Schedule "D"** and forms a part of this Agreement.

(v) "**Plan**" means a detailed plan drawn to scale, which:

(i) identifies the location, size and elevation of the Electrical Infrastructure;

(ii) demonstrate that the installation of the Electrical Infrastructure will comply with applicable safety, technical and regulatory standards and the requirements of Applicable Law;

(iii) show the Road Allowances where the installation of Electrical Infrastructure

is proposed and the location of the proposed Electrical Infrastructure or part thereof together with specifications relating to the proposed Electrical Infrastructure or part thereof; and

(iv) shows the "no winter maintenance" road allowances within the Municipality.

(w) "**Plans**" means more than one Plan, as defined herein, referred to collectively.

(x) "**Power Purchase Agreement**", (hereinafter "**PPA**") means the Feed-In Tariff Contract made between SEPI and the Ontario Power Authority, including any amendments or renewals thereof.

(y) "**Public Authority**" means any governmental, federal, provincial, regional, municipal or local body having authority over the Municipality, SEPI, the Wind Project, the Electrical Infrastructure or the Road Allowances.

(z) "**Repair Work**" means work involving the maintenance, repair and replacement of the Wind Project, including the maintenance, repair and replacement of installed Electrical Infrastructure and Entrances that does not cause the location, elevation, position, layout or route of the Electrical Infrastructure or Entrance to materially change.

(aa) "**Road Allowances**" means public rights of way, road allowances, streets, sidewalks, highways, walkways, driveways, ditches and boulevards and the allowances therefore, and includes all existing infrastructure located on or within the Road Allowances, all owned, or managed under the legal jurisdiction of the Municipality as shown in the Approved Road Use Plans (**Schedule "B"**).

(bb) "**Secured Party**" or "**Secured Parties**" means SEPI's lenders, from time to time.

(cc) "**Transmission**" means the conveyance of electricity at voltages in excess of 50 kilovolts.

(dd) "**Transmission Infrastructure**" means infrastructure conveying electricity at voltages in excess of 50 kilovolts and includes all structures, equipment or other things used for that purpose including, but not limited to, a line or lines of towers and/or poles, with such wires and/or cables for the transmission of electricity at voltages in excess of 50 kilovolts, and all necessary and proper foundations, safety barriers, footings, cross arms and other appliances, facilities and fixtures for use in connection therewith including without limitation, pads, vaults and junction boxes manholes, handholes, conduits, fiber optics, cables, wires, transmission lines and other conductors of any nature, multiple above or below ground control, communications, data and radio relay systems, and telecommunications equipment, including without limitation, conduits, fiber optics, cables, wires and lines.

(ee) "**Tree Work**" means the cutting, trimming, removing or replacing of trees or bushes growing in or extending into, over or under the Road Allowances.

(ff) "**Wind Project(s)**" means the 100 megawatt renewable energy generating facility known as Cedar Point Wind Power Project and its appurtenant wind turbines, equipment, buildings and Electrical Infrastructure, a portion of which is to be constructed in Municipality for the purpose of supplying electricity in accordance with the PPA.

(gg) "**Work**" means all the work required to be performed by SEPI pursuant to the terms of this Agreement, including, but not limited to, all Deliveries, Electrical Infrastructure

Work, Entrance Work, Tree Work, and Repair Work.

Schedules

4. The following schedules to this Agreement are an integral part of this Agreement:

Schedule "A"	SEPI Asset Document Shows type and value of all current assets owned by SEPI
Schedule "B"	Approved Road Use Plans Geographically shows the location of the Wind Project; municipal description and location of Road Allowances (including those Road Allowances which are not subject to winter maintenance); and particulars with respect of the route of Transmission and Distribution Infrastructure, including but not limited to location of poles, engineering details of poles (type, material, size, foundation, construction methods, guying details.), electrical transmission line arrangement (height of cables, vertical clearances, expected cable sag/sway, etc.), and the location of any alteration of the Municipal Road in relation to the installation of said transmission facilities (ditch grading and guardrails).
Schedule "C"	List of Appropriate Emergency Service Providers
Schedule "D"	Permits and Fees Shows all Permits and fees required to be applied for and obtained by SEPI from the Municipality, including but not limited to **[insert permits]**
Schedule "E"	Rights and Remedies afforded to Secured Parties

Statutory Rights

5. The Parties agree that nothing contained in this Agreement shall abrogate or prejudice any statutory rights held by any Party under any applicable statute, including but not limited to the *Municipal Act, 2001*, as amended, the *Ontario Energy Board Act, 1998*, as amended, *the Green Energy and Green Economy Act, 2009*, as amended and the *Electricity Act, 1998*, as amended.

B. GRANT OF PERMISSION

Term

6. The rights provided for in this Agreement shall be for a term which is the greater of: (i) thirty (30) years from the Effective Date plus an option in favour of SEPI to extend the term of this Agreement for two (2) further ten (10) year periods, or (ii) from the Effective Date to the expiry of the term of the PPA and any extensions thereof, together with such additional time (not to

exceed nine (9) months) as may be reasonably required to complete the decommissioning of the Wind Project, (hereinafter, the "Term").

Grant of Easement

7. The Municipality hereby grants and transfers to SEPI for the duration of the Term, the non-exclusive right, privilege, interest, benefit and easement to enter upon and use the Road Allowances as identified in the Approved Road Use Plans (**Schedule "B"**) with such persons, vehicles, equipment and machinery as may be necessary for the purpose of placing, installing, constructing, re-constructing, inspecting, maintaining, operating, altering, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure and the right to perform Work over, along, across, within or under the Road Allowances in connection with the Wind Project, subject to the following conditions:

Prior Approvals

(a) SEPI, prior to the installation, placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repair, replacement, relocation and/or removal of any Electrical Infrastructure over, along, across, within or under the Road Allowances, shall obtain the approval of any Public Authority required by or have the authority pursuant to Applicable Law in connection with such activity.

Notice

(b) SEPI shall make its best effort, prior to the installation, placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repair, replacement, relocation and/or removal of any Electrical Infrastructure over, along, across, within or under the Road Allowances, to provide notice to all other existing Road Allowance users of the aforementioned installation, placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repair, replacement, relocation and/or removal of any Electrical Infrastructure over, along, across, within or under the Road Allowances.

Transmission Infrastructure Placement

(c) All Transmission Infrastructure shall be installed above-grade within the Road Allowance in the location specified in the Approved Road Use Plans (**Schedule "B"**) within a reasonable error range and supported by stand facilities (poles) at an appropriate elevation to avoid incompatibilities and/or conflicts with other existing infrastructure;

Distribution Line Placement

(d) All Distribution Infrastructure shall be installed below-grade and within but under the Road Allowances at an appropriate depth so as to avoid incompatibilities and/or conflicts with other existing and potential infrastructure, except where SEPI in consultation with the Municipality identifies environmental, topographical or other obstacles that require the installation of poles or other above-grade Distribution Infrastructure to permit the distribution of electricity over, around or across the obstacle;

Distance from Travelled Portion and Property Line

(e) The Parties agree that SEPI shall, provided it is not materially or commercially

unreasonable, install Electrical Infrastructure in the following locations within the Road Allowances:

(i) in locations between the outer limit of the travelled portion of the roadway and the property line of the Road Allowance;

(ii) at depths and/or elevations within the relevant Road Allowance to avoid incompatibilities and/or conflicts with existing infrastructure and, provided it is not materially or commercially unreasonable, avoid incompatibilities and/or conflicts with currently planned infrastructure; and

(iii) in consistent locations within the Road Allowances such that the number of road crossings is minimized.

Permits/Fees

(f) SEPI will obtain all Permits from the Municipality and pay the appropriate fees associated with obtaining the same, which fees are shown in the Permits and Fees Document **Schedule "D"**. The Municipality shall issue all such Permits within the timelines set out in the Municipality's by-laws or in the relevant statutes or regulations or thirty (30) days following receipt from SEPI of its applications and fees, whichever is less, and, without limiting the generality of the foregoing, in respect of grading, guardrails and culverts related to the Electrical Infrastructure, shall issue the approval on the basis of standards typically applied in accordance with the MTO Road Safety Manual;

Legal Compliance

(g) All actions of SEPI and the Municipality shall be in compliance with Applicable Law;

Insurance Coverage

(h) SEPI agrees that prior to the placing, installing, constructing, re-constructing, inspecting, maintaining, operating, altering, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure over, along, across, within or under the Road Allowances, SEPI shall arrange for and maintain commercial general liability insurance (hereinafter, the "CGL"), insuring SEPI and naming the Municipality as an additional insured. The CGL shall provide, at a minimum limits of liability, not less than five million dollars ($5,000,000.00) per incident and in the aggregate. In addition, the CGL shall contain a cross liability and severability of interest clause and provide for a minimum of ten (10) days' notice of cancellation of the CGL. SEPI shall upon written request thereof, deliver to the Municipality, from time to time and in any event prior to commencement of the Work, a copy of a certificate of insurance evidencing that the CGL is in full force and effect. Following the date that is ten (10) years after the Effective Date and every ten (10) years thereafter, the Parties shall, acting reasonably, review the minimum limits of liability of the CGL to determine if appropriate adjustments are required. SEPI may comply with the CGl requirements through any combination of primary and excess/umbrella coverage.

Commencement of Work

(i) Prior to the commencement of any Work, SEPI shall document, by means of a video recording or other means satisfactory to the Municipality, acting reasonably, the then-

existing condition of all Road Allowances or structures that SEPI expects will or may be used for or subject to Work, and both Parties shall receive a complete copy of such video recording or document;

(j) SEPI agrees to maintain the surface of the Road Allowances for a period of twelve (12) months following the Commercial Operations Date and restore the surface of the Road Allowance to at least the same condition as prior to the commencement of any Work, except in the cases where the alteration to the untraveled potion of the Road Allowance forms part of the Work;

(k) SEPI agrees the Easement Rights shall be exercised and carried out in a good, safe and workmanlike manner;

(l) SEPI shall be responsible for any damage caused to the Road Allowances at any time by itself, its agents, employees or contractors and for removing all debris from the work area following the undertaking of any of the Easement Rights contemplated herein;

(m) SEPI shall, provided that it is materially and commercially unreasonable, protect the integrity and security of all existing equipment, installations, utilities, and other facilities within the Road Allowance or which might otherwise be located in, on, or under the Road Allowances or any adjacent lands;

(n) SEPI shall make all payments and taking all such steps as may be reasonably necessary to ensure that no construction lien or other lien is registered against the Road Allowances as a result of the undertaking by SEPI of any of the Easement Rights or any other work contemplated in this Agreement and taking such steps as may be required to cause any such registered lien or claim for lien to be discharged or vacated immediately after notice thereof from the Municipality is provided to SEPI.

Non-Exclusive Permission

8. The Easement Rights provided for in this Agreement shall constitute a non-exclusive easement. Without limiting the foregoing, the Easement Rights are subject to the rights of the owners of the property adjoining the Road Allowances who are entitled access to and from the Road Allowances from their properties, and subject to the rights and privileges that the Municipality may grant to other persons on the Road Allowances, all of which rights are expressly reserved; the rights shown on the Approved Road Use Plans and As-Built Plan and specifications only excepted. SEPI hereby acknowledges and agrees that there are other utilities and third parties that do and/or may have similar rights over the Road Allowances and SEPI hereby agree to make commercially reasonable efforts to accommodate the interests of other third parties when exercising the Easement Rights, provided that such accommodation is not materially or commercially unreasonable.

9. In respect of and without limiting the foregoing and provided it is not materially or commercially unreasonable, SEPI agrees that when engaging in any Work, it shall use commercially reasonable efforts to ensure there is minimal interference with the traveled portion of any Road Allowances or any pedestrian, vehicular, or other traffic thereon, or any use or operation of any ditch or drain adjacent to such public right-of-way, highway, street, or walkway. Unless otherwise agreed by the Municipality, the Road Allowances shall always be open to pedestrian, vehicular or other traffic and shall be open to the public. Without limiting the generality of the foregoing, SEPI shall be entitled to temporarily close any of the Road Allowances with the prior written consent of the Municipality Engineer, which consent shall not be unreasonably withheld, delayed or conditioned. If SEPI proposes the temporary closure

of a Road Allowance, it shall also provide written notice to the Appropriate Emergency Service Providers.

10. The Municipality reserves its right to enter upon and use the Road Allowances without notice to SEPI for its own purposes and to grant and transfer rights to third parties to enter upon and use the Road Allowances to construct, operate, maintain, alter, repair or relate infrastructure, and to modify the Road Allowances, provided such entry, use, grant or transfer by the Municipality does not adversely affect the Electrical Infrastructure, the Work, the Wind Project or the exercise of SEPI's rights under this Agreement.

Title

11. The Municipality represents that:

(a) it has legal and beneficial title to the Road Allowances;

(b) it has obtained the full and unconditional due authorization for execution and delivery of this Agreement by all required resolutions and other required municipal approvals;

(c) it shall defend its title to the Road Allowances against any person or entity claiming any interest adverse to the Municipality in the Road Allowances during the Term of this Agreement, save and except where such adverse interest arises as a result of the gross negligence or willful misconduct of SEPI or any person for which they are responsible at law;

(d) the Permits are the only permits, approvals, consents or authority within the jurisdiction of the Municipality required in connection with the Work and the fees as set forth in attached hereto are the only fees payable by SEPI in connection with the Permits; and

(e) the execution and delivery of this Agreement by the Municipality will not result in a breach of any other agreement to which the Municipality is a party and no rights, interests or privileges have been granted in respect of the Road Allowances by the Municipality which will or could adversely affect the rights, interests or privileges granted to SEPI hereunder.

Electrical Infrastructure at Expense of SEPI

12. Notwithstanding and without limiting any other term hereof, SEPI agrees and undertakes that all Electrical Infrastructure over, along, across, within or under the Road Allowances will be placed, installed, constructed, re-constructed, inspected, maintained, operated, altered, enlarged, repaired, replaced, relocated and removed at its own expense and in accordance with good engineering practices, and in compliance with Approved Road Use Plans, this Agreement and Applicable Law.

C. ADDITIONAL TERMS AND CONDITIONS RE EASEMENT RIGHTS

Road Closure

13. The Municipality agrees, in the event of closing of any Road Allowances, to give SEPI reasonable notice of such closing and to provide SEPI with a further easement over that part of

the closed Road Allowances sufficient to allow SEPI to preserve any part of the Electrical Infrastructure in its then existing location, and to enter upon the closed Road Allowances to maintain and repair such part of the Electrical Infrastructure.

Traffic Effects

14. Notwithstanding and without limiting any other term hereof, the Parties acknowledge that the Work from time to time may require the temporary modification of traffic patterns or the imposition of temporary restrictions on public access to or use of the Road Allowances ("**Traffic Effects**"). In the event that SEPI determine that Traffic Effects are required, SEPI agrees to:

    (a) give five (5) days' notice of anticipated Traffic Effects to the Municipality Engineer and affected residents and to coordinate with the Municipality Engineer and the Appropriate Emergency Service Providers to minimize and mitigate any adverse impacts of the Traffic Effects and to ensure public safety; and

    (b) use reasonable efforts to maintain adequate public access to and use of the Road Allowances while Traffic Effects are in progress and to remove the Traffic Effects as soon as reasonably possible when the Traffic Effects are no longer necessary.

Restoration

15. SEPI further agrees that in the event that it becomes necessary to break, remove, or otherwise pierce the existing surface of any of the Road Allowances or any other municipal lands to undertake any placing, installing, constructing, re-constructing, inspecting, maintaining, operating, altering, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure or to undertake any Work over, along, across, within or under the Road Allowances, SEPI in all cases will repair, reinstate and restore such surface at its own expense to the same or better condition which existed prior to the performing of the Work. SEPI also agrees that, except in those cases where breaking, removing or otherwise piercing the untraveled portion of the Road Allowance forms part of the Work, it shall thereafter, for a period of twelve (12) months following the Commercial Operation Date (the "**Interim Period**"), monitor that portion of such restored Road Allowances, at the sole expense of SEPI, and repair any settling thereof directly caused by the placing, installing, constructing, re-constructing, inspecting, maintaining, operating, altering, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure or any of the Work performed over, along, across, within or under the Road Allowances to the satisfaction of the Municipal Engineer, acting reasonably.

Repairs

16. SEPI shall be liable for any and all Repairs required to be performed on the Electrical Infrastructure or on the Road Allowances due to the existence of the Electrical Infrastructure. Any Repair work undertaken shall restore the road surface to at least the same condition it was in immediately prior to the use of the Road Allowances by SEPI. In the event the Repair work is require, SEPI agrees to provide the Municipality with at least five (5) days' notice that the Repair Work will occur if such Repair Work:

    (a) will have or is likely to have Traffic Effects;

    (b) will involve or is likely to involve Tree Work;

    (c) could present a danger to public health and safety; or

(d) is located in Entrances.

17. Subject to the provisions of this Agreement and provided that Repair Work on Electrical Infrastructure complies with this Agreement, SEPI shall be entitled to conduct Repair Work on Electrical Infrastructure without prior approval of the Municipal Engineer.

Emergency

18. Notwithstanding any other provision of this Agreement, in the event of any emergency involving the Electrical Infrastructure, SEPI shall notify the Appropriate Emergency Service Providers immediately upon becoming aware of the situation and shall do all that is necessary and desirable to control the emergency, including such work in and to the Electrical Infrastructure or the Road Allowances as may be required for the purpose. If after reasonable and unsuccessful efforts to communicate with the Municipality and in the event the emergency, at SEPI's sole determination, SEPI requires immediate access to Electrical Infrastructure, SEPI may enter upon the subject Road Allowances and/or municipal lands without prior notice to the Municipality in order to gain access to such Electrical Infrastructure in order to address such emergency and, in so doing, shall undertake to rectify the Electrical Infrastructure to the standards and as are otherwise required by the terms of this Agreement and to thereafter provide written notification and details and specification of such Repair Work to the Municipality on the next Business Day and to thereafter file amended Plans and drawings detailing such repairs as is otherwise required by this Agreement. Without limiting the foregoing, subject to resolving to the emergency, SEPI agrees that all work completed under this subsection shall maintain the same location of the Electrical Infrastructure as previously approved by the Municipality.

19. SEPI shall be responsible for all costs associated with such emergencies. The Parties hereby agree to cooperate with each other and with the Appropriate Emergency Service Providers and Hydro One Networks Inc. to develop and adopt protocols applicable in the event of an emergency involving the Electrical Infrastructure.

Upgrades Required

20. In the event that the standard, condition or maintenance of any of the Road Allowances is not sufficient to permit SEPI to carry out its desired operations, SEPI shall be solely responsible for carrying out any work or maintenance required to upgrade the Road Allowances, at its own expense.

Locating Infrastructure:

21. SEPI agrees at its sole expense to:

(a) mark the location of Electrical Infrastructure installed by SEPI within the Road Allowances with appropriate markings;

(b) participate in the "Ontario One Call" system to facilitate ongoing notice to the public of the location of the Electrical Infrastructure; and

(c) upon written request of the Municipality, SEPI shall properly and accurately identify the location of any Electrical Infrastructure within the Municipality, and provide such reports to identify the depth of the relevant portion of the

Electrical Infrastructure, such request to be made in writing to SEPI with advance notice of twenty (20) days prior to the Municipality or a third party commencing work that may conflict with the Electrical Infrastructure.

Relocation of Installed Infrastructure

Upon Election of SEPI

22. In the event that SEPI wishes to relocate Electrical Infrastructure which has been previously installed in accordance with this Agreement at 100% its own expense, SEPI shall notify the Municipality of such request, in writing, and such request will thereafter be considered and administered by the Municipality acting reasonably and with diligence giving due consideration to the scope of the works already undertaken by SEPI on the Road Allowances, provided that, in considering and administering such request the Municipality shall be entitled to take into consideration any specific municipal or engineering interests affected by such relocation including any additional facilities located within the Road Allowances. SEPI shall obtain all Permits and/or approvals from the Municipality which are required for any such relocation. Notwithstanding the foregoing, the Municipality shall not be permitted to unreasonably withhold, delay or condition its approval for such request.

Required by the Municipality

23. In the event that the Municipality, in conjunction with an approved municipal plan, and acting reasonably, deems it necessary for the location of the Electrical Infrastructure or Entrances (hereafter, a "**General Relocation**") to be taken up, removed, or modified within the Road Allowance, the General Relocation and any related installation work shall be conducted at the expense of SEPI within a reasonable period of time and subject to Force Majeure. If such General Relocation is required by the Municipality within five (5) years of the Effective Date then SEPI shall have the right to invoice the Municipality for 100% of the costs as a resulting from the General Relocation. Expenses associated with a General Relocation that are required by the Municipality after the fifth (5^{th}) anniversary of the Effective Date shall be split evenly between the Parties.

24. Without limiting and in addition to Section 23, in the event SEPI determines that leave to construct or amendment thereto or any other approval is required from a Public Authority, or any successor thereof, with respect to the proposed General Relocation or related installation work, then the Municipality shall provide such reasonable period of time as is necessary for SEPI to obtain such leave to construct, amendment or other approval before closing or disposing of the Road Allowance, if applicable; provided, however, in the event that any Public Authority's approval is not provided to SEPI, both SEPI and the Municipality shall be bound to comply with the determination of the Public Authority and shall modify or discontinue the relocation of the Electrical Infrastructure or Entrances as necessary.

Required by Legislation or Lawful Order

25. In the event that a General Relocation is required as a result of the Municipality's compliance with a legislative requirement, Ministerial order or such other law or order of a body which has the ability to force the Municipality to act then the costs of the General Relocation and/or related installation work associated with the installed Electrical Infrastructure shall be performed by SEPI at 100% its cost.

By Third Party

26. Where the General Relocation under Section 24 is required due to the Municipality accommodating a third party (hereinafter "Third Party Work"), the required General Relocation or related installation work shall be conducted by SEPI in accordance with the terms of this Agreement respecting installation, and the full cost of the amendment or General Relocation shall be borne solely by the third party and paid in advance. The Municipality agrees to provide SEPI with ninety (90) days' notice of the need for any such Third Party Work and to require that the relevant third party or parties bear the full cost of such Third Party Work and indemnify SEPI against all claims and liabilities arising from the amendment or General Relocation as a condition precedent to any such amendment or General Relocation.

Temporary Reconstruction or Realignment of Road Allowances

27. SEPI shall, upon reasonable prior notice to the Municipality, have the right to:

(a) temporarily reconstruct or realign certain portions of the Road Allowances in order to permit the delivery or movement of oversized Wind Project components, including wind turbine blades, tower sections and nacelles; and

(b) connect access roads located on private land and running from the Wind Project turbines to the Road Allowances to permit ongoing access to such wind turbines during the period of commercial operation of the Wind Project.

D. MAINTENACE, SNOW CLEARANCE AND TREE WORK/REPLACEMENT

28. SEPI acknowledges that certain of the Road Allowances, which are clearly identified in the Road-Use Diagram (**Schedule "B"**), are not maintained by the Municipality for winter use due to soft surfaces and otherwise. In the event that SEPI requires the Road Allowances to be maintained for winter access, they shall undertake the necessary snow plowing on its own accord and at its expense and shall be responsible for all costs associated with the repair of any Road Allowance damaged as a result of such use by SEPI.

Tree Work

29. Notwithstanding applicable statutory rights, in the event that SEPI deems it necessary to perform any Tree Work, SEPI shall be entitled to conduct the Tree Work. In the event that trees are removed from within the Road Allowances, SEPI agrees at its sole expense, to remove the tree stump to a level below grade and to restore and remediate the surface of the Road Allowance.

E. IMPLEMENTATION OF PLANS

30. Intentionally Deleted

Revisions Required

31. In the event that physical features of the Road Allowances or other obstacles or circumstances frustrate the ability of SEPI to complete the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlargement, repair, replacement, relocation and removal of Electrical Infrastructure in compliance in all material respects with the Approved Road Use Plans , SEPI agrees to revise the relevant Plans and submit such revised Plans for review by the Municipality Engineer. If revisions to the Plans are required which would impact either (i) the safety or operation of the Road Allowances or (ii) other existing Road Allowance users, in accordance with engineering and industry standards (such revisions being a **"Material**

Change”), subject to Section 64 of this Agreement, the Municipality agrees to expedite in the instance of a revision of Plans submitted and agrees not o unreasonably condition, delay or withhold approval of revised Plans.

Adherence to Approved Road Use Plans

32. SEPI further agrees to commence, perform and complete the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure in compliance with the Approved Road Use Plans, provided there is no material impact on (i) the safety or operation of the Road Allowances or (ii) other existing Road Allowance users, in accordance with current engineering and industry standards or unless otherwise approved by the Municipal Engineer, acting reasonably.

Filing of As-Built Plan Following Installation etc.

33. Following the completed placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure and within one hundred eight (180) days after the Commercial Operation Date, SEPI agrees to conduct the necessary investigation necessary to produce and file with the Municipal Engineer an As-Built Plan together with a final electronic copy (CD ROM or DVD) prepared in an AUTOCAD, CAD or GIS environment of the As-Built Plan, showing the exact location and specifications of any Electrical Infrastructure installed over, along, across, under or within the Road Allowances and any Entrances. The Parties agree that the Municipality shall not release of any deposits or securities held until the As-Built Plan is filed.

Post-Installation Report and Required Repairs

34. Following the Municipal Engineer's receipt of notice from SEPI confirming that installation of the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure over, along, across, within or under the Road Allowances is complete (the **"Completion Notice"**), the Consulting Engineer shall conduct a further inspection and provide a post-installation report (the **"Post-Installation Report"**), which includes the following:

    (a) identification of the Road Allowances which in the opinion of the Consulting Engineer, have been damaged or destroyed by SEPI and its employees, agents or contractors during the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repairing, replacing, relocating and removing Electrical Infrastructure over, along, across, within or under the Road Allowances, hauling, or establishing of Entrances; and

    (b) identification of the repairs, replacements or remedial work necessary to repair the damaged Road Allowances.

    The Consulting Engineer's inspection, for the purposes of producing the Post-Installation Report shall be completed no later than ten (10) business days following receipt by the Municipality of the Completion Notice. The Consulting Engineer shall prepare a draft Post- Installation Report for review and approval by the Municipality Engineer, acting reasonably. SEPI agree to repair any and all damage to the Road Allowances directly caused by the Work in accordance with the Post-Installation Report (hereinafter referred to as the "Required Repairs"). In the event SEPI fails to complete the Required Repairs in a manner and within a timeframe acceptable to the Municipal Engineer acting reasonably, the Municipality may do

so at the sole expense of SEPI.

Final Condition Report and Final Repairs

35. Following the expiry of the Interim Period, the Municipal Engineer shall forthwith conduct an inspection of the Road Allowances to either (i) confirm its satisfaction that all restoration work has been completed and that the Road Allowances are in the same or better condition which existed prior to the performing of the Work; or (ii) identify those Road Allowances which are not in the same or better condition which existed prior to the performing of the Work and indentify the repair, replacement or remedial work required to repair the Road Allowances to the same condition which existed prior to the performing of the Work (the **"Final Condition Report"**). The Municipal Engineer's inspection for the purposes of producing the Final Condition Report shall be completed no later than ten (10) Business Days following the expiry of the Interim Period and the Final Condition Report shall be delivered to SEPI not later than ten (10) business days following the date of inspection aforesaid. SEPI agrees to repair any damage to the Road Allowances identified in the Final Condition Report (the "**Final Repairs"**) within a reasonable period of time. In the event SEPI fails to complete the Final Repairs in a manner and within a timeframe acceptable to the Municipality Engineer acting reasonably, the Municipality may do so at the sole expense of SEPI.

F. COMPENSATION

For Use of Road Allowances

36. To offset the administrative expenses incurred by the Municipality as a result of the use of its Road Allowances and to further secure covenants of SEPI as set out in this Agreement, SEPI agrees to pay to the Municipality,

(a) An initial payment of fifteen thousand dollars ($15,000.00) within thirty (30) days of the Effective Date of this Agreement, which shall inter alia, fully compensate the Municipality for all reasonable out of pocket costs incurred in connection with the preparation and implementation of this Agreement including reasonable legal, engineering and inspection costs;

(b) An annual fee (the **"Transmission Fee"**) in the amount of four thousand dollars ($4000.00) per kilometer of Transmission Infrastructure located on Municipality Road Allowances per year, payable by March 31 of every year during the term of this Agreement. The Parties estimate that SEPI will have zero (0) km of Transmission Infrastructure within Municipal Road Allowances.

(c) An annual fee (the **"Distribution Fee"**) in the amount of:

(i) one thousand ($1,000.00) dollars per road crossing of Distribution Infrastructure; plus

(ii) one thousand five hundred dollars ($1500.00) per kilometer of Distribution Infrastructure located on Road Allowances owned by the Municipality

The Distribution Fee shall be payable within thirty (30) days following the Effective Date and thereafter once every five (5) years, on the fifth (5^{th}) anniversary of the Effective Date. The Distribution Fee may be amended by the Municipality, from time to time, in accordance with amendments to Municipal by-laws, provided the Distribution Fee charged to SEPI shall be consistent, in all respects with other such fees charged by the Municipality to similar Road Allowance users. For the purposes of this Agreement, the

Parties estimate that SEPI will have approximately _____ (##) Distribution Infrastructure crossings, and approximately _____ (##) kilometers of Distribution Infrastructure buried in Road Allowances owned by the Municipality, respectively.

(d) The appropriate permit fees, which fees are shown in the Permits and Fees Document (**Schedule "D"**) with respect to those permits SEPI requires in order to engage in desired actions while using the rights identified in this Agreement.

37. All overdue payments payable by SEPI to the Municipality under the terms of this Agreement shall bear interest at the rate of ten (10%) per cent per annum.

First Security Deposit

38. Prior to the commencement of the Work, SEPI shall deposit with the Municipality an irrevocable letter of credit or surety bond in a form satisfactory to the Municipality and from a financial institution satisfactory to the Municipality, acting reasonably (the "**First LC**") in the amount of five hundred thousand ($500,000) dollars, which shall secure the obligations of SEPI pursuant to this Agreement during the initial placement, installation and construction of the Electrical Infrastructure over, along, across, within or under the Road Allowances. SEPI acknowledges and agrees that the Municipality shall be entitled to draw on and use the proceeds from the First LC to complete the Required Repairs if SEPI fails to do so in accordance with Section 34 of this Agreement.

Second Security Deposit

39. Following the completion of any Required Repairs to the satisfaction of the Municipality acting reasonably, the Municipality shall forthwith return the First LC to SEPI and SEPI shall, within five (5) business days of the receipt of the First LC, provide a second irrevocable letter of credit or surety bond in a form satisfactory to the Municipality and from a financial institution satisfactory to the Municipality, acting reasonably (the "**Second LC**") in the amount of two hundred and fifty thousand ($250,000) dollars, which shall secure the obligations of SEPI with respect to Section 35. SEPI acknowledges and agrees that the Municipality shall be entitled to draw on and use the proceeds of the Second LC to complete the Final Repairs in the event SEPI fails to do so within a reasonable period of time, in accordance with Section 35 of this Agreement. The Municipality shall return the Second LC to SEPI within five (5) Business Days following the earlier of, (i) the date on which SEPI notifies the Municipality that the Final Repairs required to be performed by SEPI pursuant to Section 35 have been satisfactorily completed in the opinion of the Municipality, acting reasonably; and (ii) the date which is ninety (90) days following the date of the Final Condition Report.

G. LIABILITY

Risk with SEPI

40. SEPI hereby acknowledges that the placement, installation, construction, re-construction, inspection, maintenance, operation, alteration, enlarging, repair, replacement, relocation and/or removal of any Electrical Infrastructure by SEPI in accordance with the Easement Rights granted hereunder is performed entirely at the risk of SEPI and that the Municipality shall in no way or under any circumstances will be responsible or liable to SEPI or its contractors, agents, or customers for any damage or losses in consequence thereof, unless due to the negligent or intentional acts of the Municipality or those for whom it is at law responsible.

Indenmification

41. SEPI will indemnify and hold harmless the Municipality, its Warden, Councilors, officers, employees, legal counsel, agents and contractors from and against any and all claims, suits, demands, liabilities, losses, costs, damages, and other expenses of every kind that the Municipality may incur or suffer as a direct consequence of the Easement Rights granted hereunder, except where such claims, suits, demands, liabilities, losses, costs, damages, and other expenses result from the negligence or intentional acts of the Municipality, its Warden, Councilors, officers, employees, legal counsel, agents or contractors.

No Joint Venture, Partnership or Co-ownership

42. The Parties hereby acknowledge and agree that this Agreement is solely a road use agreement and that no relationship is formed between the Parties in the nature of a joint venture, partnership co-ownership arrangement or other similar relationship.

H. ABANDONMENT AND DECOMMISSIONING OF ELECTRICAL INFRASTRUCTURE

Notice of Abandonment

43. During the Term of this Agreement, SEPI may elect to permanently discontinue the use of (hereinafter, **"Abandon"**) any part of the Electrical Infrastructure in which event SEPI shall provide written notice specifying the part of the Electrical Infrastructure to be abandoned and the date when the abandonment will occur.

Removal

44. If SEPI Abandons any part or all of the Electrical Infrastructure, it shall decommission and remove in accordance with the Wind Project's decommissioning plan and the Ministry of Environment (**"MOE"**) requirements in SEPI's Renewable Energy Approval (**"REA"**). Should SEPI fail to decommission and remove the infrastructure as set out above, the Municipality may, to the extent permitted by Applicable Law, retain necessary personnel to remove the infrastructure and SEPI shall compensate the Municipality for 100% of its cost to decommission and remove the infrastructure. This provision shall survive the termination of this Agreement.

I. DEFAULT

Breach

45. Subject to the rights granted to any Secured Parties hereunder or by the Municipality, in the event that a Party commits a material breach of or omits to comply with any of the provisions of this Agreement (the **"Defaulting Party"**) which continues for at least sixty (60) days after written notification of such default is provided to the Defaulting Party, the other Party (the **"Complainant"**) shall have the right to terminate this Agreement. However, if the Defaulting Party shall have remedied the breach or shall have commenced to remedy the breach and has diligently pursued the remedying thereof within the sixty (60) days after the initial written notification of default, the Defaulting Party shall be allowed not less than one hundred and fifty (150) days after the expiry of the original notice period to remedy the breach, or such longer period of time as is reasonable in the circumstances. In the event of default by SEPI and without such default being rectified within the time period referred to in this section, the Municipality shall have the right to terminate this Agreement.

46. Intentionally Deleted.

Force Majeure

47. Whenever, and to the extent that a Party will be unable to fulfill or will be delayed or restricted in the fulfillment of any obligations under any provision of this Agreement by reason of:

(a) strikes;

(b) lock-outs;

(c) war acts of military authority;

(d) rebellion or civil unrest;

(e) material or labour shortage not within the control of the affected Party;

(f) fire or explosion;

(g) inclement weather, flood, wind, water, earthquake, or other casualty;

(h) changes in Applicable Law not wholly or mainly within the control of the affected Party, including the revocation by any Public Authority of any permit, privilege, right, approval, license or similar permission granted to SEPI or the Wind Project;

(i) any event or matter not wholly or mainly within the control of the affected Party (other than lack of funds or any financial condition of the parties hereto); or,

(j) acts of God,

(in each case a **"Force Majeure"**) not caused by the default or act of or omission by that Party and not avoidable by the exercise or reasonable effort or foresight by it, then, so long as any such impediment exists, that Party will be relieved from the fulfillment of such obligation and the other Party will not be entitled to compensation for any damage, inconvenience, nuisance or discomfort thereby occasioned. The Party relying on Force Majeure will be required and is entitled to perform such obligation within a period of title immediately following the discontinuance of such impediment that is equal to the period of time that such impediment existed. A Party shall promptly notify the other Party of the occurrence of any Force Majeure, which might prevent or delay, that doing or performance of acts or things required to be done or performed.

J. MISCELLANEOUS

Assignment

48. Subject to the provisions in other paragraphs of this Agreement, SEPI shall not assign this Agreement without the written consent of the Municipality, which shall not be unreasonably withheld, delayed or conditioned, except that no consent shall be required for SEPI to assign this Agreement to an affiliated or successor entity, or for purposes of securing indebtedness or other obligations respecting the Electrical Infrastructure or the Wind Project. The Municipality acknowledges that a change in control of SEPI shall not be considered an assignment by SEPI of this Agreement or of any of SEPI's rights and obligations under this Agreement.

49. SEPI shall be entitled to assign this Agreement and all of its rights thereunder without the consent of the Municipality to the Secured Parties as security for SEPI's obligations to such

Secured Parties which shall be further entitled to assign this Agreement and SEPI's rights thereunder in connection with an enforcement of their security. The Municipality hereby grants to any Secured Party the rights and remedies set forth in this Agreement, including those rights and remedies set forth in **Schedule "E"**. In addition, the Municipality will, from time to time, at the request of the Secured Party, promptly execute and deliver in favour of any Secured Party such consents and acknowledgements granting and confirming the rights and remedies in this Agreement, including those rights and remedies set forth in **Schedule "E"**. The Municipality shall enter into any other reasonable agreements with the Secured Party, as may reasonably be required by SEPI in order to obtain financing from the Secured Party.

50. SEPI shall be entitled, with the written consent of the Municipality, which may not be unreasonably conditioned, delayed, or withheld, to assign this Agreement to a transferee of the Wind Project other than an affiliated or successor company, and SEPI shall thereupon be released from any and all obligations under this Agreement from and after the date of such assignment, provided that such assignee has agreed in writing with the Municipality, in a form acceptable to the assignee and the Municipality, both acting reasonably, to be bound by the provisions of this Agreement from and after the date of the assignment.

51. In the event SEPI applies to the Municipality for consent to a transfer, the Municipality shall have a period of thirty (30) days following receipt of sufficient information to make a determination as to whether the Municipality shall provide or refuse to provide its consent to the proposed transfer. The Municipality's failure to respond within that thirty (30) day period shall be construed as consent by the Municipality.

52. Any documents relating to a transfer or the Municipality's consent will be prepared by the Municipality or its solicitors or their retained agents and all of the legal costs borne as a result by the Municipality together with a reasonable administrative charge of One Thousand Dollars ($1,000) shall be reimbursed to the Municipality by SEPI on demand.

Dispute Resolution

53. In the event that either Party provides the other Party with written notice of dispute regarding the interpretation or implementation of this Agreement (a "**Dispute**") then both Parties shall use their best efforts to settle the Dispute by consulting and negotiating with each other in good faith to reach a solution satisfactory to both Parties. However, if the Parties do not resolve the Dispute within thirty (30) days following receipt of such notice, then either Party may provide written notice to the other Party (the "**Arbitration Notice**") requiring resolution by arbitration or thereafter the Dispute shall be referred to arbitration in accordance with the provisions of the Arbitration Act, 1991.

54. The Parties agree to the following with respect to any arbitration between the Parties:

(a) the arbitration tribunal shall consist of an arbitrator appointed by mutual agreement of the Parties or, if the Parties fail to agree on an arbitrator within ten (10) days after receipt of the Arbitration Notice then either Party may apply to a judge of the Ontario Superior Court of Justice to appoint an arbitrator;

(b) The arbitrator shall be qualified by education and training to be able to decide upon the matter to be decided;

(c) The arbitration shall be conducted in English;

(d) The arbitration shall take place in the geographic boundary of the County of

Lambton or another place mutually agreed upon by the Parties;

(e) The arbitration award shall be given in writing and shall address the question of costs of the arbitration and all related matters;

(f) The arbitration award shall be final and binding on the Parties as to all questions of fact and shall be subject to appeal only with respect to matters of law or jurisdiction.

55. The Parties agree that except to the extent that a matter is specifically the subject of a Dispute, both Parties shall continue to observe and perform the terms and conditions of this Agreement pending the resolution of a Dispute.

Termination by SEPI

56. SEPI may upon six (6) months' notice in writing, terminate this Agreement. Once the notice has been provided, SEPI shall be liable to the Municipality for the provisions of this Agreement to the date of termination. Following the termination date, SEPI will only be liable for those obligations contained in Section 15, 16, 34, 35, 38, 39, 40, 41, and 44, all of which shall survive such termination.

Further Assurances

57. Each of the Parties covenant and agrees with the other that it will at all times hereafter execute and deliver, at the request of the other, all such further documents, agreements, deeds and instruments, and will do and perform all such acts as may be necessary to give full effect to the intent and meaning of this Agreement.

Notices

58. the parties hereto agree as follows:

Any written notice provided for and contemplated by this Agreement will be delivered to the parties by hand or registered mail at the following addresses:

To the Municipality:	The Corporation of the Municipality of Plympton-Wyoming Attention: Municipality Clerk 546 Niagara St., Box 250 Wyoming, ON, NON 1T0, Canada
To SEPI:	Suncor Energy Products Inc. Attention: Director Renewable Energy 150 6th Avenue SW, Box 2844 Calgary, AB, T2P 3E3, Canada Phone: (403) 296-8000
With a copy to:	Suncor Energy Products Inc. Attention: General Counsel 150 6th Avenue SW, Box 2844 Calgary, AB, T2P 3E3, Canada Phone: (403) 296-8000

Every such notice shall be deemed to have been received if personally delivered at the time of such delivery and if sent by prepaid registered mail, at the end of five (5) Business Days after the mailing thereof.

Governing Law

59. This Agreement shall be governed by, and be construed and interpreted in accordance with, the laws of Ontario and the laws of Canada applicable in Ontario.

Counterparts

60. This Agreement may be executed by facsimile or PDF transmission and in one or more counterparts, all of which shall be considered one and the same Agreement.

Binding Covenant

61. This Agreement and the rights granted hereunder are and shall be of the same force and effect, to all intents and purposes, as a covenant running with the Road Allowances. The provisions of this Agreement, including all of the covenants and conditions herein shall extend, be binding upon and enure to the benefit of the Municipality, SEPI and their respective successors and permitted assigns as the case may be.

Severability

62. The invalidity or unenforceability of any provision of covenant contained in this Agreement shall affect the validity or enforceability of such provision or covenant only and any such invalid provision or covenant shall be deemed to be severable from the balance of this Agreement, which shall be enforced to the greatest extent permitted by law.

Amendments to the Agreement

63. No supplement, modification, amendment, or waiver of this Agreement shall be binding unless executed in writing by the Parties.

Amendments to the Approved Road Use Plan

64. Any Material Change to the Approved Road Use Plans will be submitted to the Municipal Engineer for his approval, who will not unreasonably withhold such approval. The Parties agree that once approved, the amended Approved Road Use Plans shall substitute for, and replace the attached **Schedule "B"** as part of this Agreement.

Waiver

65. No supplement, modification, amendment, or waiver of this Agreement shall be binding unless executed in writing by the Parties.

Foreign Corrupt Practices Act and Anti-Bribery Indemnity

66. Notwithstanding anything to the contrary herein, the Municipality, in its administration of this Agreement, shall refrain from offering, giving or promising, directly or indirectly, money or anything of value to a Canadian or foreign governmental official to influence the official in his or her official capacity, induce the official to do or omit to do an act in violation of his or her

lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person. For the purposes of this Section, **"anything of value"** includes, but is not limited to, cash or a cash equivalent, discounts, gifts, use of materials, facilities or equipment, entertainment, drinks, meals, transportation, lodging, insurance benefits, or promise of future employment. **"governmental official"** shall mean any person holding any level of legislative, administrative, or judicial office of the Canadian or a foreign government or any of its departments or agencies or divisions; any person acting on behalf of the Canadian or a foreign government, including a local or provincial agency, enterprise, or organization; any official or agent of a Canadian or a foreign public administration or publicly funded organization; any official of a Canadian or a foreign political party; any officer or agent of a public international organization (e.g., World Bank, International Monetary Fund, World Health Organization, United Nations, World Trade Organization); or any relatives or close family/household members of any of those listed above. The Municipality shall indemnify and hold harmless SEPI from all claims brought against SEPI as a result of the Municipality or its representatives' failure to comply with Anti-Bribery Law. The Municipality shall immediately report any breach of Anti-Bribery Law by the Municipality or its representatives. The Municipality shall indemnify and hold harmless SEPI from all claims brought against SEPI as a result of the Municipality or its representatives' failure to comply with Anti-Bribery Law. The Municipality shall immediately report any breach of Anti-Bribery Law by the Municipality or its representatives'. SEPI shall have the right to audit the Municipality's books and records with respect to payments made on behalf of SEPI in the event that SEPI believes that the Municipality has violated this Section 66. SEPI shall have the right to immediately terminate all payments to the Municipality under this Agreement if the Municipality fails to comply with this Section 66.

IN WITNESS WHEREOF the parties hereto affix their hands and seal or corporate seals, attested to by the hand of their authorized officers, as the case may be, at _____, this ___day of _____, 2013 to be effective as of the date first written above.

SIGNED, SEALED AND DELIVERED in the presence of

THE CORPORATION OF THE MUNICIPALITY OF PLYMPTON-WYOMING

_____
Warden

_____
Clerk

We have the authority to bind the Corporation

SIGNED, SEALED AND DELIVERED in the presence of

SUNCOR ENERGY PRODUCTS INC.

_____
Per:
Title:

I have the authority to bind the Corporation

SCHEDULE"A"

SEPI Asset Document

Suncor Energy Products Inc. ("SEPI") is the project entity for the Cedar Point Wind Power Project ("Cedar Point Wind Power Project") a portion of which is located in the Town of Plympton-Wyoming, Ontario. SEPI is the owner of a Feed In Tariff Contract with reference number FIT-002175-WIN-601-160 (FIT Contract).

The Cedar Point Wind Power Project will generate 100 megawatts, and SEPI is the owner of approximately ___ Wind Farm Leases and approximately 15 Easement Agreements to support the infrastructure and facilities for the Project.

SEPI will own all the turbines and infrastructure for the Cedar Point Wind Power Project. SEPI will also have an interest in portions of the transmission lines and facilities supporting the Cedar Point Wind Power Project. The estimated value of the assets of the Cedar Point Wind Power Project, as of the commercial operation date, will be $_____.

SCHEDULE "B"

Approved Road Use Plans

SEPI B1

SEPI Transmission Plan and Profile

SEPI B2

SEPI Transmission Foundation Designs

SEPI B3

SEPI Transmission Pole Configuration

SEPI B4

SEPI Transmission Pole Clear Zone
Mitigation Map

SEPI B5

Table re SEPI Transmission Pole Clearance from Pavement Edge

SEPI B6

SEPI Typical Culvert Cross-Section

SEPI B7a

SEPI T-line Construction Methods

Exhibit B7a

DESCRIPTION OF PROPOSED CONSTRUCTION

Support Structure Assembly and Erection

Support structure assembly will begin with auger drilling of a cylindrical shaft in the soil of appropriate diameter and depth to provide necessary support to the structure. For direct-embedded poles, the bottom section of the pole will be centered in this drilled shaft and the gap between the pole and the soil will be backfilled with crushed rock. For base-plated tubular steel poles, a steel reinforcing bar "cage" and an anchor bolt "cage" will be placed in the shaft and the shaft will be filled with concrete to create a sturdy concrete foundation for the structure. Once the concrete has cured to an acceptable strength, the remaining structure will be assembled and erected on top of this foundation.

Equipment required for construction will likely include a combination of cranes, trucks, and augers.

Conductor Stringing

Once a series of support structures have been erected along the transmission line, the conductor stringing phase can begin. Specialized equipment will be attached to insulators that will properly support and protect the conductor during the pulling, tensioning, and sagging operations. Once the conductors and shield wire are in place, and tension and sag have been verified, suspension units are installed at each suspension point to maintain conductor position. Conductor stringing will continue until the transmission line construction is complete.

SEPI B7b

SEPI Collection Construction Methods

Exhibit B7b

Description of Collection Cable Installation

In general, wind farm collection power cable will be direct-buried in an open-cut trench at a typical depth below grade of 1 meter in accordance with governing codes and standards. A fiber optic cable for wind farm communication and control will normally be co-located with the power cables. Each excavated trench will be backfilled with compacted native and/or imported material to original grade. Typical equipment for this activity consists of trenchers, backhoes, skid-steer loaders, compactors, utility trucks, and cable reel deployment rigs.

At times, it may be necessary to install power and fiber cables using directional drilling. In these instances, the power and fiber cables will by inside a polyethylene casing.

SEPI B8

SEPI Conductor Horizontal Clearances

Exhibit B8

The horizontal cable clearance is defined for cable under conductor Blowout Wind condition as specified in C22.3 No.1Section 5.2.7 & A5.2.7. The horizontal clearance requirements are specified in C22.3 No.1 Table 6 (Railroad), Table 9 (building, signs, fence, etc.), Table 10 (bridges) and Table 35 (flashover for tree pruning).

SEPI B9

SEPI Collection Longitudinal Cross-Sections

SEPI B10

SEPI Collection Perpendicular Cross-Sections

SEPI B11

SEPI Collection Location Map

SCHEDULE "C"

Appropriate Emergency Service Providers

SCHEDULE "C"

Appropriate Emergency Service Providers

Contact Information:

Ambulance Station

Plympton-Wyoming-London Emergency Medical Services Authority at 519-679-5466

Fire Stations

SEPI Fire Department

SEPI Fire Station
27817 SEPI Road
SEPI, ON N0M 2B0

Fire Chief: Arend Noordhof SEPIfiredept@bellnet.ca

Ailsa Craig and Parkhill Fire Departments

Ailsa Craig Fire Station
159 William Street, Alisa Craig, ON N0M 1A0

Parkhill Fire Station
194 Main Street, Parkhill, ON N0M 2K0

Contact Scott Jones: 519-494-6001

SCHEDULE "D"

Permits and Fees

[NTD: List all permits needed, application requirements and fees associated with granting of such permits]

SCHEDULE "D"

Permits and Fees

**All references to legislation, by-laws and fees in this Schedule shall be interpreted as references to those by-laws and fees as they may be amended, superseded or replaced from time to time*

By-Law Reference	Permit Required with Appropriate Application	Cost
By-law #5783: Use, Construction or Alteration; **By-law #6410**: User Fees	Access/Entrance Permit (authorizing access, via entrance application)	$400 fee + refundable deposit determined by Municipal Engineer
By-law #5783: Use, Construction or Alteration; **By-law #6410**: User Fees	Work Permit (authorizing work and/or services, via work application)	$400 fee + refundable deposit determined by Municipal Engineer
Highway Traffic Act, R.S.O. 1990, Chapter 198; **By-law #6410**: User Fees	Moving Oversize Load/Weight Vehicles on Municipality Roads Permit (via application with utility company and emergency services sign-offs)	Variable fee between $50 and $500 depending on dimensions and weight of load + $500 refundable deposit ($2M liability insurance required)

SCHEDULE "E"

Rights and Remedies Accorded to Secured Parties

1. The Municipality will from time to time execute and deliver such consents and acknowledgements reasonably requested by the Secured Party.

2. The Municipality agrees that, upon the Secured Party giving the Municipality written notice of any security granted by SEPI in the Agreement, the Secured Party will, without any further action being required, have the benefit of the following provisions until such time as the Secured Party advises the Municipality in writing that its security is no longer in effect (and, if the Secured Party so requests, the Municipality will (i) acknowledge in writing that the Secured Party so benefits from these provisions, or (ii) enter into a written agreement with the Secured Party substantially in accordance with these provisions):

   (a) the Municipality will give prompt written notice to the Secured Party of any breach or default by SEPI of its obligations under the Agreement in respect of which the Municipality proposes to exercise any of its remedies;

   (b) the Municipality will give the Secured Party the right to cure any breach or default by SEPI under the Agreement, within a period of 90 days commencing on the later of (i) the expiry of the cure period afforded SEPI under the Agreement, and (ii) the date on which the Municipality gives the Secured Party notice of such breach or default pursuant to Section 2(a), or such longer period of time as the Secured Party may reasonably require to cure such breach or default; and no exercise by the Municipality of any of its rights or remedies against SEPI will be effective against SEPI or the Secured Party unless the Municipality has provided the Secured Party such notice and opportunity to cure.

   (c) the Municipality will, at any time and from time to time, upon not less than ten (10) days' prior request by SEPI or the Secured Party or proposed the Secured Party, execute any agreements, certificates or acknowledgements that SEPI or the Secured Party may reasonably request with respect to this Agreement; and

   (d) all notices to the Secured Party from the Municipality will be in writing and will be sent by personal delivery, registered mail, email or by fax to the address, email address or facsimile number of the Secured Party set out in any notice that the Secured Party delivers to the Municipality.

3. The provisions of Section 2 will enure to the benefit of the Secured Party and its successors and assigns, and any rights conferred on the Secured Party by the terms of this Agreement or limiting its liability under the Agreement will benefit each receiver or receiver-manager appointed by the Secured Party or by a court of competent jurisdiction.

4. The Municipality hereby acknowledges that SEPI may grant security to a trustee or collateral agent acting on behalf of one or more lenders (a "Collateral Agent"), and the Municipality hereby acknowledges and agrees that upon its receipt of notice that such security was granted, the Collateral Agent will be entitled to all of the rights of the Secured Party set forth in this and such notice will constitute notice of the existence of the Collateral Agent as the Secured Party.