

ENVIRONMENTAL & ENERGY LAW

CITY CAN'T SUBSTITUTE A DIFFERENT ACCESS/ TRANSPORT ROUTE FOR ONE SPECIFIED IN REA

Stanley D. Berger B.C.L.,L.L.B, Certified Specialist Environmental Law

On August 13, 2015 the Ontario Divisional Court in *Wpd Sumac Ridge Wind Inc. v. Corp. of the City of Kawartha Lakes 2015 ONSC 4164* quashed a resolution passed by the City which would have blocked all requests by the holder of a Renewable Energy Approval ("**REA**") for use of an unopened portion of Wild Turkey Road ("**The Road**") for the purpose of access and/or other vehicular traffic to support its approved wind turbine development. The Court found that the Resolution could not operate to frustrate the REA and that in any event, the City had acted for the improper purpose of stopping the development project rather than the legitimate exercise of its jurisdiction over roadways and was for that reason acting in bad faith. It is important to note however, that even if the City had sincerely sought to exercise its legitimate jurisdiction over roadways, its resolution would have nevertheless been quashed. At par. 51 the Court stated:

"[51] When the Ministry issues an REA, it approves the specific and detailed application submitted by the proposer. Consequently, the City's argument that other access routes would be preferable to (The Road) is beside the point. The REA as granted contemplates (the Road) as the spine of the project. Refusing to permit its use as the Resolution purports to do, even if it were otherwise a legitimate exercise of the municipality's jurisdiction over roadways, would frustrate the purpose of the REA. The Resolution must be declared inoperative to that extent. As previously noted, the City may legitimately require agreements with respect to indemnity, liability, decommissioning costs and the like. But it may not exceed the limits on its authority imposed by s.14 of the (Municipal Act)."

This reasoning is consistent with two previous decisions of the same court, *Suncor Energy Products Inc. v Plympton –Wyoming (Town), 2014 ONSC 2934*, in which Fogler Rubinoff acted for the wind turbine developer and *East Durham Wind Inc. v West Grey (Municipality), 2014 ONSC 4669*.



Albert M. Engel, Partner
416.864.7602
aengel@foglers.com



Stanley Berger, Partner
416.864.7626
sberger@foglers.com



Yadira Flores, Associate
416.365.3744
yflores@foglers.com



Tom Brett, Partner
416.941.8861
tbrett@foglers.com

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K1G8

Tel: 416.864.9700
Fax: 416.941.8852
foglers.com