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April 17, 2013

BY COURIER, EMAIL AND RESS

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
Toronto, ON  
M4P 1E4

Dear Ms. Walli:

**Re: Wainfleet Wind Energy Inc.  
Board File No. EB-2013-0031**

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Please find attached the Decision of The Honourable Justice Robert. B. Reid of the Ontario Superior Court of Justice in the matter of *Wainfleet Wind Energy Inc. v. Township of Wainfleet*. In the decision it was determined the wind turbine set-back by-law is "invalid and without force and effect".

Also attached is an amended Table of Contents (Exhibit A, Tab 1, Schedule 1) to include the court's decision (Exhibit B, Tab 4, Schedule 1).

The aforementioned documents have been filed on RESS and two (2) hardcopies are being couriered to the Board's office at this time.

Yours truly,

AIRD & BERLIS LLP

*Original Signed*

Scott Stoll

SAS/hm

14475583.1

## **EXHIBIT LIST**

<b><u>Exh</u></b>	<b><u>Tab</u></b>	<b><u>Schedule</u></b>	<b><u>Title</u></b>
<b>A- ADMINISTRATIVE</b>			
A	1	1	Exhibit List
	2	1	Application
	3	1	Summary of Pre-filed Evidence
<b>B – PRE-FILED EVIDENCE</b>			
B	1	1	The Applicant
	2	1	Project Description
			<i>Appendix A – Project Site Plan</i>
	3	1	Proposed Use of Municipal Road Allowance
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	3	2	Communication with Municipality
			<i>Appendix A – Letter to Township dated Dec. 12, 2010</i>
			<i>Appendix B – Township Moratorium Resolution</i>
			<i>Appendix C – Ratepayer Presentation to Council Jan. 24, 2012</i>
			<i>Appendix D – Wainfleet Wind Presentation to Council Jan. 24, 2012</i>
			<i>Appendix E – Council Minutes of Meeting – January 24, 2012</i>
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B	3	2	<i>Appendix I - Council Minutes of Meeting – March 27, 2012</i> <i>Appendix J – March 28, 2012 Letter to Township</i> <i>Appendix K – Wind Turbine By-law</i> <i>Appendix L - Council Minutes of Meeting – April 10, 2012</i> <i>Appendix M – Letter to Region and Letter to Township September 2012</i> <i>Appendix N - Council Minutes of Meeting – Sept. 25, 2012</i> <i>Appendix O – Letter to Township January 3, 2013</i> <i>Appendix P – Letter from Township to Wainfleet Wind</i>
B	4	1	Court Decision – Wainfleet Wind Energy Inc. v. Township of Wainfleet

## **Exhibit B / Tab 4/ Schedule 1**

**CITATION:** Wainfleet Wind Energy Inc. v. Township of Wainfleet, 2013 ONSC 2194

**COURT FILE NO.:** 53800/12

**DATE:** 20130412

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

WAINFLEET WIND ENERGY INC.

Applicant

– and –

THE CORPORATION OF THE  
TOWNSHIP OF WAINFLEET

Respondent

)  
)  
)  
) C. Williams, J. Johnson, and S. Stoll, for the  
) Applicant

)  
)  
) D. DeLorenzo and S. Draper, for the  
) Respondent

)  
)  
) M. Horner, for the Intervenor, Attorney  
) General for Ontario

)  
) HEARD: March 13 and 14, 2013

**THE HONOURABLE ROBERT B. REID**

**REASONS FOR JUDGMENT**

- [1] Wainfleet Wind Energy is in the process of developing a five turbine renewable power facility in Wainfleet, Ontario. It seeks a declaration that a municipal by-law enacted by the Township relating to wind turbine development should either be quashed or does not apply to its project.
- [2] The Township defends its by-law, and argues that if the by-law is unenforceable or *ultra vires*, certain provisions of *Regulation 359/09*<sup>1</sup> made under the *Environmental Protection Act*<sup>2</sup> (“EPA”) and certain provisions of the *Planning Act*<sup>3</sup> are contrary to section 7 of the *Canadian Charter of Rights and Freedoms*<sup>4</sup> and as a result are invalid.

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<sup>1</sup> O. Reg. 359/09 “Renewable Energy Approvals under Part V.0.1 of the Act”, ss. 53, 54, 55.

<sup>2</sup> R.S.O. 1990, c. E.19.

- [3] Because of the constitutional challenge, the Attorney General for Ontario has intervened, defending the constitutional validity of the legislation.

**Conclusion:**

- [4] For the reasons set out below, there will be a declaration that the by-law is invalid and without effect.

**Background facts:**

- [5] Wainfleet Wind Energy has completed an application to the Ontario Ministry of the Environment for approval of its wind farm project.
- [6] The Province's regulations provide that industrial wind turbines ("IWTs") must be constructed at least 550 metres from identified noise receptors<sup>5</sup> and that applicants for approval must provide detailed information concerning noise to be generated by the project<sup>6</sup>.
- [7] The Township passed a by-law pursuant to the *Municipal Act, 2001*<sup>7</sup> requiring IWTs to have a minimum two kilometre setback from "property" as defined in the by-law. According to the evidence of the Township's Mayor, the by-law was enacted to protect health, safety and well-being, to protect persons and property, to deal with public nuisances, and to deal with noise and vibrations.

**Issues:**

- [8] This application raises the following issues:
- Is the by-law void for vagueness and uncertainty?
  - Is the by-law in conflict with provincial law?
  - Is the by-law outside the Township's municipal authority?
  - Is the by-law applicable to Wainfleet Wind Energy's project?

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<sup>3</sup> R.S.O. 1990, c. P.13, s. 62.0.2(6).

<sup>4</sup> *Constitution Act, 1982*, (U.K.), being Schedule B to the *Canada Act, 1982*, c.11.

<sup>5</sup> O. Reg. 359/09, s. 54.

<sup>6</sup> Noise Guidelines for Wind Farms, Ministry of the Environment, October 2008, par. 1.

<sup>7</sup> S.O. 2001, c.25.

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- If the by-law is unenforceable or *ultra vires* because of inconsistency with provincial law or regulation, is the law or regulation in violation of section 7 of the *Charter*?

**The By-law:**

- [9] The Township, through its Council, is on record as opposing wind turbine projects pending further scientific research as to how such facilities might affect residents' health. In March 2011, a resolution was passed requesting that the province place a moratorium on any new IWT development.
- [10] At its January 24, 2012 meeting, Township Council heard a presentation from the Wainfleet Ratepayers Association requesting that Council enact a by-law creating a minimum setback for IWTs of two kilometres from residences and requiring 100% restitution from IWT developers for any loss in property value arising from IWT construction. As a result, the Council directed its staff to work with the Association to create a draft by-law implementing the requested restrictions.
- [11] A draft by-law was produced. It received first and second readings on March 27 and third reading on April 10, 2012, following which it was enacted.
- [12] The by-law applies to all property in the Township and sets out three prohibitions related to IWTs of a certain size as follows:
1. For the Construction, erection or operation of any IWT inside the Municipality, there shall be a minimum Setback of a distance of 2 km from any property measured from the tip of the rotor blade in horizontal position;
  2. In any case, noise emitted by the IWT shall not exceed 32 dB at the nearest property;
  3. The Developer shall provide an indemnification of 100% for any loss of property value or adverse health effect directly or indirectly caused by an IWT.
- [13] The by-law defines "property" to mean "property line, vacant land, dwelling or structure and their inhabitants of all species used for private or business or public purposes."
- [14] The parties acknowledge that the by-law, if valid and enforceable, will block Wainfleet Wind Energy's project as presently constituted.



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- [15] Wainfleet Wind Energy submits that no IWTs could be located anywhere within the Township under the by-law, but this is disputed by the Township. The minimum area around an IWT within which no "property" could be located pursuant to the by-law appears to be a circular area of 13.2 km<sup>2</sup>. The Township is comprised of a total land area of approximately 217.4 km<sup>2</sup>. No detailed analysis was conducted by either party to demonstrate whether the by-law would allow for an IWT project somewhere in the Township. The only evidence on this point is the opinion of Township planning staff in a report to Council that: "Based on a preliminary analysis, the effect of this by-law would be to eliminate the potential for wind turbines in Wainfleet."
- [16] There is no allegation of bad faith on the part of Township Council. In fact, it appears that the by-law was produced and enacted as a direct result of participatory democracy by Township ratepayers. It was motivated by concern about public health arising primarily from the noise generated by IWTs.
- [17] At the hearing of this application, the indemnification provision of the by-law was acknowledged to be an invalid exercise of municipal power. The Township proposed that it be severed from the balance of the by-law.

**Provincial Green Energy Legislation:**

- [18] In 2009, the Province enacted the *Green Energy and Green Economy Act, 2009*<sup>8</sup> ("GEA"), which amended several statutes including the *Planning Act*<sup>9</sup> and the *EPA*.
- [19] In the preamble to Schedule A of the *GEA*, its purposes are identified:

The Government of Ontario is committed to foster the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy."

- [20] A "renewable energy project" is defined in subsection 1(1) of Schedule A as the construction, installation, use, operation, changing or retiring of a renewable energy generation facility. A "renewable energy generation facility" is defined (as in the *Electricity Act, 1998*<sup>10</sup>) to mean a generation facility that generates electricity from a renewable energy source. A "renewable energy source" is defined to include an energy source that is renewed by natural processes and includes wind.

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<sup>8</sup> S.O. 2009, c.12, Sched. "A".

<sup>9</sup> R.S.O. 1990, c. P 13.

<sup>10</sup> S.O. 1998, c. 15, Sched. "A", s.2(1)..



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- [21] 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, subsection 62.0.2(6) 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).
- [22] The provincial requirements for approval of a renewable energy project are set out in Part V.0.1 of the *EPA*, as detailed in *Regulation 359/09*. That comprehensive process 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. An appeal may be taken from the Director's decision to the Environmental Review Tribunal, and a further appeal could be made to the Divisional Court or to the Minister.
- [23] Wind facilities are specifically included in *Regulation 359/09*. In section 54, wind turbines of the nature proposed in Wainfleet Wind Energy's project application must be located at least 550 metres from the nearest noise receptor. A "noise receptor" is, in effect, a place which provides overnight accommodation or is an educational facility, day nursery or place of worship, or vacant land zoned for such a use.
- [24] If there is a conflict between any provision of the *EPA* or its regulations and any other Act or regulation, section 179 of the *EPA* sets out that its provisions or regulations prevail.

**Municipal Act, 2001 provisions:**

- [25] Municipalities may exercise both broad and specific powers pursuant to the *Municipal Act, 2001*.
- [26] In general, subsection 8(1) of the *Act* requires municipal powers 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."
- [27] Subsection 11(2) states that a municipality is empowered to pass by-laws concerning its economic, social and environmental well-being and the health, safety and well-being of persons.
- [28] Subsection 128(1) provides that a municipality may prohibit and regulate matters that in the opinion of council are or could become or cause public nuisances. As well, section 129 entitles a municipality to prohibit or regulate noise and vibration.

- [29] Subsection 14(1) states that "a by-law is without effect to the extent of any conflict with a provincial [...] Act or a regulation made under such an Act; or an instrument of a legislative nature [...] made or issued under a provincial [...] Act or regulation."
- [30] Further, subsection 14(2) sets out that "there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in [subsection 14(1)], if the by-law frustrates the purpose of the Act, regulation or instrument."

**Is the by-law void for vagueness and uncertainty?**

- [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.<sup>11</sup> 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 IWTs.
- [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 IWTs. 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 IWTs 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.

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<sup>11</sup> *Neighbourhoods of Windfields Limited Partnership v. Death*, [2007] O.J. No. 5081 (S.C.J.) at para. 26



- [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 IWT 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 IWT 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 IWT 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.<sup>12</sup>

**Is the by-law in conflict with provincial law?**

- [41] Although it is not critical to the outcome of this application based on my finding as to vagueness and uncertainty, I wish to deal briefly with the other submissions raised by the parties.
- [42] Wainfleet Wind Energy submits that the minimum setback and noise level requirements in the by-law are in conflict with the provincial regulation.
- [43] The by-law contains a prohibition of IWT construction within two kilometres from property with a 32 dB maximum for noise at the nearest property. The provincial

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<sup>12</sup> *Neighbourhoods of Windfields* at para. 26.

standards require a 550 metre minimum setback and maximum 40 dBA at the nearest noise receptor. Since there are different measuring points - i.e. property and noise receptors - it is difficult to make a direct comparison. Similarly, the sound measurement scale is different as between the by-law and the regulation. The provincial standard is based on a measurement which relates to the way humans perceive sounds whereas the municipal by-law uses an unadjusted measurement.

- [44] The provincial standards are part of a comprehensive regulatory scheme pursuant to which an applicant must seek approval for its project. Based on submissions received, the Director can accept or reject an application for IWT construction relying on a variety of criteria, and can change the 550 metre minimum setback.
- [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 IWT 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.
- [46] The substance of the by-law deals with setback and noise. These same matters are part of the provincial application process with standards set out in the regulations and guidelines. One might ask what good is the by-law (even if the definitions were drafted more carefully), if it will always be trumped by the provincial legislation in the event of conflict?
- [47] The province has relied on significant scientific evidence and public consultation in arriving at the 550 metre minimum setback distance. Its process for establishing the setback requirements in *Regulation 359/09* has been reviewed and approved by the Divisional Court<sup>13</sup> and the Court noted that if anyone wishes to challenge a proposed project based on health concerns, he or she can do so as part of the provincial application process.
- [48] The Township apparently intended to submit the by-law to the Director for his consideration as part of the approval process. Even if the by-law was valid, I fail to see how the Director could find it relevant to the approval process since it was devised based on general ratepayer concerns about potential harm from noise, rather than any direct evidence. Of course, the possible relevance of the by-law to his consideration is a decision for the Director to make.
- [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

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<sup>13</sup> *Hanna v. Ontario (Attorney General)*, [2011] O.J. No. 944 (Div. Ct.) at para. 29.



purpose of the *GEA* 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<sup>14</sup> 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 IWTs 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 IWTs anywhere in the Township.

**Is the By-Law outside the Township's Municipal Authority?**

- [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

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<sup>14</sup> s. 62.0.2 (6).

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.

**Other Issues:**

- [56] Based on my decision that the by-law is without force and effect, it is not necessary for me to determine whether it is specifically applicable to the Wainfleet Wind Energy project.
- [57] Similarly, as to the constitutional issue, it is not necessary to determine whether the provincial enactments under the *GEA* and *EPA* deprive the residents of Wainfleet of various protections afforded under the *Charter*, since I have not relied on those legislative provisions in making this decision. It is well-established that constitutional issues should not be decided where it is not necessary to do so.

**Summary:**

- [58] For the reasons noted above, by-law 013-2012 enacted by the Council of the Corporation of the Township of Wainfleet is invalid and without force and effect as a result of vagueness and uncertainty. This determination arises from the definition of "property" contained in the by-law and on the agreement of the parties that the indemnification provisions of the by-law were an invalid exercise of municipal power.
- [59] If the by-law was otherwise valid, and if the applicant is successful in securing approval for its wind power generating facility on terms that are in conflict with the by-law, the by-law would be without effect pursuant to subsection 14(1) of the *Municipal Act, 2001*.
- [60] If the by-law was otherwise valid, there would have been a conflict between the by-law and provincial legislation if evidence established that the effect of the by-law was to prohibit IWT development anywhere within the Township. In that event, the by-law would be without effect pursuant to subsection 14(2) of the *Municipal Act, 2001*.
- [61] The enactment of the by-law was not outside the Township's municipal authority.

**Costs:**

- [62] If the parties are unable to resolve the issue of costs consensually, I am prepared to receive written submissions according to the following timetable: the applicant is to provide to the respondent and the intervenor its bill of costs together with brief written submissions within two weeks of this date. The respondent is to deliver its response to the other parties within a further week. The intervenor is to deliver its response to the other parties within a further week. The submissions by all parties and any reply submissions



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by the applicant and the respondent (as to the intervenor's submissions) are then to be filed with the court by no later than May 17, 2013.

A handwritten signature in black ink, appearing to read 'Reid J.', is written over a horizontal line.

Reid J.

**Released:** April 12, 2013

**CITATION:** Wainfleet Wind Energy Inc. v. Township of Wainfleet, 2013 ONSC 2194

**COURT FILE NO.:** 53800/12

**DATE:** 20130412

**BETWEEN:**

WAINFLEET WIND ENERGY INC.

Applicant

**- and -**

THE CORPORATION OF THE TOWNSHIP OF  
WAINFLEET

Respondent

**Released:** April 12, 2013