

IN THE MATTER OF the *Electricity Act, 1998* as amended (the "*Electricity Act*");

AND IN THE MATTER OF an application by East Durham Wind Inc. for an Order or Orders pursuant to section 41(9) of the *Electricity Act* establishing the location of the applicant's distribution facilities within certain road allowances owned by the Municipality of West Grey.

**WRITTEN SUBMISSIONS OF
THE MUNICIPALITY OF WEST GREY
(INTERVENOR)**

A. Overview

1. Section 41 of the *Electricity Act, 1998* (hereinafter "Section 41") bestows rights upon transmitters and distributors of electricity to use any public street or highway (or otherwise referenced as "municipal roads") for the placement of the transmitters or distributors infrastructure without the consent of the municipality having jurisdiction.

Electricity Act Excerpts, Tab 1

B. East Durham Is Not A Distributor

2. The Municipality respectfully submits that, presently, East Durham has no authority to construct, operate or own a "distribution system" and accordingly East Durham is not a "distributor"¹.
3. As at the time of this application to the Ontario Energy Board, East Durham had no "standing" (as a distributor) to initiate such application and therefore the Ontario Energy Board has no jurisdiction to issue an Order concerning this application.

Rules of Statutory Interpretation: Plain Reading

4. Unless there is ambiguity in statutory language, a plain reading and application of the legislation should be utilized.

¹The use of the terms *Distribution System* and *Distributor* is based on definitions in the *Electricity Act, 1998*.

5. East Durham neither owns nor operates a “distribution system” and as such it is not a distributor.

Rules of Statutory Interpretation: Strict Reading of Special Privileges

6. The Municipality respectfully submits that there is no ambiguity in the *Electricity Act* however, should the Board determine that the definition of a *distributor* is subject to some ambiguity, the Municipality further submits that the rights bestowed under Section 41 represent a significant and substantial incursion upon the exclusive jurisdiction vested in municipal corporations concerning the use, occupation and alteration of municipal roads.
7. The rights bestowed under Section 41 represent a special privilege granted to transmitters and distributors, not those entities which desire to be *distributors* even those entities that submit applications to be granted the authority to construct and operate a *distribution system*.
8. Where special privileges are granted under statutory authority, the legislation granting such special privilege must be strictly construed.

Re Stronach (1928), 61 O.L.R. 636 (C.A.), Tab 2 (a)

Re Carter and Sudbury et. al. (1949) O.R. 455, Tab 2 (b)

9. It is also well established law in Ontario, that statutes or by-laws that restrict, control or interfere with rights of enjoyment normally vested in the owner of property must be strictly construed.

City of Thunder Bay v. Potts (1982), 39 O.R. (2d) 725 (H.C.J.), Tab 2 (c)

Coleman v. McCallum (1913), 4 O.W.N. 1127 (H.C.J.), Tab 2 (d)

10. The rights bestowed under Section 41 constitute special privileges which clearly impose restrictions and control upon and/or interfere with the rights of ownership vested in the Municipality pursuant to sections 24 through 68 of the *Municipal Act, 2001* concerning roads under its jurisdiction.
11. But for the statutory provisions of Section 41 no person may alter, erect any structures or buildings upon, or occupy a municipal road (including unopened road allowances) without the written consent of the municipality.

The Application of the Plateau Decision

12. East Durham has relied upon the decision of the Board in EB-2010-0253 (*Plateau Wind Inc. and Municipality of Grey Highlands*, hereinafter the “Plateau Decision”) as confirming the application of Section 41 to the *distribution systems* that connect “renewable energy generation facilities” to the local Hydro One Networks Inc. (hereinafter Hydro One) distribution system and IESO Grid.

13. It is the Municipality's respectful submission that there is a significant and distinguishing fact that affects the application of the *Plateau Decision* to this matter.
14. Plateau Wind Inc., at the time of its application to the Ontario Energy Board under Section 41, had received approvals to construct and operate its "renewable energy generation facilities" which also authorized Plateau to construct, own and operate a distribution system (these approvals were the predecessor to the current REA process).
15. The Municipality respectfully submits that the *Plateau Decision* confirms that an entity that is authorized to construct, own and operate "renewable energy generation facilities" does not require a separate license to construct and/or operate the distribution system which connects the approved "renewable energy generation facilities" to the Hydro One distribution system and the IESO Grid, and that such entity is a "distributor" for the purposes of Section 41.
16. The *Plateau Decision* does not apply to an entity which has only applied for authorization to construct, own and operate "renewable energy generation facilities".
17. East Durham is not authorized to construct, own and operate the "renewable energy generation facilities" which gives rise to the need to construct, own and operate the proposed distribution system. If the Board is to rely upon the *Plateau Decision* in rendering a decision in this matter, all of the specific facts must be considered.
18. East Durham has stated that the "Project"² is expected to be approved..."

Application, Exhibit A, Tab 3, Schedule 1, Page 1, Line 14.

19. The Board cannot rely upon the expectations expressed by East Durham. Any such reliance by the Board would be tantamount to a conclusion that the Ministry of the Environment issues approvals in response to every Renewal Energy Approval application or that the REA process is purely administrative.
20. Nothing in Section 41 suggests or implies that the rights afforded thereunder apply to an entity that "expects" to receive approval to construct, own and operate a distribution system.
21. Section 41 does not bestow rights upon an entity that proposes to construct a "distribution system" or that has applied for (but has not received) such license that would authorize the construction of the distribution system (which in this case is an REA for "renewable energy generation facilities").

² At the subject reference, East Durham's "Project" includes both the generation and distribution facilities.

22. Section 41 must be strictly construed when considering applications thereunder. Until such time as East Durham receives an REA for its “renewable energy generation facilities” (or it obtains choose to obtain a separate license for a distribution system) it had/has no right under section 41 to initiate the application herein.
23. East Durham has no standing as a “distributor” and thus the application before the Board under Section 41 is premature and the Board has no jurisdiction to issue an Order.

C. East Durham’s Proposed Locations

24. The Municipality does not dispute the fact that it has not proposed locations for the distribution system.
25. It is not the Municipality’s duty to propose locations. Instead, East Durham must propose locations for agreement by the Municipality.
26. It is the Municipality’s respectful submission that East Durham has not proposed locations and instead has submitted “guidelines” for determining locations.
27. Furthermore, it is the Municipality’s respectful submission that the guidelines proposed by East Durham give East Durham discretion to determine the precise or exact location of the distribution lines.
28. East Durham had identified general locations for its distribution system as set out in Exhibit B, Tab 6, Schedule 1 of the Application. These locations are plotted on large scale maps with reference to road names.
29. East Durham has not identified the locations through reference to legal descriptions which are readily available through the Land Titles Office of Grey County.
30. East Durham has refined its general description of the proposed locations in Section 2 of its Submissions³.
31. In its Application, East Durham has stated that the “only outstanding issue with respect to East Durham’s use of the Road Allowances is the **exact location** (emphasis added) of the Distribution System within the Road Allowances...”.

Application, Exhibit A, Tab 3, Schedule 1, Line 17.

³This refinement constitutes the introduction of “new” evidence that was not contained in the original application. These refinements appear to have originated through East Durham’s response to the Board staff’s interrogatory #4 seeking a list of distribution facilities and identifying the functionality and necessity of the facilities. It should be noted that the specific interrogatory did not request any further information on the proposed location of the facilities.

32. In its Submissions, East Durham has indicated that it attempted to reach agreement with the Municipality. Specifically, East Durham submits "that West Grey has effectively refused to agree on the precise location (emphasis added) of East Durham's Distribution System within the Road Allowances..."

Applicant's Argument in Chief, Page 2, Line 16.

33. Notwithstanding the refinements proposed in East Durham's Submissions, it is the Municipality's respectful submission that East Durham has not truly proposed locations for its distribution but instead has proposed a set of "guidelines" for the location of its proposed "distribution system".
34. It is undeniable that East Durham has not proposed exact or precise locations.
35. The Municipality agrees with East Durham that the Board's role is to determine the exact or precise location.
36. Exact is defined to mean: 1) *not approximated in any way; precise*; 2) *accurate or correct in all details: an exact replica*; 3) *tending to be accurate about minor details*.

Oxford University Press Dictionary, Tab 3

37. Precise is defined to mean: 1) *marked by exactness of expression or detail*; 2) *very attentive to detail*; 3) *exact; particular: at that precise moment*.

Oxford University Press Dictionary, Tab 3

38. *"The Distribution System shall generally be located in the Road Allowances listed..."*.

Applicant's Argument in Chief, Page 3, Lines 6 and 7.

Application Exhibit B, Tab 6, Schedule 1, Lines 6 and 7.

39. The use of the term "generally" in the requested Order is inconsistent with the identification of an exact or precise location.
40. *"Where practicable, and where they meet all applicable engineering, environmental and health and safety standards the Distribution System lines shall be located 1-4 metres from the abutting property line"*.

Applicant's Argument in Chief, Page 4, Lines 18-20.

Application Exhibit B, Tab 6, Schedule 1, Lines 9-11.

41. East Durham has asserted that it has *"proposed appropriate setbacks from abutting property lines, so that the Distribution System will not interfere with*

neighbouring lands while still providing sufficient space to facilitate future road improvements and signage”.

Applicant's Argument in Chief, Page 7, Lines 5-8.

42. “A distinction is made between an original road allowance and a roadway. While original road allowances are those laid out on the original survey by Crown surveyors, a roadway as defined in the *Public Transportation and Highway Improvement Act* is “that part of a highway designed or intended for use by vehicular traffic.

***Russell on Roads*, 2nd Edition, Thomson, Carswell, page 61, Tab 4**

43. A roadway or the “traveled” portion of a public highway may not be located in the centre of the road allowance, depending upon the specific topographical features.⁴ Furthermore, the roadway or traveled portion of the road may actually be located beyond the boundary of the original road allowance.
44. No surveys have been produced by East Durham or provided to the Municipality which identify the location of the roadway/traveled portion of the highway, shoulders and/or drainage within the original road allowance⁵. Accordingly there is no evidence filed by East Durham to confirm its assertion (referenced in paragraph 40 above). It remains unknown/undetermined whether the guidelines submitted by East Durham for determining the location of the distribution facilities would fall within the traveled road, including shoulders and/or road side drainage ditches.
45. The term “where practicable” adds further uncertainty. No indication is given as to whether East Durham has sole discretion to determine what is considered “practicable” or whether the Municipality is given any authority or discretion to determine what is “practicable”.
46. The phrase “*and where they meet all applicable engineering, environmental and health and safety standards*” also adds further uncertainty. Again no indication is given as to whether East Durham has sole discretion to determine whether a final or exact location meets these standards or whether the Municipality is to be consulted or given any authority or discretion to determine there is satisfaction of the standards.

⁴This fact is implicitly recognized in the Municipal Act, 2001 section 65 and 66 (Tab 5) and routinely in case law related to municipal roads (See for example Tab 2, E , *1394170 Ontario Inc. v. The Corporation of the Town of Bracebridge et. al.*, 2010 ONSC 2336, at page 2, paragraph 5).

⁵The Municipality’s use of the term original road allowance means the “allowances laid out in the first or original survey of a Township”, see *Russell on Roads*, 2nd Ed., Tab RP 1-5 page 57.

47. East Durham, even in its Submission which refines the proposed general locations, fails to specifically identify starting and ending points for each segment.
48. Accepted engineering and surveying practices utilize or rely upon a "station-offset" based approach to precisely identify and locate the infrastructure.
49. With respect to applications under section 92 of the *Ontario Energy Board Act*, proponents seeking Board approval to construct electricity distribution lines submit far more detailed information identifying the precise location of the infrastructure.
50. As applications under Section 41 (of the *Electricity Act, 1998*) and applications for leave to construct under section 92 of the *Ontario Energy Board Act*, both address the location and construction of distribution lines, the level of technical supporting documentation should be the same for both applications.
51. In the absence of more detailed information concerning the proposed location, it is the Municipality's respectful submission that East Durham, for all intents and purposes, has merely proposed a set of "guidelines" for the location of the facilities; furthermore, it appears that East Durham could have sole discretion to determine whether the location of the facilities conforms with these "guidelines".
52. The Order requested which creates guidelines effectively usurps the Board's authority to determine the location when there is a dispute between a "distributor" and the Municipality as to the exact location of distribution lines.
53. In the Municipality's respectful submission East Durham has not proposed "locations" and instead has proposed guidelines for the location of its facilities.
54. The Municipality respectfully submits that in issuing an Order under Section 41, the Board must apply the rules of statutory interpretation outlined in Paragraphs 6-9 above.
55. The Board has no authority to issue an Order establishing guidelines for the location of East Durham's distribution lines.

D. Miscellaneous Issues

Attempts to Frustrate Project

56. East Durham has asserted that West Grey "has taken various steps in what appeared to be an attempt to frustrate the Project".

Submissions, Page 9, Lines, 18 and 19.

57. In its Application, East Durham has included documentation to demonstrate “the opposition of the Municipal Council to further wind energy development within the Municipality”.

Applicants Argument in Chief, Exhibit B, Tab 5, Schedule 1, Lines 11 and 12.

58. East Durham has identified “the Project” as both the “generation and distribution assets”.

Applicant’s Argument in Chief, Exhibit B, Tab 2, Schedule 1, Page 1, Lines 10 - 26

59. Only the distribution assets are the subject matter of this proceeding.
60. The Municipality’s position with regard to the further or continued development of wind energy projects within the Municipality and the Province of Ontario is not the subject matter of this proceeding. In any event, the Municipality is entitled to express its “opinion/position” and to lobby the Provincial Government with respect to the Provincial Government’s policy and legislative initiatives concerning wind energy as it does with any other topic or issue that affects the Municipality or municipalities in general (including for example, provincial spending on infrastructure, roads, etc.).
61. The Municipality denies the allegation of an intent to frustrate the Applicant’s desire to construct, own and operate a “distribution system”. More importantly, it respectfully submits that such allegations are not germane to the Board’s duty (to determine the exact or precise location of the infrastructure) as framed by East Durham itself.
62. In its May 23rd, 2013 letter to East Durham being a response to the April 26th, 2013 letter from East Durham to the Municipality, the Municipality clearly acknowledged and admitted that it is an “unwilling host for industrial and wind turbine projects”. That said the Municipality also clearly stated that:

“[n]evertheless, the Municipality is proceeding with negotiations with the economic, social and environmental well being of the municipality, health, safety and well-being of persons and protection of persons and property in mind”.

Application, Exhibit B, Tab 5, Schedule 1, Appendix G at Page 2, 3rd Paragraph and Exhibit B, Tab 5, Schedule 1, Appendix E.

63. The Municipality has been open and transparent about its “overall” position on the continued development of wind energy projects in Ontario, but despite that overall perspective, it would continue to negotiate with East Durham.

64. The Municipality's intention throughout its dealings with East Durham have been guided by the principles of the economic, social and environmental well being of the municipality and the well-being of persons and their property.

Other Demands

65. East Durham has indicated in its Application that the Municipality has "refused to engage East Durham in discussions on where in the Road Allowance the Distribution System will be located" would agree on such locations "...only...if East Durham agrees to certain other demands as described in Exhibit B, Tab 5, Schedule 1".

Application, Exhibit A, Tab 3, Schedule 1, Page, Lines 2-7.

66. There does not appear to be any statement in Exhibit B, Tab 5, Schedule 1 supporting East Durham's assertion. Instead the assertion is simply repeated. The text in the bullet points set out on pages 2-5 therein, reveals that the Municipality was seeking to conduct peer reviews of East Durham's submissions and that the Municipality was also seeking acknowledgment from East Durham of its commitment to pay the cost of such peer reviews.
67. It is a commonly accepted practice, with respect to all forms of development within municipalities, that the developer or proponent of a privately owned project is required to pay the Municipality's cost of conducting peer reviews and this requirement is premised on the accepted principle that the Municipality (and therefore the general tax payer) should not have to pay for peer reviews that are obtained in the public interest to confirm that private development will meet all applicable standards, regulations, rules etc.
68. The Municipality's request for such commitment relates to both: 1) the generation assets and REA process; and 2) the distribution assets and the attempted negotiation of the distribution line location issue.
69. The Municipality's request was and remains reasonable.

Unreasonable Demands

70. East Durham has asserted that the Municipality's request that all buried cable be enclosed in concrete conduit is unreasonable.

East Durham Response to Board Staff Interrogatory 4, page 10.

71. The Municipality has legitimate concerns about the potential for the creation of what is commonly referenced as "stray voltage" through construction and operation of additional new distribution lines in an area where existing distribution lines already exist.

72. East Durham's response to the Municipality concerning stray voltage has been minimal. In terms of the expert opinion/reports found in the materials submitted to the Board by East Durham, the issue of stray voltage is addressed in a single paragraph in the Report at Appendix 2 of the Response to Interrogatories.

East Durham Response to Board Staff Interrogatory 4, Appendix 2, page 28, section 3.6.2.

73. East Durham has not provided any information or report identifying how their proposed distribution system will interact with the existing Hydro One local distribution system and whether it will contribute to and/or increase the potential for the production or creation of stray voltage.
74. East Durham has suggested that Hydro One "oversees stray voltage issues".

East Durham Response to Board Staff Interrogatory 4(ii), page 10, Lines, 28 and 29.

75. As East Durham's distribution lines are not part of Hydro One's local distribution system, it remains unclear how or why Hydro One would be solely responsible for stray voltage that may arise as a result of East Durham's new distribution lines.
76. The Municipality is simply engaging and advocating the precautionary principle rather than supporting a proposal to consider and address stray voltage after the fact.

E. Order Requested

77. The Municipality respectfully requests the Board to dismiss this application on the basis that East Durham is not a "distributor" as it has not received an REA which would authorize East Durham to construct, own or operate the proposed distribution system; therefore it is not entitled to the rights/special privileges of Section 41 of the *Electricity Act, 1998*.
78. In the alternative, the Municipality respectfully requests the Board to dismiss the application as East Durham has merely provided "guidelines" for establishing the location of the distribution systems rather than providing definitive locations for incorporation within an Order of the Board.

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