

Ontario Energy Board

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

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. (“DWPI”) for an Order pursuant to Section 99(5) of the Act granting authority to expropriate land for the purpose of constructing, operating and maintaining transmission and distribution facilities that will connect DWPI’s planned Dufferin Wind Farm to the IESO-controlled grid

**SUBMISSIONS OF JAMES DANIEL BLACK AND
MARIAN ARLENE BLACK IN SUPPORT OF THEIR
REQUEST FOR A STAY OF THE ARBITRATION**

November 22, 2013

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Ontario Energy Board
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cc. Scott Stoll, Aird and Berlis LLP, Counsel for the County of Dufferin
David Crocker, Davis LLP, Counsel for other intervenors

Ontario Energy Board

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

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. (“DWPI”) for an Order pursuant to Section 99(5) of the Act granting authority to expropriate land for the purpose of constructing, operating and maintaining transmission and distribution facilities that will connect DWPI’s planned Dufferin Wind Farm to the IESO-controlled grid

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INTRODUCTION

1. James Daniel Black and Marian Arlene Black (the “Blacks”) request a stay of these expropriation proceedings to the extent that these proceedings affect their lands and until after a final decision has been delivered in the arbitration proceedings referred to herein.
2. The Blacks own two farms in the Township of Melancthon on which they have signed Leases being the “East farm” on part of Lot 23, Concession 2, Old Survey on which the Applicant proposes to construct two wind turbines and the “West farm” being part of Lot 22, Concession 3, Old Survey on which the Applicant proposes to construct one wind turbine, together with related facilities including access roads, crane pads and electrical supply cables as defined in the Lease that are also sometimes referred to as distribution or collector lines.
3. The Blacks signed Leases dated April 15, 2011 that were assigned shortly after their date to the Applicant, Dufferin Wind. There is one Lease for each farm and the Leases are identical except for the property descriptions.
4. The Leases provide, inter alia, in Article 15.07 Arbitration (Attachment H hereto) that “Whenever there is an unresolved dispute [between the Blacks and

the Applicant] involving any of the terms of this Lease, then such dispute shall be resolved by arbitration..." and that the provisions of the Arbitrations Act, 1991 S.O. c.17 shall apply.

5. The Leases also contain a procedure for determining the Leased Premises by having the Tenant, Dufferin Wind, select up to 50 (fifty) 16 metre square blocks on which turbines, access roads and electrical supply cables can be located as set out in Schedule B (Attachment I hereto), compliance with which is one of the issues to be determined in the arbitration.
6. The Blacks issued a notice of action dated April 12, 2013 in the Ontario Superior Court of Justice and as stated in paragraph 7 of the Applicant's submissions, filed a statement of claim dated May 13, 2013. Prior to these documents being served, the Applicant issued a Notice of Application in the Ontario Superior Court of Justice on April 25, 2013 returnable on May 10, 2013 at Barrie that has been adjourned sine die. The Superior Court proceedings have not been discontinued or dismissed but by agreement among the parties are not being proceeded with.
7. The Applicant delivered a Notice of Arbitration dated July 5, 2013 as provided for in the Leases pursuant to which William G. Horton has been appointed arbitrator. As stated in the Applicant's submissions, the arbitration hearing commenced on November 11, 2013 and four days of evidence was heard. The arbitration will resume for a second week commencing December 16, 2013 when the evidence will be completed including the evidence of the Blacks and the expert witnesses for both parties. Written argument is to be delivered by January 3, 2014 and oral argument will be on January 7, 2014.

ALTERNATIVE RELIEF SOUGHT BY DUFFERIN WIND IN THE ARBITRATION

8. The Applicant submitted a Renewable Energy Approval application that included site plans for the locations of wind turbines and related facilities on the Blacks' farms on August 13, 2012 that reflect the Current Site Plans at

Attachments B and F (East farm) and Attachments C and G (West farm). The Ministry of the Environment issued a Renewable Approval on June 12, 2013.

9. The Applicant has filed as part of its evidence on the arbitration documents identified as its Current Site Plans for each of the East and West farms. The Callon Dietz survey filed by Dufferin Wind in these expropriation proceedings shows areas that the Applicant seeks to expropriate for transmission lines that include some of the same lands that are shown on the Dufferin Wind Current Site Plans. The Callon Dietz survey filed herein does not show turbine, crane pad and access road locations.
10. The Applicant as part of its evidence on the arbitration also filed documents on October 9, 2013 that included diagrams or plans identified as Alternative Site Plans for each of the East and West farms with the result that there are now two materially different site plans in evidence showing significantly different locations for turbines, access roads and electrical supply cables.
11. The Applicant as part of the relief that is claimed in the arbitration seeks a declaration that it may site turbines, associated facilities and access roads in accordance with the Current Site Plans or in the alternative, in accordance with the Alternative Site Plans.
12. The documents described below and attached hereto were provided to counsel for the Blacks on October 10 and 15, 2013 pursuant to directions in the Arbitration. Similar versions of Attachments B and D had been provided to the Blacks on November 2, 2011 without the block overlays and similar versions of Attachments F and G also showing construction areas had been provided in about March, 2013. Attachments H and I are extracts from the Leases.

A Letter of Torys dated October 9, 2013 containing particulars setting forth the rights Dufferin is seeking to exercise under the Lease Agreements and of the relief it is seeking at the conclusion of the arbitration that was accompanied by a number of documents including those referred to in the last two paragraphs of the first page as follows at Attachments B to G below

- B 9.1 Proposed Leased Premises > East Farm > Current Site Plan
(aerial photo with block overlay)
- C 9.1 Proposed Leased Premises > East Farm > Alternative Site Plan
(aerial photo with block overlay)
- D 9.1 Proposed Leased Premises > West Farm > Current Site Plan
(aerial photo with block overlay)
- E 9.1 Proposed Leased Premises > West Farm > Alternative Site
Plan (aerial photo with block overlay)
- F 9.1 Proposed Leased Premises > East Farm > Current Site Plan
(Callon Dietz diagram referable to Attachment B above)
- G 9.1 Proposed Leased Premises > West Farm > Current Site Plan
(Callon Dietz diagram referable to Attachment D above)
- H Extract from Black lease dated April 15, 2015 - s. 15.07
Arbitration
- I Extract from Black lease dated April 15, 2015 - Schedule B
(process for determining Leased Premises where turbines, access
roads and electrical supply cables are to be located by selecting up
to fifty (50) 16 metre square blocks)

13. Dufferin Wind's evidence on the arbitration was that Attachments F and G reflect the site plan and turbine layouts that were approved by the issuance of the Renewal Energy Approval on June 10, 2013
14. As of today's date, the Applicant is pursuing in the arbitration both alternative claims. The status of the Alternative Site Plans in relation to the renewable energy regulatory process is not known. The Applicant has made no election in the arbitration as to which alternative it is pursuing nor is it required to do so. The Arbitrator has made no determination of any of the claims of either party.
15. The statement in paragraph 4 of the Applicant's submissions: "The interests in land which the Applicant seeks to expropriate from the Blacks in the Application are in respect of these same two properties." may not to be accurate if the Applicant chooses to pursue only its Alternative Site Plans.

16. One of the issues to be determined in the arbitration as provided for in the Leases is whether the location of the turbines and associated facilities will cause material detriment to the Blacks' farming operations (as provided for in Schedule B of the Lease at Attachment I). There is a high value potato growing business on about 800 acres of family owned and leased land with annual revenues exceeding \$2 million. Both parties have delivered affidavit evidence and/or reports of their expert witnesses addressing the issue of, inter alia, material detriment and who will be cross-examined when the arbitration resumes on December 16, 2013.
17. It is likely that similar evidence will be presented at the expropriation hearing in the context of establishing issues of public interest and comparable issues will arise concerning the impact of the turbine foundations, access roads and buried electrical cables on farming operations including tile drainage systems.
18. The Blacks submit that there are more than only two potential outcomes as suggested by Dufferin Wind in paragraph 9 of its submissions, having regard in particular to its submission for the first time and at this late stage in the development of the project of Alternative Site Plans on October 9, 2013.
19. By way of illustration, the arbitrator could find that the Leases are void leaving Dufferin Wind with no interests in the land; or alternatively that the Leases are valid but that Dufferin Wind has not followed the procedure mandated by the Leases to determine the locations where turbines and associated facilities can be sited or in the further alternative, that such locations cause material detriment to the Blacks' farming operations on one of both farms. In the latter two situations, Dufferin Wind may be able to determine Leased Premises and siting issues anew but this may also require further regulatory approval or an application by Dufferin Wind to amend the Renewable Energy Approval. Dufferin Wind may also not be able to start construction on the Blacks' farms by January 31, 2014 leading to a situation where the Blacks may be in a position to give notice to terminate the Leases.

20. Construction is proceeding on other properties in the project and a Dufferin Wind spokesperson has been quoted in an Orangeville Banner article dated October 2, 2013 that it will not meet its delivery date of January 30, 2014. This cannot be attributed to the Blacks.
21. The Blacks submit that it is not reasonable to proceed with the expropriation proceedings including interrogatories insofar as their land is concerned having regard to the state of uncertainty surrounding that status of the Applicant's Current and Alternative Site plans, which has only arisen in the past six weeks, and that this would not be an effective use of their resources having regard to the fact that they are in the middle of an arbitration that resumes in three weeks.
22. Accordingly, James and Marian Black request a stay of these expropriation proceedings to the extent that they affect their lands until after the completion of the arbitration and the delivery of the Arbitrator's final decision.

All of which is respectfully submitted on November 22, 2013.

James Daniel Black
and Marian Arlene Black
by their counsel Stephen Thom



(Stephen Thom)
Barrister and Solicitor
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Telephone: 416 364-3371
Email: thomsd@sympatico.ca

October 9, 2013

E-MAIL AND COURIER

Mr. William G. Horton
Arbitrator
141 Adelaide Street West, Suite 1108
Toronto, ON M5H 3L5

Ronald B. Moldaver, Q.C.
Davis Moldaver LLP
438 University Avenue
Toronto, ON M5G 2K8

Mr. Paul Bates/Mr. Rob Gain
Bates Barristers Professional Corporation
34 King Street East, 12th Floor
Toronto, ON M5C 2X8

Dear Sirs:

Re: Dufferin Wind Power Inc. v. James and Marian Black et al.

Further to the procedural order of October 4, 2013, please find enclosed: (i) the Blacks' information request, consolidated into one memorandum, with our response, and (ii) a USB of corresponding documents.

The procedural order of October 4, 2013 also requested particulars with respect to the following:

- a. the rights Dufferin is seeking to exercise under the Lease Agreements (including locations of the Leased Areas it has designated or is seeking to designate and the nature and location of other equipment and facilities it is seeking to install on the Blacks' lands); and
- b. particulars of the relief it is seeking at the conclusion of the arbitration.

With respect to (a), the information regarding the Leased Premises is at item #9.1 of the information request, and the corresponding documents. Dufferin Wind seeks to construct turbines, associated facilities, and access roads in accordance with the current plans for each of the Blacks' properties (which are located on the USB at Attachments > 9.1 Proposed Leased Premises > East Farm > Current Site Plan and Attachments > 9.1 Proposed Leased Premises > West Farm > Current Site Plan).

Alternatively, Dufferin Wind seeks to construct turbines, associated facilities, and access roads in accordance with the alternative plans for each of the Blacks' properties (which are located on the USB at Attachments > 9.1 Proposed Leased Premises > East Farm > Alternative Site Plan and Attachments > 9.1 Proposed Leased Premises > West Farm > Alternative Site Plan).

Dufferin Wind also seeks to access and use Adjoining Property in order to construct turbines, associated facilities, and access roads, including setting up temporary construction areas. Dufferin Wind relies on ss. 6.01 to 6.07 and Schedule "B" of the Leases.

Included on the USB is the current schedule for work on the Blacks' land.

With respect to (b), Dufferin Wind seeks:

- a. A declaration that the lease agreements are binding on the parties thereto;
- b. A declaration that, under the terms of the lease agreements, Dufferin Wind may site turbines, associated facilities, and access roads in accordance with the current plans for each of the Blacks' properties (as described above and included with the enclosed USB); or, in the alternative, a declaration that under the terms of the lease agreements, Dufferin Wind may site turbines, associated facilities, and access roads in accordance with the alternative plans for each of the Blacks' properties (as described above and included with the enclosed USB);
- c. Damages incurred as a result of delays, alterations, or changes to the project or the planning of the project caused by the Blacks or as a result of the Blacks' conduct, including but not limited to additional construction mobilization and demobilization costs, additional storage costs, additional permitting and engineering costs, additional weather-delay cost, and lost production;
- d. Dufferin Wind's costs of this proceeding, including the Blacks' share of the arbitrator's fees, and the fees and expenses of counsel and experts (if any), together with interest and taxes.

Depending on the progress of this matter, an issue of interim relief might also arise.

Please let us know if you have any questions.

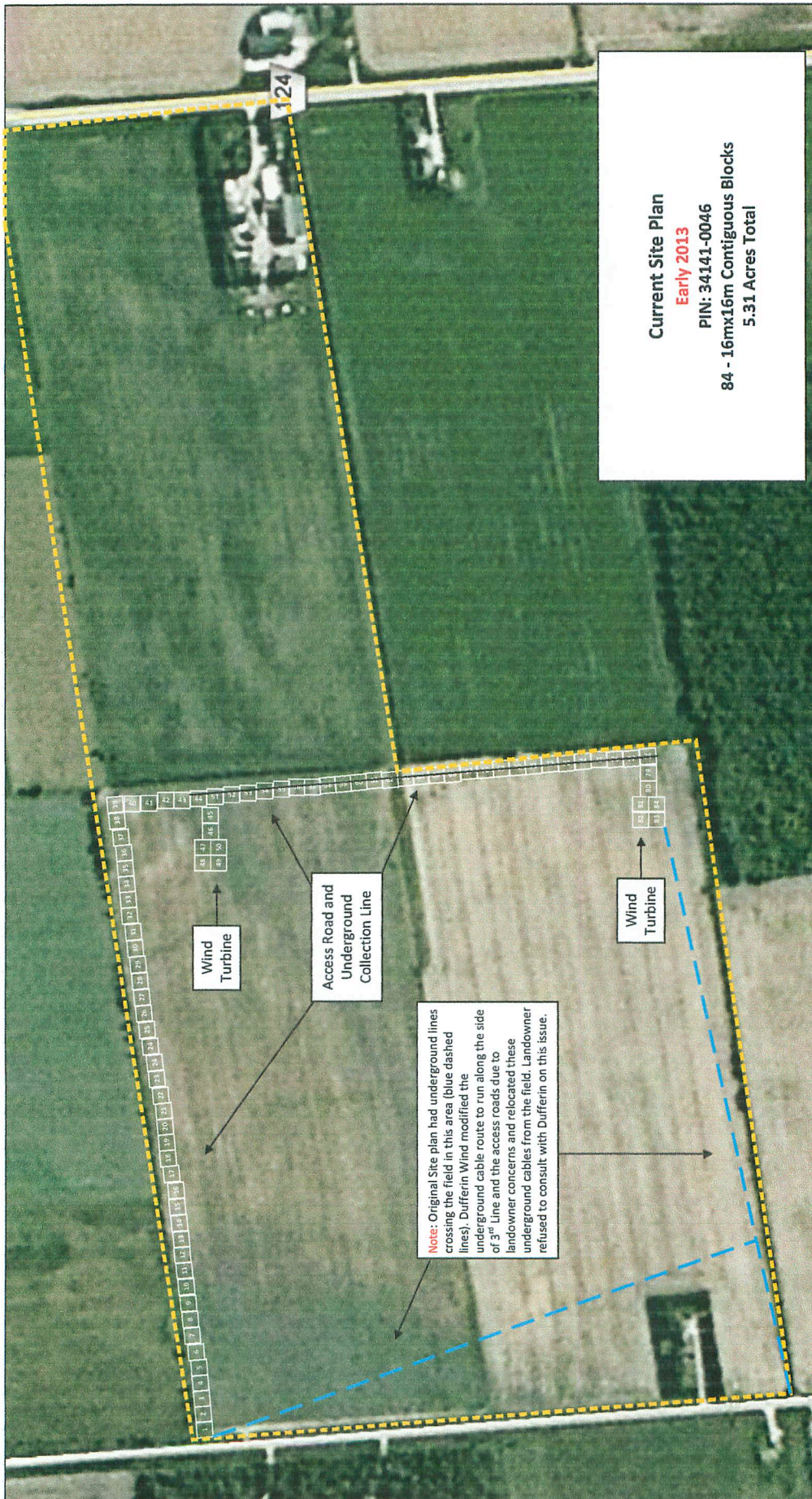
Yours truly,

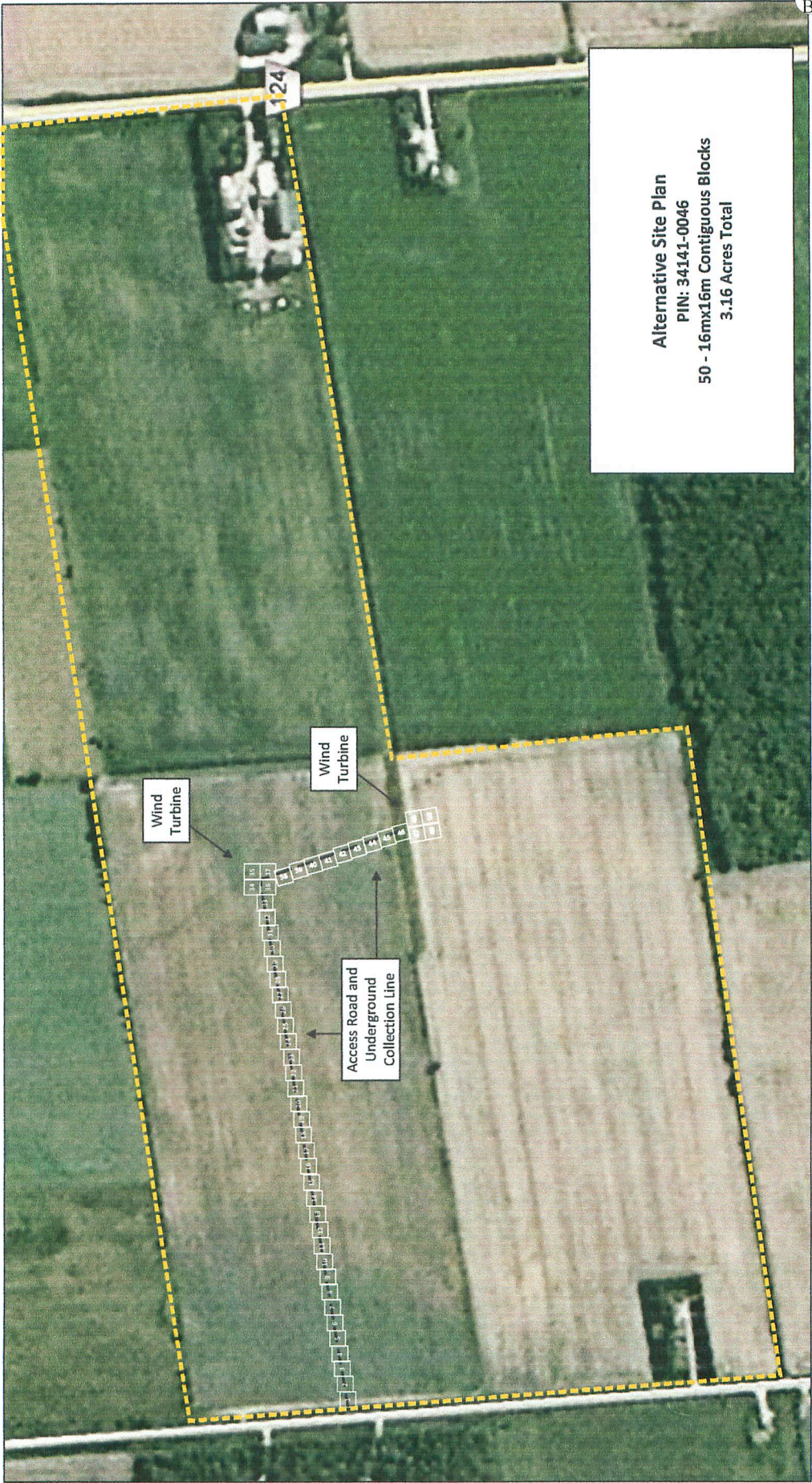


Sarah Shody

cc: John Terry
Stephanie Lafrance

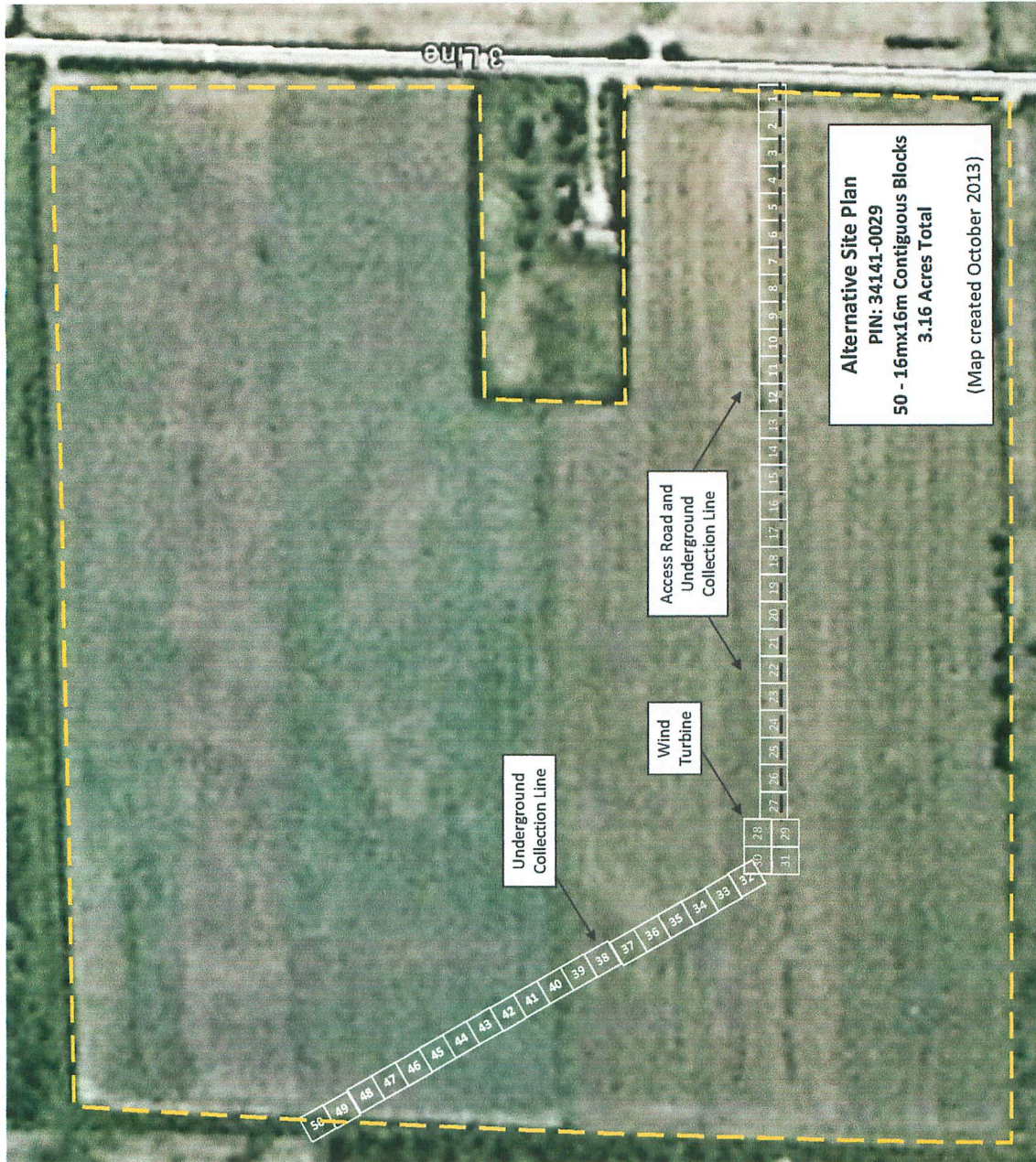
Encl.

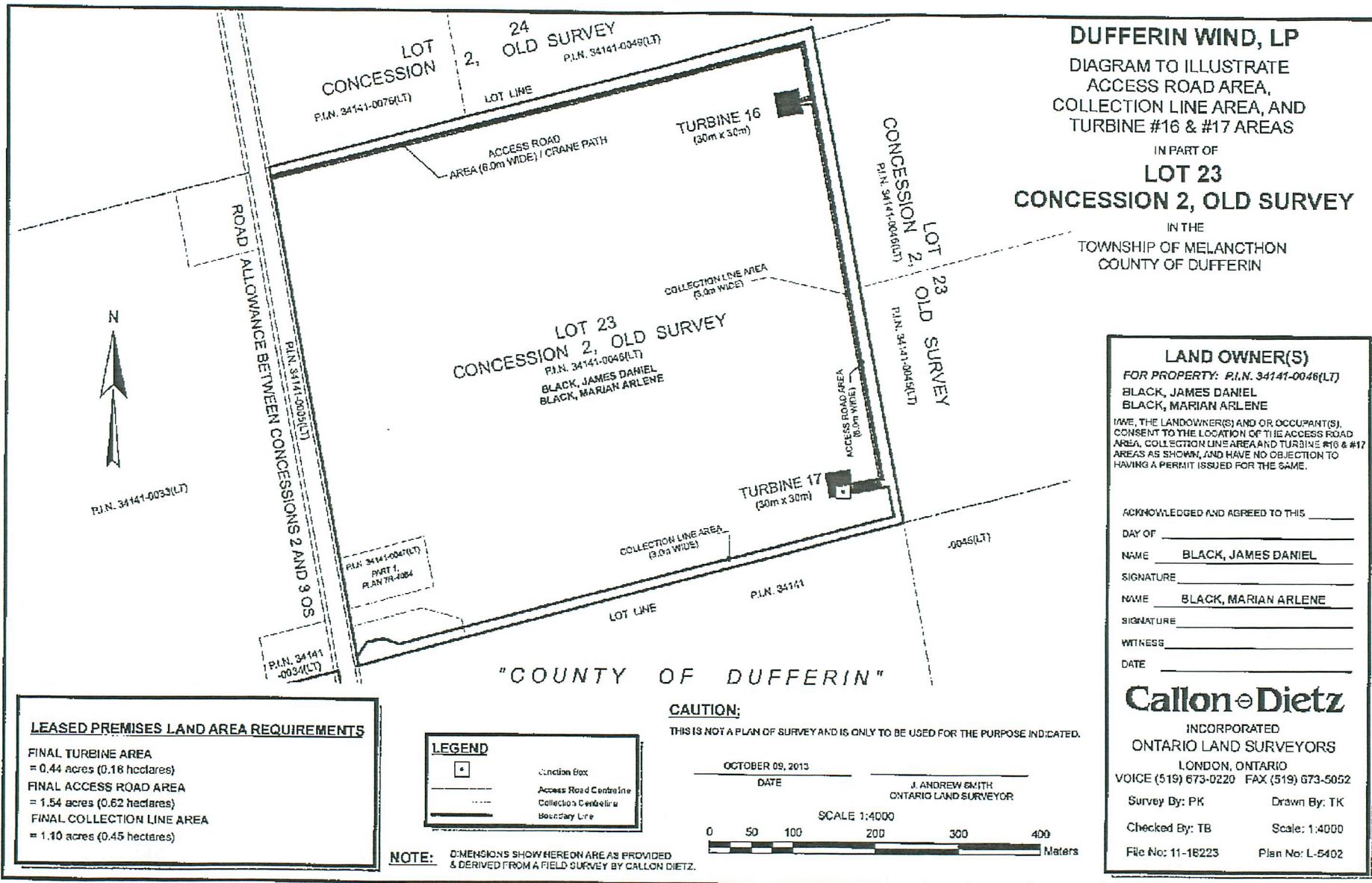




Alternative Site Plan
PIN: 34141-0046
50 - 16mx16m Contiguous Blocks
3.16 Acres Total







LEASED PREMISES LAND AREA REQUIREMENTS

FINAL TURBINE AREA
= 0.44 acres (0.18 hectares)
FINAL ACCESS ROAD AREA
= 1.54 acres (0.62 hectares)
FINAL COLLECTION LINE AREA
= 1.10 acres (0.45 hectares)

LEGEND	
	Junction Box
	Access Road Centreline
	Collection Centreline
	Boundary Line

NOTE: DIMENSIONS SHOWN HEREON ARE AS PROVIDED & DERIVED FROM A FIELD SURVEY BY CALLON DIETZ.

CAUTION:

THIS IS NOT A PLAN OF SURVEY AND IS ONLY TO BE USED FOR THE PURPOSE INDICATED.

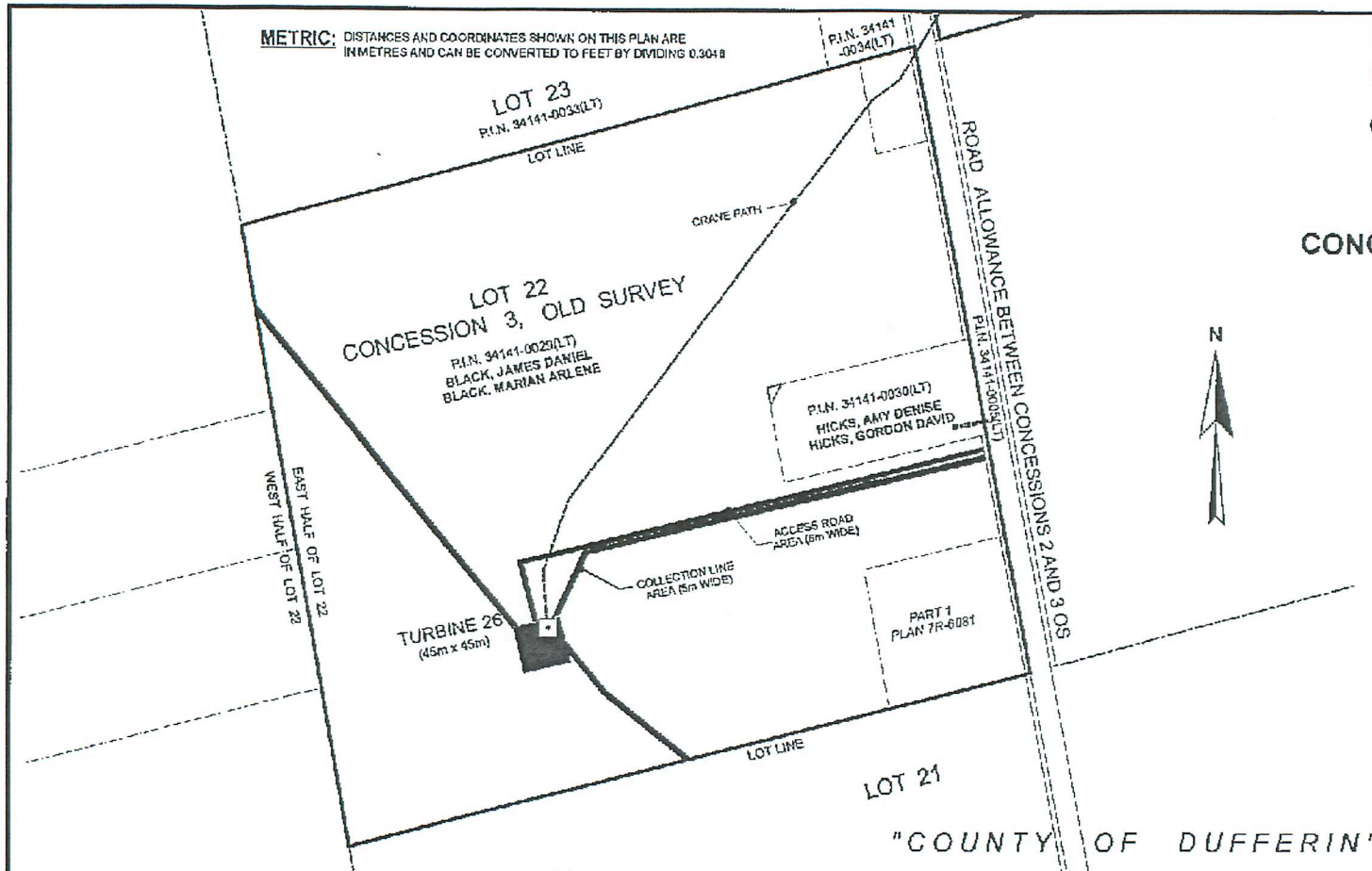
OCTOBER 09, 2013
DATE
J. ANDREW SMITH
ONTARIO LAND SURVEYOR
SCALE 1:4000
0 50 100 200 300 400
Meters

DUFFERIN WIND, LP
DIAGRAM TO ILLUSTRATE
ACCESS ROAD AREA,
COLLECTION LINE AREA, AND
TURBINE #16 & #17 AREAS
IN PART OF
LOT 23
CONCESSION 2, OLD SURVEY
IN THE
TOWNSHIP OF MELANCTHON
COUNTY OF DUFFERIN

LAND OWNER(S)	
FOR PROPERTY: P.I.N. 34141-0046(LT)	
BLACK, JAMES DANIEL	
BLACK, MARIAN ARLENE	
I/WE, THE LANDOWNER(S) AND/OR OCCUPANT(S), CONSENT TO THE LOCATION OF THE ACCESS ROAD AREA, COLLECTION LINE AREA AND TURBINE #16 & #17 AREAS AS SHOWN, AND HAVE NO OBJECTION TO HAVING A PERMIT ISSUED FOR THE SAME.	
ACKNOWLEDGED AND AGREED TO THIS _____	
DAY OF _____	NAME BLACK, JAMES DANIEL
SIGNATURE _____	SIGNATURE _____
NAME BLACK, MARIAN ARLENE	SIGNATURE _____
SIGNATURE _____	WITNESS _____
DATE _____	DATE _____
Callon & Dietz	
INCORPORATED	
ONTARIO LAND SURVEYORS	
LONDON, ONTARIO	
VOICE (519) 673-0220 FAX (519) 673-5052	
Survey By: PK	Drawn By: TK
Checked By: TB	Scale: 1:4000
File No: 11-18223	Plan No: L-5402

METRIC: DISTANCES AND COORDINATES SHOWN ON THIS PLAN ARE IN METRES AND CAN BE CONVERTED TO FEET BY DIVIDING 0.3048

DUFFERIN WIND, LP
 DIAGRAM TO ILLUSTRATE
 ACCESS ROAD AREA,
 COLLECTION LINE AREAS,
 AND TURBINE #26 AREA
 IN PART OF
LOT 22
CONCESSION 3, OLD SURVEY
 IN THE
 TOWNSHIP OF MELANCTHON
 COUNTY OF DUFFERIN



LAND OWNER(S)

FOR PROPERTY: P.L.N. 34141-0029(LT)

BLACK, JAMES DANIEL
 BLACK, MARIAN ARLENE

I/WE, THE LANDOWNER(S) AND/OR OCCUPANT(S),
 CONSENT TO THE LOCATION OF THE ACCESS ROAD
 AREA, COLLECTION LINE AREAS, AND TURBINE #26
 AREA AS SHOWN, AND HAVE NO OBJECTION TO
 HAVING A PERMIT ISSUED FOR THE SAME.

ACKNOWLEDGED AND AGREED TO THIS _____

DAY OF _____

NAME BLACK, JAMES DANIEL

SIGNATURE _____

NAME BLACK, MARIAN ARLENE

SIGNATURE _____

WITNESS _____

DATE _____

Callon & Dietz

INCORPORATED
 ONTARIO LAND SURVEYORS
 LONDON, ONTARIO
 VOICE (519) 673-0220 FAX (519) 673-5052

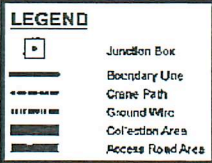
Survey By: PK Drawn By: TK

Checked By: TB Scale: 1:4000

File No: 11-18223 Plan No: L-5403

LEASED PREMISES LAND AREA REQUIREMENTS

FINAL TURBINE AREA
 = 0.50 acres (0.20 hectares)
 FINAL ACCESS ROAD AREA
 = 0.76 acres (0.31 hectares)
 FINAL COLLECTION LINE AREAS
 = 1.24 acres (0.50 hectares)



NOTE: DIMENSIONS SHOWN HEREON ARE AS PROVIDED
 & DERIVED FROM A FIELD SURVEY BY CALLON DIETZ.

CAUTION:

THIS IS NOT A PLAN OF SURVEY AND IS ONLY TO BE USED FOR THE PURPOSE INDICATED.

OCTOBER 03, 2013
 DATE
 J. ANDREW SMITH
 ONTARIO LAND SURVEYOR
 SCALE 1:4000
 0 50 100 200 300 400
 Meters

15.07 Arbitration

Whenever there is an unresolved dispute between the Landlord and the Tenant involving any of the terms of this Lease then such dispute shall be resolved by arbitration referred to a single arbitrator, if the Landlord and Tenant agree upon one; otherwise such dispute shall be referred to **three (3)** arbitrators for resolution, one to be appointed by the Landlord, one to be appointed by the Tenant, and a third arbitrator to be appointed by the first **two (2)** arbitrators as appointed by the Landlord and Tenant respectively within **thirty (30)** days after the first of the first **two (2)** arbitrators have been appointed, (and failing such appointment of the third arbitrator, as aforesaid, the third arbitrator shall be appointed upon the application of either the Landlord or the Tenant by a Judge of the High Court of Ontario, or such person as that Judge may designate). If either the Landlord or the Tenant shall refuse or neglect to appoint an arbitrator within **thirty (30)** days after the other party has appointed an arbitrator and shall have served a written notice upon the party so refusing or neglecting to appoint an arbitrator, requiring such party to make such appointment, then the arbitrator first appointed shall, at the request of the party appointing him, proceed to hear and determine the matters in dispute as if he were a single arbitrator appointed by both the Landlord and the Tenant for this purpose. The award or determination which shall be made by the arbitrator or the majority of them, or by the single arbitrator, as the case may be, both as to the matters in dispute and as to the costs of the arbitration, shall be final and binding upon the Landlord and the Tenant and there shall be no appeal therefrom. Except as otherwise hereinbefore set forth, the provisions of the *Arbitration Act*, 1991 S.O. 1991 c.17, from time to time in effect or any legislation in substitution therefore, shall apply to any arbitration pursuant to the provisions of this Lease, provided that any limitation on the remuneration of the arbitrators imposed by such legislation shall not be applicable.

15.08 Confidentiality

The Landlord covenants that any information to which it has access relating to the Tenant's operations shall be considered as confidential and shall be held in the strictest confidence by the Landlord, and that the Landlord shall not communicate the same orally or in writing to others in any manner whatsoever except as may be required by law and shall use its best efforts to prevent those within its employ and control from communicating to others such information.

15.09 Construction

Each obligation or agreement of the Landlord or the Tenant expressed in this Lease, even though not expressed as a covenant, is considered to be a covenant for all purposes.

The captions or headings introducing articles or sections of this Lease are for convenience of reference only and in no way define, limit, construe or describe the scope or intent of such articles or sections of this Lease or in any way affect the interpretation of this Lease.

The words "herein", "hereof", "hereby", "hereunder", "hereto", "hereinafter" and similar expressions refer to this Lease and not to any particular article, section, paragraph or other portion thereof, unless there is something in the subject matter or context inconsistent therewith.

If any term, provision, covenant or condition of this Lease or its application to any person or circumstance is held to be or rendered invalid, unenforceable or illegal, then such term,

SCHEDULE "B"
PART 1 – DESCRIPTION OF LEASED PREMISES

The Leased Premises means up to **fifty (50)** contiguous or non-contiguous blocks, each measuring no more than **sixteen (16)** metres by **sixteen (16)** metres square in the Designated Area to be selected by the Tenant from time to time during the Term in its sole and unfettered discretion, subject to reasonable objections of the Landlord if the selection of any block would cause material detriment (over and above the loss of available Land) to the Landlord's farming operations.

PART 2 – DESCRIPTION OF DESIGNATED AREA

The Designated Area means the Lands except that part of the Lands:

- (a) on which any house, barn, out building or other existing permanent structure is located (including that part of the Lands on which they are situate) together with that part of the Lands located within a distance less than **thirty (30)** metres from where such structures have been sited; and
- (b) lying within a distance of **ten (10)** metres from any private road, feed station or similar improvement on the Lands.