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Case Name:
Grey Highlands (Municipality) v. Plateau Wind Inc.

Between
The Corporation of the Municipality of Grey Highlands,
Appellant, and
Plateau Wind Inc. and Ontario Energy Board, Respondents

[2012] O.J. No. 847

2012 ONSC 1001

95 M.P.L.R. (4th) 188

2012 CarswellOnt 2699

214 A.C.W.S. (3d) 273

Court File No. 463/11

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

S.N. Lederman, K.E. Swinton and A.L. Harvison Young JJ.

Heard: February 9, 2012.
Oral judgment: February 9, 2012.
Released: February 23, 2012.

(11 paras.)

Counsel:

Michael M. Miller, for the Appellant.

John Terry and Alexander C.W. Smith, for the Respondent, Plateau Wind Inc.

Michael D. Schafner and Kathleen Burke, for the Respondent, Ontario Energy Board.

ORAL REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 K.E. SWINTON J. (orally):-- The Corporation of the Municipality of Grey Highlands ("the Municipality") appeals the decision of the Ontario Energy Board ("the Board") dated April 21, 2011, in which the Board declined to review a previous decision dated January 12, 2011. In the original decision the Board had held that Plateau Wind Inc. is a "distributor" under s.41 of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, and therefore Plateau was entitled to build distribution facilities on the Municipality's road allowances.

2 An appeal lies to this Court on a question of law or jurisdiction (see s. 33(2) of the *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B). Rather than appeal the original decision, the Municipality sought a review of that decision pursuant to Rule 42.01 of the Board's *Rules of Practice and Procedure*.

3 Rule 44.01 sets out the criteria for a notice of motion to review a decision stating:

44.1 Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) error in fact;
 - (ii) change in circumstances;
 - (iii) new facts that have arisen;
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

4 Pursuant to Rule 45.01, the Board held a hearing in writing to determine the threshold question of whether the original decision should be reviewed. It held that a review was not warranted. The Municipality had not shown an error of fact and, in any event, the one alleged error of fact was not material to the decision. In the Board's view, the Municipality essentially restated the legal arguments made in its original submissions. As the Municipality had failed to raise a question as to the correctness of the original decision, the review was refused.

5 The Municipality submits that the Board erred in law by interpreting its review power too narrowly, as its review power permits it to consider alleged errors of law.

6 The standard of review of the Board's decision is reasonableness, as the Board was exercising its expertise and discretion, determining questions of fact and applying its own rules.

7 The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.

8 We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.

9 The appellant argued that the participation of a Board member in the review process gave rise to a reasonable apprehension of bias when that member had participated in the original decision. This argument fails to take into account the difference between an appeal and a review or reconsideration. The participation of a member of the original panel ensured that the review panel would have at least one member familiar with the facts of the case to provide context and to determine the impact of alleged factual errors or new facts and circumstances. Given the highly technical nature of matters before the Board, it makes sense that one of the original members would be present on the reconsideration. Therefore, we would not give effect to this ground of appeal.

10 The Board's reasons clearly set out the basis for the decision and were transparent and intelligible. Therefore, the appeal is dismissed.

11 S.N. LEDERMAN J. (orally):-- I have endorsed the Record to read, "This appeal is dismissed for the oral reasons delivered by Swinton J. The Board does not seek costs. Counsel for the appellant and the respondent, Plateau, have agreed that costs be fixed at \$20,000.00 all inclusive, payable by the appellant to Plateau. So ordered.

K.E. SWINTON J.

S.N. LEDERMAN J.

A.L. HARVISON YOUNG J.

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---- End of Request ----

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Time Of Request: Tuesday, April 29, 2014 14:43:26
