

**Ontario Energy
Board**
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

**Commission de l'énergie
de l'Ontario**
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273



BY EMAIL

April 2, 2015

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4
BoardSec@ontarioenergyboard.ca

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: OEB Staff Submission
Application by wpd Sumac Ridge Inc.
OEB File No. EB-2013-0442**

In accordance with Procedural Order No. 4, please find attached OEB Staff's submission in the above noted proceeding. The applicant has been copied on this filing.

As a reminder, wpd Sumac Ridge Inc.'s reply submission, if any, is due by April 13, 2015.

Yours truly,

Original Signed By

Daniel Kim
Advisor

Encl.



OEB STAFF SUBMISSION

wpd Sumac Ridge Inc.

EB-2013-0442

April 2, 2015

Introduction

wpd Sumac Ridge Incorporated (Sumac) filed an application with the Ontario Energy Board (OEB) under subsection 41(9) of the *Electricity Act, 1998* (Act) for an order or orders of the OEB establishing the location of certain distribution facilities within road allowances owned by the Municipality of Kawartha Lakes (Kawartha).

Sumac filed evidence indicating that it has been unable to engage Kawartha in discussions regarding the terms of a road use agreement pertaining to Sumac's use of a portion of Gray Road and a portion of Wild Turkey Road (the Road Allowances) for the Distribution System.

Sumac is accordingly relying on its statutory right under section 41 of the Act to utilize the Road Allowances without the consent of the owner. The nature of the rights granted by section 41 is as follows:

Section 41(1) of the Act states:

A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.

Subsection 41(9) of the Act states:

The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

Issue

The OEB issued Procedural Order No. 4 on March 16, 2015, asking for written submissions on the following two issues:

1. Are the “unopened” or “unassumed” Road Allowances covered by the application “public street[s] or highway[s]” as contemplated by section 41 of the Act.

2. What portion of the Road Allowances covered by the application are “unopened” or “unassumed”.

Discussion and Submission

1. Are “unopened” or “unassumed” road allowances covered by the application “public street[s] or highway[s]” as contemplated by section 41 of the Act?

OEB staff notes that the terms "opened" and "assumed" refer to a municipality's obligation to clear and maintain a road allowance and have no impact upon the status of a road allowance as a public highway. There is nothing in law to suggest otherwise.

OEB staff submits that the unopened Road Allowances on Gray Road and Wild Turkey Road are owned by the Kawartha. In its letter filed with the OEB on February 24, 2015 Kawartha sets out its position with respect to the legal rights associated with an unopened road allowance.

Kawartha noted that under the *Municipal Act, 2001* section 30, Gray Road is a public road allowance and as such only the municipality has the right to open and assume these roads. Kawartha argued that the *Municipal Act, 2001* does not grant permission to a distributor to open a municipal public highway and that typically, Kawartha will only assume an unopened road allowance that meets its standards and enhances the overall planned road network. Kawartha stated that Gray Road is a local road that is unopened and is not maintained. Kawartha further stated that it will continue to accommodate placement of distribution infrastructure within Gray Road, but is not contemplating upgrading and opening the road allowance for vehicular traffic.

Dr. Salmon submitted¹ that under the *Ontario Highway Traffic Act* a “highway” is defined as:

Any place or way, including any structure forming part thereof, which or any part of which the public is ordinarily entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor, and includes all the space between the boundary lines thereof; but does not include any area designed or intended, and primarily used, for the parking of vehicles and the necessary passageways thereon.

Dr. Salmon submitted that section 41 of the Act applies to opened public streets and highways, not a historic unopened, unassumed and unmaintained road allowance such

¹ Dr. Salmon's submission, March 3, 2015, page 7.

as Gray Road. Dr. Salmon noted that the current public use of Gray Road is as a historic wild natural recreational trail.

In its reply submission, Sumac stated that whether a road allowance has been “opened” or “assumed” by a municipality does not affect its status as a “public street or highway” and is therefore immaterial to the exercise of Sumac’s rights under section 41 of the Act².

Sumac submitted that contrary to the position taken by Dr. Salmon, the terms “opened” and “assumed” refer to a municipality’s obligation to clear and maintain the road allowance and have no impact upon the status of a road allowance as a public highway. Sumac also noted that interpreting “public street or highway” under section 41 of the Act is also consistent with section 26 of the *Municipal Act, 2001*, which defines highway to include “[a]ll highways that existed on December 31, 2002” and “[a]ll road allowances made by Crown surveyors that are located in municipalities”. Sumac noted that there is no exception made in section 26 for unopened or unassumed road allowances.

Sumac also submitted that the public’s right to use a road allowance can only be removed or restricted by way of a municipal by-law passed in accordance with the procedures set out in sections 34 and 35 of the *Municipal Act, 2001*. Sumac noted that there is no evidence that a closure by-law has been passed with respect to Gray Road or Wild Turkey Road.³

OEB staff support the submission of Sumac and submits that the unopened or unassumed road allowances of Gray Road and Wild Turkey Road are properly considered as public highways for the purpose of section 41(9) of the Act. The unopened road allowances on Gray Road and Wild Turkey Road are Crown surveyed and as such are held by the municipality for the broader public interest as set out in the *Municipal Act, 2001*:

26. The following are highways unless they have been closed:

1. All highways that existed on December 31, 2002.
2. All highways established by by-law of a municipality on or after January 1, 2003.
3. All highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*.

² Reply Submission, March 10, 2015, pages 1-2.

³ Reply Submission, March 10, 2015, page 3.

4. All road allowances made by the Crown surveyors that are located in municipalities.
5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision¹

OEB staff submits that subsection 26(4) of the *Municipal Act, 2001* makes it clear that all road allowances in municipalities that are made by Crown surveyors are public highways. As a public highway, OEB staff submits that Sumac may, over, under or on Gray Road and Wild Turkey Road, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.

OEB staff notes it has reviewed the jurisprudence relating to unopened and unassumed road allowances in order to determine if there has been any judicial consideration given to whether or not they are considered as public highways. Unfortunately the cases do not speak to the issue directly but do provide insight into what rights in law attach to unopened road allowances. For example, in *Goudreau v. Chandos (Township)*, a decision of the Ontario Superior Court, Justice Weekes dealt with an application to determine rights in law respecting an unopened road allowance. He was asked to determine whether a member of the public who used an unopened road allowance for access purposes had the right to cut trees, remove or grade soil and clear natural obstructions in order to permit vehicular use, without the municipality's permission. He held as follows (at paras. 11-12):

There is a sound policy basis for coming to the conclusion that municipal consent is required to improve an unopened road allowance. The province has a great number of unopened road allowances. To rule that consent is not required would make available all of these road allowances for unregulated development. The chaos and destruction that could ensue is frightening to contemplate.

...

I am supported in this approach by the holding of our Court of Appeal in *Scarborough (City) v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, that in a broad general sense a municipality is the trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large.

Justice Weekes held that a member of the public who wants to use an unopened road allowance for access does not have the right to cut trees and remove or grade other

natural obstructions without the express permission of the municipality. The application was dismissed.

While not exactly on point, OEB staff submits that the above decision makes it clear that unopened road allowances are held in trust for members of the public by municipalities which actively regulate and control the use and development of unopened road allowances in the public interest.⁶ Accordingly, a member of the public who wants to use an unopened road allowance for access does not have the right to cut trees and remove or grade other natural obstructions without the express permission of the municipality.⁷ If the road is to be opened, it requires municipal consent and the municipality has complete discretion to determine whether to open a road allowance or not.⁴

While the municipality can open an unopened road by the passing of a by-law, that is a completely separate issue from whether or not an unopened road is a public street or highway. Based on the submissions set out above, OEB staff takes the position that the unopened Road Allowances are public streets or highways.

OEB staff also notes that Kawartha itself, in its letter of February 24, 2015, stated that it “will continue to accommodate placement of distribution infrastructure within Gray Road, but is not contemplating upgrading and opening the road allowance for vehicular traffic. The design and installation of distribution infrastructure should be implemented in a manner complimentary to the use and condition of Gray Road.”

2. What are the parties views on what portion of the road allowances covered by the application are “unopened” or “unassumed”?

It is OEB staff’s understanding that Sumac’s proposed overhead distribution facilities along Gray Road begin at the intersection where Gray Road meets Highway 35 and runs east for approximately 1,750 meters and ends somewhere between Lot 13 and Lot 14⁵. OEB staff also notes that in Kawartha’s February 24, 2015 letter, Kawartha stated Gray Road is unopened⁶. Therefore, OEB staff submits that the proposed distribution facilities along Gray Road appear to be located on an unopened portion of Gray Road.

It is also OEB staff’s understanding that the proposed underground distribution facilities along Wild Turkey Road will be located between Lot 14 and Lot 15 and will be

⁴ *North Kawartha Lakes* [2003] O.M.B.D. No. 1181

⁵ Response to Supplemental Interrogatories, January 21, 2015.

⁶ Letter from Ron Taylor, Director of Development Services, Kawartha Lakes, February 24, 2015, page 2

approximately 20 metres⁷ in length. OEB staff notes that in the Environmental Review Tribunal proceeding, Juan Rojas testified that the northern section of Wild Turkey Road is an open municipal road that provides access to the Manvers Pit, a municipal gravel pit north of Turbine 5. He also testified that a one kilometre section of Wild Turkey Road south from the Manvers Pit to the intersection of Wild Turkey Road and Ballyduff Road is an unopened municipal road allowance⁸. OEB staff notes that the proposed distribution facilities to be located underneath Wild Turkey Road are on an unopened portion of the road. However, that should not impact the OEB's determination of whether or not the requested road allowances are considered a public street or highway under section 41.9, for the reasons stated above.

- All of which is respectfully submitted -

⁷ Response to Supplemental Interrogatories, January 21, 2015.

⁸ Environmental Review Tribunal, Case No's 13-140, 13-141, 13-142, February 19, 2015, page 27