

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

**AND IN THE MATTER OF** an application by Wpd Sumac Ridge Incorporated for an Order or Orders pursuant to section 41(9) of the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A establishing a location for the applicant's distribution facilities on public road allowances owned by the Municipality of Kawartha Lakes, Ontario, as set out in this application.

**SUBMISSION OF THE INTERVENOR, DR. E. SALMON**  
**PURSUANT TO PROCEDURAL ORDER NO. 4**

1. The Ontario Energy Board (the "Board") requested in Procedural Order No. 4 that the Intervenor make submissions on the issue of whether the "unopened" or "unassumed" road allowances covered by the application are "public street[s] or highway[s]" as contemplated by section 41 of the [Electricity] Act as well as on what portion of the road allowances covered by the Application are "unopened" or "unassumed."

**THE FACTS**

**The Applicant did not advise the Board in its Application that both road allowances Gray Road and Wild Turkey are unassumed, unopened and unmaintained**

2. The Applicant's REA application states:

*The Project will be located on privately-owned land and within a municipal road allowance in the City of Kawartha Lakes, Ontario*<sup>1</sup>

---

<sup>1</sup> Wpd Canada Sumac Ridge Consultation Report Section 1.1,  
[http://canada.wpd.de/uploads/tx\\_projectdownloads/suma\\_13\\_cr\\_20120601\\_web.pdf](http://canada.wpd.de/uploads/tx_projectdownloads/suma_13_cr_20120601_web.pdf)

3. The Applicant has been aware since 2010 and is still aware that both Wild Turkey and Gray Road allowances are unmaintained and unopened.
4. There is signage posted at both ends of Wild Turkey Road at the intersections of Gray Road (north end) and Ballyduff Road (south end) that make the designation of the road allowances as being “unassumed” and unmaintained quite clear. It is presumed the Applicant, when formulating the application for REA approval which contains design and construction reports, has observed this signage and ascertained the designation of both Gray and Wild Turkey Road Allowances.



*Fig. 1 - Clear signage posted at various points along Wild Turkey Road allowance including the intersections of Gray Road, Ballyduff Road as well as Waite Road.*

**Evidence Regarding Unopened or Unassumed Sections of Gray Road and Wild Turkey Road Allowances**

5. Mr. Juan Rojas was called as an expert witness during the Environmental Review Tribunal (“ERT”) Hearing relating to this project, *Cham Shan Temple v. Director, Ministry of the Environment*, ERT Case Nos. 13-140/13-141/13-142.
6. Mr. Juan Rojas is the manager of Engineering Services at the Corporation of the City of Kawartha Lakes and has been in this position since 2010. Mr. Rojas manages four divisions for the municipality including Development Engineering, Engineering Infrastructure & Design, Technical Service and Municipal Drains within the City of Kawartha Lakes.
7. A graduate of the University of Ottawa as a civil engineer in 1999, Juan Rojas has had an extensive career within both the private and public sectors. Some of his positions have included that of a field investigator, project engineer and design coordinator. Mr. Rojas has held positions and currently holds a position which includes responsibility for roads and infrastructure capital works projects, which includes project design, environmental assessments as well as oversight of various stages of construction.
8. Mr. Rojas is a Professional Engineer (P.Eng) as well as Project Management Institute Project Professional designation, while his professional associations include The Association of Professional Engineers of Ontario.
9. Mr. Rojas testified at the ERT Hearing regarding the Sumac Ridge wind energy facility and stated:

*... the unopened portion of Wild Turkey Road is an unmaintained road allowance. The COKL (City of Kawartha Lakes) has no plans to open this road allowance, upgrade or maintain this road. The City will only assume an unopened road allowance that meets minimum City standards and enhances the overall planned road network ...The City has no obligation to*

*open this section of Wild Turkey Road to accommodate the proposed development....*<sup>2</sup>

10. Mr. Rojas also testified that to access the project from Highway 35 to the west, there are two municipally-owned routes: Gray Road and Ballyduff Road, both running east from Highway 35.
11. He stated in evidence that the first of these two access routes, “*Gray Road is an unopened municipal road allowance.*”<sup>3</sup>
12. Furthermore, evidence was presented to the ERT as well as the Board that the Applicant had planned to use the unassumed, unopened and unmaintained Gray Road allowance to access Turbines 1 and 3 but changed its plans.
13. The Applicant’s consulting firm, Ortech, explained to the Ontario Ministry of Transportation the reason for the change of plans was that there were “wetlands and species at risk” near and within the Gray Road allowance.<sup>4</sup>

### **The Wild Turkey Road Allowance**

14. Wild Turkey Road, where the Applicant proposes to construct an underground collection system, is an unopened, unassumed and unmaintained road allowance; essentially a dirt track of varying widths. In the winter months, it is only accessible by snowmobile, and those persons on skis and snowshoes.

---

<sup>2</sup> Juan Rojas, Witness Statement, Tab 2, Para. 20-21.

<sup>3</sup> Juan Rojas, Witness Statement, Tab 2, Paras. 7, 8.

<sup>4</sup> Correspondence Between Ortech and MTO, “Sumac Ridge Wind Farm – Revised Conceptual Plans Highway 35 & Gray Road, Geog. Township of Manvers, City of Kawartha Lakes”, August 10<sup>th</sup>, 2011, Evidence of the Intervenor, January 26<sup>th</sup>, 2015, Tab 12.



*Fig. 2 - Unassumed road use at own risk and no maintenance beyond this point signage at the south end at Wild Turkey Road at the intersection of Ballyduff Road with the snowmobile trail in the background. (Photo taken by the Intervenor on March 17<sup>th</sup>, 2015)*

15. The Wild Turkey Road road allowance extends in a north-south direction from the opened section of Wild Turkey Road to the north, crossing Ballyduff Road southwards to



Waite Road. A small portion of the entire 2 km length of the road allowance is open at its north end.

16. All construction the Applicant proposes to undertake is in the unopened portion.



*Fig. 3 - North end of Wild Turkey Road allowance with the snowmobile trail at the intersection of the open section of Gray Road with the same signage at the intersection at Ballyduff Road. (Photo taken by the Intervenor on March 17<sup>th</sup>, 2015)*

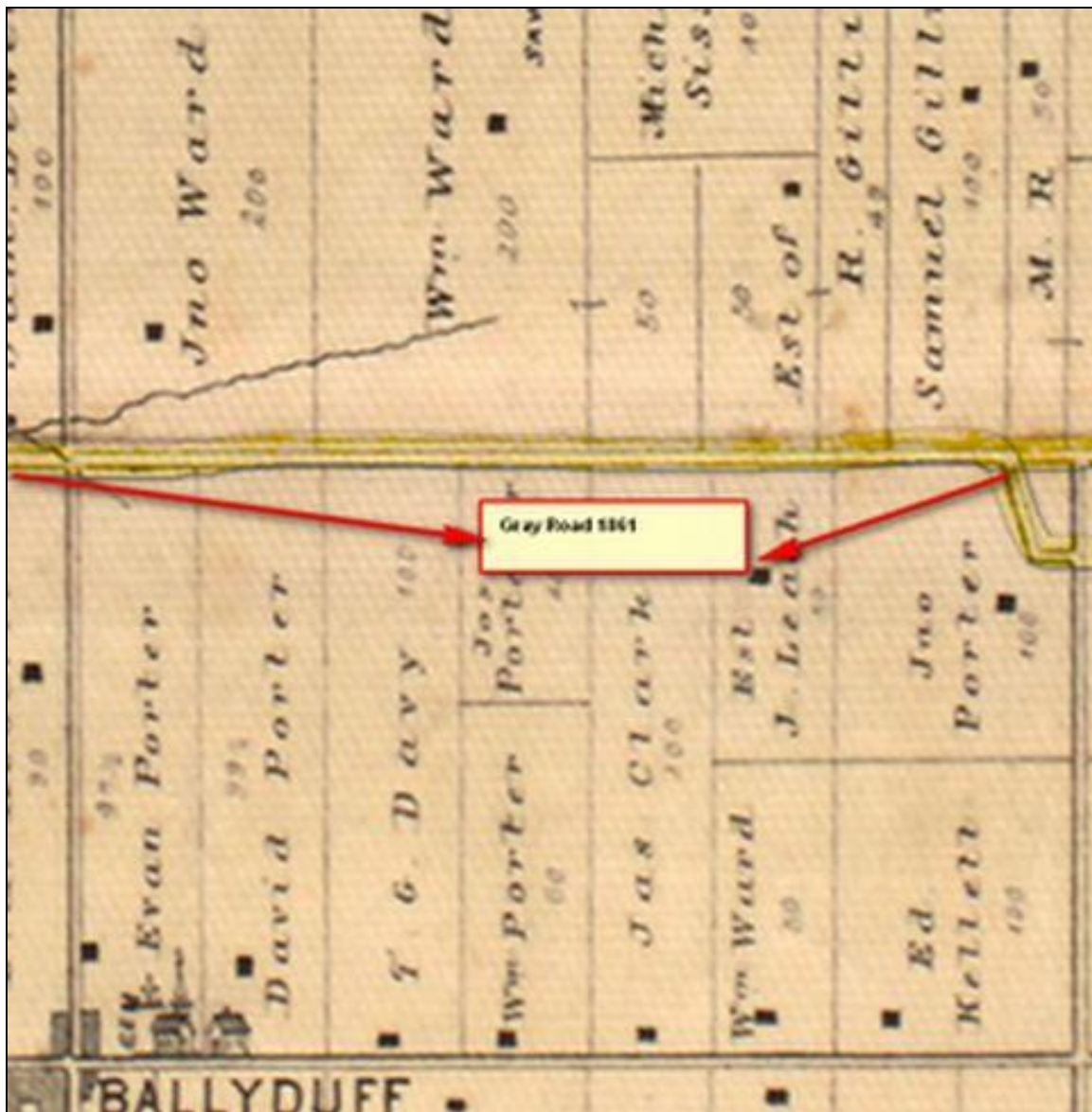
## The Gray Road Allowance

17. The Applicant proposes to construct an overhead distribution line along a 1.75 km length of Gray Road. In order to facilitate this construction, the Applicant will require a 3 m wide zone clear of vegetation along the south side of the road allowance totaling 1.75 km in length. This clear zone will require the destruction of almost all the vegetation in it, including old-growth mature trees, shrubs and native plant material.



*Fig. 4 - Unopened section of Gray Road allowance with City of Kawartha Lakes signage prohibiting any manner of interference with this trail. (Photo taken by the Intervenor on March 17<sup>th</sup>, 2015)*

18. It is obvious from this photograph that there is no vehicular access to this part of Gray Road.



*Fig. 5 - 1861 Tremaine Map. The trail has naturalized and is no longer a clear straight road allowance.*

19. There is a now a significant deviation in the path of the road allowance to the south approximately 100 m east from the entrance at Highway 35. This deviation may have resulted over time in order avoid the water that flows across this section. The Applicant



proposes to erect 22 hydro poles within the south side of the road allowance. The area where the unopened road allowance deviates to the south abuts a fence line.



*Fig. 6*

20. The road allowance has not been surveyed by the Applicant. As was discovered during the survey of the unopened road allowance of Wild Turkey Road conducted by the Ontario surveyors from the firm Cameron Coe Fisher, the width and location of this road allowance is not what has been presumed by the Applicant.
21. The Applicant's submission of drawings of the distribution line and the unopened road allowance as requested by the Board placed the path of the Gray Road allowance and distribution line on private properties.

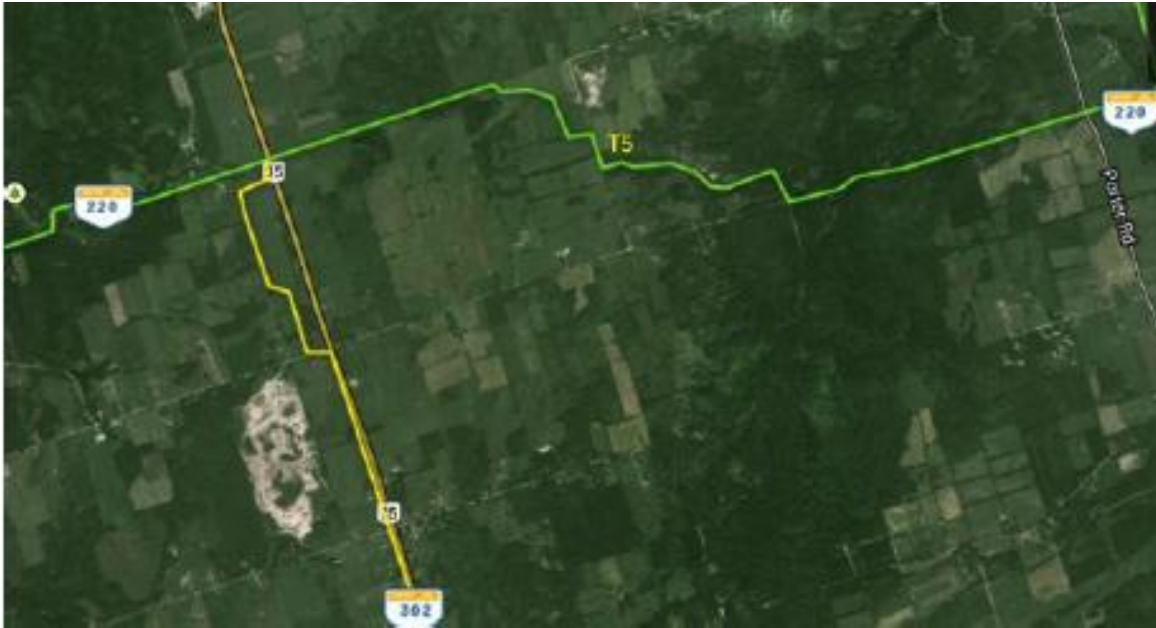
22. Since it is unknown precisely where the southern boundary that separates Gray Road from private property is located, the Applicant has not completed the required due diligence to assure the Board and the City of Kawartha Lakes it has the legal authority to place the distribution line within the unopened road allowance Gray Road as proposed.
23. Gray Road is part of an extensive recreational trail system that links natural trails and areas of natural beauty over many kilometres. It is a crucial linkage route that connects trail systems to the trails on Wild Turkey Road, the Oak Ridges Moraine, the Ballyduff Trails, Fleetwood Creek Conservation Area and AINSI area to the east to the Pigeon River Headwaters Conservation Area located several kilometers to the east.



*Fig. 7 - Gray Road is an open municipal road west of Highway 35 and again east of Wild Turkey Road. However, it is unopened and unmaintained between these points. It is this unopened portion of Gray Road that the Applicant proposes to clear in order to construct a 1.75 km distribution line.*

24. The significant alteration of Gray Road proposed by the Applicant will destroy the character of the trail system as well as place users of the trail system in harm's way, thus

creating pathways for liability imposed on abutting landowners, the Municipality, the Province as well as the Applicant.



*Fig. 8 - Snowmobile trail map that uses Gray Road allowance.*

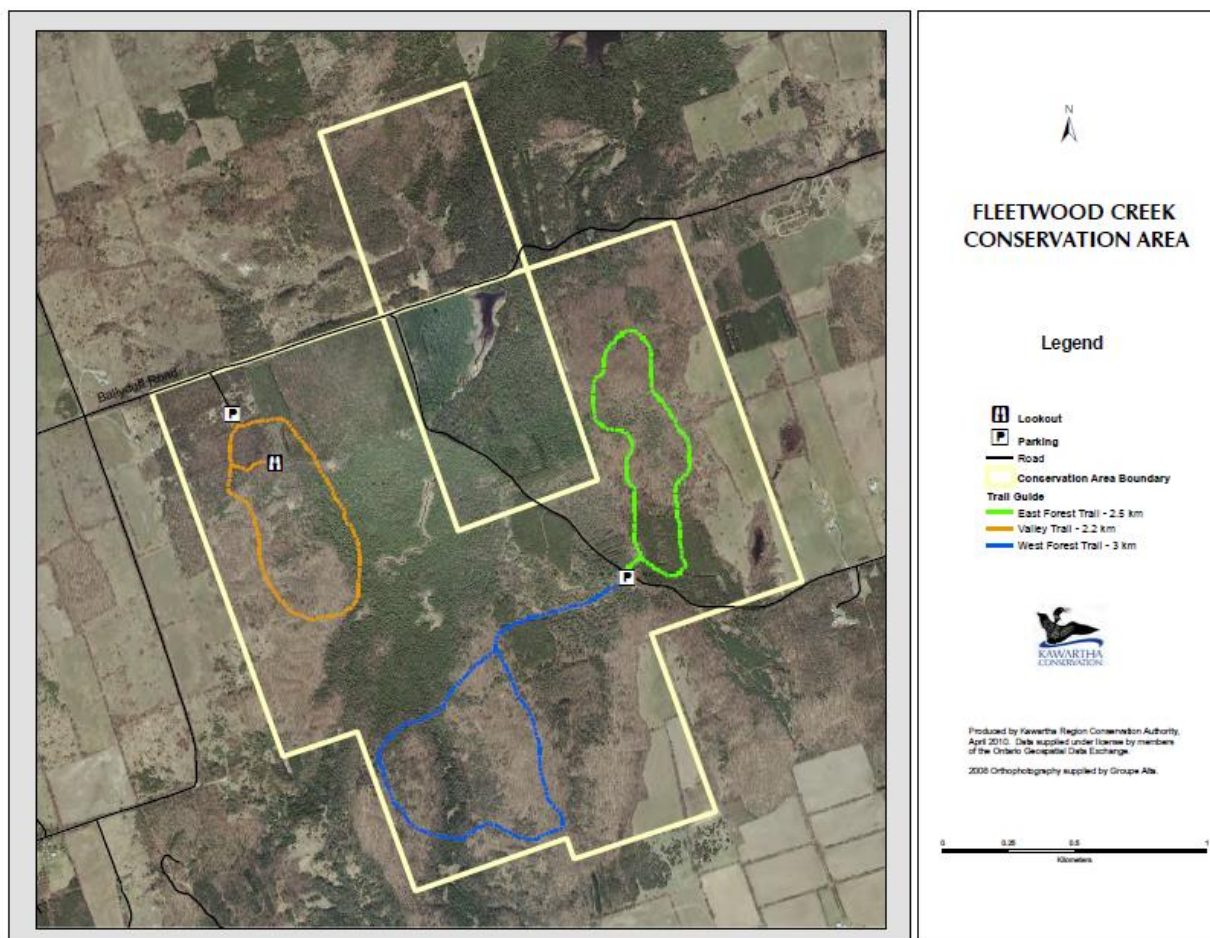


*Fig. 9 - Ballyduff Trail Map that connects to Wild Turkey Road which connects to both Gray Road Allowance and Fleetwood Creek Conservation Area.*

## **The Alternative Route**

25. An alternative distribution route has been proposed along Provincial Highways 7A and 35. The Applicant, in its response to the alternative route being proposed, did not state the alternative route is impossible or not feasible. The Applicant raised three objections; namely, that the temporary construction might place the public and schoolchildren in danger; that there will be an unspecified line loss; and that the City of Kawartha Lakes did not propose the alternative route.
26. In the final submission of the Intervenor, it was pointed out that schoolchildren at the two elementary schools will not be exposed to the temporary construction activities, and that the line loss will be minimal if the alternative route is taken. The alternative route lands are under the jurisdiction of the Ontario Ministry of Transportation, which is responsible for provincial highways.
27. The City of Kawartha Lakes cannot recommend an alternative route on property not under municipal control. However, as pointed out in the Intervenor's final submission, the developer of a wind energy facility adjacent to the Sumac Ridge project will be using the same provincial Highway 7A for a comparatively longer distribution line.
28. As both Highway 7A and Highway 35 are maintained public highways, they are clearly within the jurisdiction of the Board under s. 41(1), which the unopened, unassumed road allowances at issue here are not.





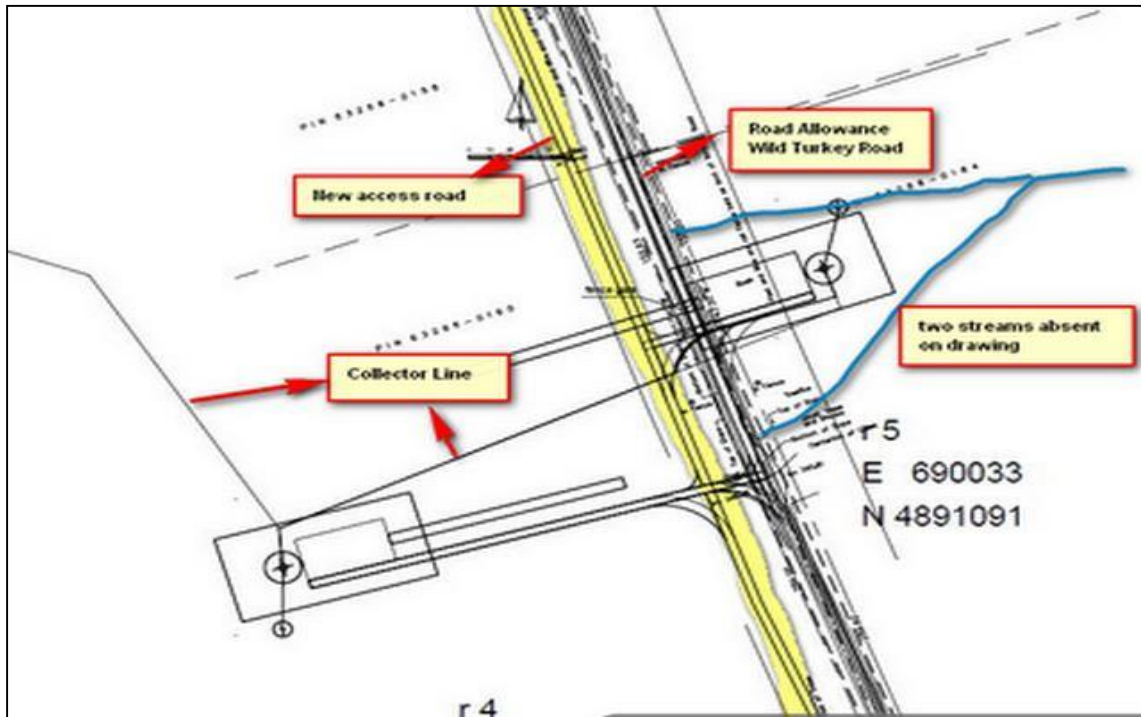
*Fig. 10 - Fleetwood Creek Conservation Area Trail system that connects to the Ballyduff Trail system which connects to Wild Turkey road allowance to Gray Road allowance to the Pigeon River Headwaters Conservation Area.*

### **Lack of Accurate Survey Information**

29. In 2014, the survey firm of Coe Fisher Cameron discovered information that indicates the width and location of the unopened road allowance of Wild Turkey Road, which is part of this application before the Board, is not what it appears. The survey found that location of Wild Turkey Road does not accurately reflect the road allowance location.<sup>5</sup>

<sup>5</sup> Witness Statement of Herman Wimmelbacher, Evidence of the Intervenor, January 26, 2015, Tab 9.

30. The Applicant's plans contained in the Application before the Board are not accurate regarding the proposed underground cable across the unopened road allowance Wild Turkey Road. Moreover, the Applicant provided maps to the Board with an alternative access road running parallel to Wild Turkey Road which will change the position and length of the underground cabling proposed in the Application before the Board.

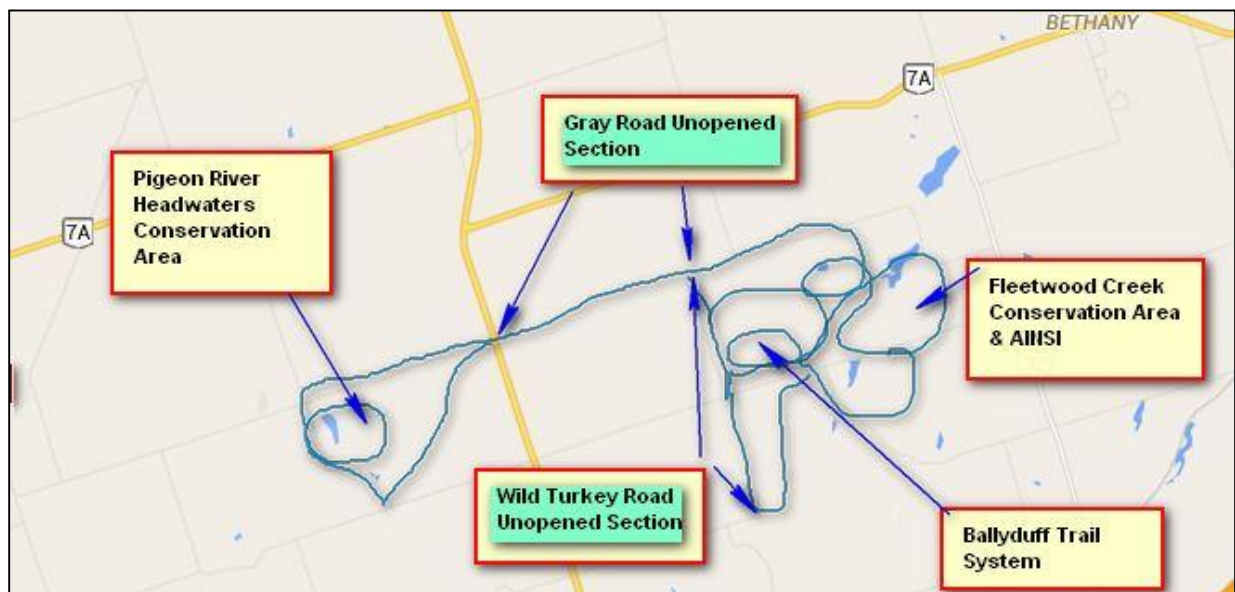


*Fig. 11*

31. There is no survey of the unopened road allowance of Gray Road. This is crucial as Gray Road both varies in width and deviates to the south in one section.
32. It cannot be definitively determined by the Applicant that the distribution line and hydro poles as proposed in the diagrams before the Board to be constructed along the unopened road allowance Gray Road will be on private or municipal lands. It is purely conjecture.

33. This lack of information supports the Corporation of the City of Kawartha Lakes' original position that the Application before the Board is premature and should be dismissed.

**Compatible and Incompatible Land Uses as Applied to Unassumed, Unopened, Unmaintained Road Allowances - Gray Road and Wild Turkey Road**



*Fig. 12 - Approximation of trails found within extensive trails system of which unopened Gray Road and Wild Turkey road allowances play a crucial connective role.*

34. Section IV of the Provincial Policy Statement 2005 states:

*“The Province’s natural heritage resources, water, agricultural lands, mineral resources, and cultural heritage and archaeological resources provide important environmental, economic and social benefits. The wise use and management of these resources over the long term is a key provincial interest. The Province must ensure that its resources are managed in a sustainable way to protect essential ecological processes and public health and safety, minimize environmental and social impacts, and meet its long-term needs.”*

35. The common aim of most municipalities is to allow uses that do not harm one another to be clustered together in the same zone, while keeping incompatible uses apart in their separate zones.
36. An extensive search was undertaken for an understanding of what municipalities across Ontario, including the City of Kawartha Lakes, consider compatible land uses for unassumed, unopened, and unmaintained road allowances. Compatible land uses specified for unopened road allowances by various municipalities contained the descriptors ‘greenway, walkway, nature trail, natural pathway, pedestrian passage, horseback riding, natural linkage areas, bicycle zone, off-road activities, snowmobile activities, winter activities’, and as indicated by the City of Kawartha Lakes, recreational activities. Birdwatchers, hikers, naturalists, horseback riders, skiers, snowshoers, pedestrians, bicyclists use the two unopened unmaintained road allowances Gray Road and Wild Turkey Road. The City of Kawartha Lakes has an agreement with the Long Sault Ridge Runners snowmobile club to use the unopened, unmaintained road allowances Gray and Wild Turkey Road as recreational snowmobile routes during the winter months.
37. Moreover, the Oak Ridges Moraine Conservation Plan (the “ORMCP”) states at section 13 (g) - Countryside Areas:

*13. (1) The purpose of Countryside Areas is to encourage agricultural and other rural uses that support the Plan’s objectives,” which applies to the unopened road allowance Wild Turkey Road located on the Oak Ridges Moraine by...*

*“(g) accommodating a trail system through the Plan Area and trail connections to it;”*

*(2) Countryside Areas also have the objectives of,*



*(a) maintaining, and where possible improving or restoring, the ecological integrity of the Plan Area;*

*(b) maintaining, and where possible improving or restoring, the health, diversity, size, and connectivity of key natural heritage features, hydrologically sensitive features and the related ecological functions;<sup>6</sup>*

38. None of the researched municipalities that have policies in place regarding unopened road allowances include electrical distribution lines as a compatible land use; neither does the ORMCP.
39. Many municipalities have enacted prohibitions regarding alteration of unopened road allowances. While the public has the right to use unopened road allowances, municipalities such as the City of Kawartha Lakes as well as the Courts have made it clear that members of the public do not have the right to cut down trees, remove or grade any natural obstruction or make any changes that may be necessary to permit the safe passage for pedestrians or motor vehicles.

#### **No Public Benefit and Not Compatible Use**

40. The Municipality will not, as stated on line 14 and 15 of the December 20<sup>th</sup>, 2013 application submitted by the Applicant, *“benefit from the road improvements that will result from the Applicant’s construction activities within the Road Allowances”*.
41. The alteration of the unopened road allowances Gray Road and Wild Turkey Road will be a detriment, detraction and a liability for the City of Kawartha Lakes.
42. The Applicant states expropriation is justified if the plan is *“a compatible public use”*. The current public use of the unopened road allowances Gray Road and Wild Turkey

---

<sup>6</sup> Ontario Regulation 140/02, “Oak Ridges Moraine Conservation Plan”, s. 13

roads are historic wild natural recreational trails that are part of a larger extensive trail system and under protection of the *Oak Ridges Moraine Conservation Act*<sup>7</sup> and ORMCP.

43. Road alteration, permanent removal of all the trees and natural vegetation 3 metres deep along a 1.75 km stretch along the south side of the unopened Gray Road allowance and installing mechanical infrastructure in the form of hydro poles that poses threats both to public safety and the environment is not a ‘compatible public use’ with a designated recreational trail that connects to areas and trail systems well outside the Sumac Ridge project area.

44. The Board’s mandate regarding the ‘public interest’, in respect of applications under section 92 of the *Ontario Energy Board Act, 1998* considers:

*(i) the interest of consumers with respect to prices and the reliability and quality of electricity services; and*

*(ii) where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewal energy sources.*<sup>8</sup>

45. The Government of Ontario policy regarding renewable energy such as the Sumac Ridge project includes: “a streamlined approvals process with service guarantees for renewable energy projects while ensuring that high safety and environmental standards are met”.<sup>9</sup>

46. There has been enormous, “record-setting” public interest (according to the Ministry of Energy and Climate Change) in the Sumac Ridge project. Thousands of EBR comments and letters registered by the public make it quite clear that significant alteration of the

---

<sup>7</sup> *Oak Ridges Moraine Conservation Act, 2001*, S.O. 2001, Chapter 31.

<sup>8</sup> *Ontario Energy Board Act, 1998*, s. 92.

<sup>9</sup> Ontario Renewable Energy Facilitation Office, Green Energy Act, <http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/#.u0nh46xouqg>

historic unopened road allowances Gray Road and Wild Turkey Road will impact the natural environment and diminish the quality of life for the community.

47. The Applicant in its Consultation Report submitted as part of the REA application for approval states:

*The objectives of the consultation process for the Project are as follows:*

- *Ensure that relevant, accurate, and consistent information about the Project is provided to local Aboriginal communities, community members, members of the public, agencies and municipalities, as early as possible;*
- *Obtain/identify relevant information and local knowledge of local communities, municipalities, and Aboriginal communities;*
- *Build and maintain community support and obtain relevant approvals for the Project;*
- *Identify potential issues and areas of concern that may arise from the Project;*
- *Address concerns by providing additional information, clarifying misconceptions, **changing Project design**, or making commitments, where appropriate in response to input and comments from the public, Aboriginal communities, municipalities, and agencies;*
- *Promote effective, proactive and responsive communications with the public, Aboriginal communities, municipalities and agencies;*
- *Resolve issues where possible, in a transparent manner;*
- *Track and document all communications between the Project Team and interested parties and ensure the information is incorporated into Project planning, to the extent possible and as appropriate; and*
- ***Demonstrate that wpd is committed to the well-being of the communities within which it works.** [Emphasis added]*

48. Residents whose properties abut the unopened road allowance Gray Road include the Intervenor, a number of other landowners including Peter Hoefelmayr, Uxbridge Nurseries, Bill and Wendy Bateman, and others, all whom have sent to the Board notices of objection to the Applicant's plans to alter and use the road allowance Gray Road as a distribution line.

49. The clear cutting of 3 metres of sections of woodlands, hedges, vines, standalone trees, and native plant material along a stretch of 1.75 km is an incompatible land use for the

unopened road allowance Gray Road which serves as a recreational and wildlife linkage corridor.

50. The removal of the 3 metre wide section of vegetation along the 1.75 km length of the unopened road allowance Gray Road will remove habitat, wind and erosion protection, which, in combination with alteration to the unopened road allowance will open the Intervenor's property to trespassers and illegal dumping. Similarly, the removal of all of the vegetation that currently acts as an access barrier to the large pond on Mr. Hoefelmayr's property will expose that water body to unwanted trespassers thereby creating multiple health, safety and liability issues. Removal of vegetation that acts as windbreak for the agricultural fields owned by Mr. Hoefelmayr will result in increased soil erosion, which in turn will cause economic hardship for this landowner.<sup>10</sup>

### **Environmental Issues**

51. The use of **open** used Road allowances for transmission corridors for electrical infrastructure makes sense economically, environmentally and legally. Where there is already existing infrastructure there will be less adverse impact on the environment and greater economies of time, space and resources are realized in doing work in a common corridor.
52. This rationale does **not** apply to unopened road allowances that have naturalized over time. This is particularly true where the unopened and unassumed road allowances are located in areas under environmental protection, such as these.

---

<sup>10</sup> Effect of Natural Fencerows, Million Mamo Bayou,  
<https://tspace.library.utoronto.ca/bitstream/1807/11737/1/mq29455.pdf>



53. Both Wild Turkey Road and Gray Road are in environmentally protected and sensitive areas. Opening of unopened roads is prohibited by the ORMCP in Countryside and near hydrologically sensitive features.<sup>11</sup> Under the ORMCP, a proponent must prove there is a need and that there is no reasonable alternative.
54. The Applicant has not demonstrated the need for accessing Gray Road and Wild Turkey Road as there are alternative routes available. The Applicant has also indicated in maps provided to the Board that an alternative access road parallel to Wild Turkey Road is an option.
55. There is no existing infrastructure along either the Wild Turkey Road or Gray Road road allowances. There are no “economies or efficiencies” to be realized from constructing new infrastructure where the proposed alternative route offers the opportunity for this construction in an area already used for similar purposes.
56. Species at risk flora and fauna inhabiting both unopened road allowances Gray Road and Wild Turkey were identified during the ERT Hearing.
57. The installation of transmission lines and access roads along both Wild Turkey Road and Gray Road will have significant environmental impacts on the natural environment, species at risk and sensitive hydrological features.
58. Municipalities were permitted under the ORMCP to adopt official plan policies “more restrictive than the ORMCP.”
59. The Applicant intends to undertake major construction within a hydrologically sensitive feature.

---

<sup>11</sup> Ontario Regulation 140/02, “Oak Ridges Moraine Conservation Plan”, s. 41(4)

60. Under the ORMCP, transportation, infrastructure and utilities may be permitted “to cross a key natural heritage feature or a hydrologically sensitive feature” in a Countryside area only if “the need for the project has been demonstrated and there is no reasonable alternative [emphasis added].”<sup>12</sup>
61. The City of Kawartha Lakes amended its by-laws in recognition of the application of the ORMCP. The City of Kawartha Lakes Oak Ridges Moraine Zoning By-Law states:

**6.6 TRANSPORTATION INFRASTRUCTURE AND UTILITIES**

*a) Notwithstanding any other provisions of this By-law to the contrary, all new transportation, infrastructure and utilities uses listed below, and all upgrading or extension of existing transportation, infrastructure and utilities uses, including the opening of a road within an unopened road allowance, are prohibited on lands within an ORMCP Zone, ORMCA Zone, and ORMLA Zone as shown on Schedules A and B to this By-law*<sup>13</sup>[emphasis added]

62. The unopened road allowance, Wild Turkey Road, is located within the ORMCA Zone as specified in the schedules.<sup>14</sup> The sensitive nature of the road allowance is indicated in the City of Kawartha Lakes’ ORM Zoning By-law, Schedule C map of which a portion is included here:

---

<sup>12</sup> Ortech Memo to Wpd Canada Cited A List of Eight “Key Heritage Features” from the ORMCP, at pp. 7-8, Tab 3; Ontario Regulation 140/02, “Oak Ridges Moraine Conservation Plan”, s. 41(5)(a).

<sup>13</sup> City of Kawartha Lakes, ORM Zoning By-Law 2005-133, Section 6, [https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/orm\\_zbl\\_2005133\\_final\\_mmah\\_app\\_consol.pdf](https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/orm_zbl_2005133_final_mmah_app_consol.pdf)

<sup>14</sup> City of Kawartha Lakes, ORM Zoning By-law 2005-133, Schedule B, [https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/orm\\_zbl\\_schedule\\_a\\_final\\_august82007.pdf](https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/orm_zbl_schedule_a_final_august82007.pdf)



Fig. 13

63. According to the City of Kawartha Lakes 2012 Official Plan, objectives include:

- *To provide for various forms of high quality recreational based developments intended for the travelling public that supports the tourism industry;*
- *To ensure that such development is compatible with surrounding uses and maintain the rural character*<sup>15</sup>

## **THE LAW**

**Are unassumed, unopened public roads “public street[s] or highway[s]” as contemplated by section 41 of the Act?**

64. Under subsection 41(9) of the *Electricity Act, 1998* (the “Act”) the Board has the authority to determine the location of the Distribution System within the road allowances where the Applicant and the Municipality cannot agree upon the location.

<sup>15</sup> City of Kawartha Lakes Official Plan, s. 26.2, p. 97, [https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/ckl\\_2012\\_official\\_plan\\_text\\_with\\_appeals\\_noted.pdf](https://www.city.kawarthalakes.on.ca/property-development-by-law/planning/official-plans-zoning-by-law/ckl_2012_official_plan_text_with_appeals_noted.pdf)

65. Section 41 (1) of the Act specifies these rights as they concern public streets and highways:

**Public streets and highways**

*41. (1) 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. 1998, c. 15, Sched. A, s.*

66. While the *Municipal Act 2001*, (the “Municipal Act”) states that “[a]ll road allowances made by the Crown surveyors that are located in municipalities” constitute highways, the *Highway Traffic Act* defines highways and streets as being used by vehicles:

*“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;<sup>16</sup>*

67. This is a practical distinction that takes into account the fact that some road allowances are not capable of conducting vehicular traffic in their current state.
68. Many municipalities do not themselves consider unopened road allowances such as Gray and Wild Turkey Road to be public streets or highways.
69. Township of Augusta (Prescott):

*9.117 STREET OR ROAD, PUBLIC shall mean a public highway, as defined by The Municipal Act and The Highway Traffic Act and shall exclude any private right-of-way or unopened road allowance<sup>17</sup>*

70. Township of Adjala Tosorontio:

*"Highway"- includes any open and maintained road allowance within the sole jurisdiction of the Corporation of the Township of Adjala Tosorontio including a common and public Highway, street, road, avenue, laneway or bridge, and includes the part which is actually used by the general public*

---

<sup>16</sup> *Highway Traffic Act*, 1990, s. 1(1)

<sup>17</sup> Township of Augusta, Restricted Area (Zoning) By-law No. 1818, s. 9.117, Tab 4.

*for the passage of vehicles and all of the area between the lateral property lines **thereof and does not apply to** highways under the jurisdiction of the Province or the County of Simcoe, **unopened road allowances**, private roads or boundary line roads.<sup>18</sup>*

71. City of Ottawa:

*"unopened road allowance" means a highway under the jurisdiction of the City that has neither been opened for public travel nor assumed for maintenance purposes by the City.<sup>19</sup>*

72. Township of McMurrich/Monteith:

*It is general policy of the Township of McMurrich/Monteith that unopened road allowances shall not be used for motor vehicle travel purposes, and that any cutting down of trees or grading or removing of rocks or fill on unopened road allowances is prohibited without the express approval of Council. Any unauthorized work will be considered trespassing and will be prosecuted accordingly.<sup>20</sup>*

73. Municipality of Gordon/Barrie Island – Manitoulin:

*In this report an unopened road allowance shall mean a road, street, lane or highway which has not been established as a public highway by a by-law of Council or otherwise assumed for public use by the Corporation.<sup>21</sup>*

74. Several municipalities expect unopened road allowances never to be opened and remain to be enjoyed as recreational trail systems, as the City of Kawartha Lakes has indicated to the Applicant with regard to the unopened road allowances of Gray Road and Wild Turkey Road.

75. The Municipality of Cavan Monaghan is in the process of preparing a Master Trail Plan that will connect to areas within the confines of the City of Kawartha Lakes.

*The Ganaraska Hiking Trail (GHT) was officially opened in 1968 and is over 500km in length. The trail starts in Port Hope, on the north shore of Lake Ontario and extends north through the Oak Ridges Moraine in the Ganaraska Forest, past the lakes and drumlin fields of the Kawarthas to the*

---

<sup>18</sup> Township of Adjala-Tosorontio, By-law No. 11-07, s. 1.4, Tab 4.

<sup>19</sup> City of Ottawa, Temporary All-Terrain Vehicles & Other Vehicles By-law No. 2013-199, s.1, Tab 4.

<sup>20</sup> Corporation of the Township of McMurrich/Monteith, By-law 13-2014, s. 1, Tab 4.

<sup>21</sup> The Municipality of Gordon/Barrie Island, By-law No. 2009-37, Definition, Tab 4.



*rugged wilderness of the Canadian Shield, linking Port Hope, Barrie, Orillia and the Bruce Trail. The trail then heads west through the rolling hills of Simcoe County and the shores of Georgian Bay to the edge of the Niagara Escarpment, where the trail meets the Bruce Trail. In Cavan Monaghan Township the Ganaraska Hiking Trail leaves the Ganaraska Forest and follows Glamorgan Road north to Dranoel Road (via County Rd. 21, Tapley ¼ Line and Fallis Line/Syer Line to cross Highway 115) and beyond the Township boundary into the City of Kawartha Lakes.*

*Many of these unopened road allowances may have potential to be used as formal trails, or linkages. Recent studies suggest that increasing activity on unopened road allowances can have detrimental effects on some species of wildlife, so consideration must be given to the species utilizing these areas before increased use is promoted. A survey of wildlife species currently utilizing this area should be undertaken prior to any trail enhancement <sup>22</sup>*

76. Since the 19<sup>th</sup> century courts have recognised that the fact that in some instances a road allowance can be included in a definition of public highway, this does not mean that it is logical to always include it in the common usage of that term. The distinction between a road allowance on paper and a road allowance in practice is directly relevant to this Application.

77. In *Hislop v. McGillivray (Township)* the Court of Appeal held that while legislation may enact

*that every public road, street bridge, and highway shall be kept in repair by the corporation and attaches to the default in the performance of that duty the liability to indictment and the responsibility for all damages sustained by any person by reason of such default, it is obvious that the public highway intended is not a road allowance across precipitous hills or through a lake or morass where no sane man would think of spending money or labour in the attempt to make a road... We have there, it is true, the term, "public highway," but when we read in connection all the associated words, "public road, street, bridge and highway," as well as have regard to the purpose of the enactment, it is plain that travelled roads, &c., including allowances for roads on which the corporation has, by opening them, invited the public to travel, are intended, and not a road which has never*

---

<sup>22</sup> Cavan Monaghan Master Trail Plan, p. 24,  
<http://www.cavanmonaghan.net/en/councilandcommittees/resources/cmtrailmasterplanfinal.pdf>

*been opened, but in lieu of which another has been provided and is used by the travelling public.*<sup>23</sup>

78. The Court further held that it is “a matter which rests in the discretion of the council as representing the whole municipality to determine whether they will open for travel a road over any particular road allowance within their jurisdiction.”<sup>24</sup>
79. This position was affirmed by the Supreme Court of Canada when it stated that the courts did not have the requisite jurisdiction to compel a municipality to open a road allowance.<sup>25</sup>
80. The Municipal Act permits municipalities to restrict usage of road allowances and pass by-laws removing or restricting the common-law right of passage enjoyed by the public over public highways, which includes an unopened road allowance.<sup>26</sup>
81. The Municipality also owns and has control over all trees and shrubs on unopened road allowances. The public’s right of access to an unopened road allowance does not carry with it the right to make any improvements or alterations to the land in order to exercise that right of access without the consent of the Municipality, here the Corporation of the City of Kawartha Lakes.<sup>27</sup>
82. This municipal control over potential improvements to unopened road allowances is necessary for the protection of these spaces. As was stated in *Goudreau v. Chandos (Township)*:

*[t]here 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*

---

<sup>23</sup> [1888] O.J. No. 50 (ONCA), affirmed [1890] S.C.J. No. 18 (QL), p. 4, para. 25, Tab 5.

<sup>24</sup> *Ibid*, p. 5, para. 35, Tab 5.

<sup>25</sup> *Hislop v. McGillivray (Township)*, [1890] S.C.J. No. 18 (QL), p. 6, Tab 6.

<sup>26</sup> *Municipal Act, 2001*, s. 31, 34 & 35, Tab 7.

<sup>27</sup> *Goudreau v. Chandos (Township)*, [1993] O.D. No. 2070 (Gen. Div.), p. 3, para. 8, Tab 8.

*unregulated development. The chaos and destruction that could ensue is frightening to contemplate. There would be no standards. Protection of wetlands and other areas of natural significance would be more difficult, if not impossible, to ensure. With the consent of the municipality being required there will be the control essential to ensure that proper environmental standards are adhered to and that the opening of such road allowances is done after consideration is given to the greater public interest.*<sup>28</sup>

83. The environmental impact of the proposed construction in this Application alone makes it imperative that the Board allow the Municipality to exercise its discretion on this issue.
84. The High Court of Appeal stated in *Kimball v. Windsor Raceway Holdings*:
- [i]t has long been settled law that, unless it is clearly and unambiguously expressed in the text of a statute or unless it follows by necessary implication from that text, a statute must not be construed so as to interfere with, abrogate or prejudice basic established rights pertaining to an interest in or title to property...<sup>29</sup>
85. For the Board to determine that the unopened, unassumed and unmaintained road allowances at issue in this Application are to be treated as if they were the same as an opened, assumed and maintained road, street or highway would be to take the jurisdiction and rights that it enjoys away from the Municipality.
86. A straightforward reading of the Act, coupled with the treatment of similar issues by the courts over more than a century, show that it cannot be reasonably concluded that the Legislature intended the words “public street or highway” in s. 41(1) of the Act to refer to sections of land that, while surveyed initially as road allowances, have never been actively taken up, assumed, opened or maintained by the relevant Municipality.
87. Rather, it is reasonable to conclude, and the Intervenor submits this is the course of action that should correctly be adopted by the Board, that the words “public street or highway”

---

<sup>28</sup> *Ibid*, p. 4, para. 11, Tab 8.

<sup>29</sup> *Kimball v. Windsor Raceway Holdings*, [1972] O.J. No. 1851 (HCA)(QL), p. 7, para. 24, Tab 9.

in s. 41(1) should be seen to refer to those streets and highways that are assumed, opened, and maintained by the municipalities in which they are located.

88. To do otherwise would leave the entirety of the unopened road allowances in Ontario open to destruction with no oversight possible by the local municipality.
89. Therefore the Board does not have the requisite jurisdiction to consider the Application as it relates to these unopened and unassumed road allowances.

### **Conclusion**

90. Gray Road and Wild Turkey Road are unopened, unassumed and unmaintained road allowances. They are not opened public highways maintained by the Municipality in the usual sense of that term. This is the key difference between this Application and the majority of those heard by Board.
91. The adverse impacts that will result from their use the purposes requested by the Applicant will cause harm that will take many decades to repair, if it is ever possible to do so.
92. The powers of the Municipality to regulate the development and halt the destruction of the natural heritage within its unopened road allowances is a power even the Supreme Court of Canada did not have the jurisdiction with which to interfere.
93. As a result, the Intervenor submits that the Board does not have the jurisdiction to approve the Application as it relates to these two road allowances.
94. The Board's Resource Guide for Regulated Entities states:

*"We, at the OEB, receive our jurisdiction from provincial legislation and regulations. In carrying out our mandate, we balance a number of objectives, including protecting consumers' interests and ensuring the viability of Ontario's natural gas and electricity sectors. To achieve this*

*balance, we must ensure that the rules and regulations are applied fairly and consistently.”*<sup>30</sup>

95. On the law alone, the Board should dismiss the Application as it relates to the unopened, unassumed and unmaintained road allowances, Grey Road and Wild Turkey Road, for want of jurisdiction.
96. All of which is respectfully submitted on behalf of the Intervenor.

**Date:** April 2, 2015

**ERIC K. GILLESPIE**  
**PROFESSIONAL CORPORATION**  
Barristers & Solicitors  
10 King Street East, Suite 600  
Toronto, Ontario M5C 1C3

**Eric K. Gillespie** (LSUC# 37815P)  
Tel.: (416) 703-6362  
Fax: (416) 703-9111  
E-mail: [egillespie@gillespielaw.ca](mailto:egillespie@gillespielaw.ca)

Solicitors for the Intervenor,  
Dr. E. Salmon

---

<sup>30</sup> Ontario Energy Board Resource Guide For Regulated Entities, Page 4,  
<http://www.ontarioenergyboard.ca/oeb/documents/documents/resource%20guide%20for%20regulated%20entities.pdf>